PROFESSIONAL STANDARDS COMMITTEE INQUIRY

CONSTITUTED PURSUANT TO PART 12 DIVISION 1
OF THE MEDICAL PRACTICE ACT 1992 TO HOLD AN INQUIRY INTO
A COMPLAINT IN RELATION TO

DR ROBERT SYDNEY ELLIOTT

Date of Inquiry:	Monday 28 September 2009
Committee members:	Ms Helen Kiel, Chairperson (Legally qualified, not a registered medical practitioner) Dr Scott Harbison (Registered medical practitioner) Dr Melanie Wroth (Registered medical practitioner) Mr Russell Smith (Lay person)
Legal Officer assisting Committee:	Ms Bridget Andersons, Legal Officer from the NSW Medical Board
Appearance for Health Care Complaints Commission:	Ms Katharina Buck, Hearing Officer from the Health Care Complaints Commission
Appearances for Dr Elliott	Ms Sondra Riley, Solicitor from Avant Dr Hugh Aders from Avant
Date of decision:	3 November 2009
Publication of decision:	Refer to page 5 of this decision for details of non-publication directions

SUMMARY

1. Dr Elliott was found guilty of unsatisfactory professional conduct and reprimanded. Conditions were placed upon his practice.

INTRODUCTION

2. On 13 November 2007 a complaint was received by the HCCC about the care a patient received at Wollongong Hospital after she had surgery supervised by Dr Elliott for a routine knee replacement. The patient stated that instead of recovering from the surgery she suffered complications and increasing pain. After ten days in Wollongong Hospital and no improvement in her condition she was sent for rehabilitation to Port Kembla Hospital where she was found to have a previously undiagnosed periprosthetic fracture of her left femur. She had to be readmitted to Wollongong Hospital for further surgery. It was not disputed that Dr Elliott did not review her xrays or see the patient after her initial surgery at Wollongong Hospital, and was unaware of the fracture until it was discovered at Port Kembla Hospital.

COMPLAINT

3. A complaint dated 30 March 2009 against Dr Robert Sydney Elliott was referred by the NSW Health Care Complaints Commissioner to be dealt with by a Professional Standards Committee. It was prosecuted before this Committee by the Director of Proceedings acting as nominal complainant. The complaint against Dr Elliott is as follows:

> *"The Health Care Complaints Commission of Level 13, 323 Castlereagh Street, Sydney NSW, having consulted with the NSW Medical Board in accordance with sections 39 (2) and 90B (3) of the Health Care Complaints Act 1993 and section 51 (1) of the Medical Practice Act 1992 ("the Act")*
>
> *HEREBY COMPLAINS THAT:*
>
> *Dr Robert Elliott of "Beaufront", 2 Allan Street, Wollongong NSW 2500 ("the practitioner"), being a medical practitioner registered under the Act,*
>
> *Has been guilty of unsatisfactory professional conduct within the meaning of s.36 of the Act 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."*

PARTICULARS OF COMPLAINT

4. The particulars of the complaint are as follows:

   On 9 July 2007, the patient was admitted to Wollongong Hospital under the care of the practitioner.

   On 9 July 2007, the patient underwent total knee replacement of the left knee, performed by an orthopaedic registrar who was supervised and assisted by the practitioner.

   The patient suffered an undisplaced fracture of the left femur following the anterior cortex of the distal femur being notched during the surgery, a known complication of the procedure.

   On 10 July 2007, an x-ray of the patient's left knee was performed. The x-ray image of 10 July 2007 demonstrated an undisplaced periprosthetic fracture.

   The practitioner failed to adequately manage and/ or supervise the patient's post-operative care:

   1. On 10 July 2007, the practitioner failed to review the post-operative x-rays taken on that day.

   2. Between 10 July 2007 and 18 July 2007, the practitioner failed to review and examine the patient and/ or supervise the details of the patient's postoperative management by the practitioner's registrar and intern, in circumstance where:

      i. The anterior cortex of the distal femur had been notched during the procedure on 9 July 2007;
      ii. The patient was suffering from increasing pain;
      iii. The patient had difficulties mobilising;
      iv. The operating surgeon, the practitioner's registrar, was going on leave.

   3. On 19 July 2007, the practitioner failed to review the patient prior to the patient's transfer to Port Kembla Hospital for further rehabilitation, in circumstances where the patient's condition had deteriorated following the procedure performed on 9 July 2007.

