IV. Sanctions Against Unauthorized or Negligent Medical and Health Care Practice

The sanctions* which may be applied against persons who engage in the unauthorized practice of medicine are a key concern of paramedicals undertaking expanded health care service roles. If they exceed the scope of their traditional practice, they place themselves in jeopardy, not only of disciplinary action from their own professions, but also of civil and criminal liability under the medical practice statutes. These would ostensibly apply where a nurse, a midwife or another non-doctor participated in health care activities without proper authorization.

A. Sanctions from Medical Profession

The primary source of sanctions against unauthorized practice are, quite naturally, the medical practice statutes. While it is possible for an individual to be punished for "falsely pretending to be registered" (Bangladesh) as a medical practitioner or to use any "name, title, addition" (Sri Lanka) which implies that he is permitted to practice medicine, the focus here is on sanctions against actual practice by unregistered persons, sanctions against doing something only a doctor is legally authorized to do. Section 38(b) of the Sri Lanka law is typical of the statutory prohibitions. It forbids anyone not registered under the act to "practice for gain, or profess to practice, or publish his name as practising medicine or surgery". The language of the Kenya statute is a carbon copy. There, anyone who is caught in violation is subject to a fine of up to 10,000 shillings or, if there is a default in payment, up to 12 months in prison.(55)

In Saskatchewan it is an offence for a person who is not "authorized under permit or other arrangement" to "furnish any medicine, treat any disease or ailment by medicine, drugs or other form of treatment, influence or appliance". (56) But not all activities of that nature are forbidden. The legislation focuses only on "practice' which is done "for hire, gain or hope of reward". Gratuitously provided advice, medicine and treatment is not subject to the graduated penalties specified in that section.

The Jamaican statute is even more thorough-going in that it forbids anyone who is not registered under the act to: a) practice medicine in any of its branches; b) diagnose or offer to diagnose or attempt to diagnose any human disease, ailment, deformity, defect, or injury or advise upon any physical or mental condition of any person; c) to prescribe or administer any drug, serum or any other substance or remedy, apply any apparatus, or perform any operation or manipulation, for the cure, treatment, or prevention of any human disease, ailment, deformity, defect or injury; or to act as an assistant or associate of any person who performs any of the above mentioned acts.(57)

As noted earlier, the decision as to whether an individual has infringed the rules on the practice of medicine has been left largely to the courts. In some instances such infringements carry with them

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* To avoid ambiguity here the word "sanction" is used throughout to connote a "penalty imposed for law-breaking."

criminal penalties. One interesting and pertinent example will suffice. In the case of State v Kwaku Nkyi, /1962/I Ghana Law Reports 197, the High Court at Kumasi in Ghana heard a complaint against a student nurse who had mistakenly injected a child with arsenic. (See Annex F). The child subsequently died. Left with the choice between convicting the nurse for manslaughter based on criminal negligence or for unauthorized medical practice, the Court took the view that he had violated the Medical and Dental Act, 1959. In short, he had practised medicine without authorization to do so. Though the nurse was trained to give injections, he had crossed the line which separates the practice of medicine from nursing and other health care professions. He had attempted, without other authorization, to use his skills, and apparently they were few, to make a diagnosis, prescribe a cure and treat the stricken child. Under normal circumstances the mere doing of the act, in this case the technical function of administering the injection, would not have been punishable. It was the fact that he made a diagnosis and proferred treatment that engaged the law. Kwaku Nkyi may seem a curious case. As Apaloo, J. said, 'that the accused was negligent is plain enough'. But that negligence was not "gross" enough to cross over the line into criminality. The case nevertheless points to one of the problems paramedicals face and hints at another, that of negligence, which will be discussed at greater length below.

B. Sanctions from Paramedical Professions

Whenever non-doctors provide medical care without proper authorization, particularly if they are nurses, midwives or other registered health care professionals, they also take the risk of being sanctioned by their own governing boards. The so-called "allied health professions" are particularly vigilant in curbing practices of their members which cross-over the somewhat ill-defined line into medical practice. For example, it is often said that nursing is a "caring" profession not a "curing" profession, that nurses may only assess the situation and "initiate" treatment, they may not "diagnose". In a way such distinctions may be nonsensically semantic. To borrow from an opinion from a U.S. court, the nurse

> has been trained, but to a lesser degree than a physician, in the recognition of diseases and injuries. She should be able to diagnose. . .sufficiently to know whether it. . . bears danger signs that should warn her to send the patient to a physician.(58)

Perhaps the word "diagnose" is used a bit loosely in the judgement but such a statement infers, as sometimes is the case, that the border lines between paramedical practice and medical practice are somewhat less than certain. Certainly some paramedicals learn from experience to make diagnoses. Nevertheless the law maintains that there is a distinct difference.

