The Medico Legal Challenge in Hong Kong

Prof. Donald Li
President
Specialists in the 15 Colleges of the Hong Kong Academy of Medicine are bound by the Latin phrase “Opus medicinae salus”, which features in the Academy’s logo.

This motto, meaning “The physician leads the way to good health”, serves as a reminder to put medical expertise and authority to wise use, so as to facilitate the return of health to patients and to promote health among the whole community.
Established by the Hong Kong Academy of Medicine Ordinance (Cap 419) in 1993

- The Academy is the only statutory body in Hong Kong to train, assess and accredit specialists.
- The Academy admits registered medical and dental practitioners as Fellows if they fulfill the training and examination requirements of the Academy.
- According to the MRO and DRO, a specialist must fulfill the CME requirements if he/she wishes to maintain his/her name in the SR. The Academy is the organization to determine the CME requirements for the SR.

“A Standard Keeper of Medical Specialists”
Regulator of doctors in Hong Kong

The Medical Council of Hong Kong

Empowered by the Medical Registration Registration Ordinance, Cap. 161, Laws of Hong Kong
Types of registration

- General Register (GR)
  - Full Registration
  - Provisional Registration
  - Limited Registration
  - Temporary Registration

- Specialist Register (SR)
  - Specialist Registration
### Number of Registered Medical Practitioners

<table>
<thead>
<tr>
<th>(A) Full Registration</th>
<th>As at 31.12.2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resident List</td>
<td>12,650</td>
</tr>
<tr>
<td>Non-Resident List</td>
<td>767</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(B) Limited Registration</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Promulgation No. 2 (HKU, CUHK, HA and DH)</td>
<td>97</td>
</tr>
<tr>
<td>Promulgation No. 3 (Clinics exempted from section 7 of Medical Clinics Ordinance)</td>
<td>34</td>
</tr>
<tr>
<td>Promulgation No. 4 (Clinics registered under Medical Clinics Ordinance)</td>
<td>15</td>
</tr>
</tbody>
</table>

| (C) Specialist Registration                   | 6,238            |
| (D) Provisional Registration                  | 398              |
| (E) Temporary Registration                    | 94 #             |

#: The figure refers to the number of medical practitioners registered under temporary registration from 1.1.2014 to 31.12.2014.
Structure of MCHK

Preliminary Investigation Committee
Licentiate Committee
Education & Accreditation Committee
Ethics Committee
Health Committee

- Examination Subcommittee
- Internship Subcommittee
- Credentials Subcommittee
- Exemptions Subcommittee
- Review Subcommittee
Disciplinary powers of MCHK

If a registered medical practitioner is found guilty of misconduct in a professional respect, he/she will face one of the following disciplinary sanctions:

- Removal from the General or Specialist Register
- Removal from the General or Specialist Register for such a period as the Council may think fit
- Reprimand
- Suspended application of any of the above order for a period not exceeding 3 years, subject to any conditions the Council may think fit
- Warning letter
Complaints to MCHK: Dissatisfaction of a doctor’s treatment which can arise out of

- Results of treatment not meeting expectation of patients
- Complications
- ‘High’ professional fee
- ‘Bad attitude’ of doctors
- Personal conflicts between patient and doctor

Dissatisfaction ≠ medical negligence ≠ professional misconduct
Negligence in law

- Doctor has a legal duty to exercise reasonable care
- Breach of this duty which causes damage to the plaintiff = Negligence
- Breach of duty is measured by reference to the standards of the ordinary competent practitioners in that field
Medical negligence

Failure by doctor to disclose risks of treatment can result in action for negligence.

The test which medical negligence is assessed is the *Bolam test*.
The Bolam Test

The standard of care which is required from a medical practitioner as laid down in Bolam v Friern Hospital Management Committee (1957) 1 WLR 583.

“If a doctor reaches the standard of a responsible body of medical opinion, he is not negligent.”

The Bolam test was later amended - the Bolitho amendment - to include the requirement that the doctor should also have behaved in a way that ‘withstands logical analysis’ regardless of the body of medical opinion.
Decline of the Bolam Test

On 11 March 2015, the UK Supreme Court delivered its decision in *Montgomery v Lanarkshire Health Board [2015] UKSC 11*, by holding that the famous *Bolam* test should no longer govern the liability of doctors in the so-called ‘informed consent’ cases. QC involved in the case James Badenoch was in Hong Kong in May 2015 to tell us about the case.

