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6. BIOMEDICAL LAW AND ETHICS

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I. Introduction

6.1 The year under review was another modest one for the field of biomedical law and ethics. There were three decisions in medical negligence, which turned largely on causal and evidential issues. The sole medical disciplinary judgment addressed improper conduct bringing disrepute to the profession, which also raised an interesting constitutional issue of whether professional freedom of speech or expression was protected in the context of professional regulation and disciplinary proceedings.

II. Medical negligence

6.2 The appeal in *Noor Azlin v Changi General Hospital*[1] ended the deceased plaintiff's negligence claim against the defendants with the resolution of issues relating to the quantification of loss and damage. The judgment in respect of Changi General Hospital's liability for institutional negligence in failing to emplace a reasonable system of follow up on X-ray reporting was reviewed in the 2019 Annual Review.[2] In the hearing for the assessment of damages,[3] the High Court held that the Court of Appeal's finding that the respondent's negligence allowed the appellant's lung cancer to develop from Stage IB to Stage IIA logically implied that the delay in diagnosis and surgical resection of the tumour allowed the cancer cells to spread into the lymphatic system. Based on the respondent's own expert testimony, this, on a balance of probabilities, caused a relapse

1 [2021] SGCA 111.
2 (2019) 20 SAL Ann Rev 121 at 121–125, paras 6.2–6.11.
3 *Noor Azlin bte Abdul Rahman v Changi General Hospital* [2021] SGHC 10.

of her cancer on 2014 after her belated lung cancer diagnosis and surgical lobectomy in March 2012.[4] In addition, the appellant's ALK-positive lung cancer was unlikely to have developed prior to July 2011 based on the growth characteristics of the appellant's tumour after that period.[5] Had she been diagnosed in a timely fashion, the appellant would have availed herself of the recommended surgical removal of the tumour and undergone adjuvant chemotherapy. Consequently, this delay in diagnosis and treatment caused a relapse of the cancer, and the appellant a diminution in her full life expectancy.

6.3 The High Court went on to award damages for pain and suffering, incorporating an element for awareness of loss of life expectancy, and an award for loss of dependency on the part of the appellant's mother. A claim for punitive or aggravated damages was dismissed for want of pleading and evidence.[6] In respect of the former, punitive damages were precluded under s 10(3)(*a*)(i) of the Civil Law Act[7] once the claimant's estate took over the proceedings. In any case, there was no evidence of a pattern of incompetence in the discharge of organisational duties or deceitful conduct to justify an award of punitive damages. In respect of the latter, an award of aggravated damages required evidence of exceptional conduct or motive on the part of the defendant when inflicting the injury in question. The mere fact of a breach of systems duty to follow up on X-ray reports was not by itself suggestive of aggravation. Finally, an award was also made for special damages comprising medical expenses and transport costs. The former was recoverable notwithstanding that they were borne by insurance or Medifund subsidy as a recognised exception to the rule against double recovery,[8] although the estate was responsible for accounting for the receipt of this compensation.[9]

6.4 On an appeal to the Court of Appeal, which was brought only in respect of the quantification of damages, the court dismissed most of the grounds of appeal save that it allowed a modest award of $6,000 for loss of marriage prospects and an additional sum for transport expenses.

6.5 In *Foo Chee Boon Edward v Seto Wei Meng*,[10] the Court of Appeal heard an appeal from a decision of the trial judge finding the appellant

4 *Noor Azlin bte Abdul Rahman v Changi General Hospital* [2021] SGHC 10 at [59]–[61].
5 *Noor Azlin bte Abdul Rahman v Changi General Hospital* [2021] SGHC 10 at [64].
6 *Noor Azlin bte Abdul Rahman v Changi General Hospital* [2021] SGHC 10 at [183]–[201].
7 Cap 43, 1999 Rev Ed.
8 The court cited *The MARA* [2000] 3 SLR(R) 31 in support.
9 *Noor Azlin bte Abdul Rahman v Changi General Hospital* [2021] SGHC 10 at [215].
10 [2021] 2 SLR 1239.

liable for medical negligence during a liposuction procedure which resulted in the patient's death from fulminating fat embolism syndrome ("FFES"). The decision at first instance was reviewed in the 2020 Annual Review.[11] On appeal, the appellant doctor revisited all grounds of liability established against him at trial, namely professional negligence in advising the patient of the risks of the liposuction procedure, performance of the liposuction and post-operative care. The Court of Appeal, however, was satisfied that the appellant's professional negligence in failing to recognise the symptoms of FFES and call for an ambulance until some 48 minutes after the patient's oxygen saturation levels dropped significantly was sufficient to establish a breach of professional duty. This breach was, on the facts, clearly causative of the patient's death as the expert evidence and medical literature adduced was consistent in establishing that FFES was not necessarily fatal but rather a retrospective diagnosis based on that very outcome. The sooner emergency resuscitation procedures are instituted, the better the patient's prospects for a full recovery. The appellant's clinic equipment was also nowhere close to replicating the emergency medical facilities available at a tertiary hospital.

