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HPCA LEGAL CASE NOTE

Health Care Complaints Commission v Jangodaz [2016] NSWCATOD 71

Background

This recent Tribunal decision dealt with the professional boundary issues of a dentist in engaging in a sexual relationship with his patient. The relationship was active during and beyond the course of dental treatment.

The complaints of unsatisfactory professional conduct and professional misconduct also particularised a failure to refer the patient to another practitioner, attempting to influence the patient to withdraw her complaint and making inappropriate and derogatory notations in the clinical records about the patient.

Standards of conduct – Dentists and boundary crossing

During the hearing an argument was made that there was no prohibition in the Dental Board of Australia's Code of Conduct against a dentist having a sexual relationship with a patient. That argument was based on an expert report considered in a 2013 Tribunal case about a dentist with boundary crossing complaints.

Ultimately, the Tribunal rejected this narrow approach. Instead it looked at the Code and other published professional standards guidance on the issue of boundary crossing. Although under s.41 of the *Health Practitioner Regulation National Law (NSW)* the Code approved by the National Board is admissible as evidence of what constitutes appropriate professional conduct or practice for the profession, the Tribunal noted that the Code states that is not exhaustive of appropriate standards of ethics and practice. Consequently, the Tribunal had regard to the Australian Dental Association (ADA's) guidelines in this area.

The Tribunal also took into account the underlying public policy disclosed by these professional publications, that a health practitioner engaging in a sexual relationship with a patient is:

- a. engaging in "primarily exploitative conduct", and that
- b. the abuse of power by a health professional is at the core of boundary crossing conduct.

In arriving at its conclusion that "[a] sexual relationship between practitioner and patient that arises through the therapeutic or clinical relationship is in and of itself inappropriate and a breach of professional boundaries" the Tribunal said:

The Tribunal rejects the view that dentists are under any lesser obligation than other health professionals concerning sexual boundary violations with patients. We reject any interpretation based upon isolated wording in the Code (such as "pursue" or "exploit") that suggests "something more" is required of unprofessional conduct

through boundary violation in dentistry than the abuse of power which inheres in the professional relationship. (paragraph 29)

This exploitative conduct also underpinned the other complaint particulars, such as trying to influence the complainant to withdraw the complaint, making inappropriate notations in the clinical records about the patient and not referring the patient to another dentist for treatment at an early stage.

Professional duty to avoid boundary crossing and consequences

In this case the Tribunal was unequivocal in its view of the obligations of a dentist in avoiding boundary crossing, stating that:

- Dentists have no lesser standard of conduct than other health professionals in managing professional boundaries,
- The duty to ensure that a sexual relationship with a patient does not happen is a paramount one for the dentist,
- This paramount duty is not negated by the patient's conduct, including whether the patient consented or initiated the sexual contact and those factors are not a defence to the standard, and
- The vulnerability of the patient is not the determining factor in escalating the seriousness of the complaint.

Outcomes

Whilst the practitioner had admitted the particulars of the complaint the Tribunal viewed his evidence as failing to accept responsibility for his conduct. This was also bolstered by his lack of insight into his conduct, and the paucity of evidence regarding substantive rehabilitative steps taken to remedy the deficits in his professional practice in the 2 years between the complaint being made and the Tribunal hearing.

Consequently, the Tribunal ordered the cancellation of the dentist's registration. This order was coupled with a preclusion period of one year before he can apply for a review of the cancellation order. These orders were made to mark the seriousness of the conduct and send a message to the dental profession and the community.

Conclusion

The Tribunal's concise analysis of the dentist's conduct and the importance of maintaining professional boundaries and not exploiting the position of power and trust that a dentist has over a patient were clearly reinforced in this decision. Dentists and other health professionals have a paramount duty to observe and maintain professional boundaries with their patients because of the power imbalance in the therapeutic or clinical relationship and position of trust held by the health professional.

The full text of the decision can be found at:

<http://www.austlii.edu.au/au/cases/nsw/NSWCATOD/2016/71.html>

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