

Minter Ellison Health News

2 June 2010

Case Law

Commonwealth

Tisdall v Webber

The Professional Services Review Committee ('the Committee') found that Dr Peter Tisdall ('the applicant') engaged in inappropriate practice as a general medical practitioner under the *Health Insurance Act 1973* (Cth) ('the Act') by providing 80 or more services on 20 or more days during a 12 month period. The Committee held that there were no exceptional circumstances affecting the applicant's provision of services on those days. The applicant appealed to the Federal Court ('the Court') on the basis that the Committee failed to properly understand what was meant by 'exceptional circumstances' and that the Committee's decision was therefore affected by legal error.

In determining whether the applicant's practice was affected by exceptional circumstances, the Court held that, pursuant to Regulation 11 of the *Health Insurance (Professional Services Review) Regulations 1999* (Cth), it was necessary to have regard to unusual occurrences and the absence of other medical services necessitating an increased need for professional attendances. The Court held that the Committee was justified in considering that the scarcity of psychiatric counselling and radiology services pleaded by the applicant affected everyone attending general practitioners in the locality in which the applicant practised. In the absence of evidence that the applicant's patients had a disproportionate need for medical services, it could not be said that exceptional circumstances existed. The Committee's reasoning in this context was not 'infected' by an extraneous consideration and consequently no error of law was demonstrated. The Court also held that the Committee was not in error in failing to consider the requirements of Regulation 11 cumulatively.

The applicant also contended that the Committee, in stating that it was 'not convinced' that there were exceptional circumstances, imposed a higher onus of proof than the Act's requirement that the Committee be 'satisfied' of the existence of exceptional circumstances. However, the Court held that the Committee referred to its 'satisfaction' elsewhere in its judgment and, in referring to the fact that it was 'not convinced', merely demonstrated an 'understandable concern to achieve elegant variation'.

Consequently, the appeal was dismissed.

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Western Australia

Medical Board of Western Australia and L

The Medical Board of Western Australia ('the Board') applied to the State Administrative Tribunal ('the Tribunal') under section 78(b) of the *Medical Practitioners Act 2008* (WA) for an order that Dr L ('the applicant') was suffering from an impairment that was or was likely to adversely affect his ability to practise medicine. The alleged impairment was the applicant's alexithymia (inability to express emotions) and frotteurism (rubbing genitalia against non-consenting persons).

The applicant sought to have the proceedings struck out on the basis that they constituted an abuse of process. It was alleged that the Board sought to rely on a medical report by Dr Hall contrary to an agreement between the Board and the applicant as to the use that would be made of the report. Further, it was alleged that the proceedings had already been determined before the Board in 2006, thus creating an issue estoppel.

Dr Hall's medical report suggested that, while the applicant's alexithymia and frotteurism did not themselves have a direct impact on the applicant's ability to practice medicine, there was a moderate to high risk that if the applicant's conditions were left untreated, the applicant would engage in further sexually inappropriate behaviour in the course of his work as a medical practitioner. Consequently, the applicant's ability to safely manage the doctor-patient relationship would be compromised.

The Tribunal held that the applicant's statement that he agreed to undergo an assessment by Dr Hall solely to initiate a discussion with the Board regarding his impairment was only a statement of intention and did not establish that there was an agreement between the applicant and the Board as to the use of any report that might be prepared by Dr Hall. No other correspondence placed before the Tribunal indicated the existence of an express or implied agreement limiting the use of Dr Hall's report.

In 2006, the Board determined that the applicant's name should be restored to the register of medical practitioners on a conditional basis. The Tribunal held that the proceedings before it raised different issues to those determined by the Board and consequently issue estoppel did not apply. This was on the basis that:

- the Tribunal was being asked to determine whether the applicant had an impairment to such an extent that it adversely affected his ability to practise medicine while the Board merely determined whether the applicant has sufficient mental capacity to practise medicine;
- Dr Hall's report referred to factual material that post-dated the Board's 2006 decision; and
- the diagnosis reached by Dr Hall was different to previous diagnoses considered by the Board in its 2006 decision.

The Tribunal held that the applicant did not establish that the proceedings were an abuse of process and therefore the application to strike out was dismissed.

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New Zealand

Acting Health and Disability Commissioner Report: Wairarapa District Health Board

The Commissioner investigated a complaint received by Mr B about the services provided to Mr B's friend, Mrs A, by Wairarapa District Health Board (the DHB).

Mrs A attended Wairarapa Hospital's Emergency Department eight times during September and October 2008 with urinary retention, and received several referrals to the DHB's urology service. Mrs A was seen by a urologist in November 2008, who identified problems with an in-dwelling catheter and arranged for Mrs A to be taught self-catheterisation. In further follow-up tests in December, Mrs A was diagnosed with aggressive and advanced bladder cancer. She had a course of radiotherapy in January 2009, but died a couple of months later.

The Commissioner found that the DHB's systems for ensuring timely access to specialist urology care were not adequate. There was a lack of reasonable care and cooperation owing to deficiencies regarding referral triaging, arranging appointments and tests, and ensuring providers had access to relevant information. Accordingly, the DHB had breached Rights 4(1) and 4(5) of the Code of Health and Disability Services Consumers' Rights.

