ANGELS ARE NOT PERFECT

CAN HUMAN DOCTORS BE?

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When angels are not perfect, how can human doctors be?

While the patient has the right to the most appropriate and sensible medical treatment, it is not possible to achieve this ideal treatment all the time. The doctor's interest is broadly in alignment with that of the patient – to achieve the best result possible.

Recently, there have been publicised cases where doctors were severely punished beyond what was considered just. This has led to petitions and mass protests by doctors to have such punishments reviewed.

Perhaps it is time to start a narrative about the interests of doctors. There appears to have been too much emphasis on the rights of patients. It is time the pendulum swung back to a sensible position.

A quasi-criminal justice system

When the Singapore Medical Council (SMC) is dealing with the reputation, livelihood, and indeed the very life of a doctor and his/her dependants, the standard of conviction must be "beyond reasonable doubt", which is the standard required by the criminal justice system. While the SMC is not yet wholly a part of the criminal justice system, it is quasi-criminal and shares the same standard of proof as that of the criminal justice system. To that extent, it should operate very much like the criminal justice system.

As in the criminal justice system, there can only be a conviction when there is mens rea (a guilty mind). Examples of a guilty mind and deliberate premeditated behaviours include:

- Cheating through the Community Health Assist Scheme;
- Illicit selling of cough syrup;
- False certification;
- Doing a procedure mainly for financial gain or self-interest; or
- Gaming the system (eg, deliberately issuing a two-day medical certificate after a major operation to avoid the causative injury to be a reportable industrial accident).

Nulla poena sine lege (Latin for "no penalty without a law"): there is no punishment without a crime. From time immemorial, a crime meant that it has to be premeditated, with malice aforethought, with an intentional guilty mind. For instance, breaking each of the Ten Commandments requires a guilty mind. Crimes are deliberate and not accidental.

"Intentional, deliberate departure" from standards would be mens rea, such as recommending in bad faith your specialty as the best treatment, as in *Ang Peng Tiam v SMC*.[1] Intentionally misdiagnosing a case would be criminal, not negligence, as in *Chow Dih v Public Prosecutor*.[2]

In medical negligence cases, conduct so outrageous that it falls far from an acceptable standard of care and becomes crimes against the state can be gross or criminal negligence.[3] Willes J famously observed that gross negligence is just negligence with a vituperative epithet.[4] Nevertheless, gross negligence, with a jury finding of recklessness, has led to cases being labelled criminally negligent in the UK. These cases were frequently those which led to death.[5,6,7,8]

Gross negligence is also a concept found in the Singapore context, although in terminology, "serious negligence that objectively portrays an abuse of the privileges which accompany registration as a medical practitioner" is more often used.[9]

Straightforward negligence, such as wrong diagnosis, treatment or advice should fall under the Civil Law. The writer argues and presses for civil negligence to be outside the jurisdiction of the SMC.

Civil or criminal

The writer argues that civil cases which can be redressed by compensation and do not amount to crimes against the state or seriously undermine public confidence in the medical profession must be outside the jurisdiction of the SMC. The SMC and its committees should be very clear about what forms a purely civil case and one deserving of punishment by the SMC. A rapid test of gross negligence could be to use the test of St Thomas Aquinas (1225–1274), the medieval philosopher whose writings still form a large part of the bedrock of Catholic Church theology. Aquinas' test of repugnance is *statim, modica consideratione*[10] – immediately, with little thought. The writer suggests that unless the elements of the complaint satisfy the simple test of "repugnance", it should not be sent to the Disciplinary Tribunal (DT). Of the 165 cases before the SMC in 2018, 46 were for professional negligence, 19 for missed diagnosis, and 20 for inappropriate treatment (ie, 85 out of 165); the majority should have originated as civil cases, with only few describing "serious negligence", or drastic or extremely egregious misconduct.

"Beyond reasonable doubt" has a lot of similes defined by different judges over time. This simply means that the DT must be "nearly 100%

sure", "absolutely sure", "firmly convinced", or "sure" before they convict. There is a great number of formulae in words which shed little light on "beyond reasonable doubt".

