

# OBSTETRICAL & GYNAECOLOGICAL SOCIETY OF SINGAPORE

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Evolving Paradigms for Medical Litigation in Singapore

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1 At the risk of overgeneralising, it may be said that it is not a happy occasion when judges and lawyers get involved in matters of medicine. Doctors are called to heal. Theirs is the domain of saving, mending and in the case of obstetricians – to bring newborns into this world. This is the stuff of hope and purpose. But then tragedy strikes. A patient might sustain some injury, or yet more tragically pass away. The courts and lawyers get involved. The doctor might find himself faced with the unpleasantness and trauma of being sued or called to account before the profession's disciplinary authorities; and having his competency, even integrity questioned. Much as we all wish that such situations never arise, errors and mishaps will occur. Unfortunately, these are the cases that eventually find their way to the courts where my colleagues and I sit.

2 My address today focuses on one aspect of the interaction between medicine and the law, namely, when a patient sues a doctor for what might broadly be called

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medical malpractice. First I shall outline the foundations of the law on medical malpractice. Next I shall explore the ways in which the practice of medicine can potentially be affected by the medical profession's consciousness of the risk of malpractice liability. I have in mind such phenomena as high insurance costs and the reported practice of "defensive medicine". Finally I consider how these effects might be mitigated if we were to re-imagine our medical litigation paradigm.

### **The history of liability for medical malpractice**

3 In modern times, medical malpractice primarily involves a branch of the law known as the law of negligence. In ordinary usage, "negligence" is simply a synonym for carelessness. But legally, a person is not obliged to compensate another just because he has been careless. Rather, he is so obliged only when three broad requirements are met. First, he must owe the other person a duty to take care. Second, he must have breached that duty by failing to exercise the standard of care that is required and imposed by the law. Third and finally, the other person must have suffered some kind of injury or damage as a result of the breach of that duty.<sup>1</sup>

4 The law of negligence is generally regarded as having been established as a coherent and principled body of law only in 1932, although the basic concepts and

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<sup>1</sup> Christopher Walton (ed), *Charlesworth & Percy on Negligence* (12<sup>th</sup> ed, Sweet & Maxwell, 2010) para 1-34.

ideas that underlie it were probably in place a century or more before that.<sup>2</sup> The notion of medical malpractice however pre-dates the law of negligence. From “ancient times”, the medical practitioner has been held to account for failing to exercise reasonable care in treating a patient. The reason for this was that medical practitioners exercised what is called a “common calling”<sup>3</sup> and held themselves out to the community as having the required skill and competence to perform it. It was in the community’s interests that such persons should follow that calling with adequate care and skill, and they could therefore be sued if they did not meet the standard imposed by the law.<sup>4</sup>

5 Thus, the obligation of doctors to practise medicine with reasonable care and skill is not new, except that this is now situated within the framework of the law of negligence. And so, whether a medical malpractice suit succeeds or fails depends on whether the claimant patient can establish the three broad ingredients I mentioned earlier: a duty of care, a failure to meet the required standard of care, and damage being suffered as a result of that failure.

6 It might be helpful at this point to outline each of these three ingredients.

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<sup>2</sup> *ibid* para 1-19.

<sup>3</sup> Michael A Jones, *Medical Negligence* (4<sup>th</sup> ed, Sweet & Maxwell, 2008) para 2-028.

<sup>4</sup> William Holdsworth, *A History of English Law* vol III 385-386.

## The ingredients of the tort of negligence

7 As to the first ingredient, whether a defendant owes a claimant a duty of care will depend on three things.<sup>5</sup> First, it must have been foreseeable that the claimant would suffer loss were the defendant careless. This threshold is easily crossed in the context of medical malpractice. Second, there must be sufficient “proximity” between the claimant and the defendant. This signifies a certain directness of dealing or relationship between the parties usually focusing on the prospects of harm or injury being caused to one another as a result. Finally, there must be no considerations of policy that militate against imposing a duty of care. Of these, the “proximity” inquiry is usually the most challenging. However, there are certain categories of relationship which have long been accepted as possessing the required closeness and directness, the doctor-patient relationship being one of these.

8 The second ingredient is that the defendant must have breached that duty by falling short of the standard of care expected of him. The standard of care is that of the reasonable man; and one falls short of this standard when one does what the reasonable man would not have done, or when one fails to do what the reasonable man would have done. Some of you must be wondering, who this reasonable man might be and how we are to know what he would or would not have done. Truth be

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<sup>5</sup> *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 [73]–[85].

told, the reasonable man is a judicial fiction; he is simply the embodiment of a value judgment made by judges about how people should behave in certain circumstances. That value judgment turns on a number of things, for example, the magnitude of harm that could result from the defendant's actions, the degree of the risk of that harm eventuating, and whether there were any alternative courses of action available to the defendant. It hinges very much on the peculiar facts of the particular case.

9 The third and final ingredient requires the claimant to have suffered some kind of injury or damage as a result of the defendant's actions. Embedded within this are at least two sub-requirements. One is that the damage must be of a type that the law recognises and protects. Physical injury to the person and physical damage to property are so protected. Emotional distress, by contrast, is not; although medically-recognised psychiatric harm is. The other sub-requirement is that the defendant's actions should have *caused* the damage sustained by the claimant. Thus, if the damage would have occurred anyway regardless of the defendant's actions, the necessary causal connection will not exist.

10 This is no more than a broad sketch of how negligence law generally operates, but it will suffice for our present purposes. I now turn to the specific context of medical malpractice.

