

DENTAL PRACTICE BOARD OF VICTORIA

RE: Dr Jonathan Hartley

[2004] DPBV 3

PANEL:

Mr Victor Harcourt (Chair)
Dr Ross Green
Dr Mandy Leveratt

DATE OF HEARING: 13 May 2004,
DATE OF DECISION: 17 August 2004

FINDINGS

The Panel, having considered the evidence and submissions placed before it, and taking into account the admissions, finds the following allegations in the Notice of Formal Hearing under section 45 of the *Dental Practice Act 1999* dated 15 March 2004 ("the Notice") to be established:

- 1 At all material times Dr Hartley has been registered as a dental care provider in Victoria under the Act.
- 2 Dr Hartley provided dental treatment to his patient, Ms A ("**the Patient**") at his surgery at 227 Commercial Road, Prahran in April 2003.
- 3 During the course of Dr Hartley's treatment of the Patient on that occasion Dr Hartley behaved inappropriately in the following respects:
 - 3.1 Dr Hartley asked the Patient to "*take a seat, sweetie*";
 - 3.2 When the Patient sat in Dr Hartley's dental chair, Dr Hartley rubbed her lip several times and said something along the lines - "*you're a pretty thing, aren't you*";
 - 3.3 Dr Hartley then placed his hands on the Patient's shoulders and left them there for some seconds, and then proceeded to give the Patient a massage;
 - 3.4 Dr Hartley stated to his assistant (in regard to one of the Patient's teeth) words to the effect that "*such and such tooth was rooted*";
 - 3.5 Dr Hartley spoke to the Patient in a careless manner concerning the necessity for an x-ray, saying words to the effect that "*well it is not costing you anything so we may as well give you an x-ray*";
 - 3.6 When the x-rays were taken, Dr Hartley roughly pulled the Patient out and "*marched her back to the waiting room*".
- 4 Dr Hartley has accordingly engaged in unprofessional conduct, as defined in Section 3 of the *Dental Practice Act 1999*, not of a serious nature.

DETERMINATION

Having considered the matter and having given due weight to the submissions placed before the Panel, the Panel considers appropriate under section 47(2) of the *Dental Practice Act 1999* to make the following determination:

- 1 The Panel reprimands Dr Hartley for his conduct found to be unprofessional conduct.

- 2 The Panel also cautions Dr Hartley in respect of his unprofessional conduct which was found to be not of a serious nature.
- 3 Dr Hartley must undergo counselling with a Board appointed counsellor for a twelve month period, with a least three counselling sessions to occur within the first quarter and further sessions to be at least monthly, and otherwise at a frequency directed by the counsellor.
- 4 The counselling should address at least the following issues (together with any others considered appropriate by the counsellor):

“Appropriate behaviour by a dentist with his patients in a current practice in Victoria, addressing issues such as appropriate professional boundaries, use of appropriate language in the doctor/patient context, doctor/patient communications generally and the avoidance of inappropriate physical contact with patients.”
- 5 The counsellor shall report directly to the Board regarding Dr Hartley’s progress in the counselling, with the first report to be submitted within 45 days of this Determination and a second report within 30 days after twelve months of treatment.
- 6 The counsellor shall also, in her first report, report to the Board on whether the nature of the counselling required by this Determination to properly address the issues identified in this matter concerning Dr Hartley is appropriate or needs to be reviewed. The report is to be considered by the Board or this Panel, as the case may be, and, if it is considered necessary, further directions may be provided to the counsellor and Dr Hartley concerning the nature of the counselling to be undertaken.
- 7 A complete transcript of the evidence given at the formal hearing and/or the contents of the Board’s folders containing material presented to the Panel during the formal hearing will be provided by Dr Hartley to the counsellor prior to the counselling sessions commencing.
- 8 Dr Hartley will himself provide a report direct to the Board at the conclusion of the period of twelve months’ counselling, providing a self-review of his progress during the counselling.
- 9 Dr Hartley is granted leave to apply to the Board if the counselling relationship is unsatisfactory, in order to arrange a transition to an alternative counsellor approved by the Board, being, preferably, one of the three counsellors submitted by counsel assisting and counsel for Dr Hartley.
- 10 All the costs of counselling and reports shall be borne by Dr Hartley.

REASONS

- 1 On 13 May 2004, the Dental Practice Board of Victoria (“the Board”) in a panel of three members (“the Panel”) convened to conduct a formal hearing pursuant to the *Dental Practice Act 1999 (Vic)* (“the Act”) into the conduct of the dentist, Dr Jonathan Hartley. Dr Hartley was at all material times a registered dentist.

