

***Misstep or malpractice: When does a doctor's actions constitute professional misconduct?
Singapore Medical Council v Dr Lim Lian Arn [2019] SGHC 172***

I. Executive Summary

Doctors are expected to uphold high standards when dispensing medical treatment to patients. However, not every misstep by a medical practitioner amounts to professional misconduct. Where a doctor does depart from acceptable standards of conduct, disciplinary action is warranted only where such departure is egregious. As highlighted in *Singapore Medical Council v Dr Lim Lian Arn* [2019] SGHC 172, the law seeks to strike a balance between (a) ensuring that serious misconduct and failings are duly censured, and (b) guarding against over-penalisation of doctors.

In this case, Dr Lim Lian Arn (“**Dr Lim**”) was charged by the Singapore Medical Council (“**SMC**”), the body governing and regulating the professional and ethical conduct of medical practitioners in Singapore, for professional misconduct under section 53(1)(d) of the Medical Registration Act (Cap 174, 2014 Rev Ed) (“the **MRA**”). The SMC alleged that Dr Lim had failed to obtain a patient’s informed consent before administering a steroid injection into the patient’s left wrist. Dr Lim pleaded guilty to the charge, and himself indicated that a fine of \$100,000 was an appropriate sentence. The Disciplinary Tribunal (“**DT**”) who heard the matter convicted Dr Lim of the charge and imposed a \$100,000 fine on Dr Lim. However, following an outcry from the medical community, the SMC appealed to the High Court (“**HC**”) to review the DT’s decision and urged the court to impose a fine of not more than \$20,000.

On appeal, the HC held that there had been a miscarriage of justice and that Dr Lim’s conviction must be set aside. This was a case that, while possibly involving a departure from applicable standards of conduct, did not warrant disciplinary sanctions under the MRA. In this regard, the HC also noted that much of the difficulty in this case arose from Dr Lim’s decision to plead guilty and seek the \$100,000 fine. The HC emphasised the duty of courts and tribunals to closely scrutinize the facts and evidence, and to satisfy themselves that a conviction was well-founded and the sentence to be imposed was appropriate to the facts before them.

II. Material Facts

In October 2014, a patient consulted Dr Lim regarding some pain in her left wrist. Dr Lim conducted a physical examination and advised her to undergo a Magnetic Resonance Imaging scan, which she did. On the following day, Dr Lim informed her of the results of the scan, and offered her two treatment options: (a) bracing and oral medication, or (b) an injection of 10mg triamcinolone acetonide with 1% lignocaine in a total volume of 2ml (“the **H&L injection**”), coupled with bracing and oral medication. The only material difference between the two treatment options was the H&L injection. The patient chose the second option.

The H&L injection carried with it certain risks and potential complications. These include: increased pain and inflammation in the injected area (typically lasting for one to two days), skin atrophy (thinning) and skin discoloration. The patient did indeed experience swelling and pain in the injected area about two hours after the injection. Subsequently, she developed paper-thin skin with discoloration, loss of fat and muscle tissues in the injected area. The patient then filed a complaint against Dr Lim regarding his alleged failure to advise her on the possible complications arising from the H&L injection. Dr Lim was subsequently charged by the SMC for professional misconduct, i.e. that his conduct amounted to such serious negligence that it objectively portrayed an abuse of the privileges which accompany registration as a medical practitioner.

Dr Lim pleaded guilty to the charge, and admitted to a statement of facts which stated that before administering the H&L injection, he did not advise the patient of the possible complications of the

injection (“**Agreed Facts**”). While the SMC sought to a five-month suspension against Dr Lim, the DT ultimately agreed with Dr Lim that the maximum fine of \$100,000 was the most appropriate sentence, concluding that Dr Lim’s conduct was not so egregious as to deserve a suspension.

There was a major outcry from the medical profession following the DT’s decision: many of them thought the penalty was unreasonably high. They appeared to be worried that this case would set an unacceptable benchmark for other cases. There was also dissatisfaction with the harsh sanction sought by SMC.

The Ministry of Health then requested SMC to review the appropriateness of the sentence and determine if additional steps should be taken. Pursuant to the request, the SMC appealed to the HC for Dr Lim’s sentence to be reduced to a fine of not more than \$20,000. The SMC maintained, however, that the DT correctly convicted Dr Lim.

III. Discussion

The HC addressed the following points:

- A. The threshold to be met before misconduct may be found to constitute professional misconduct under the MRA;
- B. The importance of expert evidence in assessing the liability of the medical practitioner and the sentence to be imposed;
- C. The nature and extent of a medical practitioner’s duty to obtain informed consent; and
- D. The issue of defensive medicine.

A. Threshold for finding professional misconduct under the MRA

The HC first explained that professional misconduct under section 53(1)(d) of the MRA can be made out in at least two instances:

- Where there was an intentional, deliberate departure from standards observed or approved by reputable and competent members of the profession (“**intentional breach**”); or
- Where there was such serious negligence that it objectively portrayed an abuse of the privileges which accompanied registration as a medical practitioner (“**negligent breach**”).

