

Note: Dr Olstein applied to VCAT for a review of this matter. Following assessment by a dentist appointed by VCAT as a special referee, Dr Olstein was assessed as being clinically competent in the Areas in which the Panel had ordered that he undergo further education. Accordingly, VCAT ordered, by consent, that paragraphs 1 - 6 of the Panel's Determination made 15 August 2007 (which dealt with the suspension and further education) be set aside and that paragraph 7 (which dealt with the reprimand) be affirmed.

THE DENTAL PRACTICE BOARD OF VICTORIA

Dr Ben Olstein [2007] DPBV 6

Panel: Ms Deborah Foy (Chair)
Dr Gerard Condon
Dr Mandy Leveratt

Counsel Assisting the Panel: Mr P Monahan of Monahan + Rowell, Lawyers
Counsel for the Practitioner: Dr Ian Freckelton instructed by DLA Phillips
Fox

Dates of Hearing: 2, 5 March, 27 April & 16 May 2007

Date of Decision: 15 August 2007

FINDINGS

Pursuant to section 47(1)(a) of the *Dental Practice Act 1999* ("the Act"), the Panel having considered the evidence and submissions placed before it, and taking into account the admissions made by Dr Olstein with respect to allegations contained in paragraphs (a) to (ee) of the Notice of Formal Hearing, finds Dr Olstein has engaged in unprofessional conduct as defined in paragraphs (a) and (b) of the definition of "unprofessional conduct" in section 3 of the Act and that conduct is of a serious nature.

DETERMINATION

Having considered the matter and having given due weight to the submissions placed before the Panel, the Panel considers it appropriate under section 47(2) of the Act to impose the following determinations:

1. Dr Olstein's registration is suspended for a period of three months from 1 October 2007 until 1 January 2008.

2. Dr Olstein undertake and complete to the satisfaction of the Dental Practice Board the following further education in a manner and form which must be first approved by the Board as follows:
 - 2.1 Diagnosis and treatment planning;
 - 2.2 Prevention and restorative treatment with particular emphasis on re-calcifying techniques and use of posterior composite resins.
3. The further education specified in sub-paragraphs 2.1 and 2.2 must include both clinical and non-clinical components and be at the expense of Dr Olstein.
4. Satisfactory completion of the further education specified in paragraph 2 will be evidenced by the production of a certificate signed by the person responsible for providing the further education to the effect that Dr Olstein has demonstrated a competency equivalent to the standard of a newly graduating final year student.
5. The further education specified in sub-paragraph 2.1 is to be satisfactorily completed by the end of Dr Olstein's suspension. If it is not completed by the end of the suspension period, Dr Olstein's registration is to be suspended until such time as the further education has been completed to the satisfaction of the Board.
6. At the conclusion of the period of suspension a condition is imposed upon the registration of Dr Olstein that he undertake supervised practise until he has satisfactorily completed the further education specified in sub-paragraphs 2.1 and 2.2. To the extent that it is necessary to practise in these areas to complete the clinical components of the said further education, Dr Olstein may so practise in these areas only in an approved institution provided this does not occur prior to the end of his suspension.
7. Dr Olstein is reprimanded for his conduct.

Reasons for Decision

- [1] The Dental Practice Board of Victoria determined under section 45 of the Act that a Formal Hearing was to be held into the professional conduct of Dr Olstein, a registered dental care provider. A Panel was convened and a hearing was held March and in May of 2007.
- [2] The allegations heard by the Panel are contained in a Notice of Formal Hearing which described the allegations against Dr Olstein below. The allegations admitted and the findings of the Panel are listed in relation to each allegation as follows:

The allegations made against you are as follows:

- (a) At all material times you have been registered as a dental care provider in Victoria under the *Dental Practice Act 1999* ("the Act") or its predecessor, the *Dentists Act 1972*, having been so registered since 10 December 1970.

Your Patients

- (b) Between July 1998 and October 2004, you provided dental treatment to your patient Ms AA.
- (c) Between July 2002 and May 2005, you provided dental treatment to your patient Ms BB.

The allegations in paragraphs (a) to (c) are admitted.

- (d) Between February 1996 and April 2006, you provided dental treatment to your patient Ms CC.

This allegation is admitted insofar as Ms CC commenced attendance with Dr Olstein in 1999. Dr Olstein's evidence is preferred on this matter.

Ms AA

- (e) The dental treatment which you provided to Ms AA was:-
 - (i) Extremely poor;
 - (ii) Grossly substandard;
 - (iii) Of a lesser standard than that which the public might reasonably expect of a registered dental care provider; and
 - (iv) Of a lesser standard than that which might reasonably be expected of a registered dental care provider by his peers.

The Panel finds that allegations (i) to (iv) are made out and acknowledge that Dr Olstein made admissions with respect to paragraphs (iii) and (iv).

- (f) In particular, the dental treatment which you provided to Ms AA was inadequate and inappropriate for the following reasons:
 - (i) During the course of your treatment, you failed to inform Ms AA of the need to manage her bruxism to maintain the integrity of her dentition and to increase the longevity of her restorations, particularly in that you were specifically asked for such advice by her;
 - (ii) Throughout your treatment, and in particular in October 2004, you failed to diagnose and/or advise Ms AA of her need for

further dental treatment in that many of her composite restorations had failing bonds.

This allegation is partially admitted and the Panel finds that it is proven.

- (iii) Throughout your treatment, and in particular in October 2004, you failed to diagnose and/or advise Ms AA of her need for further dental treatment in that many of her restorations were affected by recurrent dental caries, and needed immediate fillings or other treatment;

This allegation is partially admitted and the Panel finds that it is proven.

- (iv) You took a number of x-rays poorly and the x-rays were not of an appropriate professional standard;
- (v) You failed to properly read and interpret those x-rays in your ongoing treatment of Ms AA, and misread their contents;
- (vi) You failed to obtain better quality x-rays (and/or other diagnostic information) when you were unsure of the interpretation of the x-rays available to you.

The Panel finds that the allegations in paragraphs (f) (iv), (v) and (vi) are proven.

- (vii) Certain of the fillings which you provided between July 1998 and October 2004 were inadequate, exhibiting poor seals and bonds and recurrent dental caries when examined on 30 July 2006. These involved teeth 16, 24, 25, 26, 36, 37, 46 and 47;

The allegations with respect to teeth 25, 26 and 46 are admitted. The Panel finds the allegations in respect of teeth 16, 36 and 37 proved and the allegation with respect to tooth 47 not proved.

- (viii) You failed to conduct a proper and reasonable diagnosis of the existence of significant dental caries in your patient's dentition.

This allegation was admitted.

- (g) During the course of treating Ms AA, you failed to provide her with all necessary information about the treatment options, the likely outcomes, advantages, disadvantages, risks and possible complications of the dental treatment proposed.

The Panel notes that Dr Olstein did give Ms AA a brochure but partially admits this allegation that he did not provide her with adequate information and consequently the Panel finds that the allegation is proved.

- (h) In particular, you failed to inform Ms AA in language that she could understand:-
 - (i) That you were limiting treatment which you recommended to her out of consideration for her financial position;
 - (ii) That she needed to have further dental work done to maintain the integrity of her dentition and to increase the longevity of her restorations;

Dr Olstein admitted the allegations in paragraphs (h) (i) and (ii).

- (iii) That the composite resin restorations which you provided to her had a shorter life span and were less durable than other alternatives; or
- (iv) That the filling materials used were bio-compatibly selected to safeguard her health and were not necessarily the strongest, and in fact their life expectancy was likely to be even shorter than normal composite materials.

The Panel finds the allegations in paragraphs (h) (iii) and (iv) are not made out as insufficient evidence was available, particularly in respect of the allegation in (h) (iv).

- (i) Accordingly, in providing this dental treatment to Ms AA, you engaged in unprofessional conduct as defined in Section 3 of the Act.
- (j) Such unprofessional conduct is of a serious nature.

The allegations in paragraphs (i) and (j) are admitted.

- (k) Further, in providing this dental treatment to Ms AA, you were guilty of professional misconduct under the *Dentists Act 1972*.

The Panel makes no finding in relation to the allegation in paragraph (k).

