

IN THE MEDICAL TRIBUNAL or NEW SOUTH WALES

THE MEDICAL PRACTICE ACT 1992

DEPUTY  
CHAIRMAN:

HIS HONOUR JUDGE KIRKHAM

MEMBERS:

DR P. ARNOLD

DR C.HAMPSHIRE

MS R. SEXTON

Thursday 9<sup>th</sup> April 1998

No A0006 of 1997 DR TAN THANH LE

REASONS FOR DETERMINATION

Pursuant to s.92 of the *Medical Practice Act 1992* (the Act), Dr Le has applied to the Medical Tribunal for a review of an order by the Medical Tribunal in 1990 that certain conditions be placed on his registration.

BACKGROUND

Dr Le's history

Dr Le qualified in Medicine at the University of Saigon in 1972. In 1973, he entered a surgical post-graduate program, run co-operatively between the University of Saigon and Pittsburgh University. He studied in Pittsburgh for eight months. On his return to Vietnam, he re-commenced surgical studies, concentrating on plastic and reconstructive surgery. He presented an MD thesis in 1975, following which he was employed as a Lecturer in Surgery at Saigon University. During his time as a Lecturer, he also ran a general practice. He spent three months in Tokyo in 1974 learning cosmetic surgery techniques.

He escaped from Vietnam in 1979, and, after spending some time studying in South Australia, was registered to practise medicine there in 1982. His South Australian registration lapsed in December 1983. Meanwhile, he had registered in NSW in August 1983.

After some time working in the NSW public hospital system, he commenced a general practice and performed minor and cosmetic surgery, mainly in relation to the eyelids and nasal bridges of Oriental women.

#### The Original Conditions on Dr Le's Registration

In June 1985, Dr Le's name was removed from the Register for failure to pay the annual Roll Fee. He was re-registered on 3<sup>rd</sup> August 1988, such registration retrospective to the date of deletion, with the condition that he not perform plastic cosmetic surgery. During 1987, a number of complaints had been received by the then Complaints Unit of the Department of Health, as a result of which Dr Le gave an undertaking to the Medical Board in March 1988 not to perform any plastic cosmetic surgery unless he undertook further study and qualified as a plastic surgeon in Australia. (In a letter, dated 10 March 1988, to the Medical Board, Dr Le wrote "I will prepare (*sic*) not to perform any Plastic Cosmetic Surgery unless I undertake further study and qualified as Plastic Surgeon in Australia").

#### The 1990 Medical Tribunal

A Medical Tribunal sat in 1990 to hear further complaints that Dr Le:

1. had permitted his services in reconstructive and cosmetic surgery to be advertised as being directly associated with a Beauty Centre operating from the same premises as his consulting rooms;
2. had demonstrated a lack of adequate knowledge, skill and care in his treatment of seven patients;
3. had performed plastic cosmetic surgery in breach of the undertaking given to the Medical Board in 1988; and

4. had enabled a person who was not a medical practitioner to perform acts of operative surgery on two patients in respect of matters requiring professional discretion and skill.

The Tribunal found the first complaint proven. While noting that Dr Le's technique, regarding his management of most of the seven patients, was inadequate, it found that his behaviour constituted professional misconduct (as defined by the then *Medical Practitioners Act 1938*) in respect of only one of the patients. The Tribunal did not find the third or fourth complaints proven.

#### The 1990 Tribunal's Findings

The Tribunal reprimanded Dr Le and placed certain additional conditions on his registration:

1. Not to practise in any premises situated within one kilometre of any beauty salon owned or operated by a relative of the respondent;
2. Not to perform any surgical procedure or a cosmetic procedure of any kind and further he is not to use a scalpel;
3. Not to place any advertisement in a language other than English unless such advertisement is first approved by the Board and further the respondent is to accept responsibility for any advertisement relating to himself and to advise the Board of any unauthorised advertisement.

In answer to an enquiry on behalf of the respondent, the Tribunal clarified the restriction: "This prohibition prevents the respondent from reducing a broken or dislocated limb but does permit the respondent to suture a wound and to aspirate a boil or cyst using a needle."

The Tribunal concluded: "The Tribunal anticipates that if the respondent is in doubt about whether or not any contemplated procedure would offend against the prohibition, he would seek advice from the Department of Health. Furthermore, if the respondent obtains any post-graduate qualification in NSW

in surgery, it would become a matter for the Medical Board to lift the prohibitions imposed."

