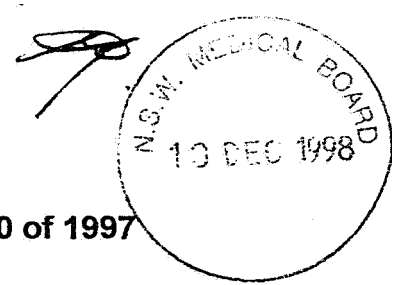


IN THE MEDICAL TRIBUNAL
CONSTITUTED UNDER
SECTION 146 OF THE
MEDICAL PRACTICE ACT 1992
AS AMENDED

No: 40010 of 1997



Deputy Chairperson:

Judge W.H. Knight

Members:

Dr. T. Robertson
Dr C. Berglund



DR. AKSEL IVANOV

ORDERS AND REASONS THEREFOR

On 12 November, 1998, the Tribunal found that the amended complaint against Dr. Aksel Ivanov had been proved and that such medical practitioner had been guilty of professional misconduct and unsatisfactory professional conduct within the meaning of sections 36 and 37 of the Medical Practice Act 1992 as amended.

The Tribunal on that date published its reasons for such findings and stood the proceedings over to 20 November 1998.

This was done to enable the parties to consider the published reasons of the Tribunal and in the light of those reasons to adduce any additional evidence that either party wished to put before the Tribunal as to the appropriate orders to be made (including orders as to costs) and also to enable the parties to make submissions as to such appropriate orders.

On 20 November 1998 senior counsel for Dr. Ivanov tendered a bundle of references but otherwise adduced no further evidence. Counsel for the complainant placed an itemised bill of costs before the Tribunal but otherwise also adduced no further evidence.

Both counsel addressed the Tribunal as to the appropriate orders to be made including orders as to costs.

Counsel for the complainant submitted that the appropriate order, having regard to the Tribunal's findings and published reasons, was for Dr. Ivanov's name to be removed from the register of Medical Practitioners kept under the Medical Practice Act 1992 as amended.

Senior counsel for Dr. Ivanov submitted that the appropriate order was to suspend Dr. Ivanov from practising medicine for three to six months with perhaps a condition that he undergo such further training in relation to the appropriate use of benzodiazepines as the Tribunal considered appropriate.

In making such submission on behalf of Dr. Ivanov senior counsel relied on the following matters:

First, that there was no suggestion that Dr. Ivanov was guilty of deceit or dishonesty or any other improper motive in committing the acts held to be professional misconduct, ie - his bona fides were not challenged;

Second , that it was not suggested that Dr. Ivanov's conduct was motivated in any way by greed or by a desire to obtain money. Thus although he obtained the usual Medicare fees for seeing the relevant patients he obtained no financial benefit from the acts found to constitute professional misconduct;

Third, Dr. Ivanov's motivation was a genuine sense of duty to the patients referred to in the complaints. In that regard, it was pointed out that Dr. Ivanov volunteered to conduct a clinic at a refuge for homeless persons (viz. Edward Eager Lodge) which had experienced difficulty in obtaining the services of a medical practitioner;

Fourth, that the patients the subject of the complaints were in a special category, namely, persons mostly seen in a refuge for homeless persons who had drug and other problems and who might aptly be described as the flotsam and jetsam of mankind;

Fifth, that Dr. Ivanov's treatment of such patients was designed to alleviate their problems. His was a noble motivation as his treatment was aimed at assisting the grossly underprivileged members of the community in relation to their medical problems; and

Sixth, that Dr Ivanov was a person of otherwise outstanding character who had practised medicine for approximately 47 years without any prior complaint, and who was remorseful and regretful over his demonstrated shortcomings.

Overall, it was argued that Dr Ivanov was a decent, humane and public spirited man whose practice was largely aimed at providing medical treatment for the grossly underprivileged members of the community and who had recognised his previous errors and would not repeat them. Accordingly he should be permitted, after a short period of suspension to mark the seriousness of his professional misconduct, to resume his practice of the profession he loves for the comparatively few years remaining to him, he being now aged 74 years.

In the Tribunal's judgment, where a medical practitioner has been found guilty of professional misconduct, the jurisdiction of the Tribunal to make orders pursuant to sections 60, 61, 62 and/or 64 of the Medical Practice Act 1992 as amended is to be exercised primarily for the protection of the public.

The Tribunal further considers that such protection of the public in any particular case involves consideration, inter alia, of the following matters:-

- a. the gravity of the professional misconduct involved. Such gravity will depend largely on the nature and the duration of the misconduct, but may also be affected by the motivation of the medical practitioner concerned and whether he has derived personal benefit from such misconduct ;
- b. the likelihood of the medical practitioner committing further professional misconduct of the same, or of a similar nature. Such likelihood will be affected by the recognition by the practitioner of the wrongfulness of . his conduct, his contrition therefor and the nature of his general character as found by the Tribunal; and
- c. the need to deter other medical practitioners who might be tempted to commit professional misconduct of the same or of a similar nature. This need is closely related to the necessity of maintaining the standards of the medical profession and public confidence in such profession.

