Legal Issues for the Medical Practitioner

David Sau-yan Wong

MBBS (HK), FRCS Ed, FRACS, FCSHK, FHKAM,
LLB (Lond), LLM (Lond), PCLL (HK)

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About the author

Dr. David Sau-yan Wong (黃守仁醫生) studied at the Diocesan Boys' School in Hong Kong. He then pursued medicine and graduated from the University of Hong Kong in 1982, with the CP Fong Gold Medal and the Gordon King Prize. He was then trained to be a surgeon and has remained in the public service. Presently Dr. Wong is a consultant plastic surgeon at the Prince of Wales Hospital. He is also an honorary associate professor in both the University of Hong Kong and the Chinese University of Hong Kong, and an honorary consultant to the Department of Health, HKSAR. Dr. Wong has been on the committees of the Hong Kong Society of Plastic, Reconstructive and Aesthetic Surgeons, the Hong Kong Head & Neck Society, and the Hong Kong Burns Society. He has also been the secretary of the plastic surgery board of the Hong Kong College of Surgeons. Dr. Wong has published more than 40 peer reviewed scientific articles.

Dr. Wong has been interested in the law since early student days and has continued to use his spare time to read the law. In recent years, Dr. Wong has obtained the degrees of LLB (London), LLM (London) and the PCLL (HK).

Disclaimer

The author does not purport to represent that the views presented in this book are those of a lawyer providing legal advice. The text is only aimed at supplying the reader with general legal knowledge related to medical practice. The reader is strongly advised to seek proper legal advice in case of need.

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Registration – the meaning

It might be better to present this topic in the form of questions and answers.

Q: How can one **lawfully practise medicine** in Hong Kong?
A: Be a registered medical practitioner, i.e. obtain a licence to practise medicine.

Q: Why do we need to get registered if we already have a medical degree?
A: A medical qualification or degree from a university is merely evidence of medical education, not a licence to practise medicine.

Q: What penalty is there to **practise without registration**?
A: Potentially imprisonment for up to 5 years, and if resulting in personal injuries, up to 7 years.

Q: What about **fraudulent registration**?
A: Potentially imprisonment for up to 5 years.

Q: Is simple registration per se sufficient?
A: Registration, if accepted, would result in the issue of a licence to practise medicine. In addition to this, a valid practising certificate is required under section 20A of the Medical Registration Ordinance, Chapter 161 of the Laws of Hong Kong. This practising certificate has to be renewed

annually by application subject to a fee and submission of no conviction in the form of a declaration (section 5 of the Medical Registration (Miscellaneous Provisions) Regulations, Chapter 161 of the Laws of Hong Kong).

Q: Who takes care of registration?
A: The Medical Council of Hong Kong.

Q: Who is to seek **Limited Registration**?
A: Limited registration is for the purpose of employment of a medical practitioner who is only registered outside Hong Kong, of good character, with approved overseas qualifications and with the relevant experience.

Q: Is there **exemption** from registration?
A: Under section 29 of the Medical Registration Ordinance, medical officers of Her Majesty's Forces serving on full pay in Hong Kong, or ships' surgeons while in the discharge of their duties, are exempted.

Q: What about **Provisional Registration**?
A: This applies to practitioners who have passed the qualifying degree examination or the licentiate examination and is for the purpose of their initial employment.

Q: Is registration always linked to **licence to practise**?
A: Not necessarily. In the United Kingdom, a proposed change in the regulation of the medical profession is that the two will be delinked. A medical practitioner will need to be both registered and to obtain a licence to practise. The latter will require revalidation meaning demonstration of practice of a standard up to that prescribed by the General Medical Council. The purpose of the delinkage is apparently an

attempt to enforce continuing professional development and to ensure fitness to practise.

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3. The website of the Hong Kong Medical Council at http://www.mchk.org.hk/doctor/index.htm.

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I want to see Dr. X!

Not uncommonly in public hospital settings patients returning for follow-up request to see a particular doctor. If that particular doctor is around and on duty, quite often we allow them the convenience. On the other hand, do patients have such a right in the first place?

The answer obviously depends on whether the scenario is one which concerns a private institution or clinic, or whether it is the public service. In the private sector, the customer is always right as they are the source of your income. In the public hospitals, however, this is not the case although the trend is to look upon the provided service in a business sense and customer satisfaction is emphasised.

Strictly speaking, a **public patient** is public. This means that he is a patient of the Hospital Authority. The doctor employees are agents of the principal, i.e. the Authority, and carry out medical treatment on its behalf. The relationship is between the patient and the Authority.

Having said that, the doctor is a highly respected professional in society and the patient confers upon him trust and confidence. It is therefore also difficult to argue that the doctor concerned should not do his best to serve the requesting patient if at all feasible. Nevertheless, it is equally correct to say that an unreasonable demanding patient need not be entertained.