5. Prior to the commencement of the hearing, Dr Elliott admitted the particulars of the complaint and at the conclusion of the hearing also admitted that his conduct amounted to unsatisfactory professional conduct.

THE MEANING OF UNSATISFACTORY PROFESSIONAL CONDUCT

6. . Section 36 of the Medical Practice Act 1992 states

> *"Meaning of "unsatisfactory professional conduct"*
> *For the purposes of this Act, unsatisfactory professional conduct of a registered medical practitioner includes each of the following:*
> *(a) Conduct significantly below reasonable standard*
> *Any conduct that demonstrates that the knowledge, skill or judgment possessed, or care exercised, by the practitioner in the practice of medicine is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience........*

7. The phrase "significantly below" is not defined in the Act. However in the Second Reading speech when this legislation was introduced to Parliament it was stated that:

> *"The first main purpose of the bill is to refocus the Health Care Complaints Commission (HCCC) on investigating serious complaints about health service providers. To achieve this, Commissioner Walker recommended that unsatisfactory professional conduct be redefined so that only significant instances involving lack of skill, judgment, or care will result in an investigation or disciplinary action. ..... the reference to 'significant' in that context may refer to a single act or omission that demonstrates the practitioner's lack of skill, judgment or care, or it may refer to a pattern of conduct. In any individual case, that will depend on the seriousness of the circumstances of the case."*

STANDARD OF PROOF

8. For the Complaint to be proved, the Committee must be reasonably satisfied on the balance of probabilities that Dr Elliott's conduct satisfies the statutory definition of unsatisfactory professional conduct. As stated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 "*Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*"

EXHIBITS

9. Prior to the hearing, and with the consent of the parties, the Committee was provided with a folder of documents numbered 1 – 22 by the HCCC which included documents and correspondence related to the complaint, expert and other reports,

and the clinical records of the patient. At the beginning of the hearing, the HCCC provided copies of the patient's xrays dated 19 July 2007, a CD of the xray images and copies of Dr Holman's Curriculum Vitae.

10. Prior to the Hearing, Dr Elliott provided a folder of documents which included his formal statement and Curriculum Vitae, two character references and evidence of his continuing education.

NON-PUBLICATION ORDER

11. Prior to the hearing, pursuant to Schedule 2, clause 6 of the Act, the Chairperson directed that the name of the patient not be published.

WITNESSES

12. Dr Peter Holman, expert for the HCCC gave evidence before the Committee. Dr Elliott also gave evidence.

BACKGROUND

13. Dr Elliott was born on 19 February 1948. He obtained his B.Sc. degree in 1968 and his M.B.B.S in 1973 from the University of Sydney. He completed his F.R.A.C.S in 1982 and his F.A.Orth.A in 1986. He undertook his basic and orthopaedic training in various hospitals in Sydney between 1973 and 1982, and has held appointments at the Canterbury Hospital, the Lewisham Institute of Sports Medicine, the Hawkesbury District Hospital and the Royal Australian Airforce Base. He has current hospital appointments at Wollongong Hospital, Port Kembla Hospital, Shellharbour Private Hospital, Figtree Private Hospital and Lawrence Hargrave Hospital. Over the past four – five years he has also held an appointment at Shoalhaven District Hospital but this has now ceased.

14. Dr Elliott is a Fellow of the Australian Orthopaedic Association, the Australian Society of Orthopaedic Surgeons, the Australian Medical Association and a past member of the Australian Foot and Ankle society. He is particularly interested in arthroscopic surgery of the knee, hip and knee replacement surgery, and trauma. He has supervised and trained junior medical officers and orthopaedic registrars for more than 20 years. He has also attended many conferences and scientific meetings, as well as numerous Mortality and Morbidity meetings at Wollongong Hospital.