Allegations

- 2 The formal hearing concerned the following allegations placed before Dr Hartley in a Notice of Formal Hearing dated 15 March 2004:

“(a) At all material times, you have been registered as a dental care provider in Victoria under the Act;

- (b) You provided dental treatment to your patient, Ms A, at your surgery at 227 Commercial Road, Prahran in April 2003.
- (c) During the course of your treatment of Ms A on that occasion, you behaved inappropriately in the following respects:
 - (i) You asked her to “*take a seat, sweetie*”;
 - (ii) When she sat in your dental chair, you rubbed her lip several times and said something along the lines - “*you’re a pretty thing, aren’t you*”;
 - (iii) You then placed your hands on her shoulders and left them there for some seconds, and then proceeded to give her a massage;
 - (iv) You stated to your assistant (in regard to one of Ms A’s teeth) words to the effect that “*such and such tooth was rooted*”;
 - (v) You spoke to Ms A in a careless manner concerning the necessity for an x-ray, saying words to the effect that “*well it is not costing you anything so we may as well give you an x-ray*”;
 - (vi) When the x-rays were taken, you roughly pulled her out and “*marched her back to the waiting room*”.
- (d) You have accordingly engaged in unprofessional conduct, as defined in Section 3 of the *Dental Practice Act 1999*.
- (e) That unprofessional conduct constitutes unprofessional conduct of a serious nature;
- (f) In particular:
 - (i) In June 2002, you were subject to an informal hearing by this board under the Act concerning your treatment of another female patient, Ms B,
 - (ii) The allegations against you in that informal hearing bore a similarity to the allegations in this matter;
 - (iii) The Panel of the Board on that occasion found that you had engaged in unprofessional conduct, not of a serious nature, in that, while treating Ms B you inappropriately took her by the hand, and during treatment physically turned her head to face you and instructed her to look at you;
 - (iv) In the course of that hearing, you agreed that you would attend counselling;
 - (v) By letter dated 19 July 2002 to the Board (copy to you), your solicitors (Phillips Fox) confirmed to the Board that “*Dr Hartley undertakes to attend a counselling session*”

with an officer or officers of the Board with respect to issues of ... client/patient relationships ...”.

- (vi) The Board then wrote to you on 1st August 2002, proposing a counselling session.
- (vii) You agreed to attend that counselling meeting on Monday 26 August 2002 and duly did so.
- (viii) At that counselling meeting, you were discouraged from unnecessary physical contact with your patients;
- (ix) The Investigative Officer of the Board wrote to you on 6 September 2002, saying -

‘On the matter of client/patient relationships, you were advised to avoid all unnecessary physical contact with patients’.

- (x) You responded to the Board by letter dated 19 September 2002 acknowledging that letter and saying:

‘I am now giving more time and attention to the areas that were identified as being in need of improvement’.

- (xi) Notwithstanding that, you engaged in unnecessary and inappropriate physical contact with Ms A when you treated her in April 2003, in the respects set out in paragraph (c) above.
- (xii) Accordingly, your conduct constitutes unprofessional conduct of a serious nature.”

Admissions

- 3 The Panel was informed at the outset of the hearing that Dr Hartley made some admissions, in particular that he admitted the allegations set out in paragraph (a) and (f)(i)-(x) of the Notice. Dr Hartley also admitted the allegations set out in paragraph (b) although he was concerned that the phrase “dental treatment” should more properly be “a dental diagnosis” or words to that effect.
- 4 While there was no formal admission at the commencement, it became apparent during the course of the hearing that Dr Hartley had a poor recollection of the treatment of the Patient and was prepared to concede to the strong evidence given by the Patient as to what occurred on all material matters. During the course of giving evidence, Dr Hartley was prepared to concede that:
 - 4.1 he probably did say “Take a seat, sweetie”;
 - 4.2 he probably did rub her lip several times and say something along the lines of “You’re a pretty thing, aren’t you?”;
 - 4.3 he probably did place his hands on the Patient’s shoulders and gave her a massage;

4.4 that when the x-rays were taken, he assisted the Patient off the pedestal and then guided her back to the waiting room with his hands on the Patient's shoulders.

