MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 142/00/60D

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by the Director of Proceedings pursuant to Section 102 of the Act against **NGAAMO RUSSELL THOMSON** medical practitioner of Te Kuiti

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr G D Pearson (Chair)

Dr F E Bennett, Mrs J Courtney, Mr J C Cullen, Dr B D King (Members)

Ms G J Fraser (Secretary)

Ms H Gibbons and Ms P Dunn (Stenographers)

Hearing held at Hamilton on Monday 24 and Tuesday 25 July 2000

APPEARANCES: Ms B Klippel Counsel for the Director of Proceedings

Ms T W Davis, Director of Proceedings

Mr S R Clark Counsel for Dr N R Thomson.

SUPPLEMENTARY DECISION:

1. THE CHARGE:

1.1 **IN** Decision 126/00/60D dated 21 August 2000 the Tribunal found Dr Thomson guilty of professional misconduct. This decision should be read in conjunction with that decision ("the initial decision"). The finding of professional misconduct was made following the Tribunal hearing of a charge laid by the Director of Proceedings concerning Dr Thomson's assessment and management of his patient Ms Meretina Kura, also known as Miriam Kura. The Tribunal found professional misconduct on the basis set out in that decision. In essence Dr Thomson was called to attend Ms Kura after she suffered an intracranial cerebral haemorrhage, when Dr Thomson arrived ambulance staff were in attendance and in the process of preparing to transport Ms Kura to hospital. Dr Thomson knew that Ms Kura's condition was serious and likely to be an intracranial haemorrhage. The Tribunal determined that the circumstances demanded that Ms Kura be taken to the local hospital, evaluated, and transferred to a larger hospital and that Dr Thomson made a serious error of judgment in instructing the ambulance staff not to take Ms Kura to hospital, but simply directing that she rest in bed. He returned later to re-evaluate Ms Kura's condition. Dr Thomson's clinical notes were also deficient.

2. SUBMISSIONS ON PENALTY:

Submissions by the Director of Proceedings:

2.1 **THE** Director of Proceedings submitted that in accordance with ***Re Wislang*** (No.102/99/47C), a decision of this Tribunal, the purposes of imposing a sanction for disciplinary offences are three fold: punishing the practitioner, deterrence for other practitioners and condemnation and opprobrium of the practitioner's conduct.

2.2 **THE** Director of Proceedings referred to a previous occasion on which Dr Thomson was found guilty of professional misconduct.

2.3 **THE** Director of Proceedings submitted that "the only appropriate penalty to reflect the seriousness of the misconduct would be to order that Dr Thomson be suspended from practice for a period of 12 months", and that "once Dr Thomson resumes practice for conditions to be imposed to enable him to work again but only under close supervision".

Submissions for Dr Thomson:

2.4 **FOR** Dr Thomson it was submitted that the exercise of the Tribunal's powers should principally be to enforce a high standard of professional conduct. In the present case, where the issue is negligent or incompetent conduct, we agree. The importance of punishment is more significant in cases where there is intentional wrongdoing, such as abusing a patient; or a practitioner failing to respond adequately because of giving the practitioner's own needs priority over the patient's needs.

2.5 **THE** submissions for Dr Thomson emphasised a number of factors:

- That Dr Thomson's conduct did not in fact alter the outcome for Ms Kura;
- Only some of the particulars of the charge were established;
- The present charge, and the one previous incident of disciplinary offending, should be seen against the background of a lengthy career, and years passing since the present offence with no further incident;
- Dr Thomson has made, and continues to, make a major contribution to the development and delivery of primary health services to Maori in the Maniapoto; and enjoys widespread support. Both witnesses at the hearing and testimonials supplied have made it very clear that Dr Thomson has made a major and valued contribution in this area.
- Dr Thomson is the only doctor for Te Pou Ora Clinic. The Clinic has 4,000 patients, and is meeting the need for delivery of primary health care services to Maori people in a manner acceptable to them.
- Dr Thomson is overworked and isolated, and it has not been possible to find another practitioner to employ in the Clinic.
- If Dr Thomson cannot continue in practice, it will have a dramatic effect on the Clinic.

