

**IN THE MEDICAL TRIBUNAL OF NEW SOUTH WALES**  
**THE MEDICAL PRACTICE ACT 1992**

DEPUTY CHAIRMAN: HIS HONOUR JUDGE J. C. McGUIRE

MEMBERS:                   DR M. PASFIELD  
                                  DR D. CHILD, AM  
                                  MS R SEXTON

**SUPPRESSION ORDER**

**On 13/8/01 and 13/12/01 a suppression order was made  
ON THE NAME, ADDRESS OR ANY MATTER CAPABLE OF  
IDENTIFYING THE PATIENTS OR ANY MEMBER OF HER  
FAMILY, ANY DETAILS OF THE PATIENT'S MEDICAL  
CONDITION AND MEDICAL TREATMENT AND THAT THE  
NAMES OR ANY OTHER MATERIAL CAPABLE OF  
IDENTIFYING THE PATIENT REFERRED TO IN PARTICULAR  
7 OF THE COMPLAINT, THAT THERE BE NO PUBLICATION  
OF THESE MATTERS IN ANY SHAPE OR FORM**

**No. 40022/00 - DR ANTONIO AGUADO**

**REASONS FOR DETERMINATION**

**Date: 27<sup>th</sup> February, 2002**

Nature of Complaint

Pursuant to the Medical Practice Act 1992 (the Act), the Tribunal is enquiring into a complaint of the Commissioner, Health Care Complaints Commission (the Complainant) into professional conduct of Dr Antonio Aguado.

The Commissioner complains that Dr Antonio Aguado (the practitioner), being a medical practitioner registered under the Act has been guilty of unsatisfactory professional conduct and/or professional misconduct within the meaning of Section 36 and Section 37 of the Act in that he:

- (1) Has demonstrated a lack of adequate skill, judgment or care in the practice of medicine; and
- (2) Has been guilty of improper or unethical conduct related to the practice of medicine.

At all relevant times the practitioner was a specialist psychiatrist. Between March 1996 and July 1999 the practitioner treated a female patient, Patient A.

1. During the period 1996 to 1999 the practitioner failed to maintain proper boundaries in his professional relationship with Patient A in that he:

- i. Gave gifts to Patient A
- ii. Went on outings with Patient A
- iii. Went out to lunch with Patient A immediately following therapy sessions
- iv. Made frequent personal phone calls to Patient A
- v. Sent personal e-mails to Patient A
- vi. Wrote intimate notes in Patient A's diary
- vii. Took a number of photographs of Patient A
- viii. Offered to give money to Patient A

2. In 1997 the practitioner commenced inappropriately touching Patient A in that:
  - i. He hugged Patient A and kissed her on the cheek
  - ii. He held Patient A's hand during therapy sessions
  - iii. On two occasions he licked and sucked Patient A's fingers
3. In December 1998 the practitioner entered into a personal and sexual relationship with Patient A which continued until July 1999.
4. The practitioner inappropriately sought to continue his treatment of Patient A after he had sexual intercourse with her on 24 December 1998.
5. On 12 February and 18 June 1999, the practitioner issued prescriptions for a Schedule 4 drug, namely, Viagra in the name of a person for whom the relevant drug was not intended and in so doing, obtained the drug Viagra for his own use from pharmacists by knowingly making false and misleading representations as to the name and address of the person for whom the drug was purportedly intended, contrary to Section 12(2) of the Poisons & Therapeutic Goods Act 1997.
7. The practitioner disclosed confidential information about two other patients to Patient A:
  - i. The practitioner disclosed that his patient, Mr [PF] (whom Patient A went to school with) had a drug problem. The

practitioner referred to Mr [PF] saying that he had “ ... kept him out of gaol”.

ii. The practitioner disclosed that his patient, Mr [JM], who was an ambulance driver had been attacked.

8. The practitioner submitted claims to the Health Insurance Commission for medical services purportedly provided to Patient A on the dates shown on the attached Schedule 2 in circumstances where the medical services claimed for were not provided.

### Orders Sought

The Commissioner seeks, pursuant to Section 64 of the Act, a finding that the practitioner is guilty of unsatisfactory professional conduct and/or professional misconduct in relation to his dealings with the patient and an order that he be deregistered.

### Unsatisfactory Professional Conduct

Section 36 of the Act sets out the matters which constitute unsatisfactory professional conduct. It relevantly provides:

*unsatisfactory professional conduct of a registered medical practitioner includes inter alia:*

#### *m) Other improper or unethical conduct*

*Any other improper or unethical conduct relating to the practice or purported practice of medicine.*

### Professional Misconduct

Section 37 of the Act sets out the meaning of professional misconduct:

*“Professional misconduct of a registered medical practitioner means unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the practitioner from practising medicine or the removal of the practitioner’s name from the Register.”*

The obligations of medical practitioners is encapsulated by Priestley J A in **Richter v Walton**, an unreported decision of the 15<sup>th</sup> Jul, 1993.

*“The degree of trust which patients necessarily give to their doctors may vary according to the condition which takes the patient to the doctor. Even in regard to the most commonplace medical matters, the trust of a patient places in a doctor is considerable. In some cases, of which the present seems to be an example, the patient’s trust cannot help but be almost absolute. The doctor’s power in regard to the patient in such cases is also very great. I do not mean power in the abstract way but as a matter of fact; the extent of the power will vary according to the temperament of the patient, but the doctor with some patients and for limited periods, because of the relationship in which they are temporarily placed, is in a position to do whatever the doctor wants with the body of the patient. This is one of the reasons why doctors are subject to correspondingly great obligations and are expected to maintain high standards; all this being very much in the public interest.”*

#### Onus and Standard of Proof

The standard of proof to be applied by the Tribunal is that referred to in **Rejfeke v McElroy** (195) 112 CLR 517 @ 521. That standard was applied in **Bannister v Walter** (1993) 30 NSWLR 699 where it was held that the requirement is that the Tribunal be “*comfortably satisfied on the balance of probabilities.*”

The Tribunal must have regard to the gravity and importance of the matters which it is deciding in accordance with the principles stated in **Briginshaw v Briginshaw** (1938) 60 CLR 336 @ 360-363. At pages 261 and 362 Sir Owen Dixon stated:

*“Except upon criminal issues to be proved by the Prosecution it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal. But reasonable satisfaction is not a state of mind that is obtained or established independently of the nature or consequent 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 proved by inexact proofs, indefinite testimony, or indirect inferences.”*

The complainant relied upon the documents tendered in a folder comprising Exhibit C. Contained therein are statements of the Plaintiff, various corroborative statements, copy photographs, e-mails and a number of medical reports which contain inter alia the opinions of Professor Tennant, a peer reviewer and the comments of Dr Quadrio, psychiatrist.

The patient gave brief evidence in elaboration of her account and she was tested in cross examination as to some facets of the account described in her statements.

The evidence of the patient gleaned from her statements and her sworn testimony is to the following effect. She initially suffered mental illness at the age of 17 when she was diagnosed with major depression and

border line personality disorder. As a result she was hospitalised and treated for depression and symptoms of insomnia. She was admitted to Lindgard Private Hospital on some 14 occasions and was also treated at the Northside Clinic. She experienced loss of appetite and engaged in episodic bingeing. Auditory hallucinations, poor concentration, fear and persecutory delusions together with other factors such as suicidal ideas contributed to a diagnosis of major depression and personality disorder as far back as 1990.

The patient came under the care of the practitioner in February, 1996. He treated her with psycho therapy and medication. Initially there were fortnightly sessions, then weekly. In addition she would telephone him between sessions as she felt the need.

The patient liked the practitioner and had a good rapport with him.

Shortly after she started therapy with him he asked her would it be alright if he gave her a hug. She agreed and such physical contact continued on a regular basis. He had given her a photograph of himself.

He commenced to kiss her. Apparently she regarded that as a greeting and initially it did not bother her.

She did not protest in 1997 when on one occasion he commenced to kiss and lick her hands.

The practitioner was aware that the patient was having major marital difficulties and as to how she was affected thereby. She and her husband parted on the XXXX, 1998 and were divorced in 1999.

Episodes of hugging, the licking of her hands and fingers incident and the bestowing of small gifts occurred prior to the patient's separation from her then husband. Indeed, the giving of inexpensive gifts commenced in 1996. He would give her presents after being away on holidays or on birthdays and at Christmas.