5 This matter came before the Board following a complaint made by the Patient to the Board. In summary, the Patient stated that:

5.1 She attended to see Dr Hartley in April 2003 having been given a discount card which entitled her to a free comprehensive check-up and charting plus x-ray if necessary from Dr Hartley;

5.2 Dr Hartley showed the Patient to a room and asked her to "Take a seat, sweetie";

5.3 Dr Hartley asked the Patient to show him her smile when she was sat in the chair. The Patient clenched her teeth together but parted her lips in a smile assuming that Dr Hartley was checking her bite or her gums. Dr Hartley then rubbed her bottom lip with his thumb several times up and down the length of the lower lip and said something along the lines "You're a pretty thing, aren't you?";

5.4 The Patient was feeling very uncomfortable as Dr Hartley rubbed her lip. After asking the Patient why she had attended, he placed his hands on her shoulder and left them there for some seconds and then proceeded to give the Patient a massage which lasted for some seconds. The Patient became very confused regarding the situation she found herself in;

5.5 When the dental assistant came into the room Dr Hartley examined the Patient's teeth while the assistant was entering the information into a computer. During the course of the examination Dr Hartley advised the assistant that "such and such a tooth was rooted";

5.6 Once the oral examination was complete Dr Hartley turned to the Patient and said "Well it's not costing you anything so we may as well give you an x-ray". The Patient was then led to the x-ray machine and as soon as the x-ray was taken, Dr Hartley placed his hands on the back of the Patient's shoulders and roughly pulled her out and marched her almost back to the waiting room.

6 The Patient's complaint covered other matters which were not the subject of the Notice.

7 The Board informed Dr Hartley by letter dated 21 May 2003 of the complaint. By letter dated 18 June 2003 Dr Hartley responded to the Board and provided a copy of his computer treatment record and the x-ray. Dr Hartley stated the following:

"I otherwise note that [the Patient] was made to feel uncomfortable during her consultation with me. I sincerely regret that. I do try to relax patients by having some physical contact with them, but do not believe I did anything to [the Patient] that could constitute a massage or inappropriate contact. I also deny that I used inappropriate language. In relation to her observation that I said the words 'such and such tooth was rooted', I was concerned that tooth 36 may have had a pulpal involvement. I do not believe I used the word 'rooted' and maintain that I was simply doing the proper thing, which is to take a full chart and identify all problems.

"I am aware that my manner is considered by some people to be unusual. It is not my intention to make patients feel uncomfortable and obviously I regret the fact that [the Patient] has felt the need to make a complaint. I have taken her concerns into consideration. I will do my level best to ensure that other female patients are not made to feel the way [the Patient] did."

8 A copy of Dr Hartley's response was provided to the Patient who responded as follows:

"As far as I am concerned, my complaint still stands. I would not have gone to the trouble of lodging a complaint that could also tarnish my reputation, if I didn't believe it to be the truth. I am not the type of person that would fabricate a story like this and attempt to harm someone else's credibility without merit. The manner in which the Dr handled me and made me feel whilst in his surgery compelled me to bring this forward to the attention of the Dental Board.

"Dr Hartley's response with reference to making me feel uncomfortable is unacceptable. He claims that he tries to make all his patients comfortable. That is what all doctors are supposed to do. He has more or less admitted fault by stating that some people consider his manner to be unusual. It is his duty of care to make sure his patients are comfortable with his manner and not to make the assumption that if he feels (sic) comfortable with it so does everybody else. The terminology used to explain his prognosis was not that of an educated man, however one of a hidden agenda. Quote "such and such a tooth is rooted" unquote immediately apologising for the use of such language - again another admission of guilt.

"I do not accept his apology. Although I do not wish to proceed with this any further I would like this letter to stay on file. I would also request that he is monitored carefully to avoid what I believe to have happened from reoccurring."

Evidence of the Patient

- 9 The Patient gave evidence to the effect stated in her complaint form. The Patient's memory of the appointment with Dr Hartley was very good. She recalled that while she was in the waiting room Dr Hartley came out and called her into his room saying words to the effect of "Come into the room, sweetie". The Patient thought that the use of such words was strange but did not think any further of it at that time.
- 10 Dr Hartley asked the Patient to take a seat in the chair and for her to show her smile. As the Patient assumed that Dr Hartley wanted to check her teeth she gritted them and parted her lips. At that time Dr Hartley ran his thumb over her lower lip a few times and again she thought it was strange but she was not sure. However, when Dr Hartley said words to the effect "You're a pretty little thing, aren't you?" she thought it was very strange and was getting confused.
- 11 The Patient recalled that there was some small talk between her and Dr Hartley when she felt him put his hands on her shoulders. At that time Dr Hartley was standing to the back of the Patient. Dr Hartley left his hands there and then she felt Dr Hartley give her five or six little rubs on her shoulder in the nature of a massage. This made the Patient feel extremely uncomfortable and confused. The nurse came into the room about 30 seconds after this and Dr Hartley began charting her teeth. During the course of this, Dr Hartley said words to the effect "such and such a tooth was rooted". He then went on to say something like that he was sorry because that was not appropriate language.
- 12 The Patient recalls that Dr Hartley said words to the effect "You may as well get an x-ray because it is not costing you anything". The Patient thought that this was careless on the part of Dr Hartley that he was taking an x-ray simply because it was part of the discount card and not because it was required.

