



New South Wales
Medical Tribunal

CITATION : In Re Dr ST [2005] NSWMT 17
TRIBUNAL: Medical Tribunal
PARTIES : Dr ST (Appellant)
 Health Care Complaints Commission (Respondent)
FILE NUMBER(S) : 40032 of 2005
CORAM: Walmsley, SC DCJ - Toh, Dr S - Glass, Assoc Prof
 A - Pasfield, Dr M
CATCHWORDS: Appeal from Professional Standards Committee -
 Removal of condition on right to practice
LEGISLATION CITED: Ss 87(1)(b), 61(1)(c) Medical Practice Act 1992
 (NSW)
CASES CITED: HCCC v Litchfield (1997) 41 NSWLR 630;
 John Fairfax Pty Ltd and Anor v District Court of
 New South Wales and Ors [2004] NSWCA 324 ;
 Minister for Immigration and Ethnic Affairs v Wu
 Shan Liang (1996) 185 CLR 259;
 Refrigerated Express Lines Pty Ltd v Australian
 Meat and Livestock Association 29 ALR 333;
DATES OF HEARING: 9 December 2005
DATE OF JUDGMENT: 9 December 2005
LEGAL REPRESENTATIVES: Mr M Lynch (Applicant)
 Ms G Furness (Respondent)
ORDERS: 1. Appeal Allowed 2. The Tribunal makes orders (a)
 and (b) in the 'amended notice of appeal' filed in
 court today 3. Respondent to pay the appellant's
 costs 4. Non-Publication Order made with respect to
 names and addresses of all patients and of Dr
 [REDACTED]

JUDGMENT:

DEPUTY CHAIRPERSON:

1 This appeal is about the appropriateness of the imposition by the Professional Standards Committee of a condition on ST's right to practise, that his records be subject to certain audits at his expense.

2 On 6 July 2005, ST, the appellant, was found guilty of unsatisfactory professional conduct by that committee, which is constituted under part 12 of division 1 of the Medical Practice Act 1992, ("the Act").

3 The complaint alleged first that he had shown a lack of adequate judgment or care in the practice of medicine, and/or had engaged in improper or unethical conduct relating to the practice of medicine, in that he had entered an inappropriate commercial business venture with a patient previously diagnosed as suffering from depression; and secondly, that between October 1995 and December 1998 he had failed to make a record of consultations with that patient.

4 The complaint itself was dated 26 October 2004, and the hearing of the committee took place on 6 April 2005. The committee concluded that the appellant had breached acceptable boundaries in respect of his commercial relationship with his patient, and that his medical records were deficient. The appellant admitted the particulars of the complaint at the hearing before the committee, but disputed, or put in issue, as to whether the conduct amounted in the circumstances to unsatisfactory professional conduct.

5 In this appeal, no challenge was raised as to the adverse findings by the committee that the standard of his conduct was to be regarded as unsatisfactory professional conduct. The appeal, which is under section 87(1)(b) of the Act, was restricted to an appeal against the decision of the committee to impose condition 2 (a) when it made its decision on 6 July 2005.

6 When it gave its judgment on that day, it made these orders:

"(1) that ST be reprimanded pursuant to section 61(1)(a) of the act;

(2) that pursuant to section 61(1)(c) of the act, ST's registration is subject to the following conditions:

(a) that within six months of this decision, and subsequently as required by the board, it is a condition of ST's registration that he submit to a random audit of his medical records by a person or persons nominated by the board, to monitor compliance with the standards required by the Medical Practice Act Regulation 2003. ST is to authorise the said person or persons to prepare a report on their findings. ST is to meet all expenses associated with the audit or audits, and any such subsequent report or reports,

(b) that within two months of the date of the decision, ST attend a counselling session at his expense with a medical colleague to be approved by the board in order to discuss boundary setting in relation to the doctor/patient relationship, and issues raised in the written reasons for the decision. ST is to provide a written report on the outcome of the counselling session to the board for consideration by the board's conduct committee;

(3) these conditions may be reviewed, varied or removed by the board or the board's conduct committee."