6.6 The Court of Appeal went further to revise damages awarded under the dependency and inheritance claims brought by the deceased's estate. In relation to the former, the award of damages for mortgage instalment payments that would have been paid by the deceased would amount to double recovery, since at the end of the day, the residential property in question would devolve to the deceased. The court also revised downwards loss of inheritance awards on the basis that projected loss of income should be assessed net of income tax, and that there was no reliable evidence of a clear pattern of stock option issuance on which to base an award for loss of inheritance.

6.7 Finally, in *Soh Keng Cheang Philip v National University Hospital (S) Pte Ltd*,[12] the plaintiff alleged that the defendant's Accident & Emergency ("A&E") doctors were negligent in failing to diagnose cervical myelopathy in a timely fashion and refer him for further investigations by a specialist. The court found that the contemporaneous evidence did not support his claim as his neurological symptoms present during three visits to the A&E department and one consultation at the Department of Neurology were not sufficiently serious to warrant immediate further investigation. The court accepted the defence experts' opinions that treatment received by the plaintiff was appropriate until his admission to the neurology department and neck surgery soon after, and there was no undue delay in this. In the context of this allegation, the plaintiff alleged

11 (2020) 21 SAL Ann Rev 161 at 161–165, paras 6.2–6.12.
12 [2021] SGHC 243.

that the medical note taking by some of the A&E doctors in respect of his neurological symptoms was not sufficiently contemporaneous and therefore incomplete. However, the court considered that it was reasonable for doctors to record their notes only after the examination was over. It was good bedside manners to engage the patient during the examination rather than make notes simultaneously.

6.8 In addition, there was no evidence to indicate what difference any delay would have made to the surgical outcome. The plaintiff's spinal cord oedema (swelling) was a known complication of this type of surgery, and there was no evidence to indicate that this outcome would have been different if the surgery had taken place two months earlier. Finally, the court, citing *Noor Azlin bte Abdul Rahman v Changi General Hospital*,[13] affirmed that the duty of A&E doctors was to focus on the patient's presenting symptoms and complaints, rather than conduct a general health screening. On the evidence, the defendant's A&E doctors had made reasonable inquires and found no life-threatening or acute conditions that called for immediate specialist attention. The court accordingly dismissed the claim with costs.

III. Professional misconduct

A. Improper conduct bringing disrepute to the profession

6.9 In *Pang Ah San v Singapore Medical Council*[14] ("*Pang Ah San v SMC*"), the appellant was convicted on three charges for improper conduct that brought disrepute to his profession under s 53(1)(*c*) of the Medical Registration Act[15] ("MRA"). The appellant had previously been disciplined twice before the disciplinary tribunal ("DT") for the use of an experimental loop percutaneous endoscopic gastrostomy ("loop-PEG") on four patients. This loop-PEG was not generally accepted by the medical profession outside clinical trial use, and the appellant was found guilty of professional misconduct under s 45(1)(*d*) of the Medical Registration Act.[16] The first set of disciplinary proceedings was also brought on appeal, which was eventually dismissed, while no appeal was brought against the second set of disciplinary proceedings. During and after these disciplinary and appeal proceedings, the appellant sent more than 120 e-mails to various recipients and published various blog posts on the Internet over a five-year period. These e-mails and posts

13 [2019] 3 SLR 1063 at [85].
14 [2021] 5 SLR 681.
15 Cap 174, 2014 Rev Ed.
16 Cap 174, 2004 Rev Ed.

contained derogatory statements that complained about the Singapore Medical Council ("SMC"), medical disciplinary proceedings and the various personalities involved, alleging bad faith, abuse of authority, incompetence and conflict of interest.

6.10 Based on these derogatory statements, three charges were brought against the appellant in respect of three distinct periods when the various statements were made. The charges alleged that these statements "eroded the integrity and good name of the medical profession" and therefore constituted improper conduct which brought disrepute to the profession. The DT found that the various statements were highly derogatory and the appellant's repeated dissemination of these via e-mails and online blogs was improper and brought disrepute to the profession. It convicted him on all three charges and suspended him for ten months. In addition, it ordered the appellant to pay a penalty of $10,000, censured the appellant and ordered that he undertake not to engage in the conduct complained of or any similar conduct. It also ordered the appellant to remove all posts on social media that contained derogatory statements against the SMC and any persons appointed by the SMC in connection with its past and pending disciplinary processes. The appellant was also made responsible for the costs and expenses of and incidental to the disciplinary proceedings.

