

HEALTH PRACTITIONER CASE SUMMARIES

1 MARCH 2012
HPCS 1

Below is a summary of recent health practitioner cases and links to the full decisions.

VICTORIA

[Medical Board of Australia v Erhardt \(Occupational and Business Regulation\) \[2011\] VCAT 1702](#)

- In 2009 patient's husband notified that his wife had affair with her doctor. Doctor admitted professional misconduct re intimate relationship (for 6 weeks in 1985 and again 16 years later following patient's divorce). Agreement re facts and appropriate determination. Doctor suspended for 3 months.

[Dental Board of Australia v Fibishenko \(Occupational and Business Regulation\) \[2011\] VCAT 1835](#)

- Finding of unprofessional conduct by Dentist for failing to obtain:
 - adequate diagnostic information before finalising treatment plan; and
 - patient's informed consent to the treatment plan (ie not providing adequate advice on risks and potential complications arising from implant surgery).
- Board also alleged failure to properly treat but abandoned this allegation after Board's expert gave evidence the treatment was not inconsistent with that of other dentists.

[Medical Board of Australia v Skehan \(Occupational and Business Regulation List\) \(No 2\) \[2011\] VCAT 1935](#)

- Findings of professional misconduct and unprofessional conduct of a serious nature for doctor transgressing professional boundaries, engaging in an inappropriate personal and emotional relationship with a patient, incompetent clinical management and dishonest record keeping and clinical practice.
- Dr also treated patient's husband and provided marriage counselling (ie. aggravating circumstance).
- Tribunal not satisfied that Dr has sufficient insight and therefore a risk of recidivism.
- Registration cancelled and disqualified from reapplying for 18 months (Board had sought 3-4yrs) but Tribunal took into account the "significant delay" as notification made in 2008 and not referred to Tribunal until 2010). Tribunal also recommended clinical management education if Dr is re-registered.
- Board sought costs because Dr's response to Board was "false, misleading and incomplete"; however, costs not awarded because Dr did "no more than put the applicant to its proof, which he is entitled to do".

[McEwan v Podiatry Board of Australia \[2011\] VCAT 2002 \(21 October 2011\)](#)

- Review Jurisdiction – Tribunal ordered removal of Board's previous conditions and new conditions imposed (competency assessment, supervised practice and monthly supervisor reports for 6 months).
- M graduated as a podiatrist and then practised for 5 months. A notification was then made regarding his competency. On 1 April 2011 the Board made a finding of unsatisfactory professional performance. M was cautioned and conditions imposed (mentoring and further education and training).
- Parties filed joint submissions on determination, which Tribunal accepted as appropriate.

[Reimers v The Medical Practitioners Board of Victoria and Anor \(OBR List\) \[2011\] VCAT 2004](#)

- Review Jurisdiction – Tribunal affirmed Board's decision (in 2010) to refuse R's registration application.
- In 2003 the NSW Medical Tribunal found professional misconduct by R (an anaesthetist) and ordered removal of name from register and no review of decision for 10 yrs. Suspended in 2000, he was effectively unable to apply for registration for approximately 13 yrs. Conduct included stealing drugs, lying to colleagues about drug addiction, performing work while drug-affected and acting negligently. One patient died and R was charged with but acquitted of, manslaughter by criminal negligence.

- In 2006 R was convicted of assault. Victim was a barrister involved in a relationship with R's (then) wife.
- R relied on 2010 report by his treating psychiatrist in which she considered he could practise safely with conditional registration but psychiatrist did not give evidence. Tribunal considered that R's further studies and present drug-free status did not constitute the "extraordinary circumstances" required for the Tribunal to make a decision that would undermine the NSW Medical Tribunal's 2003 decision, that R was banned from applying to practise in NSW until at least 4 November 2013.
- Tribunal acknowledged R had some insight but was concerned by his lack of insight into past conduct.

NEW SOUTH WALES

[Health Care Complaints Commission v Gatenby \[2011\] NSWNMT 26](#)

- Finding of professional misconduct against nurse following suicide of an adolescent psychiatric patient. Three year disqualification ordered.
- Failure to provide proper care and treatment, insensitive comments (described patient as an "attention seeker") and nurse gave misleading evidence at the Inquest.
- Tribunal noted nurses can rely on privilege against self-incrimination but are not entitled to "pretend they cannot remember" or "falsely deny" certain events when most people would "vividly remember" them for a long time.

