

THE SINGAPORE MEDICAL COUNCIL DISCIPLINARY PROCESS — A STUDY OF A RECENT CASE

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PROFILE

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In November 2014, the High Court of Singapore (also known as the Court of Three Judges) overturned the verdict of the Singapore Medical Council (SMC) Disciplinary Committee (DC) that Dr Lawrence Ang, an obstetrician, was guilty of one charge of professional misconduct (in relation to the need to call for a neonatologist to attend or be on standby for a delivery) and that, among other penalties, he should be suspended from practice for three months. At the disciplinary committee inquiry, the DC had acquitted Dr Ang of three other charges relating to the obstetric management of his patient.

In doing so, the High Court found that the conviction of Dr Ang on that charge was unsafe, unreasonable and contrary to the evidence because the DC had:

- 1 failed to determine the standard of conduct the doctor was to be judged by, or from which his departure could be sufficiently serious to amount to professional misconduct;
- 2 failed to explain its reasons for preferring certain medical opinions over others in the face of conflicting medical opinions on key issues;
- 3 taken into account facts that went beyond the ambit of the relevant charge; and
- 4 made at least two factual findings that were contrary to the evidence.

This decision came in the wake of highly publicised criticisms from the Singapore Court regarding two decisions that the SMC DC had made in 2012, and announcements regarding reforms to the disciplinary process that governs doctors, made in July 2014 by the SMC and Ministry of Health.

What might one glean from these cases?

Some, like the author of a forum letter to the *Straits Times* (10 December 2014), may think that perhaps the DCs are more stringent in applying medical standards than the courts. On the other hand, this

is precisely the point that the High Court in Dr Ang's case, comprising Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash J, found lacking in the analysis of the DC — there was no determination by the DC of what the standard of care was. In such a case, how does one conclude that Dr Ang had, so to speak, fallen short?

There is a lesson here for those interested in medico-legal matters. The issue of standard of care is crucial in the legal analysis of a complaint or suit brought against a doctor. As to what the standard of care for treatment should be, it does not mean the ideal practice. Instead, the relevant benchmark is what is known as the Bolam test. In other words, if the doctor's actions are supported by a responsible body of medical opinion, he would not be negligent. Hence, the fact that a patient has obtained a medical view in support of his complaint or claim does not necessarily mean the doctor had fallen below the standard of care. Further, the fact that the patient eventually suffered harm does not necessarily mean that there was negligence and/or professional misconduct.

One must determine the standard of care and whether the doctor has fallen below that standard. In addition, in SMC disciplinary cases, professional misconduct has to be made out. Professional misconduct is made out in at least two scenarios: first, where there is an intentional, deliberate departure from standards observed or approved by members of the profession of good repute and competency; and second, where there has been such serious negligence that it objectively portrays an abuse of the privileges that accompany registration as a medical practitioner.

In Dr Ang's case, the DC relied on the two SMC prosecution expert witnesses' views to conclude that Dr Ang should have acted differently. However, the High Court found that the factors relied upon by the

two prosecution experts *could not have stood as legitimate bases* for convicting Dr Ang on that charge. This is because the factors that the prosecution experts relied on were in respect of an *earlier* period (6.30 pm to 8.15 pm). However, since the DC did not take issue with the management during that earlier period (which was the subject of one of the acquitted charges), the DC should focus instead on the events that occurred after 8.15 pm. Besides, the DC did not explain why it preferred the evidence of the two prosecution expert witnesses to that of the defence expert witnesses.

The High Court also thought that it was important in this case for the DC to identify the point in time at which the duty to call for a neonatologist arose, because if that duty arose at, say, 8.30 pm, Dr Ang's breach had to be assessed in light of the fact that, by about 8.45 pm, he had asked for a neonatologist to attend to a patient next door, and by around 8.50 pm, he had commenced the delivery of the complainant's baby.

The High Court also commented that, while there may be significant practical difficulties in finding the precise answers to those issues, it was nevertheless the responsibility of the SMC to lead the evidence addressing these matters and the responsibility of the DC to evaluate the evidence before coming to the conclusion. Given the DC's failure to analyse the charge in the aforesaid reasoned manner, that was a fatal flaw that *in itself* warranted the setting aside of the conviction.