- 13 The Patient then described the taking of the x-ray which was in a different room. The Patient felt that Dr Hartley had acted inappropriately in putting his hands on her shoulders, pulling her out of the room and marching her back into the waiting room.
- 14 The Patient stated that she felt confused and uncomfortable by Dr Hartley's conduct and also felt some self doubt at first if she was overreacting to his conduct.
- 15 The Patient's evidence was unshaken during cross-examination. The Patient, in response to questioning to the effect that the quote she had received from Dr Hartley for the work to be done had coloured her view about the conduct, disagreed. The Patient said she was disgusted by Dr Hartley's conduct and still would have complained even if she had not received the high quote. The Patient said that she rang the Dental Practice Board the day after the appointment to discuss Dr Hartley's conduct.
- 16 The Patient agreed with Ms Dixon, on behalf of Dr Hartley, that the use of the word "Sweetie" was not always a cause for concern but she felt it was inappropriate for a dentist to address a first time patient in that manner. The Patient frankly conceded that initially she did not take offence at the use of the term but did so in the light of what followed. She said she was initially shocked as to why Dr Hartley would say it but then considered it may have been part of the way he conducted himself.
- 17 The Patient was able to give a good recollection of the room she was treated in including its layout. The Patient demonstrated the massage that Dr Hartley gave her in response to a request by Ms Dixon. The massage consisted of six squeezes of the Patient's shoulders by Dr Hartley which lasted some seconds. The Patient stated she took offence to this at the time but didn't say anything because she was not sure if she was overreacting or not.

Evidence of Dr Roseman

- 18 The Board's investigating officer, Dr Roseman, gave evidence concerning the informal hearing conducted by the Board in June 2002 concerning Dr Hartley and the subsequent counselling session. Dr Roseman noted that he made a file note of the session during the course of which Dr Hartley was informed that, in the light of the current standards, it was not appropriate for him to have unnecessary physical contact with patients. Dr Hartley indicated at the counselling session that he accepted this.

Evidence of Ms C

- 19 Ms C gave evidence on behalf of Dr Hartley as one of his patients. Ms C's evidence was that Dr Hartley used affectionate terms and would make physical contact with her. She also gave evidence that Dr Hartley said she had a beautiful smile.
- 20 During the course of cross-examination, Ms C stated that Dr Hartley had rubbed her shoulder giving her a massage when she had been hurt during the course of treatment or if she was tense. Ms C said that the shoulder rub did not occur on the first visit but that it had occurred as her treatment had progressed.

Evidence of Dr Hartley

- 21 Dr Hartley conceded at the commencement of his giving evidence that he would accept the Patient's recollection of which treatment room she was in during the appointment because while he thought it was in a different room, she had a better memory of it. Dr Hartley's independent recollection of the matter focused upon the post-examination events when he saw his assistant typing up the quote for the work being suggested. Dr Hartley recalls thinking at that time that the further work would not be done until the Patient got her diet and other matters under control.

