香港醫務委員會
The Medical Council of Hong Kong

DISCIPLINARY INQUIRY
MEDICAL REGISTRATION ORDINANCE, CAP. 161

Dates of hearing: 12 December 2012 (Day 1), 1 January 2013 (Day 2), 27 January 2013 (day 3), 23 February 2013 (Day 4), 3 March 2013 (Day 5), 9 March 2013 (Day 6), 18 March 2013 (Day 7)

Defendant: Dr TSANG Ka Hung, Barry (曾家雄醫生)
(Reg. No. M10316)

1. The charges against the Defendant, Dr TSANG Ka Hung Barry, are that:-

Case A

"He, being a registered medical practitioner, abused his professional position in relation to his patient Madam A ("the Patient") in that:-

(1) in May 2008, he instigated and/or arranged for the Patient taking out an insurance policy with the insurer with which he acted as a Sales Manager ("營業經理");

(2) from June to September 2009, he had had a sexual relationship with the Patient.

In relation to the facts alleged, he has been guilty of misconduct in a professional respect."

Case B

"He, being a registered medical practitioner, was convicted at the Kwun Tong Magistrates' Courts on 17 January 2011 of four counts of an offence punishable with imprisonment, namely, obtaining access to computer with a view to dishonest gain for oneself or another, contrary to section 161(1)(c) of the Crimes Ordinance, Cap. 200, Laws of Hong Kong."

Facts of the case

Case A

2. Case A involves the Defendant's dealings with one of his patients, i.e. Madam A. The Defendant's first marriage had ended in divorce in April 2006. He was married again in May 2008, and a son was born in October 2008.

3. Madam A first consulted the Defendant in February 2008. According to the patient record maintained by the Defendant, there were 36 consultations up to October 2009. In other words, they were in a doctor-patient relationship at least up to October 2009.

4. At the relevant time, the Defendant was also the Sales Manager of an insurance company. In May 2008, he promoted to Madam A an illness insurance plan of his insurance company. Madam A agreed to take out a policy. In the proposal dated 27 May 2008, the Defendant acted as the agent.

5. In 2009, the Defendant and Madam A developed a close relationship and treated each other as lovers. She brought him soup, and he went out with her. They went out dating, shopping and dining together.

6. Madam A said that the Defendant told her that he was single, and in June 2009 showed her his divorce paper to prove his single status. The Defendant said that in October 2009 he showed Madam A both his divorce paper and the marriage certificate of his second marriage, in order to rebut Madam A's accusation that he was not married to his second wife.

7. Madam A said that there was sexual intercourse between them. The Defendant denied, maintaining that their relationship was purely platonic.

Case B

8. Case B involves the Defendant's convictions for making fraudulent claims to the Department of Health for reimbursement of vaccination fees under the Government's "Elderly Vaccination Subsidy Scheme".

9. In November and December 2009, the Defendant submitted 4 claims for reimbursement of fees for vaccination in respect of 4 patients, falsely pretending that he had given vaccination to those patients. The claims were submitted through the Department of Health's "eHealth" computer system.

10. The claims were $320 each, but reimbursement of only the first 3 claims had been made, as the offences were discovered before reimbursement for the last claim was made.

11. He pleaded guilty to the criminal charges, and mitigated on the basis of a number of factors including the fact that he would face a disciplinary hearing by the Medical Council. The Court sentenced him to 120 hours of community service.

12. The Defendant was also charged with 4 other counts of the same offence. The prosecution offered no evidence on those charges, and the charges were dismissed. We shall disregard those 4 dismissed charges.

13. The offence of "obtaining access to computer with a view to dishonest gain for oneself or another" is punishable with imprisonment for 5 years.

Findings of the Council

Case B

14. We shall deal with Case B first, as it can be dealt with briefly.

15. The Defendant admits that he was convicted of the 4 criminal charges. In the circumstances, we find that the disciplinary charge is proven.

Case A

16. We now turn to Case A.

Insurance charge

17. Charge (1) is in relation to the Defendant's arrangement for his patient Madam A to take out an insurance policy in May 2008. He promoted the insurance product to her, and she bought the product through him. At that time, she was his patient for only 3 months.

