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Lessons from the Lim Lian Arn case: duty to advise and consent taking

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INTRODUCTION

In 2018, orthopaedic specialist Dr Lim Lian Arn was fined $100,000 by the Disciplinary Tribunal (DT) of the Singapore Medical Council (SMC) for failing to obtain informed consent before administering a hydrocortisone and lignocaine (H&L) injection to the patient's wrist.(1) This led to a written protest from the medical profession, many of whom thought the penalty of a $100,000 fine, for failing to advise a patient of the risks related to a fairly simple procedure was unreasonably high. The medical profession was of the opinion that this precedence could lead to defensive medicine practices and rising costs for patients.(2) (Report on Recommendations at [20])

The SMC DT's verdict on the case also raised confusion and anxiety regarding the professional standard for consent taking. The Bolam-Bolitho test was replaced in 2017 (*Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] SGCA 38 ("*Hii Chii Kok*").(3) The judges in the 2017 case were of the view that the duty to advise under Bolam-Bolitho "does not allow any room for the patient's perspective" and there needs a good balance between "patient autonomy and the principle of medical beneficence". (*Hii Chii Kok* at [120]).

Following the medical profession's outcry, the MOH Review Committee was set up to review consent taking and the SMC disciplinary process. In the hearings of this review committee, it was revealed that doctors thought that all of the risks associated with the treatment provided have to be disclosed to meet the new standard. The profession raised concerns that lack of time and language barriers impedes fulfilling the professional standard. (Report on Recommendations at [40]).

The MOH then requested the SMC to apply to the court to have its decision reviewed. In the review, the Court of Three Judges set aside Dr Lim's conviction as well as the orders made. (*Singapore Medical Council v Lim Lian Arn* 29 [2019] SGHC 172 ("*Lim Lian Arn*").(4)

This article aims to highlight the salient points from this judgement on informed consent and what this means to clinicians in practice.

LESSONS LEARNT

Not every risk has to be disclosed to the patient

On the practice of taking informed consent, the court reiterated that "a doctor is not under a duty to convey to his patient every conceivable risk". (*Lim Lian Arn* at [48])

In clinical practice, this means that doctors should not take a defensive stance and overwhelm patients with a deluge of information on unlikely risks. (*Lim Lian Arn* at [53]). Bombarding the patient with excessive and irrelevant information would leave the patient more confused and less enabled to participate in effective shared medical decision making. "I**nformation dumping"** disadvantages the patient in exercising autonomy, and the "doctor would then have fallen short of his ethical obligation and may well be exposed to legal liability" (*Lim Lian Arn* at [54]).

The extent of information to be disclosed as regards to material risks

In the duty to advise, several factors needed to be considered in sharing information, were pointed out in *Lim Lian Arn*. This includes whether the information was "relevant and material to the patient", whether the information was reasonably in the possession of the doctor and whether the doctor was justified in withholding the information. (*Lim Lian Arn* at [48]).

In clinical practice, this means that the doctor has to engage the patient in an open discussion on the diagnosis of the patient's condition; prognosis of that condition with and without medical treatment; nature of proposed treatment; benefits and risks associated with proposed

treatment; alternatives to proposed medical treatment and their benefits/risks; questions the patients might have and explanations provided. As for the risk, the common and serious risk, and what could be material (*Hii Chii Kok* at [140]) to the patient in undergoing the proposed treatment should be shared. In the discussion, the doctor would come to know what could be material risks to the patient and what the patient would attach significance to in arriving at their decision for the options and risks to be discussed.

Information to be disclosed in the context of choices and alternatives

The court pointed out in *Lim Lian Arn* that, "the information in question pertained to how the patient should make her choice between the two treatment options that she was presented with" (*Lim Lian Arn* at [50]). It was also noted in *Lim Lian Arn* at [56] that the H&L injection was not actively recommended by Dr Lim and that two treatment options were presented to the patient.