To a large degree the key to use of paramedicals is authorization. The issue is one of legal authority. In Barbados, for example, the Nurses and Midwives Rules, 1973, prohibit "the performance of any professional procedures not authorized by the Act or rules".(59) There are many functions they may perform so long as they have proper instructions or orders to do so from a 'medical practitioner'. All paramedicals are taught not to initiate treatment, save in emergencies,

unless there is an order from a doctor to do so. They are warned that they must be 'covered' by authorization. Sometimes this means that they will not proceed unless the order is in writing. A telephone communication or spoken order will not suffice. It is when paramedicals act without authorization that the threat of sanctions looms large. Typical of the professional sanctions paramedicals must be wary of are those found in the Nurses and Midwives Act, 1971 (Bahamas). The Nursing Council there has the power to suspend or strike off the register the name of any registered person who is guilty of

1. Dishonesty, negligence or incompetence in the peformance of his duties as a nurse, midwife or clinical nurse, as the case may be; or

2. Conduct that is unbecoming to a nurse, midwife or clinical nurse.(60)

The language of the Kenya statute is quite similar. There the person's name may be removed from the register if it is shown that he

b) has been guilty of negligence or malpractice in respect of his calling; or

c) has been guilty of impropriety or misconduct whether in respect of his calling or not.(61)

Quite rightly, these potential sanctions may, and sometimes do, make paramedicals reluctant to perform duties which are beyond their ken. But more often the reverse is true. Out of necessity many paramedicals indulge in forms of practice which are sanctionable. The paramedical professions have been quite vigilant, however, in sanctioning instances where non-doctors attempt to "wear the white coat". There are ways to avoid the apparent threat of the sanctions discussed here. These will be more fully discussed below. However, these sanctions are the sort which are on the minds of non-doctors each time it is suggested that they perform a task for which there is no clear authorization.

C. Exemptions from Sanctions

A number of jurisdictions within the Commonwealth have wrestled with the problem of providing wider health care services in the face of a shortage of doctors. Because of this, special provisions are in evidence within medical practice statutes which provide special exemptions to those who are not fully "qualified medical practitioners" but who may yet be authorized to carry on some form of medical practice however limited.

In Kenya anyone in the unauthorized practice of medicine is subject to a fine of 10,000 shillings and up to 12 months in prison.(62) But Section 13 of the Kenya statute makes exceptions. It empowers the Medical Board, where it is in the public interest to do so, to grant a licence under the signature of the Director of Medical Services to "any person who is not otherwise eligible to be registered as a medical practitioner". This licence gives the holder the "right to render medical services". Suitable limiting conditions may be placed on the various types of services to be provided under the licence, thus it serves to authorize a form of "limited" medical practice. These licencees are not considered registered medical practitioners. The

distinction made is between the right to "practice medicine" and the right to "render medical services". Registration under the Act or the granting of a special licence under Section 13 only permit those involved to work in the employ of government health schemes.(63) To practise privately another type of licence must be acquired.(64) Special exceptions are made, also, for any person in the employ of the Medical Department of the government or any approved health care institution who is called upon to render medical aid in the course of his duties.(65) This permits the widespread use of para-medicals in the government service and elsewhere without the fear of sanctions, particularly where regulations or standing orders permit expanded roles for these personnel. (See Annex G).

