香 港 醫 務 委 員 會

The Medical Council of Hong Kong

DISCIPLINARY INQUIRY
MEDICAL REGISTRATION ORDINANCE, CAP. 161

Defendant: Dr SO Cheung Fai (蘇祥輝醫生) (Reg. No.: M05632)

Date of hearing: 24 and 25 June 2024 (Monday and Tuesday)

Present at the hearing

Council Members/Assessors: Prof. TANG Wai-king, Grace, SBS, JP
(Chairperson of the Inquiry Panel)
Dr HO Pak-leung, JP
Dr BEH Swan-lip
Ms FUNG Dun-mi, Amy, MH, JP
Mr HUI Cheuk-lun, Lawrence

Legal Adviser: Mr Edward SHUM

Defence Counsel representing the Defendant: Mr Alfred FUNG as instructed by
Messrs. Mayer Brown

Government Counsel representing the Secretary: Mr Gabriel CHEUNG

1. The amended charges against the Defendant, Dr SO Cheung Fai, are:

"That in or about September 2014, he, being a registered medical practitioner, disregarded his professional responsibility to his patient [redacted] *("the Patient") in that: -*

(a) he failed to properly and/or adequately advise the Patient of the potential risks and complications of the surgical treatment for removal of the cyst under local anaesthesia ("the Treatment") before performing the Treatment;

(b) he failed to obtain consent from the Patient before performing the Treatment;

(c) he failed to properly label the medications dispensed to the Patient with the name of the medicine(s) and/or method of administration; and/or

(d) he failed to take adequate/correct medical history of the Patient before prescribing medications to her.

In relation to the facts alleged, either singularly or cumulatively, he has been guilty of misconduct in a professional respect."

Facts of the case

2. The name of the Defendant has been included in the General Register from 8 March 1985 to the present. His name has never been included in the Specialist Register.

3. The Patient lodged this complaint against the Defendant in April 2017 accusing him of causing her to lose 70% of her renal function after receiving from him treatment to a small cyst on her chest and taking medicine(s) prescribed by him.

4. Briefly stated, upon referral from another doctor, one Dr LI, the Patient first consulted the Defendant on 4 September 2014 with complaint of a mass at her left chest wall for the past 5 years with occasional swelling and pain. There is conflicting evidence as to what had happened during the consultation on 4 September 2014.

5. According to the Patient's statutory declaration in support of her complaint dated 12 April 2017, she asked the Defendant during the consultation on 4 September 2014 whether her cyst could be removed by laser. The Defendant replied that her cyst was a sebaceous cyst and could be treated with laser. She then told the Defendant that she had proteinuria for over 10 years and chronic kidney disease for which she was treated by doctor(s) at Kwong Wah Hospital.

6. The Defendant disagreed. In response to the Patient's complaint, the Defendant submitted to the Preliminary Investigation Committee ("PIC") through his solicitors' letter dated 4 April 2019, *inter alia*, that:-

> "*13. … when Dr So treated the Patient in 2014, he had not been made aware of the Patient's medical history of proteinuria and hypertension and that she had been seen by the Renal Clinic of Kwong Wah Hospital…*
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> *14. When the Patient first attended Dr So's clinic on 4 September 2014, the Patient did not give any special medical history and mentioned that she had no known drug allergy. The following notes were clearly documented in Dr So's clinical record of 4 September 2014: "past hx – no special, drugs allergy – nil". Physical examination was performed for the Patient and a clinical diagnosis of a sebaceous cyst on the left chest wall was made. After Dr So discussed with the Patient the viable treatment options, including the option of surgery, and the potential risks of the surgery, Dr So specifically asked the Patient if she was on any medication. The Patient's answer was "no".*
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> …
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> *16. … We wish to emphasise that, as the Patient's treating doctor, it was reasonable for Dr So [to] expect the Patient to provide her full medical history in an accurate and truthful manner. It was unfortunate that the Patient did not disclose her full medical history to Dr So which would very likely have affected Dr So's management of her condition in September 2014.*"

7. But according to the Patient's statutory declaration in support of her complaint dated 12 April 2017, she specifically asked the Defendant whether he would use laser to treat her cyst and the Defendant replied in the affirmative. At no time during the consultation on 4 September 2014 had the Defendant mentioned about the words "手術" (surgery) or "切" (cut). Nor had he mentioned anything about the surgery: its nature, procedure, or potential risks and complications. The Defendant merely gave her a bag of medicine and told her to take the medicine before returning to see him at his Prince Edward Road clinic in the afternoon of 5 September 2014.

8. According to the Patient's witness statement dated 9 January 2024, when she arrived at the Defendant's Prince Edward Road clinic in the afternoon of 5 September 2014, she was asked by the Defendant's clinic assistant to sit on a

rectangular bed. Her eyes were covered with an eye mask and she was asked to lie down on the bed. The Defendant's clinic assistant then asked her to unfasten her upper garments. She felt a little sharp pain and then she had no sensation over the area of her left chest where the cyst was. After some time, the Defendant's clinic assistant told her to sit up and asked her to take a look at a bloody object of the size of a peanut inside a metal plate. Then she realized that surgical treatment had been performed on her.

9. In support of her complaint, the Patient also provided the Secretary of the Medical Council with copies of medicine bags given to her after consultation with the Defendant during the period from 4 to 15 September 2014.

Burden and Standard of Proof

10. We bear in mind that the burden of proof is always on the Legal Officer and the Defendant does not have to prove his innocence. We also bear in mind that the standard of proof for disciplinary proceedings is the preponderance of probability. However, the more serious the act or omission alleged, the more inherently improbable must it be regarded. Therefore, the more inherently improbable it is regarded, the more compelling the evidence is required to prove it on the balance of probabilities.

11. There is no doubt that each of the allegations against the Defendant here is a serious one. Indeed, it is always a serious matter to accuse a registered medical practitioner of misconduct in a professional respect. Therefore, we need to look at all the evidence and to consider and determine each of the disciplinary charges against him separately and carefully.

Findings of the Inquiry Panel

12. There is conflicting evidence as to what happened during the consultation on 4 September 2014.

13. We gratefully adopt as our guiding principles the following approach for assessing a witness' credibility as set out by Deputy High Court Judge

H Au-yeung in *High Fashion New Media Corporation Ltd. V Leong Ma Li* [2022] HKCFI 2234 at para. 14:-

"*(1) Generally speaking, contemporaneous written documents and documents which came into existence before the problems in question emerged are of the greatest importance in assessing credibility;*

(2) Importance should be attached to the inherent likelihood or unlikelihood of an event having happened, or the apparent logic of events;

(3) The court will also attach importance to the consistency of the witness' evidence with undisputed or indisputable evidence, and the internal consistency of the witness' evidence. The latter type of consistency is often tested by a comparison between the witness' oral testimony and his or her witness statement;

(4) The court should consider a witness' motive for deliberately not giving truthful testimony. For example, telling the truth may prejudice his interest, or a just determination of the litigation may affect his interest;

(5) It is essential to have regard to the entirety of a witness' evidence. A witness can make mistakes, but the mistakes do not necessarily affect other parts of his evidence. Likewise, a witness may lie. However, lies themselves do not mean necessarily that the entirety of that witness' evidence is to be rejected. A witness may lie in a stupid attempt to bolster his case, but the actual case nevertheless remains good irrespective of the lie;

(6) On the other hand, where it is shown that a witness has been discredited over one or more matters to which he has testified, this fact is relevant to the assessment of his overall credibility;

(7) While the court is entitled to take demeanour into account when assessing testimony, it should be borne in mind that demeanour can be deceptive and is therefore to be approached with care."

14. In our view, the truthfulness or otherwise of any part of a witness' testimony is essentially a question of fact to be decided by looking at the whole evidence. It is open to us, as a tribunal of fact, to decide in respect of any witness whether we can accept all the evidence of that witness, none of it or only some of it.