The patient gave evidence of more expensive gifts, including items of jewellery, which the practitioner gave to her after the sexual relationship commenced and of presents which she gave to him.

In early December, 1998 he gave her a ring. He asked her to have "always" engraved upon it.

In early December, 1998 he kissed her for the first time in a passionate manner.

The extent of physical contact progressed and on Christmas Eve 1998 after they consumed champagne and strawberries at the practitioner's East Maitland surgery, he removed her clothing, his clothing and engaged in oral sex.

During 1999, prior to the cessation of the affair in July, the patient attended upon the practitioner on numerous occasions ostensibly for therapy. It was the thrust of her evidence that after the first sexual contact

there was virtually no therapy or counselling when she attended either of his surgeries. The thrice weekly visits were substantially for the purposes of the liaison, albeit that at times her problems were discussed.

Intercourse occurred frequently in both the practitioner's Toronto and East Maitland rooms on numerous occasions albeit that sexual contact was not invariable. Other liaisons occurred at motels and hotels with the practitioner meeting the cost.

There were however telephone discussions during which the practitioner would suggest strategies to deal with the patient's difficulties and problems.

The patient was cross examined on the question of whether therapy was in fact administered at these sessions and she gave the following evidence.

*Q. Nevertheless were there not still conversations when you saw Dr Aguado at his rooms, about your situation and about strategies for coping?*

*A. Possibly.*

*Q. When you went to see Dr Aguado at his rooms, did you have to make an appointment beforehand?*

*A. I would - well, the secretary used to organise that for me. She would organise the appointments, yes.*

*Q. So there were appointments made - let me take you back. When you finished one consultation would you then make an appointment with the secretary for the next one?*

*A. She would book me in. I'm sorry, I didn't mean to cut you off. You continue please.*

*Q. Or did you make a series of appointments for the coming weeks?*

*A. The secretary would arrange that for me. She would give me several dates on the following weeks, because I used to see Dr Aguado three days a week, so she would give me a series of dates on which to come to see Dr Aguado, yeah.*

*Q. And when you made those appointments, part of the reason for making the appointments was so that you would come and discuss your therapy, your treatment with Dr Aguado, is that not right?*

*A. After the sexual relationship commenced that's - I was just sort of like - I forgot all my problems and I became consumed with the affair, so my appointments were, you know, just because I wanted to see him, not so much to discuss my problems.*

*Q. But nevertheless there were discussions about your problems in that period, were there not?*

*A. At times, yes.*

Prior to January, 1999 the practitioner took brief notes during the course of consultations however he made no notes in the patient's presence after the sexual relationship commenced in December, 1998.

Before that time she would meet the practitioner's accounts by handing over the cheque that she received from Medicare together with a sum representing the gap between his account and the Medicare cheque.

This changed and from the commencement of the sexual relationship the practitioner bulk billed her following appointments when no therapy was

administered and which were the occasions for sexual or physical intimacy. He no longer charged her the gap payment.

He phoned her constantly and wrote notes in her diary such as “I love you”.

The Tribunal has perused numerous e-mails passing from the practitioner to the patient in January, 1999 and thereafter, which were couched in elaborately romantic and intimate terms. Her aunt became aware of some e-mail contact and threatened to expose the relationship to her mother.

During the course of the affair, the patient worked as a secretary at a real estate agency however she resigned from this position following the practitioner’s complaint that he wasn’t seeing enough of her.

The practitioner was taking Viagra tablets in the course of the sexual relationship. However after he had consumed all of the samples he had received from a drug company, he wrote out a prescription on two occasions in the name of a fictitious person. The patient took that prescription and money which he had given her to purchase Viagra at a pharmacy on his behalf.

She described the practitioner taking her on outings, lunches, picnics and the like. He also took photographs of her.

It is plain that virtually from the outset of their professional relationship the practitioner began to demonstrate untoward affection to the patient, which was demonstrated by inappropriate physical contact.

She stated that on her second visit he conducted her around the residential section of his combined surgery and residence at East Maitland. He requested that he be allowed to take her photograph stating “You look so beautiful standing on the stairs”.

Over the ensuing 2 years or so the hugging, kissing and declarations of love and the subsequent sexual relationship of some 7 months’ duration was conduct clearly designed to attract her love, trust and affection.

In December 1998 he made numerous phone calls with ever increasing frequency. Between 10<sup>th</sup> and 24<sup>th</sup> December inclusive he made in excess of 70 calls. In the December period there were also consultations and a picnic at the Walcha Waterworks.

His actions in suggesting that she obtain a Hotmail address so that she could e-mail him over the Christmas break and his actions in bombarding her with highly romantic e-mails were the actions of an ardent lover.

Clearly the patient loved the practitioner who had gained her complete confidence. She accepted his expression of love for her and believed that he would leave his wife for her.

The practitioner was first notified of the patient's allegations in October, 1999 by the HCCC.

The matter was first mentioned before Justice Blanch on the 16<sup>th</sup> November, 2000.

In accordance with the timetable fixed for the exchange of documents, the Respondent did not comply with the direction to serve his documents on or before the 1<sup>st</sup> March, 2001 nor did he comply with further directions given by Justice Blanch who granted extensions of time for the service of the respondent's documents.

Indeed, the respondent did not serve any documents until 5 pm on the 9<sup>th</sup> July, 2001 at which time unsigned copies of his statement together with four reports from treating doctors were faxed to the Commission.

This material disclosed for the first time the fact that the respondent was making substantial admissions in relation to the allegations raised. It was only after these disclosures were forthcoming that the complainant became aware that he was not denying her allegations.

In the material served it was indicated that the practitioner claimed that he was suffering from a condition of thyrotoxicosis which contributed to his conduct.

The significance of this is that the patient was subjected to the unnecessary stress of not knowing whether her complaints were admitted

or as to whether she would be subjected to the strain and trauma of a potentially gruelling cross examination.

The patient gave the following evidence when questioned as to this matter.

*Q. What impact did not knowing whether or not the doctor would admit or dispute the sexual relationship have on you?*

*A. Well, it caused me great stress because I thought that - I just - I've been - I'm still stressed even though, regardless of whether he admitted it or denied it, really.*

*Q. Did it have any impact on you not knowing what position he would take?*

*A. It did, yeah.*

*Q. Why?*

*A. I just thought that if he didn't admit it that he wouldn't have thought I was special or anything.*

*Q. Did it affect your self esteem in some way?*

*A. It did, yes, in a big way.*

*Q. In what way?*

*A. Well, I just felt for so long like it was a dirty little secret, I thought I was his dirty little secret.*

The practitioner was acutely aware of the patient's serious psychiatric background from the time he commenced to treat her in early 1996. He knew of her chequered work history, her financial status and he was cognisant of the difficulties she was experiencing in her marriage. The

fact that she had had many admissions to private hospitals and was constantly depressed and suicidal would have been matters of which he had knowledge.

The complainant's documents served on the practitioner contained the psychiatric report of Dr Carolyn Quadrio who expressed the following opinions:

*“[Ms A] had serious psychiatric problems when she commenced therapy with Dr Aguado but those problems have been significantly aggravated by the fact of the exploitative relationship. In addition because the relationship with the psychiatrist was one of sexual exploitation rather than a treatment relationship, [Ms A] was denied the opportunity to be properly treated and therefore denied the opportunity to make a recovery from her original problems. Had she been appropriately treated at the time she was referred to Dr Aguado, it is likely that by now she would, if not been recovered, at least have been on the way to recovery.”*

#### **PROGNOSIS**

*[Ms A] was a very vulnerable person before she began therapy with Dr Aguado and therefore she was not well equipped to cope with the severe trauma of what happened in that context.”*

The practitioner from his personal experience of the patient and from that report must have realised that her ignorance as to whether he would admit or deny her allegations would have materially impacted upon her.

#### **EVIDENCE OF DR AGUADO**

The practitioner in his lengthy statement of the 13<sup>th</sup> July, 2001 denied ever making negative comments about the patient's husband as she had alleged in her statement. He also denied using the term “empty border

line sex”. He maintained that although having a sexual relationship with the patient he continued to see her as a psychiatrist and at consultations he would discuss her problems and mechanisms for coping. He was unable to recall why he failed to make notes on 24 occasions albeit that he believed that sex had occurred perhaps 10 - 12 times. He believed that he felt depressed and out of touch and this was why he didn’t write notes. He also refuted the suggestion made by her that he had said “that he was thinking of leaving his wife”.

