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MEDICAL TRIBUNAL OF NEW SOUTH WALES

DEPUTY CHAIRPERSON: JUDGE PUCKERIDGE

FRIDAY 17 MARCH 2006

40030/05 - IN RE IAN FERGUSON AND THE MEDICAL PRACTICE ACT**REASONS FOR ORDERS**

DEPUTY CHAIRPERSON: The applicant, Ian Leigh Ferguson, seeks an order that his name be restored to the Register of Medical Practitioners. The applicant's name was removed from the Register of Medical Practitioners by order of a Medical Tribunal on 29 May 2001. In its reasons that Tribunal stated that a period of three years would be an appropriate period in which the applicant would be precluded from seeking reinstatement to the Register. The application by the applicant is the first application that has been made by the applicant.

The Tribunal, in May 2001, stated that on any application for review in the future the applicant would have to demonstrate that he has gained insight into his behaviour such as would render him a fit and proper person to practice medicine again. The Tribunal reminds itself that its jurisdiction is protective in nature rather than punitive.

The principal matter to be determined by this Tribunal is whether or not the applicant has proved to the requisite degree that he is a person of good character as befits a person to practice medicine. The onus lies on him to establish that he now bears such good character. As a person whose name has been removed from the Register he has to accept that it has been found that he was guilty

of conduct which showed a defect of character incompatible with membership of a self respecting profession.

The applicant is required to demonstrate to this Tribunal that the defect which led to the conduct and which resulted in his name being removed from the Register of Medical Practitioners has been overcome. The Tribunal, on any application for reinstatement, is required to approach its task with great caution. The onus is on the applicant to satisfy the Tribunal that if he is to be re-registered the public will not be at risk. The applicant must satisfy the Tribunal, and comfortably satisfy the Tribunal, that it is no longer appropriate for the order of the Tribunal of 29 May 2001 to remain.

In assessing the application the protection of the public is paramount and, also, the protection of the medical profession itself is an important consideration. (see Re **Jonathon Bentley and the Medical Practice Act 26 May 2005**).

As was stated by Walsh JA in Ex Parte **Tziniolis** (67 SR 448):

"If a man has exhibited serious deficiency in his standards of conduct and his attitude it must require clear proof to show that some years later he has established himself as a different man."

The applicant gave evidence before this Tribunal. A statement by the applicant, dated 27 September 2005, formed part of exhibit A. Also included in exhibit A was a report of Dr Brendan O'Sullivan of 9 May 2005, a report of Dr Lawrence Finley of 23 September 2005, and a letter

from a Lance Sewell, pharmacist, dated 10 May 2005. Dr Brendan O'Sullivan also gave evidence before the Tribunal on behalf of the applicant. Exhibit 1 was a volume of documents tendered on behalf of the respondent. Included in that volume was the determination of the Medical Tribunal of 29 May 2001.

The complaint by the Health Care Complaints Commission, which was a complaint dated 6 April 1999 and was a complaint which resulted in the order of 29 May 2001, was heard over a period of nine days and then adjourned to 28 May 2001. The proceedings were adjourned to that date as oral evidence was incomplete and one of the peer reviewers in the complainant's case was still under cross-examination.

The respondent, in the proceedings brought by the HCCC, the present applicant, had up to that date denied the particulars of the complaint with the exception of paragraph 9. The allegation in that paragraph was that the practitioner prescribed the drug of addiction, Pethidine, to persons on the dates and in the quantities shown in the schedules annexed to the complaint (a) without exercising responsible medical judgment as to whether it was appropriate to issue such prescriptions, (b) when such persons were members of the practitioners family or close friends of family members, (c) without obtaining authorities to prescribe such drugs of addiction to such patients from the New South Wales Health Department contrary to s 28 of the **Poisons and Therapeutic Goods Act** 1966, (d) without maintaining records of his

prescribing of Pethidine to such patients contrary to clause 84 of the **Poisons and Therapeutic Goods Regulation** 1994. The Tribunal considered that that paragraph or that particular in itself was indicative of unsatisfactory professional conduct by the practitioner, the now applicant.

