

Case Study

Dato' Dr. Lee Yan San Elected Council Member

There was a letter of complaint to Malaysian Medical Council ("Council") from Mdm S against Dr N for refusing to refund RM7056 after her facial treatment left her with "incurable and visible scars and marks on the face".

After the first hearing by the Preliminary Investigations Committee ("PIC"), the PIC unanimously agreed that there were grounds to support the allegation under regulation 29(4)(b). A date for defense by Dr N was then fixed after the PIC took note of the draft charge framed by the legal advisor.

However, a letter was received from respondent's legal counsel stating that Dr N elected to make his defence before the Council.

A COUNCIL disciplinary hearing was held. After taking into consideration all the statements, documents, and clarification from the relevant parties, the Council unanimously found that no case has been made out against the respondent under Regulation 31(5) and directed that the charges be dismissed.

However, there are lessons from this case for medical practitioners.

Circumstances

1. Dr N had a patient named Mdm S ("the Patient") who engaged his service for facial and body treatment at his place of practice at the Aesthetic Centre.
2. Mdm S paid Dr N the sum of RM2976 for the facial treatment and RM5100 for the body treatment.
3. Dr N had appointed one Ms L, who is not a registered medical practitioner to carry out the facial treatment on the patient.
4. Mdm S suffered injuries on her face in particular on her chin areas which left the patient with visible scars and marks as a result of the treatment.
5. Mdm S was dissatisfied with the facial treatment provided and cancelled the body treatment and requested for a refund of the monies paid for the facial treatment and the cancelled body treatments.
6. Dr N had not refunded the monies to the patient.

Charges

The Respondent was charged with infamous conduct in a professional respect under section 29(2)b of the Medical Act 1971 and if found guilty, punishable under section 30 of the same Act.

The charges were:

1. "That you had disregarded and neglected your professional responsibilities, and violated the Code of Professional Conduct as adopted by the Malaysian Medical Council as you have employed and/or permitted an unqualified and/or unregistered medical practitioner to attend and/or treat and/or perform treatment upon the patient.
2. That you had conducted yourself in a manner derogatory to the reputation of the medical profession and violated the Code of Professional Conduct as adopted by the Malaysian Medical Council in that you have involved yourself in improper financial dealings by failing to refund to the patient monies for treatment which has not been carried out."

The disciplinary jurisdiction of the Council is provided for under section 29 of the Medical Act 1971 viz:

- (1) "The Council shall have disciplinary jurisdiction over all persons registered under this Act.
- (2) The Council may exercise disciplinary jurisdiction over any registered person who-
 - (a) has been convicted in Malaysia or elsewhere of any offence punishable with imprisonment (whether in itself only or in addition to or in lieu of a fine);
 - (b) has been guilty of infamous conduct in any professional respect;
 - (c) has obtained registration by fraud or misrepresentation;
 - (d) was not at the time of his registration entitled to be registered; or
 - (e) has since been removed from the register of medical practitioners maintained in any place outside Malaysia."

Discussion

Charge 1

The matters discussed included:

- a. The current status in regards to doctors practising aesthetic medicine in Malaysia.
- b. The photograph presented by the complainant could not be accepted as the date on one photo was prior to the incident. There were no dates on the other photos presented.
- c. The statement in the consent form was "I hereby give my full consent and release this establishment and its personnel and the doctor of any claims whatsoever now or in future in connection with this desired skin treatment." Whether this could be considered a valid consent was discussed. The consent form presented was like a sales and purchase agreement and the doctor's signature was not on the form.
- d. The definition of treatment was discussed i.e. what exactly was done to the complainant's face and whether drugs or equipment were used. It was noted that only glycolic acid was used by the beautician. It was also explained by the respondent that

glycolic acid is used in a lot of cosmetic products. Therefore this is a non-medical treatment.

The respondent's defence was:

- a. A full explanation of the risks involved in the facial Treatment was given to and accepted by the complainant.
- b. Consent was taken. This was witnessed by the complainant's sister and a clinic assistant.
- c. Two facial treatments were made by Ms L (a beautician) who was also the practice manager at the centre.
- d. The facial treatment was not a medical treatment and no medical procedure was employed.
- e. The facial treatment given to the complainant merely involved topical application with a brush of glycolic acid which is freely available over the counter as *Neostrata* and often use at home.

The Council took note of the respondent's defence and considered section 1.4.1 and 1.4.2 of the Code of Professional Conduct ("Code") which states:

"Neglect or disregard of professional responsibilities

1.4.1. Employment of Unqualified or Unregistered Persons.

The employment by a registered practitioner in his professional practice, of persons not qualified or registered under the Medical Act 1971, and the permitting of such unqualified or unregistered person to attend, treat or perform operations upon patients in respect of matters requiring professional discretion or skill, is in the opinion of the Council in its nature fraudulent and dangerous to the public. Any registered practitioner who shall be proved to the satisfaction of the Council to have so employed an unqualified or unregistered person will be liable to disciplinary punishment.

1.4.2. Covering.

Any registered practitioner who by his presence, countenance, advice, assistance, or cooperation, knowingly enables an unqualified or unregistered person, whether described as an assistant or otherwise, to attend, treat, or perform operation upon a patient in respect of any matter requiring professional discretion or skill, to issue or procure the issue of any certificate, notification, report, or other document of a kindred character, or otherwise to engage in professional practice as if the said person were duly qualified and registered, will be liable, on proof of the facts to the satisfaction of the Council, to disciplinary punishment."

After deliberation, the Council found that the procedure did not need qualified person as it is just cosmetic and directed that the charge be dismissed.