For clinical practice, patients should be given information on choices and alternatives. When a patient consults a medical practitioner with a medical condition that could be managed by two or three relatively uncomplicated and equally beneficial treatment options, the information to be disclosed should be that which the patient would need in order to be able to make a decision from among these choices. This would include a disclosure of the severity and likelihood of any adverse side effects or complications. (*Lim Lian Arn* at [50]). In essence, information to be disclosed to patients should be sufficient information which enables the patient to participate actively in making an informed choice. Doctors should not just focus only on the medically recommended treatment and should instead make an effort to appreciate the patient's need for information on alternatives and choices.

Role of expert witness report in duty to advise

The expert witness report is key in determining the expected standard for disclosure expected of the doctor and whether any departure from those standards was sufficiently egregious to result in professional misconduct. *(Lim Lian Arn* at [42])

In this judgement, the court noted that the expert report was inadequate and of no value to the court as it merely presented conclusions without demonstrating how it was being reached. (*Lim Lian Arn* at [43]) Particularly, it did not explain why Dr Lim was under a positive duty to convey to the patient the risks and possible complications stated in the expert report. Expert evidence on the seriousness and likelihood of any adverse side effects or complications (in this case of the H&L injection) were also absent. (*Lim Lian Arn* at [45]). Without such expert evidence, there was no evidentiary basis to determine the standard expected of the doctor in disclosing information to the patient and on how serious the failure to disclose information was. (*Lim Lian Arn* at [50])

In practice, a good medical expert report should not just declare the standard expected, but also the reasons why the articulated standards are the most preferred standard in the circumstances of the particular case. The report should demonstrate logically how the conclusion was reached. This is to allow the court to consider the soundness of the expert's reasoning and assess the value of the expert's viewpoint appropriately. *(Lim Lian Arn* at [43]). In a complaint on the duty to advise, to determine the departure from the standard of disclosure in consent taking, the evidence must show whether the patient "would have taken a different course of action" when presented with the relevant information on the "risks and possible complications". (*Lim Lian Arn* at [14a]) Essentially, the expert report must stand the scrutiny of logic and evidence together with it being relevant to the facts of the case and based on up-to-date medical practice. Doctors who agree to be

medical experts need appropriate training and experience in writing medical expert reports that can objectively serve the courts best.

Documentation of the Consent Process - What Doctors Should Do

The Court has clarified that "the existence of supporting clinic notes, while desirable, is not determinative" in determining whether the doctor has met the legal standard. However, in cases where the procedure is "a routine one", this could be a reason "why a detailed note of any discussion with the patient of the risks and possible complications was not kept" (*Lim Lian Arn* at [58]).

In clinical practice, documenting the consent process, particularly in giving patients the opportunity to ask questions and make choices is important to defend the duty to advise when called to account for one's actions. (*Lim Lian Arn* at [59])

Factors to be considered by the tribunal hearings on complaints of consent taking

On complaints on consent taking, the important question is whether the patient's autonomy to make an informed decision on their own treatment is substantially undermined. Not every departure or deficiency by a medical practitioner in taking consent from the acceptable standards of practice would necessarily amount to professional misconduct. (*Lim Lian Arn* at [30]) It must be shown that the departure must either be "intentional and deliberate", or amount to such serious negligence that it objectively "portrays an abuse of the privileges" which accompany registration as a medical practitioner. (*Lim Lian Ar*n at [28])

In addition, the court took into consideration that, when it is involving a one-off failing committed in the course of a routine procedure with no material harm to the patient that the threshold of the egregious nature of the departure was not reached. (*Lim Lian Arn* at [14a, d]).

CONCLUSION

In conclusion, *Lim Lian Arn* highlights pertinent lessons on duty to advise and consent taking for practicing doctors, particularly the judges' perspective on the issues and legal standards relevant to the case: giving patients sufficient information on choices and alternatives to empower patients to take part in the treatment process and respect for autonomy. The value of a good expert witness report and documentation in consent taking were also emphasised.

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