SECTION ONE

Principles and Concepts of Healthcare Law and Ethics

CHAPTER 1

Introduction

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1.1 Solid professional knowledge and skills are essential attributes in competent healthcare practitioners (HCPs), the education of which forms a major part of the curriculum at universities and training programmes. While knowledge and the applications of clinical ethics and laws have become more and more important in the practices of HCPs, there have been relatively little formal teaching and training in these topics in medical schools and specialty colleges. In March 2019, the Hong Kong Academy of Medicine established a Professionalism and Ethics Committee which has organised a series of seminars, workshops and a training course as well as published best practice guidelines for Academy Fellows and specialist trainees since then.[1] Most HCPs read up the professional codes of ethics issued by their respective regulatory and disciplinary bodies. With the increasing number of complaints and court cases relating to healthcare disputes, knowledge in healthcare ethics and law is increasingly important in the education, training and practices of lawyers as well.

1.2 The rapid developments of electronic communication in the past decades have resulted in a huge amount of clinical knowledge becoming readily available to patients and the general public. While some of the information is based on scientific data from renowned laboratories and well-designed clinical trials written by experts in different fields and published in reputable journals, others may not be so reliable and may even spread incorrect messages which do not have any scientific basis. At the same time, expectations of patients and the general public on the healthcare profession and the demand for transparency are getting higher and higher. HCPs are facing more challenges and dilemmas in their daily practices nowadays.

1 <www.hkam.org.hk/sites/default/files/annual_reports/Annual_Report_2021.pdf> accessed 21 October 2022.

1.3 It is with this in mind that this book is compiled, with the aim of helping HCPs to gain some basic and practical knowledge in the two important areas of clinical ethics and laws, so that they will become better practitioners upholding the standard of care, concentrate on taking care of their patients and stay away from unnecessary legal battles. Thirteen topics dealing with issues which concern HCPs most are carefully selected and arranged in five sections.

1.4 *Section One* is on the Principles and Concepts of Healthcare Law and Ethics. It consists of four chapters. The current chapter opens the first section. Chapter 2 presents the basic legal concepts relating to healthcare from the perspectives of public law, tort, contract law, family law and criminal law to broaden the horizon of HCPs' understanding of healthcare law at the individual and population levels, healthcare provisions as well as healthcare system operations under various legal paradigms.

1.5 Chapter 3 continues with a discussion on the new paradigm of healthcare ethics and morality towards patient-centred care for the best interest of patients. It helps HCPs to approach ethical issues based on those principles from both the healthcare and legal perspectives by reviewing literature and cases critically. The best interest for the patients should be balancing the harms and benefits to the patients, with justice and equity in mind.

1.6 Chapter 4 is an in-depth review on disclosure of information and patient-centred consent. The UK Supreme Court case of *Montgomery*[2] has laid down an entirely new set of legal principles governing clinicians' duty of care in the disclosure of information to patients for the purpose of obtaining a valid informed consent to the proposed treatment. This standard was endorsed by the Medical Council of Hong Kong.[3] This chapter discusses the relevant history and the legal reasoning underpinning that decision, and the legal, ethical and practical principles, which now govern the consenting process. The new law may appear harsh in placing a heavier legal burden on doctors, but many of the reported cases following *Montgomery* have shown that the claimants need to pass the legal test of 'causation'. This requires proof that, if the claimant had been given adequate information, he or she would still have refused the proposed treatment and avoid the harm. Where the treatment carried out

2 *Montgomery v. Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 143 (Supreme Court (Scotland))

3 Medical Council of Hong Kong, 'Implications of "*Montgomery (Appellant) v Lanarkshire Health Board (Respondent) (Scotland)*"' (2015) 22 (December) *Medical Council of Hong Kong Newsletter* 1.

was prospectively reasonable and necessary, judges are slow to find that causation in this sense would be proved.

1.7 Chapter 5 considers the duty of care, breach of duty of care, causation, gross negligence manslaughter, and telehealth practice. It provides a deeper dissection of the necessary legal elements in establishing civil claims in clinical negligence and a criminal charge of gross negligence manslaughter.

1.8 *Section Two* covers the Complaints, Disciplinary Proceedings and Indemnity Insurance. It consists of three chapters. Chapters 6 and 7 analyse in details the various aspects and different stages of the screening and disciplinary processes in the Medical Council of Hong Kong, especially the reforms after amendments of the laws in 2018. These two chapters provide a comparison of disciplinary proceedings against doctors, dentists, nurses and midwives. They look at Hong Kong's regulations of the HCPs from an international perspective and discuss their future developments. Ways in formulating reform strategies to improve the efficiency of complaint investigations and disciplinary inquiry schemes to reduce delay are also discussed.

1.9 Chapter 8 reviews professional indemnity insurance, which is very important should any adverse clinical event occur, about which most HCPs know little. It should offer protection to both HCPs and patients. This chapter explains occurrence-based and claims-made indemnity covers in details. As a result of the inflated claims and a shift of public and legislative expectations, changes are required in the areas of public education, risk management, tort law and the current professional indemnity industry, in order to develop plans which will benefit both doctors and investors in a sustainable indemnity insurance business.