Whilst acknowledging that prior to the sexual relationship he exchanged small gifts, he accepted that this was an error of judgment on his part and reflected his inexperience in dealing with patients with severe Borderline Personality Disorder. He agreed that he had gone on outings with the patient and to lunch.

As to the suggestion that he made frequent telephone calls, he claimed that he would talk to her for therapeutic purposes, to provide support and help with her distress. Personal calls started at the end of December, 1998. He agreed that he had sent e-mails to her and wrote notes on her diaries, but these actions commenced towards the end of December, 1998 and continued thereafter.

As to taking photographs of her, he did so as a reference point, to do with her eating disorders, for use in therapy. From December, 1998 he took photographs which were social. Photographs that were not for therapeutic purposes. He agreed that after December, 1998 he did offer money to the patient. As to the hugging and the kissing on the cheek, and the holding of the hand during therapy sessions and the licking and

sucking of the patient's fingers, he stated that this conduct occurred between December, 1998 and July, 1999.

The practitioner frankly admitted that he had personal and sexual relations with Patient A between December, 1998 and July, 1999 and that he had inappropriately continued this treatment of her after December, 1998 (Complaints 3 and 4).

The practitioner admitted that he had issued prescriptions for Viagra in the name of other persons on two occasions intending to obtain the drug for his own use (Complaint 5).

He denied disclosing confidential information about two patients (Complaint 7).

With regard to the claims to the Health Insurance Commission (see Complaint 8) the practitioner admitted that his treatment of the patient for a period of up to July, 1999 was inappropriate and ineffective and that there were occasions during a 6 month period in which a claim was made on Medicare which should not have been made.

The practitioner concluded his statement,:

*“I have always understood that a sexual relationship between a doctor and a patient is highly inappropriate. This is particularly so when the doctor is a psychiatrist and ‘Patient A’ is a vulnerable patient. In the period December, 1998 to July, 1999 I was severely thyrotoxic. This caused me to behave in a way that I had never behaved prior to December, 1998.*

*In my disturbed mental state my reasoning was significantly impaired. Since my thyrotoxic condition has resolved I have never behaved in a similar fashion. I do not believe I would ever behave in such a manner again.*

*I am deeply ashamed of my behaviour and the grave consequences this behaviour has had for 'Patient A'".*

In the course of his statement and sworn evidence, the practitioner made admissions, some of which were guarded or qualified. He also made denials of some of the patient's claims. However, in relation to the major matters of misconduct alleged, he sought to explain his behaviour by saying that he was severely thyrotoxic and because of his disturbed mental state, his reasoning was significantly impaired.

In the course of his evidence the practitioner elaborated upon the details contained in his curriculum vitae which was before the Tribunal.

Born on 20<sup>th</sup> May, 1943, he completed his medical degree in 1983 when aged 40. At age 50 he obtained the Fellowship of the Royal Australian and New Zealand College of Psychiatrists in 1993. Since that time he has practiced as a psychiatrist in private practice with some public duties.

The Tribunal carefully considered a substantial body of highly impressive character testimonial evidence. There can be no doubt that the practitioner was highly regarded by many of his peers and colleagues, patients and by numerous members of the wider community.

Such assessments as to his character and recognition of his contributions to his profession and to the community were taken into account when

considering the practitioner's credit and the likelihood of him having misconducted himself as alleged.

As a result of a heart condition he commenced to take Amiodarone in 1996 under treatment from Doctor Leitch.

It was the effect of his evidence that in late November/December, 1998 he was anxious, sleeping poorly, losing weight and strength, becoming easily irritable and experiencing mood fluctuations. In elaboration of his statements, he gave evidence that he was feeling grandiose and believed he was possessed of special powers to cure people. He had difficulty in sleeping in December, 1998. Pre-Christmas is a stressful time for both patients and people looking after them. He claimed that in December, 1998 he started to lend money to patients - something he had never done before. He was experiencing tremor and agitation.

In the second week of December he was on a diet, however around the Christmas period he ate a lot of fatty foods. Despite his concerns for his health and concerns expressed by his wife he didn't seek medical attention until he saw Dr Donnelly who previously treated him for diabetes. On the 16<sup>th</sup> April, 1999 he consulted Dr Leitch who originally prescribed Amiodarone.

#### Dr Aguado's Reasons for his Conduct

The practitioner acknowledged that he had always understood that a sexual relationship between a doctor and patient is highly inappropriate. When asked to explain to the Tribunal why the oral sex took place on

Christmas Eve in his rooms, he stated that it was hard to make sense of it now; that he was in a confused state and wasn't thinking clearly.

At page 169 of the transcript:

*“Well, as an underlying principal I felt that there was an importance of never making her feel rejected and tolerating the negative aspects of her as well as the positive, and I felt that the relationship with one another was curative in itself. I felt that by knowing an alternative form of relating this might be generalised to her other relationships. There may have been other aspects. It was a confused time for me so it's difficult to think back and say specifically how I thought in a rational way when I was irrational then.”*

At page 170 of the transcript:

*“Again, it is confusing. On the second occasion I did develop intense passion for her and it was of a kind I had never experienced previously. At the time I also felt a sense of her being the most important thing in my life and that I must work for her welfare no matter what the expense to me was. I felt that if I gave unconditionally I could supply what was missing in her youth and that would be restorative and there was always the understanding between us that eventually she would go away and develop her own relationships that she would meet, that happens very easily for her, and that our relationship was likely to be short and finished any day.*

*I felt it was wrong on some levels. I knew it was against the rules for medical ethics, but I felt that I believed very strongly that there were rules more important than medical ethics, rules of universal caring and rules of humanity. Then I also felt it was wrong in relation to my wife. This would occur briefly, but it was something that was a problem for me, but I felt that the higher goal of trying to save a person from dying and from having a tormented life was more important. The way I saw it then, I don't see it this way now.”*

At page 171 of the transcript:

*“I thought - again, in my state of mind I believed that everything I was doing was therapeutic for her in the consulting room and outside. I felt*

*that I was putting her first and that I was working towards her development.”*

At one state the practitioner stated: *“I won’t deny that I did have a great deal of pleasure from my physical relationship with her but my pleasure was always never as important as to what I felt was right for her.”*

In explaining the connection between thyrotoxicosis and the sexual relationship the practitioner had this to say.

At page 173 of the transcript:

*“Well, first of all, it affected me in many aspects of myself in terms of my moods, my feelings, my social controls, my values, my physical self, as well as I felt I was delusional at the time. I felt that in my way that I had seen, like I had seen, I felt that I had the revelation that the rules were there to protect doctors and not patients and that if one stepped beyond it, if you cared enough then people would get better much more easily. It turned on my feelings as well as that I have never had for years. My judgment was particularly affected, my insight. It was only long after, long after I was diagnosed with thyrotoxicosis that I actually made a link between my behaviour and the thyrotoxicosis, probably about December of that year or even later. Basically it’s as if I was another person”.*

As to his mental and physical condition, the practitioner relied upon a statement by his wife and a number of other people who had observed him at a Christmas party. Mrs Aguado remarked that between the time the practitioner returned from a holiday in Europe in about July, 1998 and December, 1998, the practitioner remained unhealthy. He started to have mood swings, was snappy and irritable and appeared to be distressed. He had sleeping difficulties.

A friend, Angela Smith, had conversations with Mrs Aguado from January, 1998 onwards in which Mrs Aguado apparently expressed concern about her husband's health.

At a Christmas party on 11<sup>th</sup> December, 1998 he was withdrawn and distracted.

By early January, 1999 she noticed he was short of breath. She observed a weight loss of over 40 pounds despite the fact that he was eating fatty and sickly foods.

In early 1999 she noticed a hoarseness in his throat, his voice had become husky by March, 1999 and he continued to lose weight.

By April and May, 1999 he looked gaunt and had lost 80 - 90 pounds.

At a Christmas function in December, 1998 she observed that the practitioner was withdrawn and non-communicative.