- 22 Dr Hartley recalled that he did not give the Patient a treatment plan although he later noted in evidence that the treatment record states that a treatment plan was indeed given.
- 23 Dr Hartley conceded that he probably did say to the Patient “take a seat, sweetie” because he is very informal in his relationship with patients. He makes an effort to de-professionalise the consultation and to be very laid back. He stated that he was capable of making the statements which the Patient alleged against him.
- 24 Dr Hartley said that while he had no recollection of the appointment, he could have asked her to smile and that he may have followed her teeth line with his finger touching her bottom lip. Dr Hartley also said that he could have put Vaseline on her bottom lip because he may have noticed that she had dry lips and wanted to avoid the lips cracking.
- 25 Dr Hartley recalled that the Patient asked a lot of questions and that the consultation which should have taken 15 minutes took closer to 30 minutes. While Dr Hartley did not recall placing his hands on the Patient’s shoulders he said that he probably put his hands on them when he put the bib on the Patient. Dr Hartley stated that he may have had gloved hands with a probe in one and a mirror in the other and rested the back of his hands on the Patient’s shoulders.
- 26 Dr Hartley also conceded that he has always touched his patients a lot and it will always be a part of his practice although he has been watching his conduct since an earlier incident when he was involved in an informal hearing before the Board.
- 27 During examination-in-chief Dr Hartley said that he did not use words such as “rooted” and that he may have suggested that one of the teeth needed a root canal treatment. While Dr Hartley did not admit that he said words to the effect “Well it’s not costing you anything so we may as well give you an x-ray”, he stated that he could have said words to the effect of “Let’s go and do an x-ray as this is part of your exam”. Dr Hartley also conceded that he walked the patient down from the x-ray room to the waiting room while holding her by both shoulders in an attempt to guide her along the corridor.
- 28 Under cross-examination, Dr Hartley agreed that he could only recall about the appointment that the patient had been given too much information at the conclusion of the appointment, and that she had not received enough explanation from his assistant about the quote. Dr Hartley also recalled that the Patient asked a lot of questions and that they had discussed her diet. He could not otherwise recall what had occurred and he agreed that the Patient could more reasonably recollect what had occurred.
- 29 In that context, Dr Hartley admitted under cross-examination that he could not challenge the Patient’s evidence that he had said to her “Take a seat, sweetie” or that he had said “You’re a pretty thing, aren’t you?”. He also conceded that he could have rubbed her lips and that he could have put his hands on her shoulders although initially Dr Hartley stated that would have been with his hands facing up with a mirror and probe. While Dr Hartley sought to explain this as occurring after he put the bib on the Patient, he then said he would not have put his gloves on until after he put the bib on. Dr Hartley accepted that if there was some doubt about the evidence then the evidence of the Patient should be accepted. He also went on to say that while he would sometimes reassure patients by rubbing their shoulders, he cannot say that he did not do it to the Patient as he did not remember.
- 30 Dr Hartley sought to explain the allegation that he had said “such and such a tooth was rooted” by reference to tooth 36 perhaps having a pulpal involvement. This was stated in his letter to the Board dated 18 Jun 2003. Dr Hartley did not however make a note of this in his records. Upon considering the x-ray, Dr Hartley again admitted that he had reconstructed his recollection by assuming that if he did say the word “rooted” it must have been said in the context of root canal treatment being required. Dr Hartley then examined his records to ascertain if there was a tooth to which this may apply.

- 31 Dr Hartley denied saying “Well it’s not costing you anything so we may as well give you an x-ray” and then said that the Patient had requested it. Upon being asked about why, in his notes, it was recorded “OPG taken as offer”, Dr Hartley said that it was part of the offer on the discount card.
- 32 In relation to the incident following the x-ray, Dr Hartley said that he may have helped the Patient off the step and then guided her back to the waiting room with his hands on her shoulders. He recalls that the Patient went to go into the staffroom next to the x-ray room which is why he guided her towards the waiting room with his hands on her shoulders.
- 33 Dr Hartley denied that he had engaged in unnecessary physical contact although he was prepared to accept that the physical contact was not appropriate in this day and age. He said that while he had changed his ways following the first informal, by no longer holding hands with patients, except old patients, he did not accept that resting his hands on the shoulders of a patient was unnecessary contact. Dr Hartley also acknowledged that it was not appropriate to say “sweetie” and “darling” to patients but it was an unconscious thing on his part.

Evidence of Mr D

- 34 Dr Hartley called Mr D to give evidence concerning dental treatment that he, his wife and daughter had received over a number of years. Mr D is the managing director of and himself a lawyer. Again, Mr D provided evidence positive of the experiences of he and his family with Dr Hartley.
- 35 Relevantly, Mr D stated that Dr Hartley had on occasion given him a neck massage typically during the course of an extensive procedure. Mr D did not recall Dr Hartley asking for his consent, but said that when Dr Hartley had given his wife or daughter a massage during the course of treatment he had sought their consent. Mr D said he would be surprised if a dentist had massaged his daughter’s shoulders on her first visit to that dentist and without first obtaining her consent.

Evidence of Dr E

- 36 Dr Hartley called Dr E to give evidence concerning treatment she had received from Dr Hartley. Dr E’s evidence although initially centring upon her own experiences, covered her assessment of Dr Hartley which is not surprising given Dr E’s expertise. Dr E opined that it was difficult for someone such as Dr Hartley to give up the habits of a lifetime and that while his conduct may be seen as reassuring to people, it could be misinterpreted by someone on their first visit to him.
- 37 Dr E said that Dr Hartley needed more than one counselling session of the type conducted by the Board after the informal hearing for there to be any positive change in Dr Hartley’s conduct. She expressed the view that Dr Hartley would probably require more specific counselling from a professional person with expertise in the area of boundary violations by health professionals. She was also of the view that it would be helpful for that person to be a female who could explain to Dr Hartley the impact from a female perspective.

Other Evidence

- 38 Father F, chairman of ..., gave evidence concerning Dr Hartley’s charitable assistance provided to an organisation which Fr F was involved in. Evidence was also given by one of Dr Hartley’s patients, Mr G which went to Dr Hartley’s character and technical competence. Dr Hartley also proffered in his support, written references from various persons which were of limited assistance to the Panel in the hearing of this matter.

Submissions of Counsel assisting the Board

- 39 Mr Monahan submitted that there was not a significant degree of conflict in the evidence given Dr Hartley's poor memory of the event and his concession that the Patient's memory was to be preferred to his own. Mr Monahan submitted that the Patient was, as a witness, impressive and that her evidence should be accepted by the Panel.
- 40 Mr Monahan accepted that the allegations, if found by the Panel, would be unprofessional conduct not of a serious nature. He did submit however that in the light of the decision made at the informal hearing concerning Dr Hartley previously, the repeat nature of the conduct warranted the Panel characterising the unprofessional conduct as being of a serious nature. Later in submissions, Mr Monahan relied upon the House of Lords decision in *Gee v General Medical Council*¹ in which it was observed that continuing unprofessional conduct of the same type could bear upon whether such conduct was serious or not:

“Professional misconduct on a single occasion such as a failure to make a proper record of treatment for charging purposes might not amount to serious professional misconduct and yet if such failure were persisted in this might make the failures amount to serious professional misconduct: see, for example, *Felix v General Dental Council* [1960] ACT 704,721.”

Submissions on behalf of Dr Hartley

- 41 Ms Dixon, on behalf of Dr Hartley, submitted that the matter concerning Dr Hartley was one of whether there had been an inappropriate personal boundary violation. It was not put as being one of sexual behaviour nor was it put that way by the patient. Ms Dixon submitted that while Dr Hartley had learnt lessons from this formal hearing and that he was on notice about unnecessary physical conduct, the allegations if found did not amount to unprofessional conduct of a serious nature. Counsel conceded that Dr Hartley still had some way to go in terms of developing insight about the matters the subject of the complaint but that this could be adequately addressed in counselling. She also submitted it would probably be appropriate there was a female counsellor who had no prior knowledge of Dr Hartley or involvement with him to provide such counselling. During the course of submissions, Counsel provided information upon the background of Dr Hartley, his areas of interest and his work in the community.

Findings of the Panel

- 42 The Panel found the Patient to be a very credible witness whose evidence was to be preferred to that of Dr Hartley. The Patient gave frank and honest evidence which was consistent with her previous communications with the Board. The Patient did not attempt to exaggerate, in her evidence, the conduct of Dr Hartley. The Patient was prepared to admit when she was not able to recall matters but gave firm evidence on the matters of substance. Dr Hartley's own admissions that he could not recall much of the appointment with the Patient and his preparedness to concede that he may have engaged in much of the conduct alleged by the Patient supports the Panel's acceptance of the Patient's evidence.
- 43 Further, Dr Hartley was unable to and did not call any evidence to contradict the allegations made by the complainant. The only other person who was a witness to the incident, being his nursing assistant, was not called to give evidence. There was therefore no evidence to refute that version of events given by the Patient. Indeed, the only matter of any significance upon which Dr Hartley sought to contradict the evidence of the Patient was in respect of the allegation that he had said words to the effect “such and such tooth was rooted”. Dr Hartley sought to defend his position on the basis that he must have been referring to a tooth requiring root canal treatment. Dr Hartley then went back over his notes, by his own admission, and identified that tooth 36 had pulpal involvement. It was on the strength of this

¹ *Gee v General Medical Council* [1987] 2 All ER 193.

post-appointment assessment that Dr Hartley sought to deny the allegations of the complainant.

