

Doctors practising alternative medicine—the legal considerations

In the United Kingdom and the United States, alternatives to western medicine have become increasingly popular in recent years. Likewise, in Hong Kong, 'alternative medicine' is gaining popularity, although Hong Kong has always had a major alternative to western medicine in the form of traditional Chinese medicine. Can a physician in Hong Kong incorporate alternative medicine into the practice of western medicine? What are the legal implications of doing so?

What is 'alternative medicine'?

There is no internationally agreed upon definition of 'alternative medicine' or similar terms such as 'complementary and alternative treatment'. Broadly speaking, these terms encompass practices that are offered for the preservation of health, or for diagnosis and treatment, but are not considered or traditionally offered as part of conventional or mainstream medical care. An exhaustive listing of alternative medicine practices is therefore impossible, but some examples include tea therapy, massage therapy, magnet therapy, spiritual healing, reiki, chiropractic, osteopathy, aromatherapy, reflexology, acupressure, hydrotherapy, hypnotherapy, music therapy, and qigong.

The World Health Organization regards Chinese herbal medicine, acupuncture, and bone-setting as alternative medicines, and we shall do likewise for the purpose of this article. However, we fully recognise that many people in Hong Kong consider traditional Chinese medicine to be a viable parallel to western medicine rather than a, by implication, inferior or less-respectable alternative to it.

Regulatory framework for alternative medicine in Hong Kong

Most practices of alternative medicine are not governed by specific legislation. Chiropractic is regulated by the Chiropractors Registration Ordinance (Chapter 428): only registered chiropractors are allowed to practise chiropractic in Hong Kong. The practice of Chinese medicine is likewise subject to legal regulation. It is regulated under the Chinese Medicine Ordinance (Chapter 549). Only registered Chinese medicine practitioners and listed Chinese medicine practitioners are allowed to practise Chinese medicine, and they are required to comply with professional codes of practice.

'Practising Chinese medicine' encompasses any of the following acts or activities carried out on the basis of traditional Chinese medicine in general practice, acupuncture, or bone-setting: (a) the diagnosis, treatment, prevention, or alleviation of any disease or symptom of a disease; (b) the

prescription of Chinese herbal medicines or proprietary Chinese medicines; or (c) the regulation of the functional states of the human body.

The exact ambit of Chinese medicine may not always be entirely clear. Doctors wishing to advise patients to use herbal medicine, or wishing to provide treatments that may step into the realm of Chinese medicine, must be aware that it is a criminal offence for any unqualified person to practise Chinese medicine. It should be noted that (1) any activities practised by health care professionals (including physicians) that are not based on the theory of traditional Chinese medicine fall outside the purview of the Ordinance; and (2) physicians, dentists, and physiotherapists providing in the course of practice acupuncture (of a type with distinguishable differences from acupuncture based on traditional Chinese medicine) do not contravene the Ordinance.

Although most forms of alternative medicine are not regulated by specific legislation, some laws may have an indirect effect on these practices:

- Drugs are regulated under the Pharmacy and Poisons Ordinance (Chapter 138) and the Dangerous Drugs Ordinance (Chapter 134).
- Alternative medicine practices involving the use of specific pieces of equipment must comply with the Consumer Goods Safety Ordinance (Chapter 456).
- The Undesirable Medical Advertisements Ordinance (Chapter 231) prohibits the advertising of treatment modalities for certain diseases.

The Professional Code and Conduct of the Medical Council of Hong Kong

Although practices considered 'alternative medicine' (other than Chinese medicine and chiropractic) are not regulated by law, a registered doctor practising alternative medicine is subject to the code of professional conduct laid down by the Medical Council of Hong Kong. Paragraph 22 of the Professional Code of the Medical Council of Hong Kong deals with complementary/alternative treatment modalities (Box 1). The same paragraph also provides information about prescribing any "health claim substance" (Box 2), including "any proprietary health food product".

In the case of *Leung Sik Chiu v Medical Council of Hong Kong* ([2004] 3 HKLRD L18), the Medical Council ordered that the offending physician be removed from the General Register for 18 months after he had been found guilty of two counts of professional misconduct. First, the doctor had instituted a treatment inappropriate to a patient's medical condition, namely hydrogen peroxide oxytherapy.

Box 1. Paragraph 22 of the Professional Code of the Medical Council of Hong Kong

A doctor utilising complementary/alternative treatment modalities should ensure that:

- the treatment is ethical, beneficial, and safe for the patient.
- the procedure is carried out in good faith and in the patient's best interest.
- informed consent is obtained from the patient after the patient has been advised on the following:
 - (a) the benefit of the procedure;
 - (b) the risk of the procedure;
 - (c) the fact that this is a form of complementary/alternative treatment; and
 - (d) the prevailing conventional method available.
- the doctor himself is properly trained and competent, with professional support from qualified persons being available.

Box 2. Paragraph 22 of the Professional Code of the Medical Council of Hong Kong regarding health claim substance

If a doctor prescribes any health claim substance, which includes any proprietary health food product with or without herbal medicine contents, to his patient, he must make sure that:

- (a) he is not omitting the established conventional methods of treatment;
- (b) the health claim substance concerned is beneficial and does not cause any harm to the patient;
- (c) he is acting in good faith and in the patient's best interest;
- (d) he has explained the efficacy, deficiency, and uncertainty of the health claim substance fully to the patient, including that it may contain an element for which there is no/insufficient evidence of efficacy; and
- (e) he does not take advantage of his professional relationship with patients to promote the sale of any health claim substance; where he or his family has a financial interest in any health claim substance, he must make sure there is no improper financial transactions.

