

No. 40012 of 2004

In Re: Dr Michael Tsouroutis

And: The Medical Practice Act 1992

DEPUTY CHAIR

Her Honour Judge A AINSLIE-WALLACE

MEMBERS

Dr Stuart SPRING

Dr Katherine ILBERY

Ms Anne DEVESON

REASONS FOR DETERMINATION

Order:

Pursuant to *Clause 6 of Schedule 2 to the Medical Practice Act 1992* the Tribunal has made a Non Publication Order in respect of the name of the patient referred to in the proceedings.

1. By complaint dated 3rd August 2004¹, the Health Care Complaints Commission (the '**HCCC**') alleged that the respondent had been guilty of unsatisfactory professional conduct and/or professional misconduct within the meaning of *sections 36 and 37 of the Medical Practice Act 1992* (the '**Act**') in three respects.
2. The first complaint alleged that in relation to eight patients the respondent prescribed drugs to which *Schedule 8 and Schedule 4D of the Poisons and Therapeutic Goods Act 1996* applied;
 - a. Without exercising responsible medical judgment as to whether it was appropriate to issue such prescriptions;
 - b. In quantities in excess of recognised therapeutic standards of what was appropriate in the circumstances;
 - c. In quantities likely to cause dependence;

- d. For a purpose that did not accord with recognised therapeutic standards of what was appropriate in the circumstances
 - e. When the practitioner knew or ought to have known that the drugs so prescribed were being, or were likely to be, abused.
3. Complaint 2 alleged that the respondent had been guilty of unprofessional conduct and/or professional misconduct in relation to the same eight patients in that he failed to keep adequate records of patient consultations and treatments.
4. Complaint 3 alleged that the respondent had been guilty of unprofessional conduct and/or professional misconduct in failing to maintain a Drug Register detailing the use of Pethidine obtained by him in his “*Doctors Bag Orders*” in breach of *Clause 113* of the *Poisons and Therapeutic Good Regulations 1994*.
5. In relation to each of these complaints, the respondent admitted the conduct alleged and conceded that each amounted to professional misconduct. The hearing before the Tribunal concerned the appropriate orders to be made having regard to the admissions.

Background

6. The respondent is a man aged forty-six years. He qualified in medicine in 1982 and worked until 1986, first as a Resident Medical Officer then Registrar in Casualty in Wollongong Hospital. Between 1986 and 1993 he worked as a Registrar in Psychiatry at Liverpool Hospital. He then gave up his interest in psychiatry and worked in Fairfield Hospital and then as a general practitioner in Padstow. In 1996 he commenced work in general practice in a group practice of seven doctors, one of whom was his brother-in-law, Dr Taz Fermanis. That practice dissolved in 2002 and Dr Fermanis started his own practice in 2003 he joined the practice of Dr Fermanis. He continues to practise there. In 2001 the respondent became a Fellow of the Royal Australian College of General Practitioners.

¹ Annexure A to the Reasons for Determination

7. On 23rd May 2000 a representative of the Pharmaceutical Services Branch (the 'PSB') visited him in relation to his prescription of *Schedule 8* drugs, without the requisite authority, for two patients. During that visit, the respondent was counselled about his responsibilities under the *Poisons and Therapeutic Goods Act 1996* and he was given literature on the subject. After the interview, the PSB sent him a letter confirming the matters discussed in the interview.
8. The respondent said that he understood the context of the counselling and he then obtained authorities for the patients to whom he was specifically referred in the meeting.
9. In October 2001, the PSB was notified by a pharmacist, located in the area where the respondent was practising, of concerns about his prescription of Pethidine for a patient (referred to as "**Patient A**" in the proceedings).
10. On 8th February 2002 another complaint was made to the PSB by a pharmacist, again about the respondent prescription of Pethidine for Patient A. On 13th February 2002 the PSB received complaint that the respondent had provided Patient A with five post-dated prescriptions for Pethidine. At this time the PSB was gathering records from various pharmacies relating to the respondent's prescription of drugs. On 14th March 2002, a local pharmacist notified the PSB that the respondent had given Patient A five post-dated prescriptions for Pethidine. The complaints were not merely the fact of the prescriptions which were given but, in particular, the fact that the respondent was prescribing to patients who were drug dependent, who had "*doctor shopped*" and that he had provided "*pre-dated*" prescriptions for pethidine. Concerns were expressed that the respondent was prescribing drugs of potential addiction in "*increasing doses*".
11. On 9th April 2002 a representative of the PSB interviewed the respondent in relation to these matters. The respondent provided his notes to the investigator who thought that the entries relating to the patients were "*scant*" and did not contain a management or treatment plan for the patients whose files were being reviewed.

