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HPCA LEGAL CASE NOTE

HCCC v Orr [2015] NSWCATOD 124

In the matter of *Health Care Complaints Commission v Orr* the Civil and Administrative Tribunal considered complaints about a pharmacist with a serious drug addiction. In its reasons the Tribunal made a number of valuable observations about the mandatory reporting obligations that apply to all registered health practitioners including the benefits that can flow to both the public and the subject practitioner from timely and proper reporting.

Background

The practitioner was a registered pharmacist who had struggled with longstanding mental health issues, specifically depression and anxiety, and with drug addiction. The Tribunal proceedings arose from complaints that he had misappropriated and self-administered large quantities of drugs of addiction (particularly Oxycontin and Endone) from the pharmacy at which he was employed, and had falsified drug registers and engaged in other deceptions to cover his misappropriation.

Findings and Comments of the Tribunal

The Tribunal noted that the practitioner did not engage with the Health Care Complaints Commission during its investigation, nor did he engage with the Tribunal process. The Tribunal nonetheless went on to find all complaints proven.

In its reasons the Tribunal noted that the practitioner had on a number of occasions over many years received medical and hospital treatment for his addictions but that at no point had any treating health practitioner notified the regulatory authorities of his addiction or impairment. The Tribunal was critical of the "code of silence" that prevailed and noted that the failure to report Mr Orr to regulatory authorities was to the detriment of both the public in general and to Mr Orr's health and professional standing.

In particular the Tribunal noted between paragraphs 137 and 150:

While we do not seek to single out individual health practitioners for criticism in this decision, we strongly believe that the failure to make a notification concerning Mr Orr's condition and conduct in 2011 is indicative of a failure to understand, or properly implement, the mandatory notification provisions in the National Law.

… Multiple references in the 2011 admission notes and GP records, discussed above at [61] to [74], including a print out from AHPRA placed on Mr Orr's patient file, clearly demonstrate that both doctors and nurses were aware of the provision.

…

On a more general level we observe that a self-report from a pharmacist of an opiate addiction over many years which was supplied through their professional practice at a pharmacy should surely be taken as prima facie evidence of both an impairment under (c) and conduct well below the professional standard under (d). Indeed if circumstances such as these do not give rise to a reasonable belief of notifiable conduct under s 141, it is hard to know what purpose the provision serves at all. (emphasis added)

Even if treating practitioners thought that they were protecting the health and wellbeing of a vulnerable patient by not notifying Mr Orr while he was an in-patient receiving treatment, they should surely have done so when he was discharged and did not attend follow-up appointments. That at least two medical practitioners were on notice of the risk posed to the public and their own obligations to take action is manifest in the letter from the drug and alcohol specialist to the GP referred to in para 74 above. It bears repeating that the final line of this letter, which appears to have prompted no follow up care or action at all, was, "We need to make sure he continues to be well. Given he is a pharmacist we would need to notify the Pharmacy Board if he relapses or disappears from follow up".

…

Some commentators have expressed concern about treating practitioners notifying their own patients on the basis that this may inhibit impaired health practitioners from seeking treatment. The very low proportion of mandatory notifications made by treating practitioners since the inception of the National Law suggests that many doctors may feel the same way. [2]

However this case surely stands as proof of the reverse; in that a failure to notify actually inhibited this impaired practitioner from being provided the supervision, monitoring and treatment that could have helped him, and may even have prevented the events that ultimately led to these disciplinary proceedings. (emphasis added)

We suggest that the "code of silence" prevailed in this instance, to the detriment of both the public's safety and the practitioner's health and professional standing.

Analysis

This decision demonstrates an increasingly prevalent view that mandatory reporting obligations must be taken seriously by health practitioners, particularly treating practitioners. This view is also reflected in the decision of the ACT Supreme Court in *Hocking v Medical Board of Australia & Anor* [2014] ACTSC 48 in which the Court noted that the mandatory reporting provisions are in part designed

to ensure that practitioners do not adhere to a code of silence in relation to significant misconduct by other practitioners. The provision gives effect to the s 3(2)(a) objective of protection of the public.

The Tribunal has clearly indicated its view that a significant number of treating practitioners, including medical practitioners and nurses, have failed in this instance to comply with their statutory and professional obligations. The Tribunal has also clearly expressed its view that those failures have likely been to the detriment of public safety and to the health and professional standing of the pharmacist himself.

Conclusion

In New South Wales there is no exemption from mandatory reporting obligations for treating practitioners. It is important for regulators, practitioners and their advisers to recognise that the Tribunal has clearly set out its view that mandatory reporting is a serious professional obligation that cannot be ignored. It is particularly notable that the Tribunal has identified the reluctance of treating practitioners to make reports about their patients and indicated that in this case adherence to that *code of silence* has been to the detriment of both the public and the practitioner.

The full case can be accessed here:
https://www.caselaw.nsw.gov.au/decision/563150dbe4b003c5681fa1fb