## The modern law on medical malpractice

11 It is beyond question that a doctor owes a duty to take care to his patient. However, difficulties might arise in ascertaining when the doctor-patient relationship begins. Does it begin only upon a patient's first face-to-face consultation with the doctor? What if, prior to that, they had spoken on the telephone? These were broadly the facts of a High Court case heard about a decade ago.<sup>6</sup> There, the judge held that the doctor, an obstetrician and gynaecologist, did not owe his patient any duty of care until she had consulted him at his clinic. The judge said that it would be "onerous and unfair" to medical practitioners if their duty of care "began even before the first consultation, and extended to cover telephone advice and/or opinions sought by callers who may not even become their patients later."<sup>7</sup> This aspect of the judge's decision was later criticised by an academic, who thought that the judge's views had been stated too widely and categorically.<sup>8</sup>

12 That is one potential complexity that can arise when considering the duty of care ingredient in medical negligence. Another question that might be of particular interest to some of you in the audience would be whether an obstetrician owes a duty of care to an as-yet unborn child that could give rise to liability after the child is born. This is an interesting question but one which I will have to leave for another day.

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<sup>6</sup> *JU and another v See Tho Kai Yin* [2005] 4 SLR(R) 96 (Lai Siu Chiu J).

<sup>7</sup> *ibid* [87].

<sup>8</sup> Margaret Fordham, "A Life Without Value?" [2005] SJLS 395, 405.

Leaving these situations to one side, however, it will usually be a straightforward matter for a patient to establish that he was owed a duty of care by the doctor.

13 The claimant patient must then show that the defendant doctor failed to meet the standard of care prescribed by the law. I have said that in the general law of negligence, the standard of care is that of the reasonable man. In the specific context of medical malpractice, the standard is that of the “ordinary skilled man exercising and professing to have that special skill”,<sup>9</sup> or in other words, a reasonably skilled and competent doctor.

14 The law has developed a test for determining whether a doctor has met the standard of care and this is referred to as the *Bolam* test because it was first set out in the English case of *Bolam v Friern Hospital Management Committee*. *Bolam* was decided by a single judge after trial; but the *Bolam* test has been endorsed by the highest courts in the UK and Singapore.

15 It is best to state the *Bolam* test in the actual words used by the judge:<sup>10</sup>

[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. ... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.

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<sup>9</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, 586.

<sup>10</sup> *ibid* 587.

As the judge in *Bolam* saw it, the basis for this proposition was the “ample scope for genuine difference of opinion”<sup>11</sup> in the realm of medical diagnosis and treatment.

16 The *Bolam* test thus rests to a significant degree on the acknowledgement that reasonably skilled and competent doctors can legitimately disagree about a course of treatment or even as to how they would interpret or respond to a given set of circumstances. Such disagreement is unsurprising given the limits of what we know. Medical knowledge is not complete; and current diagnostic techniques and technology can only go so far. Furthermore, medical decisions sometimes have to be made under intense time pressure. It might often be reasonable for a doctor to take any of a number of possible courses of action in any given set of circumstances.

17 The *Bolam* test has had a practical impact on malpractice suits. So long as a defendant doctor is backed by experts who will testify that what he did in the circumstances was sound and proper, he stands a good chance of not being found to have acted negligently. To some, this seems to confer “near-immunity [on] the medical profession from actions in negligence”.<sup>12</sup>

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<sup>11</sup> *ibid* 587.

<sup>12</sup> *Khoo James and another v Gunapathy d/o Muniandy and another appeal* [2002] 1 SLR(R) 1024 [58].



18 About four decades after *Bolam* came the *Bolitho* case,<sup>13</sup> which was decided by five judges of the UK House of Lords. In *Bolitho*, the court held that judges are not bound to exonerate a defendant doctor “just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant’s treatment or diagnosis accorded with sound medical practice”.<sup>14</sup> The experts’ opinion must have “logical basis”<sup>15</sup> and if that opinion is “not capable of withstanding logical analysis”, the judge may hold that it does not pass muster because it is not reasonable or responsible.<sup>16</sup>

19 The decision in *Bolitho* is often thought to have qualified the *Bolam* test. In some respects, it sought to subject defence experts to more judicial scrutiny and put decision-making power back into judicial hands. However, any shift away from the *Bolam* test that it signified was but a small one. The judges in *Bolitho* were quick to emphasise that “it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable.”<sup>17</sup> In the vast majority of cases, they said, “the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion.”<sup>18</sup> The

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<sup>13</sup> *Bolitho v City and Hackney Health Authority* [1998] AC 232.

<sup>14</sup> *ibid* 241G.

<sup>15</sup> *ibid* 242A.

<sup>16</sup> *ibid* 243C.

<sup>17</sup> *ibid*.

<sup>18</sup> *ibid* 243B.

seeming tension between *Bolam* and *Bolitho* stems from the desire on the one hand, to recognise the room for reasonable disagreement between doctors, and on the other, to guard against the possibility of doctors escaping liability simply by persuading colleagues to say that what they did was in keeping with acceptable medical practice.

20 In Singapore, the Court of Appeal has accepted not only the *Bolam* test but also the decision in *Bolitho* in a 2001 case between Dr James Khoo and Mdm Gunapathy.<sup>19</sup>

21 Before I leave this and proceed to the third ingredient of negligence in the context of medical malpractice, I should point out one more thing. It has been said that a doctor's professional functions may broadly be divided into three phases: diagnosis, advice and treatment.<sup>20</sup> To the extent that courts accept that *Bolam* is good law, it is not controversial that it applies during the phases of diagnosis and treatment. But there is some controversy as to whether it also applies during the advice phase. This is the phase where the doctor, having isolated the likely problem, considers with the patient how best it may be addressed. There is an important

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<sup>19</sup> In this case the court elaborated on the *Bolitho* addendum, stating that whether an expert's opinion could withstand logical analysis was essentially a two-stage inquiry. The first stage asks whether the expert directed his mind at all to the comparative risks and benefits relating to the matter. In other words there must have been some weighing of all the countervailing factors. The second stage asks whether the expert's opinion is internally consistent on its face, and whether it flies in the face of proven or known extrinsic facts: *Gunapathy* (n 12) [64]-[65].