18. The insurance policy was an illness insurance plan. Given that the proposal was filled out and signed by the Defendant as the insurance agent, it cannot be denied that he arranged for Madam A to take out the policy.

19. According to the Defendant's explanation to the Preliminary Investigation Committee, he promoted the insurance product to Madam A "*in his capacity of [Madam A's] friend/lover*", doing so outside the clinic in a sushi bar during a meal.

20. The Defence argument is that by conducting this insurance business outside of the clinic there was no question of professional conduct in connection with his medical practice. However, this is a simplistic argument in disregard of the doctor-patient relationship between Madam A and him.

21. The doctor-patient relationship is a keystone of medical care. The patient must be able to confide in the doctor without concern about the confidentiality of what is confided. It is a relationship based on trust,

and requires the doctor to maintain a high standard of trustworthiness. A doctor should not engage in commercial dealings with his patients in order to make financial gains. In so doing, the doctor is exploiting and taking advantage of his patient's trust in him.

22. In a doctor-patient relationship, there is an inequality of power. The doctor is in a superior position, with the ability to influence the patient who is vulnerable to the doctor's persuasion. It is a dangerous proposition that a doctor by conducting a sideline business outside of his clinic can legitimately sell commercial products to his patients with impunity.

23. Commercial dealings with patients will likely place the doctor in a position of conflict, which will prejudice the doctor's duty to his patient. This is particularly obvious in respect of health insurance claims, in which the insurance agent's duty is to the insurer, whereas the doctor's duty is to the insured patient. If the two roles are combined, considerations of the insurer's interest will compromise the doctor's duty to his patient.

24. We are satisfied that by promoting and selling the insurance plan to Madam A the Defendant has compromised his professional duty to his patient. We are satisfied that his conduct has fallen below the standard expected amongst registered medical practitioners. We find him guilty of Charge (1).

Sexual relationship charge

25. Charge (2) is in relation to the Defendant's sexual relationship with his patient Madam A. The alleged sexual relationship took place from June to September 2009.

26. Before dealing with the evidence, we must set out the rules of professional relationship between doctors and patients:-

    (a) Section 25.1 of the Code of Professional Conduct provides that any form of sexual advance to a person with whom the doctor has a professional relationship is professional misconduct. The Council takes a serious view of a doctor who uses his

professional position to pursue a personal relationship of a sexual nature with his patient or the patient's spouse.

(b) Section 25.2 of the Code provides that the practice of medicine often involves a close personal relationship between doctors and their patients, and patients sometimes become emotionally dependent. A doctor must be aware of such a possibility and that to take any advantage of such dependency may be abuse of responsibility and trust. Doctors should exercise special care and prudence in situations which could leave them open to such an allegation.

27. A professional boundary exists between doctors and patients. If this boundary is breached, this can undermine the patient's trust in the doctor, as well as the public's trust in the medical profession. In order to maintain the professional boundary and the trust of patients and the public, a doctor must not pursue a sexual or improper emotional relationship with a patient.

28. It is a danger sign when a doctor feels being attracted to a patient or the other way round, sees the patient at unusual hours, accepts social invitations from the patient, or reveals intimate details of his personal life to the patient. The slippery slope of escalating boundary violations may begin with interpersonal attraction and off-hours appointments, progressing to rendezvous outside of the clinic, and ultimately leading to sexual intercourse between the doctor and the patient. All doctors must be alert to such danger signs and exercise caution to guard against the development of any improper relationship.

29. We then turn to the evidence.

30. We remind ourselves that allegations of sexual conduct are easy to make but difficult to rebut. We shall scrutinize Madam A's evidence critically.

31. Although it is not a requirement of law that Madam A's evidence be corroborated by independent evidence, we must take particular care in assessing whether to accept her evidence. We find corroboration as follows:-

(a) Madam A's evidence of the Defendant showing his divorce paper to her is confirmed by the Defendant's admission, although the Defendant said that it was done on a different occasion for a different purpose. We find the Defendant's version illogical, as the divorce paper was completely irrelevant if he wished to prove that he was married to his second wife.

