

COURT OF APPEAL

RECORD SHEET

NATURE OF JURISDICTION: Appeal against orders of Medical Tribunal of New South Wales (Ward DCJ and Members)

FILE NO/S: CA 40450/92

DELIVERED: 20 April 1993

HEARING DATE: 30 November, and 1 December 1992

PARTIES: DON NAI HSI HUANG v WALTON

JUDGMENT OF: Kirby P; Priestley JA; Meagher JA

COUNSEL:
Appellant: C A Evatt
Respondent: M J Joseph

SOLICITORS:
Appellant: M J Ward & Co
Respondent: Senior Legal , Officer, Complaints Unit, New South Wales Health Department

CATCHWORDS: MEDICAL PRACTITIONERS - professional misconduct prescription of benzodiazepines for alcohol and drug addicted patients - whether harm minimisation/reduction - proper orders whether removal from Register excessive *having regard to merits and public welfare* whether suspension and conditional practice appropriate - held: Removal confirmed. *Spicer v New South Wales Medical Board & Ors*, CA, unreported, 19 February 1981 applied - held: (by maj): Removal of name from Register confirmed on basis of facts admitted.

EX TEMPORE / RESERVED: Reserved

ALLOWED / DISMISSED: Dismissed

NO OF PAGES: 47

THE SUPREME COURT
NEW SOUTH WALES

CA 40450/92 OF

COURT OF APPEAL

KIRBY P
PRIESTLEY JA
MEAGHER JA

TUESDAY 20 APRIL 1993

DON NAI HSI HUANG v WALTON

MEDICAL PRACTITIONERS - professional misconduct - *Medical Practitioners Act 1938* - treatment of alcohol and drug dependent persons - prescription of benzodiazepine sedatives – whether alternative, unorthodox but legitimate mode of medical practice for harm reduction or minimisation in the case of such persons – whether simply a failure to practise medicine; to treat patients individually; and motivated by greed - held: (by the Court):

(1) The Court of Appeal may only allow an appeal and substitute its orders for those of the Medical Tribunal if error is shown which authorises disturbance of the discretionary orders of the Tribunal. *Childs v Walton*, Court of Appeal, unreported, 13 November 1990; (1990) NSWJB 159 applied;

(2) Insofar as the Tribunal's findings and orders rested upon the impressions of the medical practitioner, his patients and witnesses, the Court of Appeal should defer to the findings and orders of the Tribunal; (by Priestley and Meagher JJA; Kirby P dissenting):

(3) Upon the findings of fact proved and admitted, removal from the Register was not shown to involve error and was in fact correct. *Spicer v New South Wales Medical Board & Ors*, Court of Appeal, unreported, 19 February 1981 referred to; (4) Appeal dismissed. Orders of Tribunal confirmed.

MEDICAL PRACTITIONERS professional misconduct - unorthodox but legitimate mode of practice harm minimisation or reduction - treatment of alcohol and drug addicted persons with benzodiazepines whether permitted in law - whether conduct of practitioner amounted

- held:

(1) An unorthodox mode of treatment pursued in good faith with honest therapeutic motives does not amount to professional misconduct. *Qidwai v Brown* (1984) 1 NSWLR 100 (CA); *Bridge v Brown*, Court of Appeal, unreported, 17 December 1982; *Childs v Walton*, Court of Appeal, unreported, 13 November 1990; (1990) NSWJB 159 applied; *Cranley v The Medical Board of Western Australia*, unreported, Supreme Court of Western Australia (Ipp J) 21 December 1990 considered;

(2) The practitioner's practice, involving insufficient attention to individual patients, was not properly described as harm minimisation in the instant case;

(3) Determination of professional misconduct (which was not appealed) and (by majority) the order for removal of the practitioner's name from the Register, confirmed.

Medical Practitioners Act 1938, s 32R, 32U. *Medical Act* 1894 (WA), s 13(l)(a).

ORDERS

Appeal dismissed with costs.

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40450/92

KIRBY P
PRIESTLEY JA
MEAGHER JA

TUESDAY 20 APRIL 1993

DON NAI HSI HUANG V WALTON

JUDGMENT

KIRBY P: In this appeal Dr Don Nai Hsi Huang invokes the jurisdiction of this court to review the exercise by the Medical Tribunal (the Tribunal) of its jurisdiction to order that his name be removed from the Register of Medical Practitioners of this State. The Tribunal exercised its powers pursuant to s 32R of the *Medical Practitioners Act* 1938 (the Act). In addition to the order for the removal of Dr Huang's name from the Register, the Tribunal ordered that the time after which Dr Huang might apply to be registered should be fixed at three years from the date of removal. It also ordered him to pay the substantial costs of the respondent of the hearing in the Tribunal.

That hearing proceeded before the Tribunal over no fewer than twenty-seven sitting days between October 1991 (when the hearing began) and 6 August 1992 (when the orders were made).

In this Court, Dr Huang did not challenge the decision of the Tribunal, in the sense of contesting the findings upon which it was based. His appeal was brought pursuant to s 32U(1)(b) of the Act

which allows appeals, assigned relevantly to this Court, against: "(b) the exercise of any power under section 32R by the Tribunal"

By s 32U(2) this Court is empowered to order a stay of the orders of the Tribunal. Such a stay was sought but was not granted. Instead, the Court ordered expedition of the hearing of the appeal.

In determining an appeal under s 32U, the Court is empowered by s 32U(3) to dismiss the appeal, or to:

"(b) make such order as it thinks proper having regard to the merits of the case and the public welfare and, in doing so, may exercise any one or more of the powers of the Tribunal under section 32R."

Dr Huang's contention was that the Tribunal's orders under s 32R of the Act were too severe and/or inappropriate having regard to its findings. He urged this Court to substitute orders which would permit him to continue in his practice as a medical practitioner "working at a public hospital or in private practice under supervision".

The appeal papers constitute nine large volumes of transcript and exhibits running to nearly 3500 pages. The decision of the Tribunal alone comprises 254 pages. This is made up of the basic findings and conclusions (133 pages); an appendix which analyses the evidence of the treatment of 49 patients (66 pages); and a summary of the evidence of the medical witnesses called by the contestants before the Tribunal, describing the Tribunal's opinion of each of them (55 pages). The decision reflects the conscientious attention given to the case by the Tribunal. Into such a case, an appellate court understandably ventures with great hesitation and caution. It will be as well, at the outset, to say something about the jurisdiction of this Court.

Court of Appeal's jurisdiction

The hesitation to which I refer derives not only from the natural human reaction when confronted by such a vast bulk of factual material. The Tribunal had many days within which to absorb the detail of the evidence. Moreover, it saw the evidence unfold in a generally logical and consecutive fashion. In the nature of things, an appellate court is taken to parts of the evidence by the competing parties, each seeking to cast a spell upon the judges derived from selective passages of transcript read to advance their respective arguments. In the nature of the business of a Court as busy as this, it is impossible to assert candidly that each and every page of the transcript has been read, pored over, weighed, considered and assessed. That may not happen in the Tribunal; but it is certainly more likely to happen there than in this Court.

The Tribunal, moreover, had the opportunity of seeing the witnesses. This is a facility to which the 'repeated insistence of the High Court of Australia attaches a great deal of importance. One may be sceptical about the utility of demeanour and in particular in the assessment of competing expert evidence. Such scepticism, recorded by many judges of the common law, does not seem to have percolated to the Tribunal. Consistent with binding authority, this Court must defer to the Tribunal's assessment of witnesses, including of the medical practitioner under investigation, so far as such assessment rests upon an impression derived from seeing the witnesses, including from the subtle influences of their demeanour.

There is another reason for caution. The Tribunal is a specialist body established by an Act of Parliament. On this occasion it was comprised of a most experienced judge of the District Court (Ward DCJ) as Deputy Chairperson, two experienced medical practitioners and a lay member. Not only has Parliament constituted this Tribunal in this special way. It has restricted appeals to the Supreme Court in the terms of s 32U. There is no appeal by way of rehearing - something which, in the light of the length of the initial hearing, must be a source of some gratitude. The appeal is limited to "a point of law" as s 32U(1)(a) provides or, relevantly to this appeal, to the exercise of the powers of the Tribunal under s 32R.

In the review given to the Court, being an "appeal" in the terms of the statute, it is not open to us simply to substitute our decision for that of the Tribunal. The process being appellate in its nature, it is necessary, in order successfully to invoke it, to show error on the part of the Tribunal appealed from. Furthermore, because the powers under s 32R of the Act are so numerous and varied, ranging from caution to removal of a name from the

Register and a fine (or any combination of the enumerated powers) it is not enough for the appellate court to consider, upon a review of the entire facts, that it would have reached a different conclusion. Ordinary principles of appellate conduct, and the authority of this Court, limit the superintendence to cases where it can be shown that this Court is authorised to intervene. Such cases will be akin to those where an error in the exercise of a discretionary or quasi-discretionary power can be demonstrated. Cf *Moran v McMahon* (1985) 3 NSWLR 700 (CA), 721. This limitation was most recently called to attention by Samuels JA in *Childs v Walton*, Court of Appeal, unreported, 13 November 1990, p 14; (1990) NSWJB 159.

