



New South Wales Medical Tribunal

CITATION :	Re Mr Bar-Mordecai [2009] NSWMT 1
TRIBUNAL:	Medical Tribunal
PARTIES :	Mr Michael Bar-Mordecai NSW Medical Board
FILE NUMBER(S) :	40015 of 2007
CORAM:	Murrell, SC DCJ - Anderson, Dr P - Toh, Dr S - Collier Ms A
CATCHWORDS:	Former medical practitioner's application for review of de-registration order - Good Character - Competence - Doctor-patient boundary transgressions.
LEGISLATION CITED:	Medical Practice Act 1992 (NSW)
CASES CITED:	Ex parte Tziniolis; Re The Medical Practitioners Act (1966) 67 SR (NSW) 448 ; Zaidi [2006] NSWMT 6; Zaidi [1996] NSWMT; Zaidi v Health Care Complaints Commission [1998] NSWSC 335
DATES OF HEARING:	10-11 November 2008 and 27-29 January 2009.
EX TEMPORE	18 March 2009
JUDGMENT DATE :	
LEGAL REPRESENTATIVES:	Mr Bar-Mordecai in person Ms Richardson of counsel for the Medical Board
ORDERS:	

JUDGMENT:

1. Mr Bar-Mordecai applies for a review of a de-registration order made by the Medical Tribunal in 2000.

The 2000 Proceedings

2. Between 1979 and August 1983, Mr Bar-Mordecai was the treating general practitioner for A's husband. He became friends with her. He was not A's regular general practitioner, but between 1981 and August 1983 he treated her on about eight occasions. After the death of A's husband in August 1983, Mr Bar-Mordecai lived with A. The couple had a sexual relationship. He continued to treat her. The couple had significant interpersonal financial dealings. Mr Bar-Mordecai says that he gave A more money than he received from her.

3. A died in June 1994, within minutes of Mr Bar-Mordecai administering a 30mg dose of morphine. She left a substantial estate. Under A's 1989 will, Mr Bar-Mordecai would have received a relatively small benefit. He claimed that A had destroyed that will and died intestate and that, as her de facto spouse, he was entitled to her estate. Supreme Court proceedings ensued.

4. On 6 September 2000, the Medical Tribunal, chaired by Judge Cooper, found that Mr Bar-Mordecai was guilty of professional misconduct in the following respects:

- (1) It was improper and unethical to treat A between 1983 and 1994 as Mr Bar-Mordecai was in a "personal and sexual relationship" with her.
- (2) It was improper and unethical to destroy or suppress A's 1989 will, lie to the Supreme Court by saying that A had torn it up, and lie in a Supreme Court affidavit.
- (3) It was professional misconduct to obtain financial benefits from A between August 1983 and June 1994 because the financial benefits "arose out of the relationship of patient/doctor."
- (4) When he administered 30mg of morphine to A, Mr Bar-Mordecai demonstrated a lack of adequate knowledge, skill, judgment and care amounting to professional misconduct.
- (5) In signing a medical certificate as to the cause of A's death, Mr Bar-Mordecai demonstrated a lack of judgment amounting to unsatisfactory professional conduct.
- (6) The failure to keep a proper drug register for drugs of addiction was improper conduct. Mr Bar-Mordecai's computerized system was not equivalent to a book designed so that entries were permanent, as required by the relevant Regulation.
- (7) Mr Bar-Mordecai was guilty of professional misconduct in that he disclosed confidential information that he had obtained through treating B to B's husband C, who was also a patient. Further, Mr Bar-Mordecai gave C inappropriate advice concerning divorce and child custody.

5. The 2000 Tribunal found that Mr Bar-Mordecai had the following defects of character.

- (1) Inability to distinguish the boundaries of the professional doctor/patient relationship.
- (2) Preparedness to transgress doctor/patient boundaries by engaging in sexual relationships with patients. Mr Bar-Mordecai admitted to a sexual encounter with patient YV in December 1993 and a sexual relationship with patient FL for about six weeks from October 1994. At the time of the 2000 hearing, Mr Bar-Mordecai was in a relationship with T, who was a patient.
- (3) Avarice, as demonstrated by his suppression or destruction of A's will for the purpose of benefiting from her estate.
- (4) Lack of integrity. Mr Bar-Mordecai had lied on oath to the Supreme Court.