- 44 The Panel was however unable to accept the evidence of Dr Hartley in this respect as it was clearly not supported by his notes made at the time of the examination. Dr Hartley's notes in regard to the charting of the teeth was not questioned. It appeared on the basis of the evidence given by Dr Hartley that he was seeking to justify an assertion that the Patient had misheard his use of the term "root" by reconstructing his memory. The Panel could not in the circumstances accept Dr Hartley's evidence in this regard.
- 45 It should be noted that the Patient gave very convincing evidence to the effect that the initial conduct of Dr Hartley raised in her some disquiet which, with each inappropriate act or comment, led to confusion, discomfort and eventually disgust. While each of the allegations was made out and while some of those allegations, on their own, were more serious than others, taken as a whole the Panel viewed the conduct of Dr Hartley as being an inappropriate violation of the personal boundaries of a patient.
- 46 Dr Hartley did not know the Patient when she first attended. He did not make any effort to find out whether she would be offended by the words complained of and he did not seek her consent to the physical contact which was not, in these circumstances, necessary or indeed appropriate. Dr Hartley violated the Patient's personal boundaries to which she took significant offence.
- 47 Dr E, who was called on behalf of Dr Hartley, conceded that while Dr Hartley's physical contact could be reassuring to people, it had the potential to be misinterpreted by a patient on her first visit. Indeed, Mr D who gave much evidence supportive of Dr Hartley, indicated that he would be surprised if a dentist massaged the shoulders of his daughter on her first visit to that dentist and without her consent being first obtained.
- 48 Dr Hartley's conduct concerned the Panel particularly in the light of the decision in the informal hearing dated 17 June 2002. The Panel found that Dr Hartley had engaged in unprofessional conduct not of a serious nature in that:
- 48.1 while treating the patient he inappropriately took her by the hand; and
- 48.2 during the treatment Dr Hartley physically turned the patient's head to face him and instructed her to look at him.
- 49 Dr Hartley subsequently attended counselling with an officer of the Board and accepted that he should not engage in unnecessary physical contact. When Dr Hartley was questioned as to what changes he had made in his professional conduct, he stated that he simply did not hold hands with patients except for old patients. Dr Hartley was unable to give evidence of any other changes in his professional relationship with patients. This indicated to the Panel that Dr Hartley had not understood the need to respect the personal boundaries of patients. This was most apparent when Dr Hartley, during the course of re-examination by his counsel, gave a speech to the Panel in which he trivialised the complainant and her complaint by putting it down to the fact that she could not get compensation for the high quote and that she had come to him in response to a discount card offer rather than being a referral to him from another person.
- 50 The Panel considered at some length whether Dr Hartley had engaged in unprofessional conduct of a serious nature in light of the findings against him in the informal hearing.
- 51 The *Dental Practice Act 1999* states that its main purposes, inter alia, are :
- “(a) to provide for the registration of dental care providers and investigations into the professional conduct and fitness to practise of registered dental care providers; and

(b) *to regulate the provision of dental care services; and ...*” (section 1).

52 The functions of the Dental Practice Board of Victoria established pursuant to the Act are broad and give effect to the main purposes of the Act (section 69). It is well accepted that the Board and indeed any Panel appointed under section 43 of the Act for a formal hearing, must have regard to the objective of the Act which is the protection of the public. This is particularly pertinent to a formal hearing into the professional conduct of a registered dental care provider which inquires into whether the dental care provider has or has not engaged in unprofessional conduct either of a serious nature or not of a serious nature. Unprofessional conduct is defined in the Act to mean all or any of the following -

- “(a) Professional conduct which is of a lesser standard than that which the public might reasonably expect of a registered dental care provider;
- (b) Professional conduct which is of a lesser standard than that which might reasonably be expected of a registered dental care provider by his or her peers;
- (c) Professional misconduct;
- (d) Infamous conduct in a professional respect;
- (e) Providing a person with dental services of a kind that is excessive, unnecessary or not reasonably required for that person’s wellbeing;
- (f) Influencing or attempting to influence the conduct of a dental care provider’s practice in such a way that patient care may be compromised;
- (g) The failure to act as a dental care provider when required under an Act or Regulations to do so;
- (h) Providing dental care that the provider is not registered to provide;
- (i) The contravention of or failure to comply with a condition, limitation or restriction on the registration of the dental care provider imposed by or under this Act;
- (j) The contravention of a provision of this Act or the regulations; or
- (k) A finding of guilt of -
 - (i) an indictable offence in Victoria, or an equivalent offence in another jurisdiction; or
 - (ii) an offence if the dental care provider’s ability to continue to practise is likely to be affected because of the finding of guilt or if it is not in the public interest to allow the dental care provider to continue to practise because of the finding of guilt; or
 - (iii) an offence as a dental care provider under any other Act or regulations.” (section 3).

- 53 A finding by a Panel that a dental care provider has engaged in unprofessional conduct of a serious nature or not of a serious nature may result in certain determinations being made which may be seen to be disciplinary in their nature. Again, however, the determinations are made for the protection of the public:

“The Tribunal referred to the effect of the criminal and disciplinary proceedings on the doctor and their costs ‘in money and emotional stress’. These matters would be highly relevant if the purpose of these proceedings was punitive, but their purpose is entirely protective. In *Clyne v New South Wales Bar Association* (1960) 104186 at 201-202, the court said:

“ ... Although it is sometimes referred to as ‘the penalty of disbarment’ it must be emphasised that a disbarment order is in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege.”