It is therefore necessary to consider whether in this case it has been shown that, in reaching its order under s 32R, the Tribunal took into account irrelevant matters; failed to take into account in an appropriate way matters which were plainly relevant; or reached a conclusion which (although the precise source of error cannot be identified) is so out of harmony with the facts as found as to call for, and warrant, intervention by this Court.

Uncongenial as the task of reviewing so much evidence may be, this Court is obliged to shoulder the task. It cannot properly reject the invocation of its jurisdiction under s 32U(1)(b) by simple reference to the discretion of the Tribunal, the superior opportunities and facilities it had or by resort to comfortable generalities. It is required to perform its statutory function. It gets little assistance from Parliament in the instruction which it receives to have regard to the "merits of the case and the public welfare". But if, proceeding in the way described, it considers that, such matters being kept in mind, the exercise of the power by the Tribunal under s 32R of the Act has miscarried, it must proceed to exercise the discretions provided under that section for itself. By s 32U(3) it is afforded the powers of the Tribunal. It virtually then steps into the shoes of the Tribunal for, in the theory of the law, the Tribunal's jurisdiction has not then been lawfully exercised and the Court must proceed to do what, in its view, the Tribunal ought to have done.

All of this is trite. None of it was in dispute before this Court. Dr Huang did not seek to

have the basic findings of the Tribunal adverse to him reversed. He did not challenge the fact that his case required action under s 32R. He conceded that he had been, in the words of his counsel, "a bit lax with some of his patients". He admitted that he had not spent enough time with them and had "lost track" of their position. But he said that the orders made by the Tribunal were too harsh and that he ought to be allowed to remain on the Register doing work useful to society as a medical practitioner whether in a public hospital, in an insurance company, under supervision or under a restriction as to the drugs which he could prescribe. He pointed out that not a single patient had complained against him; that he had not engaged in any behaviour which was in breach of the law (save so far as he was in breach of the Act); that he had not prescribed "Drugs of addiction" as that phrase is defined in the Poisons Act 1966 and the Poisons List; the drugs he had prescribed were lawfully prescribable; and he already carried the heavy burden of costs of the proceedings and the loss of two profitable practices. In these circumstances, so it was said, the case called out for a primary order different from that which the Tribunal had made.

A medical practitioner Prescribes benzodiazepines

Dr Huang was born in Singapore of Chinese parents. He graduated in medicine from the University of Singapore in 1970. The following year he came to Australia and performed his residency qualifications before returning to Singapore where he practised in a large general practice. He returned to Australia in 1979. He thereafter practised as a sole general practitioner at two surgeries, one in Woolloomooloo, near Kings Cross and the other near Bondi Beach. The practices were extremely busy with an estimated patient load of 1538 patients just prior to these proceedings. His surgery hours were 8.30 a.m.. to 11 a.m.. and 3.30 p.m.. to 5.30 p.m.. Monday to Friday at Woolloomooloo and from noon to 2.45 p.m.. and 7.30 p.m.. to 9 p.m.. on the same days at Bondi Beach. That represents nearly nine hours a day. A feature of the places *in* which he carried *on* his practice (and hence of his patients) is the intense concentration of people with problems of drug addiction and sexual abuse of various kinds. Amongst Dr Huang's patients was a much higher concentration of injecting drug users and sex workers than one would find in an ordinary suburban practice.

It would seem that Dr Huang soon built up the confidence of such persons as patients. In his view, this was because he was non-judgmental, approachable, trusted and

prepared to pursue a philosophy of treatment described elsewhere as "harm minimisation". But in the view of the respondent it was because Dr Huang ceased to practise medicine and simply prescribed restricted benzodiazepine drugs whenever they were sought by the patients.

As described by the Tribunal, the 48 patients the subject of particulars in support of the charge brought against Dr Huang were:

of varying ages, all over 21 years old and of both

sexes. They were often described as social misfits or derelicts; they included drug (mainly heroin) addicts, prostitutes, alcoholics; most were unemployed and on social service benefits ... In search of the listed patients, a legal officer employed by the Department of Health, called at twenty one of the addresses in the Bondi, Woolloomooloo and inner city area listed in the respondent's patient cards. Some addresses did not exist, some patients had moved, some patients were not known at the addresses and no one answered at other addresses. Three patients were found at their addresses, while contact was made with another two by finding their

parents' addresses through hospital records."

The respondent called in evidence five of Dr Huang's patients, apparently to demonstrate Dr Huang's "practising methods." A further 16 patients were called in Dr Huang's case - a course of conduct which attracted the criticism of the Tribunal.

Dr Huang claimed that, although not known to him by such name, the strategy of "harm minimisation" was the philosophy which he learned in the large general practice in Singapore to which he returned after his period of residency in Australia. The Tribunal did not accept this assertion. Of course, it had the advantage of seeing Dr Huang give evidence and deference must be paid by this Court, in accordance with conventional theory, to the capacity which the Tribunal thereby enjoyed to judge Dr Huang's truthfulness from his appearance as a witness. I make that allowance, for the law requires it of me. I do not accept that it has a scientific basis; indeed, science proves the contrary.

Dr Huang had some early encounters with the Complaints Unit of the Department of Health. In 1980 he was sent, at his own request, a copy of a *Guide to the poisons Act and*

Regulations for Medical Practitioners and Dentists. It is under such Regulations and in the Poisons List made under them that, for the most part, are found the schedules of drugs which are either proscribed as "Schedule 8 - Drugs of Addiction", or restricted to supply only upon a written prescription of (relevantly) a medical practitioner (Schedule 4). Amongst the substances in Schedule 4 are those in Appendix D of the Poisons Regulations which are listed as "restricted substances, which may be abused and which are liable to cause dependence". These substances include, most importantly for this case, benzodiazepines.

In February 1981 officers of the Pharmaceutical Benefits Division of the Department of Health spoke to Dr Huang concerning his allegedly excessive prescription of two hypnotic barbiturate drugs. They noted his assertion of the need to provide assistance to certain drug addicts who were "genuinely seeking help" and needed the drug for sleep. No disciplinary action was taken against Dr Huang at that time. It is to be observed that, even then, Dr Huang called to attention the particular class of patient whom he was treating and their perceived special needs.

In October 1982 there was another interview following Dr Huang's prescription of Serepax (a benzodiazepine tranquilliser) to a schizophrenic patient who was under the general care of another medical practitioner. He asserted that prescription of benzodiazepines could allay the patient's discomfort whilst withdrawing from drugs of addiction. No action was taken.

In June 1983, Dr Huang was interviewed again following a patient's overdose with sedatives. He was warned that he should "prescribe with caution and a sense of responsibility and exercise professional judgment". Specifically he was told that repeated supply of drugs without an attempt to ascertain the underlying cause of a complaint and treating the same, had been held to constitute misconduct in a professional respect.

In September and November 1985 comment was made in the print and television media about Dr Huang's allegedly unorthodox practice of prescribing benzodiazepine drugs. A

survey of pharmacies near his surgeries purportedly suggested a much higher level of prescription of these drugs by him than by other practitioners. When interviewed in December 1985, Dr Huang reportedly asserted that he was simply prescribing drugs for patients with drug dependence needed by them to cope with their lives. He claimed that benzodiazepines were sometimes a drug of choice for heroin withdrawal and that sedatives such as Serepax, Rohypnol and valium were prescribed to "cut the edge off" drug intake. The prescription of strong analgesics was justified to ease the pain in his patients associated with withdrawal from, or as a substitute for, heroin. Dr Huang denied the reported assertions in the media. He claimed that comments attributed to him were incorrect or misleading. No disciplinary action was taken against him. He was simply told that his prescription practices would be monitored.

By 1989, Dr Huang was corresponding with Dr Geoffrey Bradshaw, a consultant psychiatrist attached to the Drug and Alcohol Co-ordination Unit in Chatswood. Dr Bradshaw sent him three papers concerning benzodiazepines. These papers express the concerns of their writers about the excessive use of the drugs and the problems associated with them. Dr Bradshaw asserted that they provided material setting out:

"...the reasons why benzodiazepines should be seen as generally contra-indicated in cases where there is a history of problems with alcohol or other drugs."

The papers, which were in evidence before the Tribunal, acknowledged that benzodiazepines constitute "a major advance over the types of hypno--sedatives that preceded *them* in medical practice, such as the barbiturates". However, they record that:

.. in recent years there has been increasing concern about certain problems associated with benzodiazepines, and their place in clinical practice has been the subject of considerable discussion in the medical literature; their use, or misuse, has also received attention from time to time in the mass media. In particular, there has been increasing recognition that benzodiazepine dependence is more common than previously thought there has been considerable concern expressed about other adverse effects (such as neuropsychological impairment of various kinds, and its consequences, and the emergence of troublesome symptoms in a proportion of those taking therapeutic doses long term), and there have been recurrent statements concerning the need, in view of these problems, for prescribers of these drugs to do so with care and selectivity."