In considering those matters, the Tribunal needs also to take into account any subjective considerations raised on behalf of the medical practitioner concerned. Those subjective factors, besides directly affecting the Tribunal's consideration of the appropriate orders necessary to protect the public, may also affect the Tribunal's determination of the gravity of the relevant professional misconduct and its determination of the likelihood of repetition, of either such misconduct or of other misconduct by the practitioner.

The Tribunal turns to consider all of those matters with respect to Dr. Ivanov. In doing so the Tribunal has approached the determination of the appropriate orders on the basis that the relevant standard to be applied is that of comfortable or reasonable satisfaction on the balance of probabilities in accordance with the principles set forth in **Briginshaw v. Briginshaw** (1938) 60 CLR 336 at 361-2, **Rejtek v. McElroy** (1965) 112 CLR 517 at 521,

Bannister v. Walton (1993) 30 NSWLR 699 at 711 and **Health Care Complaints Commission v. Litchfield** (1997) 41 NSWLR 630 at 635.

a. The Gravity of Dr. Ivanov's Professional Misconduct.

In the present case, when the particulars of the amended complaint which the Tribunal has found proved are carefully examined, it is apparent that the gravity of the professional misconduct committed by Dr Ivanov was very great indeed.

Thus, for example, in relation to 11 patients he prescribed a drug, flunitrazepam, which has significant known dangers, without exercising responsible medical judgment. The therapeutic use of such drug other than in a controlled withdrawal program is for 2- 4 weeks yet in the case of one of such patients, prescriptions were given by Dr. Ivanov on 141 occasion over 2 years and 44 weeks at a dosage of approximately three times the recommended daily dose. Similarly in the case of another of such patients prescriptions were given on 104 occasions over 2 years and 27 weeks.

It is unnecessary for the Tribunal to set out again the particulars of the amended complaint and the specific details in relation to each patient. Those particulars and details are already comprehensively stated in the Tribunal's reasons for finding the amended complaint proved. It is sufficient when considering the appropriate orders to note that the professional misconduct in relation to the prescription of benzodiazepines was repeated over a period of almost three years on an almost weekly basis. Furthermore, there was a failure to keep adequate medical records again over a period of almost three years. In addition Dr. Ivanov failed to keep a drug register in relation to the drug Pentazocine and prescribed the drug codeine to a patient without exercising responsible medical judgment over a period of 2 years and 10 months.

The Tribunal regards the actions of Dr Ivanov as being grossly improper and unethical over a very lengthy period.

It accepts that there is no direct evidence that individual patients suffered from his misconduct and that Dr Ivanov's motive was the medical assistance of underprivileged homeless people. It also accepts that he obtained no financial benefit from his misconduct. However the fact is that by his grossly improper prescribing habits Dr Ivanov was contributing substantially to drug abuse in the community and by his failure to keep adequate records he placed the interests of his patients in peril.

The Tribunal wishes to emphasize that this was not a case of a minor departure from appropriate standards nor was it a case of a departure from such standards in the case of a single patient nor was it a case of a departure from such standards over a very short period. In truth it was a gross departure from proper standards in the relation to eleven patients and such departures took place on an almost continuous basis over a total period of almost three years.

b. The Likelihood of Dr Ivanov Committing Further Professional Misconduct.

Dr Ivanov claimed to have changed his prescribing habits concerning flunitrazepam and clonazepam and to have commenced to keep clinical cards for his patients. It was also put on his behalf that he now recognised his failure to comply with appropriate standards and was remorseful and regretful over his demonstrated shortcomings. It was further submitted that there was thus little likelihood of his committing further professional misconduct of the same or of a similar nature.

Dr Ivanov vigorously contested the impropriety of his conduct before the Tribunal. He did this notwithstanding having made earlier written admissions which he attempted to withdraw before the Tribunal. In the Tribunal's view Dr Ivanov sought to defend conduct which, in truth, was such a gross deviation

from proper standards as to be indefensible. Although his counsel submitted that Dr. Ivanov was now remorseful and regretful over his demonstrated shortcomings there was little, if any, evidence before the Tribunal of any contrition by Dr. Ivanov for his misconduct. In those circumstances, and notwithstanding the strong evidence of his good character as shown by his character references, the Tribunal is not satisfied that once the threat of these proceedings has disappeared, there will not be a repetition by Dr Ivanov of his previous professional misconduct.

