Professional Misconduct

– *Reflections on the Proceedings of the Recent SMA Seminar*

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On 5 November 2011, SMA, in collaboration with the Academy of Medicine Singapore and the College of Family Physicians Singapore, held a seminar on professional misconduct and professional accountability (see pages 14 to 16). The keynote speaker was Prof Tan Siang Yong, who is currently an emeritus professor at the University of Hawaii and Director of the St Francis International Center for Healthcare Ethics in Honolulu. His latest work *Medical Negligence and Professional Misconduct* is a Halsbury legal treatise, and is scheduled for publication next year. I would like to share my reflections on professional misconduct based on the proceedings of this seminar.

Under the amended Medical Registration Act (MRA) 2010, the substantive grounds on which the Singapore Medical Council (SMC) Disciplinary Tribunal (DT) may find a medical practitioner liable, are if he has been found:

(a) to have been convicted in Singapore or elsewhere of any offence involving fraud or dishonesty;
(b) to have been convicted in Singapore or elsewhere of any offence implying a defect in character which makes him unfit for his profession;
(c) to have been guilty of such improper act or conduct which, in the opinion of the Disciplinary Tribunal, brings disrepute to his profession;
(d) to have been guilty of professional misconduct; or
(e) to have failed to provide professional services of the quality which is reasonable to expect of him.

The MRA does not provide any explanation or assistance to define the concept of professional misconduct.

The definition of professional misconduct provided in the SMC Ethical Code and Ethical Guidelines 2007, Section 5.4 The definition of 'professional misconduct', is:

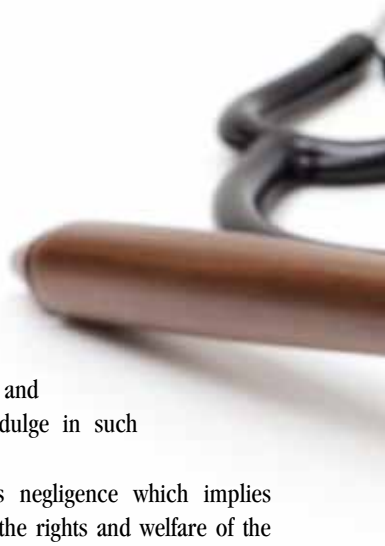
"Whether the conduct complained of amounts to professional misconduct is to be determined by the rules and standards of the medical profession. Professional misconduct is akin to the expression "infamous conduct in a professional respect".

The expression "infamous conduct in a professional respect" has been judicially defined in the case of **Allinson v General Council of Medical Education and Registration** as follows:

"If it is shown that a medical man in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, it is open to the [Council] to say that he has been guilty of infamous conduct in a professional respect."

In **Dr Low Cze Hong v SMC** [2008] 3 SLR(R) 612, the Court of Three Judges observed that the continuing reference to "professional misconduct" being somehow sired by the concept of "infamous conduct in a professional respect" is not altogether helpful and should perhaps now be dropped altogether (paragraph 23 of judgement). The court then traced the rationale of the legislative amendments in 1998, where "professional misconduct", which is of wider import, was introduced to replace "infamous conduct" in the MRA. In paragraph 27 of the judgement, the Court stated that:

"In other words, the replacement of the old term "infamous conduct" with the new term "professional misconduct" by Parliament was not merely a change in linguistic semantics but rather one of real substance. The new term "professional misconduct" plainly embraces a wider scope of conduct for which disciplinary action can be taken by the SMC. It is thus apposite to understand how the term "professional misconduct" has been interpreted in other Commonwealth jurisdictions. In interpreting the term "professional misconduct", this court is not constrained by the references in



the SMC Ethical Code to the definition of the term being "akin to the expression 'infamous conduct in a professional aspect'". This is a legal issue in which the courts are better placed to ascertain Parliament's intention. In any event, the interpretation of the phrase "professional misconduct" in the SMC Ethical Code cannot govern the meaning of the phrase as it appears in s 45(1)(d) of the Act. This would be akin to the tail wagging the dog. In our view, the SMC, in clarifying the scope of "professional misconduct", may have taken an unduly restrictive view in seeking to maintain an umbilical cord to the concept of "infamous conduct". This is no longer relevant today in fleshing out the meaning of "professional misconduct" for the reasons we now give."