In the letter which Dr Bradshaw wrote to Dr Huang *he records*, in a summary way, what

appears to have been Dr Huang's defence of his use of benzodiazepine in his class of patient:

"I appreciated your concern that patients should be treated as whole persons, and that this is sometimes neglected; and I acknowledge that your criticism of some methadone programs may well be valid. In regard to patients of mine, and this includes all those currently on the Chatswood public sector methadone program, I request that you do not prescribe benzodiazepines or other psychotropic or opioid/narcotic medications to them, or do so only after discussion with me and agreement that such treatment is clinically indicated."

Later in 1989, apparently following further complaints about Dr Huang's prescription practices, a "more thorough investigation" was carried out. This led to the complaints which brought him before the Tribunal in these proceedings.

The complaints and the particulars

Alleged against Dr Huang was the charge that he had been guilty of professional misconduct within the meaning of s 27(l)(a) of the Act in that:

"(A) he has demonstrated a lack of adequate knowledge, judgment and/or care in the practice of medicine; and/or

(B) he has been guilty of other improper or unethical conduct relating to the practice of medicine."

I should emphasise that not a single patient ever came forward to criticise Dr Huang before the Tribunal or to complain about his conduct as a medical practitioner. This is not a case, of the kind seen in the Tribunal, and in this Court, where a medical practitioner is charged with having engaged in unethical conduct, such as the abuse of position to secure sexual favours or in procuring unearned income or other benefits. Cf *R v Corbett (1991) 52 A Crim R 112* (NSWCCA). The complaints against Dr Huang fell into three categories:

1. His prescription of a benzodiazepine drug alone or in combination with other drugs (particulars 1 to 4) or of the drug codeine in conjunction with a benzodiazepine (particular 5);
2. His failure to maintain adequate records relating to patients named (particular 6); and
3. His failure to exercise responsible medical judgment in the treatment of named patients (particular 7). This last particular was added during the conduct of the hearing.

Before the Tribunal, Dr Huang acknowledged the charge of the second class, viz failure to maintain adequate medical records. Upon this particular, his own witnesses were critical of him. He agreed. But he contested the particulars relating to his prescription practices, advancing the thesis that this course of conduct arose out of the very nature of his class of patients; their peculiar and urgent demands; his practice of an alternative philosophy of "harm minimisation" which, even if unorthodox, was not unlawful; and the support he received from his patients when they came before the Tribunal. The same line of defence was advanced in respect of the third category relating to particular 7.

The "harm minimisation" theory of drug treatment

The relevance of the "harm minimisation" theory was obvious. It is not the function of the Medical Tribunal to stamp upon medical practitioners a single mode of treating their patients in accordance with the orthodox opinions of even a majority of members of the medical profession. The conduct of a medical practitioner does not, within s 27(l)(a) of the Act, demonstrate a lack of adequate knowledge, experience, skill, judgment or care in the practice of medicine, simply because a course of therapy is embarked upon which does not conform to a given professional norm. So long as the practitioner is acting lawfully and conscientiously and is pursuing, in the treatment of his or her patient, a "respectable, though minority, view" in such treatment, no misconduct exists as will attract discipline under the law. See *Qidwai v Brown* (1984] 1 NSWLR 100 (CA), 102. Cf *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 (HL), 638. In *Childs v Walton*, as the Tribunal itself noted, Samuels JA said (at 10):

"A departure from a generally accepted procedure does not necessarily constitute professional misconduct. There may be different schools of medicine and disputes between them. Adherence to the practice of a minority group does not alone entail professional misconduct. 'Every innovation has to be performed for a first time. That something has not been done is not proof that it ought not to be done': (per Hutley JA in Qidwai at 101)."

Dr Huang's prosecution before the Tribunal in this State coincided with proceedings brought against Dr Patrick Cranley by the Medical Board of Western Australia. Those proceedings came before Ipp J in the Supreme Court of that State. Dr Cranley was charged with infamous or improper conduct under the *Medical Act 1894 (WA)*. But his defence was that he had pursued a "harm reduction" strategy in respect of twelve patients who had various forms of drug dependence. Ipp J allowed Dr Cranley's appeal. He set aside the findings of the Board. He determined that Dr Cranley was not guilty of infamous or improper conduct in his

treatment of his patients. The case depended very much upon its own facts and the evidence called. There were variations in the medical evidence called for Dr Cranley. One of his witnesses, Dr Drew, supported the general strategy of harm minimisation. Whilst critical of some aspects of Dr Cranley's treatment of his patients, he rejected the notion that such treatment was either improper or infamous. Ipp J agreed. Unsurprisingly, perhaps, Dr Huang called in support of his case both Dr Drew and Dr Cranley. The Tribunal in this State was less impressed than was Ipp J.

At one stage it was suggested that Dr Huang did not really embrace the "harm minimisation" theory until he came to know of it as a result of Dr Cranley's case. It is true that correspondence was tendered which suggests that Dr Huang did not know the theory by the name explored in the Cranley proceedings. But before the subject proceedings commenced, it is fairly clear that he was pursuing a course of treatment which may have had other features but which shared some common characteristics with Dr Cranley's strategy. Like Dr Cranley he was dealing with drug addicted patients, although in very much greater numbers and much closer to the epicentre of the use of injecting drugs of addiction in Australia. Like Dr Cranley he was endeavouring to treat the patients, as stated, "as whole persons" and was conscious of the limitations of, and resistance to, the methadone programmes maintained by practitioners such as Dr Bradshaw. He may not have derived this philosophy from his early time in practice in Singapore. The Tribunal rejected that assertion. But he was forced by his practice to deal with a large number of people presenting with problems similar to those seen by Dr Cranley in Perth. And he was obliged to do so in a legal context in which there was no simple prohibition in law upon his prescription of benzodiazepines as a drug of addiction - simply a professional obligation to dispense those drugs (and the drug Codeine Forte) with care and responsibility inherent in the limitation of such prescriptions to qualified medical practitioners such as himself.

The Tribunal was itself divided as to whether there was "a sufficiently reputable minority" of medical practitioners "who could be accepted as approving of [the] use [of benzodiazepines] in substitution for opiates and alcohol". Some Members took the view that the minority view was not truly sustainable, on the evidence presented to the Tribunal, as part of a concept of medical treatment for a medical problem and at best was purely experimental.

The Tribunal suggested that the problem should be addressed by a national authority. It seems that following this suggestion, steps have indeed been taken to set in train consideration within the medical profession of the preparation of guidelines which would make clearer for practitioners such as Dr Cranley and Dr Huang the acceptable limitations and requirements to be observed in the prescription of benzodiazepines to persons with drug and alcohol dependence. Such guidelines were not, as the Tribunal pointed out, available to Dr Huang at the time of the prescriptions complained of in his case.

Because in this Court Dr Huang did not challenge the ultimate finding that the complaints made against him had been proved, I am not concerned to re-explore this issue, even if it would be open to this Court to do so having regard to the way in which the Tribunal expressed its determination of it. Dr Huang raised the issue not to avoid the charges but in an endeavour to have this Court view his conduct in the light in which, he claimed, it should be appreciated, viz as an alternative mode of treating the patients of the particular class who were under his care. According to Dr Huang, that mode may not have been entirely orthodox; nor (as found) always properly carried out. But it was not a scandalously wrong and unarguable way of proceeding as a medical practitioner.

The Tribunal's reasoning

As I read the Tribunal's decision, three considerations led it to the order which is now under appeal.

The first was its conclusion that Dr Huang's assertion of "harm minimisation" or "harm reduction" was false. In careful reasoning, the Tribunal, whilst itself unconvinced by the theory advanced, proceeded to test Dr Huang's conduct by the evidence of those practitioners who supported the theory and who were called in his case. They included Dr John Marks of London, a Fellow of the Royal Colleges of Pathologists and of Psychiatry, who for a long time worked with Hoffman la Roche and who had been in charge of biological research including the initial studies into benzodiazepines. He gave evidence by telecommunications link: an admirable innovation adopted by the Tribunal in this case. As with all other witnesses called for Dr Huang, however, the Tribunal was unimpressed. It emphasised that

Dr Marks' "experience in treating drug abusers was stated to be very limited".

The Tribunal was also obviously unimpressed by Dr Huang as a witness and as a medical practitioner. They described his evidence as "incorrect, biased and sometimes untruthful". He was criticised for his "opportunism" relative to his patients' evidence. When he stereotyped his patients as members of the "Sydney subculture of deprived people ... prostitutes, drag queens, alcoholics, gays, AIDS infected people", the Tribunal noted that he sought to "smear" them by reference to their drug usage and social position in life. Many of his problems, in describing *his many* patients, arose out of his totally inadequate records. Not to put too fine a point on it, the Tribunal was *of the view that his claim to treat "the whole patient"* was humbug:

"...he generalised, when asked any detailed question, by placing the patients into a category in a manner, which led the Tribunal to believe that, so far as [Dr Huang] was concerned, the demand by patients for legal drugs for no specific medical reason, other than the desire for it and to satisfy their dependency, was, usually or too often, sufficient to merit compliance."