The DHB was also found to have breached Right 10(3) of the Code in taking four and a half months to respond to Mr B's complaint. The Commissioner said this did not reflect a fair investigation of his concerns.

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Health Practitioners' Disciplinary Tribunal: Susan Patricia Jury, Psychologist

The Health Practitioners' Disciplinary Tribunal (the Tribunal) investigated a charge of professional misconduct against Ms Jury alleging an inappropriate relationship with a client, Mr P, and the provision of misleading information about that relationship to her employer and the Health and Disability Commissioner.

The Tribunal was satisfied that Ms Jury had disclosed personal health information to Mr P, allowed Mr P to provide assistance to Ms Jury's son in buying a car, allowed Mr P to visit and stay overnight at her residence and to provide assistance in domestic affairs. While the Tribunal was not satisfied to the relevant level of persuasion that there was a sexual relationship, it found that there was an inappropriate personal relationship.

Furthermore, Ms Jury was found to have misled her employer in relation to the relationship. Accordingly, each of the particulars of the charge was established and a charge of professional misconduct was made out.

The Tribunal cancelled Ms Jury's registration and ordered that she undertake education on the importance of maintaining appropriate professional boundaries, the Code of Ethics and the need for supervision. Ms Jury was censured and ordered to pay a \$5,000 fine, plus \$18,000 in total towards the costs of the Tribunal and the Director.

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News

Aged Care

PC's Aged Care Inquiry Issues Paper

Minister for Ageing Justine Elliot welcomed the Productivity Commission's release of the Issues Paper for its public inquiry into the future of Australia's aged care system.

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General Health

Anaesthetists object to 'midwife bias'

Anaesthetists have called for a rewrite of new draft maternity guidelines, arguing that they ignore their role in childbirth, are biased towards the use of midwives and could leave women vulnerable to complications.

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Clinical psychologists pull rank

The push for a national standard for psychologists has caused a disagreement in Western Australia, where registered specialists fear losing their titles.

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NHMRC Strategic Plan for 2010 – 2012

The NHMRC Strategic Plan for 2010-2012 has been tabled in Parliament and released on the National Health and Medical Research Council website.

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Bid for rethink on GP fees

Doctors will push Prime Minister Rudd to change a key plank of his health reform plan which proposes paying general practices a block annual fee to treat patients with diabetes in a move which could be a template for the management of other chronic illnesses.

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Cochlear eyes more custom

Cochlear Limited is reportedly seeking consent from the US Food & Drug Administration to conduct a major multi-implant centre study to examine a broader criteria for hearing loss and word recognition for its range of Cochlear implants.

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Patel 'removed cancer-free bowel'

The Supreme Court trial in Brisbane of doctor Jayant Patel has heard a man was cleared of cancer within days of an operation by former the Bundaberg-based surgeon to remove part of his bowel.

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Funding fails to cut surgery list

The number of people waiting for elective surgery in NSW has risen by more than 4500, despite the allocation of \$38 million in Federal funds to cut waiting lists.

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'Killer' stomach bug strikes Australia

A deadly stomach bug that has killed thousands of people in North America and Europe is in Australia.

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Home treatment plan to ease hospital burden

A program in which paramedics are given greater powers to treat patients at home without transporting them to hospital could be extended across NSW.

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Hospitals

Leading clinicians to run hospital networks

Doctors and other health professionals will be given an increased role in running local hospital networks through "leading clinician groups" under a plan announced by Prime Minister Rudd.

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Pathology

Probe into pathology kickbacks

Pathology and diagnostic testing providers are set to face tougher levels of scrutiny after the establishment of a taskforce to investigate claims of bribery and kickbacks in the industry.

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Preventative Health

Sexually transmitted disease rates skyrocketing

Venereal disease among young Australians has skyrocketed, prompting a warning from health officials that HIV infection rates could also rise.

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Drinking drops as alcopop tax bites

Australians greatly cut their consumption of alcopops in the year after the Federal Government introduced its tax rise, figures show.

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New Zealand

Chemist starts claim against drug giant

A South Auckland chemist has made the first step in taking on drug giant GlaxoSmithKline in a test case to claim compensation for a drug recall.

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Inquiry into abuse of mental health patient

The Health Ministry is investigating Whanganui District Health Board's mental health unit after two staff members had inappropriate relationships with a female patient.

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Doctors can be struck off if they ignore the right to die, GMC to announce

Doctors could be struck off if they fail to respect the wishes of terminally ill patients who want to die by refusing treatment, the General Medical Council is to announce.

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Carer 'left hand-shaped bruise' on woman's face

A 93-year-old woman was attacked by a rest home caregiver and left with a hand-shaped bruise on her face, her relatives say.

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DHB apologises to family over treatment delays

Wairarapa District Health Board has apologised to the family and friends of an elderly cancer patient whose suffering was prolonged by diagnosis and treatment delays.

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Decision on doctor imminent

The professional fate of a Christchurch doctor facing sex and drug allegations should be known next month, more than six months after the charges were heard.

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Clinic paying patients to get checked

A Hamilton clinic is paying people to get vaccinations and pap smears, even though it admits it is unsure about the ethics of the process.

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