2.6 **THE** Tribunal accepts that each of those factors are relevant to penalty, and we have taken them into account.

3. THE EARLIER DISCIPLINARY PROCEEDINGS AND COMPETENCE REVIEW:

3.1 **A** letter supplied by the Medical Council to Dr Thomson's solicitors was forwarded to us on Dr Thomson's behalf. The letter details the previous disciplinary action, and its consequences.

3.2 **THE** proceedings related to Dr Thomson's management of a diabetic patient. The events leading to the charge occurred on 12 April 1994, and the circumstances were apparently that:

- Dr Thomson's examination of the patient was inadequate,
- Dr Thomson did not establish an adequate diagnosis of the patient, and left her in an unconscious state without establishing the degree of hypoglycaemia, and
- Dr Thomson's records were inadequate.

3.3 **DR** Thomson was convicted of professional misconduct, and a penalty was imposed on 12 March 1996. The penalty involved a fine of $400, costs of $2,500 and a requirement that Dr Thomson practise under the supervision of a mentor until July 1999.

3.4 **WE** note that the penalties were imposed some 6 months before the events that gave rise to the present charge.

3.5 **THE** letter from the Medical Council outlines, in addition to the previous proceedings, the competency review programme in which Dr Thomson has participated. We note that participation in the competency review programme is not necessarily connected with disciplinary proceedings. The competency review programme is part of the Medical Council's processes for ensuring that practitioners maintain competence, and effect professional

development. A competence review involves a panel evaluating a practitioner's performance either generally or in respect of a particular aspect of practice. The review is in depth, very thorough, and results in a determination regarding the practitioner's competence. If a practitioner is found not to be competent, the Medical Council can prevent the practitioner from continuing to practise.

3.6 **DR** Thomson underwent a competency review which concluded with a report in May 1999. A second review was directed to be undertaken and has been in progress during this year. The Tribunal is unaware of the results of that review. The Director of Proceedings has suggested that the Tribunal should exercise its powers to obtain access to the documentation held by the Medical Council in respect of the competence review process. The Tribunal do not consider that either necessary or appropriate. That review does not, as far as we know, relate to the subject of this charge; and even if it does, it does not affect the Tribunal's consideration of the evidence placed before it during the hearing of the charge. This Tribunal has no authority to conduct a general inquiry into Dr Thomson's competence. It is authorised to impose a penalty based on the charge that has been established, having due regard to both the circumstances of the charge and Dr Thomson's present circumstances. Furthermore even if Dr Thomson has been found not to be competent by the review committee, it is possible that he will later be reinstated. Accordingly whatever the outcome of the review, the Tribunal has proceeded on the assumption that Dr Thomson may continue to practise in the medium term.

4. DECISION:

4.1 **THE** first point regarding penalty is that this Tribunal can only impose a penalty that is justified by the disciplinary offence proved against Dr Thomson. The Tribunal cannot increase the penalty simply because Dr Thomson has previously been found guilty of professional misconduct for which he has already been penalised. However, Dr Thomson cannot have a penalty imposed on him on the basis that he has not offended before; and it is material that Dr Thomson's offence was committed only a relatively short time after he was made aware of the obligations he has to patients needing urgent medical treatment.

4.2 **THE** second point is that the Tribunal has no right to speculate on Dr Thomson's general competence, except to the extent the issue arises from the charge that has been established. The evidence called by the parties was not directed to the issue of general competence, it related only to the charge. Of course, some charges are in themselves serious enough to demonstrate a practitioner is unfit to practise and attract the most serious penalties.

