

# DOCTORS' FEES AFTER SUSAN LIM'S CASE

## – Implications for the Medical Profession

By Rebecca Chew



The decision of the Court of Three Judges in *Lim Mey Lee Susan v Singapore Medical Council*<sup>1</sup> (SMC) on 28 June this year (the Judgement) has attracted unprecedented attention, but relatively little critical analysis of what it portends for the medical profession. In his article, "Doctors' Fees: What Has Changed after the Susan Lim Case?", published in the September 2013 issue of *SMA News*, Dr Tan Chi Chiu essentially concluded that the Susan Lim case is "very much an outlier".<sup>2</sup> In this author's view, the Judgement has potentially far-reaching consequences. It is thus important to apprise the medical profession of the significance of the Judgement, in terms of its impact on the way the profession may have to reorganise itself in the valuation and charging of medical services.

### **The basis for the prohibition against "overcharging"**

As far as Singapore law is concerned, this is the first judgement establishing that "overcharging" is a disciplinary offence for the medical profession. Not only had there

been no previous cases on this point in the medical context, there is no express statutory provision and nothing expressed in the SMC's Ethical Code and Ethical Guidelines. Due to the serious consequences of the disciplinary proceedings, it has been held that SMC should not sanction medical practitioners on the basis of conduct which had not been clearly established to be professional misconduct.<sup>3</sup>

The court avoided collision with this fundamental principle by arguing that the offence of overcharging existed as being "inherent" in the notion of being a professional. This leaves open the question as to what other duties or obligations may be implied by the court in the future, even in the absence of clear statutory provision or codification.

### **What is "overcharging"?**

Having decided that overcharging constituted a disciplinary offence, the court had to ascertain what overcharging meant. Dr Lim had pressed the argument that the line is crossed where there is evidence of dishonesty,

deceit or an abuse of one's position. If it were simply a matter of whether the fees charged were reasonable for the work done, this should be a matter for private negotiation or civil proceedings. However, the court rejected this, holding instead that there was an "objective ethical limit" beyond which a medical practitioner could not charge.

In order to ascertain this objective ethical limit, the court approved a set of factors which the disciplinary committee (DC) had said it looked at. These include:

*(a) the nature of the medical and other services rendered, and the time spent by the practitioner in rendering them; (b) any specific demands made by the patient of the practitioner; (c) any special relationship of trust and confidence between the practitioner and the patient; (d) the practitioner's special training, skills and expertise; (e) the practitioner's professional standing and seniority; (f) the fees generally charged for comparable services by other medical practitioners of similar training, skills, expertise, professional standing and seniority; (g) any opportunities which the practitioner had to forgo as a result of rendering the services in question; and (h) the circumstances of urgency under which the services are rendered.*<sup>4</sup>

A number of observations may be made. First, the court seemed to accept the DC's characterisation of these factors as "objective criteria". Yet, as Dr Tan noted, none of these criteria provide a quantitative yardstick by which to assess the value of any particular medical service. Indeed, it is difficult to see how that can be when there is no uniform matrix by which each of these factors can be valued either individually or collectively. Any attempt to impose such a uniform matrix of calculating doctors' fee entitlement comes uncomfortably close to reintroducing the very same sort of fee guidelines which SMA tried to introduce and which were later found to have violated anti-competition legislation.

Second, the court's analysis also raises a fundamental question as to the basis upon which doctors should price their services. In the course of its discussion, the court accepted the argument that Dr Lim's fees were not justified because she did not perform any major surgical services but was "merely" providing "palliative care" and coordinating treatment for the patient by other doctors, as the principal doctor. This implies that it is possible to ascribe some kind of intrinsic value to different types of medical care. How this value is to be determined is unclear.

Moreover, the court made the observation that Dr Lim

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should have charged less as the provision of such services did not require the application of her technical expertise. If patients demand doctors' undivided attention for a substantial period of time, does this mean that doctors cannot charge their usual rates for the time spent on non-medical or non-surgical services related to the treatment? If indeed Dr Lim is known for her surgical expertise, it follows that by reason of her substantial engagement with this particular patient, she would have substantially lost out on the opportunity to perform such surgeries for other patients while attending to this one patient. Does it mean that very little value can be attributed to this opportunity cost? The Judgement did not appear to have clarified this point.

The court also took no account of what it had itself described as the "exceptional care" displayed by Dr Lim in terms of justifying a higher level of fees. It did not appear impressed by the arguments relating to market economics. Arguments that patients accorded the benefit of unstinting round-the-clock wall-to-wall medical services in the heart of the city centre, in both hospitals and hotels, cannot expect to pay the same level of fees as those who queue for services at a neighbourhood practice, did not appear to carry much weight. Medical practitioners must be mindful of the above when considering the appropriate fee chargeable for their services.

***Can the value of medical services be "objective"?***

At the heart of the case is the question as to whether it is ever possible to place an "objective" value on the provision of medical services. Even if continuous and undivided attention is critical and vital to patients and their care, this decision seems to suggest that not much weight would be accorded to this in deciding the appropriateness of the fee to be charged. Further, even though there is no other reason why the patient would have chosen Dr Lim to take care of her at a very advanced stage of her



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cancer treatment, and for such a substantial length of time (between January to June 2007 in Singapore, and June to July 2007 in Brunei), this, according to the Judgement, is not relevant to the fees Dr Lim was entitled to charge.