Thus, the Tribunal concluded that Dr Huang had failed to treat his patients as individuals:

"Many of them were on methadone and the respondent was either unaware of it or unconcerned about it in many cases. The evidence of the patients was that they had changed their heroin usage as a result of going on a Methadone Programme, rather than by reason of the prescriptions given them by the respondent, contrary to assertions made by the respondent."

The one common thread which ran through the evidence of those practitioners who supported the harm minimisation or reduction theory of treatment of drug or alcohol dependent patients was the need to monitor their cases individually and painstakingly. This, the

Tribunal found, Dr Huang had failed to do. Therefore, even within the harm minimisation or reduction theory, as it has been developed as an alternative approach to the problems of drug and alcohol addiction, Dr Huang's prescription practices did not measure up. As charged, he had simply provided the benzodiazepines sought by his many regular patients and sent them on their way.

The most that can be said for Dr Huang under this head is that the drugs which he prescribed were not expressly unlawful (ie they were not in Schedule 8); there were no national guidelines or professional rules laid down to govern prescription practices; no patient was proved to have been specifically harmed by the prescriptions; benzodiazepines are relatively safe drugs in terms, at least, of mortality; and no patient specifically complained either about a prescription or the lack of personal attention to the fundamental problem that was causing the symptoms that gave rise to the demand for a fresh prescription of benzodiazepines.

From the foregoing it will be readily seen that this case is distinguishable from that dealt with by Ipp J, whose judgment in *Cranley I* I have read with admiration. The Tribunal here tested Dr Huang by the expressed principles of harm minimisation or reduction. They found his practices wanting. This caused them to question his asserted justification and to suggest that it was no more than an *ex post facto* rationalisation. It led the Tribunal to a conclusion which was expressed in extremely sharp language which Dr Huang criticised:

"He fell into the category of a medical practitioner 'drug pedlar' - offering prescriptions and exploiting the health-finance system with the willing assistance of drug addicted and dependent persons who had found a medical practitioner who 'understood' them and did not question too much. The Tribunal records its deep concern at the lack of judgment and care shown in the treatment of the patients

It takes the view that the respondent became so obsessed with the supply of drugs to patients requesting them that he too readily overlooked basic medical care in such patients. Although he professed individual patient care, he continually gave the clear impression to the Tribunal that he reduced a great number of his patients to a common pattern and submitted them to the same symptomatic treatment by prescriptions."

Mercenary motivation

The second consideration which seems to have influenced the Tribunal in reaching its conclusion was its determination that Dr. Huang's real motivation was mercenary, ie was designed to take advantage of the disadvantaged and dependent patients who made up the bulk of his practice, simply to make money for himself:

"The Tribunal believes that the respondent has sought to rely upon philosophical concepts and arguments of 'do gooding' to cloud his real practical motive which was to use the medical-finance system to maximum advantage. He was confident that he could say in answer to any criticism that he was prescribing within the law and that the Authorities had not laid down detailed guidelines as to prescribing. The Tribunal is not satisfied with the respondent's bona fides in his assertions of prescribing for the well being of drug addicted persons.

The Tribunal came to a firm decision that the driving motivation for the respondent's mode of practice was his use of the Medicare system of medical financing for the maximisation of his income. Patient care was secondary. His practice facilities were also orientated to that primary end. This was illustrated by his failure to have an appointment system (usually used by general practitioners in single practice); the daily patient volume through put, his lack of patient records and his computer exclusively used by himself for Medicare claims while he saw each patient. He failed to refer patients for investigation or consultation to specialist persons or institutions on an excuse that he was not 'treating' the patient by doing so. It was more important to him not to keep a patient waiting than to keep a proper record of a 'consultation' taking place. The analysis of the number of patients he saw day after day for almost a year, even allowing for working hours exceeding his stated surgery hours, is quite unreal. The time which could have been devoted to them is unacceptable for proper patient care. The great bulk of his Medicare claims were for 'standard' consultations (that is, 5 to 25 minutes), although there were periods with some patients (more particularly since 1990), when the charge was for a 'brief' consultation (that is, up to 5 minutes)."

In reaching its orders, the Tribunal returned to this finding of mercenary motivation:

"Even if its findings had been that his practice had not been influenced by mercenary considerations but by humanitarian devotion, the Tribunal would have come to the same decision. His experimentation was not based on his learning but on an irresponsible approach to prescribing drugs to untrustworthy drug addicts devoid of proper control or supervision which was reckless, despite the stratagem of professing some control ... [The Tribunal] views the professional misconduct and the respondent's mendacious conduct before it as serious."

It is worth pointing out that Dr Huang was never charged with any offence under the health insurance legislation. Nor did the particulars which were supplied to him expressly confront him with the allegation that he was guilty of offences against the Medicare legislation. Nor was this ever put to him directly and in plain terms before the Tribunal by counsel for the respondent. However, I do not read the Tribunal's conclusions and orders as resting necessarily upon this analysis of his motivation. To the contrary, the Tribunal made it plain that they would have come to the same conclusion even if a different opinion had been reached on Dr Huang's motives. I take their analysis of those motives to be a second procedure adopted by the Tribunal to test Dr Huang's assertion before it that he was simply practising an alternative, less orthodox but respectable and legitimate mode of treating the special category of patients who came to him for care. Testing that proposition by the mode of practice described, the facilities offered to patients, the amount of time which, by logical calculation, could be devoted to each patient and the attention given to their care, the "through put" (as it was described) suggested a mechanical approach to the performance by Dr Huang of his professional duties. In a sense, this was borne out by his own control of his computer for Medicare claims. The acquisition in a comparatively short time of medical practice, of five investment properties, since sold or on the market, also tends to bear out the suggested mercenary motivation of his mode of practice.

I should say that the patients who were called by the respondent before the Tribunal did not criticise Dr Huang for his lack of attention. For example, the patient "N" said that there were times when he talked to Dr Huang at length. The patient "AH" agreed in cross-examination that Dr Huang gave him the attention "you would normally expect from a doctor". The patient "V" said that she would have a "general chat" every time she saw Dr Huang. Pressed about how long these lasted she said:

"On a good day, probably only about 10 minutes. If it was something that was very worrying to me it would be maybe 20 minutes, half an hour." The patient "G" asserted that over the years Dr Huang had helped him. He elaborated: *"Well, he - I feel he - he has helped me in the respect that he was monitoring my intake to a large extent."*

He agreed that Dr Huang was "non-judgmental" and did not "hold the fact" that he was a "drug addict" against him. The patient "AW" said that Dr Huang had helped him in a "reduction policy". This patient had asked the doctor:

"...what sort of a rate I could come down at without having fits or that sort of thing."

He was advised and this assisted him in his reduction programme. The Tribunal was rather critical of Dr Huang's having called a number of his own patients in his case in his defence. The Tribunal said:

"Evidence was given by 21 of the nominated patients, a somewhat new development in Tribunal hearings concerning a doctor's prescribing conduct with drug addicts. It exposed patients to lengthy questioning about their medical histories as their aid was sought in an attempt to prove that they viewed the respondent as a 'good doctor'. It has been the experience of Tribunal members that patients, called by a medical practitioner to give evidence in an inquiry, will praise their doctor, a fortiori, if the doctor is satisfying their wishes by fulfilling their requests over a lengthy period."

This criticism appears a trifle unreasonable. Given that the particulars nominated identified patients and Dr Huang's prescription practices in respect of them, it was legitimate and understandable for him to call some of the patients. Especially was this so after the complainant had called five of his patients in her case. The examination-in-chief of the patients, once called, was typically brief. Much time was taken by their cross-examination for the complainant. It is hard to see how a complainant who wishes to contest prescription practices in respect of identified patients can do so without calling at least some of the patients. Those called, it is fair to say, spoke well of Dr Huang. One of them, the patient "AP" regarded him as a "very good doctor, someone that understands". She had been treated by him for years in connection with drug problems. At one stage she was taking 70 Serepax tablets a day. According to her evidence, he helped her reduce her intake and she was proud of having escaped her addiction. She claimed that if it "wasn't for the talking of Dr Huang", who had given her "moral support mentally", she would not have been able to do this. Another patient "R", rated Dr Huang as a "good" doctor giving him "8.5 or 9 out of 10". Several of the other patients gave evidence that Dr Huang had helped them reduce their drug intake, including their of benzodiazepines. The patient "X" said:

"He is easy to talk to and does not put words in my mouth nor does he set impossible goals but rather sets day to day changes.

Another patient, "E", said that she found Dr Huang:

"...a very compassionate man and a very good doctor and a very - man who is very willing to go out of his way at any time to call and see me should I need him."

