Professional Misconduct and Framing of Charges

By Dr Myint Soe

Introduction

The above two matters, professional misconduct and framing of charges, relate to an inquiry before a Disciplinary Committee (DC), or Disciplinary Tribunal, formed by the Singapore Medical Council (SMC). It is the second step in the disciplinary process against doctors; the first step being an *ex parte* inquiry by the Complaints Committee, and which after due deliberation, has recommended a full inquiry before a DC. The doctor concerned is duly informed of this decision and told he will be informed in due course.

In due course, the doctor concerned will receive a packet of papers titled "Notice of Inquiry by Disciplinary Committee" and signed by the solicitors for SMC, who are appointed by SMC (commonly known as "prosecutors"). That packet would include the "charges" which the DC will inquire into. These charges would have been drafted by the said solicitors. There will be discussions between SMC and the solicitors, before the charges are finalised, and communicated to the doctor concerned in the said Notice of Inquiry.

It will therefore be seen that the inquiry is to be confined to the charges as framed, and must be carefully read. In any charge, the "offence" or "offences" would be mentioned in the end. In the majority of cases, the offences would now be under Section 53(1)(c) or 53(1)(d) of the Medical Registration Act (2010), where a registered medical practitioner is found by a Disciplinary Tribunal:

53(1)(a) to have been convicted in Singapore or elsewhere of any offence involving fraud or dishonesty;
(b) to have been convicted in Singapore or elsewhere of any offence implying a defect in character which makes him unfit for his profession;
(c) to have been guilty of such improper act or conduct which, in the opinion of the Disciplinary Tribunal, brings disrepute to his profession;
(d) to have been guilty of professional misconduct; or
(e) to have failed to provide professional services of the quality which is reasonable to expect of him.
(Note: boldface mine)

The charges framed for professional misconduct today would end with the mantra "and guilty of professional misconduct under Section 53(1)(d) of the Medical Registration Act (Cap 174)", which is formerly Section 45(1)(d). Hence the popularity of the term "professional misconduct" used in the medical fraternity.

Meaning and scope of professional misconduct

The phrase which older lawyers will remember is "infamous conduct in a professional respect". In the SMC Ethical Code of 1995, reference was properly made to that phrase, and the case of Allinson v General Council of Medical Education and Registration [1894] 1 QB 750 was referred to. Unfortunately, that English case referred to infamous conduct as something "disgraceful or dishonourable" by his professional brethren. It is to be noted that England has replaced the term "infamous conduct" with "serious professional misconduct" since 1969.

It was only in 1997, with the new Medical Registration Act, that Singapore followed England and introduced the term "professional misconduct". The word *serious* was probably omitted, as any adjective could be troublesome. The term "professional misconduct" in its literal sense means "misconduct" committed in a professional capacity (ie, while acting as a doctor). The word *conduct* relates mainly to "behaviour" and *misconduct* would mean "improper behaviour".

In DC hearings, these basic meanings are often ignored. The case Low Chai Ling v SMC [2012] SGHC 2012 concerned non-invasive or minimally-invasive authentic or cosmetic procedures, the lack of evidence of improper behaviour was noted by the Court of Three Judges. No such behaviour was alleged against any patient, nor did the court accept that there was any "defiant" behaviour by Dr Low Chai Ling towards the Ministry of Health (MOH), and relied on the correspondence.

For the first time in Singapore, the court took pains in Dr Low's case to explain the difference between improper behaviour in a professional capacity (professional misconduct) under Section 53(1)(d), and improper behaviour in a non-professional or personal capacity, which would "bring disrepute to his profession" under Section 53(1)(c) of the Medical Registration Act. The court realised that there may be circumstances where it would be difficult to characterise whether the offending conduct falls under either of these two clauses in Section 53(1). That may be the reason why the prosecution in Dr Low's case drafted all the seven charges as offences for professional misconduct.

