



New South Wales
Medical Tribunal

CITATION : Re Dr Tuan Troung [2009] NSWMT 5
TRIBUNAL: Medical Tribunal
PARTIES : Dr Tuan Truong
NSW Medical Board
FILE NUMBER(S) : 40037 of 2009
CORAM: Murrell, SC DCJ - Renwick, Dr S - Ilbery, Dr K - Collier Ms A
CATCHWORDS: Review of practice condition - Recent unresolved complainant
- Practitioner offers undertaking
LEGISLATION CITED: Medical Practice Act 1992 ss 36(1)(m), 92(1)(c), 94(1)(e), 94A
(1) and (3).
CASES CITED: NSW Medical Board v Dinakar (Medical Tribunal, 24 June
2009, unreported)
DATES OF HEARING: 24 November 2009
DATE OF JUDGMENT: 25 November 2009
LEGAL REPRESENTATIVES: Mr Barnes of Counsel for the Applicant
Mr Ginters of Counsel for the Respondent
ORDERS:

JUDGMENT:

1 In August 1998 the practitioner, a sole general practitioner, performed a breast augmentation on Patient A. The patient was dissatisfied and lodged a complaint.

2 In May 2003 a Professional Standards Committee (PSC) inquired into that complaint and a complaint concerning Patient B, upon whom the practitioner had performed upper blepharoplasty surgery. The PSC found that some aspects of the complaints were established. It found the practitioner guilty of unsatisfactory professional conduct. It imposed conditions on his registration, including a condition prohibiting the performance of breast augmentation surgery (condition 1) and conditions requiring an audit of his practice.

3 In November 2003, the practice was audited. Deficiencies in record-keeping and other deficiencies were found. In January 2004, delegates of the NSW Medical Board conducted an enquiry under s 66 of the *Medical Practice Act 1992*. Further registration conditions were imposed, including a requirement for a further audit and a supervision requirement.

4 By June 2008, the practitioner had complied with the registration conditions requiring education, audit and supervision, and all such conditions had been removed. The only remaining condition was condition 1.

5 The practitioner wishes to become a Fellow of the Australian College of Cosmetic Surgeons, an association comprised mainly of general practitioners with a special interest in cosmetic surgery. Although he has satisfied the relevant examination, he cannot be awarded the Fellowship because his

registration is conditional.

6 The practitioner has long harboured the dream of qualifying as a surgeon, preferably a plastic surgeon. Without unconditional registration, he cannot seek a place in the advanced surgical training program run by the Royal Australian College of Surgeons (RACS) (Exhibit A, tab 17).

7 Pursuant to s 92 of the Act, the practitioner applied for a review of condition 1.

The Review

8 The Tribunal is the appropriate review body because, when imposing condition 1, the PSC did not nominate the Board as the appropriate review body: s 93 (1). Under s 94 A:

"(1) A review under this Division is a review to determine the appropriateness, at the time of the review, of the order concerned.

...

(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 or not ... any other action was taken on the complaint."

9 In exercising the review function, protection of the health and safety of the public is the paramount consideration: s 2A (3).

The Practitioner's Case

10 The practitioner conceded that his training was (and remains) inadequate in relation to the performance of breast augmentation. However, he submitted that condition 1 is no longer appropriate because he will not be undertaking that procedure unless and until he is required to do so as a RACS advanced surgical trainee (in which case he would be supervised), or he becomes a Fellow of the RACS.

11 The practitioner was an earnest and frank witness. He readily conceded that the 1998 conduct involved serious errors of skill and judgement. The Tribunal accepts the practitioner as a truthful witness. Indeed, the Board did not suggest otherwise.

12 The Tribunal accepts that the practitioner has a long-standing interest in surgery and is highly motivated to obtain specialist qualification as a surgeon, preferably a plastic surgeon.

13 On oath, the practitioner proffered an undertaking to the Tribunal that, except as part of the College training course, he would not perform breast augmentation surgery unless and until he became a Fellow of the College.

The Recent Complaint

14 In January 2009, a plastic surgeon reported the complaint of a 24-year-old patient that the practitioner had performed an incompetent and inappropriate "face lift" with Mr N, who is not a registered medical practitioner in Australia (Exhibit 1, tab 14). The patient did not press the complaint. The Health Care Complaints Commission took no further action.

