IN THE DISTRICT COURT
OF NEW SOUTH WALES **No 40002 /2006**
MEDICAL TRIBUNAL

THE MEDICAL PRACTICE ACT 1992

In Re **Mr David John ELLIS**
MPO 005578

DEPUTY CHAIRPERSON HIS HONOUR JUDGE A.F. PUCKERIDGE QC

MEMBERS Dr E. KERTESZ
Dr J. KENDRICK
Ms H. KIEL

DATE OF DETERMINATION 7TH SEPTEMBER 2006

REASONS FOR DETERMINATION

The Tribunal enquired into a complaint by the Health Care Complaints Commission [HCCC] against Dr David Ellis. The complaint dated 13th December 2005 claimed that Dr Ellis has been guilty of unsatisfactory professional conduct and/or professional misconduct in that he has:-

1) Demonstrated that the knowledge, skill or judgment possessed, or care exercised by him in the practice of medicine is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience; and/or
2) Engaged in improper or unethical conduct relating to the practice of medicine.

PARTICULARS

At all relevant times the practitioner was a general practitioner practising in Ulladulla, New South Wales.

Between about January 1993 and September 2002 the practitioner treated a female patient, 'patient A' and her children. Between about September 1994 and December 2002 patient A worked for the practitioner as a Medical Receptionist.

(i) From about 1995 to 1998 the practitioner engaged in a personal and sexual relationship with patient A which included sexual intercourse.

(ii) During the personal and sexual relationship the practitioner failed to refer patient A to another general practitioner.

(iii) The practitioner failed to keep proper and adequate records of his medical treatment of patient A.

In a statement by patient A dated 3rd January 2005, patient A stated that she commenced seeing Dr Ellis in about 1993. Dr Ellis as at that time was in practice as a general practitioner at Ulladulla. Patient A at the time was living with her husband and two children. Patient A states that she saw Dr Ellis three times in 1994, three time in 1995, three times in 1996, six times in 1997 and four times in 1998 as set out in the HIC Records. She further states that she may also have seen Dr Ellis for short consultations during that period between 1994 and 1998 for which she may not have been charged.

Patient A further states that she saw Dr Ellis on a number of occasions throughout 1994 and 1995 in relation to her daughter's health. Her daughter was referred by Dr Ellis to have her tonsils removed and sometime thereafter developed epilepsy.

In September of 1994 patient A commenced to work at the practice of Dr Ellis as a receptionist. Soon after commencing work with Dr Ellis as a receptionist, patient A and her husband separated.

After the separation, patient A continued to live with her two children in the former matrimonial home and also continued to work as a receptionist for Dr Ellis. In addition to her role as a receptionist, patient A also became more involved in office management and of patients' files generally.

Patient A worked at the practice of Dr Ellis from 8.30 am to 5.30 pm Monday to Thursday and on Friday from 8.30 am to 1pm. She states that Dr Ellis often took her out to lunch on Fridays and a

personal relationship developed. There were also frequent discussions as to problems each of them were having with their respective spouses.

Dr Ellis states that the relationship developed into a strong friendship and subsequently into a romantic and sexual relationship. Patient A states that sexual intercourse between she and Dr Ellis first occurred in late 1995 and continued on an average of once a week throughout the period from 1995 to 1998. Patient A continued to work as a receptionist at the practice and continued to be seen by Dr Ellis as a patient.

Dr Ellis also continued to treat patient A's daughter. In her statement, patient A details the support that she was given by Dr Ellis in relation to her daughter's medical condition and states that the support that Dr Ellis provided to her reinforced her own desire to be in a personal relationship with the practitioner.

Patient A states that the relationship ended in 1998. She states that neither she nor Dr Ellis explicitly ended the relationship but she considered that the relationship ended when she discovered that he was having a relationship with another woman. She further states that after she discovered Dr Ellis was having a relationship with another woman it was her recollection that sexual intercourse occurred between them on two further occasions. She further states that she continued to see Dr Ellis as a general practitioner thereafter. Her daughter stopped seeing Dr Ellis in 1999 and started seeing another general practitioner about that time.

Patient A ceased working for Dr Ellis on approximately 11th December 2002 following a practice meeting convened by Dr Ellis in response to the conflict and stress between staff. She states that the issue of referral to another general practitioner was never raised between her and Dr Ellis. In paragraph 60 of her statement, patient A states that during the period 1995 to 1998 there were no discussions about any ethical considerations about Dr Ellis treating her as a patient and also being involved in a personal or sexual relationship.

In his declaration of 11th August 2006, the practitioner makes the following admissions:-

40) I admit that from about 1995 to 1998 I engaged in a personal and sexual relationship with [patient A] which included sexual intercourse.

41) I admit that during our personal and sexual relationship I did not refer [patient A] to another general practitioner.

42) I admit that I failed to keep adequate records of my medical treatment of [patient A].

In his declaration of 11th August 2006, the practitioner states that it is now apparent to him that in allowing the personal relationship with patient A to develop without ending a doctor/patient relationship he allowed the boundaries of the doctor/patient relationship to become indistinct. He states that he ought to have referred patient A to another general practitioner at the time a more intimate relationship developed to ensure that patient A's medical care was provided with objectivity.