## RECENT DEVELOPMENTS

### A Further Complaint

In November 1996, the Health Care Complaints Commission notified Dr Le that it intended to refer for preliminary investigation a complaint that Dr Le had breached the Medical Tribunal's conditions. Dr Le submitted a list of the cosmetic operations performed on 21 patients in the period between November 1995 and September 1996. Dr Le claims that, immediately upon receipt of this letter in November 1996, he ceased carrying out any form of surgery.

### The Present Application

In March 1997, solicitors for the applicant submitted a request for the conditions imposed by the 1990 Medical Tribunal to be removed. This was accompanied by a statutory declaration, dated 1<sup>st</sup> February 1997, from the applicant and a statement by Dr Mario Marzola outlining tuition which he had given to Dr Le in respect of hair transplant surgery.

The applicant stated that he had responded in 1993 to an advertisement in the medical press by Dr Marzola, who was seeking doctors to operate his cosmetic surgical clinics under a franchise agreement. Dr Marzola had undertaken to train him in the relevant techniques. In July 1994, he commenced part-time practice at Dr Marzola's clinic in Woollahra, where he was trained by Dr Marzola for the next 18 months. As at the date of preparing the Statutory Declaration, Dr Marzola was attending the Woollahra Clinic every month or so to inspect Dr Le's progress. Dr Le acknowledged that this form of cosmetic surgery sometimes necessitated the use of a scalpel.

Between February 1992 and January 1997, Dr Le attended a number of conferences and short courses in dermatological surgery, cosmetic surgery, hair replacement surgery, laser surgery, liposuction and endoscopic surgery in the United States, Brazil and Canada. He became a member of a number of international cosmetic surgery and hair transplant surgery institutions.

By way of explanation of his breach of the 1990 Medical Tribunal's conditions, Dr Le stated<sup>1</sup>:

"I now understand the effect of the conditions imposed in June 1990. Unfortunately, until I made enquiry following the receipt of the November 1996 letter, I believed that if I received the requisite training, I would be able to carry out the surgery for which I had received training. I was not aware that, in order to carry out such procedures, I had to make formal application to the Medical Board of NSW to vary or remove the conditions imposed in 1990."

His statutory declaration pointed out that he had observed the other conditions imposed by the Medical Tribunal. He requested to be permitted to carry out hair replacement surgery and such general cosmetic surgery which was within his training and competence. He also requested that the restriction on his use of a scalpel be removed.

The Tribunal has no difficulty with the Applicant's request that the first and third conditions on his registration be removed. With the changes to the law in NSW concerning advertising by medical practitioners, neither of these conditions is now necessary. The present sections of the Act (ss. 113-116) and the associated Regulations suffice to deal with any future infringements of the Act. The Tribunal can see no reason why Dr Le's practice of medicine, in this respect, should be any more tightly constrained than that of any other

1 Statutory Declaration, page 5

registered medical practitioner. The substance of the application to this Tribunal therefore resides in the question of Dr Le's possession of the requisite knowledge and skills for the purpose of undertaking cosmetic surgery.

Appended to the Statutory Declaration were certificates attesting to his attendance at, or completion of, the various courses he had attended and a number of supportive character references.

Written evidence, presented by the Health Care Complaints Commission, from the Chief Executive Officer of the Royal Australasian College of Surgeons, quoted the Chairman of the College's Division of Plastic and Reconstructive Surgery, Dr David Robinson *FRACS*, who advised that:

- none of the courses had any professional standing with the College and could only be seen as being complementary to a full training program in aesthetic surgery;
- the College was unaware of the terms and conditions of membership for any of the organisations; and
- no qualification could be claimed upon completion of any of these courses, notwithstanding the fact that the parties conducting them might issue a certificate.

## THE NATURE OF THESE PROCEEDINGS

The onus is on the applicant to comfortably satisfy the Tribunal, on the balance of probabilities, that he has attained the necessary competence to have the restrictions on his practice of cosmetic surgery and on the use of a seal pel removed. The purpose of these proceedings and the paramount duty of the Tribunal in cases such as this, is the protection of the public and do not involve any element of punishment of the applicants. Specifically in this case, the Tribunal, to determine in the Applicant's favour, must be satisfied that there

are solid and substantial grounds for the conclusion that the applicant has completed the necessary training and attained the necessary skills such as to overcome the defects in his professional performance which led to the conditions being placed on his registration in 1990.

