

**ALLEN & GLEDHILL**

# **KNOWLEDGESHARE ALERT**

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Dear Clients & Friends

## **Covid-19 and issues facing the healthcare community: Standard of care in an evolving landscape**

The provision of healthcare services in a pandemic demands rapid response and adaptation. The healthcare community finds itself in situations where resources are altered, stretched, or lacking. The pandemic response has been described as a war. In the face of altered protocols and changing norms, are healthcare institutions and professionals expected to deliver in wartime, on the battlefield, the same standard of care required of them in peace time?

### **1. Standard of care**

We discuss the standard of care in two contexts: first, in the case of a claim in negligence for monetary compensation, and second, where a complaint is made to a healthcare professional's regulatory body. The question of whether the standard of care has been met is fundamental to establishing liability and/or professional misconduct.

In relation to a claim in negligence, the applicable standard of care would depend on whether the relevant conduct arises in the course of diagnosis and treatment, or in advising a patient. For diagnosis and treatment, healthcare professionals are held to the standard of reasonable and competent professionals of their respective seniorities and specialisations. A healthcare professional meets the standard of care as long he acts in accordance with the practice accepted as proper by a body of responsible similar professionals, and as long as this practice is logical. Similar concepts also apply when the claim is made against an institution. This is known as the "Bolam-Bolitho Test". As regards advice, the "Modified Montgomery Test" applies and requires that patients be advised of all relevant and material information, unless this information is not reasonably available, or there is sufficient justification for withholding the information (such as in an emergency situation).

In the context of disciplinary proceedings, a medical practitioner is guilty of professional misconduct where he has intentionally and deliberately departed from the standards observed or approved by members of the profession of good repute and competence, or when he has been so seriously negligent that this objectively portrayed an abuse of the privileges which accompany registration as a medical practitioner.

## 2. Working in a pandemic

These legal tests apply in a pandemic (or any emergency situation, for that matter). However, the application of such tests can be attenuated to address the situation at hand. In the context of diagnosis and treatment, what is reasonable will be assessed in light of the prevailing circumstances. The same can be said of what would be considered relevant and material information in the context of advice. Consideration will be given to prevailing circumstances such as government / institutional directives in force, and the need to triage and prioritise patients for the allocation of limited resources.

The Singapore Medical Council (“**SMC**”) Ethical Code and Ethical Guidelines (“**ECEG**”) recognises this, acknowledging that where a doctor is “*working in epidemics, pandemics, disasters and mass casualty situations anywhere ... circumstances are less than ideal*”. Further, the SMC Handbook on Medical Ethics (“**HME**”) recognises that doctors “*may be required to work flexibly, with manpower and resource constraints, often with overtime and during unsocial hours*”, and that doctors may be required to manage patients as best they can, even in situations where they are without specific competencies or experience.

What the ECEG requires is that “*as far as it is reasonably within [the doctor’s] ability to do so, [the doctor should] ensure that patient welfare is sustained and that [he does] nothing that would disrupt the ability of medical teams to provide care*”. The HME also provides guidance on how doctors engaged in such situations should conduct their practice, such as prioritising the interests of patients over other duties (for example, research and teaching) and keeping up to date with legislation, national or local plans and strategies for dealing with the situation.

The decision of *Noor Azlin Bte Abdul Rahman v Changi General Hospital & Ors* [2019] SGCA 13 gives some guidance as to the court’s approach when assessing the standard of care in challenging situations. In assessing the care provided by doctors in an emergency department, the Court of Appeal demonstrated willingness to take into account the unique working conditions in an emergency department (including high volume of patients and the need to make decisions at short notice in a highly pressurised environment) and to calibrate the standard of care accordingly.

That said, even if the court calibrates the standard of care, this does not mean that all conduct will pass muster. For example, challenging pandemic situations would not be a defence when healthcare providers have been derelict or have failed to put in place protocols / provisions which may reasonably have been required in the provision of their services.

We look at the application of the standard of care in two areas of concern to healthcare professionals.

