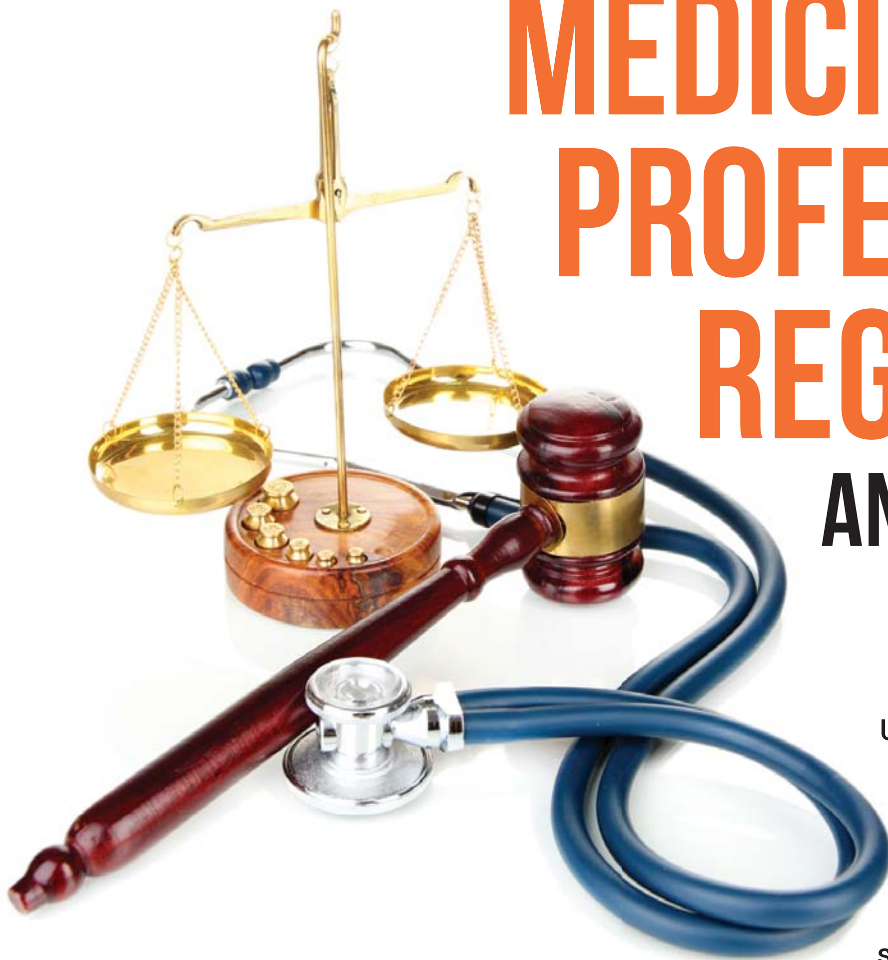

MEDICINE, LAW, PROFESSIONAL REGULATION AND ETHICS

— PART 1

Understanding and applying the law, professional ethical code and guidelines, and ethics are integral parts of professionalism in medical practice. This two-part article will attempt to make some sense of how each of these is different yet correlated. The current article looks at law and professional regulatory guidelines, while the second part examines ethical reasoning and tools.

COMMON LAW

Law can be defined as a system of rules that govern behaviour in a society; it sets out minimum standards to enable orderly transactions and interactions between people.

Singapore is a common law jurisdiction. Common law is law as determined by judges. In this system, there are Acts of Parliament, known as Statutes, which are formal written law passed by legislation. Examples of statutes that govern the medical professional are the Private Hospitals and Medical Clinics Act and Medical Registration Act (MRA). There are also statutes that especially relate to the healthcare professional, or are especially important for us to know and understand. These include but are not limited to the Infectious Diseases Act, Misuse of Drugs Act and Regulations, Mental Health (Care and Treatment) Act, Mental Capacity Act, Poisons Act, Health Products Act, Coroners Act, Human Organ Transplantation Act, Advanced Medical Directive Act and Personal Data Protection Act.

Provisions in statutes commonly need to be interpreted, and this is the role of the judges in court. For example, section 39(1)(a) of the Medical Registration Act empowers the Singapore Medical Council (SMC) to hear complaints against a doctor "touching on the conduct

of a registered medical practitioner in his professional capacity" (the basis for a charge of professional misconduct). It required the High court to clarify that professional misconduct occurs in at least two situations: (1) where there has been intentional deliberate departure from standards observed or approved by members of the profession of good repute and competency; or (2) where there has been serious negligence that objectively portrays abuse of privileges that accompany registration as a medical practitioner.[1]

Where there is no statute that covers a specific issue, the judges in court have the authority and duty to decide on the law, which becomes binding on future courts. Tort law relating to informed consent is an example of such judge-made law. While statute law can be revised only by the legislature, common law changes only if the highest court of the land departs from it. Otherwise, lower courts are technically bound to follow the law that has been laid down in previous cases.