Still another patient, "AA", said:

"I have not worked as a prostitute since mid-1990 and put this down to Dr Huang's help. Without him I would probably be dead."

The patient "AG" said:

"Dr Huang really opened my eyes to my drug problem and made me realise that I could not cope with it on my own. I regard the doctor highly and have admiration for what he does. ... My usage of benzodiazepines is much less than it was and I attribute this to Dr Huang. I am taking an amount that I believe is sufficient to let me function normally and I am comfortable. I believe that had I not been helped by benzodiazepines that my outcome might have been very different. Dr Huang has made my life more comfortable rather than more difficult."

Questioned, this patient said:

"I have gone from being on a heroin habit to being able to - it looked like at one stage of losing my job to furthering my job at where I work at the University of New South Wales and being able to maintain a steady relationship with a person. I have a nice flat that I live in. Everything is going quite well for me."

Other patients were to the same effect asserting that Dr Huang had saved their lives, was compassionate and understanding and approachable by them in their predicaments.

The Tribunal was not impressed with this testimony:

"The (patients') statements prepared for the hearing focussed too closely on denials of specific matters upon which the respondent had been cross-examined. Their evidence was assessed by the Tribunal as biassed, obviously intended to support the retention of a "treatment" regime favourable to their drug addiction or dependence. It was frequently in conflict with their written statements. It frequently bore the usual indefiniteness and unreliability of testimony of drug addicts."

With respect, this also appears to be too sweeping. It falls into the very error of which it accuses Dr Huang - of unconvincing generalisations. At least read in transcript, a great deal of the evidence of Dr Huang's patients redounds to his credit. Much of it was not challenged in its particularity. It is true that the evidence was expressed in statements drawn by the lawyers. It is also true that it was biased in favour of Dr Huang. But the patients were not forced to give this evidence. Much of it (only extracts are stated above) has the ring of truthfulness that derives from specificity. It would appear that Dr Huang's treatment of his patients was neither all good nor all bad; neither always rushed, nor always careful and prolonged. So the question remains whether the ultimate orders of the Tribunal are sustained upon the conclusions stated by it which rested so substantially upon its impression of the acceptability of Dr Huang, the medical witnesses and the parade of patients called successively by the complainant and medical practitioner.

The availability of restricted practice

In the ultimate, accepting the essential findings of the Tribunal, Dr Huang's case in the appeal was that the order for removal of his name from the Register was too harsh and that this Court, reviewing the order made, and having regard to the merits of the case and the public welfare as enjoined by s 32U(3)(b) of the Act, would substitute another order, viz that Dr Huang be permitted

to continue in his practice but under conditions imposed by the Court as it considered appropriate to the findings made against him. Such an order is permissible under s 32R(l)(c). The Court has the power to make such order by virtue of the conferral upon it of the powers of the Tribunal pursuant to s 32U(3)(b). As stated above, it may only do so in "determining" the "appeal" in a way conformably with the proper relationship between the Court and the Tribunal.

The linchpin of the arguments of Dr Huang were that the Tribunal had misunderstood the decision of this Court in *Spicer v New South Wales Medical Board*, unreported, 19 February 1981. That was a case in which a medical practitioner was found to have prescribed Mandrax, Serepax and Seconal, a barbiturate. He was found to have engaged in "misconduct in a professional respect". At first instance, the Tribunal determined that the practitioner had chosen to "pursue his own misguided course of treatment of drug addicted patients, shutting his eyes to reality". He had regarded the approach of the medical profession as "too doctrinaire". The Tribunal declared that this was a "presumptuous course to take". It suspended the practitioner from practice for a period of twelve months and it then ordered that he should not, upon his resumption of practice, prescribe substances specified in Schedule 8 of the Poisons List or in Schedule 4 of the Poisons List which were specified in Appendix D of the Poisons Regulations, for a period of three years. The practitioner appealed against this decision. His appeal to this Court was dismissed. Hope JA gave the opinion of the Court (which was constituted by his Honour, with Reynolds and Hutley JJA).

In the course of its reasons in the present case, the Tribunal quoted from this Court's decision in *Spicer*. It continued:

"The Court went on to affirm that the type of misconduct,

even if confined to treatment of drug addicts, showed an unfitness generally to practise medicine."

It is important to note that *Spicer* was not concerned with the prescription of benzodiazepines. So far as I am aware, the present is the first case in which a charge of improper prescription of benzodiazepines has come before this Court. In *Spicer*, the medical practitioner was found to have prescribed actual drugs of addiction. Clearly, this could attract the removal of his name from the Register. Instead, the Tribunal (affirmed by this Court) suspended the practitioner for a period of one year and then permitted him to practise with conditions imposed for three years. Mandrax, which was the subject of the proceedings in *Spicer*, is a much more serious drug of addiction than any benzodiazepine is. As pointed

out in *Spicer*, under the *Poisons Act* authority may be given to prescribe Schedule 8 drugs in certain circumstances. Dr Spicer had no such authority.

Insofar as the Tribunal in the present case drew from *Spicer's* decision a conclusion that this Court had affirmed that the prescription of addictive Schedule 4 drugs necessarily shows an unfitness generally to practise medicine requiring removal from the Register, I believe it went beyond what *Spicer* holds. As in all of these cases, the determination rests very much upon the peculiar facts of the case in hand. It would be dangerous, even wrong, to derive from decisions in particular cases a general rule relating to the way in which another, necessarily special and particular case, should be dealt with by the Tribunal.

It was urged that other decisions of irresponsible prescription practices supported what the Tribunal did in the case of Dr Huang. *Bridge v Brown*, Court of Appeal, unreported, 17 December 1982 and *Kirumba v Walton*, Court of Appeal, unreported, 4 October 1990 were cited as illustrations. But each of these is also distinguishable. For example, *Kirumba* involved a practitioner with a bipolar disorder who had offered restricted drugs for sexual favours. His patients complained about him. The case was quite different from the present.

In describing *Spicer*, the Tribunal in this case stated that the complaint against Dr Spicer was about prescribing "Mandrax, Serepax and Seconol". The report of the case does not bear out the assertion that Serepax was involved. This is not an unimportant mistake because Serepax, composed of oxazepam, is a benzodiazepine tranquilliser. In fact, it is probably the best known of the benzodiazepines. Insofar as the Tribunal thought that *Spicer* was a case about the prescription of benzodiazepines and that the decision of this Court affirming the orders in that case warranted the conclusion that "the type of misconduct" (ie including the prescription of benzodiazepines) showed unfitness generally to practise medicine, I believe the Tribunal fell into error. True it is there were certain similarities between *Spicer* and this case. Each involved a medical practitioner providing drugs to persons who "misused or abused drugs" or were already addicted to them. True also, some of the drugs in *Spicer* were restricted, in the sense that they were listed in Schedule 4. But in *Spicer*, others

were in Schedule 8, as the reasons of Hope JA (p 4) demonstrate. In *Spicer*, it was specifically found that the medical practitioner was not actuated by greed; whereas in the present case the contrary was concluded by the Tribunal. Also in *Spicer*, the practitioner clearly expressed contrition. A major component of the case of the respondent in resistance to an order short of removal from the Register was the suggested lack of contrition on the part of Dr Huang.

It can be seen that the case of *Spicer* bears only superficial similarities to the present one. I do not believe that it justified the holding which the Tribunal in this case appeared to have ascribed to it. on the contrary, the fact that the Court in *Spicer* affirmed the Tribunal and permitted the practitioner's name to remain on the Register indicates that it concluded that, after a period of a year's suspension, he would be fit to continue to practise medicine, although under the limitation of the conditions which were imposed.

Because I believe that this error in deriving too much from *Spicer* misled the Tribunal in the conclusion which it ultimately reached as to the order which it should make, I have come to the conclusion that such order cannot stand.

Alternatively, I am of the view that the order made by the Tribunal was in the circumstances appealably wrong. It is so out of harmony with the facts proved and found to have been established, viewed in the light of all the evidence, as to require the intervention of this Court. Even if no explicit error could be identified or adequately isolated in the reasons **expressed** by the Tribunal, its order in relation to Dr Huang is sufficiently inappropriate in the circumstances as to require that his appeal be allowed in respect of such order.

The foregoing conclusions require this Court to perform the function then assigned to it by s 32U(3)(b) of the Act having regard to the "merits of the case and the public welfare". The "merits" must be found within the determination by the Tribunal of the charge against Dr Huang. The order must be found in the list of those made available to the Tribunal, and now to the Court, under s 32R of the Act.

The proper order

So far as the finding is concerned, it is important to note

that only one of the two charges brought against Dr Huang which the Tribunal expressed itself to be "abundantly satisfied" to the high degree required as having been proved to be "professional misconduct" was the demonstration of "an inadequacy in judgment and care in the practice of medicine". It did not expressly find that Dr Huang was guilty of "improper or unethical conduct relating to the practice of medicine". In these circumstances, it would be wrong for this Court to deal with Dr Huang except upon the basis found and in respect of the particulars charged.