6.11 On appeal, the General Division of the High Court rejected the appellant's first argument that disciplinary proceedings were an abuse of process. Allegations of abuse of process involve a fact-specific inquiry and encompass a wide variety of situations. For example, abuse of process occurs in criminal or quasi-criminal proceedings when they are instituted for a collateral purpose or to undermine the finality of litigation. On the facts, the court held that it was irrational for there to be a binary imperative that proceedings had to be instituted either in the tort of defamation or for professional misconduct; the appellant's conduct could be properly characterised as either. It would therefore not be an abuse of process for the SMC to pursue the latter course of action. Furthermore, disciplinary proceedings did not confer any ostensible or improper benefit on the SMC over civil litigation for defamation. The legal burden would have been on the appellant in a defamation action to justify his allegations in the statements, whereas the legal burden was on the SMC to establish the disciplinary charges beyond a reasonable doubt. Secondly, while the proceedings before the DT were held in private, the DT's decision could be published and any appeal against that decision would be held in public. It was thus difficult to infer any abuse in instituting the present disciplinary proceedings against the appellant.

6.12 The court also rejected the appellant's contention that s 53(1)(*c*) of the MRA drew a distinction between conduct and speech.

There was no basis on the clear language of the provision to draw such a distinction – words alone were equally capable of bringing disrepute to the profession under the test promulgated in *Low Chai Ling v Singapore Medical Council*,[17] that is, whether public confidence in the medical profession would objectively be damaged by the offending conduct from the perspective of a reasonable layperson. As confidence in the medical profession could objectively be undermined in various ways, the inquiry was fact-sensitive, and the court should not set artificial limits based on different types of conduct. Where the statements made impugned the integrity of the SMC as the regulatory body of the medical profession, this was inextricably tied with the reputation of the medical profession.

6.13 On the question of proof, the court agreed that the charges were made out beyond a reasonable doubt. There was no dispute that the appellant made the specified derogatory statements; the issue lay with their falsity and impact. While the legal burden of proof was undoubtedly on the SMC, an *evidential* burden lay on the appellant to adduce evidence to counter the *prima facie* inference that the derogatory statements (and their tone and language, which in some instances was vulgar and obscene) attacking the authority and actions of the SMC would erode the integrity and reputation of the medical profession. The appellant failed to offer any evidence against this inference beyond bare assertions, or that he was justified in making such attacks against the SMC and the persons involved in the disciplinary proceedings within the bounds of reasonable criticism. The tone and nature of the criticisms were important considerations in demonstrating the true motive of their maker. This, taken together with the fact that the statements were sent via e-mail to many recipients including members of the press and other government agencies, repeatedly over a prolonged period, persuaded the court that the appellant was "clearly on a crusade to cause maximum harm to the SMC and those people who were involved in scrutinising the complaints or were members of the [Disciplinary Committees]".[18] On this element of the charge, it was not necessary for the SMC to demonstrate that the derogatory statements did in fact lower the public's estimation of the medical profession. It was sufficient that they would objectively have this impact based on the reactions of a reasonable person. A reasonable person would take issue with such abusive criticisms based on "wild accusations of corruption and dishonesty" as undermining public confidence in the medical profession and, indeed, being "wholly inappropriate conduct for a professional".[19]

17 [2013] 1 SLR 83 at [72].
18 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [49].
19 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [52].

6.14 Finally, the appellant argued that his conviction and sentence based on his statements about the integrity of the SMC and its disciplinary processes infringed his constitutional right to free speech under Art 14(1)(*a*) of the Constitution of the Republic of Singapore[20] ("the Constitution"). The court rejected this contention. Membership in a profession confers special privileges that are accompanied by commensurate responsibilities that extend beyond professional conduct to other conduct that has a bearing on the standing of the profession. Admission into the profession is accompanied by the agreement to abide by the norms and standards of the profession, and such individuals cannot fall back on the fundamental liberties protected by the Constitution to argue that their conduct should not be regulated by that very same profession that they have submitted themselves to. Likewise, the profession's regulatory body would be empowered to determine if the conditions for the privileges of professional membership have been met, and sanction non-compliance accordingly. The Constitution does not displace these rules of admission and expulsion or suspension as professional membership is a privilege conferred on each member.