Instead of leaving it to the medical profession to decide what should be disclosed to patients, the Supreme Court directed that a more ‘*patient-centred*’ test better suited to modern ideals of individual autonomy and human rights must be applied.
Implications:
Decline of the Bolam Test

Three basic duties of physicians to their patients:

- **in diagnosis**
- **disclosure**
- **treatment**

“Where treatment involved a substantial risk of grave adverse consequences, a patient’s right to decide whether to consent to that treatment was so obvious that no prudent doctor could fail to warn the risk”

The issue: Informed Consent
What is professional misconduct?

- Common Law in Hong Kong
- Interpreted by the Court of Appeal as conduct falling short of the standards expected among registered medical practitioners, which involved:
  1) Dishonesty or morale turpitude
  2) Commission or omission of clinical practice below the standards of members of the profession
  3) Any act which is reasonably regarded as disgraceful, dishonorable or unethical
A guide setting out the professional conduct and discipline to be observed by registered doctors issued and updated by the Medical Council

- Not exhaustive
- Not a legal document

Contravention of this code, as well as any written and unwritten rules of the profession, may render a registered medical practitioner liable to disciplinary proceedings.
In the real world

- Everyone makes errors
- Everyone makes careless errors
- \( \therefore \) Not all mistakes should be regarded as medical negligence
Medical Legal Challenge: Medicine is an inexact science

- Rising complexity in modern medicine have come with startling levels of risks and harm to patients

Studies in USA, UK, Australia and Israel

- Serious or potential errors in medicine was 6.7 out of 100 patients
- Adverse events is 3.7% of hospital admission, over half of which were preventable and 13.6% led to death
Data like these, once published generate

- Sentiment
- Some of which channeled into harsh forms of surveillance and criticisms
- Outcry for punishment with an attempt to fix blame and to punish someone

Such an approach will not work!
We should take lessons from the stunning programs in safety in aviation.
Lessons learned from aviation

Fear, reprisal, punishment produces not safety but defensiveness, secrecy and enormous human anguish.
If we want safer health care, we have to design safer health care systems.
Streamlining complaints is one of the ways to a safer health care system

- Dissatisfied patients or relatives
- A streamlined complaint system
- Feedback to the Health Care System
- Improvements in Health Care
Regardless of outcome, the medical profession still needs to operate on or to treat patients who have high risks of dying despite the treatment if the balance of probability is in favor of treatment.
Unlike aviation which can cancel flights when the risk of flying is high
In Medicine, things can go wrong in treatment of a patient even with the best available care;
The medical practitioner cannot be blamed every time something goes wrong;
We must also protect the medical practitioners to provide good medical treatment without fear;
Otherwise no medical practitioners are willing to treat high risk patients; and
and Medical practitioners will be practicing ‘defensive medicine’.
Distinguishing features of the medical profession

- We are dealing with life and death
- We can do good but we can also cause harm
- We belong to a self-regulating group
- Those who transgress accepted standard of conducts by their peers will be sanctioned by a self-regulating body

This self-regulating body is The Medical Council of Hong Kong.
How can the Medical Council:

- Protect medical practitioners who provides good medical treatment without fear
- Sanction those who transgress and accept standards of conduct by their peers?
The challenge:
Balancing public interest and medical practice

Public Interest

Doctors to practise without fear
Another challenge:
The concept of Fitness to Practise
Fitness to practise medicine

Unfit:
- Bad doctors
- Poor doctors
- Unhealthy doctors

Correctable to protect the public

Fit:
- Must be protected
A Bad Doctor

- Poor medical ethics
- Poor attitude
- Even with adequate medical knowledge and skills, can harm patients by using his knowledge or skills in deceiving money from his patients by
  - Carrying unnecessary investigations and treatments
  - Threaten patients into accepting unnecessary treatments
  - Negligently carry out medical procedures
- Sexually abuse or have sexual relations with patients
A Poor Doctor

- Fails to update his knowledge/skills
- Poor in terms of medical knowledge and clinical skills
- Uses outdated knowledge and skills, thus causing harm to his patients
Unhealthy Doctors

- Unfit to practice due to health or mental reasons
- Poor physical health
- Mental diseases
- Alcoholism
- Drugs
- Excessive stress

Can make a doctor temporarily or permanently unfit to practice
The Medical Council of Hong Kong

<table>
<thead>
<tr>
<th>Ensuring Justice</th>
<th>To both the public and to the doctors who are fit to practice medicine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maintaining Professionalism</td>
<td>Ethics, knowledge/skills</td>
</tr>
<tr>
<td></td>
<td>Register for qualified medical practitioners</td>
</tr>
<tr>
<td></td>
<td>Register for specialists in different disciplines</td>
</tr>
<tr>
<td>Protecting the Public</td>
<td>From bad doctors, poor doctors and unhealthy doctors who are physically or mentally unfit to practice medicine</td>
</tr>
</tbody>
</table>
## Number of complaints processed by the Medical Council