6. The 2000 Tribunal was profoundly concerned that Mr Bar-Mordecai lacked insight into his transgressions and expressed no remorse. The Tribunal ordered that he be removed from the register of medical practitioners and that there be no review application for seven years.

7. Mr Bar-Mordecai applies for review of that decision and seeks reinstatement as a medical practitioner.

The Task of the Review Tribunal

8. The *Medical Practice Act 1992* (NSW) provides:

"94A Inquiry into review application

- (1) A review under this Division is a review to determine the appropriateness, at the time of the review, of the order concerned.*
- (2) The review is not to review the decision to make the order, or any*

findings made in connection with the making of that decision, unless significant fresh evidence is produced that was not previously available for consideration, and the appropriate review body is of the opinion that, in the circumstances of the case, the decision to make the order, or any finding on which the decision was based, should be reconsidered.

(3) In addition to any other matter that the review may take into account, the review must take into account any complaint made or notified to the Board about the person, whether the complaint was made or notified before or after the making of the order that is the subject of the review and whether or not the complaint was referred under Division 3 of Part 4 or any other action was taken on the complaint."

9. A review Tribunal exercises its jurisdiction for the purpose of protecting the public.

10. In order to gain registration, an intending practitioner must be both *competent* to practise medicine (the person must have sufficient physical capacity, mental capacity, skill and communication skills to practise medicine) and of *good character*: ss 3, 13 and cl 2 of the Dictionary to the Act.

11. "Good character" is to be determined in the context that an applicant seeks to practise as a registered medical practitioner, a position of trust: *Ex parte Tziniolis; Re The Medical Practitioners Act* (1966) 67 SR (NSW) 448 at 475. An assessment of good character involves an assessment of an applicant's personal qualities, considering both the applicant's conduct and his or her state of mind.

12. An applicant for reinstatement is disadvantaged in comparison to an original applicant because he or she must, in effect, displace the reasons for deregistration. Past conduct may be treated as predictive of future behaviour. In seeking to establish that he or she has become fit to be registered (acquired the necessary good character), the applicant bears a "heavy onus". The review Tribunal "will require solid and substantial grounds for the conclusion that (the applicant's) standards have changed, (his or her) character has been reformed and that (he or she) will act honourably": *Zaidi* [2006] NSWMT 6 at [42] and [106], applying principles extracted from *Zaidi* [1996] NSWMT and implicitly approved in *Zaidi v Health Care Complaints Commission* [1998] NSWSC 335.

13. The 2000 Tribunal's decision was based primarily on findings that Mr Bar-Mordecai lacked good character. In relation to complaint 5, the 2000 Tribunal found that he lacked competence. Of itself, the fact that that Mr Bar-Mordecai has not practised for nine years raises the issue of competence.

14. Consequently, Mr Bar-Mordecai bears the heavy onus of satisfying the Tribunal both that he has the good character necessary to practice medicine and that he is competent to do so.

Preliminary Rulings

15. Mr Bar-Mordecai asked the Tribunal to reconsider the findings and orders of the 2000 Tribunal. The application was based on a 2004 New South Wales Court of Appeal finding that he had lived in a de facto relationship with A (that the relationship went beyond the "personal and sexual relationship" to which the 2000 Tribunal referred) and that he did not exercise undue influence in relation to the acquisition of a significant interest in the couple's home.

16. The Tribunal could review the 2000 decision or findings only if "significant fresh evidence" was produced that "was not previously available for consideration" and the Tribunal was satisfied that the orders or findings should be reconsidered: s 94 A (2) of the Act. As a matter of law, the Tribunal determined that the Court of Appeal's decision was not "fresh evidence". The material before the Court of Appeal was previously available for consideration. Consequently, the Tribunal could not

review the decision or findings of the 2000 Tribunal.