Ms BB

- (l) The dental treatment that you provided to Ms BB was:-
 - (i) Extremely poor;
 - (ii) Grossly substandard;
 - (iii) Of a lesser standard than that which the public might reasonably expect of a registered dental care provider; and
 - (iv) Of a lesser standard than that which might reasonably be expected of a registered dental care provider by his peers.

The Panel finds that allegations in paragraph (l) (i) to (iv) are made out and acknowledge that Dr Olstein made admissions with respect to paragraphs (iii) and (iv).

(m) In particular, the dental treatment which you provided to Ms BB was inadequate and inappropriate for the following reasons:-

(i) The restorations which you performed for Ms BB in teeth 16, 17, 26, 35 and 45 were deficient and inadequate;

The Panel notes that the allegations with respect to teeth 16, 17, 26 and 35 are admitted, finds that the allegations concerning teeth 36 and 37 are proved and the allegation with respect to tooth 45 not proved.

(ii) You failed to diagnose and advise Ms BB about the need to replace certain fillings due to decay or shrinkage of the lining or filling material in teeth 15, 16, 17, 35, 36 37, 45, 46 and 47;

(iii) You inserted certain fillings without first removing all decay in teeth 16, 17, 26, 35 and 45;

Allegations in paragraphs (m) (ii) and (iii) were substantially admitted except with respect to tooth 26.

(iv) You took a number of x-rays poorly and the x-rays were not of an appropriate professional standard;

(v) You failed to properly read and interpret those x-rays in your on going treatment of Ms BB, and misread their contents;

(vi) You failed to obtain better quality x-rays (and/or other diagnostic information) when you were unsure of the interpretation of the x-rays available to you;

(vii) You failed to conduct a proper and reasonable diagnosis of the existence of significant dental caries in your patient's dentition.

The allegations in paragraphs (m) (iv) to (vii) are admitted except with respect to teeth 16, 35 and 45. The Panel finds that these allegations are proved.

(n) Prior to commencing the treatment (and during the course of the treatment), you failed to provide Ms BB with all necessary information about the treatment options, the likely outcomes, advantages, disadvantages, risks and possible complications of the possible dental treatment proposed.

The Panel notes that Dr Olstein did give Ms BB some information but that the allegation in paragraph (n) is proved.

(o) In particular, you failed to inform Ms BB in language that she could understand:

- (i) That you were limiting the dental work that you did for her out of consideration for her financial position;
- (ii) That because of her bruxism, she needed a splint;
- (iii) That you were not sure with some of the areas on the x-rays as to whether the dark areas were decay, shrinkage or radiolucency from the possible liner that had been used;
- (iv) That you had decided only to watch the dark areas on the x-rays for changes to indicate the need for further restorative work;
- (v) That, by virtue of developing dental caries in her dentition she needed to have certain fillings done promptly.

The allegations in paragraph (o) (i) are admitted. The Panel finds that the allegations contained in paragraph (o) (ii) and (iii) are not made out, and in (iv) and (v), the allegations are proved.

- (p) Accordingly, in providing this dental treatment to Ms BB, you engaged in unprofessional conduct as defined in Section 3 of the Act.

The allegation in paragraph (p) is partly admitted and proved.

- (q) Such unprofessional conduct is of a serious nature.

The allegation in paragraph (q) is admitted.

Ms CC

- (r) The dental treatment which you provided to Ms CC was:-
 - (i) Extremely poor;
 - (ii) Grossly substandard;
 - (iii) Of a lesser standard than that which the public might reasonably expect of a registered dental care provider; and
 - (iv) Of a lesser standard than that which might reasonably be expected of a registered dental care provider by his peers.

The Panel finds that allegations in paragraphs (r) (i) to (iv) are made out and acknowledge that Dr Olstein made admissions with respect to paragraphs (iii) and (iv).

- (s) In particular, the dental treatment which you provided to Ms CC was inadequate and inappropriate for the following reasons:

- (i) During the period from January to March 1999, you performed fillings on teeth 16, 17, 26 and 27, such fillings being deficient and of an unacceptable standard.
- (ii) On or about 19 February 2004, you performed further fillings on teeth 16 and 17 which fillings were deficient and of an unacceptable standard;
- (iii) On or about 31 March 2005, you performed a further filling on tooth 27 which filling was deficient and of an unacceptable standard;

The allegations in paragraphs (s) (i), (ii) and (iii) are admitted.

- (iv) During August 2001, you failed to diagnose dental caries or possible dental caries either on examination or from your x-rays on teeth 16, 17, 26, 27, 43, 44 and 45.

Allegations in paragraph (s) (iv) are not found proven with respect to teeth 43, 44 and 45 and are admitted with respect to teeth 16, 17, 26, 27.

- (v) During or about January 2004, you failed to diagnose dental caries or possible dental caries either on examination or from your x-rays on teeth 15, 16, 23, 25, 35, 43, 44, 45 and 46.

The allegations in paragraph (s) (v) are admitted with respect to teeth 15 and 16 and the Panel finds that the allegations with respect to teeth 23, 45 and 46 are found proven.

Allegations with respect to teeth 25, 35, 43 and 44 are not made out sufficiently.

- (vi) During February 2006 you failed to diagnose dental caries or possible dental caries either on examination or from your x-rays on teeth 14, 15, 24, 25, 26, 34, 35, 37, and 47.

Allegations with respect to teeth 14, 15, 25, 26 and 35 (admitted by Dr Olstein) and 37 are found proven. Allegations with respect to teeth 24, 34 and 47 are not found proven.

- (vii) You took a number of x-rays poorly and the x-rays were not of an appropriate professional standard;
- (viii) You failed to properly read and interpret those x-rays in your ongoing treatment of Ms CC, and misread their contents;
- (ix) You failed to obtain better quality x-rays (and/or other diagnostic information) when you were unsure of the interpretation of the x-rays available to you.

The allegations in paragraphs (s) (vii), (viii) and (ix) are admitted.

- (t) You provided false and incorrect information to Ms CC, and had no reasonable basis for doing so, about her dentition, and misled her as to the state of her dentition, in that:
 - (i) On or about 28 February 2006, after taking further x-rays of her teeth, you informed Ms CC in words to the following effect that “your teeth are perfect now, no more problems, the x-rays are clear”;

The allegation in paragraph (t) (i) is partly admitted in that Dr Olstein told Ms CC that she needed treatment for some teeth and the Panel finds the allegation is not proven.

- (ii) This statement was false, and you had no reasonable basis to make such a statement, because many of her teeth were at that time carious – teeth 14, 15, 16, 17, 23, 24, 25, 26, 27, 34, 35, 36, 37, 45 and 47.

The Panel makes no finding with respect to this allegation given its finding in relation to paragraph (t) (i).

- (iii) Alternatively, on or about 28 February 2006, after taking further x-rays of her teeth, you informed Ms CC in words to the following effect that “aside from the work you had previously discussed that needed treatment and was on her treatment plan, the other teeth on the x-rays were fine”;

The allegation in paragraph (t) (iii) is admitted.

- (iv) This statement was false, and you had no reasonable basis to make such a statement, because many of her teeth which you had not previously discussed as needing treatment were at that time carious teeth – teeth 14, 15, 24, 25, 26, 34, 35, 37 and 47.

The allegations in paragraph (t) (iv) are not proven.

- (u) Accordingly, in providing this dental treatment to Ms CC, you engaged in unprofessional conduct as defined in Section 3 of the Act.
- (v) Such unprofessional conduct is of a serious nature.

The allegations in paragraphs (u) and (v) are admitted.

- (w) Further, in providing this dental treatment to Ms CC, you were guilty of professional misconduct under the *Dentists Act 1972*.

The Panel makes no finding in respect of this allegation in paragraph (w).

Explanatory Note - Conduct On and Before 30 June 2000

(cc) The Panel appointed by the Board to conduct this Formal Hearing can make Findings or Decisions. After considering all of the submissions made to the hearing, the Panel may find (in regard to your conduct on and before 30 June 2000):

- (i) That you have contravened the *Dentists Acts 1972*; and/or
- (ii) That you have been guilty of professional misconduct.