15. The Patient was adamant that the Defendant never mentioned during the consultation on 4 September 2014 the words "手術" (surgery) or "切" (cut) and let alone advised her of the potential risks and complications of the surgical treatment for removal of the cyst under local anaesthesia (the "Treatment").

16. Dr TSOI, the Secretary's expert witness, agreed with Professor LEE, the Defendant's expert witness, and we accepted that the Defendant's diagnosis of "*sebaceous cyst*" was correctly made. And we agree with Dr TSOI that "*[w]ith a clinical diagnosis of sebaceous cyst, surgical treatment is an appropriate choice*".

17. We find it implausible that the Defendant did not mention the words "手術" (surgery) or "切" (cut) during the consultation on 4 September 2014. Indeed, this part of the Patient's evidence is contradicted by the entry of "*Tx (treatment): Agreed Booking 05/09/18 (?05/09/14) at 3 pm for operation*" in the Defendant's contemporaneous consultation notes.

18. It is not disputed that the Patient was referred by her family doctor, Dr LI, in the morning of 4 September 2014 to consult the Defendant. According to the Patient, the referral was made because Dr LI told her that no laser treatment would be offered in her clinic. Dr LI never told her that her sebaceous cyst had to be surgically removed.

19. This part of the Patient's evidence is however contradicted by what Dr LI had stated in her memo dated 10 November 2020, a copy of which was attached to in the Defendant's second submission to the PIC through his solicitors' letter dated 28 December 2020. According to Dr LI, the Patient agreed with her

recommendation to have her sebaceous cyst surgically removed and requested her to make a referral to see another doctor for that purpose.

20. We disagree with the Legal Officer's submission that we should place no weight on the hearsay evidence of Dr LI. We need to remind ourselves that the burden of proof is always on the Secretary. Despite the memo of Dr LI was made available to the Secretary since December 2020, the Patient did not rebut in her witness statement dated 9 January 2024 what Dr LI had said. In this connection, Dr TSOI and Professor LEE both agreed, and we accept, that laser is not for treatment of sebaceous cyst. There was in our view no reason for Dr LI to refer the Patient to the Defendant for laser treatment.

21. Although the Patient had mentioned in her witness statement that when being asked by her, the Defendant replied that the treatment was by laser. However, when being cross-examined, the Patient told us that when being asked by her, the Defendant replied that he had laser in his clinics.

22. For these reasons, we do not accept the Patient's evidence that she had only laser treatment in her mind.

23. This is however not the end of the matter. Despite his claim that "*in accordance with [his] routine practice, [he] explained to the Patient the potential risks of surgery, including post-operative bleeding and wound infection*", the Defendant was constrained to accept that he made no record of the fact that he had advised the Defendant and let alone what were the potential risks and complications of the Treatment. Indeed, the Defendant agreed that "*in hindsight, it would have been good practice for [him] to document in greater detail [his] advice to the Patient as regards the Treatment, including… the potential risks of the surgery.*"

24. In response to the allegation that he "*had not given the Patient any explanation as regards the surgery and that the surgery was performed without her consent*", the Defendant submitted to the PIC through his solicitors' letter dated 4 April 2019 that:-

"*23. At the material time, the Patient was an adult of 51 years old with a sound mind… the Patient was given a chance to consider thoroughly Dr So's advice for the surgery after she left Dr So's clinic… There should have been more than sufficient time for the Patient to ask questions about the surgery, or even decline it, if she had concerns about the same. If the Patient did not fully understand the nature of the surgery or had doubts about it, she could well have requested further discussions with Dr So when she returned to see Dr So the next day… She could also have requested to postpone the scheduled surgery on 5 September 2014. However, she did not do so. Instead, she chose to return to Dr So's clinic to proceed with the surgery… There was no complaint by the Patient that she did not consent to the surgery before or after the same. Indeed, this allegation was only made by the Patient almost 3 years later in 2017.*"

25. We are unable to understand the logic behind the Defendant's explanation of why he believed the Patient could understand and accepted the Treatment. In our view, the fact that the Patient returned on the following day without asking questions about the surgery is neither here nor there.