MINIMUM STANDARD — LAW

While death or grievous hurt arising from negligence is punishable as a crime under sections 338A and 304A of the Penal Code, respectively, what a doctor most commonly faces in law is a claim in tort for medical malpractice. Tort is civil law that looks at providing a remedy, in the form of damages (money), for harm that is caused by the wrongful act of others. Negligence giving cause for a medical malpractice suit arises when a doctor breaches the duty of care to the patient, resulting in harm that is a direct result of this breach. The duty of care relates to all areas of practice, including diagnosis, advice given, treatment, and obtaining proper informed consent. In Singapore, the test currently used to determine whether a doctor has performed up to the minimum standard expected in law, and so has not breached the duty of care, is the Bolam-Bolitho Test[2]. In a nutshell, this test says that a doctor is not negligent if the doctor has acted in accordance with the practice accepted as proper by a responsible body of medical experts skilled in that particular art, but this must be demonstrable to have a logical basis. The opinion of the medical expert must have an internally and externally consistent defensible conclusion. For a tortious claim of negligence in law to succeed, quantifiable harm must have directly resulted from the breach in duty of care (falling below the Bolam-Bolitho standard), with the remedy being damages (money) that the doctor has to pay the patient who has suffered such harm.

The MRA is a statute law that entrusts the regulation of doctors to the profession itself, by establishing the SMC and its powers. SMC's main aim is to ensure the fitness to practice and set the standards expected of licenced medical professionals. The SMC Ethical Code and Guidelines sets out the standards that doctors are expected to live up to. These standards act like "pseudo-criminal law", which is laid down by the medical profession to define what the profession expects as minimum standards for acceptable practice. Failure to live up to these standards can see a doctor face one of four possible complaints to the SMC based on the provisions of section 39 of the MRA: complaint touching on the conduct of a registered medical practitioner in his professional capacity [which can result in the charge of professional misconduct under s53(d) MRA)] or on his improper act or conduct which brings disrepute to his profession [s.39(1)(a) MRA]; conviction of an offence implying defect in character [s.39(1)(b) MRA]; professional services not of reasonable quality [s.39(1)(c) MRA]; or of lacking physical or mental fitness to practice [s.39(1)(d) MRA]. Sanctions can range from a censure to a fine of up to S$100,000, suspension or even loss of licence to practice.

The minimum standard of practice in the SMC professional regulatory context is thus determined by failure in one of these four limbs, based on the provisions in the SMC Ethical Code and Guidelines; this differs from the Bolam-Bolitho Test in the law of negligence.

PARALLEL SYSTEMS

Doctors need to be cognisant of these two effectively parallel sets of law/regulations that define the expected minimum standard. For example, in the area of informed consent, the minimum standard in Singapore law is based on the Bolam-Bolitho Test (although this needs to be carefully watched in light of the recent UK Supreme Court decision in Montgomery v Lanarkshire Health Board[3]), whereas

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PROFILE

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the SMC Ethical Guidelines have more detailed and arguably stringent requirements, thus putting the onus on doctors to ensure patients understand the relevant information. SMC Ethical Guidelines 4.2.2 on "Informed consent" states that "it is a doctor's responsibility to ensure that a patient under his care is adequately informed about his medical condition and options for treatment so that he is able to participate in decisions about his treatment". In addition, the SMC Ethical Guidelines 4.2.4.1 on "Right to information" states that "a doctor shall provide adequate information to a patient so that he can make informed choices about his further medical management. A doctor shall provide information to the best of his ability, communicate clearly and in a language that is understood by the patient …"

There are also instances where the law considers an act permissible but it may fall short of professional standards. For example, SMC Guidelines 4.2.5.1 on "Personal relationships" states "A doctor must not have a sexual relationship with a patient … A doctor must also not, as a result of his professional relationship, enter into an adulterous or any other improper association with the immediate members of the patient's family. … A doctor's conduct must at all times be above suspicion".

The SMC Ethical Guidelines also impose obligations that the law does not. For instance, SMC Guidelines 4.1.7.2 on "Treatment in emergency situations" states "A doctor shall be prepared to treat patients on an emergency or humanitarian basis unless circumstances prevent him from doing so."

An SMC charge against a doctor is based on breach of a provision in the SMC Ethical Code and Guidelines, and any charges are framed arising from complaints under section 39 of the MRA. As the licencing body for the profession, SMC can censure, fine, suspend or even remove the licence to practice of a doctor found guilty of a transgression under one of the four limbs of section 39 of the MRA. In the event the doctor is fined, the money goes to SMC and not the complainant.

Therefore, patients need to make a claim of negligence in tort and not a complaint to SMC if they wish to get pecuniary compensation. However, patients are free to choose both routes; pursuing one route does not preclude them from also pursuing the other. The legal route provides monetary compensation for the negligent act of the doctor that resulted in harm to the patient. The focus of SMC, however, is on a doctor's fitness to practice and the minimum standard of care expected of the licenced medical professional.

FINAL THOUGHTS

The medical profession must understand that the minimum standard expected of our performance is enunciated both in the law and our professional regulations as laid out in the SMC Ethical Code and Guidelines. We need to ensure that we do not fall short of either barometer and that our practice of medicine fulfils the minimum standards dictated by both.

It can be said that, ultimately, the law imposes on us a duty *of* care and professional ethical guidelines impose a duty *to* care, but we should have a **conscience of caring** that comes from the heart. The second part of this article will deliberate on how ethical reasoning and tools can assist this conscience in a methodical way. ◆

References

1.Low Cze Hong v Singapore Medical Council [2008] 3 SLR 612; [2008] SGHC 78.
2.Dr Khoo James & Anor v Gunapathy [2002] 2 SLR 415.
3.Montgomery v Lanarkshire Health Board [2015] UKSC 11.