THE EXCEPTIONS ALLOWING FOR NON-DISCLOSURE OF INFORMATION BY DOCTORS IN SINGAPORE – PART 2 OF THE HCK SERIES

KEITH JIEREN THIRUMARAN*

I. INTRODUCTION

In the landmark decision of *Hii Chii Kok v Ooi Peng Jin London Lucien* [*HCK*][1], the Singapore Court of Appeal adopted a modified and unique test in the context of medical advice for doctors in Singapore. In Part 1 of the *HCK* series[2], an overview of the *HCK* test was provided together with a detailed analysis of various aspects of the test. Part 2 of the *HCK* series will now focus specifically on stage 3 of the *HCK* test relating to the situations where a doctor is justified in withholding information from the patient regardless of its materiality, otherwise known as the exceptions to a doctor's duty of disclosure.

II. OVERVIEW OF *HCK* TEST'S STAGE 3

The *HCK* test formulated by the Singapore Court of Appeal is a three-stage test. The first stage involves the patient's identification of the information not provided and why it should be regarded as relevant and material.[3] The second stage involves determining whether the doctor was in possession of the information identified as relevant and material.[4]

The third stage involves an examination of the reasons why the doctor chose to withhold the information from the patient.[5] The Court would determine whether the "doctor was justified in withholding the information".[6] However, this would not be measured by the *Bolam-Bolitho* test

*LLB (Hons) (NUS), Class of 2019.

[1] *Hii Chii Kok v Ooi Peng Jin London Lucien and Another*, [2017] SGCA 38; [2017] 2 SLR 492.

[2] Keith Jieren Thirumaran, "The Unique Standard of Care for Doctors in Singapore – Part 1 of the *HCK* Series" (2019) Singapore Law Review, 11 Juris Illuminae (online).

[3] *Supra* note 1 at [132].

[4] *Ibid* at [133].

[5] *Ibid* at [134].

[6] *Ibid.*

even though it is informed by medical considerations.[7] After determining that the doctor's reasons were justified, the Court would then determine whether it "was a sound judgment having regard to the standards of a reasonable and competent doctor".[8] At this stage, expert medical evidence will have some significance because there is still "an element of professional judgment involved".[9]

The Court did not want to confine or restrict the situations that could be justifiable, but held that courts would consider all the circumstances in determining whether the withholding of information was justified.[10] However, the Court elaborated on 3 non-exhaustive categories of situations that would justify non-disclosure.[11]

The first situation allowing for the withholding of information is where the patient does not wish to know the information.[12] This is treated as a "factual question" on the existence and scope of a patient's waiver of the information and will not usually involve expert opinion.[13]

The second situation is where there is an emergency scenario such as when there is a threat of death or serious harm to the patient while the patient lacks decision-making capacity and there is no appropriate substitute decision-maker.[14] In this situation, rather than justifying a doctor's withholding of information, the duty to advise the patient is itself suspended out of necessity.[15] For this situation, the *Bolam-Bolitho* test will apply because medical expert opinion will be "crucial" in determining whether the urgency of the situation is such that seeking opportunities to provide information to the patient can be sacrificed.[16]

The third situation involves therapeutic privilege and applies where a doctor "reasonably believes that the very act of giving particular information would cause the patient serious physical or mental harm".[17] For this situation, expert medical and psychological evidence will "be helpful or even crucial" to the Court but the *Bolam-Bolitho* test will not be applied as the focus is on whether

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[7] *Ibid.*
[8] *Ibid* at [134].
[9] *Ibid* at [148].
[10] *Ibid* at [149].
[11] *Ibid.*
[12] *Ibid* at [150].
[13] *Ibid.*
[14] *Ibid* at [151].
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid* at [152].

the Court is of the opinion that the patient would likely be harmed when informed of the material information.[18] The Court of Appeal also elaborated on some examples, such as patients with anxiety disorders, patients who are easily frightened and patients "whose state of mind, intellectual abilities or education" make it "impossible or extremely difficult" to weigh the risks and understand the reality.[19]