(b) The lovers relationship was admitted by the Defendant in his explanation to the Preliminary Investigation Committee, although he subsequently attempted to retract that admission in his evidence accusing his former solicitor of making up that explanation without his knowledge.

(c) The Defendant admitted, and the clinic assistant confirmed, that on a number of occasions Madam A brought him soup. Both the Defendant and the clinic assistant were aware that this was an indicator of an affectionate relationship exceeding that between a doctor and a patient.

(d) The Defendant admitted in his explanation to the Preliminary Investigation Committee that he went dating, dining and shopping with Madam A.

(e) There were photographs of the Defendant and Madam A in a shopping mall, with their heads mutually leaning upon each other. The Defendant said that the photographs were taken as mementos (although the Defendant said that the purpose was also to try out the new camera).

32. In his explanation to the Preliminary Investigation Committee, the central theme was that the Defendant's insurance dealing and personal relationship with Madam A took place when there was no doctor-patient relationship between them. He emphasised that in March 2008 (i.e. about 1 month after Madam A's first consultation) he deliberately terminated the doctor-patient relationship in order to develop the lovers relationship with her. There were many references to this lovers relationship, for example (emphases added):-

(a) "*…their doctor-patient relationship lasted for a brief period of time only. When Dr Tsang sensed [Madam A] treating him somehow differently, he expressly told [Madam A] of the restriction of the concerned rules of doctor-patient relationship, and such doctor-patient relationship had to end if they were to develop, so Dr Tsang and [Madam A] reciprocally terminated their doctor-patient relationship by respectively engaged in conducts that would not have been acted normally by a patient and doctor including but not limited to giving free consultation and medication to [Madam A], the parties' dating, shopping and dining, communicating on phones on internet about non-medical matters, dropping in occasionally bringing him soup that [Madam A] specially cooked for him. Most important of all, **they treated the other as lover**.*"

(b) "*Dr Tsang came to realize that **[Madam A] was in affection for him** and had treated him differently and he needed to terminate the doctor-patient relationship if they were to develop. Dr Tsang had expressly mentioned to [Madam A] of the concerned rules of his profession regarding relationship between doctor and patients prior to his termination of such relation **in or about March 2008**…and when Dr Tsang ceased charging [Madam A] for the consultation and medication and **started treating [Madam A] differently from his patients**.*"

(c) "*[Madam A] and Dr Tsang then **started dating each other**, they went out shopping and dining, **they became lovers***"

(d) "*Both parties understood that they were not doctor and patient but **friend and/or lover to each other***"

(e) "*On or about May 2008, Dr Tsang, **in his capacity of [Madam A's] friend/lover**, and via text message asked [Madam A] whether she would like to take out insurance.*"

33. At the inquiry, the Defendant attempted to retract his explanation, blaming his former solicitor Mr Gibson Li for making up the final explanation without his knowledge.

34. We have heard from Mr Gibson Li, after the Defendant expressly waived the legal professional privilege attaching to the communications regarding the disciplinary proceedings. From the emails and Mr Li's evidence about the Defendant's telephone instructions, it was clear that at the very beginning of the communications the Defendant gave the instructions that the "*lovers relationship*" and "*dating*" started after termination of the doctor-patient relationship. He even pointed out that Madam A in her statement to the Medical Council was hiding the facts of "*We fall in love*", "*We started dating*", "*We lunch and dinner together*", but these were stated in her police statements which could be of assistance to him in his explanation to the Preliminary Investigation Committee. This central theme remained unchanged from the first draft to the final explanation which was issued. We are satisfied that the Defendant had carefully considered and commented on each draft before giving approval for Mr Li to issue the final explanation to the Preliminary Investigation Committee.

35. The Defendant gave evidence denying having a lovers relationship with Madam A at any time. His evidence was changing all the time. Illogicality and sophistry abounded. His evidence was also contradicted by other evidence. To cite some examples:-

(a) His oral evidence that he never told Mr Gibson Li that he and Madam A were lovers and dating was contradicted by the emails which he sent to Mr Gibson Li.