6.15 The court went further to hold that Art 14 of the Constitution had no application to the relationship between the SMC and the appellant. An individual is free to enter into her own arrangements with others in a manner that restricts her right to free speech; the rights of the individual against the State are not affected. Likewise, membership in a profession, and therefore the profession's self-regulation, is a matter between the individual professional and her professional body. This is the case even though aspects of medical professional regulation have statutory footing in the MRA.

6.16 There is, with respect, some doubt about the correctness of this view that the relationship between a professional body and a member of that profession is essentially private and does not attract constitutional scrutiny.[21] Under s 2A of the Medical Registration Act 1997,[22] the object of the legislation is to:

20 1999 Reprint.

21 The court did not exclude Art 14(1)(*a*) of the Constitution of the Republic of Singapore (1999 Reprint) on the grounds that the appellant was not a Singapore citizen, or that the statements were false speech and therefore not protected by Art 14(1)(*a*): *The Online Citizen Pte Ltd v Attorney General* [2021] 2 SLR 1358 at [58]–[61].

22 2020 Rev Ed. Section 2A was introduced via the Medical Registration (Amendment) Act 2010 (Act 1 of 2010) and came into force on 1 December 2010.

> … protect the health and safety of the public by providing mechanisms to —
>
> …
>
> (*b*) uphold standards of practice within the medical profession; and
>
> (*c*) maintain public confidence in the medical profession.

The structure of s 2A indicates that whatever the model of professional regulation (here a form of self-regulation), the overarching interest is that of the public interest in health and safety. Thus, registration may be conditional notwithstanding that a person meets the formal requirements to the satisfaction of the SMC, if it is also of the view that it is in the public interest to do so.[23] Likewise, orders for the removal of a medical practitioner, or her suspension, may be done so immediately if it is necessary for "the protection of members of the public".[24] In addition, a member of the DT adjudicating on matters brought before it is deemed to be a public servant for the purposes of offences against public servants under the Penal Code 1871.[25] Taken together, the argument could be made that the relationship between the SMC and its professional members is not merely that of a private professional association, but one specially arranged and entrusted by the State for the protection of the overarching public interest in health and safety at stake.[26] From this perspective, it should attract constitutional scrutiny and, in particular, the protection of various fundamental liberties. Such a position is taken in Hong Kong[27] and Canada,[28] where similar basic rights such as freedom of speech and expression have been held to apply to the regulation of medical and other healthcare professionals.

6.17 Of course, this does not mean that the appellant would be free to make any statements he wished, in his professional capacity, criticising the disciplinary process. Freedom of speech is rightly limited by professional membership and the privileges accorded, with the need to protect the reputation of the profession in service of the overarching public interests at stake. But that is not to say that the argument concerning the infringement of freedom of speech under Art 14(1)(*a*) is simply about the impermissibility of *any* constraints. Rather, when the protection of freedom of speech is used to challenge the exercise of professional regulatory authority, the concern is with the proper balance

23 Medical Registration Act 1997 (2020 Rev Ed) s 20(3).
24 Medical Registration Act 1997 (2020 Rev Ed) s 54(8).
25 2020 Rev Ed.
26 See also *Strom v Saskatchewan Registered Nurses Association* [2020] SKCA 112 at [78]–[80].
27 See *Dr Kwong Kwok-Hay v Medical Council of Hong Kong* [2008] 3 HKLRD 524.
28 See, *eg*, *Strom v Saskatchewan Registered Nurses Association* [2020] SKCA 112.

between the conflicting interests at stake. The DT in *Pang Ah San v SMC*[29] recognised that there was a place for "reasoned, measured, respectful and constructive engagement on the SMC and its processes using proper channels for feedback".[30] The High Court accepted this.[31] This is notwithstanding that fair criticism properly made has the potential, if not more, to affect the reputation of the profession.[32] Nonetheless, it plays an important role in ensuring institutions are held accountable and strive to improve. Whether the rules of the profession, or the discretionary application of a broad standard like improper conduct bringing disrepute to the profession under s 53(1)(*c*) of the MRA by a professional body,[33] impermissibly infringe on constitutional rights like freedom of speech falls to be determined by the standards prescribed by the courts. For example, the statements could be demonstrably false, in which case they fall outside the ambit of speech protected under Art 14(1)(*a*).[34] Alternatively, the restrictions on speech have a nexus with the interests protected under Art 14(2)(*a*) in derogation of the constitutional right that balances these competing interests.[35] Taking into account the tone, unfounded allegations and improper channels of criticism, it is highly unlikely that the nature of the statements made in this case would have passed Art 14 muster in any case.