III. ANALYSIS OF STAGE 3 OF THE HCK TEST

It is evident from the *HCK* test that stage 3 is much more detailed and specific in its elaboration of the various exceptions to a doctor's duty of disclosure, as compared to the UK Supreme Court's test in *Montgomery v Lanarkshire Health Board* [*Montgomery*][20]. The *HCK* decision draws inspiration from the *Montgomery* decision while simultaneously building upon the existing pronouncements on the exceptions to disclosure. This section will now explore the features of the *HCK* test's stage 3 that set it apart from the decision in *Montgomery*.

1. *Expansion of exceptions using an open-ended approach*

The first unique and distinguishing feature of the *HCK* test's stage 3 relates to the situations (or exceptions) that entitle doctors to withhold relevant and material information.

The Court in *HCK* adopted an open-ended circumstance-based approach regarding what kinds of situations would justify the withholding of information.[21] The Court would determine whether the doctor had reasonably justifiable reasons for withholding the information and whether it "was a sound judgment having regard to the standards of a reasonable and competent doctor".[22]

At first glance, this might seem like a reversion back to the *Bolam-Bolitho* test. However, the Court has emphasised that this would not be the case[23] and medical evidence merely has significance due to "the element of professional judgment involved"[24]. Although the second aspect

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[18] *Ibid* at [153].
[19] *Ibid* at [152].
[20] *Montgomery v Lanarkshire Health Board*, [2015] 1 AC 1430 (SC (Eng)).
[21] *Supra* note 1 at [149].
[22] *Ibid* at [134].
[23] *Ibid*.
[24] *Ibid* at [148].

of this approach takes into account medical evidence, this is only done to the extent that medical considerations are involved.[25] As such, in the final analysis, it is the Court that must be "satisfied that the non-disclosure of information was justified" on the facts of the case and not whether the non-disclosure was accepted as proper by a responsible body of medical men.[26]

Insofar as the balance between patient autonomy and doctor's opinions are concerned, *HCK* appears to take a patient-centric approach by not applying the *Bolam-Bolitho* test across the board for all situations that justify the withholding of information. While *Montgomery* is silent on the tests for assessing the situations justifying the withholding of information, support for Singapore's position can be found in the Australian High Court where it was stated that medical practice and opinion are still relevant although it is no longer conclusive because the decision belongs to the courts.[27] As such, although patient autonomy now plays an important role, this is balanced against the fact that medical evidence will still be taken into consideration, albeit not in the same manner as *Bolam-Bolitho*.

However, insofar as the types of situations where non-disclosure might be justifiable are concerned, the Court in *HCK* has gone further than *Montgomery* by applying a flexible test that is broad and leaves the possibility open for other situations. While it may be argued that the open-ended nature will add to the ambiguities and uncertainties discussed in Part 1 of the *HCK* series[28], it is submitted that this will likely have no immediate impact on doctors who are likely to continue relying solely on the three well-established exceptions. This is a result that would have eventuated under the *Montgomery* test as well. Nonetheless, it does give some flexibility and manoeuvrability to the courts in the event of a future case outside the scope of the three established exceptions that has special facts that justify a doctor's withholding of information.

2. Details on the application of exceptions

The second unique and distinguishing feature of the *HCK* test's stage 3 is that it elaborates and provides the exact conditions that need to be satisfied in order to successfully rely on the situations (or exceptions) that entitle doctors to withhold relevant and material information. As the Supreme

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[25] *Ibid* at [149].
[26] *Ibid* at [134].
[27] *Rosenberg v Percival*, [2001] HCA 18 at [7], Gleeson CJ.
[28] *Supra* note 2.

Court in *Montgomery* did not elaborate on the exceptions, it remains to be seen whether the standards adopted will be the same.

Where the patient does not wish to know the information, the issue would be treated as a "factual question" on the existence and scope of a patient's waiver of the information and will not usually involve expert opinion.[29] This must be correct as a doctor's decision on whether there has been a waiver is not dependent on medical expertise[30] but is merely dependent on whether a waiver of information actually exists on the facts.

