

Medical Practitioners Disciplinary Tribunal

*PO Box 5249 Wellington Telephone (04) 499-2044 Facsimile (04) 499-2045
All Correspondence should be addressed to The Secretary*

DECISION NO: 107/99/50C

IN THE MATTER of the Medical Practitioners
Act 1995

-AND-

IN THE MATTER of a charge laid by a
Complaints Assessment
Committee pursuant to
Section 93(1)(b) of the Act
against **ANTHONY VAI
CHAU YAU** medical
practitioner of Auckland

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chair)
Mr P Budden, Dr F McGrath, Dr A M C McCoy, Dr L F Wilson
(Members)
Ms G J Fraser (Secretary)
Mrs G Rogers (Stenographer)

Hearing held at Auckland on Friday 17 December 1999

APPEARANCES: Ms K P McDonald for a Complaints Assessment Committee ("the CAC").

Mr S Perese for Dr A V C Yau.

1. PARTICULARS OF CHARGE:

1.1 THE Complaints Assessment Committee pursuant to section 93(1)(b) of the Medical Practitioners Act 1995 charges that Dr Anthony Vai Chau Yau, Registered Medical Practitioner was convicted by the District Court at Otahuhu of the following offences as set out in the attached informations each being an offence punishable by imprisonment for a term of 3 months or longer;

1. Between 1st July 1997 and 30th November 1997 did commit an offence against Section 246(2)(a) Crimes Act 1961.
2. On or about the 20th November 1997 did commit an offence against Section 265 Crimes Act 1961.
3. On or about 6th July 1997 did commit an offence against section 265 Crimes Act 1961.

and the circumstances of the offences reflect adversely on the practitioner's fitness to practise medicine.

1.2 THE CONVICTION:

THE Court sentenced Dr Yau to Periodic Detention for a period of 4 months, with the maximum duration of each period set at 10 hours. The maximum penalties for the charges laid against Dr Yau are:

Section 246(2) (a) Obtaining by false pretence, 7 years imprisonment; and
Section 265 Forgery, 10 years imprisonment.

2. THE FACTS:

2.1 SINCE 1995 Dr Yau has practised as a sole practitioner. His wife assists him in the day to day running of his general practice and he now also employs a part-time receptionist and office assistant. Part of his income is derived from his contract with the Health Funding Authority (HFA), Northern Division. Under this agreement Dr Yau was entitled to claim a government subsidy in respect of the provision of certain services to eligible patients.

2.2 TO be entitled to the subsidy the services must have been for a proper and necessary purpose and provided in person. The claim form requires certification by the practitioner to this effect and includes the following:

*“2. That services have been provided to the patients named in the claim schedule;
and*

...

*4. That in the cases of General Medical Subsidy (GMS) claims, the services were
provided by me personally.”*

2.3 ALL claims are subject to audit from time to time by the compliance unit operated by the HFA subsidiary which administers claims. In December 1997, Dr Yau was subject to a random audit by the compliance unit. This audit involved sending survey letters to a number of his patients for whom claims had been made. The purpose of the letters was to confirm that the services for which the subsidy had been claimed had in fact been provided.

2.4 THE result of the audit was that a number of claims were found to be false. An investigation was conducted and this revealed further discrepancies.

- 2.5** IN July 1998, Dr Yau was interviewed by compliance unit officers and admitted to making claims in respect of patients that he had not seen, thereby making claims that were false.
- 2.6** TO avoid detection of his fraudulent conduct, Dr Yau forged a number of documents which, if inspected, would have indicated that he had seen the patients in respect of which he had made claims. The false documentary material included patient records, attendance book entries, receipts and other accounts information.
- 2.7** DR Yau stated that the offending occurred between July and November 1997, and calculated the amount involved to be between \$3,000 and \$5,000. He co-operated in the compliance unit investigation and subsequently made full reparation to the HFA prior to being dealt with by the Court. He also pleaded guilty to the charges at the first opportunity to do so.

3. THE MEDICAL PRACTITIONERS ACT 1995:

- 3.1** SECTION 109 (1) (e) of the Act applies. It provides:

“(1) Subject to subsections (3) and (4) of this section, if the Tribunal, after conducting a hearing on a charge laid under section 102 of this Act against a medical practitioner, is satisfied that the practitioner - ...

(e) Has been convicted by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 3 months or longer, and the circumstances of that offence reflect adversely on the practitioner’s fitness to practise medicine; or

(f) ...”

- 3.2** PURSUANT to Section 110 of the Act the Tribunal may order:

- (a) Removal from the register
- (b) Suspension for a period not exceeding 12 months
- (c) Conditions on practice for a period not exceeding 3 years
- (d) Censure
- (e) Costs

4. EVIDENCE:

- 4.1 DR** Yau gave evidence by way of prepared statement and orally by way of cross-examination and re-examination, and answers to questions from the Tribunal members.
- 4.2 IN** summary, Dr Yau admitted the charges and asserted that he had always intended to repay the monies he had fraudulently obtained from the HFA. Dr Yau maintained that he had not understood that his conduct in making the false claims might attract criminal charges. He gave evidence of the family and financial hardships he had encountered since settling in New Zealand. In large part his financial difficulties were caused by circumstances beyond his control, although he accepted that this fact did not excuse his offending.
- 4.3 IN** making submissions on his behalf, his Counsel, Mr Perese, sought to characterise the false claims as an error of judgment. He also submitted that Dr Yau was not motivated by greed, but entirely by the unanticipated financial hardship he faced, and his need to provide for his family. He had not previously engaged in any dishonesty, or professional misconduct and is unlikely to re-offend.
- 4.4 FOR** the CAC, Ms McDonald submitted that, as an educated and highly intelligent person, Dr Yau must have realised that what he was doing was fraudulent, and criminally wrong. Even if he was to be believed on this point, ignorance of the law is no defence, and this was not a matter which the Tribunal could take into account.
- 4.5 THE** nature of the offending constituted a serious breach of trust by Dr Yau, and had occurred in the context of his professional practice. As such, the matter of whether or not it was conduct that reflected adversely on his fitness to practise medicine was a matter for the Tribunal, and in this regard Ms McDonald referred to the decision of the District Court in *W v CAC* (DC Wellington, CMA 182/98, 5/5/99, Judge CJ Thompson), a case on appeal from this Tribunal.
- 4.6 IN** *W* the Court discussed the meaning and ambit of the phrase contained in s.109 (1)(e) and stated:

