**Insurance & Personal Injury**

**Medical Negligence**
– Know the Duty a Medical Practitioner Owes to a Patient

**Introduction**

In recent years there have been an increasing number of medical blunders seen in Hong Kong, though the quality of its local medical treatment is widely recognised as good. When an issue of medical malpractice arises and the medical blunder has resulted in a patient being injured, the medical practitioners involved in that medical treatment may be liable for any injuries caused, for medical practitioners in general owe a duty of care to patients. In this Article, we will discuss the duty of care owed by a medical practitioner to a patient and the standard of such duty.

**Duty of Care**

**Standard of Care**

It is well-established that a medical practitioner owes a legal duty to take reasonable care to prevent undue harm and injuries to a patient under the medical practitioner’s control. As set out in the landmark authority *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, the standard of care required of a medical practitioner is the standard of the ordinary skilled person exercising and professing to have that special skill. In other words, the person need not possess the highest expert skill at the risk of being found negligent and it is sufficient if the person exercises the ordinary skill of an ordinary competent person exercising that particular art. In case where a medical practitioner fails to meet the required standard in the course of exercising his or her professional skills, he or she will breach the duty of care owed to his or her patient. Nevertheless, not every single error of judgment will amount to medical negligence. The English House of Lords decided in *Whitehouse v Jordan* [1981] 1 WLR 246 that an error of judgment will amount to medical negligence only if such error would not have been made by a reasonably competent medical practitioner with the standard and the type of skill concerned, acting with ordinary care.

It should be noted that the aforesaid standard of care to be expected of a medical practitioner must be based on events as they occur in prospect and not in retrospect for there may be events which are not in the contemplation of the medical practitioner at the time of treatment.

**Differing Medical Schools of Thought**

Sometimes, there are differing and well-established medical schools of thought on an issue and medical procedures to handle a health problem. In that scenario, a medical practitioner
will not necessarily be regarded as negligent in following one practice rather than another even if the outcome suggests that the wrong choice was made. Lord Scarman in *Maynard v Midlands Regional Health Authority* [1984] 1 WLR 643 explained that differences of opinion and practice always exist in the medical profession and there is seldom any one answer exclusive of all others to problems of professional judgment. Nonetheless, the practice relied on by the medical practitioner is not free from scrutiny. Lord Browne-Wilkinson in *Bolitho v City and Hackney health Authority* [1998] AC 232 held that a medical practitioner will be regarded as negligent if it cannot be demonstrated to the judge’s satisfaction that the body of opinion relied upon is reasonable, responsible and capable of withstanding logical analysis. In deciding whether a body of opinion is reasonable the court should consider whether the practice followed is a defensible conclusion and the medical practitioner in question has directed his or her mind to the question of comparative risks and benefits.

In *Wong Wan Chow v Secretary for Justice* DCPI 1080/2010, the plaintiff brought a medical negligence claim against the Fanling Occupational Health Clinic (“Clinic”) for damages on the ground that her condition had not been properly treated and there had been an undue delay in referral to specialist treatment. She first attended the Clinic in December 2006. The plaintiff was referred by the Clinic to the Prosthetic and Orthotics Department of the North District Hospital (“NDH”) in early 2007. She was then referred by the Clinic to physiotherapists and she received physiotherapy in July 2008. After consulting the Clinic 10 times from December 2006 to August 2008, she was finally referred by the Clinic to seek treatment at the Orthopaedics Department of NDH. The plaintiff’s expert witness was of the view that she should have been referred to orthopaedic consultation in June 2007. On the other hand, the opinion of the Clinic’s expert witness was that the line of treatment adopted was appropriate. The District Court found that the opinion of the Clinic’s expert witness was reasonable, responsible and logical for the opinion was well supported by scientific research. Therefore, following the principles set out above, the District Court held that the treating medical practitioner of the Clinic was not negligent even if the opinion of the Plaintiff’s expert witness was correct.

**Conclusion**

It is no doubt that medical practitioners owe their patients a legal duty of care. To successfully establish a medical negligence claim, a maltreated patient must first prove: (i) there is a normal practice which is applicable to his or her case; (ii) the medical practitioner has not adopted that normal practice; and (iii) the course taken by the medical practitioner was one which no professional person of ordinary skill would have taken, had he or she been taking ordinary care.