In an emergency situation, the *Bolam-Bolitho* test will apply as medical expert opinion will be "crucial" in determining whether the urgency of the situation is such that seeking opportunities to provide information to the patient can be sacrificed.[31] This is correct as the urgency of treatment is essentially a medical issue and an area in which judicial wisdom has its limits.[32]

The final situation dealt with in *HCK* where a doctor can withhold information from the patient is therapeutic privilege. Therapeutic privilege applies where "the doctor reasonably believes that the very act of giving particular information would cause the patient serious physical or mental harm".[33]

In cases involving therapeutic privilege, expert medical and psychological evidence will "be helpful or even crucial" to the Court but the *Bolam-Bolitho* test will not be applied as the focus is on whether the Court is objectively of the opinion that the patient would likely be harmed when informed of the material information.[34] Here, the Court adopts the middle ground by recognizing that medical opinion is relevant but reserving the final determination on whether the patient would be harmed to the Courts.

The necessity of therapeutic privilege in any case is largely a medical decision to make. This is because determining the effect of the information on a patient involves analysis that extends to the state of mind and psychological condition of the patient, of which doctors have a degree of experience with assessing in light of their medical training. However, a decision on the applicability of therapeutic privilege would take away a patient's autonomy in making a choice and as such it is

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[29] *Supra* note 1 at [150].
[30] *Supra* note 20 at [13].
[31] *Supra* note 1 at [151].
[32] *Dr Khoo James & Anor v Gunapathy d/o Muniandy*, [2002] SGCA 25; [2002] 1 SLR(R) 1024 at [144]. *Supra* note 1 at [81].
[33] *Supra* note 1 at [152].
[34] *Ibid* at [153].

understandable that the Court did not wish to leave such a decision entirely to the medical profession. One concern that arises is whether interfering with medical opinion on therapeutic privilege goes against the principle that "a judge, unschooled and unskilled in the art of medicine, has no business adjudicating matters over which medical experts themselves cannot come to agreement".[35] However, it appears that the Court in *HCK* was only reserving the final decision on therapeutic privilege to itself. This can be viewed as a *Bolitho*-style test of logic and consistency. Therefore, if interpreted this way, the courts reserving the right of making the final determination on therapeutic privilege does not result in any inconsistency.

A common concern that arises out of therapeutic privilege is that it has the "potential to 'swallow' the doctor's obligation of disclosure".[36] If left unchecked, the effect of the therapeutic privilege exception could render patient autonomy otiose or non-existent. This would occur where doctors are given too much freedom in exercising the privilege.

While the Court in *Montgomery* did not elaborate on the scope of this exception, the Court in *HCK* gave the exception a broad and expansive scope. This was because the Court felt that "doctors should have a measure of latitude in invoking the therapeutic privilege".[37] Nonetheless, the Court in *HCK* stressed that therapeutic privilege should not be abused to prevent a patient that is capable of making a choice from doing so just because the doctor believes that it is contrary to the patient's best interests[38]. This point was also made in *Montgomery*.[39] The broad scope of therapeutic privilege under *HCK* raises two areas of concern with regards to medical paternalism.

The first area of concern involves the kind of potential harm that would permit a doctor to withhold information. The position in *Montgomery* allows withholding information where it would be "seriously detrimental to the patient's health"[40] while in *Rogers v Whitaker* withholding information is allowed where it would "prove damaging to a patient"[41]. Notwithstanding the cautionary statements made by the courts earlier, these vague tests have the potential to include the effects of making a bad decision as a type of harm under therapeutic privilege. This would render patient autonomy illusory because a doctor can simply claim that an informed choice not

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[35] *Supra* note 32.
[36] *Meyer Estate v Rogers*, [1991] O.J. No. 139, 2 O.R. (3d) 356 at [31].
[37] *Supra* note 1 at [152].
[38] *Ibid* at [153].
[39] *Supra* note 20 at [91].
[40] *Ibid* at [88].
[41] *Rogers v Whitaker*, [1992] 175 CLR 479 (HCA) at [9].