In his declaration of 11th August 2006, Dr Ellis proceeds to state:-

34) I deeply regret any harm I may have unintentionally caused [Patient A] by blurring the boundaries of our personal and medical relationship.

35) I regret also the harm my conduct may have caused to my professional colleagues and the standing of the medical profession in the community,

36) In retrospect it was unwise to continue to treat [Patient A] as a patient when she came to work for the practice and it was inappropriate for me to have continued to treat her as a patient once a personal and sexual relationship developed. I should have referred her to another general practitioner.

37) I would not again allow a personal relationship to develop within the doctor-patient relationship. If I thought that was even a remote possibility I would refer the patient to another practitioner.

Regarding the admission that he failed to keep adequate records of his medical treatment of patient A, Dr Ellis in his statement said:-

38) I admit that the medical records kept by me of my consultations with patient A are not adequate, although I maintain that the early records are adequate. I agree with Dr Bunker's assessment of the quality of the records and I am now embarrassed by the poor quality of those medical records.

39) I do not believe that the quality of my medical records of my treatment of patient A reflect the general

> standard of my medical records today or of the past although, since receiving the notice of complaint and reading Dr Bunker's supplementary report I have given additional attention to the way I record my treatment of patients.

The Tribunal is satisfied that the complainant has proved to the requisite degree the particulars of the complaint. The practitioner concedes his conduct as proved amounts to unsatisfactory professional conduct. He disputes that his conduct amounts to professional misconduct.

The Tribunal accepts the submission of the complainant that the evidence supports a finding that the respondent's conduct constituted professional misconduct. The New South Wales Medical Board Policy Statement of 1995 makes it clear that a Medical Practitioner who engages in sexual activity with a patient is guilty of professional misconduct. The vice has been described as a breach of the 'special trust toward and power over a patient'. That breach occurs regardless of consent.

Dr Ellis said in his evidence that he was not aware of the AMA Position Statement of 1994, or the New South Wales Medical Board Policy Statement of 1995. He also stated that it did not occur to him at the time that the friendship between patient A and himself developed into an intimate sexual relationship that he should have referred the patient to another general practitioner. He also did not consider referring patient A to a different general practitioner at any time between 1995 and 1998.

The legal authorities which bind the Tribunal make it plain that the conduct of the practitioner in engaging in a personal and sexual relationship with patient A must lead to a finding of professional misconduct.

The Tribunal also accepts the submission of the complainant that the failure by Dr Ellis to keep adequate records of his medical treatment of patient A highlights the inappropriate blurring of professional boundaries which occurs when a practitioner has a sexual relationship with a patient. That blurring of professional boundaries occurred is shown by the evidence that he allowed patient A to make entries in her own clinical record without checking the entries made by the patient.

In a letter to the Health Care Complaints Commission of 20th February 2005, Dr Jeremy Bunker stated that on his examination of the clinical records of Dr Ellis in regard to patient A, ‘there is scanty record keeping, and for many dates where consultations were recorded as having being billed there no continuation notes’. Dr Bunker was moderately critical of the paucity of medical records, the lack of correlation between the dates of clinical notes and billed consultations, and also the fact that several continuation notes appeared to him to have been written by patient A. He was severely critical of the lack of documentation of five consultations in 1994 and 1995.

In answer to a question as to how he explained the paucity of his notes in relation to patient A, Dr Ellis said:-

> 'This is a difficult blurred relationship. Patient A during the latter part of 1994 was asked to be lead receptionist/practice manager of my practice, so there was more continual contact between patient A and myself. Often, as so often happens in office environments, particularly in medical practices, the fateful corridor consultation often occurs. This day and age, now, and having been through this, I advise all doctors who work with me on the perils of corridor consultations, which usually lead to inadequate notes in the first place.'

The Tribunal does not consider that this explanation by Dr Ellis is any excuse for the severe criticism of his note taking by Dr Bunker. He agreed that looking back on his notes he would have to do his best to reconstruct whether it was a request made by patient A in the course of a corridor consultation or whether it was an actual consultation.

Dr Ellis stated that when the relationship between himself and patient A became an intimate relationship in 1995 he was unaware that he was transgressing the boundary lines between a patient and a doctor. He said that the boundary lines were blurred because of the friendship with patient A and he was unaware of the AMA's Position Statement of 1994 in relation to sexual contact between patient and doctor.

The complainant submitted that the practitioner's lack of insight as to the inappropriateness of commencing a relationship with patient A, and the inappropriateness of maintaining that relationship between 1995 and 1998 was of concern in determining the

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appropriate sanction to be imposed. It is submitted that the lack of insight by Dr Ellis shows a lack of judgement in the practice of medicine and a tendency to avoid addressing difficult situations. It was further submitted that the Tribunal could not be satisfied as to whether Dr Ellis in confronting future problems in the practice of medicine would show lack of judgement.