26. Be that as it may, we do not agree with Dr TSOI that "*[t]he risks of surgery such as bleeding, wound infection, unsightly scar such as keloid formation must be explained clearly to the [P]atient before agreeing to surgery.*"

27. As the UK House of Lords aptly pointed out in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11:-

"*87. … The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.*

89. … The significance of a given risk is likely to reflect a variety of factors besides its magnitude: for example, the nature of the risk, the effect which its

occurrence would have on the life of the patient, the importance to the patient of the benefits sought to be achieved by the treatment, the alternatives available, and the risks involved in those alternatives. The assessment is therefore fact-sensitive, and sensitive also to the characteristics of the patient.

90. ... the doctor's advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that she is then in a position to make an informed decision. This role will only be performed effectively if the information provided is comprehensible..."

28. Although the House of Lords in the *Montgomery* case was mainly concerned about the risks of the recommended treatment, the legal principles expounded in the passages quoted above are equally apposite in our view to complications.

29. We disagree with Professor LEE that advice on the potential complication of unsightly scar would depend on whether the operation site is an exposed part of the body or not.

30. But then again, the Patient's sebaceous cyst was about 1.6 cm in size. In our view, a reasonable person in the Patient's position is unlikely to attach significance to the potential complication of unsightly scarring, particularly keloid formation, after the Treatment. Indeed, Dr TSOI agreed and we accept that there is no need to advise on the potential risk of keloid in this case.

31. For these reasons, we are not satisfied on the evidence that the case against the Defendant in respect of the amended disciplinary charge (a) has been made out. Accordingly, we find the Defendant not guilty of that charge.

32. Turning to the amended disciplinary charge (b), we need to remind ourselves that the Secretary's case is not concerned with whether written consent is "*a must*" in this case.

33. At the beginning of this inquiry, we gave the Secretary leave to amend disciplinary charge (b) by replacing "*informed consent*" with "*consent*".

34. The Legal Officer submitted that the primary case of the Secretary in respect of the amended disciplinary charge (b) is that the Patient never consented to surgical treatment for removal of her sebaceous cyst under local anaesthesia. As a fallback, the alternative case of the Secretary is that the Patient's consent was invalid because it was vitiated by the Defendant's failure to properly and/or adequately advise the Patient of the potential risks and complications of the Treatment.

35. The Legal Officer also sought to rely upon revised section 2.7 of the Code of Professional Conduct (2009 edition) promulgated by the Newsletter of the Medical Council in October 2011 which read:-

"*Consent is valid only if:-*

(i) it is given voluntarily;

(ii) the doctor has provided proper explanation of the nature, effect and risks of the proposed treatment and other options (including the option of no treatment); and

(iii) the patient understands the nature and implications of the proposed treatment."

36. We disagree with the Legal Officer's submission that the Defendant suffers no prejudice because he is fully aware of what the Secretary's case is. In our view, it is one thing to say that the Patient never consented to the Treatment but it is quite another matter to say that the consent given was invalid.

37. In our view, when considering the parameters of a disciplinary charge, we must give the charge its plain and ordinary meaning. We disagree with the Legal Officer's submission that the word "*consent*" covers both the primary and alternative cases of the Secretary. If the Secretary found it necessary to make this clear in the charge, amendment should be made by adding the phase "*the*

Patient did not consent to the Treatment and/or" in front of "*you failed to obtain informed consent from the Patient before performing the Treatment*."

38. Despite her claim that she had undergone laser treatment to her moles and flesh thorns before, we find it implausible that the Patient did not ask the Defendant anything about the potential risks and complications for removal of her sebaceous cyst by laser. This was the first time that she consulted the Defendant and Dr LI did not give her any advice before referring her to the Defendant.

