



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 182/01/72D

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 **LEWIS STEPHEN GRAY** medical practitioner of Balclutha

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chair)
Dr F E Bennett, Dr U Manukulasuriya, Dr J M McKenzie,
Mr G Searancke (Members)
Ms G J Fraser (Secretary)
Mrs G Rogers (Stenographer)

Hearing held at Dunedin on Monday 30, Tuesday 31 July and Wednesday
1 August 2001

APPEARANCES: Mr M F McClelland and Ms T Baker for the Director of Proceedings
Mr A H Waalkens for Dr L S Gray.

Supplementary Decision

THIS supplementary decision should be read in conjunction with Decision No. 170/01/72D which issued on 29 August 2001.

1. The Health and Disability Commissioner's Director of Proceedings charged that between 14 October 1997 and February 1998 Dr Gray, being a registered medical practitioner, entered into a sexual relationship with his patient and was therefore guilty of disgraceful conduct.
2. The Tribunal, by its Decision No. 170/01/72D dated 29 August 2001, found Dr Gray guilty of disgraceful of conduct and this Supplementary Decision issues for the purpose of determining penalty.

Submissions On Penalty – the Director of Proceedings

3. On behalf of the Director of Proceedings, Mr McClelland referred to the Tribunal's findings that Dr Gray's sexual relationship with his patient fell into the most serious of the Medical Council's three categories of sexual abuse in the professional relationship (i.e. sexual violation); that the Council's policy is expressed in unequivocal terms and that all sexual behaviour in a professional context is deemed abusive, and it is not acceptable to blame the patient for any sexual misconduct which occurs.

4. Mr McClelland referred to a number of cases which he submitted were relevant for this Tribunal to take into account when considering the penalty it ought to impose on Dr Gray, including *Guy v Medical Council of New Zealand* [1995] NZAR 67, 77. In that case, Tipping J referred to the nature of proceedings before the Medical Council under the Medical Practitioner Act 1968 saying:

“Proceedings before the Medical Council are designed primarily to protect the public from incompetent and improper conduct on the part of medical practitioners. The powers given to the Medical Council are exercised primarily in the interests of the public and the profession itself and are only incidentally penal in nature.”

5. Also in *Teviotdale v Preliminary Proceedings Committee of the Medical Council of New Zealand* [1996] NZAR 517 the Full Court held at p520:

“It is well settled that the Council is entitled to exercise its disciplinary functions only in the public interest and while any decision of the Council to exercise its disciplinary powers will inevitably have a punitive effect, nonetheless it does not have jurisdiction to impose or enforce punitive sanctions against members of the medical profession where there has been no impact on the public interest.”

6. Similar comments were also made in *Pillai v Messiter (No. 2)* (1989) 16 NSWLR 197 where Kirby P stated (p201):

“In giving meaning to the phrase “misconduct in a professional respect” in the context within which it appears, it must be kept in mind that the consequence of an affirmative finding is drastic for the practitioner. And the purpose of providing such a drastic consequence is not punishment of the practitioner as such but protection of the public. The public needs to be protected from delinquents and wrong-doers within professions. It also needs to be protected from seriously incompetent professional people who are ignorant of basic rules or indifferent as to rudimentary professional requirements. Such people should be removed from the register or from the relevant roll of practitioners, at least until they can demonstrate that their disqualifying imperfections have been removed.”

7. Mr McClelland cited the findings of the various courts in these cases in support of his submission that *“in all but only the most minor of cases where a practitioner has been*

involved in a sexual relationship with his patient his name has been removed from the Register by the relevant disciplinary body and this has invariably been upheld by the Courts on Appeal. ...It is the Director's submission that it is inevitable that Dr Gray's name be removed from the Register."