THE CIRCUMSTANCES SURROUNDING THE COMPLAINT

15. The patient was admitted to Wollongong Hospital under Dr Elliott on 9 July 2007 for a routine knee replacement, having been his patient since 2004. She had a

history of pain in her left knee as a result of degenerative meniscal tears and osteoarthritis. She expected to be in hospital for a few days. The operation was carried out by Dr Elliott's registrar under Dr Elliott's supervision. During the surgery, the anterior cortex of the distal femur was notched, a known complication of the surgery. Following the operation and for the next nine days the patient was in pain and having difficulty with the mobilization and physiotherapy that was expected of her. On 18 July she was discharged to Port Kembla Hospital for more physiotherapy, having not seen Dr Elliott since her operation. On 19 July at Port Kembla Hospital an x-ray was performed which showed that she had a displaced periprosthetic fracture of the left femur. She was transferred back to Wollongong Hospital for further surgery which was performed by another orthopaedic surgeon, Dr Leong. The patient states that she spent nearly 2 ½ months in hospital instead of what should have been about a week.

16. Dr Elliott stated in his response to the complaint dated 12 March 2008 that when the knee replacement surgery was carried out on 9 July 2007 by his registrar with himself as surgical assistant, *"the procedure was carried out in a routine manner and no difficulties were encountered during the procedure".* However, in his statement dated 12 August 2009 he acknowledged that the femur had been notched during the procedure. He did not become aware that there was a problem with the patient until he received a phone call from his registrar on 19 July 2007. During the phone call Dr Elliott reviewed radiographic images taken on 10 and 19 July 2007. He noted that the image taken on 10 July 2007 demonstrated an undisplaced periprosthetic fracture of the left femur, whilst the later image of the 19th July 2007 showed a displaced periprosthetic femoral fracture. Dr Elliott immediately arranged for the patient to be transferred to Wollongong Hospital for open reduction and internal fixation of the fracture, which was performed on 21 July 2007.

17. According to the radiologist Dr Steven Blome who was asked by the HCCC to review the patient's radiology, the undisplaced periprosthetic fracture visible on the xray taken on 10 July was missed by the reporting radiologist, Dr Wylie. According to Dr Blome, Dr Wylie should have diagnosed the fracture, but it was of a subtle appearance, and could have been missed by the minority of reporting radiologists.

EVIDENCE

Dr Holman

18. Dr Holman is a very experienced orthopaedic surgeon, with a longstanding interest and specialization in joint replacement surgery. He is Director of Clinical Services at the Central Sydney Area Health Service and also holds current appointments at New South Wales Private Hospital and Strathfield Private Hospital. He is a member of numerous professional associations.

19. Dr Holman in his report dated 16 June 2008 was of the opinion that Dr Elliott provided appropriate and adequate supervision of his registrar during the surgery, and commented that looking at the post operative x-rays it was most unlikely that the undisplaced fracture of the distal femur at the level of the notching would have been apparent at the time of surgery, although the fracture could have occurred at that

time. Dr Holman stated that Dr Elliott failed in his responsibility of care to the patient in that he failed to visit her at any stage during her postoperative treatment, and in particular, he failed to view her postoperative xrays following her total knee replacement.

20. Dr Holman stated in his report that it is an essential part of the post-operative management that the surgical team, both consultant and registrar, review the postoperative xrays before the patient is mobilised, in order to advise the nursing staff and physiotherapy staff as to the weight bearing status of the patient when they commence mobilisation, and whether it is in fact safe for the patient to be mobilised.

21. Dr Holman was also critical of Dr Elliott in not providing any postoperative supervision to his registrar in his post-operative care of the patient, and stated that as the operating registrar went on leave on 13 July 2007, it was Dr Elliott's responsibility to be aware of such leave arrangements and to hand over the patient's post-operative management to the registrar who was going to continue her postoperative supervision.

22. In evidence before the Committee Dr Holman stated that in view of the quite significant notching of the femur during the surgery, and as the standard of radiology reporting on orthopaedic xrays was reasonably poor, Dr Elliott should have personally viewed the xrays prior to mobilizing the patient. He said that Dr Elliott should also have seen the patient on the first post-operative day and examined her leg to make sure there were no adverse findings, and reviewed the patient at least two or three times whilst she was in hospital.

23. In sum, Dr Holman was of the opinion that Dr Elliott should have taken a much more active role in the patient's postoperative management. He stated that Dr Elliott's conduct, as particularized in the complaint, fell significantly below the standard expected of an orthopaedic surgeon in his position.