There is no doubt that this is a serious case. Clearly, the findings of the Tribunal require a serious response. I put to one side the emotive language whereby the appellant was described as a "drug pedlar". I do not believe that that was a proper description of his conduct; nor was it the matter charged and particularised. The expression "pedlar" is normally confined to the provision by an unauthorised person of illegal drugs, covertly and clearly in breach of the law. Dr Huang's prescription habits may have sometimes been irresponsible, ill-considered and insufficiently tailored to (or concerned about) the particular needs of his patients. But I do not think it helps the classification of the case - or the determination of the proper order - to engage in name-calling of this kind.

Nor do I consider that the findings of Dr Huang's mercenary motivation control what must now be done. Many medical practitioners, like many in the law (not to say in other walks of life) have a mercenary motivation, to some extent at least. Dr Huang was not charged with offences against the health insurance legislation. Nor was this charge ever specifically put to Dr Huang. In these circumstances, it would be quite unjust to punish him for his suggested motivation or for the large amount of money he made. This consideration is not relevant. It is clear that Dr Huang worked

very long hours and saw very many patients. Much more relevant to the exercise of the jurisdiction before the Court is the way in which Dr Huang's throughput tends to demonstrate an inability or disinclination to treat the underlying disorders of the patients, viewed always as individuals and not as persons to be hurried through the consultation: receiving social pleasantries, a fresh prescription and a Medicare form to be signed.

Because of the seriousness of the case as found, it is plainly not one appropriate for a caution or reprimand, for medical treatment or counselling, for the undertaking of educational courses, reporting on medical practice or for the imposition of a fine. In my view, the choice before the Court is either removal of the name of Dr Huang from the Register, or a suspension from practice for a time together with some restriction upon his rights to practice. An order of the kind made in *Spicer*, or some variation of it, needs to be considered.

The respondent urged that the Court should reaffirm the Tribunal's order keeping in mind the fact that the Tribunal contemplated that Dr Huang could reapply for registration three years after the day on which his name was removed from the Register. As stated, Dr Huang urged that he should be allowed to resume private practice under supervision.

In support of his case, Dr Huang sought leave to tender an affidavit which set out his position at the time the proceedings were before this Court. The reading of the affidavit was opposed. But the Court, by majority, permitted it to be read against the possibility that the Court was called upon to exercise the powers conferred upon it in an appeal pursuant to s 32U(3)(b). In such circumstances, it will sometimes be useful, even necessary, for the Court to have up-to-date information on the position of the practitioner for the Court's order to speak from the date upon which it is made. The admission of fresh evidence in proceedings of this kind is not at all exceptional. It was permitted in *Spicer*. In my view it was useful in this case for otherwise the Court would have been acting upon evidence before the Tribunal which was out of date. Before us Dr Huang was submitted to cross-examination by counsel for the respondent.

According to Dr Huang's evidence in this Court, he supports a *wife* and two young schoolchildren. In late September 1992 he negotiated the sale of his Woolloomooloo practice for \$30,000.

However, that sale did not proceed because of difficulties associated with the assignment of the lease. Because the lease of the Bondi practice had expired, the goodwill in that practice could not be sold. It was simply closed down and the goodwill lost.

Dr Huang deposed to legal costs of about \$200,000, including an estimated \$70,000 to \$80,000 payable to the solicitor for the respondent. He stated:

"I have no training or qualifications for any other occupation except as a doctor. As a migrant to this country I do not have the friends or connections that a person born here may have."

It was suggested that Dr Huang's experience with his computer might equip him for other employment. But I am satisfied that his *talents* in this regard are limited and amounted to a hobby rather than a saleable skill in the present difficult economic climate.

Dr Huang gave evidence that he owned his home and was in the process of selling the investment properties he formerly owned. He said that he had sold four of these and had two left, viz two small home units in Bondi which were "up for sale". Presumably these transactions, in a depressed property market, were required so that Dr Huang could realise the equity in the properties to reduce his expenses, particularly for the payment of the legal costs. Dr Huang stated that he was not registered as a medical practitioner in Singapore or in any other State of Australia. The possibility of his achieving a medical or paramedical engagement anywhere, whilst the order of the Tribunal stands is, I believe, negligible.

The respondent laid much emphasis upon the failure of Dr Huang to show proper contrition such as would justify an order of the kind made in *Spicer*. The purpose of contrition in this context was explained by Samuels JA in *Childs (above)*. It is not a ritual imposed by the Court as the gateway to a return to practice. Its relevance will usually be that it shows an appreciation of the error of the misconduct which has given rise to the proceedings and as an assurance to the community (whose interests are most at stake *in* proceedings of this kind) that such error will not be repeated.

The Tribunal considered expressly the making of an order for conditional practice and/or educational courses and/or advice in relation to the management of his practice. But it concluded:

in the circumstances, the lack of care and judgment

shown in the findings in respect of those Particulars is a further illustration of his lack of care and judgment in the practice of medicine flowing from his improper practising methods of drug supplying into drug addicts

and drug dependent persons."

Not without a certain hesitation, I have come to the conclusion that a different order is required. What *is* required is, in large part, a matter of impression from the whole of the material placed before this Court. It is an impression in which I differ from the Tribunal with diffidence because of the consideration of its advantages which I have already stated. But having come *to* the different conclusion, is my duty to give effect to it as s 32U(3)(b) of the Act requires.

Amongst the considerations which lead me to feel that removal from the Register is, as Dr Huang says, too harsh in his case and not required by the merits and the public welfare, are the following:

1. None of the drugs prescribed was a Schedule 8 drug. All were Schedule 4 drugs, the prescription of which was restricted but lawfully permitted to Dr Huang;
2. No national guidelines or other rules of practice have been universally agreed in the medical profession or stated by authoritative or responsible medical bodies in Australia. Even the respondent's own medical witnesses agreed that such a statement was desirable. The Tribunal itself added its voice to the call for such a

statement. Dr Huang did not have the benefit of such a statement to govern, control or guide his prescription practices;

3. Dr Huang's practice was not typical. It would be unjust to compare it to the ordinary medical practitioner's in the suburbs and towns of this State. He worked in particular districts which exposed him to the special, urgent needs of drug and alcohol dependent persons. Whilst I have absolutely no doubt that he should have done much more in the treatment of such persons as individuals, the notorious difficulty of offering such treatment, no matter how much time and attention is devoted, would undoubtedly have affected to some degree any practitioner in Dr Huang's place as, on the evidence, I believe it did him;
4. Whilst deferring to the assessment of the patients called, recorded in the decision of the Tribunal, I believe its dismissal of their opinions was too general and sweeping. Its criticism of their being called in Dr Huang's case was a trifle unfair, given that this course was initiated by the respondent and, in a sense, responded to the particulars of the complaint. Virtually without exception, the patients called spoke in praise of Dr Huang. Some even went further saying that he had saved their lives or restored them to good society. There is a touch of inflexibility about the Tribunal's approach which is missing in the more convincing reasoning of Ipp J in the Supreme Court of Western Australia when dealing with the particular problem of drug and alcohol addicted persons. I see no reason to dismiss the statements of approbation made by the patients called. Untruth was not demonstrated. They were not, after all, Dr Huang's sample. They were those of the 49 patients named by the respondent in the particulars to her charge who could be discovered and called;
5. The 49 patients, in turn, represent only a small proportion of Dr Huang's patient load of approximately 1538. An analysis of the other patients showed nothing extraordinary in the prescription of benzodiazepines. Therefore, whilst the 49 patients may have been typical of Dr Huang's prescription practice for drug and alcohol dependent persons, they may not have been typical of his whole practice. They were not chosen at random. They were selected by the respondent. Yet even they spoke of Dr Huang as a caring and compassionate medical practitioner. The whole explanation for their

assessment of him cannot convincingly rest upon their relationship with him as their medical practitioner or the fact that he unquestioningly supplied them with the drugs they demanded. Many of them gave apparently convincing evidence that Dr Huang had helped them to reduce their intake of benzodiazepines;

