

Understanding Health Law



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INTRODUCTION

Health law is based on two ethical principles that make the medical profession special. First, there is the humanitarian duty of skilled and knowledgeable members of society to respect the life and health of their patients. Secondly, there is the duty to respect the autonomy of individual patients. This principle of autonomy grounds both the doctrines of consent and of confidentiality of consultations and records.

The Hippocratic Oath states: "I will prescribe regime for the good of my patients according to my ability and judgment and never do harm to anyone."

The common law that we have inherited is founded on the protection of personal interests, the most fundamental of which is bodily integrity. Any invasion of bodily integrity is ordinarily classed as an assault, for which compensation is payable. Doctors however form a special class of persons, licensed not to kill, but to heal, with our consent.

A PRIVILEGE AND A MONOPOLY

The law gives doctors a monopoly, with any unauthorised person who practises medicine or holds himself out as a medical practitioner being liable to a fine or imprisonment. In Singapore's context an exception has had to be made for practitioners of traditional Malay, Chinese or Indian medicine, so long as they do not represent themselves to be medical practitioners.

Doctors therefore have an ethical and legal obligation to achieve and maintain acceptable standards of skill and knowledge. This applies both to general practitioners and to specialists. They are even expected to keep an eye on their brethren: if in the course of treating or attending to a fellow doctor they consider him unfit to practise because of his physical or mental condition, then they are obliged to inform the Medical Council. Failure to do so is a disciplinary offence. This is in addition to the oversight of the Health Committee.

Doctors are also given the right and responsibility of issuing certificates relating to medical status. Often the certifying role of doctors is carried out at the instance of the patient and with his consent. However, from society's perspective, doctors are also relied upon to certify a person's status for the purpose of some restraint or imposition. Such a judgment may include an assessment of whether society's interest is being protected.

The doctor who examines the suspected drug addict will simply give the results of his examination to the Director of the Central Narcotics Bureau, who then decides on the appropriate action.

In making a report to a third party about the patient, a doctor must take reasonable care to ensure the accuracy of his report. A misdiagnosis for which there were no reasonable grounds and which causes the patient to lose some opportunity may lead to liability in defamation. Although the report will be protected by qualified privilege, this privilege will be lost if the doctor acted recklessly.

THE STANDARD OF CARE

The common law recognises two basic duties: (1) to take reasonable care not to injure your neighbour; and (2) to do what you have promised to do for reward. Whenever a patient is paying for his treatment, the possibility of liability in contract arises, depending upon the terms

of any contract entered into, or on what the doctor actually says to the patient. The Courts will not be quick to accept that a doctor has guaranteed the success of his methods, for the simple reason that in the context of the human body and the current state of medical knowledge such a guarantee would be foolhardy. But where procedures are intended to bring cosmetic rather than therapeutic benefits, or are tried and trusted, it may be possible that a doctor has actually guaranteed success.

In the absence of a contractual warranty however, the implied term to use reasonable skill and care and the duty of care in the general law of tort are essentially identical in the standard imposed on the doctor. One question that a patient may reasonably ask is whether this approach gives too much room to professionals.

First of all, the Courts have become more willing to scrutinise the practice relied upon by the doctor. Sometimes, a group of professionals may concur in a practice that is in fact a negligent practice. If so, following that negligent practice is no defence.

The second development has been an increasing emphasis on the need for doctors to fairly and properly disclose the risks involved in any procedure. A balance is taking place: between the expertise and judgment of the doctor on the one hand and the exercise of free and informed choice on the part of the patient. The question of how much to tell the patient is a matter of clinical judgment. A Court will rely on expert evidence of what is the accepted and responsible medical practice. But it may nonetheless hold that significant risks (say, any reasonably severe consequence that has a one in twenty or greater chance of arising) should be told to the patient no matter what.

Is the standard of care the same for all doctors? Specialists are held to a higher standard because that is how they hold themselves out, but lack of

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experience does not lower the standard of care required. As for novices, well, every patient is entitled to expect that whoever is responsible at each stage of his treatment will exercise the appropriate degree of skill.