Dr Elliott

24. Dr Elliott gave evidence that he is employed as an independent contractor at Wollongong Hospital, with responsibility for an operating list, orthopaedic and fracture clinics, and ward-rounds. Because of the high rate of trauma in the area there is a heavy workload at Wollongong Hospital which employs 6 orthopaedic surgeons. Dr Elliott said that he operated there on Mondays, and was usually on call on that day, as well as being on-call over the week-end every 5 to 6 weeks. He has attachments to other hospitals including Port Kembla Hospital and Shellharbour and Figtree Private Hospitals. He also works in the Orthopaedic and Fracture Clinic at Nowra Hospital on Thursdays, and at the time of the complaint he spent the rest of the week at Shoalhaven Hospital, although his appointment there has now ceased.

25. Dr Elliott said that he did not attend the xray review meetings at Wollongong Hospital on Tuesday mornings because of a regular personal commitment at that time. He stated that he usually did a ward-round at the hospital on Wednesday mornings, but there was no set time. He said his failure to review the patient himself in this instance was unusual, and that although he had been regularly visiting his

father who lived alone in the western suburbs on Wednesdays, he did not seek to rely on this as an excuse.

26. When asked to respond to the comment of his registrar that he could not recall Dr Elliott doing a ward round on any of his patients, Dr Elliott stated that would not always notify his registrar of his intention, and that sometimes the registrar would be at another hospital anyway. However, when asked how he assessed his registrars, Dr Elliott also said that ward-rounds were one way of assessing their competence, and that he always expected his registrar to see his patients daily and to manage them postoperatively. Dr Elliott's evidence about his ward-rounds gave the impression of a somewhat ad hoc approach to the follow-up and review of his patients, and also to the supervision of registrars and junior medical staff.

27. Dr Elliott acknowledged in his evidence before the Committee that notching the femur was a known complication of the surgery, as it weakens the femur, increases the chance of a fracture postoperatively, and alters the post-operative management of the patient. He readily conceded that it was therefore particularly important to follow-up the patient after the surgery and to check the post-operative xrays. He admitted that he neither saw the patient prior to her discharge to Port Kembla Hospital nor checked her xrays, even though he could access them at any time on his computer. He said that had he seen the xrays on 10 July he would have placed the patient in a knee splint for 6-8 weeks with no weight bearing.

28. Dr Elliott explained that he did not re-operate on the patient when she was re-admitted to Wollongong Hospital as she was placed in the trauma operating list under the care of the on-call surgeon, and her classification changed. He said that he did not see her following her second operation and he regretted this. He subsequently saw her as an outpatient, when she expressed her feelings about what had happened to her and he apologized to her.

29. Dr Elliott stated in evidence that he had made some changes to his practice, which included personally reviewing all xrays of his patients at Wollongong Hospital, no longer practising at Shoalhaven Hospital, and conducting regular ward rounds on Wednesdays and Fridays at Wollongong Hospital at a time when his registrars could be present. He also said he would be prepared to attend the Tuesday morning xray review meetings at Wollongong Hospital. However he had made no changes in relation to how he works with registrars, in spite of the lack of communication from his registrar in the present case, stating that they usually phone him about his patients, and that he encourages them to do so. He said he was available on his mobile 24 hours a day.

DISCUSSION

30. There was no dispute that the notching of the patient's femur during the surgery placed her at risk of complications following the surgery, particularly as the notching was quite significant, as conceded by Dr Elliott in his evidence. There was also no dispute that Dr Elliott's post-operative management of the patient was well below the requisite standard. Dr Elliott acknowledged that he could have accessed the patient's xrays at any time from his own computer. He was unable to offer any explanation to the Committee as to why he did not.

31. Dr Holman was not challenged on his criticism of Dr Elliott, and the Committee found him a convincing witness in view of his lengthy experience and expertise in knee replacement surgery. In conceding the facts of the complaint and that his conduct amounted to unsatisfactory professional conduct, Dr Elliott did not seek to justify or excuse his conduct in any way, even though it occurred in the context of some systemic errors when both the radiologist and the registrar missed the fracture visible on the xray after the surgery.

32. There were some troubling aspects of Dr Elliott's evidence. In addition to failing to view the patient's xrays which were accessible to him at any time, Dr Elliott neither undertook regular ward rounds at the time of the complaint, nor attended the regular xray review meetings on Tuesday mornings at Wollongong Hospital. These facts were of some concern to the Committee in terms of Dr Elliott regularly and systematically following up his patients after surgery. Although he stated that he had made changes to his practice, such as undertaking regular ward-rounds when his registrars could be present, he provided no other evidence of these changes.