The SMC definition was rejected in **Dr Low Cze Hong v SMC** [2008] 3 SLR(R) 612, when the Court of Three Judges held their preferred definition as that:

"Professional misconduct could be made out in at least two situations: first, where there was an intentional, deliberate departure from standards observed or approved by members of the profession of good repute and competency; second, where there had been such serious negligence that it objectively portrayed an abuse of the privileges which accompanied registration as a medical practitioner."

The first limb refers to departure from standards observed or approved by members of good repute and competency. Here I believe the standards refer to professional conduct, and not standards of medical practice. As for medical practice, departure and variation is common and necessary as different patients have different goals of therapy even if they may suffer from the same disease. In an SMC press release dated 26 January 2011, on the disciplinary inquiry of a young radiologist who missed a fracture on a skull x-ray, the DT concluded that departure from standards of accepted practice was deliberate departure from standards of professional conduct.

In addition, the Court's definition emphasises the intentional and deliberate departure in nature of bringing about the misconduct. It is reasonable to draw a conclusion that the words *deliberate* and *intentional* amount to recklessness i.e., knowing the unacceptable conduct, but intentionally and willfully going ahead to deliberately indulge in such conduct.

The second limb refers to serious negligence which implies significant indifference and disregard to the rights and welfare of the patient. This serious negligence has to be objectively portrayed as an abuse of privileges of a registered medical practitioner. Privileges of a medical practitioner are not to be interpreted in the narrow sense of privileges of prescription, use of medical devices and ability to charge a fee for the work done. Privileges in professional misconduct should be viewed in the broadest sense, all the duties in the fiduciary nature of the work of the practitioner and the conferred trust by the patients and public. Abuse of privileges of a medical practitioner is improper use of medical knowledge and skills for goals other than the healing process or for medical research and education, which are considered the legitimate goals of Medicine. Deliberate and intentional neglect of professional duties would be considered as professional misconduct. The term "serious negligence" ought to exclude simple negligence as defined in tort, errors of judgement and simple lapses of professional conduct.

It is not clear from the above definition whether professional misconduct requires repeated deliberate and intentional departures or a just single departure for a doctor to be guilty of professional misconduct.

An English case, **Rao v General Medical Council** (2003) Lloyds Rep Med 62, was shared during the seminar. That court stated that if finding of serious professional misconduct had been made on basis of single clinical error, as opposed to generalised defects in practice, then appropriate disposal might well have been a reprimand. The court concluded that the committee's determination of serious professional misconduct was unsafe, and should be set aside. In the United States, single act of malpractice is unlikely to end up with a guilty charge of professional misconduct, although an egregious act or multiple negligent acts will.

The discussion next moved to the question of whether the SMC DT is bound by or has used the Court of Appeal's definition of professional misconduct in its deliberation. In the two recent cases that went for

appeal in the High Court, **Dr Eric Gan Keng Seng v SMC** (2010) SGHC 325 (single failure to attend and delay in diagnosis, not clear if it was deliberate and intentional), and in **Dr Eu Kong Weng v SMC** (2011) SGHC 68 (single failure to obtain informed consent, in spite of a valid signed consent form, and not a deliberate or intentional act to depart from standards), the courts upheld the SMC convictions and decisions over a single rather than recurring instances of what is arguably ordinary negligence rather than gross, reckless or egregious behaviour.

The concept of professional misconduct is complex and difficult to define and apply. Sitting in judgement of our colleagues in coming to a verdict of professional misconduct needs significant skills and experience. Sitting in judgement of our colleagues requires knowledge in professional ethics, skills in reasoned analysis of misconduct, and competency in basic legal jurisprudence, rules of procedure, admitting evidence, sentencing and principles of natural justice and fair play. Doctors called to be expert witnesses or to sit on disciplinary tribunals in professional misconduct have a professional duty to gain competence in this area.

A competent (effective and efficient), timely and fair system of disciplinary trials for professional misconduct promotes trust in the system of professional accountability and acceptance of medical professionalism. In turn, medical professionalism promotes the trust and confidence of our patients and the public in the medical profession and the healthcare system. SMA