The Panel has determined to make no finding with respect to these allegations.

Evidence of Dr A Roseman

- [3] Dr Roseman gave evidence with respect to publications by the Board regarding communication with patients and record keeping. He was also asked to explain various technical matters such as the radio-opacity of composite materials used in liners and composite fillings, the impact of radiolucency in diagnostic terms and his general understanding of the monitoring of decay in teeth and the use of remineralisation.
- [4] He gave evidence that he had prepared documents on the basis of Dr Olstein's records, the reports from Dr Keur and the subsequent retreating report by, in this case, the dentist subsequent to Dr Olstein for each patient which covered the history of each individual tooth over the period that Dr Olstein had seen the patient until their attendance with a new practitioner.

Evidence of Dr Johannes Keur

- [5] Dr Keur gave evidence of his experience as a registered dento-maxillar facial radiologist. Currently, he was consulting, teaching and examining for the Australian Dental Council.
- [6] He told the Panel that he had been given radiographs and digital images relating to the three patients - Ms AA, Ms BB and Ms CC.
- [7] He explained that he had started with an appraisal of the technical qualities of the radiographs as he was asked to diagnose caries, and that it had been difficult due to technical problems with the x-rays.
- [8] He described a number of the x-rays as containing gross overlapping of teeth which should have been avoided by directing x-ray beams through the space between surfaces of the teeth. In his view, such overlapped interproximal spaces generally prevented any reliable diagnosis of caries, particularly early caries. He told the Panel that the majority of the bitewings taken by Dr Olstein were grossly overlapped, particularly on the left-hand side. In his view this suggested that there is a possible fault in the technique.
- [9] In his report he stated, "The relevance of this exhaustive technical appraisal is to demonstrate the difficulty experienced with the caries interpretation of these series. For adequate detection of interproximal caries it is necessary that the

interproximal surfaces appear on the radiographs without any overlapping. As can be seen from the appraisal, overlapping is a common occurrence in these series."¹

- [10] He explained that the bitewing x-ray is a valuable aid to diagnosis of caries as the surfaces between the teeth are not terribly accessible by clinical means. He stated that "If one sees a filling and there is a radiolucent or a dark area between the filling and the tooth structure then that could be a lining, or it could be secondary caries. And if you're not sure which of those two, ideally one should remove the filling."²
- [11] And if there are no symptoms, perhaps the practitioner should watch the tooth and by take an x-ray again in, say, three or six months."
- [12] Dr Keur told the Panel that the root tips were not visible in Dr Olstein's periapical x-rays. He explained that lack of root tips meant that it was difficult to tell whether or not a root canal treatment had been adequately done, or if there was any periapical pathology present.
- [13] He also commented that the radiographs had poor contrast which also limited the diagnostic yield.
- [14] He agreed that a little bit of an overlap of no more than 1mm is at times acceptable.
- [15] He also pointed out that many of the x-rays had a "large cone cut" meaning that the x-ray tube was not properly aligned, so part of the x-ray was not exposed, resulting in a light area and providing no diagnostic information for the "cone cut" area.
- [16] In discussing the diagnosis of caries in relation to a series of x-rays of Ms BB's teeth, he noted, for example, that on tooth 17, there was a small lesion in 2002 which was larger in 2003 and larger again in 2005.
- [17] In 2002, it was already well into the dentine and should, in his view, have been treated immediately.
- [18] He suggested that on tooth 36 of Ms BB, there was a difficulty in distinguishing whether or not there were secondary mesial caries or cervical burnout and told the Panel that "if you see cervical burnout you usually have to again clinically investigate and rule out the possibility of caries."
- [19] When asked how severe were the deficiencies in this whole group of x-rays that he had been asked to review, he replied that "From an interpretation point of view, they were so severe, that it made adequate interpretation for certain areas impossible."³

¹ Report of Dr Keur – Exhibit E12

² Transcript p.198

³ Transcript p.211

- [20] In response to a question about the difficulty of detecting whether or not shrinkage of composite or decay was present, Dr Keur told the Panel that it was immaterial as when any space between the filling material and the tooth is present, all the consequences of debris arise and need to be treated.
- [21] He also told the Panel that most modern liners were radiolucent and usually showed as very thin layers.
- [22] He was asked by a Panel member to comment on the x-rays in the series of patients and what would be expected from Australian Dental Council candidates (being overseas trained dentists presenting for examination in this country to allow registration) and he advised that if he saw such x-rays from an Australian Dental Council candidate, he would recommend a fail result.

Evidence of Ms AA

- [23] Ms AA gave evidence that she first saw Dr Olstein on 8 July 1998, after she had seen an advertisement in a magazine. She said she did not originally attend his clinic to ask for the removal and replacement of her amalgam fillings but to have a check up and she had toothache. She said that he had told her that amalgam fillings were dangerous and needed to be removed.
- [24] She had attended his clinic until October 2004. She initially had a number of amalgam fillings replaced with composite fillings. She recalled being given a number of brochures about composite fillings and she recalled a conversation about the nature of composite fillings and that they were different. She did not recall that this conversation highlighted the significance of the shorter durability and lifespan of composite fillings. She told the Panel that she had relied on Dr Olstein to monitor the life of the fillings.
- [25] She also told the Panel that Dr Olstein had told her in February 2003 that some composite fillings might need replacement because of shrinkage of the filling material or the liner.
- [26] She remembered him saying, "There's some that we, you know, we'll keep an eye on."
- [27] Ms AA was asked by Counsel Assisting the Panel if Dr Olstein had told her that there were seven teeth on which he proposed to keep an active watch. She replied: "At no point would I - did I feel alarmed or that there was anything wrong, other than what he said that my teeth were fine."⁴
- [28] She said that while she was attending Dr Olstein, she "felt that I did have trouble in my teeth with not being able to floss and certain catches that would catch my skin, and different things that I'd actually asked repeatedly, you know, 'Is there

⁴ Transcript p.57

something we can do about that?⁵

- [29] She agreed that Dr Olstein had told her in July 2005 that she needed treatment on one tooth and he had undertaken that treatment.
- [30] Generally, she agreed that she was apprehensive about attending a dentist. She also agreed that she was concerned about cost and had sought to make an arrangement for part payment with Dr Olstein.
- [31] After her last attendance at Dr Olstein's practice, she had gone to Dr Sims who told her that a number of her teeth were seriously decayed and in need of urgent dental work.
- [32] Nonetheless she said that while he may have told her this, she was very dismayed to discover both the amount of treatment that had to be done, including two crowns, root canals and gum surgery and the consequent costs.
- [33] In addition, she told the Panel that prior to attending Dr Olstein she had seen a dentist who told her she had a problem with bruxism and a plate was made up that was badly fitting so when she first attended Dr Olstein, she told him, "I've been told I've got a problem, what can we do about this?" And he said, "Don't worry about it, it's not a problem for you."⁶

Evidence of Dr David Sims

- [34] Dr Sims gave evidence that Ms AA had sought a routine examination as she had been seeing another dentist for some considerable time and wanted a more local dentist now.
- [35] On his first examination, he was concerned that a lot of treatment needed to be done. Most of this work arose for similar reasons - bonds were breaking down and recurrent caries could be found around the edges of a number of restorations. The replacement restorations were required either due to age of previous restorations, poor bonding in the first place due either to poor technique or because of inadequate moisture control or choice of materials.
- [36] Dr Sims' exemplary record of treatment recorded 14 fillings and one crown.
- [37] His view was that the majority of the treatment was urgent or needing to be done as soon as possible due to the number of deep carious lesions that, if untreated, could lead to the loss of those teeth.
- [38] He agreed that the timing of Ms AA's treatment had been affected by financial matters, but not the choice of treatment.

⁵ Transcript p.53

⁶ Transcript p.53

[39] He also gave evidence that he observed, "Severe bruxer with flattening of all molars and loss of incisal points of canines."⁷ He said that there were multiple wear facets on a number of teeth, especially the canines and molars.

Evidence of Ms BB

[40] Ms BB gave evidence that she had been treated by Dr Olstein between July 2002 and May 2005, after she found information about him in a health magazine.

