6. BIOMEDICAL LAW AND ETHICS

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[The views expressed in this article are those of the author. They do not represent the views of the Attorney-General's Chambers.]

Introduction

6.1 The year under review saw three significant decisions. In *Ang Pek San Lawrence v Singapore Medical Council* [2015] 2 SLR 1179 ("*Lawrence Ang (Costs)*"), the Court of Three Judges explained its earlier decision in *Ang Pek San Lawrence v Singapore Medical Council* [2015] 1 SLR 436 ("*Lawrence Ang (Acquittal)*") to order costs – for the very first time – against the Singapore Medical Council (the "SMC"). The decision in *Uwe Klima v Singapore Medical Council* [2015] 3 SLR 854 ("*Uwe Klima*") underscored the need for the SMC to have a proper (or dominant) case theory in disciplinary proceedings. The lack of such a theory affected, in turn, two important procedural and evidential aspects of the proceedings: the charges were not properly drafted and insufficient evidence was adduced to prove these charges beyond a reasonable doubt. In *Singapore Medical Council v Kwan Kah Yee* [2015] 5 SLR 201 ("*Kwan Kah Yee*"), the court laid down a number of sentencing principles/considerations that apply: (a) generally, to appeals against sentences imposed on medical practitioners in disciplinary proceedings; and (b) specifically, to cases involving medical practitioners who issue false death certifications.

Adverse costs order made against the Singapore Medical Council

6.2 *Lawrence Ang (Acquittal)* was reviewed last year (see (2014) 15 SAL Ann Rev 97 at 97–98, paras 6.2–6.6). There, a complaint was filed by a patient against one Dr Ang relating to his management of her labour and the delivery of her child. Pursuant to s 40 of the Medical Registration Act (Cap 174, 2004 Rev Ed) (the "MRA 2004"), the SMC constituted a Complaints Committee (the "CC") to inquire into the complaint. After reviewing various materials (including contemporaneous medical records, an expert opinion, an independent medical report, and written submissions), the CC concluded that no formal inquiry was required as there was no professional misconduct. The CC therefore

dismissed the complaint. The CC also furnished Dr Ang its reasons for doing so, stating, *inter alia*, that his actions were appropriate (*Lawrence Ang (Costs)* at [6]–[7]). Dissatisfied with the decision of the CC, the patient appealed to the Minister for Health (the "Minister") pursuant to s 41(7) of the MRA 2004. The Minister acceded to the appeal, and a Disciplinary Committee (the "DC") was constituted by the SMC. "[N]o explanation or reasons were given [by the Minister] for acceding to the appeal and for directing the continuation of the proceedings against the complaint despite the complaint having been considered and dismissed by the [CC]" (*Lawrence Ang (Costs)* at [8]).

6.3 The DC subsequently convicted Dr Ang of professional misconduct under s 45 of the MRA 2004. This was for failing to ensure that a neonatologist would be present at or placed on standby for the delivery of the patient's baby despite certain clinical indicators which, in the DC's view, suggested this need. The DC also made an adverse costs order against Dr Ang – ordering him to pay 60% of the costs of the proceedings (including the costs of the SMC's counsel and the legal assessor) and 75% of the disbursements (*Lawrence Ang (Costs)* at [9]).

6.4 Allowing Dr Ang's appeal, the court set aside Dr Ang's conviction and all other orders made by the DC. This included the costs order. The court also ordered that Dr Ang was to have his costs and disbursements of the appeal and the proceedings before the DC (the "Inquiry").

6.5 The SMC then wrote to the court and challenged the adverse costs order on the following bases (*Lawrence Ang (Costs)* at [3]):

> (a) that such an order *could* not, in law, be made against it in relation to the Inquiry because the DC itself was not permitted to make such an order under the MRA 2004; and
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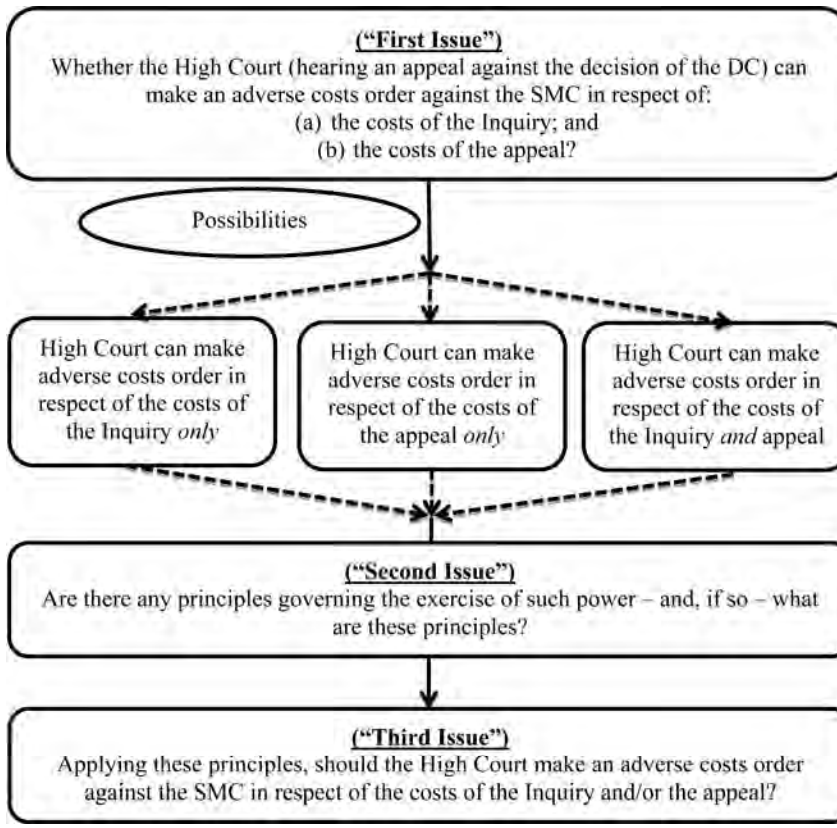
> (b) that such an order in relation to the Inquiry *and* appeal *should* not be made against it because its participation in the Inquiry and the appeal was necessitated by its fulfilment or carrying out of its public regulatory function.

6.6 The SMC did not dispute that the court could, in law, make an adverse costs order against it in relation to the appeal (*cf* above, para 6.4; *Lawrence Ang (Costs)* at [37]).