4.3 **IN** our view Dr Thomson was well intentioned in respect of his management of Ms Kura. Ms Kura was known to Dr Thomson as a friend, and there is no basis for concluding that the shortcomings identified in the management of Ms Kura were motivated either by lack of care or unwillingness to apply any necessary effort. However, that does not alter the fact that Dr Thomson was seriously and demonstrably incompetent in his management of Ms Kura's case. It was clear and obvious that Ms Kura should have been transported to hospital immediately. Dr Thomson chose to intervene in that process and to prevent the ambulance officers in attendance effecting the transfer to hospital. Dr Thomson admitted that he appreciated how serious Ms Kura's condition could be, as we indicated in the initial decision, that was a frank

admission. Misdiagnosis may or may not amount to a disciplinary offence. However, the Tribunal determined that the failure to respond adequately in the face of the circumstances Dr Thomson found, and appreciated that he was dealing with, fell far short of the competence demanded of a medical practitioner.

4.4 **THE** level of incompetence on the part of Dr Thomson's management of Ms Kura's condition raises serious issues regarding his fitness to practise. However, the Tribunal does not consider that this single incident is sufficient to prevent Dr Thomson practising, either on the basis that it is justified as a punishment, or that it is required to protect the public. We have reached that conclusion having regard to the fact that Dr Thomson was convicted of a disciplinary offence involving significantly similar circumstances, not long before the present incident. We do however consider that the circumstances of this case demand that Dr Thomson's fitness to continue in practice be evaluated fully, and carefully. We emphasise that we are not in a position to do more than speculate as to whether Dr Thomson is competent in the course of his day to day work, and we express no view on that issue. The Medical Council through the competence review programme has, and apparently still is, evaluating Dr Thomson's competence. If that review had not been in progress we would have notified the Medical Council that in our view Dr Thomson should be subject to such a review.

4.5 **IF** we had concluded that the circumstances of the misconduct were in themselves sufficiently serious to warrant suspension, there would have been a further obstacle to that course. There has been inordinate delay in the process of investigation and prosecution of this case (which we do not suggest is the responsibility of either counsel or the personnel involved in conducting the prosecution). The fact is Dr Thomson has been practising for about 4 years after the

incident that is the subject of the charge (apparently without any further disciplinary issue arising); and he has participated in the competence review process. If he has not successfully passed through that review process he will not be able to continue in practise in any event. In these circumstances, the Tribunal does not accept that the events that occurred in September 1996 require his suspension from practice to adequately protect the public.

4.6 **OUR** view regarding the inappropriateness of suspension is reinforced by the practical consequences of such suspension. The level of charge allows suspension for a maximum of a year. It is very difficult to believe that Dr Thomson's competence would be improved by not practising for a year, the reverse would more likely occur. Accordingly, suspension would be a *defacto* "striking off", or simply make it more difficult for Dr Thomson to discharge his duties to his patients when he returned to practice.

4.7 **WHILE** the Tribunal does not consider that Dr Thomson can be suspended from practice on the basis of the charge that has been established, we do consider that it raises sufficiently serious concerns about his competence to require that he practise under the direct supervision of another practitioner. Regardless of the outcome of the competence review process, we are satisfied that the facts of this case demonstrate that Dr Thomson must have more support, and that will only be provided if he is practising with another practitioner. Dr Thomson has become professionally isolated and responsible for a very large number of patients. In the course of the hearing Dr Thomson gave evidence regarding his participation in the competence review, his mentoring provided following the previous disciplinary proceedings, and his ongoing professional development. It was clear that Dr Thomson's interest in, and knowledge of, these processes was strikingly deficient, and he was at best a reluctant participant. It was

evident to us that if Dr Thomson is to attain and maintain the standards to which the public are entitled, and ensure there is no repeat of what led to this charge, he must commit himself to both achieving high standards, and to continuing education. We consider that the interests of the public require that Dr Thomson practice on a day to day basis with another practitioner who will be aware of what Dr Thomson is doing, and be available to assist.

4.8 **THE** Tribunal has considered alternatives such as limiting Dr Thomson's practice, but there appear to be no other satisfactory ways of addressing the situation. It is very difficult to limit a practitioner in general practice, the demands and obligations on them are so varied and unpredictable. Often general practitioners will have an ethical obligation to respond to a very demanding situation that presents itself unexpectedly. The facts of the two incidents which have resulted in professional disciplinary charges against Dr Thomson demonstrate the difficulty. Both involved emergency situations where the patient was sufficiently unwell to have a diminished level of consciousness. It would be impossible to prevent Dr Thomson attending such cases, indeed he has both a moral and ethical obligation to do so.