It is noteworthy therefore that the court felt that in Dr Low's case, the proper charges should be under Section

53(1)(c) for conduct bringing disrepute to the profession. For aesthetic procedures, this choice would have been justified, because of the express wording of the last paragraph in the updated October 2008 version of the Guidelines on Aesthetic Practices for doctors. Thus, the Guidelines concluded in paragraph 25 that non-compliance of them would be "deemed by the medical profession as unethical and bringing disrepute to the profession".

In terms of the SMC Ethical Code and Ethical Guidelines, it has to be noted that mere breach of any guideline does not necessarily amount to actionable professional misconduct. Thus, in Gobinathan Devathasan v SMC [2010] 2 SLR 926, the DC agreed that the novel treatment of Repetitive Transcranial Magnetic Stimulation (rTMS) and Therapeutic Ultrasound for chronic strokes, cannot be "generally accepted" in any case yet, and hence would appear to be in breach of Article 4.1.4 of the Ethical Guidelines. This by itself cannot be professional misconduct and the treatment could be regarded as "off label" treatment. There was the further question of "appropriateness" in that case. Hence, the DC acquitted him on the first charge regarding rTMS, though he could have performed a procedure in breach of Article 4.1.4.

As far as the general meaning of professional misconduct is concerned, it is noteworthy that the dicta in Allison's case has been disapproved by the Court of Three Judges in the case of Low Cze Hong v SMC [2008] 3 SLR 612. The court clearly remarked that it was not constrained by what is stated in the SMC Ethical Code and Ethical Guidelines on the meaning of professional misconduct, and it cannot govern the meaning of the phrase as it appears in Section 45(1)(d) of the Act (which was passed by Parliament). This would be akin to the tail wagging the dog. The court felt that the SMC's view was unduly restrictive.

In Low Cze Hong's case, the court noted two situations which would amount to professional misconduct:

(i) Where there is an intentional deliberate departure from standards observed or approved by members of the profession; and
(ii) Where there has been serious negligence which portrays an abuse of privilege which accompanies a member of the medical profession.

(Note: this is not a definition and is not exhaustive.)

Framing of charges

We now come to the framing of charges in a DC Inquiry. We have noted earlier that they would be drafted by the solicitors of SMC, appointed to conduct (prosecute) the DC inquiry.

It will be noted that as the DC disciplinary proceeding is a quasi-criminal proceeding, the doctor concerned can only be punished for what he is charged. He has to know how to defend himself properly to rebut the charges.

The basic requirements of a charge can be seen from Section 123 to 126 of the Criminal Procedure Code 2010 (Cap 68). In Dr Low Chai Ling's case, the court pointed out that a charge must state clearly the precise nature of the offence and also include sufficient particulars of time and place of the alleged offence(s).

The fact that a DC cannot convict beyond the charges was succinctly brought out by the court with regard to the statement by senior counsel for the prosecution that Dr Low was being sent up for a DC Inquiry, as she had continued with the treatments in spite of the letter by MOH dated 20 September 2007. According to him, other practitioners who had been sent similar letters had stopped. The court pointed out that there was nothing in the charges to show she had acted in defiance of MOH.

It was also pointed out the charges were lacking in certain detailed particulars. For example, there were no particulars on the following:

(i) What was the communication to the patients who underwent the impugned treatments;
(ii) When and how these treatments were effected on them; and
(iii) Whether the treatments were beneficial to them.

The court also commented on the use of the phrase "and/or" at the end of each "particular" to the charges. Thus, the allegations could be regarded as being cumulative, or in the alternative. The DC seemed to take the view that all the particulars were in the cumulative. In this connection, a matter which is confusing to defence lawyers, is whether the "particulars" mentioned in a charge are meant to be an element of the charge or just particulars, ie, verbal embellishments. If each particular is an element of the charge, the allegation or statement therein has to be proved by the prosecution beyond reasonable doubt. If it is just a mere particular, then the charge can still be substantiated if a "particular" falls by the wayside and cannot be proved. Indeed, the legal implications of a "particular" were also considered by the same Court of Three Judges in Devathasan's case. That case also involved situations where the DC went beyond the scope of a charge, and merits serious study. SMA

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