6. BIOMEDICAL LAW AND ETHICS

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Professional discipline

6.1 Apart from the ongoing proceedings against Dr Lim Mey Lee Susan, which is pending judgment of the Court of Three Judges, the other high-profile case concerning the discipline of the medical profession was *Low Chai Ling v Singapore Medical Council* [2013] 1 SLR 83. The case involved complaints by the Singapore Medical Council ("SMC") against Dr Low Chai Ling of The Sloane Clinic for offering a range of aesthetic procedures and treatments which, it was alleged, had not been properly tested and thus contravened Art 4.1.4 of the SMC's Ethical Code and Ethical Guidelines ("ECEG").

6.2 The court reversed the findings of the disciplinary tribunal, which had held that Dr Low was in breach of her professional conduct obligations on the majority of the charges against her. In strong language, the court criticised the framing of the charges against Dr Low and the manner in which she was found guilty by the disciplinary committee ("DC"). In particular:

(a) The court held (at [31]–[37]) that there was an inconsistency between the charges (which had focused on her offering of the impugned procedures prior and up to being notified of the complaint against Dr Low) and the case that was in fact argued (which had focused on the allegation that Dr Low had wilfully refused to cease offering such procedures even after being notified of the complaint).

(b) The court also held (at [38]–[41]) that the charges were too vague and ought to have been particularised. In addition, the court was especially vexed by the "rolled-up" charges, which contained multiple prongs and subsets of allegations, making it unclear if the various limbs were meant to be read cumulatively or in the alternative.

(c) The court found (at [60]–[66]) that the DC was correct to find that certain of the medical procedures offered did not meet the standards of "evidence-based medicine". However, prior to this case, the SMC had not issued guidelines prohibiting the offering of such procedures and indeed, they were widely practised. Furthermore, guidelines issued by the SMC in October 2008 specifically considered that procedures

for which there was low or very low scientific basis could be offered as long as certain safeguards were followed. The court affirmed (at [42]) that "*[i]t is a cardinal tenet of the rule of law that a person should only be punished for offending laws, regulations or professional practices that are both known and clearly established at the time of offending; no person should be punished retrospectively*" [emphasis in original].

(d) The court emphasised its holding in *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR(R) 612 that professional misconduct under s 45(1)(*d*) of the Medical Registration Act (Cap 174, 1998 Rev Ed) ("MRA") requires an intentional, deliberate departure from standards observed or approved by members of the profession of good repute and competency, or such serious negligence that it objectively portrays an abuse of the privileges which accompany registration as a medical practitioner. Where, as here, there was no harm to patients or hint of experimentation, s 45(1)(*d*) of the MRA was not an appropriate charge.

6.3 In the course of its judgment, the court asked (at [75]) a somewhat philosophical question as to "where and how should the boundaries of medical practice be clearly drawn for the wider common good". This was in the context of a point of principle raised as to whether medical practitioners should be permitted to perform aesthetic procedures or whether they should not be considered part of the medical profession at all. The court's answer (at [75]) was strikingly patient and consent-focused: "[I]f there is full disclosure to the patient about the lack of clinical validity about certain aesthetic treatments and informed consent to those treatments is given by the patient, it would be difficult to argue that such treatments would not be better administered by doctors as compared to beauticians."

6.4 It should be noted that similar charges had been brought against another practitioner from the same clinic, Dr Georgia Lee. As a result of the court's judgment, the SMC withdrew the charges against Dr Lee.

Informed consent

6.5 The High Court in *Tong Seok May Joanne v Yau Hok Man Gordon* [2013] 2 SLR 18 missed an opportunity to further develop the law on informed consent. Instead, it decisively rejected the more patient-centred test adopted in Australia (*Rogers v Whitaker* [1992] 175 CLR 479; *Rosenberg v Percival* [2001] 205 CLR 434) and Canada (*Reibl v Hughes* [1980] 114 DLR (3d) 1), as well more recently in England (*Chester v Afshar* [2005] 1 AC 134), in favour of the test

articulated in *Khoo James v Gunapathy d/o Muniandy* [2002] 1 SLR(R) 1024 ("*Gunapathy*"), which set a low bar of simply having to adduce evidence of support from a respectable body of medical practitioners. The High Court also rejected (at [171]–[173]), as a matter of principle, any claim to damages for negligent advice if it could not be shown that the patient would have chosen differently.

6.6 The High Court held that it was bound by the authority in *Gunapathy*. It is not clear that this is truly the case because the Court of Appeal in the latter case explicitly stated that it would not make a pronouncement on the issue as parties had not submitted on the issue. Be that as it may, the High Court cited two main points of principle for rejecting the patient-centred test.

6.7 First, the High Court, following the analysis in *D'Conceicao Jeanie Doris v Tong Ming Chuan* [2011] SGHC 193, said (at [64]–[65]) that the recent development in England may have been animated by the Human Rights Act 1998 (c 42) (UK) ("Human Rights Act"). The Human Rights Act was enacted to give force to the European Convention of Human Rights so that British citizens could seek a remedy for violations from the English courts without having to go to the European Court of Human Rights. Its principal purpose is to provide a mechanism for citizens to seek redress for violations of their rights by public bodies. It does not purport to suggest that prior to its enactment, individuals did not have the rights articulated therein, or that such rights were not enforceable in other contexts. It is difficult to see why the absence of an equivalent Act in Singapore should mean that an individual's autonomy to decide whether to undergo treatment is either non-existent or should not be taken into account in formulating legal principles.

6.8 Second, the High Court accepted (at [67]) that the obligation to obtain informed consent cannot be separated from other aspects of a medical practitioner's duty to the patient. This is not entirely convincing. While the proper exercise of a skill is probably best left to the medical experts, the very idea of informed consent recognises the autonomy of the patient to decide upon the medical procedures and attendant risks that he is willing to accept. It is not, in this sense, a medical decision; it is a personal decision. To leave the determination of whether there has been informed consent largely in the province of the medical profession defeats the very purpose of the doctrine of informed consent. On this topic, see further Margaret Fordham, "Doctor Does Not Always Know Best" [2007] Sing JLS 128; and this author's article, Paul Tan, "The Doctrine of Informed Consent? When Experts and Non-experts Collide" [2006] Sing JLS 148.