Charge 2

The complainant stated she did not receive the sum of RM7,056 which the respondent promised to refund her for both facial treatment and slimming treatment not done. The respondent had not provided evidence whether the cheque had been cashed or cleared. According to the respondent, a Mr O had apparently volunteered to handle the refund of

money to the complainant. The respondent stated that he paid the entire amount in a cheque to the patient through Mr. O.

The Council took note of the complaint and the respondent's defence. In considering whether there was an ethical issue, the Council considered section 3 of the Code which states:

“Conduct derogatory to the reputation of the medical profession

The medical practitioner is expected at all times to observe proper standards of personal behaviour in keeping with the dignity of the profession.

3.2.2. Dishonesty: Improper Financial Transactions

A practitioner is liable to disciplinary proceedings if he is convicted of criminal deception (obtaining money or goods by false pretences), forgery, fraud, theft or any other offence involving dishonesty.”

The Council found section 3.2.2 of the Code did not apply to the respondent as dishonesty had not been proven.

The Council's view was that it was up to the legal system to decide with regards to the refund of payment for services which had not been rendered. The Council noted that the complainant, through a translator, stated that the Consumer Tribunal had asked her to complain to Council. It was not in dispute that the Consumer Tribunal stated that this was not a proper forum for them to look at the matter and advised the complainant to go to court to commence legal proceedings

Fee splitting or any form of kickbacks was also discussed but there was no evidence adduced that it applied to this case.

The Council had to make a distinction between what was ethical, what was negligence and what was perhaps contractual.

After deliberation, the Council found that there was no ethical issue and directed that the charge be dismissed.

Discussion of some pointers to be learnt from this case

With reference to the Code and the facts of this case, the only issue that was ethical in the two charges was the first one. The second charge had actually nothing to do with the Code. It was just a question of recovery of money by a patient against a doctor and therefore no breach of ethics. However, if after a court hearing and the defendant is convicted of criminal deception (obtaining money or goods by false pretences), forgery, fraud, theft or any other offence involving dishonesty then the Council shall have disciplinary jurisdiction over the defendant. I also feel that if the respondent can prove without doubt that the doctor was dishonest by breaking his promise to refund the money, refusing to do so even though the complainant had solid proof that he had made the promise to refund the money then it could be dishonesty and thus an ethical issue and therefore a case for Council to consider.

Doctors should avoid making mistakes and must be aware of our Code of Professional Conduct which can be found at the Council's website. The person responsible must be willing to accept responsibility and not put the blame on others; so that he can learn from his mistakes and ensure it will not happen again.

A question also arises whether doctors should associate themselves with any non-medical personnel in treatment such as beauticians as related to the first charge.

Section 1.4.3 of the Code of Professional Conduct i.e. Association with unqualified or unregistered person, may need to be looked into. Although, it is not stated, are qualified doctors allowed to work in the same premise (under one company name) with an unqualified person such as a so called beautician?

The Council takes a particularly serious view of dishonest acts committed in the course of a practitioner's professional practice or against his patients or colleagues. Such acts, if reported to the Council, may result in disciplinary proceedings. Among the circumstances which may have this result are, the improper demand or acceptance of fees from patients contrary to the statutory provisions which regulate the conduct of the health services of the Government of Malaysia.

The Council also takes a serious view of the prescribing or dispensing of drugs or appliance for improper motives. A practitioner's motivation may be regarded as improper if he has prescribed a drug or appliance purely for his financial benefit or if he has prescribed a product manufactured or marketed by an organisation from which he has accepted an improper inducement.

The Council also regards fee-splitting or any form of kick back arrangement as an inducement to refer a patient to another practitioner as unethical. The premise for referral must be quality of care. Violation of this will be considered by the Council as infamous conduct in a professional respect.

However, fee sharing where two or more practitioners are in partnership or where one practitioner is assistant to or acting for the other is permissible.

Since Aesthetic Medicine has become very popular and more and more doctors are going into this field, Council needs to look into it more thoroughly. Council is presently preparing a guideline on Aesthetic medical practice which has not been finalized.

Some of the points that are related to the above case and also need to be stressed are:

- Evidence of training, both theory and practical.
- Selection of Patients and communication with the patient of the risks involved, possible outcome and obtaining of valid consent for the aesthetic medical procedure.

- Shall place client/patient safety as the primary concern and should provide aesthetic medicine services in an approved healthcare facility.
- The training and certification of a registered medical practitioner must be conducted by a recognized institution which must include basic sciences of aesthetic practice.
- Only medical practitioners so registered may offer aesthetic medical services.
- A registered medical practitioner engaged in aesthetic medical practice is presently not recognized as a specialist. (This should be looked into especially those who also practise invasive procedures which require higher surgical skill and specialization.
- The registered medical practitioner may employ non-medical, unregistered persons, (like beauticians, cosmetic therapists and others) to assist in his practice, but should not be associated with such persons as business or professional partners or as an employee.
- The registered medical practitioner shall be vicariously and totally liable for all untoward professional occurrences or adverse events that may become the subject of a complaint in relation to such assistants under his employment.

Values in medical ethics

It is helpful to note the four principles used in the analysis of medical ethics postulated by Tom Beauchamp and James Childress in their textbook Principles of Biomedical Ethics i.e.

1. Respect for autonomy - the patient has the right to refuse or choose their treatment.
2. Beneficence - a practitioner should act in the best interest of the patient.
3. Non-maleficence - "first, do no harm"
4. Justice - concerns the distribution of scarce health resources, and the decision of who gets what treatment (fairness and equality).

Other values which are often discussed include:

1. Respect for persons - the patient (and the person treating the patient) have the right to be treated with dignity.
2. Truthfulness and honesty - informed consent has increased in importance.