When the hearing of the complaint resumed on 28 May 2001 certain admissions were made on behalf of the applicant, the then respondent. The Tribunal noted in its reasons for its order on 29 May 2001 that as at that stage the position of counsel for the present applicant was that the admissions went to the text of the particulars in the numbered paragraphs one to ten, and the admissions were not intended to include any admission as to whether the practitioner was guilty of unsatisfactory professional conduct or of professional misconduct.

Counsel for the applicant, as at 28 May 2001, conceded that it could be taken that his client was admitting such of the evidence given in the proceedings as was necessary to support the particulars, but his position was not to make an admission as to all of the evidence founding each of the particulars, nor was the applicant accepting the validity of all of that evidence. A further adjournment was granted for further instructions to be obtained as to whether the then respondent to the complaint, the present applicant, admitted the complaint of 6 April 1999. Counsel for the present applicant, following that adjournment, confirmed to that Medical Tribunal that his instructions were to admit that the

practitioner had been guilty of unsatisfactory professional conduct and professional misconduct within the meaning of s 36 and s 37 of the **Medical Practice Act** Counsel also stated that he was admitting the allegation that the present applicant had engaged in conduct which demonstrated a lack of adequate knowledge, judgment and care in the practice of medicine and had engaged in conduct relating to the practice of medicine that was improper and unethical.

In its reasons for the order of 29 May 2001 the Tribunal stated that the then practitioner, Mr Ferguson, subject of the complaint, admits to the complaint and has admitted to the whole of the subject matter of the complaint, both as to its particulars and as to its fundamental allegations. However, because the admissions were made orally and were not in writing the Tribunal considered that it would have to be comfortably satisfied on the balance of probabilities that the complainant had proved that the practitioner was guilty of the conduct alleged in paragraphs one to ten of the complaint of 6 April 1999.

The ten numbered paragraphs in the main represented allegations as to inappropriate prescribing of drugs. As at the date of the hearing of the complaint against Mr Ferguson he had not been permitted to prescribe or otherwise deal with Schedule 4D or Schedule 8 drugs. He was further prohibited from providing medical services and/or advice to a number of named persons, one of whom was his late wife. The conditions referred to in the

preceding paragraph were imposed following an investigation into the conduct of the present applicant, which investigation led to the making of the complaint against him of 6 April 1999.

The applicant did not give evidence before the Tribunal which considered the complaint dated 6 April 1999. That Tribunal did have before it a statement by the applicant dated 18 July 2000. That statement also forms part of exhibit 1 in the present application.

The Tribunal, in the reasons for the orders on 29 May 2001, stated that the statement dated July 2000 could be read as seeking to justify the prescribing habits and conduct of the applicant. The Tribunal stated that the applicant had, in the statement, attempted to justify his treatment of the patients who were the subject of the complaint. That Tribunal stated that the peer review evidence was to be viewed as being highly critical of Mr Ferguson and that Dr Cheung was particularly critical of him.

Dr Cheung, in the report of 14 November 1998 which was part of the evidence before that particular Tribunal, had stated that the applicant's conduct, in being a pattern of behaviour involving a number of patients over an extended period of time and involving a range of drugs that involved prescribing to a number of family members on a number of occasions, was behaviour which attracted his strongest and extreme disapproval and in his opinion the strongest and extreme disapproval of his peers of good repute and competence. In particular, Dr Cheung took into

account that subsequent to 1993 the applicant's conduct directly contradicted the commitment that he gave in his written response to the Director General Department of Health dated 1993.

The Tribunal, dealing with the complaint of 6 April 1999, also had before it a report of a Dr Byrne in which that doctor had stated that the applicant had behaved in a manner which was extremely dangerous to his patients. That doctor was of the opinion that the applicant's behaviour was one of the most serious breaches of ethical practice he had seen.

The Tribunal, in its reasons for its orders on 28 May 2001, stated that the admissions made by the applicant, through his counsel, "must be seen" as effectively abandoning his justification or explanation for his conduct "at least to the extent that his explanation was intended to dispute any aspect of the complaint."