6.7 The three main issues identified by the court in *Lawrence Ang (Costs)* (at [15]) may be illustrated as follows:



First Issue: Can costs of the Inquiry and/or appeal be ordered against the Singapore Medical Council

6.8 The court considered the First Issue in three stages, and asked whether:

(a) the DC could order costs of the Inquiry against the SMC;

(b) the High Court could order costs of the Inquiry against the SMC; and

(c) the High Court could order costs of the appeal against the SMC.

6.9 These three sub-issues (above, para 6.8) stemmed from the argument by the SMC that the power of the High Court to order costs against the SMC was subject to the provisions of the MRA 2004. Relying on s 45 of the MRA 2004, the SMC had argued that the MRA 2004 expressly permitted the DC to *only* order costs against the *medical practitioner* upon a conviction. The MRA 2004 did not empower the DC

to order costs against the SMC under any circumstances. Extrapolating from this, the SMC contended that if the DC has no power to order costs against the SMC, then neither does the High Court hearing an appeal from the DC (*Lawrence Ang (Costs)* at [17]).

Disciplinary Committee can order costs of the Inquiry against the Singapore Medical Council if charges it brings are dismissed

6.10 Section 45(1) of the MRA 2004 provides that a DC may exercise one or more of the powers referred to in s 45(2) where a registered medical practitioner is found or judged by a DC to have been guilty, *inter alia*, of professional misconduct. Section 45(2) of the MRA 2004 then sets out these powers.

6.11 Section 45(4) of the MRA 2004 then states that the DC may "under subsection (2) order the registered medical practitioner concerned to pay to the Medical Council such sums as it thinks fit in respect of costs and expenses of and incidental to any proceedings before the Disciplinary Committee and, where applicable, an Interim Orders Committee" – *ie*, the MRA 2004 expressly permitted the DC to order costs against the medical practitioner upon a conviction.

6.12 Against this backdrop, the court accepted, as correct, the following two propositions advanced by the SMC:

> (a) While the MRA 2004 specifically empowers the DC to order costs against the medical practitioner (above, para 6.11), it is silent as to the costs orders the DC may make if it acquits the medical practitioner. Section 46(16) of the MRA 2004, the only provision dealing with the case where there is an acquittal, simply provides that the DC "shall dismiss the complaint or matter" where a medical practitioner is not found or judged by it to have been convicted or guilty of any matter referred to in s 45(1) (*Lawrence Ang (Costs)* at [19]).
>
> (b) That a DC can only order costs against a medical practitioner in the event of a conviction as provided for in s 45(2) of the MRA 2004 (*Lawrence Ang (Costs)* at [20]).

6.13 However, the court disagreed with the SMC which argued that a DC cannot order costs against any party in the event of an acquittal as the MRA 2004 is silent on this (*Lawrence Ang (Costs)* at [20]). The court held that a DC has an implied ancillary power under the MRA 2004 to order costs against the SMC if the DC dismisses the charges brought by the SMC (*Lawrence Ang (Costs)* at [30]). The court reasoned as follows:

> (a) Section 45(1) of the MRA 2004 limits the powers exercisable by a DC against a medical practitioner in two ways

(*Lawrence Ang (Costs)* at [21]). First, the DC can only exercise the powers contained in s 45(2) (and, by extension, s 45(4)) upon a finding of guilt against a medical practitioner. The DC therefore cannot, without such a finding of guilt, make an adverse costs order against a medical practitioner on account of, for instance, the manner in which the defence has been conducted even if this may have prolonged the proceedings unnecessarily. Second, upon a finding of guilt, the only powers exercisable by the DC are those listed in s 45(2). However, there is no similar constraint or prohibition in the MRA 2004 in relation to the making of other costs orders (*Lawrence Ang (Costs)* at [23]).

(b) Unlike the limits placed on the powers exercisable by a DC against a medical practitioner upon a finding of guilt (above, para 6.13(a)), no such *express* limits are placed in relation to the powers exercisable by a DC upon an acquittal.

(c) An adjudicative body such as the DC will have a number of implied ancillary powers, save to the extent where these are expressly limited or extended (*Lawrence Ang (Costs)* at [22]). The power to decide on matters relating to costs is an important ancillary power that would fairly and ordinarily be regarded as incidental to the power to conduct and determine an adjudicatory process (*Lawrence Ang (Costs)* at [23]).

(d) Although the SMC was exercising a public *statutory* function, it could not be that Parliament intended to allow such quasi-prosecutorial bodies to act with absolute immunity from adverse costs when even the Public Prosecutor – who exercises a public *constitutional* function – does not enjoy such absolute immunity (*Lawrence Ang (Costs)* at [24]–[25]).

(e) The power to order costs is an important salutary power for courts and tribunals, as it is a safeguard against unnecessary financial prejudice being inflicted on a party to the proceedings by the prosecution of unwarranted litigation. It is a power that should be exercised to discourage behaviour that impedes the administration of justice. Here, the Inquiry before the DC had proceeded although the CC had found that Dr Ang's conduct did not cross even a preliminary threshold of misconduct. The Inquiry had proceeded with the Minister giving no reasons for acceding to the patient's appeal despite the conclusions of the CC, and it was "not evident why or how the decision of the [CC] was considered to be unsatisfactory". If the SMC had absolute immunity from an adverse costs order in such circumstances, the medical practitioner would face the real risk of suffering not only professional embarrassment but also financial prejudice to defend what might eventually turn out to

be an unmeritorious complaint (*Lawrence Ang (Costs)* at [27]–[29]).

6.14 The court therefore concluded that a DC can order costs against the medical practitioner *and* the SMC. Such a power could only be excluded or limited by express provision, none of which existed under the MRA 2004 (*Lawrence Ang (Costs)* at [30]).

Court can order costs of the Inquiry against the Singapore Medical Council if charges it brings are dismissed

6.15 Having concluded that a DC has an implied ancillary power to order costs of the Inquiry against the SMC if it dismissed the charges brought by the SMC (above, paras 6.8–6.14), the court then held that it must follow that the High Court also has this power. This power was an implied ancillary power to the power of the High Court to hear and determine appeals from a DC under s 46(7) of the MRA 2004 (*Lawrence Ang (Costs)* at [31]).

6.16 In any event, the court found that this power to order costs of the Inquiry against the SMC arose independently from the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (the "SCJA"). This was because the High Court, in the exercise of its appellate civil jurisdiction under s 20(*c*) of the SCJA "may make such order as to the whole or any part of the costs of appeal or in the court below" (pursuant to s 38, read with s 22, of the SCJA) (*Lawrence Ang (Costs)* at [32]–[35]).

Court can order costs of the appeal against the Singapore Medical Council if charges it brings are dismissed

6.17 The court also noted that the combined effect of s 38, read with s 22, of the SCJA meant that the High Court can order costs of the appeal against the SMC (*Lawrence Ang (Costs)* at [37]; above, para 6.6).

Second Issue: Principles governing if costs should be ordered against the Singapore Medical Council

6.18 As to the principles to be applied when considering whether to make an adverse costs order against the SMC, the court drew a distinction between the Inquiry and the appeal (*Lawrence Ang (Costs)* at [55] and [58]–[59]).

Ordering costs of the Inquiry against the Singapore Medical Council

6.19 The principles to be applied when considering whether to make an adverse costs order against the SMC in relation to the Inquiry may be set out in a table (*Lawrence Ang (Costs)* at [55]–[57]):

Ultimate objective of the court: Costs order must be just and reasonable	
Factors	**Remarks**
Which party is successful in the proceedings	–
Regulatory function of the entity concerned	The degree of weight to be placed on this factor will depend on, in particular, whether the decision to bring the charges were made honestly, reasonably, and on grounds that reasonably appeared to be sound in the exercise of the public duty of the entity. There is no need to prove egregious conduct to the level of "bad faith" or "gross dereliction" (though such conduct would undoubtedly suffice to justify the making of an adverse costs order against the SMC). The determination of the CC may be very pertinent in deciding whether to order costs against the SMC. If the CC had dismissed the complaint, and the Inquiry was instituted pursuant to an unreasoned and unexplained order made by the Minister upon an appeal by the complainant, then the SMC would often be hard pressed to demonstrate a reasonable basis for instituting the proceedings despite the findings of the CC. In such circumstances, the court may have regard to whether its reasons for ultimately dismissing the charges are, in substance, the same as the reasons upon which the CC had dismissed the complaint in the first place. The greater the overlap in reasons for dismissal, the more unreasonable might appear the decision to pursue the

	matter overriding the views of the CC and the more then might be the case for ordering costs against the respondent.
Financial prejudice to the medical practitioner	The financial prejudice necessarily involved in litigation would not normally justify a costs order, and it must be a case where the successful private party would suffer substantial hardship if no order for costs was made in his favour.
"Any other relevant fact or circumstances"	–

Ordering costs of the appeal against the Singapore Medical Council

6.20 The framework applicable in deciding if the costs of the Inquiry should be ordered against the SMC is "largely equally applicable" *vis-à-vis* costs of the appeal. That said, certain other factors might also be considered in the context of appeals. One factor, in particular, would be whether the errors made by the DC were in any way contributed to by the way in which the case was prosecuted by the SMC (*Lawrence Ang (Costs)* at [58]–[59]).

Third Issue: If costs should be ordered against the Singapore Medical Council in this case

6.21 Concluding that the SMC should bear the costs of the Inquiry and of the appeal, the court reasoned that (*Lawrence Ang (Costs)* at [60]–[63]):

> (a) It could not be said that the charges were brought against Dr Ang on reasonably sound grounds because they were brought despite the CC having dismissed the complaint, and with no explanation or reasons given. Furthermore, the reasons for the court acquitting Dr Ang were "largely similar" to those of the CC in dismissing the complaint.
>
> (b) Some of the errors committed by the DC in convicting Dr Ang were largely contributed to by the SMC. The SMC had failed to sufficiently particularise the charges and to specify which type of professional misconduct it was alleging. These failures undermined the ability of the DC to properly evaluate the evidence and safely convict Dr Ang.
>
> (c) Dr Ang, who was made to endure two unnecessary tranches of proceedings, would suffer substantial financial prejudice if he was deprived of his costs.

6.22 Three points may be made of the decision in *Lawrence Ang (Costs)*. First, while the DC can only make an adverse costs order against a medical practitioner upon a finding of guilt against him (above, para 6.13(a)), no such constraint appears to operate *vis-à-vis* the SMC. As the court observed (at [23]), the DC "is vested with the implied ancillary power to make any costs order [against the SMC] upon an acquittal save that by reason of the express statutory provision to this effect, it cannot make an adverse costs order against the medical practitioner except [upon a finding of guilt against the medical practitioner]". This results in a situation where the DC cannot, without a finding of guilt, make an adverse costs order against a medical practitioner who prolongs the proceedings unnecessarily with the conduct of his defence. This does not appear to be ideal.

6.23 Second, the court held that an adjudicative body such as the DC will have a number of implied ancillary powers, save to the extent that these are expressly limited or extended (above, para 6.13(c)). *Lawrence Ang (Costs)* related to only one of these powers. It remains to be seen what other implied ancillary powers the DC has. For the sake of clarity, however, perhaps it would be better if the relevant legislation could be amended to specify, as far as possible, the powers of a DC.

6.24 Third, reading the judgment, one cannot ignore its repeated reference to the Minister having given no reasons for reversing the decision of the "experienced and highly qualified members of the [CC]" (*Lawrence Ang (Costs)* at [29]). There remains in Singapore no general duty at common law for administrative/public bodies to give reasons (*Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 and [2013] 4 SLR 483), though it has been argued that this should not always be the case (see Makoto Hong Cheng, "Shaping a Common Law Duty to Give Reasons in Singapore – Of Fairness, Regulatory Paradoxes and Proportionate Remedies" (2016) 28 SAcLJ 24). The focus of the court in *Lawrence Ang (Costs)* appears to recognise the need for reasons, albeit implicitly. In this connection, the decision of the Court of Appeal in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 (at [19]–[25]), on the judicial duty to give reasons in the context of criminal prosecutions, also bears mention.

Professional discipline

6.25 The appellant in *Uwe Klima* (above, para 6.1) was a cardiothoracic surgeon at the National University Hospital. He was a foreign medical degree holder, and the MRA 2004 therefore allowed him to practice only as a conditionally registered medical practitioner ("conditional practitioner"). This meant that he could only work under a supervisor approved by the SMC. He was convicted by a DC on

two counts of professional misconduct under s 45(1)(*d*) of the MRA 2004 relating to two separate but related operations performed on an infant with heart problems (the "Patient"). The charges brought by the SMC averred, respectively, that:

> (a) he had administered cardioplegia ("CPG") solution to the Patient, in a pre-arranged operation ("the First Operation"), without first diluting it ("the First Charge"); and
>
> (b) he had failed to personally supervise the subsequent emergency operation ("the Second Operation") on the Patient by another conditional practitioner ("the Second Charge").

Both charges alleged that the appellant had acted in "wilful neglect" of his duties to the Patient.

6.26 The appellant was the lead surgeon for the First Operation. He was assisted by a team comprising two assistant surgeons, an anaesthetist, two perfusionists, and a scrub nurse. One of the assistant surgeons, Kofidis Theodoros ("Dr Kofidis"), was also a conditional practitioner like the appellant. The perfusionists' job included the preparation of medication for the surgeon to administer to the patient. The scrub nurse was the liaison between the surgeon and the perfusionists, and would hand over medication prepared by the perfusionists to the surgeon.

6.27 The First Operation required CPG solution to be administered to the Patient. CPG is procured and stored in an undiluted state (*ie*, as "neat CPG"). It was not disputed that cardiothoracic surgeons and perfusionists have been trained to never administer neat CPG, which is potentially fatal. There are two ways to dilute CPG: with another chemical to produce "crystalloid CPG" or with the patient's blood to produce "blood CPG". During the operation, the appellant asked for "cardioplegia solution". He expected the perfusionists to prepare crystalloid CPG. The perfusionists found it unusual for a surgeon to request for CPG solution using such a term. Unsure of how the CPG was to be administered, they passed an ampoule of neat CPG to the scrub nurse. The nurse drew the neat CPG into a syringe and passed it to the appellant. The appellant did not verify if the syringe contained neat or crystalloid CPG (which both take the form of a clear solution) and administered it directly to the Patient. This administration of neat CPG formed the subject of the First Charge (above, para 6.25(a)).

6.28 The Patient's condition worsened after the First Operation, and an emergency operation was required to save his life. This Second Operation was to be conducted by the appellant. However, due to a migraine attack the appellant alleged he suffered before the Second Operation, he asked Dr Kofidis to perform it instead. The

appellant did not seek his supervisor's approval in delegating the role of lead surgeon to Dr Kofidis. The appellant was also not present in the operating theatre during the Second Operation. His failure to personally supervise Dr Kofidis formed the subject of the Second Charge (above, para 6.25(b)).

Findings of the Disciplinary Committee* vis-à-vis *the two charges

6.29 The DC convicted the appellant on both charges. For the First Charge, the DC concluded that the appellant's instructions on the form of CPG he was to receive were ambiguous and unclear. He had wrongly assumed that he would be handed crystalloid CPG. Given the potentially fatal consequence of administering neat CPG, the DC held that the appellant should have checked what type of CPG was in the syringe he was handed. According to the DC, the gravity of this failure exceeded the threshold of mere negligence and established the First Charge.

6.30 In relation to the Second Charge, the DC found that the appellant had no authority to delegate his responsibility as lead surgeon to Dr Kofidis (another conditional practitioner). The DC noted that the appellant ought to have sought authorisation from his supervisor or Dr Kofidis' supervisor. His failure to do so undermined the system of conditional registration, which aims to ensure an appropriate supervision of overseas trained medical practitioners practising in Singapore's medical institutions.

Decision of the court

6.31 The decision of the court will be examined in two parts:

(a) whether the appellant could even be convicted on the First Charge, when the First Charge and the evidence which led to establish the First Charge related to different limbs of professional misconduct (below, paras 6.32–6.37); and

(b) whether the First Charge and the Second Charge were proved beyond reasonable doubt (below, paras 6.38–6.46).

Emphasis on substance, not form, in construing charges

6.32 In *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR(R) 612, the court had observed (at [37]) that s 45 of the MRA 2004 embodied two limbs of professional misconduct:

(a) where there was a deliberate and intentional departure from the standards of medical practice observed or approved by

competent and reputable members of the profession ("the First Limb"); and

(b) where there was such serious negligence as to objectively portray an abuse of the privileges of the profession ("the Second Limb").

6.33 Against this backdrop, the appellant argued that he could not be convicted under the First Charge. This was because the First Charge referred to "wilful neglect" (above, para 6.25) and so was based on the First Limb. The evidence led, however, related to the Second Limb at best. This meant that the appellant could not be convicted on the First Charge as the evidence led was insufficient to establish a conviction beyond a reasonable doubt. The court disagreed. Acknowledging that the various ingredients of the charge should be clearly stated, the court emphasised substance over form (*Uwe Klima* at [37] and [45]–[47]). Here, the SMC had made it clear on the very first day of the trial before the DC that the First Charge was based on the Second Limb and not the First Limb. The appellant therefore knew precisely what the case was against him *vis-à-vis* the First Charge and did not suffer any prejudice.

6.34 Two points may be made of this holding. First, this holding is entirely consistent with *Lawrence Ang (Acquittal)* (above, para 6.1). There, the court had reiterated (at [38]–[40]) that a distinction should always be drawn between these two limbs as they comprised different elements that have to be proved. The court there had also advised that those prosecuting disciplinary proceedings against medical practitioners should assist future DCs by:

(a) specifying in the charge the precise allegation that is being made against the medical practitioner concerned; and

(b) specifically setting out or indicating which limb of professional misconduct is being invoked, so that there is clarity as to the case that the medical practitioner must meet as well as the issues and the relevant evidence that the DC should consider.

6.35 Although the First Charge in *Uwe Klima* could have been better drafted, the formalistic argument advanced by the appellant was correctly rejected. This is because a distinction was drawn during the trial between the two limbs of professional misconduct; the First Charge did specify the allegation against the appellant; and there was clarity as to the case the appellant had to meet as well as the issues and the relevant evidence the DC should consider. In any event, it appears from *Uwe Klima* that the appellant's issue with the First Charge was taken up only on appeal and not before the DC.

6.36 Second, parallels may be drawn between this holding and that of amendment of criminal charges. Such charges may be amended if accused persons are not misled by the error in the charges and are not prejudiced by the amendment (see, for instance, *Garmaz s/o Pakhar v Public Prosecutor* [1996] 1 SLR(R) 95 and *Public Prosecutor v Henry John William* [2002] 1 SLR(R) 274).

6.37 Notwithstanding its emphasis on substance over form in *Uwe Klima*, the court advised the SMC against using words such as "wilful", "intentional" or "deliberate" in a charge where it intends to proceed under the Second Limb. Where it is necessary to use such words, the SMC should make it clear that it is proceeding under the Second Limb, and not the first (*Uwe Klima* at [47]). Moving forward, it is suggested that charges could, perhaps, incorporate the words of the First Limb or the Second Limb – much like how charges are drafted in the criminal context.