In coming to that view the Tribunal is fortified by the fact that it does not consider that the clinical cards which Dr. Ivanov produced in evidence before the Tribunal to demonstrate his present, as opposed to his erstwhile practice, constitute adequate patient medical records. Some of the cards were blank and others contained markedly insufficient information.

The Tribunal also notes that Dr. Ivanov gave no evidence after its findings as to his professional misconduct were published and thus the Tribunal has not had the benefit of hearing from him as to his present attitude to the misconduct which was found to be proved.

Moreover there were inconsistencies in Dr. Ivanov's evidence before the Tribunal which are set out in the Tribunal's reasons for finding the amended complaint proved. Those inconsistencies, when coupled with his demeanour whilst giving evidence would also cause the Tribunal to have misgivings about accepting that Dr. Ivanov now recognizes his previous shortcomings even if such evidence had been expressly given.

c. The Need to Deter Other Practitioners from Committing Professional Misconduct of the Same or of a Similar Nature.

The Tribunal considers it particularly important that other medical practitioners be deterred from the improper prescription of benzodiazepines and in particular, flunitrazepam and clonazepam. Dr Ivanov's gross departure

from proper professional standards over a period of almost three years is such that in the Tribunal's view it would be totally inadequate to deter other medical practitioners from improper prescription of those drugs were it to simply suspend Dr Ivanov for a period of 3 to 6 months.

Furthermore the keeping of adequate medical records in relation to individual patients is regarded by the Tribunal as an essential part of the modern practice of medicine and Dr. Ivanov's failure over a period of almost three years to do so in relation to the eleven specified patients was such a significant breach of appropriate standards that again to only suspend him from practice would not be, in the Tribunal's opinion, a sufficient deterrent to other medical practitioners who might be tempted to follow a similar path. Hence the Tribunal considers that to impose such a suspension would not assist in the maintenance of the standards of the medical profession and the public confidence in such profession.

As to the subjective considerations, the Tribunal does accept that Dr Ivanov is a decent, humane and public-spirited man whose misconduct was aimed at assisting patients who fell within the class properly described as very underprivileged members of our community. It further accepts that he is a man of advanced years who has never had any previous blemish on his professional conduct over a period of approximately 47 years, but notwithstanding those strong subjective factors, the Tribunal is satisfied that by reason of the gravity of the misconduct concerned, the general lack of contrition, the potential for a recurrence of such misconduct by Dr Ivanov and the need to deter other medical practitioners from engaging in such misconduct, the protection of the public requires that Dr Ivanov's name be removed from the medical register.

In coming to that conclusion, the Tribunal notes and applies the comments of Beazley JA in **The Law Society of New South Wales v. Ronald John Walsh** (Court of Appeal, unreported, 15 December 1997) at page 10 :-

`In general, mitigating factors, such as evidence of a respected reputation, no previously found misconduct, or service to the profession, "*are of considerably less significance than in the criminal sentencing process*" *Law Society of New South Wales v Bannister at 13'* (unreported, Court of Appeal, 27 August 1993).

In relation to the submission that suspension would be the appropriate order the Tribunal further notes that the effect of such an order would be that Dr. Ivanov would be entitled to recommence practice at the expiration *of* such period of suspension. It is thus implicit in any such order that in the Tribunal's judgment Dr. Ivanov would be a fit and proper person to resume medical practice at that time. See **Law Society of New South Wales v McNamara** (unreported NSW Court of Appeal 7 March 1980), per Reynolds JA at pages 7 and 8 and Clarke JA in **Jauncey v. Law Society of New South Wales** unreported NSW Court of Appeal 1 February 1989) both cited by Beazley JA in **Walsh's Case** at pages 12 -13.

Having regard to the gravity of the professional misconduct concerned, the length of time over which it was committed the general lack *of* contrition and the Tribunal's inability to be satisfied that such misconduct would not be repeated the Tribunal cannot be satisfied at the present time that Dr. Ivanov would be a fit and proper person to resume the practice of medicine at the expiration of any period of suspension. Accordingly on that further basis it also considers that suspension would not be appropriate having regard *to* the need to protect the public.

The Tribunal has given thought as to whether it should make an order pursuant to Section 64 (3) of the Medical Practice Act 1992 as amended that an application for review of its order not be made until after a specified time. It is conscious that, because of his advanced age, any such order might well have the effect that Dr. Ivanov would not be able to ever regain registration. Nevertheless it has come to the conclusion that it is appropriate to specify

such a time and considers that no such application should be made until after two years from the date of these orders, which period, it regards as the minimum time within which rehabilitation could occur.

As to costs, the complainant sought that Dr. Ivanov pay its costs in the sum of \$58,978.33. This was opposed by senior counsel for Dr Ivanov.