<sup>20</sup> *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital and others* [1985] 1 AC 871, 896G (Lord Bridge of Harwich).

element of patient autonomy here. Patients generally have the right to refuse treatment and here the law is concerned with whether the patient was given enough information to enable him to come to a decision. The usual complaint is that the doctor failed to warn the patient of the risks of a particular treatment, or otherwise failed to furnish relevant information. If the *Bolam* test were applied, whether the doctor ought to have furnished that information to the patient would depend on the opinion of other doctors. As long as a responsible body of doctors thought that withholding the information was compatible with sound and proper practice, the doctor would not be liable. However, there is an alternative view that where the giving of advice to patients is concerned, the opinion of doctors should not be determinative since it must ultimately contend with the question of patient autonomy. Moreover, the question of how much information ought to be given seems to be neither beyond the competence of the judicial mind nor scientifically controversial. In any case, this is a contentious issue which has not been settled under our law.

22 I turn now to the final ingredient which is the element of causation. In medical malpractice cases, a patient usually goes to the doctor with an existing illness or injury. Left unchecked, that illness or injury could increase in severity and even lead eventually to death. Sometimes the patient's condition might have already reached a stage where despite the best efforts of the doctor, nature cannot be prevented from taking its course. In such a situation, even if it turns out that the doctor breached his

duty of care, he will not be liable because it was not his breach that caused the eventual injury. An English case from the 1960s illustrates this point.<sup>21</sup> Three men went to the hospital complaining that they had been vomiting for three hours after drinking tea. The medical officer on duty told the men to go home and call their own doctors. It turned out that that the men had been poisoned by arsenic and one of them later died. The judge held that the medical officer had breached his duty of care. However, he also found that even if the medical officer had fulfilled his duty and admitted the men to hospital, there was little if any chance that the deceased would have been saved. The medical officer's negligence therefore did not cause the man's death and on this basis he was not liable.

23 It can thus be seen then that the essence of a malpractice claim rests in the assertion that the doctor failed to exercise due skill and care, which failure resulted in harm or injury to the patient. This can take the form of doing something he should not have done; or perhaps failing to do something he should have done. But this is easier said than it is established. Human experience tells us that the easy cases are those at the extremes: either the doctor was so obviously wrong that he should have no regrets in meeting the claim; or the claim is so obviously bad that it is unlikely to be pursued. The hard cases are the ones in the middle. Medicine is rarely straightforward and it is certainly not formulaic. Doctors may reasonably disagree over the correct diagnosis or what the best course of treatment might be.

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<sup>21</sup> *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.

24 How then should we strike a balance between the interests of:

- (a) the patient who might indeed have a meritorious claim to a remedy;
- (b) the doctor who might indeed have done his best in a difficult situation but failed, despite his best efforts to get the desired outcome; and
- (c) the public in ensuring that medical behaviour is not distorted by the fear of litigation?

### **Potential effects of malpractice liability on the medical profession**

25 Let me take the last point first by considering whether there is empirical support for the notion that doctors may end up making decisions and judgments with an eye not just on the patient but also the risk of a lawsuit. The phrase that is often used is “defensive medicine”. A practitioner’s text for lawyers defines this as “the process of conducting tests or treatment for legal protection rather than medical reasons.”<sup>22</sup> A judge in the UK House of Lords has defined it as “the practice of doctors advising and undertaking the treatment which they think is legally safe even though they may believe that it is not the best for their patient.”<sup>23</sup>

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<sup>22</sup> *Halsbury’s Laws of Singapore* vol 14(4) (LexisNexis Singapore, 2012) para 177.001.

<sup>23</sup> *Sidaway* (n 20) 887B (Lord Scarman).

26 The legal system exists as an ameliorative mechanism to redress wrongs and restore balance in society when things have gone wrong. When the law functions as it is intended to, it serves a salutary purpose in raising standards of behaviour. However, the phenomenon of defensive medicine is predicated on doctors wanting to insulate themselves from the possibility of having to face a lawsuit. One can immediately see how this might play out either in an unwillingness to take necessary or at least reasonable risks or in shifting the risk calculus by opting for other risky options that may be less prone to litigation. If indeed this is the case, then the law has ceased to play that salutary role and we should be thinking about why it is so.

27 There is literature, mainly from the United States, supporting the view that awareness of malpractice liability does affect the behaviour of doctors.<sup>24</sup> There, the problem of medical behaviour being influenced by the risk of malpractice liability has been said to be particularly acute in the O&G context.<sup>25</sup> This has probably to do with the frequency with which O&G practitioners are sued. In the late 1980s it was estimated that O&G lawsuits represented almost one-tenth of all medical malpractice claims in the United States and nearly half of all indemnity payments;<sup>26</sup> and in the

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<sup>24</sup> It should be noted that not everyone is convinced that there is empirical evidence, as opposed to anecdotal evidence, for the phenomenon of defensive medicine: Jones (n 3) paras 1-022 and 3-117.

<sup>25</sup> Jessica Wolpaw Reyes & Rene Reyes, "The Effects of Malpractice Liability on Obstetrics and Gynecology: Taking the Measure of a Crisis" (2012) 47 *New Eng L Rev* 315, 317.

<sup>26</sup> Roger J Bulger & Victoria P Rostow, "Medical Professional Liability and the Delivery of Obstetrical Care" (1990) 6 *J Contemp Health L & Pol'y* 81, 82–83.

years 1990 and 1991, 54% of all medical malpractice claims involved obstetrical care.<sup>27</sup> In the latest survey on professional liability conducted in 2012 by the American Congress of Obstetricians and Gynaecologists, 77.3% of slightly over 9,000 respondents from all over the United States reported that they had in the course of their professional lives experienced at least one professional liability claim filed against them.<sup>28</sup> The frequency of malpractice claims in turn drives up the cost of medical insurance. In Singapore, according to a book edited by two members of your society Dr Kelvin Tan and Dr Tay Eng Hseon, as at 2003 O&G doctors paid the highest premiums within the medical profession.<sup>29</sup> Is there something about the nature of O&G practice such that patients are more likely to sue when things go wrong? As Dr June Tan pointed out in correspondence with me leading up to this address, when patients go for an obstetrics procedure they do so because they are preparing to welcome a new life into their world and not because of illness. Inevitably, the expectations are positive rather than negative. By contrast, in most other areas of medical practice, patients go to their doctors in bad health and expect the worst. So when something does go wrong in the O&G context there is an especially difficult

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<sup>27</sup> Elizabeth Swire Falker, "The Medical Malpractice Crisis in Obstetrics: A Gestalt Approach to Reform" (1997) 4 *Cardozo Women's LJ* 1, 2.