Barbara Douglas, another friend, observed his behaviour at that Christmas function, noting that he was quite disinterested in his food and to what others had ordered, nor did he take photographs as was his custom. His social behaviour was unusual in that he didn't initiate social engagement and was unresponsive in conversation.

Jan Mascara was told by Mrs Aguado of her concerns about her husband's health in January, 1999. This lady also attended the Christmas

party and observed the practitioner to be sweating profusely and that he did not seem to be enjoying himself as he usually did at these functions.

The practitioner called evidence from a number of treating physicians, a treating psychiatrist and Dr Westmore, who was qualified to express opinions. Reports from Professor Posen and letters from Dr Corrigan and Professor Middleton were tendered.

Professor Posen stated *“The thyrotoxicosis is a condition characterised by the delivery of excessive amounts of thyroid hormones into the circulation. Amiodarone is a well known cause of thyrotoxicosis and it is likely that in this case the drug was responsible for the glandular condition. It can manifest itself by, on one hand, only subtle biochemical changes. On the other hand, rapid heart rate, cardiac irregularities, diarrhoea, severe weight loss, etc.”*.

Professor Posen went on to say *“Nevertheless there is strong clinical impression amongst endocrinologists that thyrotoxicosis may be associated not only with agitation but with unusual behaviour.”*

It was the respondent’s case that his judgement and insight was materially affected as a result of thyrotoxicosis which became manifest in December, 1998. As a consequence he lacked the ability to care about the wrongness of his actions. Whilst he did not claim that he had no insight that what he was doing was wrong, he held the belief that he was serving a higher good, by giving himself to his patient.

The Tribunal has no doubt that the practitioner did suffer from thyrotoxicosis at some stage however there is substantial controversy between the medical experts as to when the thyrotoxicosis became manifest and as to what extent his conduct could be explained by this condition and during what period was he relevantly affected.

Accordingly, it was important that the Tribunal closely considered the chronology of events; to examine the time frame and evidence of the various manifestation of symptoms described by the practitioner and any

account of observations of his conduct, behaviour, signs and symptoms from persons who were or would have been in a position to comment thereon and the histories given to various treating medical practitioners and their findings.

Whilst there were quite serious allegations of misconduct with regard to events occurring prior to December, 1998 and in relation to the Viagra prescripts and false claims against the Health Insurance Commission, clearly the most serious disputed misconduct alleged is contained in particulars 3 and 4 of the complaint.

If the practitioner commenced the sexual relationship on the 24<sup>th</sup> December, 1998 when he was not subject to the thyrotoxicosis then it would be difficult to conclude that his subsequent sexual liaison was due to the effects of this condition, that it was other than a continuation of that liaison.

As is common with a case in matters such as this, the Tribunal was faced with conflicting opinions from highly qualified and impressively credentialed experts who were equipped with essentially the same history and evidentiary material, proffered different views and conclusions.

The reliability, veracity and credit of the practitioner was of paramount importance to the Tribunal. This touched upon our assessment of him and the accuracy of his history and presentation to the various doctors.

It is common ground that thyroid function tests were normal as at 28<sup>th</sup> November, 1998 at which time he was not thyrotoxic. The practitioner was diagnosed as suffering from thyrotoxicosis in May, 1999. Accordingly, that condition must have occurred between 28<sup>th</sup> November, 1998 and 7<sup>th</sup> May, 1999.

### Dr Donnelly

Dr Donnelly, a specialist physician diabetologist and endocrinologist, had treated the practitioner for some years prior to December, 1998 and thereafter. He examined the practitioner on 1<sup>st</sup> December, 1998 and found him to be generally well. He noted improved dietary compliance.

He next examined him on the 1<sup>st</sup> April, 1999.

The purpose of these consultations was to monitor his diabetes. Dr Donnelly had impressed upon the practitioner the need to lose weight and on the 1<sup>st</sup> April, 1999 consultation, Dr Donnelly observed that he had lost weight because his diabetic control had improved and the practitioner was pleased that he had lost weight. The practitioner told him that the weight loss began about November, 1998.

He believed that the thyrotoxicosis could have occurred within weeks of the normal reading on the 28<sup>th</sup> November, 1998. He did not diagnose nor indeed did he consider the thyrotoxicosis in the consultation of the 1<sup>st</sup> April, 1999. On that occasion both he and the practitioner were both pleased with the weight loss and Dr Donnelly did not consider it to be an unexplained weight loss. The practitioner had told him of his diet.

Indeed, the practitioner had demonstrated an ability in past years to lose substantial weight. There was nothing in the practitioner's presentation consistent with thyrotoxicosis and there was nothing in his behaviour that was inappropriate or out of the ordinary.

At neither the consultation on 1<sup>st</sup> December, 1998 nor 1<sup>st</sup> April, 1999 did this treating doctor obtain any history of muscle weakness, hoarseness of voice, sleep disturbance or wasting illness. Nor did the practitioner present with tremulousness, irritability, intolerance, nausea, mood changes, fractiousness, diarrhoea, palpitations, greasy skin, greasy hair.

Dr Donnelly did however consider that in retrospect the practitioner was subject to thyrotoxicosis when he saw him on 1<sup>st</sup> April, 1999 on the basis of the weight loss and the fact that he was shown to be thyrotoxic a month later.

#### Dr Leitch

Dr Leitch, a specialist cardiologist, began treatment of the practitioner in 1992 and in February, 1996 prescribed Amiodarone. He further examined the practitioner on the 16<sup>th</sup> April, 1999. In his letter to the practitioner of 22<sup>nd</sup> April, 1999 Dr Leitch made no reference to any unusual mental state or symptom. At that stage he did not diagnose thyrotoxicosis however in retrospect he believed that he was markedly thyrotoxic. With regard to the testing done on the 7<sup>th</sup> May, 1999 and the symptoms he presented, Dr Leitch prepared a statement containing

conclusions which were markedly inconsistent with the view that he had initially formed with regard to weight loss.

On the one hand he wrote, “*You have been very successful with weight loss*” indicating thereby that the weight loss was deliberate; yet that conclusion was not contained in his report of 13<sup>th</sup> September, 2000.

He considered that his original diagnosis was incompetent. In his later report he made note of the fact that his patient appeared markedly unwell with weight loss and proximal muscle weakness and that he appeared to be agitated, yet he had made no notes to the effect that the patient was agitated nor did he make any note of personality changes. Although unable to state exactly the duration of the tremor, he believed it would have been present for less than three months. He noted that in the past the practitioner had been breathless on moderate exertion.

#### Dr Tierney

Dr Tierney, a consultant physician, had also treated the practitioner. On a consultation on the 6<sup>th</sup> May, 1999 he formed the opinion that the practitioner suffered a respiratory tract infection.

Dr Tierney didn't discern anything odd about his patient's behaviour on consultation. He obtained a history that his patient had been unwell for about 2 months and had developed a hoarse voice. The patient had been suffering flu like illness for about 2 months, for which he had taken antibiotics.

In the course of the consultation on the 15<sup>th</sup> July, 1999 the patient did not report to him that he had been generally anxious, nor depressed, nor had there been such a report on a consultation of the 6<sup>th</sup> May, 1999. He did however note that the patient had been suffering from diarrhoea. He didn't believe that the patient's symptoms of muscle weakness and tiredness could be attributed to the infection.

These three treating doctors with long standing experience and knowledge of the practitioner did not detect at the relevant time any signs or symptoms nor obtain any important matters of history which demonstrated to them that he was suffering from thyrotoxicosis in December, 1998 or early 1999.

The Tribunal was totally unimpressed by Dr Leitch's apparent reversal of the view he expressed as to weight loss and his failure to record matters which obviously called for notation had they been present.

#### Professor Middleton

Professor Warwick Middleton, a psychiatrist, was a long standing friend of the practitioner. He provided a letter which detailed his contact with the practitioner for whom he obviously had a high regard. He recalled that "*around January, 1999 he had a long telephone conversation with the practitioner*". He could not be precise as to the date of that conversation, however in the course of it, the practitioner made mention of strange ideas and was opinionated and grandiose. He complained of being physically unwell. Professor Middleton considered that the

telephone conversation was out of character compared with the previous conversations that he had with the doctor.