The Tribunal accepts the evidence of Dr Ellis that he is now very much aware that his conduct transgressed the professional boundaries between a doctor and patient. The Tribunal also accepts that Dr Ellis regrets the harm done to the profession generally by his conduct in not abiding by the New South Wales Medical Board Policy Statements regarding the conduct of a medical practitioner engaging in sexual activity with a patient.

The purpose of the Tribunal exercising its powers of sanction is to protect the public and the profession. The Tribunal bears in mind that serious lapses in the conduct of practitioners are not to be lightly put aside.

It has been submitted by Counsel for the HCCC that the conduct of Dr Ellis is not the most serious example of professional misconduct. It was submitted that a finding of professional misconduct allowed the Tribunal to consider the full range of orders including an order for deregistration.

On 22nd August 2006, the Tribunal stated 'that the unsatisfactory professional conduct to which the practitioner has admitted and which the Tribunal found proved to the requisite degree, did

amount to professional misconduct but that such misconduct was not of a sufficiently serious nature to justify suspension of the practitioner from practicing medicine or the removal of the practitioner's name from the Register'. The Tribunal took into account that Dr Bunker in a report of 20th February 2005 stated that his degree of criticism of the practitioner was moderate.

Dr Bunker noted that the events which resulted in the complaint occurred a decade ago. He also stated that although he believed the profession did hold that personal and sexual relationships should not develop between doctors and patients, this was less clearly enunciated at the time. Dr Bunker was also moderately critical of Dr Ellis continuing to treat patient A having developed a close personal and sexual relationship with the patient.

The Tribunal has also taken into account that Dr Ellis's personal and professional circumstances are now more settled. The Tribunal also accepts that the practitioner is genuinely remorseful for any harm which he may have caused to patient A.

The Tribunal is concerned as to the practitioner's lack of awareness of the AMA Position Statement of 1994 or the New South Wales Medical Board Policy Statement of 1995. The Tribunal considers that it is appropriate the practitioner complete an ethics course approved by the NSW Medical Board. The Tribunal also considers that it is appropriate that the practitioner submit to an audit of his medical records. It is also considered that the practitioner not be allowed to practise as a sole practitioner.

It was submitted on behalf of the complainant that the practitioner be ordered to pay a fine of $25 000. That was a fine imposed by a Medical Tribunal in an enquiry against a Doctor Stuart Anderson. The determination of the Tribunal in that matter was on 13th February 2004. The circumstances in that case differ from the circumstances in the instant case. As the Tribunal stated on 22nd August 2006, the Tribunal considered that a fine would be nothing other than punitive. The Tribunal has also taken into account that the practitioner will be liable for the costs involved in completing an ethics course, and the costs involved in an audit or audits of his medical records.

The Orders of the Tribunal are:-

1) The practitioner is guilty of professional misconduct.

2) Pursuant to section 61(1)(a) of the Medical Practice Act 1992 (NSW) the Tribunal reprimands Dr Ellis.

3) Pursuant to section 61(d) of the Medical Practice Act 1992 (NSW) Dr Ellis is ordered to complete the course "Ethics" (MFM1017) (conducted y the Department of General Practice, Monash University by December 2007. If the course is not available then Dr Ellis is to complete an equivalent ethics course approved by the NSW Medical Board by December 2008. The cost of the course is to be borne by Dr Ellis.

4) Within two weeks of completing an Ethics course as referred to in 3) above, Dr Ellis is to provide evidence to the Medical Board that he has satisfactorily completed the course.

5) Pursuant to section 61(1) (c) of the Medical Practice Act 1992 (NSW) the following conditions are imposed on Dr Ellis's registration:

a. Dr Ellis only practise medicine in a group General Medical Practice. [A group having 3 or more Medical Practitioners];
b. Dr Ellis to notify the Board of the name and professional address of a registered medical practitioner who has agreed to act as his professional Mentor within twenty one days from 7TH September 2006.
c. The nature and frequency of the contact between Dr Ellis and the Mentor is to be determined by the Mentor in accordance with the Board's Guidelines for Mentors, a copy of these orders and a copy of the Medical Tribunal decision from 7th September 2006.
d. Dr Ellis is to authorise the Mentor to notify the Board when the Mentor is of the view that professional mentoring is no longer required.
e. That Dr Ellis submit to an audit or audits of his medical records. Such audit or audits are to be conducted by a medical practitioner nominated by

the NSW Medical Board and are to be at the reasonable expense of the respondent. The respondent is to make available to the auditor such of his medical records as the auditor may request and is, in consultation with the auditor, to set aside sufficient time to discuss the selected records and the consultations to which they relate.

f. The respondent is to authorise the auditor to prepare a report of each audit and provide a copy of that report to the NSW Medical Board.
g. The audits to be conducted at a time agreed between the auditor and the practitioner but no later than 28 days after the written reasons of the Tribunal.
h. The audits to be no more frequent than monthly, but not less frequent than quarterly and shall continue unless and until two successive audit reports are considered satisfactory by the Medical Board.
i. The Medical Board or its Committees may at their discretion terminate or vary the conditions of registration.

(6) The respondent to pay the complainant's costs of the proceedings.