17. The 2000 Tribunal's decision did not depend upon whether the relationship between Mr Bar-Mordecai and A was a de facto relationship: p2.9 of the reasons for judgment.

18. The status of Mr Bar-Mordecai's relationship with A (whether it was a de facto relationship or fell short of that status) is not important to the findings of this Tribunal. Nor is this Tribunal influenced by the propriety or otherwise of financial dealings that occurred more than 15 years ago between Mr Bar-Mordecai and A. The Court of Appeal's findings do not affect this Tribunal's opinion about Mr Bar-Mordecai's past boundary transgressions and do not significantly impact on the critical issue of whether he now has a sufficient appreciation of the boundaries of the doctor/patient relationship.

19. Mr Bar-Mordecai asked the Tribunal to set aside the 2000 decision pursuant to section 154 (2) of the Act. He argued that the decision was that of Judge Cooper alone. He asserted that the other Tribunal members in 2000 had played no role in the formulation of the decision and had simply "signed off" on it.

20. As a matter of law, the Tribunal rejected that application. First, s154 (2) of the Act does not confer the power that Mr Bar-Mordecai sought to invoke. Any attack on the bona fides of the 2000 decision must be made in the Supreme Court. Second, when they signed the reasons for judgment, all Tribunal members purported to adopt the reasons and decision. There is no evidence that the adoption was anything other than genuine.

21. In January 2009, Mr Bar-Mordecai complained to the International Criminal Court that, in refusing to set aside the 2000 decision, the Deputy Chairperson of this Tribunal had perpetuated a perversion of justice. He asked her to disqualify herself on the basis that, if she continued to sit on the Tribunal while the ICC complaint was unresolved, there may be a perception of bias. She declined to disqualify herself, holding that there was no possibility that such a perception would arise in the mind of a reasonable person.

Issues

- (1). Having regard to his past boundary transgressions, has Mr Bar-Mordecai established that he is now a person of good character whom it is appropriate to reinstate as a medical practitioner?
- (2). Having regard to past lack of integrity, has Mr Bar-Mordecai established that he is now a person of good character whom it is appropriate to reinstate as a medical practitioner?
- (3). Having regard to the lack of skill and judgment associated with the administration of morphine to A and the fact that he has not practised since 2000, is Mr Bar-Mordecai now competent to practise medicine?

Understanding of Doctor/Patient Boundaries

22. In Exhibit B, which was created on or about 10 November 2008, Mr Bar-Mordecai stated:

"The Applicant submits that sex in the context of a doctor treating his/her patient is not acceptable [wrong] whatever type of relationship there is i.e. social, domestic, de facto marriage or marriage irrespective of how the relationship arose, because irrespective of the ethics involved, in the context of a personal [familial] and/or sexual relationship that a doctor has with a patient, such a relationship is more than likely to blunt the doctor's objectivity in the treatment of his/her patient and that applies to:

- (i) A sexual partners;*
- (ii) A family member.*

Of course, there are exceptions, where a doctor is obliged to treat the

patient, namely:

(i) Emergency situations ...

Of course, there are exceptions, where a doctor is not obliged to treat the patient, but may treat the patient namely:

(i) Non-emergency simple medical problems e.g. impetigo, cyst,

(ii) Trivial complaints e.g. lipoma, acne"

23. As far as this Tribunal is aware, Exhibit B is the first occasion upon which Mr Bar-Mordecai has acknowledged the impropriety of a medical practitioner treating his/her de facto partner. Up to November 2008, Mr Bar-Mordecai erroneously believed that it was acceptable for a practitioner to treat his/her de facto partner.

24. Mr Bar-Mordecai's erroneous belief was based on the following statement made by Judge Cooper on 16 July 1999, when refusing an adjournment of the 2000 hearing.

"It may well be that if a medical practitioner gives treatment to his or her spouse, be it a legal spouse or a de facto spouse, that that medical practitioner is not guilty of any lack of ethics. But, if, on the other hand, the relationship of medical practitioner and patient brings about a sexual relationship in circumstances where it arises out of a breach or abuse of the power which a doctor has over the patient, then that can be quite a different matter."