<sup>28</sup> Jeffrey Klagholz & Albert L Strunk, *Overview of the 2012 ACOG Survey on Professional Liability* <<http://www.acog.org/~media/Departments/Professional%20Liability/2012PLSurveyNational.pdf>> accessed 4 September 2014 (2012 ACOG Survey), 3.

<sup>29</sup> Kelvin Tan & Tay Eng Hseon, "O&G Medico-Legal Risks and Liability — A Growing Crisis Worldwide" in *The History of Obstetrics and Gynaecology in Singapore* (Obstetrical & Gynaecological Society of Singapore and National Heritage Board, 2003) (Tan Kok Hian and Tay Eng Hseon eds) 628.

disconnect between the patients' expectations and the reality they must confront and this might increase the impetus to sue in search of a channel to vent their hurt and the disappointment.

28 The 2012 American survey that I mentioned earlier suggests that the fear of malpractice liability does affect the behaviour of O&G practitioners. Out of the 9,006 respondents, 57.9% reported having made at least one change to their professional practice as a result of that fear and 6.2% of those who reported having made changes to their practice said that they had in fact stopped practising obstetrics altogether.<sup>30</sup> This is not a new development. In 1989, the Institute of Medicine of the National Academy of Sciences in the United States released the results of a two-year study investigating the effects of liability on obstetric care and noted that obstetricians and family physicians increasingly reported that they were eliminating the obstetrics portion of their practices.<sup>31</sup> Potential malpractice liability has also negatively impacted the training of young O&G doctors with residents not being given the opportunity to exercise a level of responsibility appropriate to their stage of training.<sup>32</sup> Another undesirable consequence of the fear of malpractice liability is the unwillingness or reluctance to provide care to high-risk patients, according to 27.4% of the 2012

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<sup>30</sup> 2012 ACOG Survey (n 28) 3.

<sup>31</sup> Bulger & Rostow (n 26) 83.

<sup>32</sup> *ibid* 86.



survey respondents who had made changes to their professional behaviour.<sup>33</sup> There is anecdotal evidence to suggest that members of the legal profession or their spouses are deemed high-risk!

29 Declining to treat high-risk patients or discontinuing the practice of obstetrics altogether are facets of defensive medicine sometimes categorised under an umbrella called “avoidance behaviour” where the focus is on getting out of the way. An unsatisfactory consequence of this is that the public’s access to essential medical services is curtailed.

30 The second aspect of defensive medicine is called “assurance behaviour”, where the focus is on protecting oneself. This encompasses practices like prescribing more medication than medically indicated and suggesting additional, often invasive procedures such as biopsies to confirm diagnoses. In 2003, a survey conducted in Pennsylvania of 824 physicians from six specialties at high risk of litigation, including O&G, suggested that such assurance behaviour was fairly prevalent. Amongst O&G specialists, 59% of the survey respondents said that they “often referred patients to other specialists in unnecessary circumstances” whilst 54% of the survey respondents reported that they “often ordered more diagnostic tests than medically

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<sup>33</sup> 2012 ACOG Survey (n 28) 3.

indicated”.<sup>34</sup> The obvious effect of this is to increase the patient’s medical costs without any corresponding medical benefit.

31 Moreover, there may be a shift from one type of risk to another. One important way in which defensive medicine has manifested in the O&G context in the United States is in the increased incidence of caesarean sections. In the late 1980s, the threat of malpractice suits was commonly cited by O&G practitioners as a consideration contributing to the increased rate of caesarean sections.<sup>35</sup> This seems to have persisted. In the 2012 American survey I referred to earlier, among the 5,000-odd respondents who reported making changes to their professional practice as a result of the fear of malpractice liability, 23.8% said that they had increased the number of caesarean deliveries. In Singapore, the Caesarean section rates at KK Hospital rose from 4.8% in 1974 to 23.3% in 2000 and one of the reasons cited for this trend was the fear of malpractice suits.<sup>36</sup>

32 This is in spite of the existence of literature suggesting that the risks of the procedure are such that it should be avoided except where medically necessary. In a

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<sup>34</sup> David M Studdert *et al*, “Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment” (2005) 293(21) J American Medical Assn 2609 at 2612. <<http://jama.jamanetwork.com/Issue.aspx?journalid=67&issueID=4978&direction=P>> accessed 5 September 2014.

<sup>35</sup> Hilary E Berkman, “A Discussion of Medical Practice and Cesarean Section” (1991) 70 Oregon LR 629, 630.

<sup>36</sup> Kelvin Tan, “Cesarean Section in KKH and Singapore” in Tan Kok Hian & Tay Eng Hseon (eds)(n 29) 302 and 304.

wide-ranging study of more than 100,000 deliveries in nine Asian countries, not including Singapore but including our neighbours such as Thailand and Vietnam, it was found that intrapartum<sup>37</sup> caesarean sections were associated with a higher risk of maternal morbidity than spontaneous vaginal delivery. In the study, maternal morbidity was defined to include admission to intensive care, blood transfusion, hysterectomy or internal artery ligation. Even though there seemed to be evidence that caesarean sections decreased the risk of foetal death or injury, the authors of this study concluded that caesarean sections should be done only where there exists some medical indication to improve the outcome for the mother or the baby.<sup>38</sup>

33 It therefore does seem to be the case that the concern with defensive medicine is real and not imaginary. The detrimental effects of defensive medicine are apparent – higher costs; in some cases a denial of access to medical care and attention; and a tendency towards unnecessary or even sub-optimal medical decisions ironically taken in an attempt to limit legal risk. We would do well to avoid these potential pitfalls.

34 The difficulty is in addressing some of the concerns that doctors face while ensuring that disaffected patients can access the courts for solutions. Can we

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<sup>37</sup> This refers to caesarean sections performed during the period of labour, and is to be contrasted with “ante-partum” procedures which are performed prior to that.

