

PROFESSIONAL ACCOUNTABILITY

[PART 2]

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This is the second instalment of a two-part series. The first instalment was published in the July 2018 issue of SMA News (<http://bit.ly/2Mn2vte>).

Professional accountability and the law

While professional self-regulation as enforced by the Singapore Medical Council (SMC) is empowered by legislation (the Medical Registration Act [MRA]), the law also has a direct role in enforcing accountability on the medical profession. This is separate and administered differently from the SMC disciplinary process. While disciplinary matters in the SMC are ultimately judged by a Disciplinary Tribunal, matters in relation to law are decided by the courts of the land. The penalty also differs; the SMC can fine or suspend a doctor, or revoke his/her licence, whereas the remedy in legal cases in tort is a claim for damages (money), and in contract in the medical context would commonly be money. A licenced doctor can potentially face a complaint in the SMC and a lawsuit for the same matter. A simple way of looking at them is that they are two parallel, separate systems of answerability and administration.

Two areas in law that a medical professional can be held accountable for are breach of contract or tortious negligence. When a patient pays a doctor for medical services, the essential elements of a contract are fulfilled; the doctor offers the medical

service, the patient accepts this offer with the consideration of the fees (money) and there is an intention to create the relationship. The doctor has an implied duty to exercise reasonable care and skill, and falling below this can be construed as a breach of contract. The remedy for breach of contract is to place the “innocent party” in a position as if the contract had not been breached. There is no need for harm to have resulted to the patient. A doctor can also be held to a breach of contract if a specific outcome is promised for a treatment (eg, this treatment is guaranteed to deliver 10 kg of weight loss in two weeks) and the outcome is different from what is promised.

In reality, the principle area in law that the medical professional is held accountable for is the tort of negligence. In this context, quantifiable harm that directly results from falling below the minimum standard of care expected in law is actionable against the doctor. There are three key elements that must be fulfilled for the tort of negligence to occur. There must be a duty of care (a “given” in the normal doctor-patient relationship), breach of this duty and quantifiable harm that directly flows from this breach. The restitution for this harm is damages in the form of money, which is paid to the person harmed. The test to determine minimum standards is different for diagnosis and treatment (Bolam-Bolitho test),¹ for provision of information and advice (Hii Chi Kok test)² and for SMC cases when the charge is professional misconduct (Low Cze Hong test).³



The Bolam test: The test is the standard of the ordinary skilled man exercising and professing to have that special skill; it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. 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 doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.

The Bolitho addendum: A defendant doctor cannot escape liability for negligent treatment or diagnosis simply because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant’s treatment or diagnosis accorded with sound medical practice, because what is required is that the practice must be accepted as proper by responsible, reasonable and respectable professionals, and the court must be satisfied that the exponents of the body of opinion relied upon can demonstrate that such an opinion has a logical basis.⁴

The Bolam-Bolitho test (summary): The minimum standards are not breached if a respectable, responsible and reasonable body of professionals considers the practice as proper, so long as this opinion is able to withstand the scrutiny of logic, is internally consistent and has taken account of recent advances.

The Hii Chii Kok test: Also known as the modified Montgomery test, this entails

three stages or questions for the plaintiff to succeed in a claim against the doctor:

- 1 Patient must show that the information the doctor failed to disclose was:
 - a. information that would be relevant and material to a reasonable patient situated in the particular patient's position; and
 - b. information that the physician knows is important to the particular patient in question.This is the "Reasonable Patient" test.
- 2 If patient succeeds at the first stage, the Court will then determine whether the doctor was in possession of that undisclosed information, and if not, why so. This is judged by the Bolam-Bolitho standard.
- 3 If the doctor was in possession of that undisclosed information, the doctor must then show that in all the circumstances, he was justified in withholding the information. Eg, waiver by patient ("I don't want to know any more"), emergencies/principle of necessity or therapeutic privilege.

The Low Cze Hong test: Professional misconduct can be made out in at least two situations: first, where there is an intentional, deliberate departure from standards observed or approved by members of the profession of good repute and competency; or second, where there has been such serious negligence that it objectively portrays an abuse of the privileges which accompany registration as a medical practitioner.

Potential for criminal charges

Negligence leading to grievous harm or death can constitute a criminal offence. Under section 304A of the Penal Code, whoever causes the death of any person by doing any negligent act is punishable with imprisonment. Under section 338A of the Penal Code, whoever causes grievous hurt to any person by doing any act so negligently as to endanger human life or the personal

safety of others is punishable with imprisonment, or a fine, or with both.

The hurt designated as "grievous" is defined in section 320 of the Penal Code as such: emasculation; death; permanent privation of the sight of either eye; permanent privation of the hearing of either ear; privation of any member or joint; destruction or permanent impairing of the powers of any member or joint; permanent disfiguration of the head or face; fracture or dislocation of a bone; any hurt which endangers life, or which causes the sufferer to be, during the space of 20 days, in severe bodily pain, or unable to follow his ordinary pursuits; or penetration of the vagina or anus, as the case may be, of a person without that person's consent, which causes severe bodily pain.

While a doctor has not to date been found guilty of criminal negligence arising from medical care, other healthcare professionals have been. In the case of Siah Kah Ying, a pharmacist was fined \$6,000 for negligently causing the death of a 78-year-old diabetic lady who was prescribed ten times the dose of her diabetic medication.

In *Lim Poh Eng v Public Prosecutor*, a practitioner of traditional Chinese medicine was convicted under section 338 of the Penal Code for having caused grievous hurt by negligently failing to attend to the patient's complaints adequately after administering colonic washout treatments and failing to refer her to the hospital for treatment. These omissions gravely endangered the patient's life and she lost her rectum.

The difference in criminal as compared to civil cases is the standard of proof required; criminal cases must be proved beyond reasonable doubt, whereas the standard for civil ones is the balance of probability.

Summary

In summary, professional accountability in its strict sense is entrusted to and

administered by the SMC, largely delineated by the statements in the SMC Ethical Code and Ethical Guidelines and the principles that underlie them. Law applies to society at large, but ones such as the MRA, Mental Capacity Act, Infectious Diseases Act, Penal Code and some common law concepts in Negligence, Confidentiality and Contract, are particularly pertinent to or specifically for the medical profession. Consideration should be made whether the adversarial approach to settling disciplinary issues should be utilised significantly more judiciously. ♦

References

1. *Dr Khoo James and Another v Gunapathy d/o Muniandy and another appeal* [2002] SGCA 25.
2. *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38.
3. *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR 612; [2008] SGHC 78.
4. *Judith Prakash J. citing Lord Browne-Wilkinson's speech in the Bolitho case in Jason Carlos Francisco v. Dr L. M. Thng & Singapore General Hospital Pte Ltd* [1999] SGHC 206.

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