1.10 *Section Three* consists of three chapters and is about the Confidentiality, Disclosure and Apologies. HCPs are under a duty to protect patients' confidential information obtained in their professional capacities such that patients will have no fear in providing information about their personal data and history of their health to assist their doctors to make correct diagnoses and give appropriate treatments. This principle is deeply rooted in the Hippocratic Oath[4] and affirmed in the International

4 World Medical Association, 'WMA Declaration of Geneva' (amended 2017) <www.wma.net/policies-post/wma-declaration-of-geneva/> accessed 31 January 2021.

Code of Medical Ethics.[5] HCPs are also subject to various statutory duties in collecting, handling, accessing and disclosing patient's data. The law in this area is sometimes far from clear leaving HCPs in dilemma situations. Chapter 9 discusses how HCPs can take a balancing act between the duty of confidentiality towards their patients and the overriding public interest on a case-by-case basis.

1.11 The behaviour of patients is intensely affected by the information their HCPs choose to share with them, especially after an adverse event. Studies have shown that patients' decision to take legal actions against their HCPs is often due to the insensitive handling and poor communication of the HCPs after mishaps, and not the extent of their injuries alone. It follows that good communication skills of HCPs play a very important role in the aftermath of adverse clinical events. Chapter 10 discusses what would be done in meeting the challenges of documenting models of good practice for open disclosure, testing these models and describing outcome measures which are applicable.

1.12 Chapter 11 discusses apologies and the Apology Ordinance. 'Sorry' can be the hardest word coming out from HCPs. In the past, legal advisors and indemnity providers often advised against offering any expressions of regrets or formal apologies, pending completion of investigations and understanding of the complaints and medical management, to protect individual HCPs' interests and positions. This kind of approach does not facilitate the resolution of disputes nor encourage a more co-operative approach. This chapter provides a clearer picture of what constitutes an apology and the purpose and implications on legal liability stemming from such making. Care must be taken before making apologies, as an insincere or improper apology may even irritate or cause further psychological/emotional damage to the complainants and aggrieved parties. Saying 'sorry' in Hong Kong is easier with the enactment of the Apology Ordinance in December 2017, which is the most comprehensive apology legislations in the world. The Apology Ordinance and other apology legislations are discussed in details. This chapter also discusses the challenges and the needs for more guidance and support for HCPs.

1.13 *Section Four* covers Alternative Dispute Resolution (ADR) and Relationship with Colleagues. With the introduction of the new Civil

5 World Medical Association, 'WMA International Code of Medical Ethics' (2006) <www.wma.net/policies-post/wma-international-code-of-medical-ethics/> accessed 31 January 2021.

Procedure Rules (CPR) in the U.K. and the Civil Justice Reform (CJR) in Hong Kong, the courts expect lawyers to resolve disputes using ADR. In Australia, solicitors also have the duty to advise their clients about the alternatives to fully contested adjudication of the cases[6] and should attempt to settle the disputes before commencing proceedings.[7] Chapter 12 examines the various aspects and advantages of mediation to resolve healthcare disputes. Mediation has received more and more attention in both the U.K. and Hong Kong. The potential use of two other forms of ADR, namely arbitration and collaborative practice, in healthcare disputes is also explored.

1.14 The healthcare community depends on building and maintaining intra- and inter-professional connections that are respectful and fair, and consistent with the professional principles and legal guidance of the day. It is no longer that certain HCPs should dominate the industry. Difficulty in intra- and inter-professional relationship can arise from fear of uncertainty. It can be less daunting if HCPs know more, especially from education perspective, and expose to it longitudinally as part of usual practice (undergraduate and postgraduate training to continuing professional education in clinical practices). Education in skills of conflict resolution and communication in teamwork, legal and ethical implications of clinical practice, and how to be HCPs in relationship with other colleagues within the same discipline and other disciplines should start early in training. Chapter 13 explains the relationship, cooperation and communication with colleagues as a team. It highlights some of the ethical and legal considerations in these tricky inter-professional issues, behaviours and practices and also between colleagues.

1.15 *Section Five* is on the Liabilities beyond Healthcare Practices and consists of Chapter 14, which examines the liabilities of the occupiers of healthcare institutes to their visitors, as well as shares the lessons learned from court cases. It will not achieve fruitful result of patient management if successful treatment is provided but the patient suffers from injury due to unsafe healthcare premises. HCPs also owe a duty of care to protect people patronising the healthcare premises from injuries. This chapter discusses the relevant law, shares some learning points from court cases and suggests a few possible precautionary measures to make HCPs aware that occupier's liability is no less important than daily clinical routines

6 Legal Professional Uniform Law Australian Solicitors' Conduct Rule 2015 (New South Wales) (ASCR), r 7.2.

7 Civil Dispute Resolution Act 2011 (Cth), s 4(1); ASCR r 21 — responsible use of court process and privileges.

such as prescribing medications and performing clinical procedures. The issues of patient safety should go beyond clinical interventions to include safety on premises.

1.16 Finally, the book ends with a chapter on concluding remarks.