6. The "public welfare" which the Court is required to have regard to includes the public welfare of utilising the training and experience of a practitioner such as Dr Huang. There would seem to be no risk or danger to the community if he were to be restricted in his practice, as in working for an insurance company (without a right of prescription at all) or in a public hospital (with a limited right of prescription). On the contrary, because this would allow Dr Huang to maintain his family and to restore his good name whilst maintaining some professional skills, it would seem that such an order would adequately protect the public whilst advancing its welfare and that of Dr Huang and his family. The alternative, once his property is sold, is that he will probably be thrust upon his family or the community;
7. It was suggested that because of the want of express statements of contrition, the Court could not be convinced that Dr Huang would desist from his established practice of unthinking prescription of benzodiazepines in the future. Certainly there is some such risk, given the findings of the Tribunal. But having gone through such a lengthy inquiry, and the ordeal of proceedings before the Tribunal and in this Court, I consider it most unlikely that Dr Huang would obdurately and defiantly continue with his past practices. The whole course of the litigation has been a rather expensive education. Dr Huang would be advised by his lawyers that any future breaches or reversion to the prescription practices which led to the findings of the Tribunal would expose him to the risk of permanent removal of his name from the Register;
8. There is no reason to doubt the legal costs bill of which Dr Huang spoke in his affidavit, viz \$200,000. This would now have been increased by the costs of the appeal. Nor is there

any reason to doubt the loss of the goodwill in the Bondi practice and the probable loss of the goodwill in the Woolloomooloo practice. Although these losses and costs do not strictly represent fines as envisaged by s 32R(l) (h) of the Act they certainly represent a very severe financial burden which Dr Huang is required to carry by reason of the findings of the Tribunal which he now accepts;

9. There is also the delay in bringing these proceedings. Whilst it is true that some warnings were given to Dr Huang about his prescription practices, they amounted to a case of too little too late. Where, as in this case, the complaint related to restricted and not illegal drugs, the proper course of conduct by the authorities would seem to be, at least in the first instance, more direct counselling and warning than occurred in this case. Perhaps the absence of the warnings arose from the controversy within the medical profession itself concerning the suggested adverse effects of benzodiazepines administered to drug and alcohol dependent persons. Whilst the obligation rests upon the medical practitioner to ensure that he or she continues to practice medicine as the law and professional standards require, I think that it is appropriate to say that more could have been done, at an earlier phase, to counsel Dr Huang about the need to reconsider his prescribing habits in respect of benzodiazepines and other restricted drugs. In 1983, Dr Huang was told that the Department would continue to monitor his prescribing habits. His case came under the attention of the Complaints Unit of the Health Department as early as 1985. Monitoring continued, so it seems. But no action was taken against Dr Huang until 1990 when the files of his patients were taken by officers of the Department. In these circumstances, I have the impression that more precise and explicit counselling of Dr Huang, at an earlier stage, would have brought him into line. Instead, the matter was allowed to drift until the present proceedings were launched.

Conclusion and orders

The respondent resisted suspension from practice because of a suggested lack of contrition on the part of Dr Huang. She resisted a conditional return to practice because, it was said, it would be impossible to police it.

So far as contrition is concerned, Dr Huang at all times acknowledged the inadequacy of his records. Before this Court he has now admitted the other charge found against him. He has not contested any of the particulars. He asks to be dealt with upon that basis. I take this to indicate a measure of contrition. He is not now still contesting the finding that he demonstrated a lack of adequate knowledge, judgment and/or care in the practice of medicine. We cannot know if this acknowledgment comes from a sincere conversion to the merits of the complainant's case or simply acceptance of legal advice that, given the limitations upon the Court's review, the Tribunal's findings would be likely to stand. Probably both considerations have

affected the position now adopted by Dr Huang. However that may be, he is entitled now to be dealt with upon the basis that he does not contest the charge as particularised. I consider that the Court is entitled to infer from this that he realises what the law requires of him, whatever personal doubts or mental reservations he may have about the law. The requirement of contrition is not a litigious auto de fe whereby spiritual conversion is demanded by the Court, to be expressed in words which show a complete intellectual acceptance of all that is said against a person. Every person has the dignity of his or her own self-justification. In Dr Huang's case, the evidence of his patients indicate that they thought he had certain strengths both as a doctor and as a human being. I am not inclined to require, as the respondent seemed to suggest, that the price for an order short of the removal of Dr Huang's name from the Register was an acceptance of everything said against him by the respondent. If that were required in cases such as the present, such statements of contrition would be hollow indeed.

In his evidence Dr Huang acknowledged error to this extent:

"Q: What do you say now as to your prescribing habits in

respect of those patients under review. Do you adhere to what you have done

...

A: I would say that in hindsight I should have maybe listened to my colleagues.

Q: Which colleagues? A: The colleagues who have testified against me."

Furthermore, in his statement to the Tribunal, Dr Huang acknowledged that Dr Cranley had worked in his surgery and had given him the benefit of his advice on the way to deal with bad cases of drug and alcohol dependent patients who needed benzodiazepines. So far as there was a failure to notify methadone treating doctors, Dr Huang conceded this failure at the hearing and gave evidence to this effect before the Tribunal.

The respondent urged that the imposition of conditions upon Dr Huang's registration would be unenforceable. Various possibilities of his breaching the conditions without the breaches coming immediately to notice were elaborated. I acknowledge that such breaches could indeed occur. But against the whole background of the circumstances of this case, I consider that it is extremely unlikely. If the litigation, the loss of his practice(s), the sale of his properties, the publicity and the exposure to the adverse

opinion of his medical colleagues could not teach Dr Huang the standards expected of him in medical practice in this State, I should be most surprised. I do not believe that the case is so significantly different from *Spicer* as to call for a different order. Whilst some features of this case are more serious, others, as I have demonstrated, are less serious.

The merits of the case and the public welfare would be better served if Dr Huang were allowed to resume practice after a period of suspension. The suspension would mark the disapprobation of the community which arises from the findings of the Tribunal which Dr Huang now accepts. The conditions of practice would make it difficult for Dr Huang to secure employment. But if he can do so (as in an insurance company, a government department or a public hospital under supervision) that would be preferable in the public interest and more just in all the circumstances than the order appealed from. If Dr Huang's undoubted energies and interest in, and empathy for, at least some seriously ill patients can only be channeled in the right direction, he could, after the period of conditional practice, return to practise on his own account with the warning of this litigation behind him.

The orders which I would favour are therefore:

1. Appeal allowed;
2. Confirm the finding by the Medical Tribunal of New South Wales *that Dr Don Nai Hsi Huang* was guilty of professional misconduct within the meaning of s 27 (1) (a) of the Act as found by the Tribunal;
3. Set aside the orders and directions of the Tribunal;
4. In lieu thereof, order:
 - (a) that the said Dr Don Nai Hsi Huang be suspended from practising medicine *for* a period of 12 months from

6 August 1992, such suspension expiring on 5 August 1993;

(b) direct that there be imposed on Dr Don Nai Hsi Huang's registration, for a period of three years commencing on 6 August 1993, the following condition - that he should not prescribe substances specified in Schedule 8 of the Poisons List, nor those substances of Schedule 4 of the Poisons List specified in Appendix D of the Poisons Regulations;

(c) order that the said Dr Don Nai Hsi Huang pay the costs of the complainant before the Tribunal to be assessed or taxed on the Special Scale under the District Court Rules;

5. Order that the respondent pay the appellant's costs of the appeal but have, in respect thereof, a certificate under the *Suitors' Fund Act* 1951.

I Certify that this and the 38
preceding pages are a true copy of
the reasons for judgment herein of
The Honourable Justice Kirby.

20/4/93
Date

M J Crowley
Associate

THE SUPREME COURT OF
NEW SOUTH WALES
COURT OF APPEAL

CA 40450/92

KIRBY P

PRIESTLEY JA

MEAGHER JA

HUANG v WALTON

PRIESTLEY JA: In his reasons Kirby P has set out the nature of this case and the issues it raises for this court. In the section headed "Court of Appeal's jurisdiction" he states this court's powers and duties in an appeal of this kind in a way which I think, with respect, is accurate, and which I adopt. From Dr Huang's point of view, the conclusion reached by the President is compassionate and humane. However, after consideration of his reasons, and reconsideration of the appeal materials I have not been able to see either that the President's *conclusion* is one which this court should come to on the materials and argument before us, or that, on those same materials, it is in the public interest.

The outstanding features of this case are that 1. the Medical Disciplinary Tribunal found every particular of the complaint against Dr Huang was proved, 2. in the appeal to this court those findings of fact were not challenged (because the statute so ordained) and 3. this court must accept them (for the same reason). The "appeal" is thus a very limited one, and the reasons for my own conclusion are very brief.