[41] In July 2002, Dr Olstein did an x-ray examination and he told her that he had compared the x-rays with those of her previous dentist, Dr Sable's and there was not significant change and that it would be satisfactory to monitor the teeth that Dr Sable was watching.

[42] Dr Olstein had initially undertaken some restorations. She explained to the Panel that after some time waiting for her teeth to settle she had decided that she wasn't satisfied with the situation. After new x-rays had been taken, Dr Olstein told her then that there were significant cavities present under the fillings he had inserted earlier. He had suggested that she must have been consuming substantial quantities of sugar which she denied.

[43] She also told the Panel, "I would like to make it clear that I did not ever request to have dental work postponed due to money concerns as I was prepared to pay to save the teeth Dr Sable had expressed concern over."⁸

[44] Ms BB gave evidence that, for example, she had raised a concern about tooth 35 when she initially attended Dr Olstein and claimed that the full extent of the problem of tooth 35 was eventually identified some three years after she sought advice. She told the Panel "I was aware of potential cavities in both of those teeth that was indicated to me from Dr Sable and I felt that they weren't tended to quickly enough considering I - I was aware that there was a problem when I first consulted with him."⁹

[45] She was asked about an entry in his record that indicated possible decay in tooth 35. Dr Olstein had told her about his intention to try topical remineralisation.

[46] She said that he had not told her that the effectiveness of remineralisation depended on the depth of decay in any particular tooth. She said that she remembered it being a fairly superficial type of cavity, not a deep cavity.

[47] Ms BB acknowledged that she did find dental work quite nerve wracking and that she had been financially stretched and did pay off her account in instalments.

[48] She told the Panel "I had the filling done initially and Dr Olstein asked me to monitor its progress and it didn't settle down and when I returned back to him he indicated that there was a large amount of decay under the filling that he had initially put in and that I would require root canal work. And I questioned him

⁷ Transcript p.69

⁸ Transcript p.92

⁹ Transcript p.93

about why there was still decay and that was when he mentioned that there was a lot of bleeding (at the time of his earlier attempt to fill the tooth)."¹⁰

- [49] She agreed that Dr Olstein had told her that she would need root canal treatment on two of her teeth and she also recalled that Dr Olstein had mentioned decay in other teeth in addition to the decay noted by her previous dentist.
- [50] Dr Olstein later told that Panel that, "I recorded in my treatment notes that decay was appearing in those five teeth and that they needed to be filled" and she did recall that we were actively watching teeth.
- [51] Ms BB told the Panel that she was aware that he was checking several teeth but not that he was specifically looking at five teeth every time she attended between 30 July 2002 and her last visit in 2005.
- [52] She also said that Dr Olstein had not, in her view, spoken to her in detail about all of the advantages and disadvantages of particular treatment options or risks.
- [53] She agreed that he did tell her about her grinding of her teeth and did mention the possibility of a splint but she claimed it was mentioned on several occasions but she never thought that was an essential part of her treatment until her last consultation on May 2005.
- [54] She had subsequently found out on seeing his notes that on 30 July 2002 he actually identified a dozen teeth that could be suffering from decay.
- [55] In cross-examination, Counsel for Dr Olstein asked Ms BB if she remembered being told that there were a number of teeth which she had been told were problematic and which needed to be looked after by way of fillings. She recalled that tooth 35 was a problem and she believed a top tooth was a problem but she was unsure of the others.
- [56] She did recall, "We were always watching teeth".
- [57] Eventually, she decided to leave Dr Olstein and go to another dentist Dr Peter Varley.

Evidence of Dr Peter Varley

- [58] Dr Varley gave evidence that when Ms BB first presented on 24 May 2005, he diagnosed a mouth with gross caries requiring 11 restorations and a root canal.
- [59] He gave evidence of a range of mild to medium level caries on a number of teeth, which, in his opinion, would have been present in respect of the medium caries for over 12 months.
- [60] On one tooth, he diagnosed a large area of caries on one surface and a smaller area on another surface. He told the Panel that these were approaching gross caries and had been there for approximately two or three years. On another

¹⁰ Transcript p.95

tooth, there were mild caries, which had been there approximately six months, maybe 12 months.

- [61] He also gave evidence that, in his opinion, in respect of tooth 35, looking at Dr Olstein's x-rays, the caries had been there since 2002 so that when he saw Ms BB in 2005, it had reached the stage of severe caries and the tooth possibly required extraction.
- [62] He did agree that medium level caries on one tooth, tooth 34, would be difficult to diagnose which was a three-surface restoration which he thought would have been present for approximately six to 12 months.
- [63] He was asked to comment on Dr Olstein's evidence that some of the fillings which were performed on Ms BB's teeth were adequate and he told the Panel that he did not agree.
- [64] He was also asked about Dr Olstein's strategy of "active watching" and he told the Panel that caries of a certain depth cannot be watched as it continues to progress. In his opinion, changing diet or application of calcium phosphate, medications or topical agents were not going to stop a decay of that level. He acknowledged in cross-examination that evaluation of the age of caries is an impressionistic exercise because a whole variety of different factors can impact upon the speed at which caries develop.
- [65] He commented that he had nonetheless seen decay in Ms BB's teeth on recent and earlier x-rays.
- [66] Counsel for Dr Olstein suggested to Dr Varley that Dr Olstein had been canvassing the need for root canal treatment on tooth 35 in November 2003.
- [67] Dr Varley told the Panel that he thought a root canal treatment should have been considered in 2002 on the basis of an x-ray yet it was not done until 2005 when Ms BB came to Dr Varley.

Evidence of Ms CC

- [68] Ms CC gave evidence that she first attended Dr Olstein in 1996 after referral from a natural practitioner. She was looking for a dentist who removed amalgams and replaced them with "good material". She was asked several times about the date as Dr Olstein's records indicated that she had begun treatment with him in 1999.
- [69] She told the Panel that in the first years when she attended Dr Olstein, he had always advised her about any possibility of decay. She agreed with his evidence on Affidavit that he had taken x-rays in 2001, 2004 and 2006.
- [70] She agreed that she did remember a treatment plan being organised but not the details of the plan. She had required treatment for fillings which replace amalgam fillings, crowns and root canal treatment.

- [71] Her complaint to the Health Services Commissioner about which she gave evidence to the Panel arose following her last attendance with Dr Olstein before attending Dr Matriste.
- [72] She told the Panel that on February 29, 2006 when she presented to Dr Olstein with extreme pain, he had told her that she needed a root canal which his brother would have to perform. She was concerned as was Dr Olstein to save the tooth. She said that the particular tooth had been previously treated by Dr Olstein.
- [73] She was also aware at the time that four different crowns needed to be done.
- [74] She told the Panel, "I sat in the chair in tears and he said, 'Let me take x-rays'. He came out and said, 'Your teeth are perfect now. No more problems. X-rays are clear.'"¹¹
- [75] While she was aware that there was a treatment plan, that she and Dr Olstein both knew that there was work to be done on her teeth but she had assumed from that conversation that she had no more cavities.
- [76] She agreed in cross-examination that there had been talk about decay in her teeth previously.
- [77] She said, "I just thought my teeth - my teeth were great, that's what I thought, because I hadn't heard much about cavities, you know, in the last probably three years."¹²
- [78] She was also asked about whether cost had influenced her treatment decisions. She told the Panel that because she was not feeling good about the treatment that she was receiving she would always end the discussion with, "Look Dr Olstein - look I can't afford that at the moment".¹³ She explained that the issues about cost were always about crowns, broken teeth inlays, and apart from those things being costly I was a bit nervous to have the work done. And I was always concerned about having cavities addressed immediately and I would act on that immediately if - if I was given the information.
- [79] She denied that he communicated the outcome of the x-rays which he had taken on that day as being that no further new problems had developed and told her that she needed fillings on two different other teeth, the 16 and the 23 and that there was another tooth next to the one where she was having the pain which needed to be watched carefully.
- [80] She went to see Dr Matriste and explained to her that she had been with her dentist for a long time as she had concerns about the work that her dentist was doing. She told the Panel that Dr Matriste had checked throughout her mouth and taken a photograph of every tooth in her mouth and then after looking at each tooth she said that "I had a mouth full of decay" which was subsequently confirmed on OPG.