## 3. Delayed care in non-urgent cases

The pandemic response has resulted in reduced resources such as manpower, operating theatres and ward beds for non-Covid-19 cases. Some patients have had the interval between routine reviews expanded; others have been advised to defer elective procedures.

A key concern is whether, having effectively made the decision to move away from optimal care which would otherwise be made available to patients, healthcare providers are now exposed to liability. This could arise, for example, if there is a delay in detection of disease recurrence due to a later-than-usual planned / scheduled review date (commonly known in the local healthcare community as a “TCU” date), or if a patient’s condition deteriorates before an elective procedure is performed.

In this regard, negligence or misconduct does not lie just because an adverse outcome occurs. Applying the “Bolam-Bolitho Test”, the central question is whether the decision to defer the TCU date or the elective procedure was reasonably taken in the circumstances of the case. Such a decision is a matter of clinical judgment, taken with regard to all relevant factors such as the specific patient’s history, risk factors, condition, investigation results, expected prognosis, etc., *as well as* the need for resource management during a pandemic, and any applicable legislation, measures and/or government / institutional orders and directives. Having regard to this, a court can, in appropriate cases, consider the decision to defer and the period of such deferment to be reasonable.

Still, if a patient’s review or treatment is to be deferred, it is worth taking time to communicate with the patient to explain the current limitations and seek agreement to the deferral. Good communication and a consultative approach are powerful tools in minimising litigation risks.

#### **4. Non-provision of care resulting from border control and other measures**

Another aspect of the measures which concern many doctors is the curtailment of access to medical treatment. To contain disease spread, Singapore’s borders have been closed to short term visitors, stay at home notices are being issued to citizens and long term pass holders returning from overseas, and, more recently, “circuit breaker” measures to enhance safe distancing have included the suspension of non-essential healthcare services (as set out in [Annex A](#) to the Ministry of Health statement on “[Continuation of Essential Healthcare Services During Period of Heightened Safe Distancing Measures](#)” dated 4 April 2020). Such non-essential healthcare services include screening and surveillance services, and physiotherapy and rehabilitation services.

This has given rise to concerns that healthcare providers will be liable for not providing care.

Whilst the standard of care will not be breached by a healthcare provider’s compliance with border control and safe distancing measures, the healthcare provider should nevertheless consider and advise patients of the steps which may be taken by patients (if any) to mitigate the impact of their reduced access to care. This may include alternative arrangements for follow up, such as providing patients receiving rehabilitation services with instructions on home-based exercises, advising patients with chronic conditions on symptoms to monitor for which might signal relapse or deterioration, and regular check-ins via telephone or videolink. Telemedicine is a tool that can be used to achieve these aims, subject to compliance with the National Telemedicine Guidelines 2015 and the guidelines promulgated by the relevant regulatory bodies (for example, telemedicine guidelines in the ECEG). Where overseas patients are unable to return to Singapore for treatment, offers can be made to provide referral letters and/or convey patient records and information to alternative providers in the patient’s country.

#### **5. Conclusion**

Overall, healthcare providers should be assured that the law is equipped to recognise and provide for the challenges presented during a pandemic. In these difficult times, the community relies heavily on innovation and decisive judgment calls being made by our healthcare institutions and professionals. Providers of healthcare should continue to feel empowered to do the best they can, and exercise their judgment in the best interests of patients, without being unduly fearful of deviating from standard practice where this is required.

## Further information

Allen & Gledhill has a [Covid-19 Resource Centre](#) on our website [www.allenandgledhill.com](http://www.allenandgledhill.com) that contains knowhow and materials on legal and regulatory aspects of the Covid-19 crisis.

In addition, we have a cross-disciplinary Covid-19 Legal Task Force consisting of Partners across various practice areas to provide rapid assistance. Should you have any queries, please do not hesitate to get in touch with us at [covid19taskforce@allenandgledhill.com](mailto:covid19taskforce@allenandgledhill.com), your usual contact at Allen & Gledhill or any of the following:

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