To find a medical practitioner guilty under either limb, a disciplinary tribunal or court engages in a three-step inquiry:

- Establish the relevant benchmark standard that is applicable to the doctor;
- Establish if there has been a departure from this applicable standard; and
- Determine whether such departure was sufficiently egregious to amount to professional misconduct.

The HC stressed that the underlying rationale for this three-step test was because not every instance of negligence by a doctor would amount to professional misconduct. Instead, there must be a threshold separating minor breaches from the more serious ones which would demand disciplinary action. Mere negligence or incompetence would not amount to professional misconduct; instead, there must be something more. Otherwise, it would be impossible for a medical practitioner to practice in a reasonable way.

The critical inquiry was whether the conduct fell so far short of expectations as to warrant the imposition of sanctions. Factors that are relevant to the inquiry are: the nature and extent of the misconduct; the gravity of the foreseeable consequences of the doctor’s failure; and the public interest in pursuing disciplinary action. This last-mentioned factor would in turn depend on a number of overlapping considerations, including: the importance of the rule or standard breached; the

persistence of the breach; and the relevance of the alleged misconduct to the welfare of the patient or to the harm caused to the doctor-patient relationship.

Negligent breach would generally cover those cases where, on considering all the circumstances, it became apparent that the doctor was simply indifferent to the patient's welfare or to his own professional duties, or where his actions involved abusing the patient's trust and confidence in him. On the other hand, it would not typically cover one-off breaches of a formal or technical nature, where no harm was intended or caused to the patient or where harm was not a foreseeable consequence. Neither would it ordinarily cover isolated and honest mistakes that were not accompanied by conduct which suggested a dereliction of the doctor's professional duties. Ultimately, a determination that the disciplinary threshold has been crossed was not an abstract exercise. A tribunal or court would typically expect to be guided by the available expert evidence.

To further illustrate the disciplinary threshold, the HC referred to two previous cases. In the first, a doctor was convicted of professional misconduct for removing a patient's left ovary which contained lumps, without further investigating whether the lumps were malignant in nature (and indeed, the lumps were found, after surgery, to be not malignant at all). The court found that in recommending the surgery without further tests, the doctor had been indifferent to the patient's welfare. In another case, the doctor misdiagnosed a one-year old's illness (Incomplete Kawasaki Disease), concluding instead that the infant patient had viral fever and insisting on this diagnosis over three separate occasions, despite the potential danger to the infant. This was even though the infant displayed symptoms of Incomplete Kawasaki Disease, and despite the availability of relatively straightforward and harmless tests in this regard. The HC noted that this was a case where the misconduct was plainly avoidable, the consequences of the lapse were serious, and the doctor's persistent failure to resort to readily available and relatively harmless exclusionary tests could be characterised as indifference to the patient's welfare and gross negligence.

B. Importance of expert evidence

In establishing the applicable professional standards and determining whether any departure from those standards was sufficiently serious for professional misconduct, a court or tribunal would typically expect to be guided by the available expert evidence. Thus, an expert could not merely present his conclusion without also (a) presenting the underlying evidence, and (b) the analytical process by which he reached the conclusion. Without such relevant information, the court could not consider whether the expert's reasoning was sound, and thus could not evaluate the worth of the opinion. It was also the duty of the lawyers involved to ensure that an opinion meets the minimum standards.

In this regard, the HC stated that there were serious inadequacies in the expert report tendered in support of the charge against Dr Lim. While the report gave a list of risks and possible complications that could arise from the H&L injection, and concluded that Dr Lim should have advised the patient of these complications, it did not state *why* that specific list had to be disclosed to the patient, or *why* Dr Lim was under a positive duty to convey those risks and possible complications. The opinion ought to have discussed the likelihood of the risk or complication actually occurring, and the severity of the potential injury that might follow. This would have affected the question of precisely what information Dr Lim should have disclosed. Thus, the SMC had failed to produce sufficient and adequate evidence before the DT to prove the charge of professional misconduct.

C. Duty to obtain informed consent

The HC reiterated that a doctor was *not* under a duty to convey every conceivable risk to his patient. Instead, whether information would have to be disclosed depended on:

- Whether the information was relevant and material to the patient, as determined from the patient’s viewpoint, with regard to matters that the patient was reasonably likely to attach significance to in arriving at his/her decision (which would be based on the likelihood and severity of such risk);
- Whether the information was reasonably in the doctor’s possession; and
- Whether the doctor was justified in withholding information in that situation.

Ultimately, what had to be disclosed was largely a matter of common sense.

In this case, the information in question pertained to how the patient should choose between two treatment options. If a patient consulted a medical practitioner with a routine complaint that could be addressed by two or three relatively uncomplicated and equally valid treatment options, the information to be disclosed was that which the patient would need to make a decision from among those options. This would require consideration of the nature and likelihood of any adverse side effects or complications.