Further, the court in this case did not take into account two potentially important indicia of the value that the patient herself accorded to Dr Lim's medical care. The first indicium would have been what the patient was prepared to pay and indeed paid for Dr Lim's services in previous years. There was evidence before the court as to the amounts invoiced by Dr Lim and paid by the patient in 2001, 2004, 2005 and 2006. The Judgement did not analyse how Dr Lim's fees in 2007, which were the subject of the charges, compared to previous years'.

The second indicium would have been the fees which the patient had indicated she was willing to pay in 2007, which was further reinforced by her continued return to Dr Lim's care in the same year, despite invoices apparently having been rendered throughout the period. The court dismissed this argument, holding that the ethical limit on fees operated “over and above” market and contractual forces. It is clear that even a perfectly legal, valid and enforceable agreement between doctors and patients might not forestall disciplinary proceedings. It is therefore important for medical practitioners to note that they cannot rely on agreements with their patients to safeguard their positions both from an ethical and legal perspective. Medical practitioners must be careful to ensure that the terms of their agreement do not breach the objective ethical threshold. But the key question would then be what the appropriate threshold is.

### **The relevance of greater transparency in fees**

As Dr Tan points out, the court relied on the possibility

of greater transparency in fees (through guidelines or the publishing of common charges and bill sizes) to justify the viability of imposing an objective limit on fees. But as Dr Tan also notes, there is an inherent tension in the rationale for promoting transparency in fees (namely, empowering patient choice) and the court's imposition of an ethical objective limit. One might argue that the more pricing information there is, the less the court should intervene since patients would be fully aware of what each doctor or hospital is charging. According to the court, because the objective ethical limit operates “over and above” market and contractual forces, doctors may still be accused of professional misconduct for overcharging even if their patients had chosen them in spite of knowledge of what others would charge.

Even after accepting that doctors should charge within the same range as their peers, fee guidelines or pricing information may not be comprehensive enough so as to anticipate each and every circumstance that doctors may find themselves in. It would be quite difficult to envisage a set of guidelines that would have assisted in the formulation of an appropriate fee in Dr Lim's case, involving an intensive engagement for at least 110 days over a six-month period in Singapore alone.

### **The “I know it when I see it” approach to determining fees**

Ultimately, as Dr Tan himself acknowledged, the Judgement provides little guidance as to how doctors could take steps to ensure that they are not the subject of professional complaints over their fees. In its final analysis, the court discerned that at least \$2 million (with some upward leeway) would have been an appropriate fee for the services provided by Dr Lim. This was not grounded in any expert evaluation of each of the services provided.

In some ways, this is not surprising because the value of a service in any industry is at best an amalgamation of a multitude of considerations, not all of which are capable of objective or scientific proof.

One might argue that the difficulties inherent in fixing a particular price for particular services should lead the court to adopt a test which finds professional misconduct only in cases where there is an intention to take advantage of patients or where doctors demand a fee which they know they are not entitled to. The court gave no weight to the fact that Dr Lim was not fraudulent in rendering her invoices; that the patient had specifically sought the services of Dr Lim as her principal doctor when she could have gone to any other doctor in the world; that there was no evidence of any abuse or advantage taken of the patient; that similar fees had been charged in previous years; and that above all, irreproachable care and unwavering commitment had been given to the patient.

Accordingly, it is not necessarily the case that it would take "almost an extraordinary effort of deliberate, almost predatory, overcharging" to be found guilty of an offence of overcharging. The Judgement is clear that the offence of overcharging can be established without any "guilty mind" on the part of the practitioner. Indeed, overcharging can be established in spite of patients' agreement to the fees that the doctors may charge. This must be so given the court's conclusion that the ethical limit is objective, and operates over and above contractual and market forces.

It is significant to note that Dr Tan himself accepts that there was no intelligible way of defining overcharging. Dr Tan sought some comfort from the fact that even US Supreme Court judgements can struggle to define limits (referring to the "I know it when I see it" test in the context of pornography).<sup>5</sup> However, the case Dr Tan relied on was subsequently overturned in another US Supreme Court judgement that laid down a concrete test for obscenity.<sup>6</sup> This confirms the need for certainty, not ambiguity, in matters affecting the rights and liberties of individuals.

### **A taxation process for the medical profession?**

Dr Tan has argued that pricing transparency may help doctors better gauge how to price their services but, as explained above, this may be true only to a limited extent. One proposal which SMA or SMC might study more fruitfully is to implement an assessment or review process whereby, for bills above a certain amount, patients who cannot agree on the appropriate level of fees that their doctors are entitled to charge, may apply to have invoices reviewed. This process will take disputes as to the quantum of fees payable outside the disciplinary process, except for cases involving dishonesty or fraud. Such a process

would provide recourse for patients who might feel that their doctors have rendered bills which are excessive. This process also provides the benefit that, over time, there will be more case studies of what the reasonable fees chargeable ought to be in different circumstances.

### **Conclusion**

The Judgement does create some uncertainty as to the appropriate fee one should charge for medical and other services provided to patients. The "I know it when I see" approach to determining an objective ethical limit on fees is unsatisfactory and compounded by the fact that a breach of the objective limit, no matter how innocent, can be the subject of disciplinary action. The Judgement cannot be brushed away as an "outlier". This is all the more so especially given Singapore's bid to position itself as the region's medical hub. The demands of patients will become more sophisticated, and they will include not only medical or surgical services but a suite of services including other non-medical services. The issue as to the appropriate fees doctors can charge will recur in increasingly complex circumstances. The current regime which treats all disputes on fees as a disciplinary matter may not be an ideal solution and does not provide the guidance which the medical profession needs. **SMA**

### **References**

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