The statute in Sri Lanka, though perhaps sadly out of date, makes provision for allowing special categories of individuals to registered to practice medicine and surgery. Apothecaries* "actually employed in the public service" who are at present "in charge of a hospital or dispensary" or retired apothecaries who have worked for twenty years and been in charge of a hospital or dispensary for at least ten of those years, and estate apothecaries or estate dispensers, with special approval of the Director of Health Services, may register as medical practitioners.(66) In the case of estate apothecaries or dispensers, their practice is limited to the estates or groups of estates to which they are assigned. This may not be all that helpful in alleviating immediate manpower shortages as the number of years of experience required before registration for some of the personnel is quite substantial, but it serves as an example of the use of special registration requirements. Moreover, nothing in the statute interferes with medical practice undertaken by a <u>verderala</u> "according to the indigenous or ayurvedic systems". Special permits may also be issued in Saskatchewan to any person:

> who does not possess all the qualifications required by this Act to entitle him to be admitted to the practice of medicine in Saskatchewan, to practice medicine in any or all of its branches in any particular locality in the province where in the opinion of the council in view of the scarcity of duly qualified medical practitioners such person should be authorized to practice.(67)

In Malaysia it is an offence to practice medicine or surgery unless the person is "registered or <u>exempted</u>" (emphasis added).(68)

Some exemptions from the threat of sanction for practicing medicine may be found in other statutory texts. In Ghana, for instance, pharmacists are granted the authority to give medical advice including "treatment in the case of ailments of common occurrence where it is not reasonably practicable for the patient to consult" a doctor, or dentist for that matter. (68a) This is notwithstanding the provisions of Sections 23 and 24 of the Medical Practitioners and Dentists Act, 1959 which protects the right to practice medicine.

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* Names for cadres are an important issue. In the search for an adequate term to describe a non-doctor practitioner this has much to recommend it. It is non-pejoritive and could be used instead of "medical assistant". Apothecaries have a long history of practice in the Commonwealth as compounders and dispensers of medicines and as diagnosticians. Notice how the tradition is kept alive in the Ghana statute referred to below.

The use of special licences or exemptions is one technique which can be used to alleviate the fear on the part of paramedicals that they will be penalized for performing primary health care duties normally reserved to doctors, while at the same time achieving some flexibility in what types of personnel do what procedures.

D. Negligence

A brief word on the question of liability for negligence is appropriate. Suggestions that non-doctors assume traditional doctor roles raise the issue of consumer protection, alluded to above. Where paramedicals, whether authorized or not, provide primary health care services which result in injury to recipients, rules of negligence will apply to determine liability. However, at the present time the legal concern for malpractice and consumer protection, as evidenced by the number of law suits, seems to be a preoccupation of only the more developed countries. That does not mean that those interests should be ignored elsewhere. However, claims for malpractice based on negligence particularly in the sphere of primary health care, are virtually non-existent in the developing world.(69).

The mere fact that paramedicals are duly authorized to provide health care services does not mean that they can do so with impunity; neither does the fact that the person receiving the treatment has consented. Any attempt to provide health care carries with it the obligation not to do so negligently, that is, in a way which injures the recipient.

If it is that paramedicals are to assume doctor-functions two important questions arise. First, by what standards will the actions of non-doctors be measured? And, second, where paramedicals are negligent who ultimately will shoulder the burden of liability?

1. Standards of care applicable to paramedicals

We must necessarily begin with the notion that non-doctors who are performing acts which, if done negligently, are likely to cause physical damage are under a duty to exercise reasonable care and demonstrate the professional skills of a reasonably competent non-doctor.(70) Where they fail to exercise the degree of care and skill expected of the average paramedical, negligence may follow. This would seem to answer the question in a general way, bearing in mind that what we are talking about are non-doctor acts. The standards would rise as the levels of skills of the profession increase. What then of those non-doctors who have received a higher level of training? Should they be measured by the standards applicable to doctors? What even of those who are not authorized who are providing doctor-like care?

The case of R v Bateman, /1925/ 94 L.J.K.B. 791, seems to suggest at least some of the answers.

> If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking treatment. If he accepts the responsibility and

> undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering treatment.
>
> . . . The law requires a fair and reasonable standard of care and competence. This standard must be reached in all matters above mentioned.
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> . . . As regards cases where incompetence is alleged, it is only necessary to say that the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a qualified man.(71) (emphasis added).