39. We also find it implausible that the Patient never confronted the Defendant why the surgery was not performed by laser. Nor was there anything in the medical records obtained from Kwong Wah Hospital to support the Patient's claim that she had complained to her renal doctors about the Defendant. Indeed, the Patient was unable to give us a satisfactory explanation why she only lodged this complaint against the Defendant with the Medical Council almost 3 years later in 2017.

40. For these reasons, we do not accept the Patient's claim that she did not consent to the Treatment. Since we are not satisfied on the evidence before us that the Secretary's case against the Defendant in respect of the amended disciplinary charge (b) has been made out, we find the Defendant not guilty of that charge.

41. As regards the amended disciplinary charge (c), there is no dispute that name of the drug and/or the method of administration were found to be missing on some of the medicine bags, particulars of which are set out in the table annexed to this judgment.

42. The Defendant also accepted in his second submission to the PIC through his solicitors by letter dated 6 September 2022 that "*there were inadequacies in the labelling of the medications dispensed to the Patient… and… apologize[d] for his oversight.*"

43. It was clearly stated in section 9 of the Code of Professional Conduct (2009 edition) that:-

"*9.2 A doctor who dispenses medicine to patients has the personal responsibility to ensure that the drugs are… properly labelled before they are handed over to the patients…*

…

9.4 All medications dispensed to patients directly or indirectly by a doctor should be properly and separately labelled with all the following information:-

(a) name of prescribing doctor…;

(b) full name of the patient…;

(c) date of dispensing;

(d) name of medicine…;

(e) method of administration;

(f) dosage to be administered; and

(g) precautions where applicable."

44. In failing to properly label the medications dispensed to the Patient with the name of medicine and/or method of administration, the Defendant had by his conduct in this case fallen below the standards expected of registered medical practitioners in Hong Kong. Accordingly, we find the Defendant guilty of the amended disciplinary charge (c).

45. We gratefully adopt as our guiding principles the following statements of the law summarized by the learned author of *Michael A Jones: Medical Negligence* (6th edition):-

"[at 4-019]

… Of course, the patient also bears some responsibility to give truthful and frank replies when questioned by a doctor. Fraser J made this telling point in the Canadian case of Rose v Dujon:

"To be effective, communication must be bilateral. Doctors are not mind readers and it would be unrealistic and unfair to treat the doctor-patient relationship as one in which the doctor were constantly being tested to see if he could solve the patient's medical problems with limited or no relevant information from the key source—the patient. Diagnostic testing in a vacuum is time-consuming, costly and inefficient."

If the information given by the patient is misleading the doctor will not be held accountable for acting upon it, at least where it is reasonable to rely upon the information. It may not be reasonable where what the patient says is clearly contradicted by the symptoms, or where the patient may not understand the significance of the information or may not remember it, or where it is contradicted by information provided by others…

[at 4-021]

… On the other hand, there are limits to what can reasonably be expected of a general practitioner in attempting to elicit information from a patient. In Mellor v Sheffield Teaching Hospitals NHS Trust, Gross J commented that…

"With specific reference to general practitioners, there is a duty to make relevant inquiries of a lay patient arising out of the history given by the patient, together with the symptoms with which the patient has presented and to record those inquiries and the answers to them… The duty resting on the general practitioner to make inquiries is, however, necessarily limited. It is one thing to probe that which the general practitioner is told or can reasonably observe or already has reason to monitor; it is quite another to suggest that a general practitioner comes under a duty to cross-examine a reticent or unwilling patient; as it seems to me, the former is but the latter is not, at least generally, within the scope of any duty resting on the general practitioner.""

46. The Patient was adamant that she had repeatedly told the Defendant during the consultation on 4 September 2014 that she had proteinuria for over 10 years and hypertension. This part of her evidence is however contradicted by the

record made in the Defendant's contemporaneous notes for the consultation on 4 September 2014 that the Patient had "*no special*" medical history.