12. During this interview, the respondent agreed that he had prescribed *Schedule 8* drugs in excess of the authorised doses, that he had not maintained a drug register for Pethidine and that he prescribed *Schedule 8* drugs without the proper authority. During the interview in relation to these complaints, the respondent described himself as being a “*soft touch*” for his patients. During this interview, the respondent was given departmental guides to prescribing.
13. The respondent was asked whether he wished to relinquish his rights to prescribe *Schedule 4 and 8* drugs. He declined and told the interviewer that he thought that he could change his prescribing patterns.
14. The PSB made a report of the matter to the Medical Board and an inquiry pursuant to *section 66* of the *Medical Practice Act 1992* was convened on 13th May 2002. At the conclusion of the inquiry conditions were placed on the respondent’s right to practise and his entitlement to prescribe *Schedule 4* and *Schedule 8* drugs was withdrawn.²
15. It is clear from the patient records to which the complaint related that, although the respondent referred some of the patients to other specialists for opinion and they advised him to assist the patients to reduce their reliance on the drugs of addiction, he was unable or unsuccessful in achieving this. He was also unable or unsuccessful in referring them to appropriate outside help.
16. The respondent has continued to practise since then without the prescribing rights for *Schedule 4D* and *Schedule 8* drugs and has had additional conditions on his right to practise.³ He has practised without adverse comment since that time.

The respondent’s attitude to the Complaints

17. In his statement, which was filed in the proceedings,⁴ the respondent said that he accepted he had acted inappropriately, irresponsibly and with poor insight into the patients’ drug seeking behaviour. He accepted that he had acted in a way which

² The certificate of Registration is annexure B to these reasons

³ Annexure @ to the Reasons for Determination

⁴ Part of Exhibit 1

had exposed the patients to potential harm from drug dependence. He did not dispute that his behaviour amounted to professional misconduct.

18. The respondent said that after the PSB visit in April 2002 he made efforts to change his prescribing pattern and reflected on it although not to the degree to which he did after the *Section 66 Inquiry*.⁵ This is clear from the statement in which he commented on the complaints. In relation to the *Section 66* inquiry he said that he was “*shocked*” to find himself in that position. He said that he that he was:

*“... shocked to see the number of prescriptions. I had a look at them in overall numbers before and I hadn’t realised the depth of what I was doing and that’s what shocked me to the fact that I seemed to be unaware of what I was doing”.*⁶

19. Asked why he declined to relinquish his rights to prescribe after the 2002 PSB visit, the respondent said that he thought that if he did he would have to give up his work in the hospital Emergency Department. When this was explored with him, it became clear that he did not prescribe *Schedule 4D* or *Schedule 8* drugs to outpatients at the hospital but ordered them for ward patients. It was never fully clear to the Tribunal why to relinquish those rights posed a difficulty for the respondent.
20. In relation to his prescribing, the respondent described himself as having a “*mindset*” in which he had made a commitment to prescribe for his patients based on their complaints or their expressed need for the medication rather than using alternative approaches to the prescription of drugs for their complaints.⁷ In his statement⁸ the respondent said that he knew that he needed an authority to continue to prescribe and yet found himself unable to stop prescribing for these patients once he had started. He said he focussed on alleviating symptoms as quickly as possible and was drawn into the patients’ anxiety and distress, which caused him to ignore proper medical considerations.

⁵ transcript page 64

⁶ transcript page 64 line 46

⁷ transcript page 38, lines 0-5

⁸ Exhibit A paragraph 7 ff

21. During cross-examination, the respondent was asked whether there was an event in his life in mid 1999 which could explain why his conduct as a practitioner changed significantly. He said that there was nothing. The respondent said that he had reflected on why he became entrapped with his patients in the way he described. He had undertaken courses in the management of drug dependent patients, which had taught him about therapies for such patients and he was pursuing acupuncture as a pain relief therapy.
22. Dr Harding, who conducted the peer review in relation to this matter, said in evidence that he thought that perhaps the respondent had some personality issues which may have led to his conduct which might benefit from being explored with a psychologist or psychiatrist. This was put to the respondent in cross-examination,⁹ who said that he had identified issues which caused him to feel overly responsible for his patients' pain and which made him anxious to the extent that he felt that he had to give them pain relief at all costs. As to whether he has gained some insight, the respondent said¹⁰ that having identified that he tended to take on his patients anxiety and react by prescribing, he believes that now he is able to detach himself from this anxiety in a way which would ensure this situation would not arise in the future. He said that he needed no outside assistance with this problem and believed that self-analysis was useful and productive for him. He was confident that he would not find himself in the same position in the future.
23. When this issue was pressed, the respondent said that he did not consider he had a problem which required assistance, but if the Tribunal ordered that he accept some psychological help, he would comply.
24. Why the respondent found himself in the position of prescribing huge amounts of *Schedule 8 and Schedule 4D* drugs was never revealed to the satisfaction of the Tribunal which felt disquiet that a practitioner who had apparently conducted himself without adverse comment for years should find himself drawn into prescribing for demanding and addicted patients without a seeming cause. It was also of considerable concern to the Tribunal that during the time that the

⁹ transcript page 45-46

¹⁰ transcript page 62 ff

respondent was being counselled over his prescribing in 2000 and 2002 he was working closely with his brother-in-law, Dr Fermanis, yet he chose not to tell him of these matters or the fact that he was over prescribing.