<sup>38</sup> Pisake Lumbiganon *et al*, “Method of Delivery and Pregnancy Outcomes in Asia: the WHO Global Survey on Maternal and Perinatal Health 2007-08” (2010) 375 *The Lancet* 490, 497.

imagine a system of medical litigation that does not generate undue fear in doctors, while remaining substantively just? This might require us to re-think our medical litigation paradigm. Let me suggest some ideas to start the discussion.

## **Mediation**

35 There is a saying in the legal profession that if losing the case is the worst thing that can happen to a litigant, then starting the case is the next worst thing. Litigation is frightening. It often takes place in the spirit of acrimony and has, in some respects, the hallmarks of a battle. It can ruin relationships, and the public nature of a trial means that dirty linen can be freely aired. The litigants themselves will almost invariably have to enter the witness box. When they do so, they face the daunting prospect of intense cross-examination by opposing counsel that can last days or even weeks. The whole process can drag on for years and during this time it will often feel impossible to get on with life as the ongoing litigation becomes a source of constant stress. On top of all this, there is the fear that inevitably comes with surrendering whatever control one has over the outcome of this frightening situation to a third party who may struggle to understand the technical issues in the case.

36 The pitfalls of litigation have become more widely recognised in recent years. The result has been a general push towards alternative methods of dispute resolution for private disputes, in particular, a process known as mediation. Unlike litigation, there is no adjudicator who makes a decision and imposes it on the parties in mediation. The role of the mediator is purely facilitative; any decision is made by the

parties who therefore retain autonomy over the outcome and the process. It is possible, however, for a skilful mediator to suggest approaches to the dispute that yield solutions to the very problem the parties are troubled by. Moreover, all discussions that take place during mediation are confidential.

37 Of course, if the parties are unable to come to an agreement, they will have to proceed to litigation. In that sense, it is true that if mediation fails it merely prolongs the litigation process. But if it succeeds it saves parties a great deal of time and stress. The statistics in this respect are impressive. From 2011 to 30 September this year, 73% of the 718 matters that went for private mediation administered by the Singapore Mediation Centre resulted in a settlement. The figures are even more encouraging in the specific area of medical negligence – a settlement was reached in 17 out of 19 cases, a success rate of 89.5%.

38 It seems to me that the fear of medical malpractice might be reduced to some degree by a culture of taking mediation seriously by ensuring that all potential litigants are apprised of this avenue and also of its potential benefits. Indeed, there is some basis for thinking that mediation may be particularly apt in the medical malpractice context. It has been suggested that when patients sue, they do not necessarily do so for the money. What they may really want is a chance to be alone

in a room with the doctor for 15 minutes.<sup>39</sup> Sometimes, they want an explanation, an apology or a real gesture of compassion and empathy more than they want to destroy the doctor's reputation or to extract a large monetary payment.

39 These things matter because in a patient-doctor relationship, both parties tend to have different perspectives and expectations. Patients often look up to their doctors as healers holding the solution to a problem that has become a source of dire fear and anxiety. To them, the doctor might be thought of as a miracle worker.<sup>40</sup> On the other hand, the doctors' primary concern might be to deal with the disease rather than the person. The doctor might not exhibit as much sympathy as the patient desires because that which the patient finds alarming and worrying, the doctor sees as routine.<sup>41</sup> Doctors are also very busy people and there is a limit to how much time they can spend with their patients. Doctors might not share every bit of information with the patient who he thinks of as a layman. However, in this day and age of the Internet, most patients will come armed with a little knowledge and may therefore feel disregarded when the doctor does not engage them as someone medically sophisticated and knowledgeable.<sup>42</sup>

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<sup>39</sup> Ann J Kellett, "Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients" [1987] *J of Dispute Resolution* 111, 124.

<sup>40</sup> *ibid* 114–115.

<sup>41</sup> *ibid* 120.

<sup>42</sup> *ibid* 121.

40 Hence there is fertile ground for ill-will when things go wrong. But it also means that solutions might be found in righting the real problems of dashed expectations and miscommunications, which greatly differ from allegations of malpractice and incompetence.

41 Thus it may be helpful to think of mediation as potentially being the first port of call in the medical malpractice context. If even some medical malpractice claims can be resolved at this stage without the matter having to go to trial, I imagine it will be welcomed by all doctors. This will require the buy-in of the key stakeholders including the insurance companies, lawyers and the medical profession.

42 To this end, in its effort to strengthen its outreach to the healthcare industry, the Singapore Mediation Centre, supported by MOH Holdings, launched a pilot Healthcare Mediation Scheme in April this year to offer subsidised mediation services for disputes between patients and healthcare institutions. 42 trained mediators accredited to the Singapore Mediation Centre were appointed by MOH Holdings as specialist healthcare mediators for this Scheme. 7 of these are medical doctors; Dr Joseph Sheares, a well-regarded cardiothoracic surgeon, is one of those on the specialist panel, while the others on the specialist panel have had experience in the healthcare industry.

43 This Scheme offers incentives for parties to resolve their differences through a frank and confidential discussion, including by providing free mediation advice for those who need help deciding whether to go down this route as well as in preparing

their case for mediation; and in certain cases even providing for a full subsidy of the mediation cost if there is an early settlement!

44 In addition, since 2011, the Singapore Mediation Centre has worked with the Singapore Medical Council to implement a referral procedure, under which the Complaints Committee of the Medical Council may refer disputes between a complainant and a registered Medical Practitioner that are not in fact concerned with professional misconduct to mediation.

45 In seeking to encourage more healthcare institutions to consider mediation as the first step in resolving disputes, the Singapore Mediation Centre has also managed to secure the pledge of several healthcare institutions and groups to become signatories to the Singapore Mediation Charter. The pledge signifies their commitment to resolve disputes outside traditional litigation channels.