Second, the doctor had failed to arrange prompt emergency treatment for respiratory failure whilst the patient underwent oxytherapy in his clinic. The doctor appealed unsuccessfully against the sentence. The Court of Appeal quoted with approval the views of the Medical Council: "We recognize that some medical practitioners do practise alternative/complementary treatment modalities. However, in life-threatening situations a doctor must deal with the dangerous situation first and adopt appropriate treatment in accordance with evidence-based medicine". The Medical Council emphasised "the standard required of registered medical practitioners, whose fundamental duty is to preserve the life of the patient".

Medical negligence

In the context of western medicine, the 'Bolam test'—from *Bolam v Friern Hospital Management Committee* ([1957] 1 W.L.R. 582)—is adopted by the court to judge whether a doctor is negligent. Doctors are required to exercise the care and skill of a reasonably competent practitioner practising in his or her field. A doctor is not negligent if he acts in accordance with a practice accepted as proper by a responsible body of medical opinion, even if there is another body of medical opinion contradicting it.

Box 3. Principles extracted from the *Shakoor v Situ* judgement

- The 'Bolam test' does not apply in this context. The practitioner is not to be judged by the standard acceptable to a body of opinion of his fellow Chinese herbal medicine practitioners.
- A practitioner of alternative medicine cannot be judged by the standards of orthodox medical practitioners since he is not declaring himself to be or representing himself as a practitioner of such medicine and his patients have chosen to reject the orthodox approach.
- The duty of the practitioner in alternative medicine is to ensure that the remedy prescribed is not merely believed within the art to be beneficial, but also it is not harmful.
- In order to discharge his duty, an alternative medicine practitioner should keep abreast of the relevant publications in the orthodox medical and pharmacological fields in order to be aware of published reports of adverse reactions to remedies or their components. The Court recommended that practitioners to subscribe to an association that arranged to search the relevant literature. The Court gave this warning: "If he does not subscribe to such an association, the practitioner will not have discharged his duty to inform himself properly and may act at his peril".

Medical negligence in alternative medicine

Is the 'Bolam test' applicable to alternative medicine practice? If not, what is an appropriate standard? Cases of negligence in the context of alternative medicine are very rare in the legal record, and there has not been any such case reported in Hong Kong.

In a case in England, *Shakoor v Situ* ([2001] W.L.R. 410), the defendant was not a medical doctor but an experienced practitioner of Chinese herbal medicine. The patient received from the defendant a course of nine doses of a herbal remedy for multiple benign lipomas and died of acute liver failure produced by an extremely rare reaction to the remedy. The defendant was sued for negligence in prescribing the remedy and in failing to warn the patient of the potential risks. The defendant received support from a fellow practitioner, and the claim failed. The principles that may be extracted from the judgement are shown in Box 3.

The situation in *Shakoor v Situ* does not involve a physician using alternative medical approaches. However, if an alternative medical practitioner is required to be sufficiently knowledgeable about developments in the orthodox field that may impact on alternative treatments, it must follow that a physician must be at least as knowledgeable about developments in his primary field that may affect an alternative treatment modality he wishes to recommend to a patient.

What test for medical negligence in alternative medicine?

We think it eminently arguable that the 'Bolam test' should apply to any physician practising alternative medicine. In the management of a patient, the doctor owes a duty of care to the patient, and the 'Bolam test' is a test of the standard

of that care. If that care encompasses not only orthodox medicine, but also an alternative treatment modality, there is no reason why the 'Bolam test' cannot or should not apply.

In our view, when a court comes to decide whether a doctor has been negligent in practising alternative medicine, a lot of weight will be given to paragraph 22 of the Professional Code and Conduct of the Medical Council of Hong Kong quoted above. Furthermore, if the 'Bolam test' applies, and it refers to a responsible body of medical opinion, surely the views of the Medical Council of Hong Kong in its Professional Code and Conduct constitute a responsible body of medical opinion.

Insurance

Although there is no compulsory requirement for practitioners of alternative medicine to take out malpractice insurance (indeed insurance for the practice of orthodox medicine is not compulsory), doctors must realise that they are taking risks if they practise alternative medicine without a valid insurance/indemnity cover. It is our understanding that a doctor's professional indemnity organisation, the Medical Protection Society (MPS), will indemnify members practising alternative medicine in appropriate cases.

However, the MPS requests that practitioners only undertake procedures which are in the patient's best interests and for which the practitioner has the requisite skills, training, and facilities.

Conclusion

Physicians who may wish to practise alternative medicine should ensure that: (a) they are properly skilled in that particular alternative medical practice; (b) the particular alternative practice is safe; (c) they have taken reasonable steps to ensure that the alternative treatment modality is not contra-indicated under orthodox medicine; (d) they have thoroughly reviewed the relevant literature for adverse reports related to the relevant practice; and (e) they observe the requirements stipulated by the Professional Code and Conduct of the Medical Council of Hong Kong.

J Tse, LLB (Hons)

W Chang, B Soc Sc (Hons), LLB (Hons)

(e-mail: woody.chang@jms.com)

C Yeung, LLB (Hons)

Johnson Stokes & Master

16-19/F Prince's Building

10 Chater Road, Hong Kong

Answers to CME Programme *Hong Kong Medical Journal* February 2006 issue

Hong Kong Med J 2006;12:15-20

I. Tension-free vaginal tape sling procedure for the treatment of stress urinary incontinence in Hong Kong women with and without pelvic organ prolapse: 1-year outcome study

A	1. True	2. False	3. True	4. False	5. True
B	1. False	2. True	3. True	4. False	5. False
C	1. True	2. True	3. False	4. True	5. False

Hong Kong Med J 2006;12:21-6

II. Atypical mycobacterial cutaneous infections in Hong Kong: 10-year retrospective study

A	1. True	2. True	3. False	4. False	5. True
B	1. False	2. True	3. False	4. False	5. True