25. It was also clear from the respondent's evidence that at the time these events were occurring, he was working very long hours in a practice in which he was quite isolated from his professional peers. The respondent said that when there were seven doctors in the practice and later, when it was just him and Dr Fermanis, there was little time for consultations between them other than quick meetings between patients.

26. After the *Section 66 Inquiry*, conditions were placed on the respondent's registration. Of those, Condition 3 is as follows:

"To work only when another Board-approved registered medical practitioner is on site and not at any other time".

27. The respondent said since having conditions imposed on his registration, he has made home visits and has seen patients in nursing homes without Dr Fermanis being present. The respondent said that if he needed to prescribe a *Schedule 8 or Schedule 4D* drug for a patient during one of these visits, he would ring Dr Fermanis. Dr Fermanis said that the Medical Board had not contacted him about the terms of this condition on the respondent's registration or informed him of any obligations on him arising from the condition. At the time of the hearing, Dr Fermanis and the respondent were complying with Condition 3 by Dr Fermanis working when the respondent was working and not taking time off for any reason, because to do so would mean closing the practice.

28. In his peer review, Dr Harding said that, up until the middle of 1999, the respondent's patient notes appeared to be adequate but then the quality of them declined to the point that he believed that it departed from the minimal accepted standard and invited his severe disapproval. He said that in many cases there was:

¹¹"... no note of presenting complaints, examination, diagnoses or plan of management. Most clinical notes just indicate prescriptions for either S4 or

¹¹ Letter Dr Harding 27th July 2003

s8 drugs. ... almost no evidence of ongoing general practice. For example I could find minimal evidence of any preventive health planning or clinical examinations which would be appropriate in the age groups and clinical conditions stated to be present in those patients.”

29. The respondent conceded that he had not kept adequate records of consultations and that he had not maintained a Drug Register to keep a record of Pethidine use. In relation to the Drug Register he said that his experience had been that the practice kept a single register and he was not aware of his obligations to maintain a personal register of Pethidine kept in his Doctor’s bag. In relation to his notes, he said that he found his consultations with these patients exhausting as he often spent a long time talking to them about their distress. His consultations often ran overtime and he said that he did not have time to make proper clinical notes.¹²

Discussion

30. This matter concerns *sections 36 and 37 of the Medical Practice Act 1992* (the ‘Act’).

31. Those sections are in the following form:

S 36(1) “For the purposes of this Act, unsatisfactory professional conduct of a registered medical practitioner includes each of the following:..

(a) Any conduct that demonstrates a lack of adequate knowledge, skill, judgement or care, but the practitioner in the practice of medicine.....

(m) Any other improper or unethical conduct relating to the practice or purported practice of medicine.”

S 37 “For the purposes of this Act, 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.”

32. The practitioner admitted the acts alleged and conceded that they constituted professional misconduct. The Tribunal is satisfied to the relevant standard¹³ that the practitioner is guilty of professional misconduct.

¹² Statement of Respondent (Ex 1)

¹³ *Briginshaw v Briginshaw* (1938) 60 CLR 336. That is that the Tribunal must be comfortably satisfied on the balance of probabilities but that having regard to the serious nature of the charge and the consequences, the satisfaction cannot be produced by “inexact proofs, indefinite testimony or indirect references”.

33. The issues at the hearing concerned the appropriate orders which should flow from this finding.
34. The jurisdiction of the Tribunal is a protective not punitive one. The purpose of disciplinary proceedings is to maintain proper ethical and professional standards in protection of the community and also to protect the good standing and reputation of the profession. When an order for suspension or removal from practice is made, its purpose is:
- “... from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege.”¹⁴*
35. It was agreed that there was little point in continuing Condition 3 on the respondent’s registration in its present form but that someone needed to prescribe *Schedule 8 and Schedule 4D* drugs for the respondent should it be required. Other than for these purposes, the Tribunal sees no need for the respondent to practise with another practitioner present.
36. The events which led to the *Section 66 Inquiry* and this hearing occurred at a time when the respondent said that he felt isolated from his professional colleagues. The Tribunal is of the opinion that it is important for the respondent to have a colleague with whom he can discuss his cases and any problems he might be encountering in his practice and that he have sufficient time with this colleague to explore the issues and problems fully.
37. The evidence of Dr Fermanis and the respondent is that the present practice is extremely busy and there seems to be scant time for them to discuss matters other than in short moments taken between patient consultations. Although Dr Fermanis was willing to act as a mentor to the respondent and discuss cases in greater detail, it seems on the evidence to be an impossible burden to place on him particularly given that he was unaware of any professional problem that the respondent had until the *Section 66 Inquiry*. The Tribunal is of the view that the respondent should have a professional mentor for a period of time who should be someone from outside his practice.