The applicant has not contended that the findings of professional misconduct were wrongly made. Accordingly, this Tribunal accepts that the findings concerning the Applicant's performance at that time were correct. That Tribunal was so concerned at Dr Le's lack of competence that it forbade him from using a scalpel. It is incumbent on the applicant to prove that he has since acquired the requisite skills such that that restriction on his practice of medicine can safely be lifted.

#### HAS THE APPLICANT PROVED HIS CASE?

In support of his application, Dr Le has given evidence before the Tribunal and submitted the various certificates testifying to the courses which he has attended or completed overseas and to his membership of various societies, he has called on Dr Marzola to testify as to his skills in the field of hair transplant surgery, and on Dr Harwood to testify to his skills in liposuction.

Arguing the contrary case, the Health Care Complaints Commission has produced the documentary evidence from the Royal Australasian College of Surgeons and the personal evidence of Dr Richard Barnett, a fellow of that College and current Chairman of the College's Division of Plastic and Reconstructive Surgery and President of the Australian Society of Plastic Surgeons.

The Tribunal would be remiss if it did not record the evident dispute between those specialist doctors who are fellows of the Royal Australasian College of Surgeons and who have subsequently specialised in plastic, aesthetic or cosmetic surgery and those doctors coming from a background of general practice who have studied and perform some aspects of cosmetic surgery. Whereas the former body of medical practitioners consider it necessary for a doctor to have a full surgical training before embarking on cosmetic surgical procedures, the latter group maintain that such extensive training is not necessary for what are essentially simple and non-invasive procedures. The Tribunal is not assisted in this matter by any of the medical regulatory authorities. The Act does not require the NSW Medical Board to maintain a register of specialists. While the Health Insurance Commission, which administers Medicare, does maintain a register of specialists, through its National Specialist Qualifications Advisory Committee, this recognition pertains purely to the performance of those procedures covered by the Medicare scheme; where the procedures do not attract any reimbursement from Medicare, the Commission has no interest in the qualifications of the doctor performing them. As this is the case with the cosmetic procedures of the sort undertaken by Dr Le, the Commission's recognition of specialists is of no utility to this Tribunal.

The Tribunal recognises that the practice of cosmetic surgery by general practitioners is widespread in Sydney<sup>3</sup> and would appear, to judge by its extensive advertising, to be in favour with the wider community.

The Tribunal can, therefore, do no more than recognise the 'turf battle' which exists between these two groups of doctors and assess the value of the evidence placed before it in that context.

<sup>3</sup> *vide* Sydney Yellow Pages, 1997, pp 1883-1895

### The Applicant's Evidence

At the outset, the Tribunal must record an observation, also made by the 1990 Medical Tribunal, in relation to Dr Le's competence in the English language.

That Tribunal commented<sup>4</sup>:

"The Tribunal has been conscious of the fact that the evidence in this matter has been given through an interpreter or by people whose native language is not English, excluding the expert witnesses. This includes Dr Le, who gave his evidence in English, but it was quite obvious to the Tribunal during the course of his evidence that there were certain nuances of meaning which Dr Le did not comprehend. The language factor has made the Tribunal's task more difficult in assessing the credit to be given in relation to each witness and the Tribunal has made appropriate allowances in relation to this."

In this hearing, the only witness whose native language is not English was Dr Le himself. As with the previous Tribunal, there were occasions when Dr Le appeared to be having some difficulty in understanding the nuances of the questions asked of him. Furthermore, Dr Le's claim not to have understood the specific implications of the findings of the 1990 Medical Tribunal appear to rest on his difficulties with English.

Counsel for the respondent, the Health Care Complaints Commission, has made the point that Dr Le was present throughout the twelve-day hearing in 1990, that he was present when the judgement was handed down, that there is evidence that he discussed the proposed conditions with his counsel who made a further written submission to the Tribunal querying the detail of the proposed orders, and that Dr Le was present when the final orders were handed down.