“what the Tribunal is to assess is whether the circumstances of the offence ‘reflect adversely’ on fitness to practise medicine. This is a phrase permitting of a scale of seriousness. At one end the reflection may be so adverse as to lead to a view that the practitioner should not practise medicine at all. At the other end a relatively minor indiscretion may call for no more than an expression of disapproval by censure or by an order for costs. In that respect I agree with the views of the Tribunal in the decision cited to me as Re Dalley (MPDT 8-97-4C, 15/7/97).” [refer p6]

4.7 MS McDonald submitted that, in the circumstances of this case, Dr Yau’s conduct fell somewhere between the extremes on this scale of seriousness, but it could not realistically be argued that the offending amounted merely to “*a relatively minor indiscretion*”, as was argued for on Dr Yau’s behalf.

5. DECISION:

5.1 THE Tribunal agrees with the submissions made by Ms McDonald and is satisfied that this is not a case involving a mere error or lapse of judgment on the part of Dr Yau. The Tribunal is satisfied that the circumstances of the offending giving rise to the conviction now brought to the Tribunal do reflect adversely on Dr Yau’s fitness to practise medicine (s.109(1)(e)). Dr Yau carried out a systematic and deliberate fraud over a period of several months; the fraudulent conduct being brought to an end by the fact of discovery, rather than voluntarily or as a result of remorse on the part of Dr Yau.

5.2 IT is hard to resist Ms McDonald’s submission that it “*defies belief*” that a person of high intelligence and education such as is obviously the case here, did not realise the criminality of what he was doing. Mr Perese at one point sought to characterise the false claims as “*an unauthorised loan*”. However, it is axiomatic that a loan must be repaid, and repayment necessarily requires that the amount of the loan be known. Thus, the fact that Dr Yau did not keep any record of the amounts involved in the false claims effectively counters the assertion of any sincere intention to repay the monies falsely obtained at some future time. Reparation was made on the basis of Dr Yau’s estimate of the amounts involved.

5.3 **PERHAPS** of even more concern to the Tribunal was the extent of the efforts Dr Yau had made to conceal the falsity of claims made, especially the falsification of patient records by the insertion of bogus details and details of consultations which did not occur. This aspect in particular causes the Tribunal to have some reservations about Dr Yau's character and ethical standards, particularly if he is subjected to stress or hardship in the future.

5.4 **AGAINST** this, the Tribunal is satisfied that Dr Yau is genuinely remorseful about his conduct, and that he has undoubtedly suffered considerable hardships since bringing his family to New Zealand, and in establishing a new life away from the support of his extended family and professional colleagues. To a large degree, the circumstances which preceded the offences were indeed beyond Dr Yau's control. He clearly found himself quite isolated, both in a professional and personal sense, and the Tribunal considers that he would derive considerable benefit from a period of mentoring and collegiate support. In making the orders which accompany this decision the Tribunal has sought to address these issues.

5.5 **TAKING** into account all of the facts and circumstances presented to it, the Tribunal is satisfied that it should give Dr Yau the benefit of doubt with regard to the matters which cause it concern and for that reason principally, it has determined that Dr Yau's conviction does not warrant his name being removed from the register. However, it confirms the oral advice given to Dr Yau at the conclusion of the hearing that he should not be under any illusion about the potential consequences of any re-offending.

5.6 **ACCORDINGLY**, the Tribunal orders as follows:

5.6.1 Dr Yau be censured;

5.6.2 That Dr Yau must practise under the following conditions:

- (a) That Dr Yau enter into the Mentoring Programme conducted by the Medical Council of New Zealand. The period of mentoring is to be not less than 18 months, and otherwise the terms and conditions of mentoring of Dr Yau are as shall be approved by the Mentoring Programme. A

report to the Tribunal at six monthly intervals is requested, to ensure the Tribunal is aware of progress and that the programme is being undertaken.

At the Council's discretion a review of Dr Yau's competence may be initiated pursuant to Section 60 of the Act, in the event that a problem is highlighted during the mentoring programme; and

- (b) He must participate in a peer review and/or practice management programme to the satisfaction of his mentor and the mentor is to provide a report to the Council confirming that such a programme has been identified and satisfactorily completed by Dr Yau.

5.6.3 Dr Yau is to pay 45% of the costs of and incidental to the CAC's prosecution of the Charge and the hearing thereof in the sum of \$5,533.09.

6. NAME SUPPRESSION:

6.1 **PRIOR** to the hearing of the Charge Dr Yau made an application for interim name suppression pending the hearing of the Charge pursuant to s.106 of the Act. That application was granted and now lapses. No orders for permanent name suppression are sought or made.

7. PUBLICATION

7.1 **THE** Tribunal orders publication in the New Zealand Medical Journal pursuant to Section 138(2) of the Act.

DATED at Auckland this 18th day of January 2000

.....

W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal