5. BIOMEDICAL LAW AND ETHICS

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5.1 This year's decisions may not be as dramatic as last year's blockbuster on the decisional autonomy of incompetent patients. Nonetheless, they are important. The first set of cases relate to the very common practice of hospitals providing estimates of their fees to patients prior to admission, and the question that was before the courts was what the effect of such estimates should be when the final bill far exceeds the estimate. The second case concerns disciplinary matters.

Pre-admission fee estimates and their legal significance

Background to the case of Ms Sandar Aung

5.2 Most, if not all, hospitals require patients to undergo financial counselling prior to admission. As part of this counselling, an estimate of the likely fees that will be charged is usually issued. Particularly for elective (as opposed to emergency) surgeries, financial counselling makes eminent sense. From the hospital's perspective, this helps to ensure that patients select the type and level of medical care appropriate to their needs and within their means so that the hospital is not saddled with bad debts. Especially with rising medical costs, financial counselling also helps to manage patients' cost expectations. Patients, too, benefit from this process. They are able to make informed decisions on the most cost-effective procedures and hospital care appropriate to their needs so that they are not also saddled with bad debts.

5.3 But it is unfortunately in the nature of medical operations that complications arise. Who should bear this risk? According to the Court of Appeal in *Sandar Aung v Parkway Hospitals Pte Ltd* [2007] 2 SLR 891, it is the hospital, not the patient or his guarantor, that should foot the bill.

5.4 The case facts are these. Ms Aung was a guarantor for her mother, who was admitted to hospital for an angioplasty. The anticipated hospital charges were approximately $15,000. Complications arose and the total bill rendered was some $343,000 (not including doctors' fees which the hospital sued for but which should have been brought separately since these doctors had individual contracts with the patient; and not including expenses incurred post 1 October 2004 when

the hospital was restructured but without notice to Ms Aung of the assignment of the contract to the subsequent owner).

5.5 The main substantive issue was whether Ms Aung should be liable for the additional expenses arising from the complications.

The High Court judgment

5.6 The High Court relied on the following clauses in the agreement between the hospital and Ms Aung ("the main agreement"). The first was the "Financial Obligation" clause, which reads:

> 1. **FINANCIAL OBLIGATION**:
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> The undersigned is liable to pay the account of the hospital immediately upon his discharge in accordance with the prevailing rates and terms of the hospital. In the event that the undersigned fails to pay any sum due to the hospital on the date of his/her/the patient's discharge, the hospital reserves the right to charge interest at the hospital's then prevailing rate on the said sum from the date of the tax invoice until payment of the said sum is made in full to the hospital, subject to a minimum interest payment of S$10.00. For the avoidance of doubt, the hospital's right to claim interest as aforesaid shall not affect or prejudice its right to payment of the said sum immediately upon his/her/the patient's discharge.
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> *The undersigned should obtain an estimate of his/her/the patient's attending physician's/specialist's charges from them. The hospital shall assume upon the receipt of this signed conditions of services/hospital policies form that the undersigned has familiarised himself/herself with the hospital charges and fees and charges of his/her/the patient's attending physician/specialist and that the undersigned appreciates and is fully aware of the financial obligations that he/she is undertaking in relation to his/her/the patient's hospitalisation and treatment*.
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> [emphasis added]

5.7 The second clause was an undertaking that was in the following terms:

> I hereby declare that I am not an undischarged bankrupt and agree, in consideration of your admitting and/or rendering medical services/facilities to the patient, to be liable and/or to be jointly and severally liable with the patient for all charges, expenses and liabilities incurred by and on behalf of the patient including any interests chargeable and legal costs on an indemnity basis as set out in paragraph 1 hereinabove. I confirm that my agreement hereunder is an independent obligation which shall continue in full force and effect notwithstanding that the patient or the person authorised by the patient to sign on his behalf (as the case may be) is unable and/or unavailable for any reason whatsoever to sign this document as required above.

5.8 The estimate of the hospital fees ("the Estimate") was itself on a separate document and the following disclaimer appears:

> Please note the following:
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> The above estimated hospital charges are averages based on the previous hospital patients with similar diagnosis and treatment. *The actual bill may differ depending on the final diagnosis, treatment received and the actual length of stay in the hospital*. The estimated hospital charges stated above are at best estimates only.
>
> The Hospital does not warrant that the actual charges payable by the above-named patient upon discharge would be similar to the estimated total charges stated above. *This would depend on the final diagnosis, treatment received and the actual length of stay of the patient*.
>
> [emphasis added]

5.9 The High Court was not persuaded that Ms Aung did not contemplate the possibility of complications or that the interpretation of the clauses above should be "coloured and blinkered" by the fact that the only familiarisation of the hospital fees given to Ms Aung was in relation to the estimated fees and not what might happen if there were complications. In this regard, it appears uncontroverted that the business office executive at the hospital handling the admission registration of the patient and attending to Ms Aung emphasised that the figures given were only estimates but that she did not caution Ms Aung about the possibility of her being responsible for hospital fees associated with complications that may arise.