CONSENT

Not to obtain a patient's consent is not merely negligent but an invasion of the patient's rights in his body: this makes an operation an assault. "The patient's consent must be a 'valid' consent, which means that it must be voluntary, the patient must have the mental capacity to understand the nature of the procedure to which he is consenting, and he must have a certain minimal amount of information about the nature of the procedure." (Jones. 1996. *Medical Negligence*. Sweet & Maxwell.)

At common law the parent of a child has the legal power to give consent for medical or surgical treatment on behalf of his child. In Singapore the age of majority after which parental consent is definitely not required is 21. However, this does not mean that before the age of 21 the parent's consent is always required. Depending on the nature of the treatment proposed and the degree of intelligence and understanding of the child, a doctor may rely on the child's own consent. A very difficult issue that may arise is where a doctor believes that the best interests of a child are served by a particular course of conduct and the parents disagree.

More routinely encountered are cases where a patient is temporarily unconscious, perhaps after a traffic or industrial accident, and immediate surgery is necessary. The doctor should do what is needed to stabilise the patient, acting in the patient's best interests. Once the patient has regained consciousness he should be consulted about the longer term measures appropriate in his case. Consulting next-of-kin (for example with elderly patients) is simply a matter of good practice and a means for the doctor to test and corroborate his views of the patient's best interests. In Singapore we also have the mechanism of "living wills", by which

a person who is at least 21 years old and of sound mind can execute an advance medical directive stating his desire not to be subjected to extraordinary life-sustaining treatment in the event he suffers from a terminal illness and register this with the Registrar of Advance Medical Directives.

Where a person is mentally disordered or of unsound mind and incapable of managing himself, an application should be made by a relative (or a public officer) for the appointment of a committee which will have management (including medical treatment) of his person.

It is now standard to have patients sign consent forms before any procedure. Such forms typically include language that extends the procedure to what appears necessary to the surgeon in the course of an operation should unforeseen circumstances arise. However, if the additional surgery can be postponed until after the patient has been given an opportunity to make his own decision, then that is the proper course of action.

CONFIDENTIALITY

Confidentiality in the diagnostic process is essential so that patients speak freely and without reserve. The Oath of Hippocrates mentions this virtue of a physician, vowing: "Whatever I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret." A doctor is responsible for ensuring the confidentiality and security of his medical records. This may be founded in one or more of three ways: first, it may be an express or implied term of the contract between doctor (or hospital) and patient; secondly, it is a general incident of the professional relationship between doctor and patient arising out of the general law of confidence; and thirdly there may be a specific statutory provision, as in for example section 7 of the Termination of Pregnancy Act. The general rule is that disclosure should only be made with the patient's consent. A patient has a legal right to seek an injunction to prevent anticipated disclosure or to seek damages for actual disclosure.

The obligation is not however absolute. Medical records can be disclosed where there is an overriding social or public interest. For example, if a doctor considers or has reasonable ground to believe or suspect that his patient is a drug addict or suffers from or is a carrier of specified infectious diseases.

However, the disclosure that is required by the public interest is likely to be a limited one, namely to those with a special interest in the information, rather than disclosure to the public at large.

DOCTORS AND THE COURTS

It sometimes happens that medical reports or records are sought, for example under a writ of subpoena duces tecum. Given that there may be issues of patient confidentiality, documents sought should not simply be turned over to the lawyers who have obtained the order. Instead, the documents should be released to the Court in the first instance. It is always prudent to seek solicitors' advice on whether an application should be made to set aside the writ of subpoena.

Doctors are also often called upon to give evidence in Court. Although our system is essentially adversarial, the role of expert witnesses is meant to be independent rather than partisan. An expert witness's duty is ultimately to the Court, and this trumps his duty to the party calling him, even if he is a paid expert.

CONCLUSION

Some of the issues raised go to fundamental questions about the dignity of life and individual autonomy. One hopes that among us there are many who seek to cultivate the essentials of a good professional: a caring attitude, thoughtfulness towards and respect for those with whom we come into contact. It is not a coincidence that we speak of a duty of care, rather than simply one of skill or knowledge. When a patient sees something go wrong, if the professional who has dealt with him was abrupt or aloof, he is all too likely to seek out a lawyer. But if he has always been treated with care, that feeling of having been respected may well stay his hand. ■