7 The appeal in its amended form then seeks to attack and displace only condition 2 (a). ("the audit condition".) Section 61(1)(c) of the Act, under which we take the committee to have purported to act in imposing it, reads as follows:

*"(1) a committee or the tribunal may do any one or more of the following
...
(c) direct that such conditions relating to the person's practising medicine as it considers appropriate be imposed on the person's registration."*

8 Mr Lynch, who appears for the appellant, attacks that condition in various ways. First he says there is no express power to permit the committee to impose a condition which requires him to pay the costs of compliance with that condition. He refers the tribunal on the issue of the lack of express power, to *Refrigerated Express Lines Pty Ltd v Australian Meat and Livestock Association* 29 ALR 333 at 343.

9 Secondly, he submits the condition is indeterminate in time and cost.

10 Thirdly, he says, the purpose of a committee's inquiry is to consider only the complaint, and if the complaint is established, what protective orders are appropriate. Here, by reason of the findings and reasons it came to and expressed, it went beyond merely adjudicating on the complaint and dealt with his continuing performance. That was a matter which was more appropriately done by other means.

11 Further, he submitted that the audit condition does not relate to the practice of medicine.

12 The thrust of his primary submission is that the Act which creates the committee and gives it its power did not give relevant power to the committee to impose the audit condition.

13 Alternatively, Mr Lynch submitted that in view of the findings which were made, it was an inappropriate condition, and there was nothing involved in the findings and reasoning of the committee leading to a need to protect the public, particularly given the age of the complaint and the findings the members of the committee made.

14 Next, it was submitted that the committee found that the doctor was complying with the appropriate standard for medical records and that the audit condition was totally out of proportion to the nature and the facts of the conduct.

15 Further, the audit condition lacked utility because it was unfortunately expressed and did not say to whom reports were to be given. This was to be contrasted with the other condition, namely condition 2(b), which required him to report for a counselling session with a medical colleague and for him to provide a written report on the outcome to the board. There, the utility of the condition was apparent.

16 The Health Care Complaints Commission, (the HCCC) the respondent to the appeal, for whom Ms Furness appeared, opposes the order sought in the appeal. For reasons which will become apparent, the Tribunal does not consider it necessary to deal with the jurisdictional arguments put by Mr Lynch.

17 In passing, however, the Tribunal does express the view that section 61(1)(c) is sufficiently wide to give power to committees to make conditions, even though they might lead to some cost, either direct or indirect, to the doctor. This is because there is, on the face of it, a provision giving power to impose conditions and that provision must be given some work to do.

18 We see it also as arising from the observations of the Chief Justice in *John Fairfax Publications Pty Ltd and Anor v District Court of New South Wales and Ors* [2004] NSWCA 324 at paragraph 24, where his Honour said this:

"As a statutory court, the District Court of New South Wales has only such powers as are expressly conferred on it or as are necessarily implied from the express conferral of jurisdiction upon and grant of powers to the court."

19 The power to impose an obligation or a condition which causes some cost, indirect or direct, to a doctor, is, we consider, a necessary implication of the power given to committees under section 161(1)(c). Otherwise the power might not be permitted to be exercised.

20 So that, had the committee's reasons and findings supported it, then we consider that it did in fact have the power to impose a condition of audit provided that it did not impose unreasonable cost burdens on the doctor, or burdens which were disproportionate to the subject of the complaint.

21 We say that, particularly bearing in mind the evidence contained in a statement tendered today by the HCCC, from Dr Reed, dealing with matters of audit and the cost of the audits, which we infer are of the type referred to in the audit condition.

22 However, it is the Tribunal's view that by reason of the findings and reasoning of the committee, it was "inappropriate" (to adopt the word in the Amended Notice of Appeal), for the committee to impose the audit condition. That is because the Tribunal takes the committee to have found that ST was complying at the relevant time with the medical records standard.

23 Further, it is by reason of the fact that the conduct involved patients and conduct between 6 October 1995 and 5 July 1998. We note that there were 21 consultations involved, largely home visits, and all for one patient. Next, the complaint was not made until 2003, the formal complaint in 2004, and the committee had its hearing in 2005.