¹¹ Transcript p.147

¹² Transcript p.153

¹³ Transcript p.154

[81] She told Dr Olstein about the photographs and his response was, "Well my x-rays showed your teeth were good" and he agreed to delete his bill for taking the x-rays.

Evidence of Dr Lisa Matriste

[82] Dr Matriste told the Panel that when she saw Ms CC on 20 March, some three weeks after Ms CC's last attendance at Dr Olstein's clinic, her clinical impression was that there was extensive decay. On 5 May, Ms CC had two molar teeth extracted and over a period of five or six months thereafter she had well over a dozen further fillings or treatments to other carious teeth in her mouth.

[83] She found a number of teeth with deep recurrent caries. For example, she found a small inter-proximal carious lesion present on tooth 22 which needed a filling and then observed recurrent decay on tooth 23. She also told the Panel that there was recurrent decay on tooth 24 which needed filling.

[84] She was concerned about the rate of caries in Ms CC's teeth as she thought it was inconsistent with Ms CC's healthy practices. She found her to be a cooperative patient and did not find financial issues a concern.

[85] Dr Matriste had prepared a report¹⁴ of the treatment that she had provided to Ms CC which focused on treatment provided in May to October 2006 planned on the basis of her initial examination.

[86] She told the Panel that a number of the carious teeth, which were evident at her examination on 20 March 2006, would have been highly likely to be present for longer than three weeks.

[87] In addition, as she treated and replaced some of Ms CC's teeth she observed new carious lesions on the adjacent teeth, so these fillings were added to the treatment plan subsequently.

[88] On cross-examination, she agreed that at the examination on 20 March 2006, she was not on notice that there were further difficulties with some teeth. She acknowledged that there were elements of her treatment plan, which coincided with the treatment plan given to Ms CC by Dr Olstein, including the use of remineralisation for one tooth.

Evidence of Dr Ben Olstein

[89] Dr Olstein gave evidence that he had been in practice for 37 years and that early in his practice he focussed on preventative work particularly related to the impact of nutrition on teeth and on reducing patient anxiety.

[90] Over the years, he became aware that "a lot of the products that are used in dentistry have potential toxic side effects and can also impact on people's health."

¹⁴ Report by Dr Matriste dated 2 November 2006

[91] He gave evidence with respect to each of the patients.

Ms AA

[92] Dr Olstein gave evidence that Ms AA was a very nervous patient. He replaced amalgam fillings and arranged for root canal treatment on tooth 27. He said that initially he did not identify a bruxism problem. He replaced fillings in eight teeth and gave her a brochure which explained to her the longevity of the fillings and the need for ongoing maintenance.

[93] There was a gap in treatment in 2001. In February 2003, Ms AA complained of intermittent pain in tooth 16. He took further x-rays. With respect to Ms AA's x-rays, he was not sure at that stage whether those dark areas were decay. He decided to keep an active watch on those. He treated Ms AA in February and March 2003, and warned Ms AA that she may need to have root treatment on that tooth.

[94] In February 2003, he had seven teeth on watch i.e. he had identified the fact that there was a dark area and a potential problem on the x-rays and that he needed to be aware of that.

[95] It was conceded by Counsel Assisting the Panel that the x-ray on tooth 44 was indeterminate and no finding is made.

[96] He was asked to respond to the evidence given that a number of restorations ultimately done by Dr Sims were in respect to fillings that he had done earlier. He said that the restorations were seven years later and he had advised the patient that some of these fillings may not last, particularly the larger ones. He told the Panel that he had advised in 2003 that "we were keeping some on watch and that I may need to replace some of these fillings for her".

[97] He gave Ms AA all the information with regards to the risks involved with the replacement of the amalgams and the longevity of the fillings at her original visit.

[98] He said that she had been happy with his strategy of keeping an active watch over her teeth and not intervening more actively. He said that her financial position may have been one of the reasons why he did not intervene but that he did not think it was a significant factor.

[99] Dr Olstein conceded that he should have diagnosed actual or highly probable decay on teeth 23, 26, 27, 35, and 46 in October 2004.

[100] He also admitted that the fillings he gave to Ms AA between July 1998 and October 2004 were of poor quality in teeth 16, 24, 25, 26, 36, 37 and 46. The Panel accepts that evidence regarding tooth 47 was ambivalent and accepts Dr Olstein's evidence that he was attending to this tooth.

[101] The allegation in paragraph (f) (vii) is therefore made out except with respect to tooth 47.

[102] The Panel also accepts his evidence with respect to the allegations in paragraph

(h)(iii) and (iv) on the basis that he did provide information regarding the nature of composite fillings to Ms AA and that there was insufficient evidence available regarding the information about bio-compatibility of filling materials.

Ms BB

- [103] He told the Panel that when he took x-rays, he discovered that there were quite a large number of questionable areas.
- [104] He told her that there had been some change between the x-rays that she brought with her and that he had suggested remineralisation and monitoring.
- [105] In July 2002, he identified 12 teeth to be watched.
- [106] In February 2003, he found that some of the decalcified areas that she had around the gingival margins were stable but the 44 was decayed so he advised her that she needed a filling on the 44.
- [107] In November 2003, he did an examination, took x-rays, and did two fillings for her, one in the 26 and one in the 35. He noted that she had a large cavity in that area which he acknowledged to Panel that he should have picked up before that time. He also noticed definite progression of some of these dark areas in seven of the 12. Even though they had progressed he did not feel they had progressed to the state where intervention was needed, apart from the 35.
- [108] In January 2004, he did two further fillings and told her that he would x-ray again in six months time and if some of these areas that were being watched progressed then she would need to have some fillings done.
- [109] He advised her that he was not happy with four teeth as they had shown significant increases. He also told her about tooth 35 that she needed possible root treatment and refilling of those teeth.
- [110] He agreed that he was slow in relation to treating tooth 35 but he did treat it in November 2003 and that he had a plan in relation to it as of 10 May 2005. In May 2005, he suggested a saliva test because she kept telling him that she had a very good diet so it was surprising to see the progress of the caries. He also recommended a splint for grinding at that point in time.
- [111] Consequently, the Panel accepted his evidence that he advised Ms BB of the need for a splint and therefore the allegation in paragraph (o) (ii) was not made out. Similarly, the Panel accepts his evidence that he did advise Ms BB that he was not sure of the dark areas on her x-rays and the allegation in paragraph (o) (ii) is not made out. He agreed that the strategy of remineralisation did not work as well as he hoped. He agreed that in hindsight he should have been more interventionalist in this patient at this point.
- [112] While the Panel notes that Dr Olstein did provide some advice to Ms BB of her need for treatment, it was insufficient and not in a manner which she could understand concerning the risks and disadvantages of remineralisation and monitoring of teeth as alleged in paragraph (o) (iv) and (v).

[113] Ms BB subsequently was given nine fillings by Dr Sims. Dr Olstein admitted failure in regard to eight of them. He did not agree that the restoration which he performed on tooth 45 was inadequate and the Panel accepted his view. It did not accept his view with respect to teeth 36 and 37. Consequently, the allegation in paragraph (m) (i) is made out except with respect to tooth 45.

[114] The allegations in paragraph (m) (ii) and (iii) were substantially admitted and are made out except with respect to tooth 26 on the basis that there was insufficient evidence to make a finding.

Ms CC

[115] He first saw Ms CC on 6 January 1999. She complained of having some sensitivity in some teeth and wanted her amalgam fillings taken out. He also advised her that she needed a splint.

[116] In January 2004, he proposed to watch three teeth. When he treated one tooth, tooth 17, he realised there was a problem with the 16 and treated that as well. He told the Panel that he had recurring problems with the four teeth because of the size of the restorations and also that she had fractured cusps in these teeth. He was asked about the quality of the fillings on four teeth. He said, "because I had to redo them a number of times so I can only say that they were unacceptable."¹⁵

[117] He admitted that he had done a further filling on one of these teeth in March 2005 which was deficient.

[118] He did discuss various options in relation to some of Ms CC's teeth.