The Tribunal does not accept Dr Le's claim that he did not read the judgments, especially as he would have needed to have been acutely aware of the conditions placed on his registration if he were to attempt to comply with those conditions. While the Applicant's present counsel was willing to take the blame on his firm's shoulders for Dr Le not having been fully advised of the details of the conditions, the Tribunal does not accept that Dr Le's language difficulties prevented him from understanding the nature of the conditions.

Likewise, the wording of the conditions concerning his re-training and subsequent application to the Board for lifting of the conditions is so specific as not to be capable of being misunderstood. Indeed, counsel for the respondent has argued that Dr Le knew and understood the orders, but simply did not accept them. Counsel for the respondent has argued that the evidence indicates Dr Le's rejection of the findings of the 1990 Tribunal, in that:

- (a) he never sought a copy of the reasons for judgement<sup>6</sup>;
- (b) he failed to tell Dr Marzola<sup>7</sup> of the findings of the Tribunal or of the restrictions on his practice of medicine; and
- (c) he failed to tell Dr Klein<sup>8</sup> (one of his American tutors) of these matters.

Counsel argues further that Dr Le's breach of the conditions imposed by the 1990 Tribunal was not an honest error. Counsel has drawn the Tribunal's attention to the list of cosmetic procedures, performed between November 1995 and September 1996 on Z 1 patients, which had been submitted by Dr Le. It emerged in evidence, however, that Dr Le had performed a further eighty or so cosmetic operations (other than hair transplant procedures) at Dr Marzola's clinic in Woollahra, and evidence by Dr Harwood indicated that he

5 Transcript, page 9, line 5

6 Transcript, page 9, lines 5-54; p.13, line 36; p.14, line 35 7

Transcript, page 17, line 49; p.74

8 Transcript, page 58, line 5

had performed liposuction operations outside of the November 1995 to September 1996 time span.

The Tribunal was not convinced by Dr Le's answers to questioning on his understanding of the Tribunal's conditions<sup>9</sup>, even allowing for language difficulties. The applicant told this Tribunal that he had thought that the 1990 Tribunal wanted him to become "fully qualified as a surgeon in NSW"<sup>10</sup>. He subsequently made an inquiry and was informed of the requirements for surgical training in NSW. He decided not to pursue this course. Dr Le argued that his attendances at the overseas courses constituted relevant post-graduate qualifications.<sup>11</sup>

#### The Evidence of the Expert Witnesses

Dr Marzola gave evidence as to Dr Le's competence to perform hair transplant surgery. Impressed with Dr Marzola's evidence, the Tribunal made an interim order permitting Dr Le to perform hair restoration procedures. This type of procedure was not the subject of the 1990 Tribunal.

Dr Harwood is a relatively inexperienced practitioner of cosmetic surgery who attested to having seen Dr Le perform liposuction on two occasions, on both of which Dr Le was demonstrating his techniques and when Dr Harwood was in a learning role. His evidence does nothing to support the assertion of the applicant that he is now competent to perform cosmetic surgery.

Dr Barnett had given evidence to the 1990 Medical Tribunal. His written evidence, by way of an affidavit, described the type of surgery undertaken by Dr Le, discussed the risks associated with those procedures and detailed the training which candidates undergo in order to gain the Fellowship of the Royal Australasian College of Surgeons, with a special interest in cosmetic or plastic

<sup>9</sup> Transcript, page 18, lines 29ff; page 20, lines 16ff; page 23, lines 47ff

<sup>10</sup> Transcript, page 45, lines 22-24

surgery. In his evidence, Dr Barnett stressed the importance of a doctor's being able to properly assess patients wishing to undergo cosmetic surgery and being able to advise them which of a variety of surgical procedures would be most suitable for them. He did not consider it appropriate for a doctor, with only limited skills in undertaking specific procedures, to be recommending and performing those procedures because they were the only procedures the doctor was capable of performing. The Tribunal did not find Dr Barnett's evidence of assistance, one way or the other, in its consideration of whether or not Dr Le had obtained the necessary skills.

#### Dr Le's Competence to Undertake Cosmetic Surgery

Bearing in mind that the onus is on Dr Le to demonstrate that he has fulfilled the 1990 Medical Tribunal's conditions relating to training, the Tribunal has carefully considered the evidence which has been presented on his behalf. Dr Marzola's evidence does not go to the question of Dr Le's competence to perform a range of cosmetic surgery, but relates exclusively to his competence at hair transplant surgery. Dr Harwood's evidence, based on extremely limited exposure to Dr Le's work, and coming from someone then in the role of student, does not carry sufficient weight to persuade the Tribunal. The Tribunal is left with the evidence of Dr Le himself.