The submission was made on behalf of Dr Ivanov that extensive oral evidence in chief was given by Mr Thomson on 19 and 20 November 1997 and 16 March 1998, by Dr. Chung on 20 November 1997 and by Dr. Seidler on 16 and 17 March 1998 all of which would have been unnecessary had that evidence been contained in appropriate statements and tendered before the Tribunal.

The history of the matter is that on 17 July 1997 orders were made for the complainant to file and serve appropriate material by 15 August 1997 and for Dr. Ivanov to file and serve appropriate material by 17 October 1997. On 17 October 1997 the proceedings were fixed for hearing on 19 -21 November 1997 with an estimated hearing time of three days. On 30 October 1997 following a disagreement with his advisors Dr. Ivanov changed his legal representation and on 11 November 1997 made application for the hearing date to be vacated. The application was refused and the hearing date of 19 November 1997 confirmed.

Shortly prior to the commencement of the hearing Dr. Ivanov indicated that he intended to seek to withdraw the admissions made previously by him in his letter of the 15 May, 1996. In addition, on the first morning of the hearing Dr. Ivanov filed, for the first time a personal written statement dealing with the particulars of the complaint. This statement became Exhibit 2. These actions considerably changed the nature of the case which the complainant believed it had to meet. Counsel met that altered case by adducing oral evidence from Mr. Thomson and Dr. - Chung in November 1997 and then subsequently, in

March 1998 after the matter had been adjourned part heard, by calling oral evidence from Mr. Thomson and Dr. Seidler.

In the Tribunal's view, the need for Mr. Thomson, Dr. Chung and Dr. Seidler to give extensive oral evidence in chief was occasioned by the late change in position on the part of Dr. Ivanov. In that regard it notes that a report from Dr. Tahmindjis dated 8 February 1998 (Exhibit 6) supporting the propriety of Dr. Ivanov's actions was not served until February 1998. Such report also contained material that the complainant needed to place before Dr. Seidler for his comments. This was done by way of oral evidence as Dr. Seidler's report had been served months previously.

Accordingly, the Tribunal considers that there is no substance in the objection taken on behalf of Dr. Ivanov to the payment of the complainant's costs based on the complainant unnecessarily prolonging the hearing.

In general, the Tribunal considers this to be an appropriate case where costs should follow the event. However the Tribunal is mindful of the fact that it found that the particulars in paragraph 9 of the amended complaint dealing with the supplying of false or misleading information to the coroner had not been established. It also found that part of the particulars in paragraph 1 of the amended complaint in relation to patient H and the particulars in paragraphs 2, 3, and 4 of the amended complaint in relation to patient H had not been proved. In the Tribunal's view, Dr. Ivanov is entitled to have the complainant pay his costs in relation to those matters in respect of which the complainant was not successful.

The Tribunal further considers that approximately 5% of the hearing time of the proceedings including addresses was taken, up by the matters on which the complainant was not successful.

Although It would be possible for the Tribunal to order the complainant to pay 5% of Dr. Ivanov's costs and for Dr. Ivanov to pay 95% of the complainant's


costs the Tribunal considers that it is more appropriate to offset, in effect, the two possible orders and simply order Dr. Ivanov to pay 90% of the complainant's costs and disbursements, which amounts to \$53,080.50 (ie. \$58,978.33 less 10%).

In making the decisions it has in relation to costs the Tribunal is conscious that it may be arguable that any decision on costs is required to be made by the presiding Deputy Chairperson Judge Knight. See section 154 (4) and Schedule 2 clause 13 of the Medical Practice Act 1992 as amended. In order to avoid any potential dispute concerning the matter the Tribunal wishes to place on record that its findings and orders in relation to costs represent the unanimous views of all members of the Tribunal, including the Deputy Chairperson. Further, Judge Knight also wishes to have it recorded that he would have made the same findings and orders as to costs had he made the decision alone.

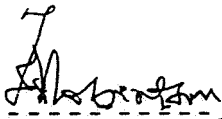
For the foregoing reasons, the Tribunal therefore makes the following orders:

1. That pursuant to section 64 (1) of the Medical Practice Act Dr Aksel Ivanov be deregistered (ie. that Dr. Aksel Ivanov's name be removed from the register of medical practitioners kept under the Medical Practice Act 1992 as amended);
2. That pursuant to section 64 (3) of the Medical Practice Act an application for review under Division 3 of Part 6 of such Act of the order that Dr. Aksel Ivanov be deregistered, not be made until after two years from the date of this order ie. until after 4 December 2000; and
3. That Dr Aksel Ivanov pay 90% of the costs and disbursements of the complainant, the Health Care Complaints Commission, of these proceedings such 90% being the sum of \$53,080.50.

Dated:- 7 December 1998



Judge W. H. Knight.
Deputy Chairperson



Dr. T. Robertson.
Member



Dr. C. Berglund.
Member