[119] He knew that she was concerned that, since she had the composites placed, her teeth were breaking and she was worried about her teeth being weakened. He pointed out to her that was a possibility because of the size of the fillings but also that she had a 46 that had broken that had an amalgam in it. He suggested to her that she should think about having a splint.

[120] In mid July 2004, he advised her of the need for a crown and of the splint because of her grinding and an inlay on the 36, a filling that had been done by her previous dentist.

[121] In March 2005, he performed two restorations in teeth 26 and 27 and gave her a treatment plan which suggested that she attend to the other teeth that they had already discussed. Dr Olstein said that Ms CC had told him that she wanted a crown on tooth 36, not an inlay and she was going to wait until she could afford it.

[122] He also gave her a brochure on root canal treatment.

[123] He next saw her some eight months later in early December 2005 and she was unhappy about having broken a tooth. He discussed her options and suggested

¹⁵ Transcript p.280

that she have an inlay on this tooth due to the size, as it was still alive.

- [124] On 28 February 2006, she had severe pain in tooth 27 which he pulp tested it and suggested that she have root canal treatment on this tooth and a crown or extraction. She indicated she wanted to save the tooth so his suggestion was root canal treatment. He also reminded her about the crown on the 45 and that she needed crowns on the 17, 27, 36 and also some fillings to tooth 16 and 23 and that he was watching tooth 26.
- [125] He gave Ms CC a treatment plan on 28 February 2006.¹⁶ He observed that there appeared to be buccal erosion from her bruxism.
- [126] He took further x-rays which had some overlap in the posterior area, mainly on the periapical x-rays but also some on the bitewings which he said did not impair his capacity to diagnose her condition
- [127] He told the Panel that the x-rays were sufficient for their purpose as he could still see the dark areas on the x-rays. One x-ray indicated that there could have been a bubble on the tooth 45. He explained the expression "bubble" as a void in the filling caused by a flowable composite.
- [128] He told the Panel that he did not tell her "her teeth were perfect now, no more problems and the x-rays were clear." He told the Panel that he said to her that "apart from what we had already discussed with regards to her treatment that there was nothing further on the x-rays"¹⁷ and we had gone through the treatment plan with her and some of this treatment she'd known well before that anyway because there were a couple of teeth that had already been discussed with regard to treatment.
- [129] The Panel accepts that this comment gave rise to a misunderstanding on Ms CC's part, and consequently, the allegations in paragraph (t) of the Notice of Formal Hearing are not made out except to the extent that Dr Olstein agreed that he did make the statement which gave rise to the misunderstanding.
- [130] He was extensively cross-examined on the state of Ms CC's teeth at this point and went into detail as to his treatment plan for her. He told the Panel that although there was a question with respect to two of the amalgam fillings he was not convinced that they actually needed replacing because of decay.
- [131] He had spoken to Dr Matriste after she had seen Ms CC and she had a treatment plan that was exactly the same as his, except for a crown on one tooth for which he had suggested an inlay, so basically the treatment plans were the same.
- [132] The Panel accepted Dr Olstein's evidence with respect to the allegation in paragraph (s) (iv) and (v) with respect to his x-ray finding of cervical burnout on teeth 43 and 44 and accepts that tooth 45 could have been a fractured cusp. Dr Olstein admitted the allegation with respect to teeth 15 and 16.

¹⁶ Exhibit G5 p.165 treatment plan

¹⁷ Transcript p.286

- [133] Similarly, the Panel accepted his evidence that he did diagnose caries in teeth 25 and 35 and that his diagnosis with respect to teeth 43 and 44 was acceptable and that the allegation in paragraph (s) (v) was not made out sufficiently. However, this allegation with respect to tooth 46 was partly admitted and his evidence was not accepted by the Panel in light of the evidence of Dr Keur and Dr Matriste.
- [134] The Panel accepted Dr Olstein's evidence that he did not fail to diagnose caries on teeth 24, 34 and 47, as alleged in paragraph (s) (vi), as there was insufficient evidence concerning whether or not diagnosis of caries was possible in these teeth.
- [135] The Panel preferred Dr Matriste's evidence with respect to the allegation in paragraph (s) (vi) concerning tooth 37 as she gave evidence of the presence of two carious lesions in tooth 37, some four weeks after Ms CC had last seen Dr Olstein.¹⁸
- [136] At the conclusion of his evidence regarding each patient, he then gave evidence in relation to a number of issues which had arisen in the case of each patient which are dealt with in turn below.

X-rays

- [137] When asked about Dr Keur's criticisms of his x-rays, Dr Olstein agreed generally with Dr Keur.
- [138] He told the Panel "when I read Dr Keur's report and I went back to my x-rays and had another look and then saw the progression of what had happened over the years with these patients then I have admitted that maybe I should have intervened earlier."¹⁹
- [139] When asked by Counsel Assisting that his poor technique in taking x-rays meant that he was putting himself into a position where he was misdiagnosing his patients because of the inadequate diagnostic information that he was making available to himself, he disagreed and told the Panel that x-rays were only one form of diagnosis.
- [140] Dr Olstein explained the poor quality of the x-rays by saying that he started using digital x-rays and that he had had difficulty in beginning to use them as they were very technique sensitive. He told the Panel that his technique had improved over the years.
- [141] He told the Panel that he took bitewing x-rays to see whether there is any decay or any dark shadows on the tooth. However, he suggested that a periapical x-ray would not be taken by most dentists unless looking for infection at the apices of the teeth. Generally, he took them to evaluate the periodontic condition with regards to bone loss. On that basis, even though there was a lot of overlap in the periapical x-rays, they were sufficient for him to check bone levels of those teeth.

¹⁸ Exhibit G10 Report of Dr Matriste dated 2 November 2006 at page 3

¹⁹ Transcript p.318

- [142] He also told the Panel that he had changed the cone on his x-ray machine and that he thought that his diagnostic competency was satisfactory.
- [143] Dr Olstein was asked a number of questions about frequency of x-rays in each of the three patients. He told the Panel that he disagreed with Dr Keur's opinion that an appropriate time was about three months as he thought that this would be over exposing patients to x-rays. In his view, x-rays should be taken no more than 12 months apart unless there is sort of some other problem. His interval was usually 12 to 18 months.
- [144] He acknowledged that, however, there were many occasions in his treatment of these three patients where the interval was much longer than 18 months in situations where teeth were on active watch.
- [145] Further he agreed that in those instances, he had not discussed the need for x-rays with these patients and there was no evidence to indicate that they had objected to the taking of x-rays.
- [146] He told the Panel that he had trouble convincing Ms AA to have x-rays.

Techniques

- [147] Criticisms of Dr Olstein included his techniques in undertaking composite fillings in terms of use of liners and adhesives, and the place of remineralisation as a remedial and prophylactic technique.
- [148] Dr Olstein advised the Panel that in relation to remineralisation he was much more conservative now and would probably restrict it to surface remineralisation. He advised that he was moving over to the use of inlays for substantial restorations which he stated were far less technique sensitive.
- [149] He admitted that he had had technique problems with the composites which he had made efforts to remedy. He told the Panel that he was always prepared to learn and improve his techniques.
- [150] He also recognised that problems had surfaced with the use of flowable composites. He used flowable composites for the purpose of trying to eliminate sensitivity in teeth, but over the years problems had arisen and that he also needed to consider his techniques in this area.
- [151] He acknowledged that in light of the outcome of these three patients, there were many areas that he had not been happy about and that he needed to improve his technique.
- [152] He advised the Panel that he had engaged another dentist to provide assistance to him on the basis of three hours training every fortnight with a focus on

diagnosis, technique, x-raying and the usage of suitable dental materials.²⁰

“Active watch”