(b) His explanation to the Preliminary Investigation Committee was that he ceased charging Madam A for consultation and medication since March 2008, indicating termination of the doctor-patient relationship. The patient record was enclosed, showing that charge $0 was recorded in each consultation from 9 March 2008 onwards. However, Madam A's oral evidence on 1 January 2013 revealed that at each consultation she had signed an insurance claim voucher for her employer's group insurance, which was supported by the vouchers for the consultations on 21 August 2009 and 7 October 2009 bearing both Madam A's and the Defendant's signatures. On 17 January 2013, the Defendant tried to salvage his position by a supplemental written statement, stating that he "*did all along*

charge Madam A for consultation and medication" but Mr Gibson Li got it wrong. Nevertheless, this was later contradicted by his first email to Mr Li stating that "*the patient record showed I did not charge her for consultation after the "Lovers relationship" started*".

(c) In his written statement dated 31 December 2012, he stated that "*I never showed her any divorce papers as she said and I had no reason at all to show her such papers*". However, in his oral evidence he contradicted himself by saying that on 7 October 2009 he showed Madam A his divorce paper and his marriage certificate of his second marriage in order to rebut Madam A's accusation that he was not married to his second wife. This was again contradicted later by his email to Mr Gibson Li confirming that "*I did showed her that document*", in reply to Mr Li's question "*Did you produce to her in June 2009 as she alleged copy of decree absolute to prove your status?*".

(d) In his oral evidence, he said that he never read the draft and amended draft explanation to the Preliminary Investigation Committee. However, Mr Gibson Li's evidence showed that he had made specific comments and modifications to each draft, therefore he must have read the drafts.

(e) In his oral evidence, he said that after the third time that Madam A brought him soup in early 2009, he was afraid that she might cross the professional boundary. So he deliberately kept a distance from her, and insisted that the clinic assistant must come into the consultation room as chaperone during Madam A's consultations. However, he contradicted himself later by conduct, going out with her for lunch and shopping on 1 September 2009, and also took photographs in an intimate manner as mementos.

36. We find that the Defendant is a dishonest and unreliable witness. We reject his evidence, save insofar it is consistent with Madam A's evidence.

37. The Defendant called 4 alibi witnesses, including his wife, a relative, a clinic assistant and a cleaner. Their evidence was for the purpose of

showing that the Defendant could not have been at the places in which sexual intercourse was alleged to have taken place on the 5 occasions alleged by Madam A.

38. The clinic nurse and the cleaner had no recollection of the 5 occasions on which sexual intercourse was alleged to have taken place, including the 2 occasions when intercourse was alleged to be in the clinic during the 3 hours when the clinic was closed in the afternoon. They could only say what would have been the usual routine for the majority (but not all) of the time. They could not even remember whether they were on leave on those dates. Such evidence does not provide alibi for the Defendant.

39. The relative gave evidence in respect of 13 June 2009. About 3 years later she first recalled what happened on that date because it was the first school day of the Defendant's son in a playgroup in Kowloon Tong. Her evidence was that she had lunch with the Defendant and his wife together with the son and then went shopping together until the evening.

40. However, this was entirely different from the Defendant's email to his former solicitor (Messrs Howse Williams Bowers) on 26 September 2011 in preparing for the alibi evidence, which gave specific details about the first school day of the son (who was born on 8 October 2008 and was exactly 10 months old on 8 August 2009):-

> "*I have patients in hospital on 8-8-2009, and a minor operation in hospital in afternoon of that day. Night time I was having dinner with my wife. That day was the FIRST day of my son (10 months old at that time) to attend Playgroup in Kowloon Tong. It was a very special day and that why we could recall what we had done.*".

41. On this issue, it is relevant to point out that the Defendant in subsequent emails to Messrs Howse William Bowers again gave a different version as to the intended alibi evidence.

42. Having regard to the inconsistency and the relative's relationship with the Defendant, we cannot accept her evidence.