4.9 **TAKING** all of these matters into account, the Tribunal has concluded that the following penalty should be imposed:

4.9.1 **DR** Thomson is censured,

4.9.2 **DR** Thomson will practise for 3 years, commencing from 14 days after he is notified of this decision subject to the condition that he works under the supervision of another registered medical practitioner who is engaged in general practice, and works for the time being on a full-time basis in the same premises in which Dr Thomson's practice is located. Any medical practitioner in the supervision role shall

be supplied with a copy of the initial decision, this decision, and a copy of such materials relating to the competence review that the Medical Council sees fit; that practitioner shall also have full and free access to all clinical records maintained by Dr Thomson subject to any limitations the practitioner in the supervising role considers appropriate to preserve reasonable patient confidentiality.

4.9.3 **DR** Thomson is fined $5,000.

4.10 **FOR** the avoidance of doubt we indicate that the supervising practitioner shall be regarded as "full-time" as long as they are holding clinics at least 4 days a week from the premises, excepting normal holidays, and the practitioner may be a locum or other practitioner acting on a temporary basis; and the condition may be fulfilled by more than one practitioner jointly meeting the "4 day a week" requirement.

4.11 **THE** Tribunal is conscious of the practical difficulty of Te Pou Ora Clinic engaging another practitioner. However, we are also conscious of the obligation to provide adequate and safe services. For Dr Thomson the submission was made that:

"… a further condition that can be imposed is that from 1 April 2001 Dr Thomson work on a part-time basis under the supervision of another GP. That will allow a window of opportunity for the clinic to employ a further GP, which on counsel's instructions, they are striving to achieve."

As stated above, the Tribunal understands the difficulty of engaging another doctor. However, we are satisfied that the condition we have imposed on Dr Thomson's practice is necessary to ensure the safety of patients. Having reached that view, it is not acceptable to defer implementation for some months. It will be necessary to make some temporary arrangement.

4.12 **DR** Thomson is required to pay 50% of the costs and expenses of the investigation by the Health and Disability Commissioner and prosecution of the charge by the Director of Proceedings and the hearing by the Tribunal. Subject however to a reduction of $4,000 in the costs and expenses of the Director of Proceedings, as there was an element of duplication in that both counsel and the Director attended the hearing and prepared the case. We do not suggest that it was inappropriate to have two counsel involved, however we are prepared to take the view that Dr Thomson's contribution should be on the basis of the minimum essential expense (we have considered the actual total level of costs and the full circumstances of the case in taking that view, it is not intended as a precedent of general application). The Secretary of the Tribunal will forward a schedule detailing the amount Dr Thomson is required to pay with this decision. The total amount of costs Dr Thomson is required to pay is $23,225.38.

5. PUBLICATION:

5.1 **IN** supplying material relating to the competence review, Dr Thomson requested that he have the opportunity of applying to maintain confidentiality in respect of any particulars. The competence review process is an important one for the protection of the public, and it can only work if practitioners have the confidence to be frank in their dealings in the process. Practitioner's are, as a general principle, entitled to confidentiality to facilitate that process. It does not appear that there is any information in this decision that would raise any difficulty, having regard to the fact that in the open hearing the competence review process was discussed. However, we do reserve leave to Dr Thomson to apply for orders or directions in respect of information relating to the competence review process that he considers necessary.

5.2 **WE direct that this decision will remain confidential to the parties for 4 days following notification of the decision, or until further order in the event of Dr Thomson giving notice of an application for further order or direction within that 4 day period.**

5.3 **THE** Secretary of this Tribunal shall cause a notice under section 138(2) of the Act to be published in the New Zealand Medical Journal.

DATED at Wellington this 14th day of November 2000

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G D Pearson

Deputy Chair

Medical Practitioners Disciplinary Tribunal