- [153] Dr Olstein gave evidence in relation to each patient that he had a number of teeth on “active watch”. In the case of Ms AA, he had seven teeth, in respect of Ms BB five teeth and in the case of Ms CC, four teeth on “active watch”.
- [154] He described this as being aware that there was a potential problem which he was prepared to monitor and that generally he advised the patient of such, that there were some fillings that may need replacing, depending on what happened over the next period of time. On the next attendance, he told the Panel that he took the x-rays and if he thought there was an increase in size in the areas about which he was concerned, and then he would deal with them.
- [155] The Panel accepts that Dr Olstein did tell each patient that he had teeth on “active watch” but does not accept that he properly informed them of what this meant in terms of monitoring. In addition, it does not accept that Dr Olstein had a structured process in place for management of these teeth.
- [156] He also explained to the Panel about the difficulty of determining whether dark areas on x-rays indicated radiolucency or decay. He explained that many adhesives used underneath the flowables unfortunately were radiolucent and that this lead to uncertainty regarding whether or not decay was present.
- [157] When asked if patients should have been brought in between three to six months hence for further x-rays to be taken and for the progress of caries or possible caries to be monitored, he replied that each patient required individual monitoring and that there were different paths for different patients.
- [158] In the case of Ms CC, he told the Panel that he believed that the dark areas on two of Ms CC’s teeth could be cervical burnout. The Panel accepted his evidence on this point.
- [159] The Panel also accepted that there could have been a bubble on Ms CC’s tooth 45. He explained the expression “bubble” as a void in the filling caused by a flowable.
- [160] The Panel took the view that it is normal practice for a dentist to watch suspect teeth for incipient decay and that there are a number of factors to keep in mind including the hygiene practices of the patient and the rate of caries. Normal practice would be to examine the patient every three to six months and exercise diagnosis in light of one’s knowledge of the patient and a radiological examination every six to 12 months.

²⁰ Letter from DLA Phillips Fox to Dr Lazaridis dated 26 March 2007 and another is from Dr Lazaridis and a fax directed to DLA Phillips Fox

Caries management

- [161] While acknowledging that he should have been more interventionalist in some of these areas, Dr Olstein advised the Panel that he did not think there was anything wrong with his diagnostic ability.
- [162] Dr Olstein gave evidence that he divided caries into infected caries and non-infected caries which he suggested was a recognised division of caries within the practice of dentistry; namely that caries is a bacterial infection. Treating the lesion does not necessarily relieve the caries process, an ongoing process and is not treatable but needs to be monitored over a lifetime with a patient. He did agree that once found it needs to be removed.
- [163] Dr Olstein did not demonstrate to the Panel that he was well versed in contemporary caries management philosophy.

Treatment planning

- [164] Dr Olstein produced treatment plans for each of the patients. These were difficult to evaluate.
- [165] They clearly supported Dr Olstein's evidence that he was aware in relation to each patient that there were problems regarding a number of each patient's teeth and that he did perform treatment upon a number of the teeth and was monitoring, albeit in the Panel's view in an inadequate manner, issues related to several teeth.
- [166] He produced a number of computerised documents to demonstrate the progress of his treatment with respect to each of the three patients. The Panel found them difficult to interpret as they did not identify by date what had occurred nor did they indicate on what date they were updated by Dr Olstein. The Panel acknowledges that this is not intentional on Dr Olstein's part but was surprised that Dr Olstein had not taken steps to ensure his computer program was accurate.
- [167] Dr Olstein was extensively cross examined on the timing of his interventions and the progress of his treatment planning by comparing his records, x-rays, the evidence of each patient and their respective treating dentist and the treatment plans. Difficulties arose in relation to the treatment plans in relation to their dates of generation and the lack of dated treatment and diagnosis.
- [168] The Panel accepts that Dr Olstein did have treatment plans and did have records of his treatment plans. However, in the Panel's view, patients were not always clearly informed of the progress of treatment planning.

Limiting treatment for financial reasons

- [169] In his Affidavit, Dr Olstein stated that he had limited his treatment of Ms AA and Ms BB out of consideration for their financial position. For example, he made

references to limiting treatment to two of Ms AA's teeth for reasons of cost.²¹

- [170] Dr Olstein gave evidence that he did tell each patient of the potential risks of deferring treatment. In the Panel's view, this assertion did not match the evidence of each of the patients who clearly indicated that they were told the teeth were being actively watched but were not told of any risks in that strategy.

Information provision

- [171] One of the allegations concerned whether or not each of the patients was informed about the nature of composite fillings. In his Affidavit, Dr Olstein stated that all of his patients were on notice that these composites were weaker than amalgams and were likely to fail more quickly. He was questioned about the information which he gave them. One of the brochures stated that "These materials are not necessarily the strongest or the lasting longer materials but are the least toxic."
- [172] He agreed that the material did not state a time period but that he did tell patients that the duration of amalgam fillings was three to seven years.

Ms AA and Bruxism

- [173] The Panel did not accept Dr Olstein's evidence on this issue. Ms AA was told by both the dentist prior and the dentist post her attendances with Dr Olstein that she had a problem with bruxism. It is noted that Ms AA stated on her questionnaire when first attending Dr Olstein that she did clench or grind her teeth and that she did suffer head or neck pain. This should have put Dr Olstein on notice of a possible bruxism problem as he subsequently agreed.

Evidence of Dr Roseman regarding counselling following Informal Hearing

- [174] Dr Roseman gave brief evidence regarding counselling following an Informal Hearing conducted pursuant to s.38 of the *Dental Practice Act 1999* on 8 October 2003 concerning a technique known as the Bi-Digital O-Ring Test. The determination was that Dr Olstein undergo counselling with an officer or officers of the Board with regard to the issue of informed consent in dental care and in particular informed consent to the use of alternate therapies and he was reprimanded and cautioned.
- [175] During the counselling there was a discussion about the definition of bio-compatibility and a review of some documents and a decision that Dr Olstein should provide more information to the patients on a range of dental materials, diagnostic modalities and testing methods and devices, both orthodox and complementary. Dr Roseman also told the Panel that Dr Olstein was cooperative and compliant with the counselling and produced all requested documentation which he was asked to produce.

Submission by Counsel Assisting the Panel

²¹ Letter from Dr Olstein to Board - E6 at p.59 of Book of Evidence

[176] Counsel Assisting drew the Panel's attention to the seriousness of its findings. He pointed out that the findings essentially mirrored all but some of the allegations raised in the Notice of Formal Hearing. In many cases, the exceptions relate to the evidence given in regard to the treatment of one or two or more individual teeth. Counsel Assisting outlined the allegations and findings in summary and argued that Dr Olstein's unprofessional conduct was repetitive, pervasive and broad ranging. He submitted that there were failures on Dr Olstein's part to:

- properly inform his patients about important matters;
- diagnose that restorations had failing bonds or that teeth were suffering from caries and needed fillings;
- take x-rays properly and reach an appropriate standard;
- properly read and interpret those x-rays in his ongoing treatment of the patient and misread to obtain better quality x-rays when he was on his own account unsure of the interpretation of the x-rays; and
- provide patients with all necessary information about their treatment options, likely outcomes.

[177] He also claimed that Dr Olstein's decisions to limit treatment to the patient out of consideration for her financial position but never told her was old fashioned, patronising, paternalistic and unacceptable in modern society.

[178] Counsel submitted that there was a very real need for the community to be protected from Dr Olstein because of the repetitive and serious nature of his behaviour. He submitted that there was a real likelihood of repetition in this case.

[179] A final observation was made that the allegations related to the diagnosis and management of decay and infection which, in this case, was of a very serious scale and regularity.

[180] Counsel argued that those deficiencies were fundamental to day to day practice of dentistry, diagnosis, treatment, plans, fillings, composite resins, x-rays and that a suspension period for the purpose of didactic and clinical education was necessary together with an audit program.

Submissions by Counsel for Dr Olstein

[181] Counsel for Dr Olstein submitted that Dr Olstein fully recognised and understood that the findings of the Panel are very serious and relate to a variety of matters in respect of his clinical practice. The Panel was invited to conclude that he is an honourable, thoughtful and committed dental practitioner. He has one prior appearance before a Panel of this Board in 37 years.

[182] He admitted that he had engaged in unprofessional conduct of a serious nature in respect of all three patients. Counsel for Dr Olstein suggested that while he admitted some matters contained in the allegations he contested others and the Panel has accepted his arguments in relation to a number of those matters.