43. As to the wife, we find that her evidence was contrived and artificial. She gave evidence in a rather dramatic manner, sometimes hystrionic, sometimes solemnly accusative of Madam A, and sometimes deeply reflective and self-critical. Nevertheless, she was completely in control of her emotions, being able to switch instantly from one mood to another.

44. The wife's evidence was illogical, and was obviously contradictory to what she consistently told her psychiatrist and clinical psychologist in many consultations in the past 4 years. In order to preserve her privacy, we shall not enumerate the various contradictions, save to say that a reasonable reading of the consultation notes reveals that her complaints as recorded in the notes were significantly different from her oral evidence.

45. The wife was unable to give any plausible explanation as to why she adopted a relaxed and confident attitude towards Madam A despite her knowledge that Madam A was bringing soup to her husband and had rendezvous with him outside the clinic, given her unrealistically tight control of the Defendant's daily life and her hostility towards all other women around him owing to jealousy and diffidence. Her explanation that in light of the many beautiful acquaintances of the Defendant, Madam A's appearance posed no threat was plainly absurd. We are of the view that she distorted her evidence heavily in order to assist the Defendant. We reject her evidence.

46. Although the wife's complaints about the Defendant recorded in the consultation notes supported Madam A's evidence in a number of respects, we remind ourselves that such notes do not constitute evidence against the Defendant. We shall disregard such notes in deciding on the charge.

47. We also remind ourselves that we should not rely on the confidential communications between the Defendant and his lawyers as evidence against the Defendant, unless they were clearly instructions given by the Defendant as to what had actually happened (as distinct from discussions on the possibilities or analysis of the evidence).

48. Although we have found the Defendant to have lied extensively, we do not have to rely (and we have not relied) on the lies as evidence in

coming to the following findings.

49. Having considered all evidence and assessed Madam A's evidence with particular care, and bearing in mind the seriousness of the accusations thus the need for strong evidence in order to prove them, we make the following findings:-

(a) there was a doctor-patient relationship between the Defendant and Madam A from 11 February 2008 to 7 October 2009;

(b) the Defendant had showed his divorce paper to Madam A in order to convince her that he was single;

(c) the Defendant had made various sexual advances to Madam A, suggesting that they go to hotels for sex;

(d) there was a lovers relationship between the Defendant and Madam A, which trespassed beyond the professional boundary in a doctor-patient relationship;

(e) there was sexual intercourse between the Defendant and Madam A;

(f) the lovers relationship and sexual intercourse took place during the time when Madam A was the Defendant's patient.

50. We are satisfied that the Defendant's conduct was seriously below the standard expected amongst medical practitioners. We find him guilty of Charge (2).

51. We must point out that even if we had not made the finding of sexual intercourse, the mere finding of the lovers relationship (which was proffered by the Defendant in his explanation to the Preliminary Investigation Committee to show that it was a consensual relationship with no impropriety) was sufficient for finding professional misconduct.

52. It is a vain argument that by artificially pretending that the doctor-patient relationship has been terminated by agreement (when in fact there is such a subsisting relationship) it is acceptable for the

Defendant to develop a lovers' relationship with his patient, current or previous. It is also a misguided belief that a sexual relationship must involve physical contact between the two.

53. In this regard, we entirely agree with Lord Upjohn's remarks in _McCoan v. General Medical Council_ [1964] 1 W.L.R. 1107:-

> *"One of the most fundamental duties of a medical adviser, recognised for as long as the profession has been in existence, is that a doctor must never permit his professional relationship with a patient to deteriorate into an association which would be described by responsible medical opinion as improper. It is for this reason that the Medical Acts have always entrusted the supervision of the medical adviser's conduct to a committee of the profession, for they know and appreciate better than anyone else the standards which responsible medical opinion demands of its own profession.*
>
> *Sexual intercourse with a patient has always been regarded as a most serious breach of the proper relationship between doctor and patient."*

54. In summary, the Defendant is guilty of all 3 charges.

Sentencing

55. The Defendant has a clear record.

56. We shall give him credit for admission of the factual allegations in respect of the criminal conviction charge and the insurance charge. However, given that such allegations are indisputable in any case, the extent of credit will be necessarily smaller than credit in other cases.