25. Dr Roberts, Mr Bar-Mordecai's treating psychiatrist, confirmed Mr Bar-Mordecai's earlier belief that, had it found that he was in a de facto relationship with A, the 2000 Tribunal would have reached a different conclusion.

26. Mr Bar-Mordecai overlooked the 2000 Tribunal's statement that the de facto status of his relationship with A was irrelevant to its decision: page 2.9 of the reasons for judgment.

27. Because of his erroneous belief, Mr Bar-Mordecai has been particularly incensed when judges or tribunals have failed to acknowledge his de facto partnership with A.

28. Despite the statement in Exhibit B, the review Tribunal feels profound disquiet about Mr Bar-Mordecai's current appreciation of doctor/patient boundaries.

29. The Medical Board submitted that Mr Bar-Mordecai's evidence of belated acceptance of the rule that it is improper for a doctor to treat his or her de facto partner was an opportunistic lie. The Board referred to the many past statements of Mr Bar-Mordecai to the effect that it was not improper for a doctor to treat his/ her de facto partner, including statements made at the commencement of the review proceedings.

30. The Tribunal is divided on the issue of whether Mr Bar-Mordecai now has an intellectual understanding and acceptance of the rule.

31. Regardless of his or her view about whether Mr Bar-Mordecai has acquired an intellectual understanding and acceptance of "the letter of the law" in relation to doctor/patient boundaries, each member of the Tribunal is puzzled and troubled by Mr Bar-Mordecai's apparent lack of emotional insight or intuitive appreciation of doctor/ patient boundaries. It has been necessary to "tell" him that a practitioner must not provide ongoing treatment to close family or friends, including a de facto partner. A practitioner should intuitively "know" that any close personal relationship with a patient is likely to impair the practitioner's professional objectivity and may cause serious psychological injury

to the patient.

32. Mr Bar-Mordecai's lack of intuitive understanding was starkly illustrated when he defended his conduct in relation to BL. For a brief period in 1985, he lived with BL in a sexual relationship. Well after the relationship ended, BL's sister asked him to institute the process by which BL would be made an involuntary psychiatric patient, telling him that "ten other doctors" had declined involvement. Without seeing BL, based on knowledge gained during the relationship, statements by BL's sister and a belief that there was an "emergency", he acceded to the request. In evidence, Mr Bar-Mordecai asserted that the prior relationship did not blunt his objectivity. Rather, it gave him "more acute" insight into BL's psychiatric health and made him "more objective".

33. Dr Roberts agreed that Mr Bar-Mordecai's understanding of boundaries was intellectual rather than emotional or intuitive. He was not convinced that Mr Bar-Mordecai had developed true insight into his conduct. However, he pointed out that intellectual understanding is the first step to gaining true insight. Nevertheless, Dr Roberts considered that, if reinstated as a practitioner, Mr Bar-Mordecai was unlikely to commit boundary transgressions.

34. Dr Phillips, the psychiatrist briefed by the Medical Board, agreed. He said that "fear of the big stick" would probably prevent transgressions. However, Dr Phillips remained concerned about the possibility of future transgressions. His concern arose from the number of past transgressions and Mr Bar-Mordecai's "struggle" to appreciate the impropriety of those transgressions. He said that Mr Bar-Mordecai lacked an appreciation of the bases of the findings of the 2000 Tribunal, and his insight regarding boundary violations was and remained unsatisfactory.

35. Those members of the Tribunal who believe that Mr Bar-Mordecai now has an intellectual understanding and acceptance of boundaries consider that nothing short of true insight is adequate. It is essential that a practitioner have true insight into doctor/patient boundaries in the sense that he or she can identify the boundaries and intuitively appreciate the damage that may result from boundary transgression. Because of the variety and complexity of boundary issues that may arise in practice, protection of the public requires that a practitioner have true insight into such issues.

