



香港牙醫管理委員會
The Dental Council of Hong Kong
Disciplinary Inquiry under s.21 of DRO

Defendant: Dr TSE Kit-ming 謝杰明牙科醫生 (Reg. No. D02297)

Dates of hearing: 29.1.2013 (Day 1), 21.2.2013 (Day 2), 7.3.2013 (Day 3),
19.3.2013 (Day 4)

1. The Defendant, Dr TSE Kit-ming, is charged that:-

“He, being a registered dentist, in or about November 2009 –

- (i) canvassed for the purpose of obtaining patients by sanctioning, or conniving at, or failing to take adequate steps to prevent the publication of an article in the “South China Morning Post” on 16 November 2009 (“the Article”) which promoted various Oral & Maxillofacial Surgery treatments provided by the Hong Kong Adventist Hospital, a hospital with which he had a financial and/or professional relationship; and/or
- (ii) sanctioned, connived at, or failed to take adequate steps to prevent the use of a clinical case of another dentist in his article published in Pulse (Oct/Nov 2009 issue) and/or the Article without his consent;

and that in relation to the facts alleged he has been guilty of unprofessional conduct.”

Facts of the case

2. The case involves 2 articles, one published in the newspaper South China Morning Post, another published in the newsletter of a private hospital called "Pulse". Other than minor variations in the layout, the contents of the 2 articles are identical. As there is a question as to whether the SCMP article was published with the Defendant's consent (which we shall deal with later), for the purpose of analyzing the contents we shall simply refer to both articles as one article.
3. The Defendant is a specialist in Oral and Maxillofacial Surgery. He became a specialist of the Hong Kong Adventist Hospital in September 2009. He prepared the article at the request of the Marketing Department of the hospital for publication in the Pulse.
4. The article is about a range of treatments in Oral & Maxillofacial Surgery. It was published in the Oct/Nov 2009 issue of Pulse.
5. The article was published as a "sponsored feature" in the SCMP, meaning that it is an advertisement placed in the newspaper by the Hong Kong Adventist Hospital. It was published on 16 November 2009, occupying more than a quarter of a page.
6. In the SCMP article, there was the addition of the Defendant's photograph and contact information of the hospital.
7. In the article, there was a set of 2 photographs of a clinical case showing the pre-operative and post-operative condition of a patient with cleft lip. The Defendant did not perform the operation. There was no acknowledgement as to the source of the photographs, nor was there any indication that the patient was not the Defendant's case. Another dentist recognized that the photographs were of a clinical case performed by him. He complained that the Defendant used the photographs without his permission.

Findings of the Council

Charge (ii)

8. We shall deal with Charge (ii) first.

General rules

9. The article was published under the heading "*Oral & Maxillofacial Surgery*", followed by "*by Dr. TSE Kit Ming, Specialist in Oral Maxillofacial Surgery*". This clearly is a representation that the article was published by the Defendant in his professional capacity as a specialist dentist, on dental procedures within his dental specialty.
10. When a dentist publishes an article on dental procedures within his own specialty, at the same time holding himself out as a specialist in that specialty, it is a requirement of professional ethics that the clinical materials (including clinical photographs) published are either his own clinical cases or materials for which he has been given permission by the owner to use. In the latter case, proper acknowledgement of the source is required, so that it will not give any false impression that the materials are the dentist's own clinical cases.
11. Registered dentists, being members of a recognised scientific discipline, are required to observe the rules against plagiarism. Dentists are not allowed to wrongfully appropriate other persons' clinical achievement and publish it as his own. It is disgraceful for a registered dentist to publish clinical materials belonging to other persons without permission or, if with permission, without acknowledgement as to the source. It is despicable and unprofessional conduct for a dentist to publish others' clinical materials passing them off as if they were his own. To do so is a matter of dishonesty.

12. When a dentist publishes an article on a dental procedure, he must comply with the provisions of the Code of Professional Discipline governing information dissemination to the public. The relevant rules are set out in sections 1.2.1 and 1.2.2 of the Code. In summary, the information must be accurate, factual and objectively verifiable.
13. As the truth and accuracy of materials from an unknown source cannot be verified, they should not be published by a dentist as if they are true and accurate. Doing so gives a false representation about the efficacy of the relevant procedure, thus generating unrealistic expectations of patients who are induced by the published materials to undergo the procedure.
14. A notable example is cosmetic procedures, with photographs showing much better improvement than was actually achieved by the procedure in a genuine clinical case. Photographs modified by photographic or computer techniques are also false representations of the clinical results of the procedure. This is a deceptive practice. Again, it is despicable and unprofessional conduct.

Present case

15. The article in question described several treatments in the specialty of Oral and Maxillofacial Surgery, with 6 sets of accompanying clinical photographs showing the pre-operative and post-operative conditions in each procedure. No acknowledgment whatsoever was given as to the source of the photographs, thus according to general understanding both within the profession and by the public they are his own clinical cases representing his achievements in respect of the relevant procedures.
16. According to the Defendant, he downloaded the photographs on revised cleft lip from an unknown source on the Internet, using a software called Foxy. There was no information as to the provenance of the photographs, therefore there was no way for him to contact the owner in order to obtain permission for him to publish the photographs in his article.

17. The Defendant said that it was his belief that the owner voluntarily shared the photographs over the Internet, therefore he inferred that the owner agreed for the photographs to be used by whosoever coming into possession of the photographs.
18. The Defendant had been a registered dentist for over 21 years when he published the article. He was an experienced civil servant familiar with the rules against usurping other professionals' achievement and publishing them without permission. These rules are applicable in both Government departments and private sectors. The Defendant admitted that when he was in the Government he certainly would not publish other persons' materials without permission.
19. We see no basis for the Defendant's belief that simply because the photographs are available on the Internet it can be inferred that the owner gives permission for them to be used by anyone having access to them. If this be right, the Defendant can use any material published on the Internet without permission, despite the fact that many of these materials are copyright protected.
20. The Defendant claimed that Foxy is a sharing software therefore the owner should have agreed to share those photographs. We disagree. Firstly, sharing something for others to see does not mean that the owner also agrees for them to be used by others. Many copyright protected materials are shown to the public, but the public cannot reproduce and publish them unless permission is obtained. One cannot even copy an article published in the newspaper and re-publish it. Secondly, the Foxy software has been well known in recent years to be responsible for leaking many confidential documents of some Government departments. The Defendant must know that those departments victimized by the software have never, and can never, agree for persons who come into possession of the leaked materials to use or publish them.

21. In any case, the Defendant himself said that for copyright protected materials circulated by Foxy such as music pieces, he certainly would not use them. If he is aware that copyright protected materials are also circulated by Foxy, how could he know that the photographs in question were not subject to copyright protection or restriction on use.
22. The Defendant also said that the origin of the photographs were unknown, and there was the possibility that they were generated or modified by softwares such as Photoshop. If that was his understanding, he was using untrue, inaccurate and unverifiable clinical photographs to falsely represent that they were the results actually achieved by the clinical procedure of lip revision surgery.
23. If the Defendant wishes to illustrate the results which can be achieved, he must use verifiable materials. If the materials are unverifiable, he must not use them. If the materials do not belong to him, he must obtain permission from the rightful owner. If he cannot obtain such permission, he must not use them. If permission is granted, he must acknowledge the source and make clear to the reader that the materials are not his own clinical case.
24. The Defendant has violated each and every of these rules.
25. Given the Defendant's experience and seniority in the profession, and the context in which the article was published, we are of the view that he deliberately published the photographs with no acknowledgement, pretending that they were his own clinical achievement so as to attract patients to use his services.
26. We take a very serious view of such dishonest and despicable conduct. We are satisfied that the Defendant's conduct would be reasonably regarded as disgraceful and dishonourable by registered dentists of good repute and competency. We find him guilty of Charge (ii).

Charge (i)

27. We then turn to Charge (i).
28. We have heard evidence that the Defendant was asked by the Marketing Department to provide an article on his specialist services shortly after he joined the hospital. He said that he had made enquiries with the Marketing Department as to the target circulation of the newsletter Pulse, and he was told that it was for internal circulation among staff of the hospital. We have heard that around 2,000 copies were printed for each issue around that time.
29. We have also heard evidence that the article was published in the SCMP without the Defendant's consent. The Defendant said that if he had known, he would not have given consent for the article to be published in the SCMP.
30. The evidence from the email between SCMP and the Marketing Department clearly show that the article was provided by the Marketing Department to SCMP for publication. It was provided in reply to SCMP's email dated 6 November 2009: "*Kindly send me the materials for the Nov 16 insertion before lunch on Wednesday Nov 11*". The reply to SCMP on 10 November 2009 stated: "*Attached please find the copy and the photos required for your reference. Since I will be leave from tomorrow..., you may contact my colleague ...for the layout.*" [sic]. In the circumstances, it is mere casuistry to argue that the article and the photographs were provided to SCMP for any other purposes.
31. The letter dated 29 October 2012 from SCMP to the Dental Council clearly stated that: "*We understand that while HKAH provided us with al contents of the Article, HKAH protested because we had not obtained their approval of the final layout and design of the Article before its publication.*" In the circumstances, the only problem was the final approval for the layout and design, and nothing connected with the contents.

32. Judging from the contents of the article, it is an article promoting several dental procedures offered by the hospital. It is not an article on public health education as claimed. Section 1.6 of the Code on “Dental/Oral Health Education Activities” makes clear that health education materials should be presented in a balanced manner, without exaggeration of the positive aspects or omission of the significant negative aspects. The article is a one-sided description of the procedures in question, with no mention at all of the risks involved. Such lopsided description is promotional material, not health education.
33. It is relevant to point out that starting at least from June 2009 there was an on-going large-scale promotion campaign launched by the hospital, with regular advertisements of identical size and format, carrying articles of a similar nature, being published in SCMP on every Monday. Although the Defendant claimed that he never read newspapers and therefore was unaware of the campaign, we find his claim incredible.
34. We are satisfied that the article in SCMP was a promotional advertisement to promote the services of the hospital.
35. The question is whether the Defendant was aware that his article would be published in SCMP. He said that he provided the article only for publication in Pulse, on the understanding that it was an internal newsletter only for the staff. He also said that the article was provided to SCMP without his consent or knowledge.
36. We must point out that given the large number of staff of the hospital, a newsletter for circulation to the staff is for circulation to a section of the public who are potential patients using the service. The contents of the newsletter are directed towards commercial marketing of various services offered by the hospital.
37. Therefore, the Defendant ought to be aware that he was providing the article to be published in a publication for commercial promotion of the services. In order to ensure compliance with provisions of the Code governing the

dissemination of information by registered dentists, it is the duty of a registered dentist to exercise reasonable diligence to find out the nature of the publication before he provides anything to be published in it. It is insufficient to simply rely on the words of others. If the Defendant had looked at a copy of the Pulse, it will be readily obvious that it is a publication for promoting the hospital's services. In any case, the request for the article came from the Marketing Department, not the Administration Department. That should have put him on alert.

38. While we do not know whether the Defendant was aware that the article would also be published in SCMP, we have no doubt that the circumstances of the on-going promotion campaign and the request coming from the Marketing Department for the article to be published in a promotional publication would have, and should have, put him on alert that there is the possibility of the article being published in other promotional publications as well. As we have mentioned earlier, it is the duty of a registered dentist to exercised due diligence to ensure compliance with the provisions of the Code. The circumstances made it reasonably foreseeable to the Defendant of the possibility of the Marketing Department using his article in other promotional publications such as newspapers. He should have taken steps to prevent publication of the article in the advertisements of the hospital. However, he had taken no steps at all.
39. We are satisfied that the Defendant has failed his professional duty to prevent the publication of his article in commercial advertisements. We are satisfied that the Defendant's conduct would be reasonably regarded as disgraceful and dishonourable by registered dentists of good repute and competency. We find him guilty of Charge (i), on the limb of failing to take adequate steps to prevent the publication of the article.

Sentencing

40. The Defendant has a clear record.

41. The Defence has advanced no mitigation. In any case, we can see no mitigation other than his clear record.
42. Judging from the Defendant's argument in the inquiry, it is obvious that he has no insight into his problem at all. There can be no remorse if he has no insight. This reflects on the likelihood of recurrence of the same problem. If he continues to practise under the same mentality, there is a high risk that he will re-offend.
43. We are very concerned that he has never read the Code of Professional Discipline since 1988, although he recognizes that it is every registered dentist's professional duty to acquaint himself with the Code which sets out the ethical rules governing dental practice. Since then, there have been at least two major changes of the Code. In other words, in the past 25 years he has been practising in ignorance of the ethical rules. If he does not know the rules, he will not comply with the rules. This calls into serious question whether he is a fit and proper person to practise dentistry.
44. We hope that he has learned a lesson from the inquiry. We strongly advise him to take immediate action to read the Code, so that he knows how to properly conduct his dental practice, and do so ethically.
45. It will damage the profession's honour and reputation, if dentists resort to using other persons' clinical materials without permission and passing such materials off as a dentist's own clinical cases. In the end, it will undermine the public trust in the profession.
46. We bear in mind that the purpose of a disciplinary order is not to punish the Defendant, but to protect the public from persons who are unfit to practise for reason of integrity, competence or otherwise, and to maintain public trust in the dental profession by upholding the reputation of the profession.