24 It is true, on the issue of delay, as Ms Furness submitted on the basis of *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630 and cases referred to therein, that merely because time goes by it does not follow necessarily that a doctor's conduct improves. Nevertheless, delay is a factor. Given the conduct here involved, we do not see it as nearly significant as it was in *Litchfield* and cases referred to there.

25 We note that the audit condition was not one sought by the HCCC at the hearing of the committee. We note Ms Furness' submission that that is not of itself in any way conclusive, and we accept that because, of course, it is expected that members of the committee will from time to time use their own knowledge and experience to derive means of protecting the public if and when appropriate. It is nevertheless a factor we take account of.

26 We reject Ms Furness' submission overall that it was not the effect of the decision that the doctor's capacity to keep proper records was by the time of the hearing no longer a matter of concern. It is necessary to look at some aspects of the decision to see how we arrive at that view.

27 There were, as we have noted, two aspects to the complaint. One was the inappropriate commercial relationship. The other was the records aspect. At page 9 of the decision the committee said this:

"As to the records aspect, in his report, exhibit H11, Dr Chung was also severely critical of ST's failure to document 21 consultations with patient A between the period October 1995 to December 1998. He told the committee that as a general practitioner for 40 years he understood an occasional failure to record a home visit, but even if the unrecorded consultations were all for vitamin B injections they should have been recorded. Dr Chung stated the fact that schedule 2 of the Medical

Practice Act Regulations (NSW) did not commence until 1 September 1998 did not alter his opinion. He said, 'The day that doctors needed regulations to behave properly would be a very sad one. Anyone who needed regulations should not be in the profession.'

28 At page 10 – [this concerned evidence given by another practitioner, namely, Dr Walsh about the conduct relating to the records] - the committee said this:

"In relation to ST's failure to record 21 consultations, Dr Walsh said it was not uncommon at the time for solo practitioners not to record home visits, and he suspects that this is why the regulations were brought in. He is moderately critical of ST because a failure to record consultations could result in harm to the patient."

29 Then at page 11 there is reference to evidence given by ST. At the bottom of page 11 the committee said this:

"In relation to his failure to record consultations with patient A, ST told the committee he got into bad habits, but has now corrected these, and takes patient files on visits or makes notes that he later transcribes onto the patient record. He admitted that patient A's notes were not adequate."

30 There was reference to ST's credit at page 14. This was a matter which was referred to in oral submission by Mr Lynch, and Ms Furness submitted to us, with justification, that the reference to credit is not specifically to the issue of credit relating to records, but rather credit relating to the commercial relationship. Nonetheless, it is a matter which we think is of some moment. At page 14 the committee said this:

"The committee was unable to test patient A's evidence as to who initiated the business arrangement. ST submits that in accordance with the principles of Dr B and the Medical Tribunal, where there are any factual inconsistencies between patient A's version of the events and the evidence of ST the committee must prefer the evidence of ST. The HCCC submits that it would be misleading to rely solely on ST's evidence. The committee finds ST's evidence credible. Given this, and in accordance with the principles of procedural fairness, the committee accepts ST's version of events."

31 At page 16 - having set out their details of particular 2 of the complaint, namely, that concerning the inadequate records - the committee said this:

"In both his written statement (exhibit R1) and his oral evidence, ST admitted to this particular, but did not admit that the conduct as alleged amounted to unsatisfactory professional conduct. The Health Insurance Commission (HIC) Report (exhibit H13(b)) lists a total of 21 claims over the period 1995 to 1998 for which there is no record in the patient notes. Most, but not all of these, were for home visits. In the response to the complaint (exhibit H4) Ms Crossin submits that schedule 2 of the Medical Practice Act Regulations, which set standards for medical records, did not commence until 1 September 1998."

32 ST submits that the implementation of a standard should not be seen as an opportunity retrospectively to criticise or establish what was or should have been the standard for maintaining medical records prior to their existence.

33 Both peer reviewers acknowledged that it was not uncommon at the time under consideration for solo practitioners occasionally to fail to record home visits. Notwithstanding this, in their respective peer reports Dr Chung expressed his strong disapproval, and Dr Walsh his moderate criticism of ST's failure to record such a large number of consultations. They confirmed these levels of criticism in oral evidence. On the evidence before it the committee was comfortably satisfied that in failing to make a record of medical services he provided to patient A as particularised in particular 2 of the complaint ST demonstrated a lack of adequate judgment and care in the practice of medicine which represented a departure from acceptable standards.