[Camacho v Psychology Council of NSW \[2011\] NSWPST 1](#)

- Finding of unsatisfactory professional conduct (equivalent to Victoria's 'unprofessional conduct') against psychologist following criminal conviction for obtaining money by deception.
- Criminal Conviction - Psychologist pleaded guilty to 9 counts (submitted 260 invoices to WorkCover for consultations that did not occur). Sentenced to 250hrs community service and \$10,000 fine.
- Psychologist appealed (to the Tribunal) the Council's decision to suspend his registration.
- The Tribunal accepted Council's submission that the appeal was a hearing de novo and observed that the Tribunal's role was not to identify errors in the Council/Board's processes, nor to "play a supervisory role".
- The Tribunal also observed that a hearing de novo enabled consideration of steps taken by the practitioner to remedy his/her conduct deficiencies.
- Despite the gravity of the Psychologist's criminal conduct, the Tribunal noted that 'curiously' the matter was referred to the Council as a complaint of 'unsatisfactory professional conduct' only. The Tribunal observed that the additional complaints of 'professional misconduct', 'unfitness on the basis of conviction' and 'not of good character' would also have been 'open' on the facts of this case.

- The Tribunal noted the Psychologist's early guilty plea, reparation, admission of unsatisfactory professional conduct and willingness for conditions to be imposed on registration.
- The Tribunal was satisfied the Psychologist was: 'unlikely to commit any offences of this nature in the future provided that he takes care to maintain good mental health'.
- Psychologist reprimanded and required to provide the Tribunal's judgment to employers; not to work in private practice; financial audits for 2 years; 2hrs supervision per month for 2yrs; undertake 30hrs CPD in first 12mths plus 30hrs mandatory CPD; and continue treatment from GP and psychiatrist at least 2 times per year for 2yrs.

[HCCC v Deano \[2011\] NSWNMT 27](#)

- Findings of professional misconduct and unsatisfactory professional conduct against nurse/midwife for:
 - Sleeping in empty patients' beds and taking longer breaks than entitled to and encouraging other nurses to do the same;
 - Falsely recording medication administration;
 - Failing to properly supervise enrolled nurses on her shift (including allowing an EN to administer IV medication in contravention of policies); and
 - Contacting key witness in hospital investigation and seeking to influence evidence (unethical conduct).
- Tribunal found nurse's evidence contradictory, unconvincing, evasive and implausible. Nurse lacked insight or contrition and failed to accept that her conduct was inappropriate.
- Nurse's personal responsibilities (family) should not be allowed to impinge on professional duties.
- Less weight given to character references tendered by nurse because referees had not read complaint.
- Registration cancelled and disqualified from reapplying for 2 years. HCCC was awarded costs as the nurse's denials required HCCC to prove all allegations.

[Professional Standards Committee Inquiry into Dr Nadi Hanna](#)

- Finding of unsatisfactory professional conduct against doctor for unqualified procedure (given the location of the recurrent basal cell carcinoma on eyelid); inappropriate treatment; failure to refer the patient to a specialist surgeon; failure to follow up pathology results; and poor record keeping; and also for contravening the relevant provisions of the Medical Practice Regulations.

- Dr's objection to patient giving evidence at a late stage was upheld on grounds of procedural fairness.
- At time of conduct, Dr's registration was subject to conditions (audit of medical records) following previous disciplinary proceedings in 2008.
- A finding of unsatisfactory professional conduct was made against Dr. Committee noted that this included failure to maintain adequate medical records.
- Dr reprimanded and condition re auditing of medical records to continue. Committee held that Dr should not be prohibited from performing wedge excisions in all circumstances. Dr referred to Medical Council's Performance Committee regarding competence to perform wedge excision and clinical decision making.

[HCCC v Banks, Boyce, Gossip, Hinchcliffe and Sharp \[2011\] NSWNPSC 2](#)

- Findings of unsatisfactory professional conduct against 5 registered nurses in aged care facility.
- In 2007 patient suffered a neurological incident, was incontinent and unconscious for 15 minutes. Patient later complained of pain and cramping but was not reviewed by a medical practitioner until 7 days later. Three days later patient was observed in excruciating pain while being transferred to the shower.
- Committee noted that the general education of nursing staff at the facility was "basic" but that concerns regarding the Facility were outside the Committee's jurisdiction.
- 4 nurses reprimanded. 1 nurse cautioned. Conditions imposed on all 5 (education and/or mentoring).

[HCCC v Andrews \[2011\] NSWNPSC 4](#)

- Finding of unsatisfactory professional conduct (of a most serious nature) against registered nurse/midwife for acting outside her scope of practice, failing to adhere to hospital policy and failing to alert the medical emergency team.
- Midwife accepted that a vacuum delivery was outside her scope of practice but submitted that the seriousness of the emergency necessitated her to act immediately.
- Committee did not accept nurse's reliance on the Qld Nursing Council's Framework for Nurses and Midwives as the document has no direct force in NSW and would be over-ridden by local policies.