### **A more inquisitorial and less adversarial approach**

46 The considerations in favour of mediation lead me in turn to a second way to re-imagine our medical litigation paradigm. It consists of a shift from an adversarial approach to a more inquisitorial one. In the common law system, litigation is an adversarial process. Each side is represented by advocates who advance their clients' case with full vigour. The central idea is that the best way for the truth to emerge is for each side to present its case and for its opponents to subject that case to critical examination and scrutiny. Much autonomy is afforded to the parties as to



how they choose to present their own case and attack their opponent's. The judge is more a referee than he is a director of the proceedings. This is to be contrasted with an inquisitorial approach, which is practised in civil law systems such as in France and Germany. There the judge is the one who asks the questions and directs the course of the inquiry. It is impossible to say that one system is always better than the other. The adversarial system has served us well throughout our history and I am certain this will not change. However, there may be some specialised areas where, for particular reasons, we may be better served by a less adversarial and more inquisitorial system.

47 One disadvantage of the adversarial system is that it tends to polarise parties. Each party takes a position, which then comes under heavy attack from the opposing party. Parties become increasingly entrenched in their positions and are often unable to see things from any other perspective but their own. This can especially be so in an area like medical negligence in which emotions run very high and there is a clash between the patient who feels she has been wronged and the doctor who believes he has done his best. Such polarisation worsens the already-fractious relationship between parties, possibly to a point beyond repair.

48 A parallel might be found in the area of family law. There, too, emotions reach fever pitch; and since the divorce cases which eventually come before the courts are those in which the parties cannot reach agreement, those are also usually the cases in which parties most seethe with animosity. The hostility is usually exacerbated by

the court proceedings. Such cases are often replete with allegation and counter-allegation of extra-marital affairs, physical, verbal or other abuse, and neglect of the children. It can be a challenging task for the judge to sift the truth from the exaggerations and outright falsehoods. In the public consultation exercise conducted by a Committee for Family Justice that was formed last year, one respondent astutely observed from personal experience that the adversarial system connoted a zero-sum game in which there is a winner and a loser. This encourages lawyers to “write in a skewed manner that distorts reality.”<sup>43</sup> In July this year, the Committee for Family Justice recommended that family litigation move away from the adversarial model towards a more inquisitorial, judge-led process, in which the judge is empowered to guide and direct the proceedings proactively instead of relinquishing this prerogative to the lawyers, as is usually the case in the adversarial system. The Family Justice Courts were opened on 1 October 2014 and the details of its new working methods are in the process of being worked through, but those of us who are behind this initiative firmly believe that it will yield better outcomes in this area.

49 The broad vision underlying our family justice reforms could well have a place in medical negligence litigation as well. Indeed the medical profession has indicated a preference for a less adversarial approach in the context of disciplinary proceedings, albeit for reasons that differ somewhat from those I have been discussing. This was

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<sup>43</sup> *Recommendations of the Committee for Family Justice on the framework of the family justice system* (4 July 2014), para 139.

noted in the report of the Singapore Medical Council review committee for disciplinary processes that was submitted to the Council in November last year.<sup>44</sup> The adversarial mode was thought to increase complexity and become as much a fight between lawyers as a determination of fault or lack thereof. This is surely as much a consideration in medical negligence cases as it is in disciplinary proceedings, and so I imagine that the medical profession would also welcome a more inquisitorial approach in medical negligence litigation.

50 Judges have as their sole objective to find the truth and arrive at a just outcome. If they were to take the lead in the litigation process in these cases, they could keep the focus firmly on fact-finding and leave out of the equation emotionally-charged matters of peripheral relevance that parties might otherwise be keen to put forward to cast their opponent in a negative light or just to give vent to their emotions. In the more clinical and detached atmosphere that a judge could cultivate, parties may be more candid and open, thus allowing the truth to emerge more easily. This might also prevent relations between the parties from deteriorating further, and perhaps parties might come round to the idea of working out their differences through mediation, even in the middle of proceedings, for mediation can be resorted to at any stage.

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<sup>44</sup> *Report of the Review Committee (for Disciplinary Processes) 2013* (1 November 2013), para 4.19.2.1(a).

51 There is a further reason to explore this option carefully. Medical negligence cases will often have a significance that extends beyond the immediate facts of the case. Such cases might well reveal systemic or institutional weaknesses in the way medicine is generally practised. In that sense there is a strong public interest in the truth coming to light, so that lessons may be learnt and mistakes not repeated. A judge-led litigation process that is more inquisitorial in nature would seem more likely to facilitate this.

### **The *Bolam* test and the appointment of assessors**

52 Let me turn to the third way in which we could possibly re-think our medical litigation paradigm. This has to do with the limitations of judicial expertise. Judges are not doctors. We certainly do not have the specialised learning and experience of a medical professional. And the last thing you want is a judge who sets out to educate himself in the intricacies of medicine by engaging in some internet research. All this poses a considerable difficulty in medical malpractice cases when the plaintiff and the defendant each call expert witnesses who then give conflicting evidence. How is the court to adjudicate on matters it knows little about? Let me return here to the *Bolam* test.

53 In the *Gunapathy* case there was some suggestion that the *Bolam* test is seen, at least in Singapore, as a solution to the problem of limited judicial knowledge of medical matters. Allow me to quote at some length from the judgment:<sup>45</sup>

...this court would politely decline the invitations of both counsel to enter the fray that is the arena of divided medical opinion. ... [A] lawyer-judge undertakes such an enterprise at his own peril. ... [M]edical 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*] restrains the Judiciary from treating medical experts as they would any other. ... It would be pure humbug for a judge, in the rarified 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 tell doctors not to play god; it seems only fair that, similarly, judges and lawyers should not play at being doctors.

...

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.

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<sup>45</sup> *Gunapathy* (n 12) [3] and [144].

54 In these passages there are two different reasons advanced to justify the *Bolam* test. The difference between these two justifications is subtle but important. The first has to do with the limitations of medical knowledge. Reference is twice made to the “frontiers of medical science”, which reminds us that since there is an end to medical knowledge, there comes a point where, in effect, one doctor’s guess is as good as another. To the extent the *Bolam* test rests on this notion that doctors should not be penalised for acting reasonably in uncharted waters, it seems fair, legitimate and sensible.

