

Grounds of Decisions

—What Medical Practitioners Need to Know When Sitting in Judgement of Colleagues

By Eric Tin and Dr T Thirumorthy

Experience, conscientiousness, moral courage and a keen sense of fair play are qualities assumed in those vested with the authority to sit in judgement of fellow doctors. These qualities are essential but not exhaustive. Sitting in judgement of colleagues also requires knowledge in ethical analysis and basic competence in judicial-style reasoning. A good grasp of basic procedural and evidential rules, including principles of natural justice, as well as substantive considerations in sentencing, are necessary. Making judgements that are well reasoned and writing clear grounds of decision (GD) is an important requisite skill.

What is a GD?

A GD is essentially the reasons of the decision issued by those who are empowered by law to adjudicate on a particular matter and make orders in accordance with the law. In the context of the Singapore Medical Council (SMC) hearings, the Disciplinary Tribunal (DT) is required by Section 40(1) of the Medical Registration Regulations 2010 (MRR) to “inform parties of its findings in relation to the facts of the case”. Its findings are usually expressed in a written GD.

Why is a GD important?

The rendering of a GD can be said to be an integral part of the disciplinary justice process.

What the medical profession does in their course of work has a major impact on the health, interest and rights of patients, their families and the public. Parties involved in the disciplinary inquiry, the medical profession, patients and the public all have a legitimate interest to know the outcome of an inquiry. Having to give a well-reasoned GD increases the diligence and care of the DT in ensuring sound and rigorous reasoning, which should lead to better quality decisions. This ensures that a DT is accountable for its decisions.

A well-reasoned GD provides for transparency and eliminates suspicion of arbitrariness in the disciplinary justice process. A GD that contains sound reasoning also exhibits greater accountability and demystifies the disciplinary justice process. This ensures that justice is not only done but seen to be done, thereby inspiring confidence in the rule of law by the parties, the profession and the public. The public will not be left in doubt as to what the tribunal has considered in arriving at its findings. The withholding of reasons or flawed reasoning that suggests a lack of proper consideration of the merits of a case is bound to affect the legitimacy of a decision, eroding trust in the disciplinary justice system.

Decisions of a DT constituted under the Medical Registration Act (MRA), Cap 174, are appealable to the High Court by the respondent doctor or SMC. Under Section 55(11) of the MRA, on hearing an appeal from a DT's decision, the High Court shall accept the DT's findings on any issue of medical ethics or standards of professional conduct as final and conclusive, unless such findings are in the opinion of the High Court unsafe, unreasonable or contrary to the evidence. A GD which is clear, cogent, coherent and comprehensive makes the appeal process less arduous for the parties and the appellate court.

A GD with systematic reasoning is a valuable source of precedent for reference or use by respondent doctors in defending similar charges, supporting a system of transparent and fair justice. The counsels for the doctors will be better placed to advise their clients whether a case is defensible having regard to the precedents. Such a GD also provides useful reference for other DTs hearing similar cases, contributing to consistency in DTs' decisions where like cases can be decided alike.

A well-reasoned GD is also a valuable educational resource for all doctors, as its reasoning provides guidance and articulates what constitutes acceptable

or unacceptable professional conduct, which can help doctors cultivate desirable professional attributes. It also allows doctors to better understand the professional standards and norms set and expected of them.

What should a written GD include?

In general, a GD should address the following:

1. A summary of all key relevant evidence;
2. Set out the charge, parties' respective positions, agreed facts, and issues of contention for determination;
3. Examine and analyse the relevant evidence. Draw reasonable inferences from the established evidence and primary facts;
4. Explicate clearly how a particular conclusion is arrived at, giving reasons in support of the finding on each contentious issue and the finding on the ultimate issue; and
5. Avoid giving impressionistic statements or broad and unsubstantiated propositions in this reasoning process.

Unpacking the charge

A charge is a legal document containing the alleged disciplinary offence and brief factual particulars in support of the allegations. A GD should set out the elements of the charge and the DT's understanding of the case that SMC's solicitors have to prove beyond reasonable doubt. A practitioner prosecuted in the DT proceedings is only required to respond to the charge. If the charge against a practitioner is for professional misconduct, the DT should focus on what the alleged actual conduct of the practitioner is, with reference to the care of his patients or otherwise.

A key lesson from the recent DT decisions overturned by the High Court is that the DT should first and foremost seek to clearly understand SMC's case based on the charge, so that as the evidence unfolds during the trial, the DT will not be sidetracked towards irrelevant matters, derailing its findings of fact as a result. This approach instils discipline and encourages focus, so that a DT will not miss the woods for the trees.