¹⁴ *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 201-202

38. As well as having a professional mentor, it was the view of the Tribunal that although the respondent was reluctant to have psychiatric help, given the level of concern in the Tribunal that the reasons or causes for these breaches of the *Act* were not satisfactorily explained. It would be of assistance to the respondent to have regular contact with a psychiatrist who may offer some further insight or assist him in ensuring that he does not find himself again losing control of his clinical judgment. The Tribunal does not require, nor does it regard it as appropriate, that the clinician report the substance of the sessions with the respondent to the Medical Board, but that he or she report to the Board information that the contact is taking place and the frequency of the contact.
39. The respondent said that he did not wish to have his rights to prescribe *Schedule 4D and Schedule 8* drugs restored and was content to continue practising without them. He felt confident that he could manage his type of practice without those rights and would call on Dr Fermanis if and when he needed a prescription. In time the respondent may wish to reconsider this give thought to applying to have all his rights to practise restored so that his patients can have the benefit of his complete care of them.
40. As indicated at the conclusion of the hearing, the Tribunal determined that this was a case in which the protective functions of the *Act* could be well served by allowing the respondent to continue to practise with restrictions. It is also appropriate to add conditions to his registration in relation to counselling and mentoring. Counsel for the parties were invited to prepare a list of agreed conditions¹⁵. Although the Tribunal has not adopted the agreed conditions entirely they do form the basis of the Tribunal's orders.

Orders

1. That the respondent's right to practice be subject to the following conditions:
 - a. he is not to possess, supply, administer or prescribe any Schedule 8 drugs. Any future change in the respondent's Schedule 8 Authority will

¹⁵ Annexure C to the Reasons for Determination

be in accordance with the procedures contained in the protocol of the Medical Board;

- b. he is not to possess, supply, administer or prescribe any Schedule 4 Appendix D drugs. Any future change in the respondent's Schedule 4 Appendix D Authority will be in accordance with the procedures contained in the protocol of the Medical Board;
- c. the respondent is not to work as a sole practitioner in general practice;
- d. the respondent is to seek the approval of the Medical Board before changing the nature or place of his practice and will seek that approval at least twenty-eight days before the date on which he proposes to make one or both of the changes referred to;
- e. the respondent is to accept supervision from a medical practitioner approved by the Medical Board in relation to any recommendation by the respondent to prescribe Schedule 8 or Schedule 4D drugs to his patients. The supervising medical practitioner is not required to be present at all times when the respondent is seeing patients. For the purposes of this condition, it is noted that the Medical Board approves of the supervision by Dr Tas Fermanis. In the event that Dr Fermanis is no longer willing or able to provide the supervision required by this order, the respondent is to seek the approval of the Medical Board for another practitioner nominated by the respondent to supervise him. Notification and approval is to be given twenty-eight days before Dr Fermanis is no longer able to supervise the respondent;
- f. the respondent is to provide Dr Fermanis and any other supervising medical practitioner with a copy of the Reasons for Determination and Orders made by the Tribunal on 9th June 2005;
- g. the respondent is to attend a psychiatrist for counselling and treatment. The attendances are to be at his expense. The times and duration of the attendances are to be at the discretion of the psychiatrist. The

respondent is to notify the Medical Board of the name and professional address of the psychiatrist within twenty-eight days of these orders and must authorise the psychiatrist to advise the Medical Board every six months of the fact of the respondent's attendance. The respondent is to provide the psychiatrist with the Reasons for Determination and Orders made by the Tribunal;

- h. within twenty-eight days of these orders, the respondent must notify the Medical Board of the name and professional address of a medical practitioner who has agreed to act as his professional mentor. The nature and frequency of the contact between the respondent and his professional mentor is to be agreed between them. The respondent is to give the professional mentor a copy of the Reasons for Determination and Orders of the Tribunal. The respondent must authorise the mentor to notify the Medical Board every six months of the fact of their contact;
- i. the respondent may not apply for a review of these conditions before the period of two years from the date of the orders and any application for review is to be made to the Medical Board.

Deputy Chair:

A Ainslie-Wallace J

For and on behalf of the Tribunal.