5.10 Explaining further, the High Court held that the Estimate did not form part of the agreement between the parties. Therefore, the Estimate, which made reference only to the likely fees chargeable for the angioplasty operation and two days in hospital, could not be used to circumscribe the extent of Ms Aung's liability to pay for "all" the hospital's charges, expenses and other liabilities incurred by and on behalf of the patient. In the absence of any counselling that only the estimated fees would be payable, the High Court held that the clauses in the main agreement were conclusive. On a plain reading of these clauses, the High Court was of the view that Ms Aung's liability was not capped at the estimate given.

The Court of Appeal's decision

5.11 The Court of Appeal reversed the decision of the High Court. The main difference of opinion it had with the High Court was its belief that the terms of the main agreement between the parties had to be read in the context of the Estimate given. When that was done, it became clear that the subject-matter of the agreement (to pay) between the parties related only to the angioplasty and not the complications that

arose. The critical passage in the Court of Appeal's judgment is as follows (at [24]):

> The paragraph just quoted [*ie*, the italicised portion of the financial obligations clauses reproduced at para 5.8 above] obviously constitutes part of the terms of the contract between the appellant and the second respondent. What is of particular legal as well as logical significance, in our view, is that both parties to the contract obviously intended that both the patient as well as the appellant would familiarise themselves with the *estimated* costs of *the subject matter of the contract*. This gives a clue to the correct construction that ought to be adopted in the context of the present appeal. If, as the respondents argue, the subject matter of the contract extended to cover all items of treatment arising from the complications that had unfortunately arisen, how could the cost of *these* items be *estimated* since, *ex hypothesi*, contingencies that might never have arisen could not be estimated in the first instance? It is clear that when this particular paragraph of the contract is read together with the Estimate, the subject matter of the contract entered into between the appellant and the respondents related to *the angioplasty procedure only*. Indeed, the sum quoted in the Estimate ($15,227.30) clearly referred to the angioplasty procedure – and that procedure only. This is not surprising as that was the procedure for which the patient was initially admitted into the hospital. It should also be noted that the angioplasty procedure was (in contrast to contingencies and complications that might or might not occur) eminently capable of being estimated and were in fact estimated, as noted above. [emphasis in original]

Implications of the rulings

5.12 The different interpretations given by the High Court and Court of Appeal are defensible. Even if we took the Court of Appeal's approach, it is not immediately obvious that Ms Aung's liability should be limited. True, the main agreement does ask the guarantor to familiarise herself with the estimates. True, the Estimate related only to the angioplasty surgery. After all, as the Court of Appeal noted, the cost of unexpected complications cannot be estimated. But does it follow that the patient/guarantor cannot be liable for all the hospital charges eventually incurred, even if they arose out of unexpected complications? It seems unlikely that a hospital would have intended that a patient should be liable only to a certain extent; and if so, it seems equally unlikely that the hospital would not have intended to hold the guarantor liable for all the patient's fees. Indeed, it seems unlikely that a patient/guarantor would think that her liability would be capped. In the event of complications, does the patient truly believe that the hospital was going to absorb the cost; or stop medical care until a fresh estimate is issued? In turn, does the guarantor truly believe that her liability is not co-extensive with the patient's, and that she would have to return to sign another guarantee each time there is a complication?

5.13 Contractual interpretation aside, the different interpretations raise very different implications from the perspective of medical law. The High Court ruling, favouring the hospital, is undoubtedly hard on patients and their guarantors. Having been advised what the approximate hospital fees would be, the patient or her guarantor suddenly finds herself in a position of having to foot an enormous bill.

5.14 On the other hand, the Court of Appeal's ruling, favouring the patient or her guarantor, may be said to be unfair to hospitals, which now have to foot the bill for complications arising from their patient's care. If hospitals cannot be certain that the patient or her guarantor will pay expenses incurred, this may increase the cost of insurance and, ultimately, hospital fees. The Court of Appeal's ruling may also introduce uncertainty. The court writes that (at [37]):

> [W]e are not suggesting that the estimate was cast in stone. Thus, if the patient had stayed in hospital a few days longer than the estimated two days, it could not be argued that that was not within the bounds of reasonable foreseeability. In contrast, in the absence of evidence to that effect, the open heart surgery could not be said to have been reasonably foreseeable by the parties.

5.15 With respect, this invites litigation. Suppose the complications are not as drastic as in this case; and suppose all the patient needed to fully recover was a couple more days in hospital. Would that have been reasonably foreseeable? On the Court of Appeal's reasoning, it appears that it might, even though it is arguable whether there is any substantive difference between such a situation and Ms Aung's. Although the consequences of the two scenarios may be different, both involve a complication that was not expected but, nonetheless, associated with or the result of the procedure that formed the subject-matter of the estimate given. Acknowledgment that liability should not be absolved just because the speed of recovery cannot be precisely anticipated should also lead to recognition that liability should not be capped just because complications in medical procedure cannot always be anticipated.