to undergo treatment would result in harm to the patient simply because the patient would not be getting treated. Under *HCK*, the position appears to be similar and includes both serious "physical" harm and "mental" harm.[42] This potentially allows physical harm caused by not undergoing treatment to qualify.[43] This is further supported by the fact that the privilege applies even where a patient may be "easily frightened out of having even relatively safe treatments that can drastically improve their quality of life".[44]

The second area of concern involves the type and condition of patients who may potentially have therapeutic privilege invoked against them. Under *HCK*, therapeutic privilege extends to cases where a patient's decision-making capabilities are impaired to an appreciable degree, although they may not strictly lack mental capacity.[45] In determining whether the patient suffers from an impairment of his decision-making abilities, regard will be given to the benefits of the treatment, the relatively low risks present, and the probability that even with suitable assistance the patient would refuse treatment due to a misapprehension of information.[46] The factors that are taken into account suggest that a patient who has made a mistake in his decision, and as a result has not chosen something that would objectively be considered good for him, may be considered as having an impairment in decision-making abilities. This mimics medical paternalism where the patient's choice is overturned because it is not good for the patient. This is difficult to reconcile with the principle that a person should not be treated as unable to make a decision merely because he makes an unwise decision under the Singapore *Mental Capacity Act*.[47]

Furthermore, although the Court in *HCK* emphasized that a patient's decision-making ability had to be "impaired to an appreciable degree", the Court tapered this with the inclusion of patients who were easily frightened and whom it would be extremely difficult to explain the true reality to.[48] To some extent, this is contradictory with the earlier statement that a patient who is "capable of making a choice" should be allowed to do so even if it is contrary to the patient's best interests.[49]

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[42] *Supra* note 1 at [152].

[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid* at [152]-[153]. Examples provided by the court included patients with anxiety disorders, geriatric patients who may be easily frightened out of relatively safe treatments, and patients whose state of mind, intellectual abilities or education make it impossible or extremely difficult to explain the true reality to them.

[46] *Ibid* at [153].

[47] *Mental Capacity Act* (Cap 177A, 2010 Rev Ed Sing), s 3(4).

[48] *Supra* note 1 at [152].

[49] *Ibid* at [152]; *Supra* note 20 at [91].

The combined effect of these two areas of concern is that the balance between patient autonomy and medical paternalism becomes blurred. While medical decisions in clear-cut scenarios of mentally incapacitated patients should be left to the doctor and a clear-minded and informed patient should be allowed to make a "bad" decision, the line becomes very fine in the grey area where a patient has mental capacity but his decision-making ability is impaired. This presents a difficult tension between allowing the patient to "wrongly" weigh the information in the interests of patient autonomy and allowing medical paternalism to protect the patient from his own decisions and their resultant harms under beneficence.

As such, the current position in respect of the scope of the therapeutic privilege exception in Singapore is unclear and requires further clarification. The effect of the current uncertainty surrounding this privilege is that doctors will not be comfortable invoking therapeutic privilege in the grey area where their patient has mental capacity along with some impairments in decision-making abilities. This may well be the desirable position to remain in in order to give full effect to patient autonomy and allow patients to make "bad" decisions.

IV. CONCLUSION

In conclusion, although the *HCK* test has many positive features and has made great progress in the direction of patient autonomy[50], stage 3 of the *HCK* test presents certain difficulties that have the potential to derail the progress made in the former stages of the test. The expansion of the potential exceptions and situations for the withholding of information entails different forms of analysis within each exception. The *HCK* test provides details on how each exception should be applied, some of which bring back notions of medical opinion and evidence playing roles. However, the adoption of therapeutic privilege from English and Australian law requires further thought. Nonetheless, overall the *HCK* test strikes a unique and delicate balance between patient autonomy and beneficence in Singapore.

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[50] *Supra* note 2.