8. Mr McClelland also referred to the Tribunal's findings that misconduct of the type alleged in this case constituted the most serious breach of fundamental professional obligations, and that Dr Gray had breached not only the obligations he owed his patient, and also those owed to his patient's family, whose care has also been entrusted to Dr Gray as he was also the family's general practitioner.
9. Mr McClelland referred to the Tribunal's finding that Gray lacks insight into the nature and extent of the harm he caused to the patient and her family, together with a lack of remorse or contrition demonstrated by him towards the patient and her family in the course of the hearing. Taking all of these matters into account, it was the Director's submission that it is in the public interest and the interest of the profession that Dr Gray be struck off the Medical Register and to impose any lesser penalty would send quite the wrong message to the public and the profession.
10. The Director submitted that given the nature of the misconduct and the Tribunal's findings, imposing conditions on Dr Gray's practice would not be in the public interest nor would it provide sufficient protection for the public.
11. The Director also sought censure, a fine reflecting seriousness of the misconduct and costs.

Submissions on behalf of Dr Gray

12. In summary, it was submitted by Mr Waalkens on behalf of Dr Gray that two points should be raised in relation to penalty:
 - (a) that notwithstanding suggestions to the contrary, Dr Gray does have very real insight and acceptance of the wrongfulness of what happened between him and his patient and

any suggestion to the contrary must be firmly rebutted. Mr Waalkens submitted “*such a suggestion is also completely at odds with all of the evidence heard by the Tribunal from many sources*”;

- (b) Mr Waalkens submitted that the Tribunal’s comments regarding Dr Gray’s misconduct in the context of the patient’s family as being “*of deep concern*” and, in effect Mr Waalkens, on behalf of Dr Gray, rejects those findings.
13. In terms of the law regarding erasure, Mr Waalkens submitted that it is very clear that there is no principle that all sexual intimacy cases involving a doctor and his or her patient must result in erasure from the Register. Mr Waalkens referred to *Re A Medical Practitioner* [1993 – No2], previously referred to by the Tribunal. Mr Waalkens submitted that there were a number of points to be made by way of mitigation, namely:
- (a) that Dr Gray’s conduct was not predatory and on that basis should be distinguished from sexual misconduct proven in some of the cases referred to by the Director;
 - (b) the relationship was consensual. While it is accepted that this factor does not constitute a defence nor an answer to the charge, it should be taken into account by way of mitigation;
 - (c) the relationship began in the context of the social, rather than clinical, setting;
 - (d) Dr Gray has had a large number of stressors in his own life and had suffered a breakdown. He had been seeing a psychiatrist for a number of years and there was a good deal of psychiatric/psychological evidence presented at the Tribunal, all of which supported the finding that Dr Gray himself was particularly vulnerable;
 - (e) the community within which Dr Gray currently practises is aware of these events, the professional disciplinary charge, and the outcome. Notwithstanding, the weight of opinion and support in the 268-plus patient letters submitted to the Tribunal is

significant. This is a relevant factor for the Tribunal to consider in the context of its assessment of the public interest factor;

- (f) at the hearing of the charge, evidence was given of the steps Dr Gray has himself taken to ensure the safety of his medical practice. Dr Walsh, gave evidence regarding the external safeguards (wife and peer group) that he would recommend to ensure that Dr Gray was a safe practitioner. These included at least six months devoted to counselling; and
- (g) Dr Gray has practised safely in the three and a half years since the complaint against him was made. Dr Gray co-operated with the Health and Disability Commissioner's investigation, and that of the Director of Proceedings, and has never denied the events giving rise to the charge.

- 14. In terms of penalty, Mr Waalkens submitted that removal and/or suspension would be unduly harsh. It is appropriate that conditions be imposed, together with a fine and a contribution towards the reasonable costs of the hearing. Dr Gray accepts that censure is inevitable.
- 15. In relation to a fine and costs, Mr Waalkens submitted a Statement of Assets and Liability prepared by Dr Gray's accountants, for the Tribunal to take into account when determining the amount of any fine and/or costs.

Orders

- 16. The Tribunal has carefully considered all of the submissions and financial information provided. However, whilst it has kept in mind the very serious findings it made against Dr Gray, and the concerns that it still has regarding Dr Gray's insight and overall judgment, it considers that it must take into account the fact that Dr Gray has apparently been practising safely during the three and a half years since the events giving rise to the charge occurred, and that he has put in place a number of measures to ensure not only that he practises safely, but also that the community, and the practice, within which he is currently practising can be reassured of his commitment to ensuring that he will not re-offend.