B. Sentencing principles

6.18 In terms of sentencing, the following key points may be gleaned from the court's judgment. First, in disciplinary proceedings concerning charges for improper conduct that brought disrepute to the medical profession under s 53(1)(*c*) of the MRA:[36]

(a) The objective is to uphold "the standing and reputation of the profession, as well as to prevent an erosion of public

29 See para 6.9 above.
30 *Singapore Medical Council v Dr Pang Ah San* [2020] SMCDT 2 at [54].
31 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [49].
32 *Strom v Saskatchewan Registered Nurses Association* [2020] SKCA 112 at [160]: "In any event, the fact that public confidence in aspects of the healthcare system may suffer as a result of fair criticism can itself result in positive change. Such is the messy business of democracy."
33 The fundamental liberties under Pt 4 of the Constitution of the Republic of Singapore (1999 Reprint) apply to both legislation and the application of those laws by the State: *Eng Foong Ho v Attorney General* [2009] 2 SLR(R) 542 at [27]–[28].
34 See *The Online Citizen Pte Ltd v Attorney General* [2021] 2 SLR 1358 at [58]–[61].
35 See, *eg*, *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 at [31]–[32].
36 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [68]–[69].

> confidence in the trustworthiness and competence of its members";[37]
>
> (b) The DT and the court will also have regard to the principles of general and specific deterrence. General deterrence is a central and operative sentencing objective in most, if not all disciplinary cases, while specific deterrence is especially relevant for recalcitrant offenders.

6.19 Second, in determining the appropriate sentence to be imposed in such disciplinary cases, precedents with very different factual matrices will not be helpful.[38]

6.20 Third, it is not objectionable for a DT or a court, in deciding the appropriate sentence to be imposed in medical disciplinary cases, to rely on precedents involving the legal profession in order to ascertain the (aggravating and mitigating) factors that may possibly be relevant in medical cases.[39]

6.21 Fourth, in medical disciplinary cases where general and specific deterrence play an important role, the fact that the offender has rendered volunteering services may be accorded little mitigating value.[40] This is very much consistent with the position taken in criminal cases. In *Stansilas Fabian Kester v Public Prosecutor*,[41] the High Court has stated the following as relevant sentencing principles:[42]

> (a) Any evidence concerning an offender's public service and contributions must be targeted at showing that specific sentencing objectives will be satisfied were a lighter sentence to be imposed on the offender.
>
> (b) The fact that an offender has made past contributions to society might be a relevant mitigating factor not because it somehow reduces his culpability in relation to the present offence committed, but because it is indicative of his capacity to reform and it tempers the concern over the specific deterrence of the offender.
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> (c) This, however, would carry modest weight and can be displaced where other sentencing objectives assume greater importance.
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> (d) Any offender who urges the court that his past record bears well on his potential for rehabilitation will have to demonstrate the connection

37 Citing the court's earlier decision in *Wong Meng Hang v Singapore Medical Council* [2019] 3 SLR 526 at [23].
38 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [71].
39 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [72].
40 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [73].
41 [2017] 5 SLR 755.
42 *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 at [102].

> between his record and his capacity and willingness for reform, if this is to have any bearing.
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> [emphasis in original omitted]

6.22 Fifth, in a case involving medical misconduct, the harmfulness of an offender's conduct might be something self-evident, having regard to the nature of the offender's conduct. Accordingly, there might hardly be any need for formal proof of the level of actual or potential harm caused. The test is an objective one, not so much what one person or another person would say.[43]

6.23 Sixth, DTs should be encouraged to provide individual sentences for each charge in most, if not all, cases, because it offers greater transparency for the offender in question, the profession as a whole, future DTs and the court.[44]

6.24 Seventh, all other things being equal, it could be said that misconduct under s 53(1)(*c*) of the MRA is less egregious than professional misconduct under s 53(1)(*d*) of the MRA. Importantly, however, on the specific facts of a case, a particular misconduct *vis-à-vis* the former could well be more serious than a particular professional misconduct *vis-à-vis* the latter. Ultimately, the facts of each case must be considered carefully on their own.[45]

6.25 Finally, in deciding whether to impose a fine in medical misconduct cases, a similar approach to that taken in criminal cases might be adopted,[46] which is that while fines are most commonly employed as a means of punishing an offender, it may also be imposed as a rough and ready method of confiscating the proceedings of crime.[47]

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43 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [74].
44 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [77].
45 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [80].
46 See *Koh Jaw Hung v Public Prosecutor* [2019] 3 SLR 516 at [44].
47 *Pang Ah San v Singapore Medical Council* [2021] 5 SLR 681 at [81].