34 Under the heading "Findings" on the same page and continuing over to the next page, the committee said, having considered the written and oral evidence and the submissions of the parties, *"ST admitted to particular 2 prior to and at the hearing. The committee finds to its comfortable satisfaction that particular 2 is proved."*

35 Then at page 18 under the heading "Orders", having dealt with the commercial relationship issue, the committee said this:

"His statement also outlines the changes he has made to his practice with a view to applying for accreditation. These include introduction of the recommended RACGP medical records system and methods to ensure appropriate recording of home visits. The committee notes the example patient records provided to the committee in ST's submission as evidence of his changed practice."

36 Then, leaving out a paragraph, they continue:

"ST submits that the education courses suggested by the HCCC are not necessary" -

(There are then arguments to support the submission), then:

"The committee notes ST's statements of remorse, his evidence regarding the changes he has made to his practice, and the evidence in submitted samples of patient progress notes of improvement in the record keeping. Nevertheless, given the committee's responsibility for maintaining the standards of the medical profession for the protection of the public, the committee is obliged to seek confirmation that ST has a full understanding of boundary issues and is continuing to conform to the standards required by the Medical Practice Act Regulations on maintaining patient records."

37 They then went on to make the orders which we have earlier set out.

38 The view the Tribunal has is that what the committee was doing was expressing the view that, as at the time of the hearing, it was satisfied as to the standards of his record keeping, and accepted his evidence that he was keeping proper records. One of the matters which was referred to by them was patient progress notes which were submitted as part of the submissions. That these were put in as part of the submissions appears at page 12 of their decision.

39 Ms Furness submitted that, so far as these were concerned, these ought not necessarily be read as having the weight that the records might have if selected randomly because these came, first of all, as chosen by ST, and, secondly, at the submission stage. However, it was open, as we see it, to the HCCC at the time, had it chosen to challenge this, to seek an opportunity to have other records produced had it had a concern about them. We do not see any great substance in that submission.

40 We also accept the submission of Mr Lynch that the word "notes" in the fourth-last line of the second-last paragraph at page 18 does appear on the face of it and when seen in the context of the whole decision, as an acknowledgment by the committee that it accepted ST's statements of remorse: it accepted his evidence regarding the changes he had made to his practice, and it accepted that the submitted samples were typical of the way he then ran his practice. If further confirmation is necessary, we see it in the addition of the words "and is continuing to conform to the standards required", rather suggesting, if they had not otherwise made it plain, that they regarded him as having already commenced to conform and, at that stage, was conforming to the relevant standards.

41 Ms Furness referred the Tribunal to the High Court's decision in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, where the then chief justice Sir Gerard Brennan and Toohey, McHugh and

Gummow JJ warned that "a court should not be concerned with looseness in the language, nor with unhappy phrasing" when dealing with a decision of an administrative decision maker. Whilst we respectfully accept that as the appropriate principle, we do not read the reasons of the committee as showing looseness with language or as consisting of unhappy phrasing. Further, we note that there is nothing on the face of it, apart from the imposition of the audit condition itself, and the committee's apparently seeing itself as having an obligation to require its continuation, to justify the requirement for the audit condition.

42 It is true, as the HCCC submits through Ms Furness, that there is no express finding of the type that one might see a judge make. But we see it as sufficiently clear in the reasoning set out, which we have quoted, to satisfy us that the committee was satisfied that ST was at that time appropriately keeping records.

43 Accordingly, we are satisfied that it was inappropriate for the committee to impose the audit condition and we allow the appeal.

44 Dealing with the orders sought in the amended notice of appeal, we make orders (a) and (b).

45 By reason of the view the Tribunal has, the appeal has succeeded. There were several different issues relied upon, and although the jurisdiction argument was dealt with by both sides, and, for the reasons we expressed, in essence the appellant's argument on jurisdiction we regarded as not successful, by reason of the fact that the appeal was successful and the relevant orders set aside, it is appropriate that the respondent should pay the costs of the appellant.

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

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