Professor Middleton opined that the practitioner's description of himself as being in a "*hypnotic state*" was consistent in retrospect with what he had directly experienced during the phone conversation "around" January, 1999.

The difficulty with Professor Middleton's impressions is that it is impossible to determine when the conversation took place.

The relevance of the date of that conversation was glaringly obvious, yet nothing was placed before the Tribunal to identify the precise or indeed the approximate date.

There is reference in the reported conversation of the practitioner returning from a trip up the coast with his wife. Clearly the date of that trip could have been ascertained by the practitioner and his legal advisers. If the date was ascertained then the Tribunal wasn't enlightened as to the matter.

The time frame "around January, 1999" does not allow the Tribunal to determine whether the conversation occurred in December or early January, i.e. close to the commencement of the sexual relationship, late January when it would have been of lesser significance, or indeed whether it occurred in January at all.

Accordingly, this evidence was of limited assistance.

## Dr Corrigan

The practitioner shared rooms with a psychiatrist, Peter Joseph Corrigan, whose letter is before the Tribunal. He noted inter alia *“I would like however to comment on Dr Aguado’s personality during that period of time. He was certainly less sociable, more irritable and inclined to be short with people. There is no doubt there appeared to be a change in his demeanour, which I put down to stress of work, until we had our Christmas get together in December, 1998. He appeared to be very isolated at our party, when normally he is gregarious. By that stage he was losing a tremendous amount of weight and didn’t look well. I recall wondering at the time whether he had cancer. During this period I recall a conversation I had with him where he told me he lent a patient money. I recall thinking this was unusual.”*

As a psychiatrist, a trained observer, and a person who shared rooms with the practitioner, Dr Corrigan would seem to have been in a position to note the practitioner’s conduct in and about their shared rooms and to have possibly observed his interaction with his staff and others attending the rooms, to have noted matters which were or could have been of greater significance such as how he was apparently managing and administering his practice, and his work load.

Yet again, the Tribunal found Dr Corrigan’s letter to be of limited assistance.

## Dr Rickarby

In mid January, 2000 the practitioner came under the care of Dr Rickarby, psychiatrist. He continues to see the practitioner on a weekly basis.

It was Dr Rickarby's opinion that thyrotoxicosis was present by mid December, 1998 and that it carried significant and cognitive changes as well as changes in mood and personality. He believed that there was a wide range of evidence of an abnormal state of mind during thyrotoxicosis, induced illness and atypical and exaggerated behaviours associated with the strange depressive or hypomanic mood elements with disregard of consequence of appropriateness.

Critical to Dr Rickarby's opinion that he was suffering thyrotoxicosis by mid December 1998 was his belief that present at that time was tremor, unexplained weight loss, vocal huskiness, bizarre and extreme foolishness and diarrhoea. In the absence of any other cause or sudden onset of really bizarre foolishness, he believed that thyrotoxicosis was the explanation.

He regarded lust as a possible but highly improbable explanation.

He had accepted without independent verification the timing of his symptoms albeit that he had later read reports of what other people had written and accepted without question the truthfulness of the practitioner's account. He agreed that he would expect the practitioner's staff members to notice if he was behaving differently.

Dr Rickarby reflected in his report the detailed history provided by the practitioner as to his relationship with the patient, in particular from December, 1998 onwards. The practitioner included such details as the patient planning a campaign of harassment against the new secretary he had employed two weeks before Christmas, 1998. The patient demanded he get rid of her, she was frequently threatening suicide and was also threatening to return to her promiscuous life.

He went on to say that on 18<sup>th</sup> December, 1998 he had informed the patient that he was going to view an art exhibition. She joined him there and after a surge of feeling for her, he kissed her.

He agreed to meet her at his surgery on December 24<sup>th</sup>. She brought strawberries and champagne. Mutual passionate kissing occurred and the patient suggested that they go to bed upstairs. His overall feeling was that she must not feel rejected and oral sex occurred as a result of his impotence. The patient became angry and threatened to follow him home and eviscerate his cats and leave the pieces on the front door of his home.

A week before Christmas he had lent a patient \$1,000.

As to the Viagra, the practitioner claimed that it was she who mentioned they needed a supply. He said he would get some more from the drug company representative, however, she suggested taking a prescription to the chemist. When he expressed embarrassment about this, it was she who suggested putting somebody else's name on it. She offered to pick up the prescription and in fact collected the Viagra after presenting the prescription.

When she requested him to refer her to another psychiatrist, Dr Graham Vickery, she told him that Dr Vickery was very spunky and she would soon have his pants off.

On the 21<sup>st</sup> July she wanted them to meet twice a week, however he declined.

The clear impression that the Tribunal gained from this history is that the practitioner was conveying to Dr Rickarby that it was the patient who was the instigator of the relationship; that the obtaining of the Viagra in a false name was her idea; that she was responsible for the meeting at his surgery on the 24<sup>th</sup> December; that she had brought the strawberries and champagne; and that it was at her suggestion that they resort to a bed upstairs following mutually passionate kissing.

It is to be noted that not all of these matters are detailed in Dr Aguado's statement, nor in the history he gave to Dr Westmore. Indeed, in his statement when dealing with the Viagra issue he said "I admitted I issued prescriptions for Viagra in the name of another person, intending to obtain the drug for my own use. This was done on two occasions. I cannot now think why this was done".

There is however nothing in the history given to Dr Rickarby detailing the numerous romantic e-mails that he sent to the patient nor the multitude of telephone calls to her in December, 1998. Nor apparently did he tell Dr Rickarby of his conduct in arranging ostensible therapy sessions which were the occasions for sexual activities. There is no

mention of his actions in charging Medicare for consultations which had no therapeutic purpose whatsoever.

The history obtained with regard to loans is not strictly accurate as any loans which may have been made prior to 24<sup>th</sup> December, 1998 were but for small amounts. Any loan of \$1,000 or more was made well into 1999.

Dr Rickarby believed that it was the practitioner's idea she should be referred to another psychiatrist after he terminated the relationship. A decision that this should be done was made after a discussion had occurred between him and the patient. Clearly, this was an incorrect belief.

It is to be remembered that the patient stated that she asked the practitioner to refer her to another psychiatrist after she terminated the relationship. She was not challenged about this nor indeed did the practitioner maintain this position, yet Dr Rickarby thought that what he believed to be the practitioner's action demonstrated some insight on his part.

Dr Rickarby appeared to have difficulty in accepting the validity of the proposition that earlier boundary violations had occurred before the onset of thyrotoxicosis. He didn't remember whether the practitioner had told him that he had given the patient gifts before 1998. He believed however that the giving of gifts to patients did violate the boundaries between the therapist and the patient. He considered that it was particularly important to maintain proper boundaries when treating a patient who has a severe

Borderline Personality Disorder. The violation of such a boundary was a serious matter.

Dr Rickarby persistently maintained that he didn't remember whether the practitioner had denied giving the patient presents before the start of the sexual relationship. The Tribunal believed he would remember such a significant denial if made. He was aware that the patient had alleged this and was aware that the practitioner was denying a lot of matters claimed by the patient. He did however state that it was his impression that all of the gifts were given during the sexual relationship and not otherwise.