36. All Tribunal members accept that Mr Bar-Mordecai "fears the big stick". Consequently, if he was reinstated, it is most unlikely that he would knowingly transgress boundaries. However, in the absence of true insight, the Tribunal is not satisfied that the public would be adequately protected against the possibility of transgression.

Understanding of Patient Confidentiality

37. The second complaint before the 2000 Tribunal concerned a breach of patient confidentiality and the giving of inappropriate advice in circumstances where a husband and wife were both patients. In essence, this was another example of his failure to appreciate and respect doctor/patient boundaries.

38. When he appeared before the 2000 Tribunal, Mr Bar-Mordecai was "dogmatic that his conduct was correct": page 71 of the decision.

39. Before this Tribunal, Mr Bar-Mordecai maintained that he had been "maliciously prosecuted" in relation to the matter. He accepted that he should not have disclosed confidential patient information, but sought to minimise his misconduct by explaining that "the safety of three children was at risk".

40. Mr Bar-Mordecai's understanding of the importance of patient confidentiality is superficial. It is an intellectual understanding that is not reinforced by an intuitive appreciation of the reasons for the rule.

Integrity

41. A medical practitioner occupies a position of trust in relation to his or her patients and must therefore be a person of high integrity.

42. Mr Bar-Mordecai has not satisfied the heavy onus of establishing that he is now a person of high integrity.

43. First, some Tribunal members consider that Mr Bar-Mordecai's belated "acceptance" of the rule that a practitioner should not treat his or her de facto partner was an opportunistic lie. For those members, the lie reflects adversely on his integrity.

44. Second, while Mr Bar-Mordecai conceded to the Tribunal that he had lied in Supreme Court proceedings, he was evasive about the nature of the lie/s and the circumstances in which he had lied. He said that he had signed an affidavit "without understanding what he was signing". As Mr Bar-Mordecai is an intelligent person whose personality inclines to the obsessive, the Tribunal does not accept that assertion. The Tribunal is concerned about Mr Bar-Mordecai's level of acceptance and remorse in relation to past dishonesty.

Other Matters Relating to Good Character

45. When Justice Bryson was presiding over litigation to which he was a party, Mr Bar-Mordecai told Dr Roberts that he was contemplating an assault on Justice Bryson as a means of gaining a tactical advantage in the proceedings. Dr Roberts opined that Mr Bar-Mordecai would not act upon that threat, and Mr Bar-Mordecai did not act upon it. Nevertheless, the Tribunal was alarmed to learn that Mr Bar-Mordecai had considered such conduct, however fleetingly.

46. In a recent paper proposing the existence of a "battered litigant syndrome" Mr Bar-Mordecai states that a person suffering from the syndrome may contemplate maiming or killing a judicial officer. He says that, as any such behaviour is a "cry for help", the "battered litigant" should not be held responsible for the assault. Mr Bar-Mordecai reluctantly conceded that the paper is based exclusively on his own experience as a "battered litigant".

47. Dr Phillips described the paper as "a highly personalised document" that was "without reference to the established medical, legal or sociological literature". The reference to the possible assassination of judicial officers "worried" Dr Phillips.

48. The suggested assault on Justice Bryson and the recent attempt to legitimise hypothetical attacks by disgruntled litigants on judicial officers reflect adversely on Mr Bar-Mordecai's judgment and cause the Tribunal deep concern about Mr Bar-Mordecai's character.

49. For a decade, Mr Bar-Mordecai has been embroiled in litigation. He is dissatisfied with every judicial officer whom he has encountered. He levels the most serious criticisms against Judge Cooper, whom he has described as "a thief", determined to rule against Mr Bar-Mordecai, whatever the merits of the case. He is convinced that the New South Wales judicial system is riddled with corruption and enmeshed in conspiracy. He has complained to the International Criminal Court about most, if not all, judicial officers who have made findings against him. In the paper "The Battered Litigant Syndrome", he calls for legislation making "judicial batterers" accountable for their actions.