First Charge not proved beyond reasonable doubt

6.38 The court acknowledged at several points in *Uwe Klima* that "a duty probably arose for the appellant to check whether the syringe handed to him by the scrub nurse contained crystalloid CPG or neat CPG as both solutions are colourless in form" (see, for instance, [59] and [62]–[64]). This was because apart from using crystalloid CPG prepared by the perfusionists, the evidence suggested that it was also *possible* for the appellant to dilute neat CPG using sterile blood at the operating table itself to produce blood CPG (at [48], [50]–[59] and [63]). It was therefore not inconceivable for the perfusionists to have passed him neat CPG in a syringe (at [63]).

6.39 That said, the court found that there was insufficient evidence on record to make a clear finding as to whether the appellant had a duty to check and, if so, whether he had fulfilled this particular duty (at [59]). The court reasoned as follows (at [52], [59] and [64]):

> (a) That it might have been possible for the appellant to have manually prepared blood CPG at the operating table itself did not appear to have been the "central plank" or the "dominant case theory" advanced by the SMC in the proceedings before the DC.
>
> (b) The evidence suggesting that it was possible for the appellant to have manually prepared blood CPG at the operating table itself came across only as "tangential references".
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> (c) The appellant was never asked about the mechanics and the practicality of drawing sterile blood from the Patient at the

> operating table – a point which carried equal or greater significance than the possibility of drawing sterile blood.

6.40 These evidential deficiencies aside, the court also observed that the appellant should not be guilty of professional misconduct notwithstanding his failure to check with the perfusionists. This was because the system, comprising two layers of safeguards against the administration of neat CPG (*viz*, the perfusionists and the appellant, who both had a duty to ensure that neat CPG was not administered to the Patient), had failed as a result of a breakdown of communication between members of the surgical team. Just as the appellant did not check with the perfusionists what type of CPG had been given to him in the syringe, the appellant was also not warned by the perfusionists that he had been given neat CPG. Had the perfusionists brought to the appellant's attention that the syringe contained neat CPG, there would have been no need for the appellant to check with the perfusionists (*Uwe Klima* at [65]–[69] and [71]).

6.41 Setting aside the appellant's conviction on the First Charge, the court emphasised the quasi-criminal nature of disciplinary proceedings and that the SMC bore the burden of proving its case beyond a reasonable doubt. According to the court, the evidence was insufficient to satisfy the Second Limb (*ie*, that there was such serious negligence as to objectively portray an abuse of the privileges of the profession) (*Uwe Klima* at [71]).

6.42 The decision of the court to set aside the appellant's conviction on the First Charge has been referred to as "difficult to understand" and "curious": see Sui Yi Siong, "Reviewing the Decision of a Disciplinary Tribunal: *Uwe Klima v Singapore Medical Council* [2015] SGHC 97" *Singapore Law Watch Commentary* (April 2015) at pp 4–5. According to the author, "[t]o focus on the fact that the [a]ppellant was never cross-examined on whether there was an alternative means of administering diluted CPG (*ie*, by mixing it with the patient's blood first) seems to be splitting semantic hairs" (at p 5) ("the SLW Critique").

6.43 In *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983, the High Court had remarked (at [102]) that the burden of proof on the Prosecution to prove guilt beyond reasonable doubt requires it "to adduce sufficient evidence not only to support its theory of guilt but to categorically dispel any reasonable doubts that may arise on the evidence presented". This observation applies, equally, to disciplinary proceedings given that the SMC bears the burden of proving its case beyond a reasonable doubt in such quasi-criminal proceedings. Proof beyond reasonable doubt "need not reach certainty, but it must carry a high degree of probability … If the evidence is so strong against a man as to leave only a remote possibility in his favour

which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond a reasonable doubt, but nothing short of that will suffice" (*Miller v Minister of Pensions* [1947] 2 All ER 372 at 373). A reasonable doubt can "arise by virtue of the lack of evidence submitted, when such evidence is necessary to support the Prosecution's theory of guilt" [emphasis in original omitted] (*Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 at [61]).

6.44 It appears that the SLW Critique may not have appreciated the point the court in *Uwe Klima* was trying to make. The court was not "splitting semantic hairs". Rather, the basis of the decision of the court to set aside the appellant's conviction was that the SMC had not adduced sufficient evidence to prove the appellant's guilt *vis-à-vis* the First Charge and to categorically dispel any reasonable doubts that arose on the available evidence (above, para 6.43). Because the appellant was never asked about the actual mechanics and the practicality of drawing sterile blood from the Patient at the operating table (above, para 6.39(c)), there was no evidence as to the probability (as opposed to the possibility) of this happening in this case. This meant that the court could not say that the appellant's evidence that he was entitled to assume that the syringe must have contained crystalloid CPG because everyone knew (or ought to have known) that neat CPG cannot be administered directly to the Patient was "not in the least probable". Indeed, an expert witness had also observed that diluting a "separate solution on table is very unusual, [and] not normally done" (*Uwe Klima* at [56]). All this therefore meant that a reasonable doubt as to the alternative method of manually preparing blood CPG at the operating table itself did exist on the facts of the case. This was a case where the SMC failed to discharge its burden of proof.

Second Charge not proven beyond a reasonable doubt

6.45 The court also set aside the appellant's conviction on the Second Charge. This was because there was "no clear nexus" between the particulars of the Second Charge and the grounds relied on by the DC to convict the appellant on the charge (*Uwe Klima* at [80]). The Second Charge had alleged that the appellant "instructed and allowed" Dr Kofidis to perform the Second Operation "in [the appellant's] absence and without [the appellant's] personal supervision" (at [19]; emphasis in original omitted). It also averred that Dr Kofidis could only work "under direct supervision" as he was a conditional practitioner (at [19]). The "gravamen" of the Second Charge was, hence, that the appellant should have supervised Dr Kofidis by being present at the operating theatre (at [78]). But, the grounds relied on by the DC to convict the appellant was premised on the appellant's failure to obtain

authority to delegate the task of carrying out the Second Operation to Dr Kofidis (at [79]).

6.46 The DC had stated that it was "in no position to doubt or accept the [appellant's] migraine attack" (at [26]). Against this, the court also observed that even if the Second Charge was taken on its own terms, the DC had made "no definitive finding either way" in so far as the appellant's claim that he suffered a severe migraine was concerned and consequently what the precise consequences of that migraine were *vis-à-vis* the appellant's duty to supervise (assuming the DC believed the appellant's claim in the first place). In the absence of such a finding, the court held that the DC could not fault the appellant for not supervising Dr Kofidis (at [81]).