However, since the SMC did not produce any expert evidence on the gravity or likelihood of any adverse side effects or complications of the H&L injection, there was no way for the tribunal or court to determine just what Dr Lim should have disclosed, why he should have done so, or how serious his failure to disclose was.

D. Defensive medicine

With regard to the SMC’s submissions that the DT’s decision could promote the practice of defensive medicine, the HC declined to comment in that context. However, the HC noted that there had recently been petitions organized by the medical profession to have tribunal decisions reversed. These cases generally protested the perceived harshness of the penalties given and warned about the spectre of defensive medicine.

The HC stressed that fidelity to the rule of law demanded that courts remain independent and not succumb to external pressures. Decisions are to be made within the confines of the case at hand and not under the sway of public opinion. Hence, the “outcry” from the medical community was irrelevant to the decision of the court; the court was concerned solely with the merits of Dr Lim’s case.

Moreover, the HC considered that there was a tendency to overuse the term “defensive medicine.” “Defensive medicine” refers to the situation where a doctor takes a certain course of action to avoid legal liability, rather than secure the patient’s best interests. The two paradigm examples are:

- where the doctor prescribes unnecessary treatments to avoid the risk of later being faulted, and
- where the doctor refuses to recommend a potentially beneficial treatment, because it is riskier or newer than other less effective treatments and therefore more likely to expose the doctor to future litigation.

In the context of obtaining informed consent from a patient, it was suggested that doctors were likely to overwhelm patients with information on unlikely risks, to protect themselves legally. However, this was not technically “defensive medicine”. Giving too much information would *not* prevent the doctor from being legally liable, since doing so could potentially confuse a patient and leave him unable to meaningfully make an informed decision as to his treatment. The foundation for the obligation to obtain informed consent stems from the patient’s right to participate in decisions about his or her treatment and medical management. Bombarding the patient with excessive information might leave the patient more confused, and less able to make a proper decision. The patient could not be said to be in a position to give informed consent, and the doctor would have fallen short of his ethical obligation and thus exposing himself to legal liability.

IV. CA's Findings

The HC held that the DT had wrongly convicted Dr Lim. First, the HC had serious doubts on whether Dr Lim had even failed to advise the patient of the risks and possible complications that arose from the H&L injection in the first place. This was because Dr Lim had offered the patient two options which were for the most part the same; the only difference between them was whether the H&L injection would be administered. In the circumstances, the HC doubted that the patient would have proceeded with the injection without any question or discussion as to possible benefits and side effects of the two treatment options. Further, Dr Lim had actually indicated during the disciplinary proceedings before the DT that he was *unsure* if he had indeed failed to advise the patient in this regard. The HC also noted that it was Dr Lim's usual practice to discuss these matters before administering the injection.

The HC further held that even if Dr Lim had not advised the patient of the risks and benefits of the H&L injection, the facts (as accepted by the DT) did not support the charge of professional misconduct. The DT's own findings showed that the case involved a one-off failing, committed in the course of a routine procedure with no material harm to the patient that could fairly be said to have been caused by Dr Lim. Further, the DT also found that the patient's autonomy to make an informed decision on her own treatment was not substantially undermined despite Dr Lim's omission, since there was nothing to suggest that she would not have undergone the injection if she had been informed of the risks and possible complications. Moreover, Dr Lim had offered an alternative option to the injection, and the injection was an appropriate and reasonable treatment for the underlying ailment. Finally, the side effects suffered by the patient were not permanent or debilitating or caused by an act or omission by Dr Lim; they were simply a consequence of the treatment. Thus Dr Lim's degree of culpability was on the low end, and the harm caused was limited in nature and extent. Had the DT reassessed its conclusions and Dr Lim's decision to plead guilty, the DT would have realised that this was not the sort of case that warranted a conviction.

Finally, the HC observed that even if the charge of misconduct had been made out, the \$100,000 fine imposed by the DT was unwarranted, given that the DT itself agreed that Dr Lim's degree of culpability was on the lower spectrum and the harm suffered by the patient "was limited in nature and extent".

V. Lessons Learnt

First, the HC has made it clear the court does not adjudicate cases based on public opinion, especially in situations involving a person's rights and liberties.

Secondly, the HC stressed that there is a difference between a mere misstep and serious negligence on part of the medical practitioner; it is only the latter that would constitute professional misconduct. Indeed, a medical practitioner who inadvertently makes "one-off" errors resulting in inconsequential harm to the patient should not be punished out of proportion for his conduct.

Thirdly, in the context of medical disciplinary proceedings, the HC warned that medical practitioners should be more careful in deciding whether or not to plead guilty to a charge. Furthermore, the mere fact that a doctor chooses to plead guilty in such proceedings, does not mean that the disciplinary tribunal should be any less cautious in deciding whether the charge against that doctor has been made out.