Address the preliminary objections

Where there are preliminary objections to a charge on a point of law or on the basis of breach of natural justice, a GD should set out the basis for upholding or dismissing any such objections.

Identify the issues

A GD should distil the questions of facts in dispute and any questions of law so that it will assist those reading the GD to understand all the issues that a DT has to determine.

Finding of fact

A GD should state clearly what the agreed/undisputed facts are. Likewise, it should be clear as to what are the disputed facts and the tribunal's findings of these disputed facts. The GD should also address why the tribunal decides to rely more or less on a piece of documentary evidence or the oral testimony of a particular witness, and the weight accorded to these evidence. The GD should try to analyse the reliability of evidence with reference to its validity, consistency, and contemporaneity to the events in question, and whether a witness has any incentive to conceal or embellish a certain fact.

Witness credit, credibility and demeanour

A DT should understand the main difference between witness credit and witness credibility. Credit concerns a witness's moral make-up, specifically his or her honesty and integrity. Credit is part of credibility, which is a wider concept encompassing a witness's ability and accuracy of perception, retention and recall. A DT must be careful not to rely only on a witness's demeanour during the disciplinary inquiry without testing such observations against objective evidence, such as contemporaneous documentary records or the testimony of independent witnesses, and evaluating consistencies of the witness's testimony.

Dealing with expert evidence

A GD should explicate the DT's preference for a particular expert witness opinion based on what the expert has stated in his or her written report and oral testimony, and examine these evidence for their logicity, accuracy and consistency.

Avoid logical leaps

A GD should reason logically to its conclusion, and avoid making logical leaps. For example, in a recent case, the High Court noted that the DT failed to show in the GD how the respondent doctor's conduct corresponded with the DT's understanding of what constituted professional misconduct. The significant leap from a breach of a paragraph of the SMC Ethical Code and Ethical Guidelines to a finding of professional misconduct was apparently left unexplained in the GD, which together with other flaws in reasoning, incurred harsh judicial criticism on appeal.

Who should have access to a GD?

Neither the MRA nor the MRR mandate the DT to publish its GD in regard to its findings or sentencing. It is discretionary of a DT to publish an account of the inquiry and its findings under Section 42 of the MRR. In practice, the DT will read out its GD to the parties at

the conclusion of the disciplinary inquiry. The Medical Council or the respondent doctor who desires to obtain a hard copy of the GD may apply to the DT, which as a matter of course will furnish the requesting party. It is not known whether a complainant is entitled to a copy of the GD although there seems no good reason in principle to deny the complainant of it. SMC will also issue a media release for cases where a respondent doctor had pleaded guilty or was found guilty. Such GD issued from July 2011 onwards are accessible on SMC's website, as are media releases giving an account of the inquiries. These developments foster greater transparency and accountability of the DT's decision making process.

Is it justified to limit public access to all GD?

In cases where a respondent doctor is found not guilty of all the charges, the DT tends not to order publication of the GD. By not publishing the GD of cases where a respondent doctor is found not guilty creates a skewed, incorrect and undesirable perception that cases referred to the DT invariably end up with findings of guilt and punishment, and raises unnecessary doubts over the fairness of the disciplinary justice process.

In addition, access to such GD, even when a doctor is found not guilty (whether or not the doctor's particulars are anonymised to preserve confidentiality), would be useful to not only future DTs as precedents, but also benefit doctors' defence counsels and the medical educational community to better understand the professional standards expected of medical practitioners.

What competencies are necessary to write effective GD?

All doctors who accept the responsibility of sitting in judgement of their colleagues should acquire core competencies by training so as to be able to render an effective GD:

1. Competence on issues of medical ethics, ethical reasoning and analysis;
2. Concepts of what constitutes professional conduct;
3. Understanding of the charge and factual/legal issues in dispute;
4. Objectivity in assessing evidence and arguments;
5. Rationality of basis for findings and decisions; and
6. Clarity in expression of findings and orders.

Conclusion

Disciplinary tribunals and inquiries are accountable to demonstrate in the GD that the charges have been carefully analysed, the undisputed facts established, the issues to be determined properly framed, the evidence tested and weighed, and logically reasoned findings

of fact on each issue. Through a GD, the patients, the public, the profession and the parties involved can then judge for themselves how conscientiously the DT has done its work. Only then can justice be done and seen to be done. The perception and reality of justice will strengthen trust and confidence in the disciplinary justice system. **SMA**

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