It was put to Dr Rickarby:

*Q. If there had been boundary violations before the sexual relationship commenced that would detract from the thesis that you embrace, namely, that thyrotoxicosis is the cause of the sexual relationship?*

*A. No*

*Q. Why do you say that?*

*A. Because the issue of the thyrotoxicosis on his behaviour in making foolish decisions to put him in a vulnerable position is certainly due to his lack of judgment and lack of cognitive faculties to see what would possibly happen, you know.*

*Q. Just a moment. Do we understand your evidence to be this, he had thyrotoxicosis in December 1998 and not before?*

*A. Yes.*

*Q. Thank you, and if there were boundary violations before December, 1998, that detracts from your thesis, does it not, that thyrotoxicosis is the cause of this man's sexual relationship with the patient?*

*A. When you say detracts, you mean one percent, two percent? I would accept, but ---*

*Q. Do you regard a doctor kissing a patient at the beginning or end of a therapy session as appropriate conduct?*

*A. No*

*Q. Do you regard it as a boundary violation?*

*A. Of course.*

*Q. Giving a patient a hug in therapy or at the beginning or end of therapy, do you regard that as appropriate conduct?*

*A. Except under exceptional circumstances, yes.*

*Q. As part of a greeting?*

*A. As part of a greeting it is most inappropriate.*

*Q. And it constitutes a significant boundary violation, doesn't it?*

*A. It would be, yes.*

*Q. Similarly, kissing a patient as a greeting?*

*A. Yes.*

*Q. And for a patient like [Ms A], the patient in this particular case, it can send all the wrong sort of signals; do you agree with that?*

*A. Exactly.*

*Q. Did Dr Aguado admit or deny to you conduct of that nature?*

*A. He denied it.*

*Q. And you accepted his denials?*

*A. Yes.*

*Q. For the purpose of arriving at your conclusions do I take it that not only did you accept what he said to you as being both true and accurate, but you also rejected anything that the patient said when it was inconsistent with what Dr Aguado said to you?*

*A. Yes, but because, you know, the patient –*

*Q. Doctor, I didn't ask you why?*

*A. Sorry.*

### Dr Bruce Westmore

Dr Bruce Westmore was qualified by the practitioner. He obtained a history that around Christmas time the practitioner started to feel spiritual towards his patients. He gave some patients small amounts of money and lent \$3,000 to another patient. He had become irritable with patients that did not agree with his treatment regimes. As Christmas approached the patient became more and more needy. He knew that it was wrong but he felt that if he gave her unconditional love and acceptance, she could begin again. He gave her presents, he kissed her in an art gallery albeit that it was not a sexual kiss for him.

Having closed his practice on the 23<sup>rd</sup> December, he arranged to see the patient again in his rooms. After drinking champagne, he kissed his patient while they were on a sofa. He realised that he had a choice with regard to sexual activity but that he couldn't reject his patient as she would have had a rage.

Sexual contact occurred at which time he knew that what he was doing was wrong. It happened so quickly and he quotes "It happened so

quickly, rules didn't seem to apply. I felt it was important not to reject this person, to keep her safe". He went on to say "Ideas of rule seems foreign, it's bizarre now. How can you make someone feel safe by having sex with them?"

The practitioner told him that the patient had sent him some e-mails and he returned these. On the 2<sup>nd</sup> January, 1999 she returned after a treatment session and oral sex occurred. On that occasion he started to feel a romantic attachment to her. Prior to this he felt a spirit of closeness to everyone, but with the patient it became sexual.

The practitioner readily agreed that he was aware of what his secretary was doing regarding the Medicare card on occasions when he had sexual intimacy with his patient. He told Dr Westmore that on occasions the patient had attended for treatment "they had sex sometimes". He believed that he was helping the patient through unconditional love. "The rules weren't clear to me, there was a taboo against having sex with patients, but I felt she would die if she did not have my unconditional love and acceptance. All along I felt that I was acting in her best interests".

Dr Westmore's provisional diagnosis was that the practitioner qualified for the diagnosis of personality change due to thyroid disease. He went on to say "It is clear that at some level he had some insight to the wrongness of this behaviour but based on his history his ability to care about the wrongness appears to have been significantly affected.

In evidence Dr Westmore stated that his opinion was based principally upon the history provided. That he reports having some understanding

that what he did was inappropriate and incorrect but he reports he lost the ability to really care about making wrong choices. Although he was aware of that choice he didn't care that he was making a wrong choice.

Dr Westmore believed it was a reasonable proposition that the practitioner was affected by thyroid disease at the time.

Dr Westmore was asked about the potential of damage to a patient by a relationship of this nature, she suffering from a severe borderline personality disorder and she presented with suicidal ideation and she had a long therapeutic relationship with the practitioner. He believed that the transgression of the professional boundaries caused extreme damage as a betrayal of trust. The therapeutic relationship, because of the breaches, breaks down. The doctor is no longer able to conduct effective therapy with the patient.

When asked whether he believed that it was highly likely that serious damage was sustained by the patient, he stated that although he hadn't examined her, on the history given to him, it seems most likely. He considered that the giving of the gifts she described prior to the commencement of the sexual relationship was highly inappropriate. At no stage did the practitioner tell Dr Westmore about these gifts. The giving of these gifts would have impaired the doctor/patient relationship before the commencement of the sexual relationship.

Dr Westmore's opinion was dependant upon the history given to him that in December the practitioner was subject to tremor, unexplained excessive weight loss, diarrhoea. He agreed that there were various other

factors present which could explain these various symptoms, for example, an unusual degree of anxiety at that time of the year - Christmas being a very anxious time for both patients and doctor - and the fact that he had at least two patients with serious psychiatric illness, could account for the factor of anxiety.

The agitation could be explained by the unusual time at his practice and the developing relationship of an improper nature with the patient, whilst at the same time he was conducting the busy practice. That may possibly disturb his sleep, making him irritable during the day, affect his diet and cause him to have diarrhoea. Although conceding these possible explanations he didn't resile from his acceptance of the history.

Dr Westmore was asked the question "I think it follows from what His Honour put to you that he must have cared about the consequences in order to account for his concealment of his wrong doing?" Answer: "He did care about the consequences. 1. For his marriage; and 2. Professionally, I think".

The practitioner had given two statements relating to his hugging the patient. In one he suggested the hugging occurred in August, 1997 and in another, it occurred in November, 1998. Dr Westmore agreed that if the hug occurred well before any suggestion of incipient thyrotoxicosis, then that suggests "that the sort of conduct we're talking about is not so out of character, and that it tended to militate against the notion that thyrotoxicosis is an explanation for the practitioner's behaviour".

There were further contradictions revealed in the practitioner's two statements.

In one he asserts that he was unusually rude and aggressive to the patient on the phone; and in the other he denied that he was rude to her during a phone call.

The significance of any rudeness or aggression to patients was regarded as being a symptom of personality change that could be attributed to thyrotoxicosis. If he wasn't rude or aggressive, that tended to diminish the notion that he had any significant personality change.

The practitioner recorded contradictory histories in the two statements referred to. In one statement he said "In late 1998, I began to have increasing concern with my health. I became unpredictable anxious, my weight began to fall. I was having more problems walking and my legs were weak. I also developed a hoarse voice".

Dr Westmore agreed that this was a history upon which he relied to form his provisional diagnosis and if the history was unreliable, then plainly was his provisional diagnosis.

The extract quoted is from his statement of the 13<sup>th</sup> July, 2001, yet in his statement of May, 2001, the practitioner claimed that in the early part of 1999 he developed a hoarse voice and generally felt as if he had a wasting illness; that he had persistent aching and pains in his leg muscles; he noticed that sometimes his hands would start to shake.

It was pointed out to Dr Westmore that in December, 1998 the practitioner purchased a phone which was used, almost exclusively, to make calls to the patient. For example, on the 15<sup>th</sup> December, 1998 he appears to have telephoned her 8 times from 8 am to 7 pm.

Dr Westmore couldn't see any clinical explanation for so many calls and regarded it as being quite improper.

On the question of when the practitioner commenced to feel unconditional love for the patient, Dr Westmore was asked:

*Q. When do you say, doctor, what you've read and what you've heard from him and what you've learned in this Court today, when do you say he started to give her unconditional love? Was it back when he was giving her gifts, two or three years before December, 1998; or was it when he was hugging her, well before December, 1998; or sucking her fingers, as she suggests; or was it only at the time when he actually commenced sexual contact with her - sexual intercourse?*

*A. I would suspect that the emotional unconditional love occurred sometime before the physical love, but I can't date it your Honour, but certainly there was a breach of the rules well and truly before the history of thyrotoxicosis occurred.*

### Professor Posen

Professor Posen reported that there is a strong clinical impression amongst endocrinologists that thyrotoxicosis may be associated not only with agitation but also with unusual behaviour. He recommended that this Tribunal in considering the practitioner's actions from December, 1998 to July, 1999 should bear in mind that at the relevant time, he was suffering from relatively severe thyrotoxicosis, a disease known for its association with potential changes in cognition and behaviour.

Professor Posen opined that thyrotoxicosis could have occurred in mid December, 1998 and accordingly, he was in sharp disagreement with Professor Robinson.