The Tribunal doubted Dr Le's credibility. The Tribunal did not accept his claim of not having understood the orders of the 1990 Medical Tribunal. In the Tribunal's view Dr Le is seriously lacking, and not simply in English language skills, if he failed to ensure that he did understand the findings of the earlier Tribunal, as was his duty as a responsible practitioner. The Tribunal has great difficulty in accepting that any practitioner would not wish to understand precisely what he was or was not permitted to do given the known ramifications of any failure to comply. Indeed, the submission made by his then counsel, following the handing down of the proposed orders, suggests

strongly that Dr Le was fully aware of the detail of the conditions and that he contributed to the formulation of the queries made by his counsel about the detail of the conditions. This conclusion throws his credibility into serious doubt. Furthermore, the Tribunal was not impressed by Dr Le's answering of questions during his evidence, While it is tempting to account for some of his answers entirely on the basis of language difficulties, the Tribunal is of the opinion that he was frequently evasive. It is noted that the 1990 Medical Tribunal, likewise, had difficulty in accepting Dr Le's assertions<sup>12</sup> of ignorance concerning the advertising of his practice. The Tribunal is also mindful that, if it were to accept that Dr Le's language skills are so poor as to explain his difficulties with his answers when under examination, then this would throw open the question of whether or not Dr Le possesses the necessary command of the English language required by s.13 (a) of the Act. This is not an area which the Tribunal wishes to pursue.

Dr Le has not produced any evidence of substance as to his having fulfilled the 'training' caveat placed on the conditions imposed on him by the 1990 Medical Tribunal, namely "if the respondent obtains any post-graduate qualification in NSW in surgery, it would become a matter for the Medical Board to lift the prohibitions imposed."

## DETERMINATION

The Tribunal has determined on the evidence before it that the first and third conditions placed on Dr Le's registration in 1990 are no longer necessary. It asks Dr Le to note carefully the provisions of ss.113-116 of the Act and the associated Regulations.

However, the Tribunal has determined on the basis of its findings that Dr Le has not discharged the onus of establishing that he possesses the knowledge

and skills necessary to perform surgical procedures without the direct supervision of a competent practitioner. The Tribunal has expressly excluded the performance of hair transplant procedures from this part of its determination.

## ORDERS

The Tribunal makes the following formal orders:

1. That the orders made by the Medical Tribunal of New South Wales on 29<sup>th</sup> June 1990 be revoked and discharged;
2. That the following conditions be placed on Dr Le's registration:
  - (a) That Dr Le be prohibited from performing any surgical procedures, with the exception of hair restoration/transplant procedures, unless he complies with all of the following conditions:
    - (i) that he notify the Medical Board of New South Wales ("the Board") in advance in writing that he intends to perform a surgical procedure;
    - (ii) that he give the Board at least 28 days notice of his intention referred to in (i) herein;
    - (iii) that all procedures be directly supervised by a medical practitioner ("the supervisor") approved of in advance by the Board in writing;
    - (iv) that he authorise the supervisor to notify the Board in the event that Dr Le fails to perform to the standard required by the supervisor and/or in the event Dr Le does not fully cooperate with the requirements of the supervisor and/or if the Board requires information about Dr Le's performance;
    - (v) that if he wishes, for any reason, to change his supervisor, he notify the Board and obtain its approval in writing in

advance of performing any surgical procedure under the supervision of the new supervisor, and that the new supervisor(s) shall have the same authority as the original supervisor, in accordance with these conditions.

- (b) That, within six months of performing any surgical procedure in accordance with conditions (i) to (v) herein, and every six months thereafter, Dr Le provide the Board with a list of all procedures performed, and the location at which those procedures were performed.
3. That Dr Le bear any costs associated with the supervision arrangements.
  4. That the Medical Board of New South Wales be the reviewing body.
  5. That each party pay its own costs of and incidental to these proceedings.

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F.A. KIRKHAM, DC  
Deputy Chairman



DRP. ARNOLD  
Member



DR C.  
HAMPSHIRE  
Member



MS R. S XTON  
Member