47. We are puzzled as to why the Patient might wish to withhold her medical history of chronic renal problems from the Defendant. But then again, the real point is, to use the words of the learned author of *Michael A Jones: Medical Negligence* (supra.): "*[i]f the information given by the [P]atient is misleading the [Defendant] doctor will not be held accountable for acting upon it, at least where it is reasonable to rely upon the information.*" or "*unless there was something to suggest that [the P]atient had… a medical history that might be relevant to her treatment and understanding.*"

48. Despite the Patient's claim that she lost 70% of her renal function and developed Hepatitis B after the surgery, there is nothing in the medical records obtained from Kwong Wah Hospital to support this part of her evidence.

49. We need to remind ourselves that the burden of proof is always on the Secretary and the Defendant does not have to prove his innocence. Also, the fact that the Patient has been discredited over numerous matters to which she has testified is relevant to our assessment of her overall credibility.

50. For these reasons, we are not satisfied on the evidence before us that the Secretary's case against the Defendant in respect of the amended disciplinary charge (d) has been made out. Accordingly, we find the Defendant not guilty of that charge.

Sentencing

51. We bear in mind that the primary purpose of a disciplinary order is not to punish the Defendant but to protect the public from persons who are unfit to practise medicine and to maintain public confidence in the medical profession by upholding its high standards and good reputation.

52. The Defendant has two disciplinary records.

53. The first disciplinary record related to the issue of 4 medical certificates to a patient in 1991, which contained statements that were untrue, misleading or improper.

54. The second disciplinary record related to the signing on one consent form for the use of physical restrainer in residential home for the elderly without making proper assessment records; and the Defendant's name was ordered in 2021 to be removed from the General Register for a period of 1 month and suspended for a period of 6 months.

55. We acknowledge that the first disciplinary record was a long time ago and not of a similar nature to the misconduct in the present case.

56. Since this case had happened before the event leading to the second disciplinary record, we shall not activate the suspended removal order imposed by the Inquiry Panel.

57. Taking into consideration the nature and gravity of the disciplinary charge for which we find him guilty and the mitigation plea, we order that a warning letter be issued to the Defendant. We further order that our order be published in the Gazette.

Prof. TANG Wai-king, Grace, SBS, JP
Chairperson of the Inquiry Panel
The Medical Council of Hong Kong

Annex

Drugs prescribed by Dr SO to the Patient

Date	Prescribed Drugs	Missing Information on the Medicine Bag
4.9.2014	Olfen 100 mg (to be taken three hours before operation on 5.9.2014)	Name of the drug and the method of administration
5.9.2014	Paracetamol 500 mg (three times a day)	N/A
	Cephalexin 250 mg (four times a day)	N/A
	Augmentin 1 gm (once daily)	Name of the drug
	Zopiclone 7.5 mg (once at night)	Name of the drug
	Nidol 100 mg 1 tab (once daily)	N/A
8.9.2014	Paracetamol 500 mg (three times a day)	N/A
	Codewon 2 tabs (once a day)	N/A
	Amplicox 500 mg (four times a day)	Name of the drug
	Zopiclone 7.5 mg (once at night)	Name of the drug
	Coritab 1 tab (three times a day)	N/A
10.9.2014	Paracetamol 500 mg (three times a day)	N/A
	Coritab 1 tab (three times a day)	N/A
	Ampiclox 500 mg (four times a day)	Name of the drug
	Zopiclone 7.5 mg (once at night)	Name of the drug
	Mucosolvan 1 tab (three times a day)	N/A
13.9.2014	Paracetamol 500 mg (three times a day)	N/A
	Cephalexin 250 mg (four times a day)	N/A
	Zopiclone 7.5 mg (once at night)	Name of the drug
	Mucosolvan 1 tab (three times a day)	N/A
15.9.2014	Paracetamol 500 mg (three times a day)	N/A
	Cephalexin 250 mg (four times a day)	N/A
	Zopiclone 7.5 mg (once at night)	Name of the drug
	Cyclovax 400 mg x2 (three times a day)	Name of the drug
	Doxyclcline 100 mg	N/A
	Vitamin C 100 mg	N/A