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<thead>
<tr>
<th>Year</th>
<th>Number</th>
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<tr>
<td>2007</td>
<td>472</td>
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<tr>
<td>2008</td>
<td>469</td>
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<tr>
<td>2009</td>
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<tr>
<td>2011</td>
<td>461</td>
</tr>
<tr>
<td>2012</td>
<td>463</td>
</tr>
<tr>
<td>2013</td>
<td>452</td>
</tr>
<tr>
<td>2014</td>
<td>624</td>
</tr>
</tbody>
</table>

*(including an influx of 191 complaints referring to a same incident).*
Challenge to fairness: Disciplinary proceedings

3-stage proceedings:
(i) initial screening of the information/complaint received;
(ii) meeting of the Preliminary Investigation Committee (PIC); and
(iii) disciplinary inquiry
The disciplinary inquiry

- Inquiry proceedings similar to those of a “tribunal”
- Both the “prosecution” and “defence” can make submissions and adduce evidence
- Usually legally represented
- The complainant and/or other witnesses can be summoned to give evidence
- The inquiry panel comprises of members of the profession and at least a lay person
### Number and nature of disciplinary inquiries conducted by MCHK

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<tr>
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<tbody>
<tr>
<td>Disregard of professional responsibilities to patients</td>
<td>12</td>
<td>13</td>
<td>8</td>
<td>15</td>
<td>10</td>
<td>11</td>
<td>10</td>
<td>15</td>
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<tr>
<td>Conviction</td>
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<td>3</td>
<td>3</td>
<td>6</td>
<td>6</td>
<td>2</td>
<td>4</td>
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<tr>
<td>Labelling of drugs</td>
<td>-</td>
<td>2</td>
<td>2</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Issuing misleading, false medical certificates</td>
<td>8</td>
<td>2</td>
<td>2</td>
<td>1</td>
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<td>-</td>
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<tr>
<td>Advertising/canvassing</td>
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<td>3</td>
<td>4</td>
<td>10</td>
<td>4</td>
<td>-</td>
<td>10</td>
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<tr>
<td>Others</td>
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<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
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<td>Total</td>
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<td>28</td>
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<td>No. of complaints received</td>
<td>472</td>
<td>469</td>
<td>493</td>
<td>476</td>
<td>461</td>
<td>463</td>
<td>452</td>
<td>624</td>
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</tbody>
</table>
Some recent trends in complaints

- Professional jealousy - doctors are complaining against other doctors in an attempt to protect one’s turf, in areas of specialty and qualification claims.

- Complaints of Sexual nature - e.g. relationship with patient’s spouse, underskirt photography, breast grabbing in the wards, touching and exposure, flirtatious remarks to patients, etc.
Medical ethics and medical law

Do they combine to form a cohesive unit?

Do they benefit each other?

It may be argued that they do not, but rather suffer a symbiotic relationship clashing rather than cooperating.

You may avoid Disciplinary Inquiries, but What is right?
Medical ethics: What is right?

- **Moral (道德)** - comes from Latin ‘mos’(mores)
- **Ethics (倫理)** - comes from Greek ‘ethos’
- Both have meaning of **customs (風俗)**, or generally accepted **social norm**
- But ‘What is right’ is not just a matter of social norm (e.g. slavery was a social norm at one time)
- **Professional norm** is not always right, it does revise over time
- **What is legally permitted** is not always right
Medical ethics dilemma

- Money - e.g. acting dishonestly, fraudulently, promoting pharmaceutical products and performing unnecessary procedures, unnecessary referrals to specialists
- Peer relationship - e.g. informing patient of other medical professional’s incompetency and their high fees
- Confidentiality - e.g. disclosing, withholding and sharing of patient’s information

Integrity - What we do when we think nobody is watching!
Medical ethics dilemma

- Bioethics
- Care of terminally ill
- Reproductive technology and embryo research
Medical ethics dilemma

- Life, death and pain - abusing a patient’s trust or other fundamental right
- Practice Promotion/Advertising in a way designed to mislead regardless of local culture and legal system
Medical Legal Challenge: Regulation of practice promotion/Advertising

Appropriate scope and limits to be set should be critically approached against the background of the history of medical ethics:

- Need to attentively considering local culture, legal systems, and expectations
- Need to preserve a collegial spirit among medical practitioners (avoid creating antagonism)
- Need to avoid undue competition and commercialism
- Need to allow Hong Kong’s private health care sector more adequately to compete on the Mainland
Any doctor who is aggrieved by any order of the Council is entitled to appeal to Court of Appeal, and to the Court of Final Appeal as appropriate, against the order made by the Council within one month from the date of service of the order.

