



**THE MEDICAL TRIBUNAL
OF NEW SOUTH WALES**

No: 40002 of 2009

HEALTH CARE COMPLAINTS COMMISSION
Complainant

DR DERRICK PERERA
Respondent

Medical Tribunal constituted under the Medical Practice Act 1992:
Deputy Chairperson, Judge Peter Johnstone
Dr Guan Yeo
Dr Joanna Hely
Dr Arthur Glass

Hearing dates: 10 and 11 August 2009
Date of Decision: 23 September 2009

REASONS FOR DECISION

The proceedings

1. By a Complaint dated 19 January 2009 the Health Care Complaints Commission, following consultation with the New South Wales Medical Board, complained that the Respondent, Dr Derrick Perera, a practitioner registered under the *Medical Practice Act 1992*, has been guilty of unsatisfactory professional conduct and/or professional misconduct in that he has:
 - (i) demonstrated that the knowledge, skill or judgment possessed, or care exercised by him in the practice of medicine is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience; and/or
 - (ii) engaged in improper or unethical conduct relating to the practice of medicine.

2. The Particulars of the Respondent's alleged conduct which is the subject of the Complaint are that on 27 September 2006, during a professional consultation with a female patient in his surgery:
 - he failed to observe proper professional boundaries by speaking to her in an inappropriate manner, including telling her a number of times that she was a pretty young woman, and that she should have been a model; and
 - he touched her in an inappropriate manner including cupping and touching her face without explanation; holding her with his left hand moving around on her back and his right hand on her chest, partially covering her breast; and placing his right cheek on her right cheek, rolling his face towards her mouth and placing his tongue on her lips.
3. The Respondent denied the substance of the complaint.

The Respondent

4. Dr Perera is 81. He graduated MBBS in 1954 from Ceylon University, Sri Lanka. He first worked as an intern and resident at the General Hospital and the Children's Hospital in Colombo. From 1958 to 1971 he worked as a general practitioner and as a medical officer for the Pet Soleum Corporation. He then came to Australia where he worked for 3 months in the Rehabilitation centre at Ryde before joining a group practice in St Mary's as a general practitioner.
5. In January 1973 Dr Perera commenced solo practice in St Mary's. In 2003, in addition to his own practice at St Mary's, he also started doing 3 sessions per week at the Valley Plaza Medical Centre in Hinchinbrook, where the events the subject of this complaint occurred.

The patient

6. The patient who is the subject of the complaint is a 24-year-old married mother of two children. She was not quite 23 when the events the subject of the complaint occurred. At the time she was working as a receptionist.
7. She had been attending the Valley Plaza Medical Centre for some 10 years. Her usual doctor there was Dr Lakshmi Karthigesu, a female practitioner. She had previously been seen by Dr Perera, but on limited occasions when her preferred practitioner was not available.
8. She was well known at the medical centre and there had been no previous problems with any doctor or member of staff.

The misconduct alleged

9. The patient attended at the Valley Plaza Medical Centre in the late afternoon, around 5.30pm, on 27 September 2006 because she was feeling unwell. She had a sore throat and swollen glands. She wanted some antibiotics and a medical certificate for work. She first saw the receptionist, Ms Angie Pillay, who she knew from previous visits, and was told that her usual doctor, Dr Karthigesu, was not available. She was therefore seen by Dr Perera.
10. She entered Dr Perera's consulting room, which was some 15 metres from the reception desk, and sat down in a chair in front of a desk. The doctor was seated behind the desk and there was an initial conversation. She told him she had been feeling lethargic and tired all day and could feel her glands were a bit swollen, and that her throat was very sore.
11. The patient said the doctor then got up from his chair, came around the desk and examined her throat whilst she was still seated in the chair, using an extender-arm light, which he faced towards her. He then proceeded to feel the glands in her throat area, and took her blood pressure. The patient said he also used a stethoscope to listen to her heart, which he placed on her chest and back. As he went to sit back down, he told her that her glands were a bit swollen and a bit red, but not enough to warrant antibiotics. He made some recommendations about over-the-counter treatments, and wrote the work certificate she had requested.
12. The patient said the doctor then began questioning her about her smoking. He told her that smoking gives you wrinkles, that she was a pretty girl and should give it up. She said he told her several times that she was an attractive young lady and that she should have been a model. In response she told him that she had considered modelling a few years before, but that she had recently been assaulted and scarred, which had made her doubtful about her looks. He asked her what happened and she explained that in February of 2006 she had been hit across the face with a 2-litre glass wine bottle. She had suffered serious injuries to the left side of her face, including broken bones, requiring the insertion of 3 metal plates in her face and some stitching underneath the eyelid. She had also lost the sight of her left eye and had been left with some scarring
13. She said the doctor then got up from his chair and came around the desk and without saying anything proceeded to place one hand on her back, between the shoulder blades, and the other hand on her chest area, above the breast area. He then brought his hands around and he cupped her face with his two hands. She described what happened next in the following way (T 16.47ff):