- Midwife reprimanded and conditions imposed (further education and mentoring).
- The evidence sought to distinguish care provided to a fetus in utero and neonate. Committee not required to determine this issue but noted that this did not sit comfortably with the general approach that should be made by health practitioners to care provided to a fetus.

[HCCC v SCULLY \[2011\] NSWNMT 28](#)

- Finding of unsatisfactory professional conduct and professional misconduct against endorsed enrolled nurse for inappropriate personal/sexual relationship with a mentally ill patient.
- The patient had a history of schizophrenia and poly-substance abuse. Nurse smoked marijuana with patient. The patient was also on a Community Treatment Order, supervised by the hospital.
- Nurse contravened codes of conduct by failing to inform her employer of the relationship.
- Registration cancelled and disqualified from reapplying for 1 year. Costs awarded to HCCC.

SOUTH AUSTRALIA

[Nursing and Midwifery Board of Australia v Kim and Li \[2011\] SAHPT 24](#)

- Two nurses fined and suspended for one month for providing test answers to their interstate friends.

[Dental Board of Australia v Smithson \[2011\] SAHPT 23](#)

- Finding of unprofessional conduct against dentist. Tooth extraction performed for 3 hours, causing “excruciating pain”. Patient told dentist to stop.
- Dentist should have ceased extraction much earlier and considered other forms of treatment.
- Dentist argued patient’s evidence was unreliable due to anaesthetic. Critical evidence was HICAPS receipt (as evidence of the procedure duration).

[Dental Board of South Australia v Kow \[2011\] SAHPT 25](#)

- Dentist admitted unprofessional conduct for providing unorthodox procedure (ie cleaning out wisdom teeth sockets) without patient’s informed written consent. Procedure also performed without patient’s medical history (ie diabetes).

- Dentist told patient that the procedure would improve cardiovascular health and energy levels (although not the patient's concerns). Client experienced infection.
- Board did not press for a finding that the procedure was unprofessional. Board identified 7 points for informed consent.
- Tribunal criticised treatment provided where no diagnosed need. Tribunal rejected submission that duration of pain (4 days) and no substantial injury were mitigating factors.

TASMANIA

[The Tasmanian Board of the Medical Board of Australia -v- Dr Ross Douglas Whittaker \(Ref No. 3/2011\) \[2011\] TASHPT 3 \(15 September 2011\)](#)

- Finding of professional misconduct against doctor for failing to co-operate with an investigation, without reasonable excuse and within a reasonable time. Doctor reprimanded and fined \$2500.
- Tribunal noted that refusal to cooperate in an investigation "cannot be condoned" and "strikes at the very foundation" of the Board's endeavours to maintain professional standards.
- Interestingly, the allegations that were the basis of the investigation (ie patient examinations) were adjourned sine die at the Directions Hearing.

QUEENSLAND

[Attudawage v Medical Board of Australia \(No 2\) \[2011\] QCAT 452](#)

- In March 2011 the Tribunal stayed the Board's previous decision to void Dr A's specialist registration.
- Dr A later qualified for specialist registration, which the Board accepted. However, the Board could not process the application because Dr A already registered as a specialist by reason of the stay.
- Neither party submitted that the Tribunal could take into account new evidence of Dr A's change of circumstances.
- Although the Tribunal had heard the matter 'on the papers' no decision had been made.
- The Tribunal reopened case to enable new evidence of Dr A's current qualifications. Parties afforded opportunity to make further submissions.

[Nursing and Midwifery Board of Australia v Dyason \[2011\] QCAT 423](#)

- Finding of unsatisfactory professional conduct (equivalent to Victoria's 'unprofessional conduct') against nurse for sexual relationship with prisoner while working at a correctional facility.
- Relationship of approximately 1.5 years but no evidence of physical sexual activity while nurse was patient's carer and nurse left her position shortly after relationship commenced.
- Registration cancelled and conditions imposed. The Board sought disqualification period of 3 years but the Tribunal ordered 18 months,

noting that the nurse would need to demonstrate her fitness for registration when the disqualification period ended.

- Costs awarded to the Board (capped at statutory limit of \$13,500). Although nurse had conceded the majority of allegations, she put the Board to unnecessary expense by later denying possession of a mobile phone used to communicate with the prisoner.

These case summaries have been generously provided by [Russell Kennedy's Health Law Team](#)

DISCLAIMER

The information contained in this update is intended as general commentary and should not be regarded as legal advice.

General Counsel