57. The Defendant disputed the sexual relationship charge strenuously, challenging every possible issue including his former lawyers. This shows that he has no remorse at all.

58. Of the 3 charges, the sexual relationship charge is the most serious. As we have pointed out earlier, it is a fundamental duty of all doctors to maintain the professional boundary in a doctor-patient relationship and not to pursue any improper relationship with their patients. As Lord Upjohn said, sexual intercourse with a patient has always been regarded as a most serious breach of the proper relationship between doctor and patient.

59. The public reposes in the medical profession a high degree of trust, as in medical practice doctors are often involved in physical examination of patients and are privy to intimate details of the patient's life. Patients seeking medical help are often vulnerable (emotional or physical) and can easily be manipulated by unscrupulous members of the profession.

60. Any sexual impropriety by a doctor towards a patient will seriously undermine the public trust in the profession. We cannot allow the delinquent few to blemish the reputation of the profession which has been built up over the years. A clear message must be sent as to the seriousness with which this Council regards any sexual impropriety towards patients.

61. In respect of the insurance charge, the impropriety lies in the Defendant putting himself in a position of conflict with his duty as a doctor. However, we accept that there is no evidence of abuse of the patient's trust in the present case. We consider that an order of reprimand is appropriate.

62. In respect of the criminal convictions charge, we do not accept that the Defendant committed the 4 criminal offences out of negligence. From the materials produced by the Defence in mitigation, the Defendant was required by the Department of Health to repay $21,840 of fees which he successfully claimed under the Health Care Voucher Scheme and the Elderly Vaccination Subsidy Scheme but was unable to produce the relevant patient consent forms. This reflected that the defendant was involved in about 200 other similar claims. While in sentencing we shall not have regard to these claims for which there is no disciplinary charge, they completely negate the mitigation that the 4 criminal offences were committed out of negligence.

63. The criminal offences involved deliberate fraud perpetrated upon a public body. We consider that an order of 4 months removal from the General Register is appropriate for the criminal convictions charge.

64. In respect of the sexual relationship charge, we accept that sexual intercourse was consensual in the present case. However, this does not change the fact that it is a most serious breach of the proper relationship between doctor and patient.

65. It is a fundamental rule of medical ethics that doctors must not pursue an improper personal relationship with patients. The fact that the patient willingly succumbs to the doctor's suggestions, or even if the sexual relationship is instigated by the patient, is no excuse for the doctor to allow himself to breach the rule.

66. The Defendant actively solicited Madam A for sexual intercourse. He used his divorce paper to induce her into succumbing to his solicitations. He committed the misconduct deliberately with planning. He can be a danger to his patients. In the circumstances, indefinite removal from the General Register is necessary in order to protect the public.

67. We are satisfied that immediate implementation of the removal orders is necessary in order to protect the public.

68. Having regard to the gravity of the cases and the mitigating factors, we make the following orders:-

    (a) In respect of Case A Charge (1), the Defendant be reprimanded.

    (b) In respect of Case A Charge (2), the Defendant's name be removed from the General Register indefinitely. The order shall take effect immediately upon its publication in the Gazette.

    (c) In respect of the single charge in Case B, the Defendant's name be removed from the General Register for a period of 4 months. The order shall take effect immediately upon its publication in the Gazette.

(d) Given that the respective charges are separate and distinct, the removal orders shall run consecutively.

69. Although any application for restoration to the General Register is a matter to be decided when the application is made, we recommend that any application for restoration by the Defendant submitted earlier than 5 years after the removal should not be considered.

70. If an application for restoration is made after at least 5 years, we recommend that the Council should not approve the application unless the Defendant produces cogent and concrete evidence that he has fully rehabilitated from his misconduct. We further recommend that the Council should impose a condition that the Defendant practice be subject to a monitoring condition for at least 2 years.

Prof. Felice Lieh-Mak, GBS, CBE, JP
Temporary Chairman, Medical Council