“Once he took his hands away from my face, he kind of, I was still sitting in my chair. He sort of leant down, like crouching position-wise, but just to be level with me in the chair. And then he proceeded to put his right cheek against my right cheek... He kept his cheek there for, it seemed like forever, but probably about 20, 25 seconds, and then he began to kind of slowly roll his face in towards my face... As he started rolling his face in, I felt his tongue against my lips on the outside of my lips.”

14. During these events, the patient was shocked and unsteady. She protested that she needed to get going because her husband was picking her up and would be outside waiting for her. As soon as she felt his tongue touch her lips she jumped up out of the chair, grabbed her wallet, the paperwork and her mobile phone from the desk and went to go out the door:

“That's when I became - like as soon as I opened the door to actually get out of the room, that's when I started like, getting a bit like, physically upset... Like, I began to cry as soon as I walked out of the room.”

Subsequent events

15. The patient walked straight down the corridor to reception, in a distressed state, to the receptionist, Ms Pillay, and told her she needed to speak to her in private. Ms Pillay took her into the manager's office and settled her down. The patient told Ms Pillay the doctor had tried to kiss her. Ms Pillay asked her what happened and she described how the doctor had come close to her and tried to kiss her saying 'He took his tongue out and tried to put it on my lips' (T 45.34).

16. The patient then filled out a complaint form in the presence of Ms Pillay headed "Comments Form" (Exhibit D) in which she wrote:

“...I came to see Dr Perera...and after the examination he began to tell me that I should give up smoking when he then began to hold me and he put his face to mine and tried to put his tongue in my mouth. I turned away and got up and walked out.”

17. Ms Pillay put the complaint in an envelope and left it for the Centre Coordinator, Ms Rose Avenoso, to read the next morning. Later, Ms Pillay also prepared a handwritten note for Ms Avenoso, which read:

“(The patient) went in to see Doc Perera and came out of his room crying about 7pm and asked if she could talk to me privately. I took her in your office and she stated that Doc Perera tried kissing her and she broke out on my shoulder crying.

I asked her to fill in a complaint form and leave it for you.

At about 7.15pm (the patient's) husband and father walked in, asked if Doc Perera was in with any patient and in which room he was. They went right in his room as there was no pt. Meanwhile I called the security officer to come and stay around. Soon after both of them (her dad and her husband) came out and the father said to me as he walked out of the surgery, “The doctor tried kissing my daughter”.

At about 7.40pm 2 Police officers came in and asked for a copy of (the patient's) complaint. I did not know whether I should give it or not, any way I gave a copy b'cos they were Police officers... They took Dr Perera with them. I don't know what she wrote in the complaint. It is in the envelope on your desk.”