33. It appeared to the Committee that Dr Elliott is very dependent upon the feedback of his registrars and junior doctors in relation to the post-operative management of his patients. Whilst this may be normal practice, in view of the lack of communication between Dr Elliott and his registrar in the present case, the Committee is concerned that such communication problems could recur unless Dr Elliott takes a more proactive approach in this respect.

34. Both parties submitted that if the complaint was found proved, the appropriate order was a reprimand, with the HCCC submitting that Dr Elliott should be required to attend a risk management course which focussed on communication skills. It was argued on behalf of Dr Elliot that such a condition was unnecessary, as there was no evidence that he had any difficulty communicating with patients.

FINDINGS

35. In view of Dr Elliott's own admissions, the unchallenged evidence of Dr Holman, and the patient's clinical notes, xrays and other documentary evidence, the Committee finds each of the particulars of the Complaint proved, and that Dr Elliott's conduct amounts to unsatisfactory professional conduct.

ORDERS

36. The Committee has carefully considered the written and oral evidence and the submissions by the parties, and orders, pursuant to Section 61 of the Act:

(1) that Dr Elliott be reprimanded

(2) that for a period of 12 months from the date of this decision, or such other period as the NSW Medical Board may nominate, Dr Elliott be required at the end of each three months to submit a report to the Board of

I. the name of each patient who has been operated upon by Dr Elliott or under his direct supervision and care at Wollongong Hospital

II. the date of each operation

III. the date of each ward-round conducted at Wollongong Hospital in relation to each of these patients

IV. the name of the registrar who accompanied him on each ward round.

The report is to be submitted in an approved format as required by the Board.

(3) Dr Elliott authorises and consents to any exchange of information between the NSW Medical Board and Medicare Australia where such exchange is necessary to facilitate the monitoring of compliance with these conditions.

(4) The Board is the appropriate review body for the purpose of a review under Part 6 Division 3 of the Medical Practice Act and these conditions may be varied, amended or removed at the discretion of the NSW Medical Board.

PUBLICATION OF DECISION

38. Section 180 of the Medical Practice Act 1992 provides

180 Committee to provide details of its decision

(1) A Committee must provide a written statement of a decision on an inquiry to the complainant, to the practitioner concerned and to the Board, and must do so within one month after the decision is made.
(2) The statement of a decision must:
(a) set out any findings on material questions of fact, and
(b) refer to any evidence or other material on which the findings were based, and
(c) give the reasons for the decision.
(3) A Committee may also provide the statement of a decision to such other persons as the Committee thinks fit.

39. Pursuant to Section 180 (1) of the Act the Committee provides a copy of this written statement of decision to the HCCC, to Dr Elliott, and the Board.

40. Pursuant to section 180 (3) of the Act the Committee provides a copy of this written statement of decision to the patient.

41. Section 180 (4) of the Act provides that

(4) The Board:

(a) must make publicly available a statement of a decision provided to it under this section if the decision is in respect of a complaint that has been proved or admitted in whole or in part, and

(b) may disseminate any other statement of a decision as the Board thinks fit,

unless the Committee that provided the statement has ordered otherwise.

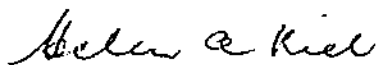
42. It was submitted on behalf of Dr Elliott that publication of the Committee's decision on the Board's website should cease after 12 months, as such publication then becomes punitive. No other reasons were put forward in support of this submission.

43. The Second Reading speech of 4 June 2008 in relation to the Medical Practice Amendment Bill refers to the publication of Professional Standard Committee decisions, stating that the unique power of the medical profession to cause harm or even death to the members of the public means that any allegation that a medical practitioner has engaged in unsatisfactory professional conduct is a matter of public interest. The speech also notes that greater openness and transparency of the process will also help build public confidence in the disciplinary system, and enhance the accountability of that system.

44. The Committee has carefully considered Dr Elliott's submission. However as he has not provided any compelling reasons which might outweigh the public interest in the publication of the Board's decision, the Committee rejects his submission.

APPEAL

45. An appeal against this decision is available under section 87 of the Act, or section 88 if the appeal is with respect to a point of law. Such an appeal is to be made within 28 days of the handing down of the decision (or such longer period as the Registrar may allow in any particular case).



Ms Helen Kiel
Chairperson

3 November 2009