The famous case of Kwong Kwok Hay of Hong Kong Sanitorium versus Medical Council
Practice promotion/ Advertising

Dr. Lee, a medical practitioner, expressed that medical advertisements are essential in today's competitive market. Citizens make informed decisions based on advertisements and promotional activities of medical practitioners. In particular, Dr. Lee emphasized the importance of the integrity and credibility of medical advertisements. It is crucial that advertisements be truthful and not misleading to ensure that citizens do not make hasty decisions when choosing medical services.

Dr. Lee also discussed the ethical implications of advertisements. It is mandatory that medical practitioners conduct thorough research before launching advertisements to ensure that they are informative and beneficial to the public. Moreover, advertisements should not promote unnecessary medical procedures or therapies.

In conclusion, Dr. Lee advocated for a more responsible approach to medical advertisements, promoting transparency and honesty to build trust between medical practitioners and the public.
Beyond Medical/ Legal / Ethics
Conflict and the healthcare service

The healthcare workplace is a fertile ground for conflict because of the dynamic and interdependency of the various relationships that exist between:

- Physicians and administrators
- Physicians and other physicians
- Physicians and nurses/other healthcare workers
- Physicians and patients/family members
Serious conflicts: Violence against doctors in China
Why?

Patients are unhappy with their doctors and the treatment received.
Ways of responding to conflict

**Thomas-Kilmann Conflict Modes**

**COMPETING**
- Zero-sum orientation
- Win/lose power struggle

**COLLABORATING**
- Expand range of possible options
- Achieve win/win outcomes

**COMPROMISING**
- Minimally acceptable to all
- Relationships undamaged

**AVOIDING**
- Withdraw from the situation
- Maintain neutrality

**ACCOMMODATING**
- Accede to the other party
- Maintain harmony

**ASSERTIVENESS**
Focus on my needs, desired outcomes and agenda

**COOPERATIVENESS**
Focus on others’ needs and mutual relationships

HONG KONG ACADEMY OF MEDICINE
Conflict resolution training for medical professionals

“Communication is at the heart of both conflict and conflict resolution.”
Trust in medical practice

- **Trust** is essential to the practice of medicine.
- There can be no medicine in the absence of trust.
- The patient’s trust imposes upon the doctor a corresponding duty to be trustworthy and accountable.
Empathy in medical practice

No treatment is 100% guaranteed. We should emphasize that in our discussion with our patients before starting therapy and maintain proper documentation.

Nothing replaces empathy and time spent explaining to patients.
To avoid disciplinary inquiry

- Respect Patient’s Autonomy
  - Informed consent
  - Maintain patient’s confidentiality
- Do no harm
  - Practice within your own limitation
  - Upkeep your knowledge and skills
- Be courteous
- Never criticize other doctors
- Communicate well
- Do not deceive
- Do not advertise
- Report all cases of conviction of a disciplinary offence punishable with imprisonment to the MCHK including careless driving
Medical Indemnity - Protecting doctors

MPS Obstetric Cover
Occurrence to Claim-made Basis

- Lack of consideration for tail cover
  - Created anxiety about long term welfare of the professional
  - not just a matter of subscription fees
- Some senior Obstetricians abruptly withdraw from labor wards
- Immediate impact on manpower: retirement, retention & enrollment
MPS Obstetric Cover
Occurrence to Claim-made Basis

- Remedies from HKCOG
  - Review/ improve health systems
    - Tightening to labor ward risk management, documentation of newborn normality
  - Analysis of situation: change of financial reference time point
    - from entry time to retirement time

- New insurance provider?
  - A mission possible
  - Claim-made basis with reasonable tail cover
  - Unlimited coverage realistic/ a reality?
Do we need more regulation to address medical legal challenges?

Regulation can signify any measure or intervention carried out by government, or on behalf of government or some other statutory body, that seeks to change the behavior of individuals or groups; and to monitor those changes, and to act where it thinks necessary.

Let us maintain our “Professional Autonomy”
GMC: The role of the 21st regulator

- **Medical School**
  - Set standards and outcomes and inspect medical schools

- **Foundation Programme**
  - Approve entry to the register, foundation programme curricula and the educational environment

- **GP/ Specialist**
  - Approve specialist curricula, programmes and posts and require assurance about the quality of the educational environment

- **Ongoing Practice**
  - Require on-going assurance of competence and fitness to practice, and support for doctors from their responsible officer

**GMC**