55 The second justification, however, has to do with the limitations of judicial expertise in the field of medicine. The court in the *Gunapathy* case observed that judges are “unschooled and unskilled in the art of medicine” and noted that the *Bolam* test “restrains the Judiciary from treating medical experts as they would any other” – that is, any other experts.

56 The latter justification has been criticised.<sup>46</sup> What makes medical science so special? There are many other fields of knowledge in which judges have little or no expertise. Matters of engineering, for instance, can be formidably technical and complex. So too matters of computer science. Yet in those fields there is no direct equivalent of the *Bolam* test, and no-one says to the judge that he has no business

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<sup>46</sup> Disa Sim, “*Dr Khoo James & Anor v Gunapathy d/o Muniandy and another appeal: Implications for the Evaluation of Expert Testimony*” [2003] SJLS 601, 604.

resolving or adjudicating upon differences of views between engineering or other scientific experts just because the judge himself is unschooled in these matters.

57 The precise justification on which the *Bolam* test rests may be important because it could have a bearing on how we should approach the expert evidence. Because of the *Bolam* test, lawyers are sometimes incentivised to “shop around until a sympathetic expert is found”. A survey carried out in the UK among expert witnesses in general revealed that many of them had been asked by lawyers to modify their reports or opinions, and some of them had in fact done so.<sup>47</sup> As I said earlier, in theory expert witnesses owe a duty to the court to be impartial. But when a lot is at stake, as is often the case in litigation, reality might differ somewhat from theory. This may be exacerbated by the nature of the traditional adversarial process, which is that the expert takes a position that the opposing counsel will endeavour to demolish. A fairly common reaction is for the expert to become defensive and to focus on not looking silly. After all, his professional reputation might also be at stake. It is probably unfair to place the blame for this entirely on the *Bolam* test. However, a possible implication of this is that it might be dangerous to defer too much to the opinions of the experts in the name of judicial restraint on account of judicial inexperience.

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<sup>47</sup> Harvey Teff, “The Standard of Care in Medical Negligence—Moving on from *Bolam*?” (1998) 18 Oxford JLS 473, 481–482.

58 While I am on this point about experts, let me digress briefly to mention a process known as “hot-tubbing”, which was developed with the aim of increasing the utility of expert evidence. Instead of experts taking the witness stand one by one, with no opportunity to engage one another, in “hot-tubbing” the experts sit side by side and give evidence concurrently. Each expert gives his reasons to support his conclusions while challenging the opposing expert's conclusions and the latter has the opportunity to respond immediately. Throughout the process, the court and counsel can ask questions; counsel are also permitted to provide facts to support or challenge the reasons given by the experts. It is hoped that this will make the process of expert evidence more of a conversation and less of a quarrel and that this should lead more readily to experts finding common ground through a reasoned and reasonable discussion.

59 Even as we seek to improve the way we take in expert evidence, the courts will not and should not accept expert medical opinion unquestioningly. The *Bolitho* addendum makes it clear that judges should test the logic of these opinions, and if they are then found wanting, they should be rejected. However, this leads to a paradox. On one hand the judge is expected to know enough to test the logic of expert medical opinion, which includes ascertaining whether the opinion controverts “known medical facts or advances in medical knowledge”.<sup>48</sup> On the other hand the judge is also told that he “has no business adjudicating matters over which medical

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<sup>48</sup> *Gunapathy* (n 12) [65].



experts themselves cannot come to agreement”<sup>49</sup> because he is unschooled in the art of medicine.

60 In fact, there might be an alternative way of addressing or at least mitigating the problem of judicial inexperience in matters of medicine. It is a mechanism that has been available for at least two decades but it was invoked in the medical malpractice context for perhaps the first time just this year. I am referring here the court’s power to appoint assessors.<sup>50</sup> The court can appoint an assessor on the application of the parties or it can do so on its own motion. Assessors are persons of skill and experience in the subject matter to which the legal proceedings pertain, and their appointment will invariably be most apt in cases of technical complexity. The function of the assessor is to assist the judge to come to grips with material that would be beyond his usual range of expertise and competence. I should emphasise though that the judge remains the sole decision-maker. In medical litigation, the court may therefore appoint a doctor with expertise in the relevant field to sit as assessor. Unlike an expert witness, the assessor is not called by any of the litigants and cannot be cross-examined. The assistance of assessors can be invaluable in furnishing the judge with the medical and scientific context and background that expert opinions may often assume without spelling out in detail.<sup>51</sup>

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<sup>49</sup> *ibid* [144].

<sup>50</sup> Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), s 10A.

<sup>51</sup> Tan Yock Lin, “Supreme Court of Judicature (Amendment) Act 1993” [1993] SJLS 557, 575.

61 There are no detailed rules or guidelines on how court proceedings are to be conducted with assessors. Indeed our Rules of Court state that an assessor “shall take such part in the proceedings as the Court may direct”.<sup>52</sup> Thus what role an assessor plays in a given case is very much at the court’s discretion. The assessor may be asked to tender a formal report, or he may be called upon to give informal oral advice only.<sup>53</sup>

62 At the trial, the assessor will sit alongside the judge. He may sit in for the entire trial or for part of it only. He is free to suggest to the judge questions to pose to the expert witnesses. There is a view that the assessor is not permitted to ask questions directly to the witnesses,<sup>54</sup> but I see no objection to this provided it is done in open court and provided that the parties can respond to the questions put by the assessor. Indeed, the judge may discuss points with the assessor at any point in time. But as I have said before, the assessor is not a substitute for the judge.

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<sup>52</sup> Rules of Court (Cap 322 R5, 2014 Rev Ed), O 33 r 4(3).

