Medical manslaughter

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The death of an individual is not taken lightly in civilised society. Although death is a common occurrence in large populations, much happens behind the scenes to ensure that the death is normal and the result of a natural disease or process. Oversight includes registration of deaths, causes of death, and permission for cremation and burial.

The death of an individual that results from the actions of another individual is (rightly) looked at rigorously. As an example, in Hong Kong, police officers carry firearms and are allowed to use them even though their use will often result in a fatal outcome for another individual. The deaths of such individuals are intended, and the actions causing the death are clear. When the rules governing the use of such lethal force are followed, this intentional causing of the death of another individual is sanctioned by society, and the intended killing (homicide) of that individual is ruled as justifiable. However, before such a death is sanctioned, it is subject to rigorous and independent scrutiny.

Modern medicine now entails significant risks to patients' lives. When such risks materialise, society generally does not bat an eye, as long as the parties involved followed common practices. The doctor is presumed to be properly trained and has shown due diligence in assessing the patient's needs; therefore, the conclusion is reached that taking such a risk was the correct course of action. In more complicated cases, assessment of the patient's competence and the appropriateness of informed consent are reviewed.

Recent events in the United Kingdom have generated much media attention and responses from the medical profession: the case of Dr Bawa Garba[1] is one example. Such events have generated a substantial amount of anxiety and angst among young doctors. However, this phenomenon needs to be viewed in light of widespread dissatisfaction with the United Kingdom's National Health Service. This journal issue includes a review of the law and literature,[2] which can serve as a good starting point for anyone who is interested in this area. The review also briefly examines the situation in Hong Kong, referencing several cases, some very recent. It has been argued that the 'criminal response' may reflect the perception of an ineffective systemic response to redress death with effective civil action.[3] However, much of the medical literature argues against such criminal prosecution. The usual reasons given include: "to err is human", "mistakes should be prevented, not prosecuted", and "criminal prosecution will lead to the wasteful practice of protective medicine".[4,5]

The intentional killing of an individual, whether that individual is a doctor's patient or not, is wrong and must be subject to criminal sanctions. This is simply murder, which is not the subject of our concern.

Medical manslaughter is a situation in which a doctor is deemed by society to have overstepped or failed to comply with well-established norms of doctor-patient interaction and that such transgression has resulted in an individual's death. A robust review of such situations is necessary. The medical profession enjoys an almost unique power in that they are permitted by society to self-regulate. This power is vested with a tremendous amount of trust, but there is evidence that this level of trust is eroding. Many civil societies now have ever-increasing public representation in the profession's regulatory bodies, and recently proposed changes to the Hong Kong Medical Council are a clear indication that such sentiments exist in Hong Kong.

Arguments about the deterrent value of criminal sanctions are never-ending: the debate on capital punishment is illustrative. Until a perfect solution can be found, criminal sanctions will continue, as they represent society's collective values and a collective statement of civil society's boundaries of acceptance. The medical profession, as a component of such a society, can only abide by such rules.

Acceptance that the doctor charged did not have evil intentions and did not intend to use a medical procedure as a means of killing is ingrained in the concept of medical manslaughter. Hence, society accepts that this form of manslaughter is different. There is concern that society is now less tolerant of fatal outcomes, but it is unclear whether this is true. In Hong Kong, there have been few manslaughter trials of doctors, although they attract much media coverage and attention from the medical profession. I will not comment on one recent case, as a retrial has been ordered. A cursory review of cases published on the Hong Kong Medical Council webpage from 2008 to 2017 revealed only four cases in which the death of a patient had occurred, and no

doctors were convicted of medical manslaughter in any of these cases.[6]

A frequent bone of contention is the meaning of gross negligence and the interpretation of how an act or an omission becomes 'gross'. Doctors argue that the legal definitions and application of such rules are unscientific and lack objectivity. However, this is not the point; these rules are naturally subjective and constantly varying, as they depend on the assessment of other members of society who collectively serve as the arbiters of standards. It is likely that modern society views the medical profession with far less reverence than it received previously, but this is true in all cases. This trend may be the product of increased access to hitherto 'secret' information and stronger expectations of decision making and perception of individual rights. Attempts to reverse this tide will fail and may lead to a total fracture of the previous trust afforded to the medical profession by society.

Various cases that have been widely reported in other common law jurisdictions are important to us here in Hong Kong, as we are still a common law jurisdiction. However, we should not allow ourselves to jump too far ahead, as the importance of a particular judgement can only be ascertained with the passage of time. Bad decisions are appealed, sometimes corrected, and often forgotten. However, they provide important stimuli and warnings to the profession that the trust from society that it enjoys is not a given and must be actively nurtured and cultivated. Factors that lead to patient death must be studied, and poor decisions need to be highlighted, with grossly negligent ones sanctioned criminally if necessary. No one is above the rule of law.

Declaration

The author has no conflicts of interest to disclose.

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