[183] Counsel submitted that Dr Olstein had undertaken a number of changes in his

practice which included:

- changes in techniques of use of flowables;
- change the way he does composite restorations;
- setting out options to his patients orally and preferably in writing as well, and with notations on the file;
- greater use of OPG x-rays;
- purchase of new x-ray equipment; and
- engaged Dr Lazaridis at his expense to come to assist him and to teach him for three hours every fortnight.

[184] He also noted Dr Olstein's acknowledgement that he should have been taking more x-rays and intervened earlier and more intrusively with respect to the three patients.

[185] Counsel suggested that the reasons underpinning Dr Olstein's failures in treatment related to too much pressure, too many patients and not giving enough time to each one and not doing enough in respect of each.

[186] Dr Olstein was committed to providing his services as a complementary dental practitioner and dealing in a holistic way with his patients.

[187] His patients prefer composite fillings to amalgam ones. Many of his patients come to him asking for their amalgams to be replaced by composites and for that replacement to be done in ways which are as non toxic as can possibly be orchestrated. And so he treads the line between catering to what these patients want and running unacceptable risks.

[188] In support of these submissions, Dr Olstein's practice manager and his brother gave evidence that Dr Olstein was very committed to his practice and his patients and worked hard at providing a comprehensive and caring practice. "He likes to do the best for his patients and if they want alternate type treatment that's what he provides for them because he believes that - that's what he believes in and also what the patients believe in as well."²²

[189] Counsel submitted that the appropriate way to safeguard the community of Victoria was to impose a condition upon Dr Olstein's practice that he submit to ongoing and comprehensive practice audits to assess compliance with a variety of his obligations, that they extend for a period of some two years, at first very regular and for the second period less regularly, and that the results of those practice audits be provided essentially directly to the Board through the CEO.

Determinations

[190] The Panel takes the view that Dr Olstein's serious errors resulted from a lack of fundamental clinical skill in diagnosis and treatment such that Dr Olstein should undertake a course of skills development.

[191] The Panel also acknowledges the many admissions made by Dr Olstein in regard

²² Transcript p.461

to the quality of his x-rays and the treatment of a number of teeth of each patient. He contested some of the allegations and the Panel made findings in his favour on some of those matters.

- [192] However, the majority of the allegations are either admitted by Dr Olstein or the Panel has found them made out.
- [193] The evidence presented by each of the three patients and the three treating dentists described a pattern of vulnerable, nervous patients who attended Dr Olstein for numerous visits over a lengthy period of treatment, who attended a different dentist and received advice and a diagnosis of significant gross caries requiring significant restorative treatment.
- [194] There appear to be gaps in both the information provided to patients both oral and written with respect to the strength and duration of composite fillings. It is clear to the Panel that each of the three patients did want composite fillings in the belief that they were less harmful. It is also clear that they attended Dr Olstein because they believed in an approach to dentistry which placed greater emphasis on nutrition and other health factors.
- [195] Dr Olstein gave evidence that he did not treat the patients carious teeth, either because he did not diagnose the caries and believed that on x-ray the dark areas were shrinkage rather than caries, or he did not treat them because he believed that the patients were too financially stretched to cover the cost of treatment, or the patients' motivation and diet allowed gross carious lesions to be "watched".
- [196] Each patient gave evidence that if they were told that their teeth needed treatment that they would have agreed to the cost.
- [197] There is no evidence that Dr Olstein informed them at any stage in a clear and comprehensible manner that he was not treating teeth which he believed required treatment because they could not afford it. In the case of Ms BB, he suggested that she agreed to continue remineralisation and monitor teeth and was happy to do so. Her evidence was that she knew he was watching teeth but that she had no idea that further treatment was warranted.
- [198] It is the Panel's view that Dr Olstein made significant diagnostic errors and that not only did he take very poor x-rays but he also confused dark areas on the x-rays which were carious areas, an indicator of poor diagnostic skills.
- [199] The evidence of each of the three other treating dentists is that, with some exceptions such as one of Ms AA's teeth, a significant number of each patient's teeth had moderate to gross caries which, in their view, were easily diagnosable.
- [200] In some areas, the Panel preferred the evidence of Dr Olstein most notably in respect of Ms CC's evidence with respect to her attendance with Dr Olstein beginning in 1999 rather than 1996 and in respect of her claim that he told her that her teeth were fine in February 2006.
- [201] Dr Keur's evidence, again with some exceptions, where he either suggested that the x-rays were unreadable or that there could be some other exceptions such as

cervical burnout, is that some teeth of each patient were carious from the time that Dr Olstein commenced treatment and were not treated by him either at all or in an inadequate manner.

[202] It is accepted by the Panel that a number of the teeth which were eventually filled or restored by another dentist were initially treated by Dr Olstein not only once but twice. Again, the failures of Dr Olstein to conclusively treat the teeth give rise to a view by the Panel that his techniques in restoration were inadequate and that his technical skill consequently fell significantly below the standard expected of a dentist.

[203] The Panel noted Dr Keur's observation that Dr Olstein would not pass ADC examinations at this level of diagnostic skills.

[204] The *Dental Practice Act 1999* does not go beyond the definition of unprofessional conduct and define what is not of a serious nature and what is of a serious nature. The meaning of unprofessional conduct "of a serious nature" has been considered in a number of cases. These include *Parr v Nurses Board of Victoria* (1998) 16 VAR 118 where Kellam J stated that the consideration of the nature of the unprofessional conduct must depend on the facts of the case and further said:

"...The word serious is defined in the Oxford Shorter Dictionary as being 'dealing with or regarding a matter on its grave side, not jesting, trifling or playful; in earnest' and further 'weighty important, grave; (of quantity or degree) considerable', and 'attended with danger, giving cause for anxiety'...."

He goes on to say:

"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".²³

[205] The Panel is mindful of the statement by Morris J in *Kozeniauskas v Dental Practice Board of Victoria* [2005] VCAT 1058 where he noted that a Panel is required to undertake "an assessment of the conduct in the context of the conduct of professional practice generally."²⁴

[206] It is not open to the Panel to make specific findings on whether or not the unprofessional conduct of a dentist is grossly below the standard expected of a practitioner. It is however open to a Panel to make its determination in relation to the gravity of the conduct.

[207] The Panel has assessed that the conduct of Dr Olstein in the context of the conduct of professional practice generally falls well below that expected. His failures in not one but three instances are longstanding as they occurred over a number of years of treatment and indicate a consistent pattern of omission, lack

²³ *Parr v Nurses Board of Victoria* [1998] VCAT 16 VAR 118

²⁴ *Kozeniauskas v Dental Practice Board* [2005] VCAT 1058

of skill and diagnostic failure such that it fell into the category of grossly substandard practice.

[208] Accordingly, the Panel has determined to suspend Dr Olstein for a period of three months and further to order that he undertake specific training and education to improve a number of his areas of practice.

[209] The Panel refers to the findings of the Court in *Clyne v New South Wales Bar Association (1960) 104 CLR 186 at 201-202*, the Court said in discussing a disbarring order:

“When such an order is made, it is made, from the public point of view, for the protection of those who require protection.”²⁵

[210] The Panel is of the view that Dr Olstein’s conduct presents a significant risk to members of the public unless he undertakes remedial work of a significant nature.

[211] The Panel notes the following passage in *Craig v the Medical Board of South Australia*,²⁶

“... sometimes the protection of the public will require the making of an order with a greater adverse affect on the practitioner that might be warranted if the punishment alone were the relevant consideration....In other cases the protection to the public or the public interest may justify an order intended to bring home to the practitioner the seriousness of the practitioner’s departure from professional standards, and intended to deter the practitioner from ay further departure..... an order might also be intended in professional disciplinary proceedings to emphasise to other members of the profession, or to reassure the pubic that a certain type of conduct is not acceptable professional conduct.”

[212] Consequently, the Panel orders that Dr Olstein be suspended for a period of time to enable him to undertake didactic training in dentistry followed by a period of time in which he is reregistered and able to undertake supervised clinical practice as specified in the determination.

[213] Further, the Panel has determined to reprimand Dr Olstein for his conduct in relation to these three patients.

Deborah Foy

²⁵ *Clyne v NSW Bar Association (1960) 104 CLR 186 at 201-202*

²⁶ [2001] SASC 169 at parags 43 and 47