As set out in the Tribunal's decision, the particulars of the complaint were:

- " 1 . Dr Huang prescribed a benzodiazepine alone or in combination with one or more other benzodiazepines likely to produce dependence, on the dates to persons in quantities shown on the schedules annexed hereto and marked with the letters 'A' 'B' 'C' 'D' 'E' 'F' 'G' 'H' 'I' 'J' ,K, ,L, ,M, .N, ,O, ,P, ,Q, ,R, ,S, ,T, ,U, V ,W, X ,Y, ,z, 'AA' 'AB' 'AC' 'AE' 'AF' 'AG' 'AH' 'AI' 'AJ' 'AK' 'AL' 'AM' 'AN' 'AO' 'AP' 'AQ' 'AR' 'AS' 'AT' 'AU' 'AW' 'AX' 'AY' without exercising responsible medical judgment as to whether it was appropriate to issue such prescriptions when he knew or ought to have known that the drug or drugs were being or likely to be misused.
2. Dr Huang prescribed benzodiazepines alone or in such combination with another benzodiazepine on the dates and in the quantities shown in Schedules 'A' 'B' 'C' 'D' 'E' 'F' 'H' 'I' 'K' 'L' 'M' 'O' 'R' 'T' 'U' 'V' 'W' 'Y' 'AC' 'AF' 'AG' 'AJ' 'AK' 'AL' 'AM' 'AO' 'AR' 'AS' 'AT' 'AU' 'AW' and 'AY' in a quantity in excess of normal therapeutic standards.
3. Dr Huang prescribed a benzodiazepine alone or in combination with other benzodiazepines on the dates and in quantities shown in Schedules 'E' 'F' 'G' 'H' 'I' 'J' 'K' 'U' 'O' 'P' 'Q' 'R' 'S' 'T' 'W' 'Y' 'Z' 'AB' 'AC' 'AF' 'AG' 'AI' 'AY-AK' 'AL' 'AO' 'AP' 'AQ' 'AR' 'AW' 'AX' on a continual basis for a period exceeding normal therapeutic standards so maintaining or inducing a dependence on that or those drugs.
4. Dr Huang prescribed a benzodiazepine alone or in combination with another benzodiazepine and or codeine on the dates and in quantities shown in the Schedules 'A' 'B' 'C' 'G' 'I' 'J' 'M' 'N' 'O' 'V' 'W' 'X' 'AC' 'AF' 'AG' 'AH' 'AL' 'AN' 'AW' 'AX' to persons he knew or ought to have known were addicts receiving treatment on a State methadone programme without proper consultation with the medical practitioner responsible for that person's therapy.

5. Dr Huang prescribed the drug codeine in the preparation Codral Forte or Panadeine Forte (in conjunction with a benzodiazepine) on the dates and in quantities shown in Schedules 'E' 'F' 'J' 'L' 'O' 'R' 'T' 'W' 'AB' 'AI' 'AK' 'AN' 'AO' 'AP' 'AR' 'AW' 'AX' for extensive periods without exercising responsible medical judgement as to whether it was appropriate to issue such prescriptions when he knew or ought to have known that the drug was being or likely to be misused.

6. Dr Huang did not maintain adequate medical records relating to the patients named in the schedules annexed hereto and marked with the letters 'A' 'B' 'C' 'D' 'E' 'F' 'G' 'H' 'I' 'J' 'K' 'L' 'M' 'N' 'O' 'P' 'Q' 'R' 'S' 'T' 'U' 'V' 'W' 'X' 'Y' 'Z' 'AA' 'AB' 'AC' 'AE' 'AF' 'AG' 'AH' 'AI' 'AJ' 'AK' 'AL' 'AM' 'AN' 'AO' 'AP' 'AQ' 'AR' 'AS' 'AT' 'AU' 'AW' 'AX'

7. That the practitioner failed to exercise responsible medical judgement in his treatment of patients "A", "B", "C", "D", "F", "L", "M", "N", "Q", "T", "U", "V", "X", "Y", "Z", "AB", "AF", "AI", "AJ", and "AN", in that:

(a) In respect of patients "A", "B", "C", "D", "F", "L", "M", "N", "T", "U", "V", "X", "AB", "AJ", "AN"

i) the practitioner failed to obtain a full medical history,

ii) the practitioner failed to make an appropriate assessment of the patients' drug usage history including drugs used, quantity, frequency and pattern of usage, degree of dependence on drugs used and previous treatment obtained in respect of drug abuse,

iii) the practitioner failed to obtain an appropriate inter-personal, family and social history of the patient,

- iv) the practitioner failed to carry out any adequate physical examination of the patient,
- v) the practitioner failed to examine the patient for any underlying physical problems associated with or exacerbated by the patients' drug use,
- vi) the practitioner failed to refer the patient to specialist drug and alcohol clinics, practitioners or counsellors or obtain assistance from such clinics, practitioners or counsellors in his treatment of the patient, the practitioner failed to monitor or adequately monitor the continued drug use of the patient during the course of his treatment, the practitioner failed to make any assessment as to whether the treatment being provided by the practitioner was causing any harm to the patient, the practitioner failed to make any adequate assessment as to the effectiveness of the treatment being provided by the practitioner,
- x) the practitioner failed to make any assessment of alternative treatment options for the patient.

(b) In respect of patients "M", "Q", "U", "X", "Z", and "AP", the practitioner failed to refer such patients to a specialist psychiatrist for assessment, diagnosis, and treatment of the patients' apparent psychiatric disorders.

(c) In respect of patients "A" and "V", the practitioner failed to take any adequate steps to ascertain whether the patients were pregnant during the course of the practitioner's treatment.

(d) In respect of patient "Y", the practitioner failed to adequately monitor the diabetic condition of the patient.

(e) In respect of patients "AF" and "AI", the practitioner failed to refer the patients to Pain Clinics, physiotherapy and/or orthopaedic care and failed to carry out investigative procedures such as radiography."

As I have said, this court must approach Dr Huang's appeal against the orders made against him on the basis that what was alleged against him in the particulars was all true. There is no basis in this case upon which this court can look behind the Tribunal's findings of fact.

On those findings it seems to me that the orders made by the Tribunal were virtually inevitable. Mr Evatt's earnest efforts to persuade the court to replace the Tribunal's orders with orders less severe must in my opinion be rejected for two reasons. The first is that none of the errors he submitted the Tribunal had made, even if his submissions were accepted, seemed to me to bear significantly upon the Tribunal's basic reasoning in arriving at its orders. The second is that even if some sufficiently significant error were established, on the facts found against Dr Huang, which this court must accept, the orders made were in my opinion appropriate, so that, if this court were exercising its own power to make orders on the facts found, I would support the same result.

In my opinion the appeal should be dismissed with costs. -----

I certify that this and the preceding 4 pages are a true record of His Honour's Reasons for Judgment.

MT Crowley
Associate
20 141 93

**IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL**

CA: 40450/92 CORAM:

KIRBY P

PRIESTLEY JA

MEAGHER JA

Tuesday 20 April 1993

DON NAI HSI HUANG v WALTON

JUDGMENT

MEAGHER JA: In this appeal, Mr Evatt, counsel for the appellant, Dr Huang, made it clear to this Court that he accepted all the Tribunal's findings of fact. With respect they were a good deal more horrendous than appears from the President's judgment, which I have had the benefit of reading in draft. I shall refer to some of them, culled fairly unsystematically from the Tribunal's judgment. In Particular one of the sour charges brought against Dr Huang, in respect of a list of patients, the Tribunal found that (a) Dr Huang had prescribed benzodiazepenes to each of the patients on the list; (b) those benzodiazepenes were likely to produce dependence; (c) he did not exercise reasonable judgment as to whether it was appropriate so to prescribe; (d) he knew, when he so prescribed, that the drugs were likely to be misused; and (e) there was no possible justification for his so prescribing(p 28). It held that

he "was not attempting to exercise responsible medical judgment *in the* treatment of his patients with prescriptions of benzodiazepenes." (p31). The Tribunal also found that Dr Huang prescribed drugs for his patients - who were mainly drug addicts, alcoholics or prostitutes (which category emerges *in* the President's judgment disguised as "sex workers") - without taking a full history from them or making any adequate, or sometimes any, assessment of their drug usage history: pp82-3. The Tribunal found that Dr Huang "demonstrated an inadequacy of judgment and care in the practice of medicine" (p.128) and was not even satisfied as to his "bona fides in his assertions of prescribing for the well being of drug addicted persons." (p. 129).

As I have said, Mr Evatt conceded the accuracy of these findings. In so doing he was making a virtue of necessity by admitting what he could not deny. The reason why he could not deny these facts is that they were found by the Tribunal on the evidence before it, and statute gives this Court power to hear an appeal on a point of law but not on a finding of fact.

On the factual findings made by the Tribunal, which we are obliged to accept, this appeal does not involve the case of an honourable practitioner espousing sincere but eccentric views. It is a case involving the wholesale repudiation by Dr Huang of professional standards, "and for no very obvious reason than for financial gain.

These critical findings of fact having been made by the Tribunal, there is no course left for this Court to adopt than to dismiss the appeal. That is because these findings of fact require an order that the name of Dr Huang be struck off the register of medical practitioners. The matter emerged clearly in argument when Priestly JA said to Mr Evatt in relation to the finding on p.31, which I have already quoted: "They are findings of fact, as I understand them, and they are not ones against which you can appeal or are appealing ... what is your answer to the proposition that this is a striking-off offence?"

Thus, there is no point in hymning the praises which would be due to Dr Huang if he had been benevolently motivated. Nor is it relevant to dwell on the courage and importance of genuine professional rebels. Nor, although I understand why it could be suggested that the Tribunal was over-censorious, is it profitable to consider whether or not this impression is correct.

The appeal should be dismissed with costs.

I certify that the preceding 2 pages are a true record of His Honour's Reasons for Judgment.

MT Crowley
Associate
20/4/93