Sentencing

6.47 In *Kwan Kah Yee*, the SMC appealed against the individual suspension sentences and total suspension sentence imposed on the respondent by the Disciplinary Tribunal ("DT"). The respondent had pleaded guilty before the DT to two charges of professional misconduct ("Charges") under s 53(1)(*d*) of the Medical Registration Act (Cap 174, 2014 Rev Ed) ("MRA 2010"). Each charge was for falsely certifying the cause of death of a patient. The salient details surrounding these two charges are set out in the following table:

Charges	Details surrounding charges
First charge	Respondent certified the cause of death of "Patient *A*" as being a particular disease, and based his conclusion on an alleged chest X-Ray from the Singapore Anti-Tuberculosis Association. No such X-Ray existed.
Second charge	Respondent certified the cause of death of "Patient *B*" as being a particular disease, and based his conclusion on alleged medical records from various polyclinics and hospitals. These records either did not exist or did not show that Patient *B* had the disease stated.

6.48 Before the respondent committed the acts leading to the Charges (above, para 6.47), he was already being investigated for an earlier incident of improper death certification ("Prior Charge"). The complaints leading to the Charges were made in the midst of the disciplinary proceedings for the Prior Charge. Amongst other sanctions, the respondent was suspended for three months following his

conviction on the Prior Charge (and before he was sentenced *vis-à-vis* the Charges).

6.49 The DT eventually suspended the respondent for three months after convicting him on each of the Charges, and ordered these sentences to run concurrently. The DT reasoned as follows (*Kwan Kah Yee* at [20]):

> (a) The respondent was, strictly speaking, not a repeat offender as the subject matter of the Charges related to acts committed before he was sentenced for the Prior Charge.
>
> (b) The respondent had, despite knowing about the potential consequences, continued with his wrongful actions even though he had received notice of the Prior Charge informing him that he was facing a complaint for an instance of erroneous death certification.
>
> (c) The respondent's acts involved dishonesty and false documents, and so warranted a suspension.
>
> (d) As the respondent had pleaded guilty to the Charges, the sentences *vis-à-vis* these Charges should not be more severe than that imposed *vis-à-vis* the Prior Charge to which he had claimed trial.
>
> (e) The suspension sentences *vis-à-vis* the Charges should run concurrently, given the unfairness caused to the respondent by him having to "stand" trial twice as the proceedings for the Prior Charge were not consolidated with the First Charge.
>
> (f) The respondent should be given credit for complying with the undertaking he gave, upon his conviction on the Prior Charge, to not engage in similar conduct.

6.50 The SMC appealed against the suspension sentences imposed *vis-à-vis* the Charges. It sought a sentence of 12 months for each of the Charges, and for the sentences to be served consecutively (*ie*, a total suspension period of 24 months).

6.51 The court allowed the appeal. It enhanced the suspension sentence for each of the Charges from three months to 18 months. It also ordered that they be served consecutively, giving a total suspension period of 36 months. In allowing the appeal, the court made a number of important observations on:

> (a) the threshold for appellate intervention in sentences imposed by Disciplinary Tribunals;
>
> (b) the functions served by sanctions in medical disciplinary proceedings;

(c) the applicability of general deterrence and specific deterrence as sentencing principles; and

(d) the sentencing considerations where a medical practitioner falsely certifies the cause of death.

Threshold for appellate intervention by court in sentences imposed by Disciplinary Tribunals

6.52 In criminal proceedings, an appellate court can intervene in the sentences imposed by the lower court only if the lower court (see *Public Prosecutor v UI* [2008] 4 SLR(R) 500 ("*UI*") at [12] and, more recently, *Chong Han Rui v Public Prosecutor* [2016] SGHC 25 at [21]):

(a) made the wrong decision as to the proper factual basis for sentencing;

(b) had erred in appreciating the materials before it;

(c) had imposed a sentence found to be wrong in principle; or

(d) had imposed a sentence found to be manifestly excessive or inadequate.

6.53 When a criminal sentence is said to be manifestly excessive or inadequate, this means that the sentence is, respectively, unjustly severe or lenient, and "requires substantial rather than minute corrections to remedy the injustice" (*UI* at [13]).

6.54 The MRA 2010 is silent on the threshold for appellate intervention in sentences imposed by DTs. That said, the court in *Kwan Kah Yee* referred to the sentences imposed by the DT as being "manifestly inadequate" (at [1] and [28]). This same term also appears to have been used by the SMC in its submissions to the court (*Kwan Kah Yee* at [23]–[24]). In a similar vein, the term "manifestly excessive" was used in *Ho Paul v Singapore Medical Council* [2008] 2 SLR(R) 780 (at [7] and [14]–[16]) and *Lee Kim Kwong v Singapore Medical Council* [2014] 4 SLR 113 (at [40]).

6.55 That a sentence being "manifestly excessive or inadequate" is also *a* threshold warranting appellate intervention in sentences imposed by DTs appears to have been accepted by the court in *Kwan Kah Yee* (at [1], [23] and [28]. Indeed, the court cited, with approval (at [31]), the observations of Leveson J in *Council for the Regulation of Health Care Professionals v General Medical Council* [2004] 1 WLR 2432 ("*CRHCP v GMC*") pertaining to criminal and disciplinary proceedings:

> 14 … The context in which undue lenience must be considered may be different for criminal cases (concerned with retribution,

> deterrence and rehabilitation) and disciplinary cases (concerned with the protection of the public and the reputation of the profession) *but the relevant question remains the same, namely, whether, having regard to the purposes of the particular sanction being imposed (whether criminal or disciplinary), this particular sanction is outside the range of sanctions which the sentencing tribunal, applying its mind to all the factors relevant to its jurisdiction, could reasonably consider appropriate.* [emphasis added]

6.56 Following *Kwan Kah Yee*, it appears safe to say that the court will intervene in a sentence imposed by a DT where it is manifestly excessive or inadequate – or, where the sentence is "outside the range of sanctions which the sentencing tribunal, applying its mind to all the factors relevant to its jurisdiction, could reasonably consider appropriate" (above, para 6.55).

6.57 Though not expressly acknowledged in *Kwan Kah Yee*, it appears that the remaining three thresholds for appellate intervention in criminal sentences (above, para 6.52) will also justify appellate intervention in sentences imposed by a DT (below, paras 6.64–6.66).