Perhaps it is better to express it in numbers. In a 2009 Institute of Criminology paper, the University of Cambridge suggests a threshold figure of being 91% sure.[11] This test takes on a significance in assessing mens rea as the guilty act(s) comprising the "actus reus" would usually be agreed upon in a deemed "Statement of Facts" before trial. 91% to 100% sure is very far from the standard required for a plaintiff to prove in a civil case against a doctor, which is to cross the 50% threshold, called "a balance of probability". The patient wins if the civil court tips just 51% to his favour. At 50%, the patient still loses.

Clearly, to score more than 9/10 in an SMC case is a very stringent requirement[12] compared to needing only more than 5/10 in a civil court. Ideally, there should be a final screening check before the case is referred by the Complaints Committee (CC) to a DT. This should preferably be at the Review Committee (RC) stage, which should oversee CC referrals to the DT. This is not possible under current law, but a good practical alternative is to ensure that the CC first satisfies defined stringent requirements before a case is allowed to go to trial by the DT. The RC must lay down the stringent requirements which must be satisfied before a case is sent to the DT. The SMC President must ultimately be the goalkeeper and give the green light before any case is sent to the DT, with the RC ensuring that all stringent requirements are met.

Screening a case before it even gets to the CC stage may not serve much useful purpose, as the CCs at present seem adequately adept at detecting frivolous and vexatious cases. The 2018 SMC Annual Report statistics show that of the 192 cases reviewed by the CC, 109 were dismissed. Before sending a case to the DT, alternatives such as mediation or a warning should be considered.

Why be selective?

The first reason for the SMC to be more selective is that cases which are purely civil in nature and can be settled between parties should be given the fullest consideration before being sent to the DT.

The second reason is that there is now talk of a Conditional Fee Agreement, which means lawyers can take on cases on a no-win, no-fee basis. Champerty and champertous agreements used to be illegal and were strictly banned in the UK and Singapore, as it increased speculative litigation. Now, even the UK is accepting no-win, no-fee for medical negligence litigation. Singapore may also consider giving a statutory exemption for the medical profession. Patients may then be encouraged to compose their Statutory Declarations to imply and presuppose a prima facie case. This can oblige the DTs to do all the tedious work while the patient's lawyer may not need to do any work except to gamble on a multiplicity of DT verdicts, and then use any adverse DT verdict as a cash cheque (eg, as brawny leverage in obtaining more favourable terms from the Medical Protection Society).

SMC committees should be wary or in medical parlance "have a high index of suspicion" for civil cases dressed up as quasi-criminal ones. In cases of an alleged breach of the SMC Ethical Code and Ethical Guidelines (ECEG), great care should be taken to distinguish between "such disregard for life and safety of others as to amount to a crime against the state and conduct deserving punishment"[4] or "egregious misconduct"[13] and civil cases where "the relation of rules of practice to the work of justice is intended to that of handmaid rather than mistress."[12]

The third reason stems from the Judgement of the Court of Appeal in the case of Dr Lim Lian Arn.[13] The Court held that in deciding whether the doctor was negligent it was necessary to (a) establish a benchmark standard; (b) establish a departure; and (c) find the departure sufficiently egregious. The logical corollary would be that if a case does not show a prima facie case of egregious behaviour, SMC committees should not send the case to the DT. A warning should be sufficient to highlight and underscore displeasure. Good policing does not mean that every prima facie case has to go to trial. *De minimis non curat lex* – the law does not bother with minor matters. There are alternative sanctions in place which register disapproval of occasional minor departures from the ideal benchmark standards. These sanctions lower the threshold for sending a similar case to the DT should the infraction be repeated.

The fourth reason for the SMC to be selective is to avoid a blunderbuss approach which leads to imprecise results. The recent imbroglio has diminished the reputation of the SMC. It takes a great deal of perceived injustice for a normally staid profession to collectively protest DT rulings. We should be cognisant of our police force being very selective in prosecuting cases with a resulting high conviction rate and public confidence, leaving civil cases to be settled between parties.