In the application being considered by this Tribunal the applicant gave evidence. His statement of 27 September 2005 explains why it was that he prescribed Pethidine for his late wife. In his statement the applicant states that his wife was involved in a car accident in which she sustained injuries resulting in a high level of unremitting pain. He states that she was often suicidal and he prescribed Pethidine for her. When he reached the maximum number of prescriptions which he could lawfully prescribe for her he falsely used her children's and friend's names. The applicant further states in his statement that after he was placed on a

restricted practising certificate whereby he could no longer prescribe Schedule 4D or Schedule 8 drugs he fully complied with the conditions and with the restrictions placed upon him. He states that thereafter his wife turned to heroin and was eventually found dead in a caravan park in April 2001.

In evidence before this Tribunal the applicant said that when he applied for a relevant authority in May 1997 to prescribe Pethidine for his late wife he probably did not disclose that he was in a relationship with her. He said he could now see that was a relevant matter to be brought to the attention of the authority, but did not think so at the time.

In evidence before this Tribunal the applicant has stated that as at the time the matter with which the complaint on 6 April 1999 was concerned he could be considered "a soft touch". He has stated that he now accepts that there were shortcomings in his practice and that he was incorrect or had adopted an incorrect practice in accepting the complaints of certain patients at face value. He said that he had addressed that particular matter in that he did not wish to be reinstated with the right to prescribe Schedule 4D or Schedule 8 drugs. He said that he did not believe that he would be a soft touch in the future if put in the same position. He said he considered he would be very sensitive to requests about those drugs from here on because of his experience. He said he would be "very careful not to be a soft touch in the future".

This Tribunal accepts the explanation given by the applicant in explaining his conduct in relation to this prescribing Pethidine for his late wife. In accepting the explanation as given by the applicant that is in no way condoning the conduct of the applicant.

The applicant, in evidence before this Tribunal, agreed that he had not been frank or honest with officers of the Pharmaceutical Board. He agreed that he went to some steps to conceal his prescribing practices in relation to family members and close friends. He said as at present that he would be extremely unlikely to get in the same position again in regard to his prescribing practices because as at the time the matters the subject of the complaint of 6 April 1999 he had a wife who was in the situation where she was in severe pain and suicidal without obtaining any sort of pain relief. He said that the reasons he misled and concealed important information from officers of the Pharmaceutical Board was to protect his late wife. He said he was in a very, very perplexing situation and he had no other way but to hide what he was doing, at least temporarily, to get her through what he referred to as "that bad spot".

This Tribunal appreciates that as at the time of the proceedings of the previous Tribunal the applicant was in a difficult situation. This Tribunal has been particularly concerned with the applicant's conduct and behaviour in relation to the prescribing of drugs of addiction generally, as referred to by the Medical Tribunal in its reasons on 29 May 2001. In those reasons

that Tribunal noted that the applicant's conduct extended over about three and a half years, involved a significant number of patients, and that for most of those patients at least the prescribing was done without any proper program of treatment for them.

That Tribunal was unanimously satisfied, and comfortably so, that in the circumstances set out in paragraph one to ten of the complaint of 6 April 1999 the practitioner engaged in conduct which demonstrated a lack of adequate knowledge, judgment and care, in the practice of medicine and engaged in conduct relating to the practice of medicine that was improper and unethical. That Tribunal considered that the conduct of the applicant was of a sufficiently serious nature to justify the removal of his name from the Register.

There is no objective evidence before this Tribunal that there has been any change in attitude by the applicant in relation to drug prescribing. The applicant stated in a letter to the Medical Board on 16 September 1998 that he had not always distinguished between drug seeking and pain relief requests. He again stated same in evidence before this Tribunal. The applicant did say in evidence before this Tribunal that in retrospect it was "perfectly reasonable" for the HCCC to behave as they did. He further said in evidence that he has come to realise since that his arguments in relation to the complaint were weak and that it has dawned on him "that some of his earlier view points were not correct."

The Tribunal does accept that the applicant has now

accepted responsibility for his drug prescribing behaviour and accepts that what he did was wrong. The Tribunal further accepts the evidence of the applicant that he now recognises that his behaviour did have the potential to harm the patients he was treating.