18. After leaving the Medical Centre the patient was collected by her husband. He noticed she was upset, and asked her why. As they were driving away she told him what had happened. He then drove her to her parents' place, dropped her off, and drove off. She suspected he was going back to the medical centre. She spoke to her father who immediately left to go to the medical centre. Both the father and the husband went to the medical centre where they confronted Dr Perera. Her father then arrived back home and took the patient to the Green Valley Police station where she made a statement. The statement recorded the following version of the complaint:

"I then saw Dr Perera get out of his chair and walk around to the corner of the table which was next to the chair which I was sitting on. I thought he was going to examine my injury but he cupped my face with his left hand as I could see his wedding ring which appeared to be an old tarnished wedding band. His fingers pointed towards my right ear the opposite side to my scar which is next to my left eye. Within a short period of time his second hand moved to the other side of my face. He said - "You are a very pretty girl." (I heard him repeat this numerous times) I could not say anything to him as I felt extremely uncomfortable and just stared at the ground in front of me.

I then saw Dr Perera remove his hands from my face and place his left hand on the top of my back and his right hand on my chest partial (sic) covering my breast. I was really nervous and could not speak as I had frozen and was unable to talk after his actions towards me. I didn't know what to think - he was an old man. I then felt Dr Perera's left hand which was on my back start to move around slowly. His left hand then moved to my left shoulder whilst his right hand remained in the same position. His upper body moved closer to me and he placed his right cheek up against my right cheek. I had no idea what he was doing. I wished that someone would interrupt us as I was scared and frozen. He then rolled his face and his mouth rolled towards mine. I then felt his tongue touching the right side of my lips. I was so shocked and scared I moved my head away in a jerky manner. I stood up really quickly, grabbed my wallet and paper work. I said - "I have to go."

I moved towards the door, opened it and started to leave. As I was halfway out the door, he said - "... come back and see me soon." I moved quickly towards the front counter and saw Angie who is the receptionist at the surgery."

19. The next morning, the Centre Coordinator, Ms Avenoso, read the patient's complaint and Ms Pillay's note to her about the events of the previous evening. She spoke to Ms Pillay who told her the patient was very distressed and upset and she had never seen the patient in this state before. The patient then told her

"...he got up and walked around to her, tried to put his arms around her in the form of a hug and put his face close to hers & tried to put his tongue in her mouth."

20. Later, Ms Avenoso received a phone call from Dr Perera who told her this was embarrassing for him and it was not true. He went on to say that the patient was a psychiatric patient who he had in the past referred to a psychiatrist.

21. Dr Perera was charged by the police with Assault with an Act of Indecency. The trial took place on 9 July 2007. The patient gave evidence in which she gave a substantially similar version of events to the one she gave to this Tribunal, including the following (Page 84):

“Then he kind of lowered his right cheek on my right cheek and then he proceeded to roll his face inward towards mine and then when he got close enough like I could feel his tongue just on the outside of my lips and that’s when I just kind of jerked away from him.”

22. The Magistrate dismissed the charge. He said:

“The complaint evidence that I have before me does not support the issue of the touching on the breasts...The attempted kissing is supported by the complaint evidence and we have here a situation where it is oath against oath. Clearly the alleged victim got very upset after seeing this accused. Something in my view happened that may have amounted to an attempted kiss, I do not know. Certainly the evidence is not such, in view of all the evidence, that I could say to the required criminal standard that that happened in the circumstances as the alleged victim said it happened.”

23. The required criminal standard is of course proof beyond reasonable doubt. The standard of proof on the Applicant in these proceedings is of course less stringent, and requires proof on the balance of probabilities consistent with the principles in *Briginshaw v Briginshaw* [1938] HCA 34.

The Respondent’s version of events

24. Dr Perera declined to make a statement to the Police on the night of the alleged events. He did, however, give evidence before the Magistrate in the criminal prosecution, during which he denied that he tried to kiss the patient, or that he made any attempt to stick his tongue into her mouth or onto her lips. He told the court he did not move his mouth close to her mouth at any time. He also said he was not wearing a wedding ring, and had not for many years, and had given it to his son-in-law when he married the doctor’s daughter 18 years ago. He was wearing a ring on his right hand, a religious ring with a picture of a Hindu saint.

25. Dr Perera also gave evidence before this Tribunal, in which he maintained his denial of the patient’s complaint. He said he made no attempt to kiss her, nor did he place his cheek against her cheek, or roll his face towards her mouth and place his tongue on her lips.

26. He went on to say that having regard to his age he was not interested in her sexually, nor would he have attempted to kiss her having regard to the viral infection from which she was suffering.

Determination

27. The Respondent's position was one of denial. It was submitted that in considering which version of the events to prefer, little reliance could be placed on the patient. Firstly, there was no corroboration of her complaint, and her respective accounts were full of variations. Secondly, there were inconsistencies as to what occurred at the Police station, to which the Magistrate made reference and relied upon to form his decision. Thirdly, there were a number of glaring improbabilities. These included the assertion that the doctor examined her with an extensor lamp, not a torch as he maintained. There was also his denial that he used a stethoscope to examine her. Nor were there any medical records to support her assertion that she had previously told the doctor about the assault on a prior occasion. The doctor asserted that this was the first such occasion. And, finally, there was the wedding ring, which the doctor said he gave to his son-in-law many years ago.
28. In the view of the Tribunal, however, the patient was a credible and convincing witness who had no reason to fabricate the events she described. Despite the doctor's attempts to discredit her psychological condition, no evidence was led to raise any suggestion that she was a person prone to delusion, or even that she had some predisposition to erratic or irrational behaviour. Indeed the staff at the medical centre painted the opposite picture of her. The Tribunal noted the consistent story she gave of the incident in the consultation room, that evening, the next day, and in her evidence before the Magistrate. As he said, something must have happened. Such variations as there were between these various accounts were peripheral and inconsequential. As to the central complaint of feeling the doctor's tongue on her lips, her accounts were invariable. The evidence from the doctor about his wedding ring was equivocal. The Tribunal was concerned that the son-in-law, who was present throughout the hearing in support of the doctor, did not give evidence to corroborate the assertion that he had been given the ring. The doctor's submission that there was no medical record of her telling him previously about her accident was also unpersuasive. On the contrary, where was the medical record that he had previously given her a referral to a psychiatrist?
29. There were, however, a number of undisputed facts that were consistent with the patient's version, including the doctor having told her she was pretty, and that he did touch her face. His explanation that he was only doing so to have a look at the plate in her cheek was unconvincing.
30. But the most telling aspect of the events for the Tribunal was the unexplained, instantaneous emergence of the patient from the consultation room distressed and crying, followed by the immediate and specific complaint.
31. For these reasons the Tribunal preferred the patient's version of the events and is comfortably satisfied that the Respondent doctor did attempt to kiss her, and finds that having placed his cheek against hers, he slowly rolled his face in towards her mouth then placed his tongue on the outside of her lips. In that context, the Tribunal is also comfortably satisfied that the doctor also made inappropriate comments about her being pretty, and that she should have been a model.

Disposition

32. This Tribunal is, therefore, comfortably satisfied that the Respondent doctor's conduct was significantly below the standard reasonably expected and was improper and unethical. We find him guilty of professional misconduct.
33. The Complainant's position is that the Tribunal should seriously consider an order for deregistration of the Respondent doctor. It submitted that the gravity of the conduct renders the Respondent doctor unfit to practice medicine having regard to the risk he presents to patients in respect of conduct of the type involved here.
34. The Medical Tribunal exercises its jurisdiction for the protection of the public and of the medical profession. This jurisdiction is protective rather than punitive, and deregistration is not an automatic outcome of professional misconduct even where that conduct is sufficiently serious to justify it: *HCCC v Karalasingham* [2007] NSWCA 267 at [67], particularly where significant steps have been undertaken by the medical practitioner to rehabilitate himself.
35. However, it is clear that deregistration may be required in serious cases of misconduct in order to adequately achieve those objectives by minimising the risk of recurrence, by deterring other practitioners from engaging in such conduct, and by maintaining public confidence in the profession.
36. The Tribunal is not persuaded that deregistration is warranted in the present case. The conduct involved was clearly inappropriate, but there is no other evidence of similar conduct.
37. Nevertheless, the Respondent doctor has not expressed contrition or remorse. He provides no details of subjective circumstances to explain, or at least put in context his conduct in such a way that he persuades this Tribunal to assess the possibility of recurrence as unlikely.
38. The Tribunal considers that in all the circumstances his misconduct requires that he be reprimanded and that conditions be placed on his registration to minimise the risk of recurrence.
39. The evidence also disclosed significant shortcomings in the Respondent's record keeping. These inadequacies were manifest in the evidence before the Magistrate and in the material before this Tribunal. Although the Tribunal has eschewed the imposition of any condition as to supervision, contrary to the submissions of the Complainant, it does consider that there should be a condition imposed as to an audit of the Respondent's records.
40. Accordingly, the Tribunal considers that there should be conditions imposed on his registration as to counselling and practice conditions, but on the basis that the conditions may be reviewed and amended or varied by the NSW Medical Board as it considers appropriate.

Costs

41. The power of the Tribunal to determine costs is unlimited: Clause 13 of Schedule 2 to the *Medical Practice Act 1992*. It is for the losing party to establish a basis for any departure from the usual rule that costs follow the event: *NSW v Stanley* [2007] NSWCA 330 at [24], *Ohn v Walton* (1995) 36 NSWLR 77 at 79.
42. No basis for a departure from the usual rule has been put forward in these proceedings. The Tribunal considers, therefore, that the Respondent should pay the Complainant's costs of these proceedings, on the ordinary basis as defined in s 3 of the *Civil Procedure Act 2005*.

Statement of Decision

43. For these reasons the Tribunal orders that:

1. The Respondent doctor is reprimanded.
 2. The Respondent doctor is to pay the Complainant's costs of these proceedings, on the ordinary basis as defined in s 3 of the *Civil Procedure Act 2005*.
 3. The conditions set out in the Annexure are to be placed on the Respondent doctor's registration. The NSW Medical Board (the Board) is the appropriate review body for the purposes of the review of these conditions and it may remove or vary the conditions at such times and in such ways as it considers appropriate.
44. Pursuant to Clause 6 of Schedule 2 to the Medical Practice Act the Tribunal has made a Non-Publication Order in respect of the name of the patient referred to in the proceedings.

Annexure

Counselling conditions

- 1.1 Dr Perera is to attend on a psychiatrist or psychologist approved by the Board for the purpose of counselling for a period of 12 months from the date of the first consultation (which is to be within 1 month of the date of the Board's approval of the practitioner). Dr Perera is to notify the Board of the name and professional address of such a counsellor who has agreed to act in that capacity and provide his curriculum vitae within one month of this decision.
- 1.2 The Board may provide the approved counsellor with a copy of the Tribunal's decision.
- 1.3 Dr Perera is to authorise the approved counsellor to:
 - (i) provide the Board with a report of Dr Perera's progress in approved format on a 6 monthly basis; and
 - (ii) notify the Board immediately if there are any concerns or issues in relation to Dr Perera's compliance with any condition or if the counselling relationship ceases.
- 1.4 In the event that the approved counsellor is no longer willing or able to continue to provide counselling, Dr Perera is to nominate another counsellor for approval by the Board within 28 days of the cessation of the original counselling relationship.
- 1.5 All expenses associated with the counsellor as set out in these conditions are to be met by Dr Perera.

Practice conditions

- 2.1 Dr Perera is to practice only in a group practice approved by the Board (group is defined as at least three practitioners) with one other practitioner always on site.
- 2.2 Dr Perera is to not to change in the nature or place of his practice without prior approval of the Board..
- 2.3 Dr Perera is to submit to an audit of randomly selected records by a person nominated by the Board, within 6 months of this Decision, on the basis that the Board may determine if any further audit or other action is indicated by the results, and that Dr Perera is to meet all associated costs.
- 2.4 Dr Perera authorises and consents to any exchange of information between the Board and Medicare Australia needed to monitor compliance with these conditions.

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