5.16 Perhaps most fundamentally, the practice of issuing an estimate is part and parcel of responsible financial counselling. This practice was designed to assist patients by managing their expectations – precisely to prevent patients from later complaining about hefty medical bills. Had it occurred to hospitals that in doing so, they would be agreeing to limit the liability of their patients' guarantors, they might not have engaged in this very beneficial practice. This is an important contextual clue to the interpretation of the contracts; and all the more so at a time when the government is asking even private hospitals and clinics to publish fee guidelines. Unfortunately, this point does not appear to have been fully argued before the High Court or the Court of Appeal.

5.17 Despite these potentially far-reaching implications, the impact of the Court of Appeal's decision is likely to be pre-empted by hospitals redrafting their contracts to make it plain that patients and their guarantors are liable even for medical complications. It is also hoped that the Court of Appeal's judgment will prompt hospitals to make explicit the boundaries of the liability of both patients and guarantors during the pre-admission financial counselling sessions.

Professional discipline

5.18 As a result of the government making Subutex a controlled drug in 2006, doctors (particularly general practitioners) began being investigated for malpractice. Dr Paul Ho was one of them: see *Ho Paul v Singapore Medical Council* [2008] SGHC 9. He was charged with and found guilty by the disciplinary committee of the Singapore Medical Council ("the SMC") of 19 charges for inappropriately managing the care of his patients by not formulating a management plan for the treatment of his patients' medical conditions by the prescription of Subutex; and in failing to record with sufficient detail and clarity his patients' diagnosis, symptoms, diagnosis and management plans. For these failures, he was fined $1,000 and suspended for three months.

Clarity of charges

5.19 Each of the charges read:

> (a) Your management of the said patient was inappropriate in that you did not formulate and/or adhere to any management plan for the treatment of the said patient's medical condition by the prescription of Subutex; and
>
> (b) You did not record or document in the said patient's Patient Medical Records details or sufficient details of the patient's diagnosis and/or condition and/or any management plan such as to enable you to properly assess the medical condition of the patient over the period of treatment.

5.20 It was argued on Dr Ho's behalf that the disciplinary committee had misdirected itself by focusing on whether there was *an adequate or a proper* management plan despite the particularisation of the charges stating that Dr Ho failed to institute *any* such management plan. The Court of Appeal agreed with the general principle that "the required response [by a defendant] to a charge is circumscribed by the precise framing of that particular charge" (at [9]). But it found that Dr Ho's argument "focus[ed] selectively on one aspect of the charges while ignoring the other aspects". Although this is true, that appears to be the

fault of the charges, which switched between "any" and "adequate" and which were not entirely clear as to the standard it was holding Dr Ho to.

5.21 There are two possible reasons why the Court of Appeal rejected Dr Ho's submission. It could be that the Court of Appeal has taken the view that it would not adopt an overly technical or pedantic parsing of charges preferred. Thus, even though the particulars provided in the charges zeroed in on Dr Ho's failure to devise or maintain any management plans whatsoever, the disciplinary committee did not err in relying on the umbrella clause to scrutinise whether adequate management plans had been formulated or documented.

5.22 Alternatively, the court may simply have thought that Dr Ho faced no prejudice in any event. In rebutting the allegation that he had no management plans, he would, in the ordinary course, have had to disclose his records. Therefore, there was no further evidence that he would have or could have adduced even if the higher standard of proving that he had an adequate management plan were imposed. In this context, the Court of Appeal's finding that there had been no breach of natural justice in the sense that Dr Ho had been given the opportunity to meet the charges by presenting his case, cross-examining witnesses and making a mitigation plea, is arguably justified.

Consistency in sentencing

5.23 The real significance of this case lies in the court overturning the disciplinary committee's decision to suspend Dr Ho. Observing that like cases should be treated alike, the court found the suspension manifestly excessive in view of a previous case decided by the disciplinary committee itself on facts similar to the present (in fact, the doctor in that previous case had an antecedent). The court thus concluded that Dr Ho should not have been suspended. The court added that the SMC and its counsel (who also prosecuted the previous case) should keep a record of "all previous decisions" (at [17]). SMC's counsel should then draw the attention of the disciplinary committee to previous cases, "regardless of whether such material supports their case" (*ibid*). This advice is commendable, especially given that there may be doctors who, like Dr Ho before the disciplinary committee, are not represented and would not otherwise have knowledge of what previous cases held. This suggestion should be taken further, and a comprehensive database of precedents ought to be available to all doctors and their lawyers in order to minimise any inadvertent failure of SMC's counsel to flag the appropriate precedents to the disciplinary committee or the courts.