### Professor Robinson

Professor Robinson stated that it was not possible to suffer from thyrotoxicosis in the face of normal functioning thyroid tests. There was such a test with a normal result on the 28<sup>th</sup> November, 1998. There was nothing in Dr Donnelly's notes of his consultation of the 1<sup>st</sup> December, 1998 which suggests that the practitioner had any features of thyrotoxicosis.

It was Professor Robinson's opinion that it was unlikely that thyrotoxicosis could have developed between the 28<sup>th</sup> November, 1998 and the day when the practitioner met the patient outside of his consulting rooms and they kissed. Similarly that his meeting with her for lunch on the 22<sup>nd</sup> or 23<sup>rd</sup> December could not be so explained nor the oral sex which took place on the 24<sup>th</sup> December, 1998.

*Q. Does that mean that the behaviour cannot be explained in terms of thyrotoxicosis in your opinion?*

*A. Yes.*

*Q. Again, on the 22<sup>nd</sup> or 23<sup>rd</sup> December 1998 the patient and the doctor go to lunch at a place called the Walcha Waterworks, well outside the consulting rooms. Can that sort of behaviour be explained in terms of thyrotoxicosis?*

*A. Again, I think it would be unlikely that thyrotoxicosis could have developed to have a degree in that short space of time. We are talking about roughly a month to have explained abnormal mental behaviour.*

*DEPUTY CHAIRPERSON: Just as a matter of interest, what are the Walcha Waterworks? Is that a restaurant or a picnic ground or a park?*

*KATZMANN: It is apparently a recreation area your Honour.*

*Q. And oral sex apparently took place on the 24<sup>th</sup> December, 1998. That is less than a month after the normal thyroid function tests. Is it your opinion that that behaviour can be explained in terms of thyrotoxicosis or not?*

*A. I do not believe it could.*

He did believe that this condition became manifest at some stage, but not in December as the practitioner asserts. He stated:

*A. "No, that's the point that I was making earlier. I think it would have taken several weeks after that for the symptoms of thyrotoxicosis to have actually developed. The blood levels may have been high in December, but I think it would be well toward the end of January or February before symptoms of thyrotoxicosis developed".*

In Professor Robinson's opinion, the practitioner was certainly thyrotoxic in April and that by the end of January he was clearly becoming so but at the end of December it was unlikely that he was thyrotoxic.

He based that opinion upon the normal thyroid function tests. He considered that it was an infrequent event that patients with thyrotoxicosis show significant behavioural changes such that their judgment is impaired. He went on to say "the most common symptom reported by patients, is anxiety, and patients complaining of an overwhelming sense of anxiety which they have not previously experienced before, even verging on a sense of impending doom".

He believed that a person who did experience such significant behavioural changes would have great difficulty in conducting a busy clinical practice in psychiatry.

Although he agreed that Amiodarone induced thyrotoxicosis can occur very quickly and could occur at any time during treatment, it would be in the order of 4 - 6 weeks before that would occur. After the normal thyroid test on 28<sup>th</sup> November, 1998 he believed that anxiety, agitation, weight loss, sweating and frequent trips to the toilet in December were unlikely to be related to thyrotoxicosis.

*Q. Do you mean then to indicate that the kind of mood changes upon which others have commented are explicable in terms of the practitioner conducting an extramarital affair with a disturbed patient rather than by any biomechanical alteration in his thyroid levels or any consequent mania?*

*A. Yes.*

The Tribunal had no difficulty in preferring and accepting the opinion of Professor Robinson over that of Professor Posen. Professor Robinson was cross examined at length and he was unshaken as to his opinion that:

- a) The practitioner would not be suffering from thyrotoxicosis in the face of normal thyroid function test on 28<sup>th</sup> November, 1998;
- b) That it was unlikely that he had developed thyrotoxicosis during December, 1998.

He agreed that one of the effects of thyrotoxicosis was a change in the pattern of someone's behaviour, in the sense that if a person was previously non-anxious and became anxious, that's a change in behaviour.

It is to be noted that Mrs Aguado had observed mood swings in the practitioner between the time they returned from holidays in Europe in about July and December of 1998. To her observation he was unhealthy during that period. He was snappy, irritable, frenetic, depressed and sleeping poorly. That is to say he was demonstrating those symptoms at a time prior to the time when the test demonstrated that he was not thyrotoxic, as at the 28<sup>th</sup> November, 1998.

True it is that he was noticed to be withdrawn, sweating and visiting the toilet frequently on a social occasion on the 11<sup>th</sup> December, 1998.

Dr Corrigan's observation of weight loss in December, 1998 is at odds with the patient's unchallenged evidence that the practitioner commenced

to lose weight in February, 1999. At that point he appeared to be run down and have a flu like condition. She didn't recall any hoarseness of voice in early 1999.

The Tribunal was aware of the descriptions of the practitioner's appearance and attitude at the Christmas function, however there is no persuasive independent evidence which impressed the Tribunal that the practitioner began to manifest such symptoms in December, 1998 as to doubt upon the opinions expressed by Professor Robinson. He believed that there was an explanation for them unrelated to thyrotoxicosis.

#### Professor Tennant

Professor Tennant, a psychiatrist, opined that the practitioner demonstrated an awareness of problems with the patient before December or Christmas Eve, 1998. That less severe boundary violations were occurring up to that time.

In his opinion, if there was an elevation of mood and there isn't much evidence to suggest that there was very much elevation of mood, it was not sustained.

Even in the report given to Dr Westmore it didn't reach the level where Dr Aguado had lost awareness, that what he might be about to do was wrong. He believed that if a mood disturbance occurred, it would have been relatively abrupt in onset and the change in his behaviour would have been obvious to his patients, those who see most of him - his secretary, his family, his friends and colleagues. He believed that if there

had been a significant loss of insight, the practitioner's behaviour should have been noticeable as different or disordered by those around him including the physicians that he had been seeing. The fact that he was able to continue his practice, without apparent difficulty and without adverse comment indicated that mood disturbance was probably not severe and not sufficient to deprive him of his judgment.

It would have been patently obvious to the practitioner and his legal representatives that the alleged loan transactions were a matter of real significance. If, in fact, the practitioner was making loans in December, 1998 - something that he hadn't previously done - then this could well have been reflective of aberrant conduct. Clearly the practitioner and his representatives sought to make the point to the Tribunal that the practitioner had seriously departed from his normal mode of conduct. This seemed to be an important matter of history to Rickarby who was led to believe that a \$1,000 loan was made in December, 1998 and was put to other witnesses as conduct demonstrating uncharacteristic behaviour. The clear suggestion was made that it was a factor reflective of mental affectation related to thyrotoxicosis.

There was ample opportunity before the hearing commenced and during the course of the hearing to have obtained some form of proof of such loans, even if this only involved the names of the recipients. Professor Tennant was cross examined as to this matter on the 5<sup>th</sup> November, 2001 and various mentions were made of loans and questions put during the ensuing week. On 9<sup>th</sup> November, 2001 the matter was adjourned until the 13<sup>th</sup> December, 2001.

During the resumed hearing on the 14<sup>th</sup> December, 2001 the practitioner produced three short letters from three patients purporting to evidence loan dealings. Two of the letters were dated the 14<sup>th</sup> November, 2001 and one the 26<sup>th</sup> November, 2001 yet they were not served on the complainant's legal representatives until the 7<sup>th</sup> December, 2001.

The practitioner was cross examined as to the circumstances in which these letters came into evidence.

He claims that during the period of the adjournment, between the 9<sup>th</sup> November and the resumption of the hearing on the 13<sup>th</sup> December, a patient, [G] who he hadn't seen for a number of years, rang him saying he wanted to see him.

In the course of that call [G] said to the practitioner, "Look, I remember the favour you did me those years ago. I want to come to re-pay the money". It was only at that point of time that the practitioner remembered giving [G] money.

[G] told the practitioner that he remembered that the loan was for a present for his wife. [G] subsequently attended and elaborated stating that "Yeah, I remember you gave me \$40 and it was because I needed to buy some presents for my wife"

The practitioner then went on to say that after the visit from [G], he starting thinking about other patients that he gave money to at the time.

Subsequently, a patient, [D], attended for a scheduled visit. He asked her had he ever lent her some money. She in turn made a statement corroborating a loan.

The practitioner did not make any entry into his records relating to the consultation with this lady on the 14<sup>th</sup> November, 2001. He did however make a note in his records in relation to the attendance of Gordon and made the note “paid \$40 lent at Christmas, 1998”.