Hence, for claimants contemplating legal action against doctors and for medical experts who are being asked to provide opinions that would be used in medical malpractice litigation or complaints, it is important to first establish what the standard of care applicable to that case would be.

Another significant aspect of the November 2014 judgement by the High Court was its order that the

SMC is to pay Dr Ang the costs of the appeal, as well as the costs of the inquiry proceedings that took place before the DC.

After the November 2014 judgement, the SMC wrote to the High Court to clarify this costs order, and the High Court invited both parties to tender submissions on whether the Court had the power to make such a costs order, and if so, whether it should be exercised against the SMC in this particular case.

In March 2015, the High Court released its decision on the costs order. The High Court affirmed its earlier costs order.

In doing so, the High Court held that:

- 1 the DC has the power to order costs of the disciplinary committee inquiry against the SMC;
- 2 the High Court also has the power to order costs of the disciplinary committee inquiry against the SMC; and
- 3 there was ample justification in Dr Ang's case to order the SMC to bear the costs of the disciplinary committee inquiry as well as the costs of the appeal.

This is a significant development on two counts. Firstly, it was hitherto believed that the DC does not have the power to order costs of the disciplinary committee inquiry against the SMC in the event of an acquittal of a charge. Secondly, before this case, the High Court had never ordered the SMC to pay a doctor the costs of the appeal even when the latter had succeeded in his appeal against a DC decision.

In relation to the power of the DC to order that the SMC pays the costs of the disciplinary committee inquiry, the High Court noted that, while the Medical Registration Act was silent on the issue of making a costs order against the SMC, the Court also said that it was difficult to imagine that the Parliament intended for the SMC to be immune from adverse costs orders. It noted that even the Public Prosecutor was not immune to adverse costs orders.

The High Court held that the DC would have an implied ancillary power to make costs orders against both parties and not just the doctor alone. Such an implied ancillary power to make a costs order against the SMC could not be easily displaced and indeed could not be displaced just because the Medical Registration Act was silent on the issue.

As for the power of the court, the High Court held that there was an implied ancillary power (the power to hear and determine appeals from a DC), as well as a power under the Supreme Court of Judicature Act (which vests in the High Court the same powers as that of the Court of Appeal in the exercise of its appellate jurisdiction), to make a costs order against the SMC.

In determining whether the power to order costs against the SMC should be exercised, the High Court in this case cautioned that excessive emphasis should not be placed on the consideration that a public or regulatory function is being exercised by the SMC. This is an important but not conclusive factor.

The High Court found that a multi-factorial approach should apply in deciding whether to order costs against a body exercising a public or regulatory function. Ultimately, what the Court seeks to do in each instance is to make an appropriate costs order that is just and reasonable in the circumstances of the case.

In finding that costs should be ordered against the SMC for Dr Ang's case, the High Court considered the following points:

- 1 It could not be said that the charges were brought against Dr Ang on grounds that appeared to be reasonably sound.

There was no available reason to explain the Minister of Health's decision to require the disciplinary committee inquiry to proceed despite the findings of the Complaints Committee. The DC's reasons for dismissing the first three charges and the High

Court's reasons for reversing the DC's conviction on the fourth charge (which was the subject of the appeal to the High Court) are largely similar to the reasons given by the Complaints Committee in dismissing the complaint in the first place.

- 2 The errors made by the DC in convicting Dr Ang were largely contributed to by the SMC.

The charges were not sufficiently particularised; the type of professional misconduct that Dr Ang was alleged to be guilty of was not specified, and this undermined the ability of the DC to properly evaluate the evidence. Further, the DC had considered extraneous facts, and presumably, this arose from the SMC's submissions.

- 3 Dr Ang was initially cleared by the Complaints Committee but was then made to endure two tranches of proceedings, which he should never have been put through. He would have had to incur significant costs in his defence.

The legal principles above were stated by the High Court to also be applicable to disciplinary tribunal inquiries under the current regime of the Medical Registration Act. Dr Ang's case was under the previous regime.

The High Court's decision to order costs against the SMC was the first time the SMC had been asked to bear the acquitted doctor's costs of the disciplinary committee inquiry. Given its relevance to disciplinary tribunal inquiries that may be on-going or are to be undertaken, the High Court's November 2014 judgement, as well as its views set out in the March 2015 judgement on costs, would have to be considered carefully by the parties and counsel involved in such inquiries. ♦