“Later, in *New South Wales Bar Association v Evatt* (at 183-184), the court said:

“... The power of the court to discipline a barrister is ... entirely protective and notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved.”²

- 54 Unprofessional conduct of a serious nature is not specifically defined. Assistance can be found in the comments of Kellam J (as president of the Victorian Civil and Administrative Tribunal) in *Parr v Nurses Board of Victoria* (unreported, VCAT, 2 December 1998) in which he indicated that whether a nurse had engaged in unprofessional conduct of a serious nature must depend on the facts of the case. He also said:

“Clearly such conduct would not be serious if it was trivial, or of momentary effect only at the time of the commission or omission by which the conduct was so defined. It must be a departure, in a substantial manner, from the standards which might be reasonably expected of a registered nurse. The departure from such standards must be blameworthy and deserving of more than passing censure.”

- 55 Referring to Kellam J’s decision, Ashley J in the Victorian Supreme Court stated:

“There is always a question whether it is best to let the language of legislation - particularly where the language involves words in everyday usage - speak for itself; or rather seek to clothe it with meaning by recourse to other language. Bearing in mind that the particular language needs to be applied, if not often then at least not infrequently, by bodies consisting either wholly or in the main of non-lawyers, His Honour’s analysis should be seen - bearing in mind always that it was tailored to the circumstance of the case before him - as an accurate and useful guide to the application of that legislation.”³

² *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630, 637 to 638. See also *Reyes v Dental Board of South Australia* [2002] SASC 239, paragraph 32.

³ *Domburg v Nurses Board of Victoria* [2000] VSC 369 at [59].

56 Mr Monahan also referred to *Gee v General Medical Council*⁴ in which comment was made that continuing acts of unprofessional conduct may be a factor in determining whether it is serious or not:

“Professional misconduct on a single occasion such as a failure to make a record of treatment for charging purposes might not amount to serious professional misconduct and yet if such failure were persisted in this might make the failures amount to serious professional misconduct: see, for example, *Felix v General Dental Council* [1960] ACT 704,721.”⁵

57 In the circumstances the Panel finds that Dr Hartley has engaged in unprofessional conduct not of a serious nature. In reaching its finding the Panel gave Dr Hartley the benefit of Dr E’s opinion qualified as it must be by the fact that she was not called as an expert witness, that Dr Hartley probably did not understand the inappropriateness of his conduct and that the counselling session which was provided by the Board after the informal hearing was not adequate. It is for this reason also that the Panel has made the determinations which it has in an endeavour to protect the public by giving Dr Hartley the opportunity to be counselled about what is appropriate behaviour in the professional setting.

58 The Panel acknowledges, with some appreciation, the effort made by counsel for Dr Hartley and counsel assisting to submit to the Panel submissions regarding the determination about which there was considerable agreement. The Panel, when it adjourned the further hearing of this matter to receive submissions in respect of the determinations, specifically indicated that it would find it of considerable benefit to receive submissions in relation to the nature of counselling and education which may be proposed, the content and length of it, and the person or organisation suggested. This did occur and the Panel was greatly assisted by the submissions which have been adopted in this regard. We do note that counsel for Dr Hartley sought that he be referred to by a pseudonym in this document when published in the annual report and on the Board’s website. It was submitted that the protection of the public would not be compromised by the Board taking into account the potential for personal embarrassment. The Panel does not concur in this view and does not accept that Dr Hartley’s personal embarrassment is a sufficient ground to depart from the usual practice of the Board in publishing the findings made at a formal hearing. The Board would not be serving its role in protecting the public if Dr Hartley’s identity were concealed in the manner suggested.

59 Dr Hartley should however take no comfort from the fact that this Panel did not make a finding of unprofessional conduct of a serious nature. The matters complained of by the complainant in this instance were of a more serious nature than that made against Dr Hartley in the Notice of Informal Hearing dated 16 May 2002. It is concerning that the escalation in the inappropriate conduct took place so soon after the counselling session on 26 August 2002. If Dr Hartley does not change his conduct and adopt a more professional relationship with his patients in line with current community attitudes then he may well find himself again the subject of a complaint.

Dated: 17 August 2004

**Victor Harcourt
Chair**

⁴ *Gee v General Medical Council* [1987] 2 All ER 193.

⁵ *Gee v General Medical Council* [1987] 2 All ER 193,198.