15 The practitioner answered this allegation. He said that he had not performed a "face lift". He had excised a triangle of skin lateral to the eye and upper eyebrow for the purpose of elevating the eyebrow and flattening the surrounding skin. The suture lines had broken down. The patient worked as a swimming instructor and may have saturated the wounds too early, against his advice. For several weeks after the procedure, the patient failed to return for follow-up treatment. As a result, she

suffered infection and scarring. The practitioner denied that he performed cosmetic surgery on demand. If a 24-year-old patient appeared to be mature and psychologically balanced and she was committed to cosmetic surgery, then he would perform the surgery. The patient in question had requested further surgical procedure, but he had declined the request because she had already undertaken substantial cosmetic surgery.

16 The Tribunal is satisfied with the practitioner's attitude to the performance of cosmetic surgery on the 24-year-old patient. The practitioner gave a plausible account of events. On the limited material available, the Tribunal is satisfied that the practitioner demonstrated adequate skill, knowledge and judgement in relation to the surgical procedure.

17 The practitioner readily conceded that Mr N assists with surgical procedures, and assisted with the surgical procedure on the 24-year-old patient. Mr N is an elderly man who has qualified to practise as a surgeon in Vietnam and Austria. Mr N assisted with the 1998 breast augmentation to a degree that was inappropriate. Currently, Mr N takes measurements and makes a preliminary drawing on the patient. As drawing is a crucial preliminary part of any procedure, the Tribunal questions the wisdom of delegating that function. However, the Tribunal accepts the practitioner's evidence that he always checks the measurements and drawing.

18 In any event, although Mr N was inappropriately involved in the 1998 breast augmentation which resulted in the imposition of condition 1, that condition is not designed to prevent Mr N from assisting the practitioner.

The Board's Case

19 The Board argued that, as there had been no relevant change in the practitioner's situation since 2003 when condition 1 was imposed, the condition should remain. Alternatively, condition 1 should be replaced by conditions requiring supervision in relation to breast augmentation, in accordance with Exhibit 3.

The Tribunal's Findings

20 The issue is whether condition 1 is now appropriate.

21 In 1998, the practitioner had six years experience as a general practitioner, mostly as a sole general practitioner. In relation to patient A, he committed serious errors. The manner in which he ran his practice was unsatisfactory.

22 The practitioner has acknowledged and addressed his shortcomings. Since 2003, he has undertaken no breast augmentation. Except insofar as it is part of formal surgical training, the practitioner has no intention of undertaking the procedure for at least six years (the earliest possible time at which he could obtain a RACS Fellowship).

23 Condition 1 is inappropriate because it is irrelevant. Just as there is no need to expressly prohibit most general practitioners from performing breast augmentation on the basis that they lack the necessary skills, there is no need to expressly prohibit this practitioner.

24 The practitioner gave an undertaking of his own volition. He understands that any breach of that undertaking would be unethical. It could found a complaint of unsatisfactory professional conduct contrary to s 36 (1) (m) of the Act (any other improper or unethical conduct relating to the practice of medicine).

25 The Board submitted that a condition of registration has the benefit that it can be monitored, whereas an undertaking cannot be monitored. However, the Board failed to identify any statutory or other basis for that distinction.

26 The Tribunal accepts that, in circumstances where it is appropriate to impose a condition on registration, the condition should be imposed. Generally, an undertaking is no substitute for a condition. A condition is a matter of public record. Practitioners, patients and other members of the public should be able to ascertain whether there are restrictions on the manner in which a practitioner may practice.

27 In this case, condition 1 is no longer appropriate. The Tribunal did not seek the undertaking, and the Tribunal does not accept the undertaking as a substitute for condition 1. Rather, the Tribunal accepts the undertaking as a confirmation of the practitioner's bona fides.

Costs

28 The Tribunal's power and discretion in relation to costs was reviewed in *NSW Medical Board v Dinakar* (Medical Tribunal, 24 June 2009). In relation to costs, the Tribunal has a broad discretion. The general rule is that, in the absence of discrediting conduct by the successful party, the Tribunal will exercise its discretion by compensating the successful party through an order for costs. However, the general rule must be read in the context that the Board and the Health Care Complaints Commission appear before the Tribunal in the public interest.

29 The Board submitted that, as the practitioner was seeking an indulgence and the Board appeared in the public interest, the practitioner should pay the Board's costs regardless of outcome.

30 The Tribunal accepts that the Board appeared in the public interest. However, the practitioner had a strong case. For some years, he has sought removal of condition 1. In those circumstances, the Tribunal makes no costs order.

Orders

- (1) Condition 1 is terminated.
- (2) No order as to costs.
- (3) The undertaking referred to in paragraph 13 is noted.
- (4) The Tribunal notes that the practitioner is entitled to unconditional registration.

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