There is however no objective evidence before this Tribunal that the applicant has sought to redress the defects in his conduct which, on his own analysis, resulted in the complaint of 6 April 1999. There is no evidence that he has sought advice as to mechanisms which might be put in place to prevent such behaviour occurring in the future, particularly in relation to treatment programs for patients suffering intractable pain and/or substance abuse.

Dr O'Sullivan's evidence was unsatisfactory in this regard. Dr O'Sullivan did not have notes in respect of any consultation between him and the applicant prior to 2 May 2005. He particularly relied on what the applicant told him was the decision of the Medical Tribunal of 29 May 2001. The Tribunal considers that Dr O'Sullivan was focusing on the applicant's behaviour in relation to his late wife and reinforcing with the applicant the danger for members of a medical practitioner prescribing for and/or treating family members. Dr O'Sullivan did consider that the applicant was now fit to be readmitted to the medical profession and in particular took note of the fact that the applicant was open and forthcoming in all of his consultations.

The applicant in evidence stated when he first saw

Dr O'Sullivan he was still upset in relation to the loss of his wife. He said that Dr O'Sullivan prescribed some anti-depressant medication which he "took for a week and then gave it up". The applicant said that Dr O'Sullivan did not provide any other guidance or assistance as to how he could remedy any defect in character as identified by the Tribunal in 2001.

The applicant himself in evidence, before this Tribunal, has said he has not read in detail the judgment of the previous Tribunal since 29 May 2001. This Tribunal, as was the previous Tribunal, is in a difficult position in assessing whether or not the applicant has demonstrated by way of clear proof any sufficient insight into his conduct. It is submitted on behalf of the applicant that the Tribunal should accept the evidence of the applicant, that he has genuine contrition and insight into his conduct and that he has shown that he is a different person to the person he was in May 2001.

The applicant has expressed to this Tribunal, contrition for his actions, but as the Tribunal stated in May 2001 the prescription of drugs of addiction to patients over a period of three and a half years was done without any proper program of treatment for them. This was also a matter of concern to Dr Cheung. There is no evidence before this Tribunal that the applicant has attempted to educate himself by attending courses for treatment of persons suffering continuing pain and in the management of patients with continuing pain or with substance abuse problems.

On evidence before this Tribunal the applicant has not undertaken the range of activities required to ensure the maintenance of knowledge and skills for competency in operating a general practice. The applicant has stated that it is his desire to operate a solo general practice seven days a week.

The Tribunal accepts the submission of the respondent that there are no character statements provided which would allow the Tribunal to assess a change of character through the eyes of a person who has known him at the time of the matters giving rise to the complaint and then subsequently such that it could be seen that there was a change through the eyes of an objective independent observer. The Tribunal also accepts the submission of the respondent that the reference of Mr Sewell makes no mention of the decision of 29 May 2001, or of the applicant's character. It further accepts the submission that the statement of Mr Sewell would tend to establish that there is a need for more general practitioners in the local area but does not attest to the applicant's character.

The Tribunal considers that the applicant's self continuing medical education is inadequate and that his statement that "it doesn't take long to pick up what's new in the field" is itself evidence of a need for continuing medical education. On any future review application the applicant would need to show, by way of evidence, participation in the range and variety of courses required by the College of General Practitioners and Specialist

Medical Colleges. The applicant concedes that his continuing medical education to date has not been of a formal kind. He has stated that the reason for that has been lack of finances, yet he has also stated that he does have the necessary finances to establish a general practice.

The Tribunal has also been troubled by the statement of the applicant that he did not consider he was in need of supervision if he was reinstated. If the applicant was reinstated there would be clear need for supervision and the supervision required would have to be of a strict kind.

The Tribunal is not satisfied that the applicant, as at the present time, is a fit and proper person to be reinstated on the Roll of Medical Practitioners. The applicant has not discharged the onus of proof which rests upon him to show that he is now a fit and proper person to be restored to the Register. It is the unanimous decision of the Tribunal that the application of the applicant, Ian Leigh Ferguson, be dismissed.

The order for costs will be that each party is to pay his or its own costs.

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