

What constitutes professional misconduct?

It would not be too far wrong to say that in everyday practice, a cloud hovering over the heads of many doctors in Hong Kong is the fear of being the subject of formal complaint by a treated patient. Whether the doctor has endeavoured to find the best medical solution for the patient or whether the medical decisions made were genuinely well intended is not the point at issue. The fact is that if the outcome of the medical intervention is not what the patient anticipated (reasonably or unreasonably), there is the risk of a formal complaint from the patient to the Medical Council of Hong Kong. This likelihood has been increased by growing awareness of patients' rights and the trend to litigation among the patient population of Hong Kong.

The Medical Council is a statutory body which regulates the conduct of medical practitioners. How does it regulate? It regulates by acting as a quasi-judiciary body to which all complaints against doctors are eventually lodged. How does it decide whether or not the complaints are valid? It decides by asking whether or not professional misconduct has occurred. The beginning of the 'ultimate nightmare' for a medical practitioner is the receipt of a letter from the Secretary of the Medical Council with words all too familiar to Counsel dealing with medical complaints: "Information has been received by me that you have been guilty of misconduct in a professional respect while practising in Hong Kong or elsewhere. In summary, the information against you is: That you, being a registered medical practitioner..."

Readers who are not familiar with the workings of the medical disciplinary committee or the medico-legal area may be excused for thinking that the definition of "misconduct in a professional respect" is straightforward and unambiguous. After all, it appears to be spelt out very clearly in the little red book—Professional Code and Conduct (the Code)—given to every doctor in Hong Kong by the Medical Council on qualifying and registering with the Medical Council, and subsequently periodically when revisions have been made. In Part I of the Code under the heading "Meaning of misconduct in a professional respect", the following words engage the reader: "If a medical practitioner in the pursuit of his/her profession has done something which will be reasonably regarded as disgraceful, unethical or dishonourable by his/her professional colleagues of good repute and competency, then it is open to the Medical Council of Hong Kong, if that be shown, to say that he/she has been guilty of professional misconduct."

It would be a simpler matter for Counsel (and defendant doctors) if this was the definition adopted and followed by the Committee in disciplinary hearings. Unfortunately, this is not the case.

According to this definition in the Code, one could logically deduce that mere inadvertence and carelessness on the part of a doctor would be insufficient grounds for the ruling of professional misconduct. The conduct concerned must be so grave that it could reasonably be regarded as disgraceful, unethical, or dishonourable. On the contrary, the legal officer (a Government Counsel) sent by the Attorney General Office to act as prosecuting officer will advise the Disciplinary Committee members that they are not to take such a 'telescopic' view of the definition. Instead, they are requested to take a 'broader perspective', a 'bolder view', and a 'wider meaning' of the definition. The members will be counselled that the legal test to be adopted is "whether the doctor's conduct has fallen short of the standard expected among doctors". What does that mean? Essentially, that means the members (the majority being doctors practising to the 'standard expected among doctors') can decide as they see fit. The conduct need not be so grave as to be disgraceful, unethical, or dishonourable. It need not even be serious misconduct. The definition has thus become very flexible, subjective, and imprecise, to the point of being ambiguous.

Those in favour of the wider meaning of the term would argue that the definition gives members a high degree of freedom to interpret the conduct of their fellow medical brethren—"to save or not to save". It allows the interpretation to move with time. With rapid advances in medicine and technology, what may have been totally acceptable conduct in the past may well be misconduct in the present context. However, there will always be many 'grey areas' in medicine—euthanasia, embryo/foetal research, human foetal cloning, teenage contraception, and so on. These issues are more than medical matters. Moral (personal), ethical (community), social, and religious considerations should also be taken into account. There are also differences in medical practice according to practice settings. Private medical practitioners may approach the treatment of patients differently from their colleagues in institutions. While both approaches may be totally acceptable, controversies may arise. Do we give antidiarrhoeal agents in acute gastroenteritis? Must we always take cultures before starting antibiotics? Should we give antibiotics in a given situation and when should they be started? Should the patient be referred to a specialist in the first place?

These vexing and perplexing questions constitute the 'bread and butter' of Counsel work in addressing issues related to the definition of professional misconduct. Indeed, the loose definition of the 'standard expected among doctors' is a double-edged sword. It can be applied so subjectively that the defendant doctor and Counsel cannot help but feel the outcome of disciplinary hearings is completely at the whim of the particular members involved. Moreover,

lately, that 'whim' may bear the marks of influence by the media, as well as the current perspective of the public with regard to the medical profession. Put in another way, mere 'inadvertence and carelessness' could result in a decision of professional misconduct, if the members considered that mishap, no matter how unfortunate for the poor doctor, to be below the 'standard expected among doctors'.

What is the legal basis for this broad interpretation of professional misconduct? It seems that the origin is the Privy Council decision in *Alexander Robert Doughty versus General Dental Council* [1987] 1 A.C. 164. This was an appeal case of the Professional Conduct Committee of the General Dental Council of UK. The dentist was charged under section 27(1) of the Dentists' Act 1984 with serious professional misconduct in:

- (1) that he failed to retain the radiographs of 19 National Health Service patients for a reasonable period after completion of treatment and failed to submit them to the Dental Estimates Board when required to do so;
- (2) that he provided six patients with dental treatment in the course of which he failed to exercise a proper degree of skill and attention; and
- (3) that he provided four patients with dental treatment in the course of which he failed to satisfactorily complete the treatment required by the patients.

The Committee found the undisputed facts alleged in charge 1 proven, charge 2 proven with regard to five patients, and charge 3 with regard to three patients. They judged the dentist to have been guilty of serious professional misconduct in relation to the facts proven against him in each charge, and directed that his name should be erased from the dentists' register.

