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Lessons from the Lim Lian Arn case (II): professional misconduct

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INTRODUCTION

In a Singapore Medical Council (SMC) disciplinary hearing, Dr Lim Lian Arn was fined $100,000 under section 53(1)(*d*) of the Medical Registration Act (MRA) by the SMC's Disciplinary Tribunal (DT) for professional misconduct in failing to obtain informed consent from a patient.(1) The conviction was subsequently set aside by the court for several reasons including the basis that the disciplinary threshold of professional misconduct was not met.(2) The court judgement highlighted several flaws of the SMC disciplinary process, the critical issues being that the DT too readily accepted Dr Lim's plea of guilt without assessing if the charge is indeed supported by the facts and evidence put before it. (*Lim Lian Arn* at [20]).

To ensure that such miscarriage of justice is not repeated in the future, it is important to learn from the mistakes - for which the court has shed light on in the judgement. This article aims to elicit the important and relevant lessons from the judgement for all doctors, especially those entrusted to sitting on disciplinary and inquiry committees, particularly in determining whether a misconduct constitutes professional misconduct under the MRA or in other situations needing a sanction or punishment on the doctor.

DETERMINING WHETHER A MISCONDUCT CONSTITUTES PROFESSIONAL MISCONDUCT UNDER THE MRA OR OTHERWISE

The three-stage inquiry test

The test for professional misconduct necessitates the court or tribunal to adopt a three-stage inquiry, to allow for analysis on a case by case basis, based on the validated facts of the case.

"The First stage is to establish the relevant benchmark standard that is applicable to the doctor. The Second stage is to establish whether there has been a departure from the applicable

standard. The Third stage is to determine whether the departure in question was sufficiently egregious to amount to professional misconduct." (*Lim Lian Arn* at [28])

All three stages must be met for professional misconduct to be considered. Under no circumstances should the parties in the disciplinary process stop at the first or second stage without considering the third stage as this could lead to an unwarranted escalation to the courts, such as in the Lim Lian Arn case. (*Lim Lian Arn* at [28]).

The underlying rationale for the three-stage inquiry is to support the premise that not every deviation from the professional ethical guidelines and code or accepted standards of conduct meets the seriousness threshold for professional misconduct. In addition, a conduct that may result in a finding of civil negligence is different from that which attracts a disciplinary action and regulation. The former involves "punishment and regulation" while the latter involves "compensation rather than punishment and regulation in a formal sense". The MRA thus allows for various options to resolve the issue at hand, including issuing a letter of advice or warning to the medical practitioner or referring the matter for mediation (*Lim Lian Arn at* [22]) given the different severity/nature of misconduct. (*Lim Lian Arn at* [30])

Expert evidence

Each of the three-stage inquiry is to be supported by a statement of the expected standard and supporting reason, else, there will be no evidentiary basis in establishing the standards applicable to the doctor. Reasons should also be provided in "determining whether any departure from those standards was sufficiently serious to amount to professional misconduct". (*Lim Lian Arn* at [42]). Such information would also have been relevant in assessing the "potential harm and culpability inherent in any misconduct" (if found) when it comes to sentencing. (*Lim Lian Arn* at [45]).

When does misconduct cross the threshold to constitute professional misconduct?

In this judgement, the court highlighted *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR(R) case (*"Low Cze Hong"*) where they observed two situations which would amount to professional misconduct (*Lim Lian Arn* at [26]):

> "(a) first, where there is an intentional, deliberate departure from standards observed or approved by members of the profession of good repute and competency (commonly referred to as the "first limb of *Low Cze Hong*"); and
>
> (b) second, where there has been such serious negligence that it objectively portrays an abuse of the privileges which accompany registration as a medical practitioner (commonly referred to as the "second limb of *Low Cze Hong*")."

With regard to the first limb, standards of professional conduct, and whether it required the doctor to do something and, if so, at what point in time such duty materialized must be made known by the DT to prove SMC's charge against the purportedly errant doctor. (*Lim Lian Arn* at [29]) The court's definition emphasizes on the intentional and deliberate nature of the departure from professional conduct. This would include reckless action based on unjustifiable risk - in situations where the doctor knows of the unacceptable conduct, but intentionally and deliberately indulges in such conduct or a malicious intent to cause harm. Harm may be defined as injury to a patient or bringing disrepute to the medical profession.