Functions served by sanctions in medical disciplinary proceedings

6.58 Endorsing English authorities, the court in *Kwan Kah Yee* recognised (at [50]) that sanctions in medical disciplinary proceedings serve two functions. First, such sanctions aim to uphold the standing of the medical profession. Second, these sanctions sought to ensure that the medical practitioner does not repeat the offence. The "ultimate aim" is "to ensure that the public is protected from the potentially severe outcomes arising from the actions of errant doctors" (above, para 6.55). In this regard, the court observed that the public interest is wider than the protection of patients (or the danger which the doctor may pose to his patients) and extends to other matters as well. Against this backdrop, the court noted that issuing a false death certificate is a very grave breach of a doctor's ethical and professional duties. The court found that the severity of the potential consequences (below, para 6.67) and the respondent's attempts to substantiate his lies (in which he claimed the existence of extensive medical records as well as his conduct of treatments and investigations) meant that public interest considerations weighed heavily in favour of significantly increasing the sanction to be imposed on the respondent (at [50]–[54]). According to the court, the sentences imposed by the DT were manifestly inadequate, considering the nature of the harm as well as the respondent's dishonest and evasive conduct (at [28]).

General and specific deterrence apply as sentencing principles

6.59 In what appears to be the first time, the court in *Kwan Kah Yee* imported the concepts of general and specific deterrence – applicable in criminal sentencing – to disciplinary proceedings.

6.60 General deterrence aims to educate and deter other like-minded members of the general public by making an example of a particular offender (*Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 ("*Law Aik Meng*") at [24]). The court in *Kwan Kah Yee* was of the view (at [56]) that general deterrence was warranted because the respondent's actions led to an erosion of public trust in the medical profession. It also had serious implications and consequences for the families involved. In addition, it would also potentially have an impact on public health, including the work of medical statisticians, and even possibly criminal investigations when homicides might be covered up or investigations hampered. These factors map broadly onto those identified as to when general deterrence is warranted (*Law Aik Meng* at [24]–[25]). That said, it may be that an additional factor as to why general deterrence was warranted in this case was the fact that the respondent's acts were difficult to detect (*Law Aik Meng* at [25(d)]). It appears that but for the "feedback" received in relation to the First Charge (*Kwan Kah Yee* at [9]) and the "complaint" *vis-à-vis* the Second Charge (*Kwan Kah Yee* at [13]), the respondent's wrongful conduct may well not have been detected at all. In a similar vein, the false certification of death that led to the Prior Charge was only detected when the patient's family dealt with an insurance claim (*Kwan Kah Yee* at [34]).

6.61 Specific deterrence "operates through the discouraging effects felt when an offender experiences and endures the punishment of a particular offence. Drawing from the maxim "once bitten twice shy", it seeks to instil in a particular offender the fear of re-offending through the potential threat of re-experiencing the same sanction previously imposed (*Law Aik Meng* at [21]). In *Kwan Kah Yee*, the court was of the view (at [57]) that specific deterrence was also warranted. This was because the respondent had committed the acts leading to the Charges when he was already being investigated for the acts which led to the Prior Charge. According to the court, the respondent's attitude was "reckless and callous". Further, together with his lack of remorse and attempts at justifying his actions, the respondent did not seem to realise the wrongfulness of his actions.

6.62 The premeditated nature of the respondent's acts and his propensity to repeat his wrongful acts are recognised factors justifying specific deterrence (Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at pp 121–122). But, the classification of the respondent as "reckless" does not sit entirely well with *Public*

Prosecutor v Wang Ziyi Able [2008] 2 SLR(R) 1082 ("*Able Wang*"). There, the High Court had observed (at [27]) that since the offender was convicted under the Securities and Futures Act (Cap 289, 2006 Rev Ed) for reckless, rather than dishonest, dissemination of information, general deterrence was perhaps a more significant consideration than specific deterrence. Perhaps it would have been better to have characterised the respondent as "dishonest" (a term which the court in *Kwan Kah Yee* also used at [28], [49], [59] and [62]) instead of "reckless".

6.63 One further point bears mention. In *Able Wang*, the High Court had noted (at [29]) that where "the false statement had been made negligently, deterrence could arguably be a significantly less relevant consideration since the offence would have been committed without any reckless or dishonest intent". That said, it also acknowledged (at [29]) that "in egregious cases, a custodial sentence (in addition to a fine) may be appropriate even when false statements are made negligently". In the context of professional misconduct, does this mean that deterrence is only applicable when the charge is under the First Limb (above, para 6.32), where there is a *deliberate* and *intentional* departure from the standards of medical practice observed or approved by competent and reputable members of the profession – but not where the charge is under the Second Limb which requires "such serious negligence"? Given that the threshold of "such serious negligence" exceeds that of mere negligence, it is submitted that the concept of specific deterrence is applicable where the charge is framed under either limb of professional misconduct.

Errors made by the Disciplinary Tribunal

6.64 The court identified four errors made by the DT in sentencing the respondent. First, the DT erred in considering that the respondent was not a repeat offender as the subject matter of the Charges related to acts committed before he was *sentenced* for the Prior Charge (above, para 6.49(a)). This was because while the respondent had not yet been formally charged with the Prior Charge when he falsely certified the death certificates of Patients *A* and *B*, he was already on notice that he was under investigation for the Prior Charge (*Kwan Kah Yee* at [67]). Second, the DT erred in placing emphasis on the respondent's plea of guilt as a mitigating factor (above, para 6.49(d)). The court acknowledged that a plea of guilt may be accounted for as evidence of remorse. That said, it noted that its relevance and weight will depend on the facts. Here, the respondent's guilty pleas had no value as a mitigating factor because the evidence against him was overwhelming and there was no way in which he could possibly have justified his actions. Of greater relevance was the fact that although the respondent had previously admitted to fabricating medical records (above, para 6.47), he

had: (a) maintained the position in relation to the Second Charge that he was entirely justified in issuing the death certificate in that case; (b) produced what purported to be a letter from Patient *B*'s husband which sought to exonerate him; and (c) maintained before the court that the medical records that would have substantiated his claim did in fact exist but were just not before the court (*Kwan Kah Yee* at [16], [27], [49] and [69]).