50. Frustration with the legal process is common. Suspicion, dislike or even hatred of the judiciary is not, prima facie, evidence of lack of good character rendering a person unfit to practise as a medical practitioner. However, respect for the rule of law does bear on the question of good character.

Mental State

51. Dr Roberts said that Mr Bar-Mordecai does not have a mental illness or personality disorder. At times, he has suffered from an adjustment disorder with depression. Dr Roberts described a dogged

personality that "never lets go". He said that Mr Bar-Mordecai was highly suspicious but not paranoid.

52. Dr Phillips agreed that Mr Bar-Mordecai does not have a psychiatric illness. He said that Mr Bar-Mordecai was strongly inclined towards obsessive/ compulsive behaviour. Such personalities tend to make good doctors as they take time with patients and research their condition.

Competence

53. Mr Bar-Mordecai still maintains that the administration of a 30mg dose of morphine to A was appropriate. He has described the 2000 Tribunal's finding in relation to the dosage as a "bogus finding of fact" and a "wilful perversion of the course of justice". However, he says that he now appreciates that the prevailing view is otherwise. Consequently, if reinstated, he would not administer a 30mg dose of morphine but would dose in 5mg increments.

54. Since 2000, Mr Bar-Mordecai has updated his medical knowledge by researching and creating a computerized information system based on symptoms, signs and test results. The system is designed to enable practitioners to make differential diagnoses. Dr Phillips described the system as "very interesting" and "quite impressive", while noting that it had not yet been peer reviewed.

55. Dr Roberts considered that Mr Bar-Mordecai's theoretical knowledge is comparable to that of other general practitioners because of his many years of experience and the research associated with his computerised information system. However, he would need some retraining and may benefit from general practitioner supervision.

56. Dr Phillips said that, if Mr Bar-Mordecai was reinstated, initially he should practice in a hospital environment, where he could be closely supervised.

57. Mr Bar-Mordecai did not propose a firm "return-to-practice plan".

58. Mr Bar-Mordecai has significant interaction with his brother, who is a general practitioner. They discuss professional issues. Mr Bar-Mordecai said that, if allowed to return to practice, he may practice with his brother. Unfortunately, Mr Bar-Mordecai's brother did not give evidence. There was no confirmation that he was willing to supervise Mr Bar-Mordecai.

59. It is nine years since Mr Bar-Mordecai engaged in general practice. General practice involves clinical skills as well as intellectual knowledge. Any appropriate "return-to-practice plan" would include supervision. Mr Bar-Mordecai considers himself to be highly skilled and more knowledgeable than an average general practitioner. He considers hospital medicine to be irrelevant to general practice. The Tribunal doubts that he would accept -- let alone embrace -- close supervision, either in a hospital environment or in a general practice environment.

Decision

60. The Tribunal's decision does not turn on Mr Bar-Mordecai's competence, the absence of an appropriate "return-to-practice plan" or the Tribunal's reservations about whether any such plan could be implemented.

61. Rather, the Tribunal is not satisfied that Mr Bar-Mordecai is a person of good character within the meaning of the Act. Inter alia, a person lacks the good character to practice medicine if he or she lacks the capacity to intuitively recognize doctor/patient boundaries and appreciate the reasons for those boundaries. Only true insight can provide adequate public protection. At most, Mr Bar - Mordecai has an intellectual understanding of the boundaries and a desire to avoid transgression.

62. The application is dismissed. Pursuant to s 64(3) of the *Medical Practice Act 1992*, the Tribunal

orders that there be no review for three years.

[| Previous Page |](#) [Back to CASELAW ONLINE |](#) [Top of Page |](#)

[Courts & Tribunals of NSW |](#) [Webmaster |](#) [Feedback](#)

© Copyright 1999, 2000 Crown Copyright

All material is reproduced by permission of the Crown but does not purport to be the official or authorised version. Downloading, copying or printing of materials in this database for personal use, or on behalf of another person, is permitted. Downloading, copying or printing of material from this database for the purpose of reproduction or publication (in whole or in part) for a fee is not permitted without express authorisation.