The conclusion is that the patient has no absolute right to demand seeing any particular doctor. If the particular doctor is available and pleased to do so, he has the discretion whether to entertain the request or not.

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Avoiding complaints

Complaints are annoying. Complaints are disgusting. Complaints are distressing. Complaints are insulting. Complaints are disheartening.

Honestly, no one wants complaints, although modern management theories see complaints as 'opportunities for improvement'. Certainly, if a doctor receives complaints all the time, the supervisors will be wondering what is wrong with that doctor.

Can we avoid complaints? The answer is perhaps not too encouraging because it is no. A complaint is basically something arising out of a mutual relationship between two parties. You can be prudent and professional. The other party, however, can always be insane and unreasonable.

But we can reduce the chances of being a victim of a complaint.

How?

The solution will be clear if one is to first look into the reasons why patients file complaints. Patients complain because they are unhappy with something. If the subject of their complaint is you as a doctor, then they are unhappy with you.

'Why should a patient be unhappy with me?' one may immediately ask.

According to information derived from a vast number of cases handled by the Medical Protection Society, very often there is already some disappointment with the doctor-patient interaction on the part of the patient. This may be due to the doctor being too much in a hurry, having not addressed the patient's main concerns, having not shown empathy, or having not given the patient sufficient chance to voice his worries, etc. These are predisposing factors for complaints. The result

is that the patient is not pleased with the doctor concerned. He or she may even be angry at the doctor. Yet it often takes more than simply an unsatisfactory encounter for the patient to take action.

What triggers the outburst is a precipitating event. Examples of such are a known complication occurring, a minor mistake on the part of the medical personnel, a slight confusion of arrangements caused by miscommunication between colleagues affecting the patient, etc. One or more of these is enough to cause the patient to speak out and take the case to the hospital's patient relations manager. Under ordinary circumstances, these latter events are not really significant enough to set anything in motion nor would they be sufficient to warrant any litigation. However, they have now become instrumental in causing a disaster because the patient had been 'prepared'. They are the straw which breaks the camel's back.

How to avoid this situation now becomes clear. To reduce the risk of a medical practitioner being the subject of a complaint, spend more effort in developing a better doctor-patient relationship.

Some doctors will question why if they have been very nice to a patient, the patient is still unhappy with them. The answer here is that it is not the doctor's perception but that of the patient which counts. A medical practitioner therefore has to be very sensitive and tailor his behaviour to the 'needs' of the patient.

We keep on hearing stories of forgiving patients despite their having been on the receiving end of a clinical error. Studies indeed have shown that complaints and legal action are most often not made or taken against negligent doctors but against those whom patients were not happy with. Quite logically, if patients are pleased with you and are thankful, they will not at the same time think of challenging or harming you.

The culture of modern medical care has changed from what it used to be. It is not wrong to say that concepts of consumerism have superseded paternalism. A team-based approach is emphasised and heroic individualism is no longer in vogue. We nowadays constantly review our policies and standard teachings with evidence-based

data to guide our decisions. We treat our errors positively and make improvements instead of hiding and covering them up. We investigate problems to fix them rather than assigning blame.

One aspect of the doctor's practice has remained unchanged. In an article in the Surgical News of the Australasian College of Surgeons, a medical insurance group advised on good medico-legal risk management and emphasised that 'good old-fashioned etiquette never goes astray'. Five Cs were raised as important in reducing risk: competence, culture, communication, courtesy and candour. Competence, often taken to be the only factor of importance by many more experienced doctors, is just one of the five.

The author has a real story to tell. A doctor who was working in the same department years back once performed a hernia repair on the wrong side. Those were the days when there was still nothing like a surgical checklist before putting a patient to sleep. The 'unfortunate' doctor was very worried. What made things worse was that the elderly patient went on to develop postoperative bronchopneumonia and his condition deteriorated a little more each day. What could one have done apart from praying and doing whatever possible medically? The young doctor talked to the relatives at length each day and was honest about what had happened. He explained, counselled, provided support, showed empathy, did what he could have done and repeatedly did so. To be frank, I was not really sure if the doctor's motive was one of genuine kindness and good or whether he was merely putting on a show. What was in no doubt was the end result when the old gentleman passed away. To the surprise of every member of the department, a thank-you card was sent to the chief in honour of the young doctor who had been the very wrongdoer from the start. The relatives were so grateful for the treatment received they disregarded the mistake!

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Writing expert opinions – charging, competence and liability

When a medical practitioner picks up the phone to find that he/she is being asked to act as an expert in a court case, often the following issues will arise:

- Are you eligible to be an expert and to accept an offer of writing up an expert opinion?
- Are you free to charge as much as you wish so long as the party requesting the report agrees?
- Are you subject to liability for negligence as a result of writing an unsatisfactory report?