On the 26<sup>th</sup> November he had a consultation with another patient, [D], in the course of which she told him that he had lent her \$20 in November, 1998. He made no record of this in his notes.

Both Gordon and Dorey make observations in their letters that at the time of the loan, Dr Aguado had lost a lot of weight. When asked how this observation came about, the practitioner stated, in effect, that he had asked them was there anything unusual about him.

There is documentary evidence corroborating the making of a loan in a cheque butt which purports to refer to a loan of \$1,000 mid 1999.

The Tribunal was firmly of the opinion that Dr Aguado’s evidence as to how those patients came to give accounts of how the loans were made and the remarks by some of them as to his weight, was simply incredible.

The Tribunal makes no finding one way or another as to whether he did or didn’t make small loans, however the Tribunal has no hesitation in

rejecting the practitioner's account of his contact with the patients referred to and as to how they came to compose the letters tendered.

The Tribunal is firmly of the view that the practitioner was misconducting himself in the psychiatrist/patient relationship well before December, 1998. The giving of gifts - the physical contact, albeit not sexual - leads the Tribunal to the conclusion that the practitioner was developing an unhealthy emotional attachment to the patient long before his conduct could be in any way attributed to the possible effect of thyrotoxicosis.

The Tribunal is of the opinion that that developing relationship culminated in the almost inevitable sexual contact which ensued and which continued until the patient terminated the relationship after some 7 months.

It is entirely possible that his disinterest in food, that he was non communicative, unresponsive in conversation as was observed at a social function where he appeared to be sweating profusely and not enjoying himself was relating to his developing relationship with the patient. However, his wife noted that he appeared to be unhealthy between July 1998 and December 1998, that he was subject to mood swings, was snappy and irritable and appeared to be distressed and experienced sleeping difficulties.

As previously indicated, the Tribunal was impressed by and accepted the evidence of Professor Robinson that symptoms of thyrotoxicosis would not have occurred so soon after the negative tests for thyrotoxicosis on 28<sup>th</sup> November, 1998. It further accepted his opinion that for patients to

show significant behavioural changes such that their judgment is impaired is a very infrequent event.

In accepting Professor Robinson's conclusions the Tribunal took into account that there was no evidence from staff members, patients, and others with whom he would have been in frequent and close contact which was to the effect that he was unable to maintain his normal relationship with his patients and staff and that he experienced any difficulty whatsoever in conducting his practice as usual. His was a very busy practice and seemingly he continued to treat his patients without complaint or incident.

During the relevant period, the practitioner saw patients at Morisset Hospital where he held discussions with the Registrar, The Nursing Manager, the nurses, the Social Worker and others. In the course of conducting his practice at two surgeries, he would be in constant contact with his Officer Manager and other staff. He shared rooms with two doctors.

The arrangement which he made as to providing the patient's telephone and the number of calls that he made to her well before the culminating sexual act could not be explained on the basis of thyrotoxicosis.

A matter of great concern to the Tribunal was the demeanour of the practitioner and its assessment of his credit and veracity. He was considered to be evasive when dealing with searching questions.

Mention has been made of the Tribunal's assessment as to the practitioner's veracity with regard to the provision by patients of evidence of loans.

The Tribunal found it significant that he gave two different accounts of when the hugging of the patient occurred. The practitioner would have been well aware of the importance of this occurrence and of the other contradictory matters in his statements.

The Tribunal found no reason to doubt the account of the patient and where she and the practitioner were in conflict the Tribunal resolved such conflict in her favour.

A matter of concern to the Tribunal was the history recorded by Dr Rickarby which in important aspects is inconsistent with the evidence. For example, there can be no doubt that it was he who instigated the obtaining of the Viagra. It is only a small matter however the Tribunal has no doubt that it was Dr Aguado who brought the champagne to the meeting in his surgery on the 24<sup>th</sup> December. Clearly, Dr Aguado was giving the patient gifts long before December, 1998 yet Dr Rickarby was under the impression that all gifts were given after the commencement of the sexual relationship.

The flawed history obtained by Dr Rickarby is important in two respects.

1. Presumably it had an impact upon the opinion he expressed;
2. It reflects upon the credit of the practitioner.

Dr Rickarby was seemingly unaware that on numerous occasions there was no therapeutic purpose for consultations post 24<sup>th</sup> December, 1998. They were merely an opportunity for sexual relations. He made no mention of having been told that the practitioner made claims against the Health Insurance Commission for medical services which were not provided.

It is entirely possible that such information would have not caused Dr Rickarby proffer the opinions he expressed had these matters been reported to him, however the fact that they were not so recorded casts doubt upon the frankness of the practitioner.

A finding that the practitioner was a witness of credit is vital to the acceptance of his evidence which formed, in part, a basis for the opinions expressed by his supporting medical witnesses. The Tribunal makes no such finding.

If there was any validity in his claim that the relationship was curative in itself “and that it was important never to make the patient feel rejected”, it completely escapes the Tribunal as to how his confused state and his inability to think clearly about the sexual relationship, influenced his conduct in relation to the Viagra transaction and the making of false claims to the Health Insurance Commission for medical services, which were not provided.

Finding as it does that the commencement of the sexual relationship was not related to a condition of thyrotoxicosis, the Tribunal has difficulty in distinguishing his conduct subsequent to December, 1998, that is to say

the continuation of the sexual relationship. It appears as though his conduct was exactly the same with or without the presence of thyrotoxicosis which became manifest in 1999.

The Tribunal is mindful of just how serious is the relationship between a treating psychiatrist and the highly vulnerable, disturbed patient as the practitioner knew her to be.

This wasn't the case of a general practitioner misconducting himself with a patient presenting with a sprained ankle, the flu of something of the sort serious though such misconduct may be.

The practitioner was acutely aware of the actual or potentially devastating effects of his sexual exploitation of her and how it would impact upon her prospects of recovery. He would have realised how ill equipped she was to cope with the trauma which must have inevitably resulted from that sexual relationship and its interference with her therapy.

### Findings of the Tribunal

The Tribunal finds that the practitioner grossly breached his professional duty to the patient by abusing the trust placed in him and by exploiting her in order to obtain gratification in the full knowledge that she was vulnerable and subject to major psychiatric disability.

It rejects the respondent's claim that his actions were attributable to the effects of thyrotoxicosis either as at 24<sup>th</sup> December, 1998 or during the continuation of the sexual relationship during 1999.

The Tribunal further finds that the practitioner was in serious breach of his obligations as a medical practitioner in issuing prescriptions for a schedule for drug, namely Viagra, and arranging for its presentation in the name of a person to whom the person was not intended to a pharmacist and obtaining the drug by knowingly making false and misleading representations as per the allegations fully set out in particulars 5 and 6 of the complaint.

Further that the practitioner was in serious breach of his obligations as a medical practitioner in submitting false claims to the Health Insurance Commission. Such deliberate and calculated actions were solely for the purpose of satisfying (1) his own desires and (2) his financial interests.

The Tribunal is comfortably satisfied in accordance with the requisite onus that particulars 1, 2 (save and except that the evidence refers to only one incident of licking and sucking patient's fingers), 3, 4, 5, 6 and 8 of the complaint have been established and that he has been guilty of "improper and unethical conduct in the practice or purported practice of medicine".

The Tribunal is not comfortably satisfied in accordance with the requisite onus that particular 7 in the complaint has been proved.

## Determination

The Tribunal is charged with exercising a protective power for the protection of the community. The principal consideration in the exercise of this power is the maintenance of the standards of the medical profession and maintaining the confidence of the public in the profession.

The Tribunal is unanimous in its opinion that the practitioner has been guilty of professional misconduct within the meaning of Section 37 of the Act so as to justify the removal of his name from the Register.

## Orders

We order that

1. The name of Antonio Aguado be removed from the Register of Medical Practitioners of New South Wales;
2. Pursuant to Section 63(5) of the Act, no application for review of Order 1 may be made until the expiration of 3 years from today;
3. That the practitioner pay the costs of the complainant of and incidental to the hearing of the complaint.

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**JUDGE J C McGUIRE**

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**DR D CHILD**

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**DR M PASFIELD**

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**MS R SEXTON**