<sup>53</sup> The position in England is that if an assessor prepares a report for the court before the trial has begun, the court will have to send a copy of the report to the parties and the parties may then use it at trial: UK Civil Procedure Rules, rule 35.15(4). In fact copies of any report prepared by the assessor – presumably at any time before, during or after the proceedings – must be furnished to the parties: UK Practice Direction 35, para 10.4. If the assessor does not submit a report but confines his assistance to oral advice, it would seem that the judge is not obliged to disclose that advice to parties: Anthony Dickey, “The Province and Function of Assessors in English Courts” (1970) 33 MLR 494, 501. There are no similar rules or practice directions in Singapore but our courts are presumably free to follow the English procedures.

<sup>54</sup> Dickey, *ibid* 505.

63 Given the potential importance of an assessor's views to the decision of the judge he is advising, it would be only natural for parties to wish to have some say in the identity of the assessor. This is something that is permitted by our Rules of Court, which provide that the court shall notify each party of the name of the proposed assessor and that parties are entitled to object to the appointment of that proposed assessor.<sup>55</sup> However, in order to prevent objections and counter-objections from going on indefinitely, it is ultimately the court which decides who the assessor will be.<sup>56</sup>

64 The appointment of assessors is not a universally acclaimed course of action. Some time ago a great Australian judge questioned the wisdom of using an assessor.<sup>57</sup> Amongst other criticisms, he suggested that it was not clear how assessors would be an improvement over resolving technical issues using only the testimony of expert witnesses. Assessors, he said, would be a poor substitute for experts since parties could not cross-examine them. Moreover, if assessors were meant to be an addition to the experts deployed by the parties it would raise the costs of trial without discernible benefit.

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<sup>55</sup> Rules of Court (n 52), O 33 r 4(4)–(5).

<sup>56</sup> *ibid* O 33 r 4(6).

<sup>57</sup> Owen Dixon, "Science and Judicial Proceedings" in *Jesting Pilate* (1965), as related by Tan Yock Lin (n 51) 574.

65 It should be noted first that this critique of the use of assessors comes from a perspective that is rooted entirely in the common law adversarial process. From that purist perspective, one might see the force of the point that it is best to leave the judge to his own devices and let him work through the arguments, the expert opinions and draw such conclusions as may emerge from cross-examination.

66 Even then, the position is not straightforward. It is no doubt true that on one level assessors do add to the costs of trial. After all they take time off to assist the court and should be remunerated for this. However, the hope is that their use will ultimately save costs because the judge should be able to understand the technical intricacies and reach the heart of the case more quickly with their assistance. If we are looking to move away somewhat from a pure adversarial model to one where the judge leads the inquiry, the assistance of an assessor seems indispensable. On top of that, and this is where I come back to the need to minimise doctors' fear of medical litigation, it might give doctors greater confidence in the process and may mitigate the dangers of defensive medicine. If mediation fails and the medical malpractice claim must be litigated, they have the assurance at least that a fellow professional who intimately understands the unique and perhaps often unseen challenges of medical practice is there to help the judge work through the intricacies of a mass of technical material.

67 I believe that the use of assessors might well be advantageously combined with a shift towards a more inquisitorial and judge-led litigation process. To take just one

example, as positive a development as hot-tubbing has been for receiving expert evidence, I am certain its value would be immensely enhanced in a medical case if the judge leading the experts' conclave were assisted by an assessor.

68 Undoubtedly, there would be many issues to work through. We would have to find doctors willing to set aside the time for this. We would need to consider how such resources should be funded. And we would benefit from guidelines or protocols to spell out how assessors can be used without compromising transparency in the judicial process. However, none of these seem to pose insuperable obstacles.

69 I should finally clarify that I am not saying that with the use of assessors, the *Bolam* test can or should be done away with. I only address one rationale for the *Bolam* test, namely that judges may lack the knowledge to assess the expert evidence. There remains another important justification, which is that doctors may legitimately disagree on approaches and probable outcomes because of the limitations of medical science and knowledge. But, the *Bolam* test, even so justified, has come under occasional fire from courts and academics. It is said that it carries the risk of occasional abdication of judicial responsibility;<sup>58</sup> that deciding what a reasonable doctor would have done is sometimes not a matter of medical science but of society's social, moral and political values;<sup>59</sup> and that it provides a defence for

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<sup>58</sup> Kumaralingam Amirthalingam, "Judging Doctors and Diagnosing the Law: *Bolam* Rules in Singapore and Malaysia" [2003] SJLS 125, 130.

<sup>59</sup> Disa Sim (n 46) 604.

doctors who lag behind the times.<sup>60</sup> The validity of these criticisms have yet to be tested and the day may yet come when my colleagues and I find ourselves having to deal with the issue head on. Until then, for the avoidance of any doubt, I should make it clear that the determination of the standard of care in medical malpractice law remains governed by the *Bolam* test.

## **Conclusion**

70 I began this talk by suggesting that doctors such as yourselves often view the law as an unpleasant and unhappy intrusion into medical practice. Certainly it can disrupt lives and careers or even destroy them. But when the fear of malpractice liability is at the forefront of doctors' minds, this has the potential to adversely affect medical practice. It is not in the public interest if such fears were to lead to medical practices which are ultimately detrimental to society at large. Of course we cannot do away with malpractice claims. Indeed properly constructed, a legal system which upholds the possibility of such claims should result in rising standards and in that way serve the public interest. What I have put forward this evening are possible ways of re-thinking the way we might conduct medical litigation. These are not by any means radical changes but I believe that they may well serve us better when law and medicine must meet in the context of alleged medical malpractice.

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<sup>60</sup> Harvey Teff (n 47) 477.

71 I hope that these ideas can be aired and discussed with and within the medical community; and if there is interest, then with other stakeholders including the courts, so that together we might make an informed choice as to whether we should move in this direction. Such processes might reduce acrimony and increase the chances of medical negligence matters being settled out of court; and where this is not possible, one imagines that all parties would welcome a situation where the chances are enhanced of litigation being conducted in a focussed, targeted and clinical manner, with the judge being better-placed to understand the technical complexities and intricacies of medical science and practice. Perhaps, through a process of dialogue consultation and collaboration, we might find that the coming together of doctors and lawyers proves, after all, to be an occasion for constructive solutions to address an important issue that concerns us all.