The second limb refers to serious negligence where the doctor was simply indifferent to the patient's welfare or to his own professional duties, or where his actions entailed abusing the trust and confidence reposed in him by the patient.

The professional standard for determining professional misconduct including in cases of informed consent is determined by the "Low Cze Hong" test. With regards to civil negligence,

prior to the *Hii Chii Kok* ruling,[3] the Bolam-Bolitho Test was used in all 3 aspects of medical practice: diagnosis, advice and treatment. (*Gunapathy*[4]) However, in view of the need for a "more patient-centric approach…in relation to the doctor's duty to advise" (*Hii Chii Kok* at [4]), the current tests that the courts in Singapore apply in civil negligence in duty to advice cases (cases of informed consent) is the Modified Montgomery Test (*Hii Chii Kok* at [99]), whereas the Gunapathy test (Bolam-Bolitho Test) is still applied for diagnosis and treatment.

When then does the failure to obtain proper consent cross the threshold of professional misconduct?

From *Lim Lian Arn* at [60],[2] we can infer that professional misconduct comes about in informed consent, under the second limb when:

1) The patient's autonomy was severely undermined (inferred from *Lim Lian Arn* at [60 a, c]), meaning that had the risks and possible complications of the treatment been conveyed to the patient, the patient would have taken a different course of action.

It was concluded by the DT in Dr Lim's case that the patient's autonomy was not substantially undermined as no evidence suggested that the patient would change her decision had she been told of the risks and possible complications of the H&L Injection. (*Lim Lian Arn at* [60 c]).

2) The negligence was serious by nature of effect and outcome as inferred from *Lim Lian Arn* at [38, 60 b, e, f]). This would include instances where treatment proposed is clearly not guided by the patient's symptoms and investigations done or where there is harm caused by the act or omission on the doctor's part (i.e. the harm caused was not simply a consequence of the treatment) or where the negligence of failing to obtain proper consent occurs repeatedly with the intention of harming the patient.

What Dr Lim did was considered by the DT as "an isolated one-off incident, involving one patient" and an "honest mistake" as he was able to produce redacted notes of consultations with other patients showing that he usually did explain and discuss the risks and complications of treatments such as the H&L Injection. (*Lim Lian Arn* at [14 b]).

3) There is coercion, manipulation or misrepresentation of information or refusal to offer information when requested with the intent to bias the patient to a certain treatment inferred from *Lim Lian Arn* at [60 d]). This would include situations where the doctor actively recommends a particular treatment to the patient, without offering a reasonable alternative option or when the doctor deliberately ignored the patient's questions.

It was accepted in Dr Lim's case that he had offered an alternative treatment to the H&L Injection and that the H&L Injection was not being actively recommended by Dr Lim. Given that the two treatment options offered differed in whether the H&L Injection would be administered, the court very much doubted that the patient would have proceeded with the H&L Injection without any queries or discussion (*Lim Lian Arn at* [56, 60 d]).

CONCLUSION

In conclusion, the miscarriage of justice in (SMC v LLA) case could have been avoided if either of the respective parties' counsel or the DT have considered the question of liability of the doctor's actions based on logic, facts and evidence.

Doctors in their normal education and training are not informed of the complexity and intricacies of the ethics and law of professional accountability. To achieve equitable and efficient processes and outcomes, doctors sitting in judgement of their colleagues' professional conduct must be schooled, trained and skilled in carrying out their duty competently.[5] Continual training

should also be provided to ensure that they are kept up to date on case developments and sentencing principles so that justice is served in their position of governance.

A competent, effective, efficient, timely and a fair system of complaint hearings and disciplinary trials in professional misconduct promotes trust in the system of professional accountability, which is ultimately for the patients and society's good as their trust and confidence in the healthcare profession and healthcare system is preserved.[3]

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