Of course, where paramedicals are authorized to provide primary health care they would not really be classified as "unqualified practitioners" for most purposes. In that instance one of the few questions left would be what happens when they attempt a treatment which is beyond their power or competence. We have seen what the court in State v Kwaku Nkyi had to say -- it was unauthorized practice of medicine. What, for example, becomes of a paramedical who performs surgery? Bateman speaks of the standards which apply. Certainly, such a persons exposes himself to the risk of civil liability, if he causes injury. He "must answer the consequences if he fails to exercise the skill of a surgeon".(72) But here we must note that there may be negligence but no injury. Equally, there may be injury but no negligence. Circumstances dictate what result follows. The paramedical, for example, who undertakes surgery as an emergency measure may escape liability. Under normal circumstances, he will not be liable if it can be shown that his actions approximated "general and approved practice".(73) Yet the words used in Bateman still haunt us. Of cases involving treatment provided by unqualified practitioners it was said:

> . . . juries are not likely to hesitate in finding liability on the ground the defendant undertook, and continued to treat, a case involving the gravest risk to his patient, when he knew he was not competent to deal with it....

More will be said later about the necessity of teaching paramedicals the limits of their craft.

2. Who shoulders liability?

It is one thing to find negligence, quite another to determine who is liable in actuality for injuries which result from that negligence. Irrespective of who acted negligently, the question often arises: who is financially responsible? The answer is particularly pertinent to public programmes which undertake to use large numbers of paramedicals for the delivery of primary health care. If a paramedical gives the wrong injection and it results in injury, permanent or otherwise, who pays the claim? The paramedical or the employing agency?

With respect to the liabilities of the employing agency -- and in most cases it would be the Ministry of Health or a local

authority -- we can look to the series of cases decided in England some time ago. These provide, if only by analogy, some substantial hints as to who would be legally responsible for the negligence of non-doctors in the provision of health care. All deal with the liabilities of hospitals.

Time was when hospitals were not held vicariously responsible for the negligent acts of some types of people who worked in them.(74) This has changed. In Cassidy v Ministry of Health, /1951/ All E.R. 574; /1951/ 2 K.B. 343, the question of hospital liability for acts of employees came before the Court of Appeal. There an assistant medical officer was accused of negligence in the course of post-operative treatment -- bandages on the injured hand were left on too long and were too tight. It is the opinion of Denning, L.J. which is of interest.

In Cassidy Denning, L.J. elaborated on the principles set out by Lord Green, M.R. in Gold v Essex County Council, /1942/ All E.R. 237; /1942/ 2 K.B. 293. Denning, L.J. said among other things:

> In my opinion authorities who run a hospital, be they local authorities, government boards or any other corporation, are in law under the self-same duty as the humblest doctor; whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment.

He went on to say, this they must do "by the staff they employ. And if their staffs are negligent in giving the treatment they are just as liable for that negligence as is anyone who employs others to do his duties for him". Then he concluded:

> . . . when hospital authorities undertake to treat a patient, and themselves select and appoint and employ the professional men who are to give treatment, they are responsible for the negligence of those persons in failing to give proper treatment, no matter whether they are doctors, nurses or anyone else.

Denning appears to have opted for a rule which imposes a duty of care in all cases where care and treatment is offered by a staff selected, employed and paid by the hospital. Lord Green, M.R. in Roe v Minister of Health, /1954/ 2 K.B. 66, took the view that the hospital's obligations can be decided only after analysing the circumstance of each particular case. One author has ventured the opinion that the approach used by Green "is likely to be considered the correct one", though he also says that they both may lead to the same results.(75)

It is interesting to note that Gold, from which Denning took his lead, involved a hospital run under the powers granted in the Public Health Act, 1936, and therefore by analogy may have an influence in Commonwealth countries where health services are provided under the auspices of that type of legislation. Another case, Razzell v Snowball, /1954/ 3 All E.R. 429, was decided by reference to the National Health Service Act, 1946. There Denning, L.J. spoke of the relationship between the Minister and employed staff and hence of the seat of liability.

The Minister, he said,

> does not discharge his duty /under the Act/ merely by appointing competent doctors and nurses and competent specialists. He has not merely to provide staff. He has to provide their services; and inasmuch as their services consist of treating the sick it is his duty to treat the sick by means of their services.

In summary, because Ministries of Health have 1) the power to select paramedicals, 2) the authority to pay them, 3) the right to control their work methods and 4) the right to suspend or dismiss them, Ministries who undertake to provide health care to the community will be, in all likelihood, liable for the negligent acts of paramedicals they employ. The ultimate determination may well turn on the circumstances of each case, however, a distinction being made between injuries caused as a result of negligence for acts which are authorized and injuries caused by acts which exceeded the authority of paramedicals.