47. Having regard to the gravity of the case, we make the following orders:-

- (a) In respect of Charge (i), a warning letter be served on the Defendant. The order shall be published in the Gazette.
- (b) In respect of Charge (ii), the Defendant's name be removed from the General Register for a period of 2 months. We further order that the removal order be suspended for a period of 2 years, subject to the following conditions:-
 - (i) Within the suspension period, he shall undergo continuing professional development in professional ethics to the equivalent of 10 CPD points. He shall produce documentary proof of compliance with the condition before the expiry of the suspension period.
 - (ii) He shall not commit further disciplinary offence within the suspension period.

If he breaches any of the conditions, the removal order is liable to be activated in part or in full.

Other remarks

48. We feel obliged to make the following remarks in respect of lawyer's duty to the Council in disciplinary inquiries.

49. The Council functions as a statutory tribunal in disciplinary inquiries. A lawyer appearing as legal representative must behave in a manner commensurate with his/her professional status. In particular, he/she must not seek to mislead the Council deliberately. If owing to inadvertence he/she has misled the Council unintentionally, action must be taken immediately to rectify the error once it has been detected. To behave as if he/she can

mislead the Council at will and be indignant about his/her mistake being pointed out is conduct unbecoming of his/her professional status.

50. In the present case, on 29 January 2013 (Day 1 of the inquiry) the Legal Officer produced some pages of the Pulse and explained that the Pulse can be accessed on the hospital's website. On 21 February 2013 (Day 2 of the inquiry) after the Defendant had finished giving evidence, this Council pointed out that the online version of the Pulse can be accessed without the need for any password. Defence Counsel immediately complained that she had never been given an opportunity to take instructions on the matter and the Legal Officer had not explained the purpose of producing those pages. The inquiry was adjourned for her to take instructions.
51. Upon resuming, she said she wished to put on record that she was being ambushed as she did not know the purpose of producing those pages. She insisted that she had to put it on record if the case goes to another venue, there is proper record of the procedure. What she was suggesting was that she might appeal. Later leave was granted for her to recall the Defendant to deal with the online version of the Pulse. During cross-examination our attention was drawn to the transcripts of the hearing on Day 1, showing clearly that the Legal Officer explained the effect of those pages.
52. Later it was pointed out to her that what she said earlier about being ambushed and not being told the purpose of those pages was clearly inconsistent with the truth. We believed that she did not deliberately mislead us, and was expecting that she would apologize for an unintentional mistake. However, she became indignant and complained that she was being pinpointed. Despite ample opportunity being given for her to offer an explanation or an apology, she was adamant not to give any explanation or apology.

53. We have decided not to take the matter further, giving her the benefit of the doubt that she might have acted unintentionally. However, we must emphasise that we do not expect the same to happen again. We expect lawyers who come before us will behave with due respect. If the same happens again, we shall not give lawyers the same benefit of the doubt.

A handwritten signature in black ink, appearing to read 'Homer Tso', with a stylized flourish at the end.

Dr Homer Tso, SBS, JP
Chairman, Dental Council



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**Footnote to the judgment of the disciplinary inquiry against
Dr TSE Kit-ming 謝杰明牙科醫生 (Reg. No. D02297)**

Dr TSE Kit-ming subsequently appealed the Dental Council's decision to the Court of Appeal in Civil Appeal No. 86 of 2013. The appeal was directed at the conviction of charge (i), at the conviction of charge (ii) only in respect of the publication of the article in the SCMP, and at the sentence of charge (ii).

The Court of Appeal held that the evidence at the inquiry fell short of proving Dr TSE had actual knowledge that the article would be published in the SCMP. Further, the conclusion that Dr TSE would or should have been put on the alert such that he should have taken steps to prevent the publication of the article in the SCMP was not supported by evidence presented at the inquiry. The Court of Appeal set aside the conviction of charge (i) and the conviction of charge (ii) insofar as it related to the article published in the SCMP.

The Court of Appeal further held that even though the conviction of charge (ii) was confined to the article printed in the Pulse, a suspended removal order was within the proper range of sentence that might be imposed by the Dental Council in the circumstances of the case. The Court of Appeal however took the view that the condition imposed on the suspended removal order was problematic and should be removed.

The Court of Appeal made the following orders on 8 May 2015 –

- (1) The decision of and the sentence passed by the Dental council on charge (i) be set aside.
- (2) The decision of the Dental Council on charge (ii) in respect of the publication in SCMP be set aside.
- (3) The sentence passed by the Dental Council in respect of charge (ii) be varied to the extent that the condition requiring Dr TSE to undergo continuing professional development in professional ethics to the equivalent of 10 CPD point within the two years' suspension period be set aside.