The dentist's appeal against the Professional Conduct Committee's decision was dismissed by the Privy Council. The latter held that 'serious professional misconduct' in section 27(1b) of the Dentists Act 1984 was not to be construed so that it had the same meaning as the repealed charge of "infamous or disgraceful conduct in a professional respect" within section 25(1b) of the Dentists Act 1957; but that "...serious professional misconduct was a wide expression that was not restricted to dishonesty or moral turpitude but included all professional conduct, whether by acts of omission or commission, by which a dentist had seriously failed to attain the standards of conduct which members of the dental profession expected."

The judgement of their Lordships was delivered by Lord Mackay of Clashfern. He emphasised that what was required was that the General Dental Council should establish conduct connected with his profession in which the dentist concerned had 'fallen short', by omission or commission, of the standards of conduct expected among dentists and that such falling short as was established should be serious. The three charges of serious professional misconduct of which the dentist had been found guilty did not

impute any dishonesty on his part. It was not suggested that he was carrying out unnecessary treatment for the purpose of increasing remuneration. What was suggested was that, judged by proper professional standards in the light of the objective facts about the individual patients which were presented in evidence, the dental treatments criticised as unnecessary were treatments that no dentist of reasonable skill exercising reasonable care would have completed.

The Doughty case judgement was echoed in Hong Kong in the Court of Appeal case of *Koo Kwok Ho versus The Medical Council of Hong Kong* [1988, No.23 (Civil)]. Dr Koo was found guilty of professional misconduct for failing to exercise effective personal supervision over a nurse (who sold 10 tablets of physepton to a constable apparently without Dr Koo's knowledge), contrary to Section 14 of the Warning Notice of the Medical Council of Hong Kong. Dr Koo's name was ordered by the Medical Council to be removed from the Register for 3 months. His appeal was dismissed. In Judge Cons, the Vice-President's judgement, the comments in the Doughty case were adopted. The test was simply whether the doctor's conduct had fallen short of the 'standard expected among doctors' and the best judges of that were deemed to be doctors themselves.

The decision in the Doughty case and in the Koo case have since been applied on numerous occasions in the hearings of the Medical Council in Hong Kong. In theory, this definition of professional misconduct can be challenged in a disciplinary hearing. As the cases were heard by the Privy Council in the UK and the Court of Appeal in Hong Kong, however, their decisions are authoritative and binding on the lower courts, including domestic tribunals, such as the Medical Council. In practice, it is therefore over to Counsel to make submission as to why 'mere inadvertence and carelessness' should not amount to misconduct. The Counsel would have to distinguish the case at hand from the Doughty and the Koo case, which would be a very difficult undertaking.

What of appealing to the Court against the Medical Council's decision? The difficulties faced by the appellant are aptly summarised in the case of *Julius Libman versus General Medical Council* [1972 A.C. 217]. The appellant was found guilty of serious professional misconduct by the Disciplinary Committee of the General Medical Council in respect of two charges and his registration was suspended for 6 months. His appeal to the Judicial Committee of the Privy Council under section 36(3) of the Medical Act 1956 was dismissed. It was held that the rules approved by Parliament were such as to make it difficult for an appellant to displace a finding or order of the Disciplinary Committee unless it could be shown that error was evident:

- (1) in the conduct of the trial;
- (2) in the legal principles applied; or
- (3) it could be shown that the findings of the committee were sufficiently out of keeping with the evidence, indicating with reasonable certainty that the evidence had

been misread and that within that legal framework, the Disciplinary Committee was, on the evidence, entitled to come to the conclusion they did.

Application of (1) was successfully made in the case of Dr Ip Kay Lo versus the Medical Council of Hong Kong [1998] 4 HKC, in which the appeal against the Medical Council's decision was allowed on the grounds of procedural irregularity, since the issues before the tribunal were not sufficiently made known to the defendant doctor. Application of (3) was unsuccessful in Dr Kwan Chee Keung versus the Medical Council of Hong Kong [1999] 1 HKC. In this case, it was held that "the Medical Council's conclusion that the failure to label the medicine dispensed was specially serious could not be faulted simply because it did not give reasons which they might well have done. There was ample material which the Medical Council could have taken into account in reaching the conclusion."

It remains therefore to see whether the second ground could be challenged in the high courts of Hong Kong. This may be elucidated in the case of The Medical Council of Hong Kong versus Dr Tseung Siu Kei. In this case, the Medical Council is seeking a judicial review of its own finding of no professional misconduct. The writer has had the privilege of being the legal Counsel defending Dr Tseung at the disciplinary hearing in July 2001.

New developments have occurred since this paper was accepted for publication. In the High Court hearing on 22 March 2002, The Hon Mr Justice Burrell agreed that the legal advice tendered by the Medical Council legal advisor at the disciplinary hearing on 11 July 2001 was wrong and the judicial review was allowed. An order of certiorari to quash the order of the Medical Council (by which Dr Tseung was acquitted) was made. It was declared that the test for 'misconduct in any professional respect' is whether the doctor's conduct has fallen short of the standard expected amongst doctors, as set out in Koo Kwok Ho versus Medical Council of Hong Kong Civil Appeal No. 23 of 1988. It was ordered that the matter was remitted to the Medical Council for reconsideration. A retrial was subsequently held on 5 June 2002. Again, the writer had the privilege of representing Dr Tseung at the retrial. Using the High Court definition of 'professional misconduct'. Dr Tseung was nevertheless acquitted of all charges by the Medical Council.

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