The requesting party might be a law firm, the police, or the Legal Aid Department, etc, and will usually briefly outline the case and seek your view as to whether you can take up the case.

First, who is **an expert**? Whether a particular doctor is an expert is for the judge to decide. Factors such as qualifications, training and experience are relevant in the consideration. The ultimate test is whether one possesses the necessary expertise so as to enable the formulation of the required opinion. Basically, the purpose of the court in asking for an expert opinion is to summon the necessary expertise required for it to determine an issue which falls outside its expertise. It is therefore clear that the expert's opinion is of an assisting nature only, and the final decisive opinion remains that of the judge or the jury. Indeed the court has the discretion to decide how much weight to give to the expert's opinion. In the first section of a professionally written expert opinion, it is customary for the expert to enumerate his qualifications and experience, such as his number of years in the field, his position

in university service and the number of relevant publications he has produced.

Second, **charging**. It might seem obvious to the reader that the offer and acceptance of writing an expert opinion is a straight forward agreement between two parties and therefore, owing to the English concept of freedom of contract, no third party can intervene with the terms provided that the contract is not illegal. This is all nice and simple and is correct. However, should the case proceed all the way to court, which is actually uncommon because parties usually will have settled in due course, the court will decide upon the fees warranted according to the usefulness of the opinion in the case. The taxing master will estimate the amount of fees allowed depending on the complexity of the facts, the amount of time spent and the standing of the expert. There is therefore no guarantee that the commissioning party, even if he wins the case and is awarded the costs, can recover the exact amount of the fees paid to the expert.

Third, is it safe to be an expert witness? The traditional position is that it is. The rationale of **immunity from negligence** claims was originally developed to give individuals the confidence to give evidence at trial without fear of reprisal. However, this needs to be updated in view of recent changes. It is increasingly being argued that experts are professionals who are paid for their expertise and therefore should be subject to the same rules of negligence as professionals so that the injured party can seek redress for any loss incurred. The topic has become a rather hot one in recent years in the United Kingdom and already it is becoming clear that in civil litigations, only those reports prepared for the principal purpose of testifying in court would attract witness immunity. It is notable that the argument that the overriding duty of an expert is to the court rather than the party employing the expert is no longer considered a valid reason to support the long held 'blanket immunity' given to barristers since the famous case of *Arthur JS Hall & Co v Simon* (2002).

Most of the claims arising in this context allege negligent underestimation of prognosis causing an undervaluation in the amount

of settlements. In the article 'How safe are expert witnesses?' by Kirsten Miller in volume 13 of Casebook published by the Medical Protection Society in 2005, the author advised against being pressed for particular conclusions and raised the importance of including further treatment as a suggestion when it is indicated. In any event, it is prudent not to express any opinion outside the scope of one's expertise.

The interested reader is referred to the Code of Guidance on Expert Evidence 2001, which was produced by a Working Party set up by the then Head of Civil Justice in England in relation to the Woolf civil reform and the implementation of the Civil Procedure Rules 1998.

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Good practice versus legal requirement

It is increasingly common to come across the term ‘good medical practice’ these days and guidelines for what constitutes good medical practice are regularly issued by authoritative professional bodies such as the General Medical Council.

It may be useful to be clear in one’s mind the purpose for stating what is good medical practice. Good practice is, as its name suggests, what is regarded as good in medical practice. To be ‘good’ often actually implies a degree of ‘better’ practice in the presence of alternative ways of doing things.

Many a time good practice incorporates what is legally required. Indeed, good practice often exceeds **legal requirements** and goes further with a view to the better management of patients.

The point is best clarified by an example again. Patients often default appointments for investigations for one reason or another. Let’s say it’s a colonoscopy examination where a patient is to be admitted as a day case for the procedure. The patient fails to turn up. What are the duties of the hospital in tracing the patient? What would be the hospital’s liability for not doing anything to recall the patient? What if the patient turned out to have a colonic cancer and diagnosis and treatment were delayed as a result of the default? The truth of the matter is that the patient has every right not to turn up. He has the full right to go to any other doctor or institution. He has the full right to come back later for an appointment if he chooses to do something else in the meantime which he considers more urgent. Should his default cause his demise, he is to be blamed. Such was the immediate cause of any resulting damage and the caring doctors should be safe from reproach, provided that they have

explained, to the patient's understanding, the indications and necessity for the investigation.

On the other hand, had the hospital been diligent enough to trace the patient and to remind him of the appointment and to advise him to return for further work-up that would be considered good medical practice.

To sum up, good medical practice is in a way doing **more than obligatory** in order to provide a better and safer service. It is something in line with our much valued modern culture of quality and exceeding expectations as well as process re-engineering for continuous improvement.

We are certainly prepared as professionals to do our best and to do more than what the law requires. The latter should only prescribe the minimal standard of tolerance below which some form of prohibition and penalty becomes mandatory.

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