Expert opinions

The SMC should be cautious in its reliance on external "expert reports". The expert has the benefit of having all the information from the beginning, through the progress of the case and to the final result. His report with 20/20 hindsight typically

surfaces a few weeks or months later with the possible benefit of deliberation, aided by reference to textbooks, journals and discussions with colleagues. The expert may present the ideal solution, with care not to incriminate himself in any way. The expert report may bear all the hallmarks of defensive medicine.

Retrospective "expert reports" have little correlation to real-time situations. A suggested approach would be to provide the expert with all the information until just before the point of contention. The expert is then asked to provide all acceptable management options from just before the alleged material act and also what are contraindicated. The expert would not be told of what the respondent doctor actually did. Whichever form the expert opinion takes, common sense is still needed in weighing it.

For a civil case, opposing parties start on equal footing (50-50) and it is for the authority to decide whom to believe. For a criminal or egregious negligence case, the respondent doctor starts with a 100% advantage, as he is presumed innocent until proven guilty.[14] The difference between a civil and a quasi-criminal matter ought to be inculcated into our CCs, DTs, and indeed the SMC itself and the medical profession at large.

Final thoughts

Many doctors live in dread of a registered letter from the SMC. This must change. A DT must not find a doctor guilty of negligence unless "there has been an intentional, deliberate departure from the standards observed or approved by members of the medical profession who are of good repute and competency",[1] ***OR*** "there has been such serious negligence that it objectively portrays an abuse of the privileges which accompany registration as a medical practitioner."[9]

Doctors must not practise and live in fear. ◆

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References

1. Ang Peng Tiam v Singapore Medical Council [2017] SGHC 143.

2. Chow Dih v Public. Prosecutor [1990] 1 SLR(R) 53.

3. R v Bateman [1925] 28 Cox Crim. Cas. 33, also (1925) 19 Cr App R 8, per Lord Hewart, Chief Justice.

4. Grill v General Iron Screw Collier Company (1866) LR 1 CP 600 @ 612.

5. Regina v Adomako [1995] 1 A.C. 171. Anaesthetist failed to spot a disconnected tube for 15 minutes.

6. R v Shulman, Times 21 May 1993: patient died from wrong injection which had known risks.

7. R v Prentice [1993] 4 All ER 935: two junior doctors without training or experience told under protest to do lumbar puncture on leukaemia patient. Criminal conviction quashed on appeal. Hospital may be criminally liable.

8. R v Holloway and Others [1993] 4 Med LR 304: Hypoxia from anaesthetist's failure to notice signs of disconnection.

9. Wong Meng Hang v Singapore Medical Council [2018] SGHC 253. Liposuction death. In all the cumulative circumstances, the Court of Appeal held that "we find it difficult to conceive of a worse case of medical misconduct" para. 92. The test of "such serious negligence that it objectively portrays an abuse of the privileges which accompany registration as a medical practitioner," in Wong Meng Hang was used verbatim from Low Cze Hong v Singapore Medical Council [2008] 3 SLR(R) 612 at para 37.

10. Boyle J. Natural Law and the Ethics of Tradition. In: Robert P. George ed. Natural Law Theory: Contemporary Essays. Oxford: Oxford University Press, 1992: 11. Also in St Thomas Aquinas (the "Angelic Doctor"), Summa Theologiae, I-II, 100.1

11. Arts and Humanities Research Council. Beyond Reasonable Doubt. Available at: http://bit.ly/2IP17jl.

12. Dictum of Collins, Master of the Rolls, in the Court of Appeal case of Coles v. Ravenshear [1907] KB 1.

13. Singapore Medical Council v Lim Lian Arn [2019] SGHC 172. The Court of 3 Judges at paragraph [28] criticised the DT for holding Dr Lim culpable when he merely departed from the ECEG. The DT must go further and hold the departure egregious, or serious.

14. For "Beyond Reasonable Doubt", the writer prefers to use a figure more familiar with the medical profession, which is $p<0.05$ where there is over 95% correlation between the act and guilt. If the correlation can be disproved by any alternative reason, then the accused should be given the benefit of the doubt. Two Standard Deviations=95.45%. For SMC's internal use, 95% should be the standard. Repugnance can be up to 3SD or 99.73 or $p<0.01$.