6.65 Third, the DT erred in finding that the proceedings for the Prior Charge could have been consolidated with the First Charge (above, para 6.49(e)). The MRA 2004 (above, para 6.2) was repealed on 1 December 2010 and the Medical Registration (Amendment) Act 2010 (Act 1 of 2010) (the "Amendment Act") had taken effect that same day. The Amendment Act had transitioned the MRA 2004 to the MRA 2010 (above, para 6.47). Section 41(3) of the Amendment Act stated that any inquiry, investigations, or proceedings commenced before any DC or CC appointed before 1 December 2010 would be governed by the MRA 2004, but those commenced after 1 December 2010 would be governed by the MRA 2010. Since the CC for the Prior Charge was appointed before 1 December 2010, the MRA 2004 applied. As the proceedings for the First Charge did not commenced until 21 September 2011, the MRA 2010 applied. The proceedings for the Prior Charge could not therefore have been consolidated with the First Charge (*Kwan Kah Yee* at [64]–[66]).

6.66 Fourth, the DT erred in not according sufficient weight to the respondent's level of dishonesty (above, para 6.49(c)). The improper issuance of a false death certificate based on non-existent medical records went against the very essence of professional medical standards and is a serious breach of the SMC's Ethical Code and Ethical Guidelines. This is seriously aggravated if the doctor then fabricates records to justify the false certification – this element of dishonesty was scarcely accounted for by the DT when it held that dishonesty led to the crossing of the threshold from a mere censure or fine to a suspension. It was out of line with the approach taken to dishonest lawyers who are invariably struck off the rolls regardless of the mitigating circumstances (*Kwan Kah Yee* at [49]).

Sentencing considerations in cases of false certification of cause of death

6.67 In its submissions to the court in *Kwan Kah Yee*, the SMC had pointed to the disparity in sentencing between doctors who were found guilty of improperly certifying deaths and those found guilty of improperly issuing medical certificates. The court found this analogy "inappropriate" for sentencing because while the issuance of a false

medical certificate is a serious matter, the only resultant harm is a loss of money or productivity (*Kwan Kah Yee* at [32]). However, far more serious consequences can result from improper death certifications. The Coroners Act (Cap 63A, 2012 Rev Ed) requires that certain types of unexplained deaths be inquired into by the coroner. In this vein, the court noted that this requirement serves several important functions (*Kwan Kah Yee* at [52]):

> (a) From the legal standpoint, it is a vital safeguard against the possibility of homicides being covered up. It may also be important in determining liability in civil lawsuits – for instance, in cases of malpractice or for the settlement of certain kinds of insurance claims.
>
> (b) From the public health standpoint, it helps society understand why an otherwise healthy person has died so that mistakes may be avoided, lessons may be learnt, and possible sources of disease and infection may be discovered and guarded against.
>
> (c) From the personal standpoint, not knowing the true cause of the death of a loved one can cause great anguish and confusion for the bereaved family.

6.68 In this light, the court observed that the sentences in earlier cases for improper death certifications (such as, suspension for a period of three months, $3,000 fine, censure, or an order to pay the legal costs and expenses of the SMC) appeared grossly and disproportionately light given that doctors found to have improperly granted medical certificates had been suspended for up to 12 months (*Kwan Kah Yee* at [33]–[34]).

6.69 The court then reviewed three English cases that dealt with falsely certified deaths, where periods of suspension ranging from six to 18 months were imposed. The court then observed that the sentences imposed in England have been consistently higher than those imposed in Singapore notwithstanding that: (a) although the maximum term of suspension that can be imposed on errant doctors in England is 12 months, errant doctors in Singapore can be suspended for up to three years; and (b) despite the presence of mitigating factors in the English cases. In this regard, the court held that there was no reason to shy away from using the full range of sentencing powers where necessary to ensure that sentences would commensurate with the gravity of the offences. The court noted that English cases could guide local cases, but sentencing in the local context must be developed with due reference to the applicable local framework (*Kwan Kah Yee* at [40]–[47]).

6.70 In mitigation, the respondent raised "an extensive record of voluntary work" (*Kwan Kah Yee* at [59]). But, this was given no weight. The court first noted that disciplinary proceedings were primarily concerned with the protection of public confidence and the reputation of the profession. As such, mitigating circumstances which weigh in favour of an offender in criminal proceedings are viewed in a qualitatively different light where disciplinary proceedings are concerned (*Kwan Kah Yee* at [58]). This point was elaborated in *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] 4 SLR 91 in the following terms:

> 49 The point simply is that even if a mitigating circumstance might be found that could weaken the case for *punishment* in a criminal case, this circumstance may often not avail an Advocate and Solicitor in disciplinary proceedings because an equally, if not more, important consideration is the protection of public confidence in the administration of justice. This interest can legitimately trump the individual offender's interest in having his punishment finely calibrated according to his precise degree of culpability. Where aggravating factors are concerned, there is usually less need to draw this distinction since a factor that aggravates the offender's particular culpability would generally tend also to aggravate the adverse impact on confidence in the administration of justice, although there may be exceptions to this. [emphasis in original]

6.71 The court then observed (*Kwan Kah Yee* at [59]) that the respondent's voluntary work should be given no weight because:

> (a) the respondent's offences were serious ones with potentially damaging consequences;
>
> (b) the respondent was brazen and his acts of dishonesty were indefensible;
>
> (c) the respondent attempted to cover up his wrongdoing;
>
> (d) the respondent persisted in dishonest conduct despite already facing the Prior Charge;
>
> (e) the respondent displayed a lack of remorse before the court (*Kwan Kah Yee* at [27]); and
>
> (f) the respondent displayed a lack of insight into the wrongfulness of his actions.

6.72 The approach adopted by the court in sentencing the respondent focused on the seriousness of the respondent's misconduct (above, paras 6.59–6.63 and 6.70–6.71). It also suggests the adoption of the following framework in assessing the appropriate sanction to impose:

(a) assess the medical practitioner's culpability in committing the offence – with a focus on aggravating factors only;

(b) determine any harm which his offence caused, was intended to cause, or might foreseeably have caused – whether to individual victims or the community; and

(c) assess if the mitigating factors raised outweigh (a) and (b).

6.73 The court enhanced the suspension sentence for each of the Charges from three months to 18 months. It also ordered that they be served consecutively, giving a total suspension period of 36 months. In doing so, the court noted that the respondent could have been struck off the medical register for his actions. But it declined to do so because: (a) there were too many questions left unanswered at the end of the investigation and the DT proceedings; and (b) in the absence of detailed submissions on the question of whether the usual penalty for dishonesty in professional dealings in the medical profession should be similar or different to that in the legal profession (*viz*, striking out) (*Kwan Kah Yee* at [62] and [70]–[73]).