17. The Tribunal considers that, as a matter of fairness, it must take into account the personal rehabilitative efforts Dr Gray has made over the past three and a half years, and the steps he has taken to improve and ensure the safety of his general practice. Taking all of these matters into account, and balancing them against the public interest generally, and the interests of the community and patients Dr Gray currently practises in, the Tribunal has determined that Dr Gray should not be struck off the Medical Register.
18. In making the orders which it has done in relation to suspension, the Tribunal has similarly endeavoured to be fair to Dr Gray whilst at the same time balancing both the public interest and the need to take into account the need to protect the public interest and also the Tribunal's responsibility to ensure that appropriate and acceptable standards are identified and maintained.
19. Taking all of these matters into account together with the matters raised in counsel's submissions, the Tribunal orders as follows:

Censure

- (1) Dr Gray is censured.

Fine

- (2) In determining the amount of the fine Dr Gray should be ordered to pay the Tribunal was mindful that, in *Parry* (supra), the Tribunal ordered that the practitioner, having also been found guilty of disgraceful conduct, should pay a fine of \$15,000 - the maximum fine being \$20,000.

On appeal, the quantum of the fine was reduced to \$5,000.00, in part on the basis that the Tribunal had also ordered that Dr Parry's name should be struck off the medical register. In this present case, Dr Gray's offending involves sexual misconduct, and the Tribunal considers that this factor puts Dr Gray's offending in a different category to Dr

Parry's, and it is a factor which fairly should attract a significantly greater monetary penalty, and that should be reflected in the fine component of the overall penalty.

Accordingly, taking into account all of the considerations which the Tribunal considers are relevant, it is satisfied that a fine in sum of \$7,500.00, is fair and reasonable.

Costs

- (3) Dr Gray is to contribute 50% of the costs and expenses of and incidental to the investigation by the Health and Disability Commissioner, the prosecution by the Director of Proceedings and the hearing of the Tribunal.

In relation to the fine and costs Dr Gray is ordered to pay, the Tribunal considers that these fairly and reasonably take into account the seriousness of the charge, and Dr Gray's own circumstances as disclosed in the financial information provided to the Tribunal.

Suspension

- (4) The Tribunal also considers that Dr Gray's registration should be suspended for a period not exceeding six months.
- (5) However, because Dr Gray has practised for three and a half years since his offending occurred, it is the Tribunal's view that it would be artificial to now suspend him from practice. But, the Tribunal is also concerned that if it does not order a period of suspension the Medical Council's unequivocal policy on sexual misconduct/abuse in the professional relationship may be undermined.
- (6) Accordingly the Tribunal also orders that the period of suspension should itself **be suspended provided that** no other charge involving allegations of sexual misconduct is laid against Dr Gray during a period not exceeding three years.

- (7) In the event that any such charge is laid in the Tribunal then Dr Gray's registration should forthwith be suspended for not less than six months, such period to commence immediately upon receipt of the charge by the Tribunal, or any successor tribunal.
- (8) This period of suspension is to take effect notwithstanding any other powers the Tribunal, or its successor, may have to suspend Dr Gray's registration in the context of any new charge as this suspension relates solely to this present charge, and is made pursuant to the powers vested in the Tribunal under section 110(1)(b) and clause 5 of the First Schedule to the Medical Practitioners Act 1995.

Conditions on practice

- (9) Pursuant to section 110(1)(c) the Tribunal also orders that Dr Gray may, for a period not exceeding three years, practice medicine only in accordance with the following conditions:
 - (a) Dr Gray is required to attend a psychiatrist for a full assessment by the psychiatrist and follow-up at approximately monthly intervals at the discretion of the psychiatrist;
 - (b) This Decision and the Tribunal's Decision No 170/01/72D are to be referred to the Medical Council's Health Committee together with a request that the Committee receive reports and monitor Dr Gray's practice in such manner as the Committee deems appropriate for a period of not less than three years. Dr Gray is to observe and comply with all of the terms of any programme of reporting and/or monitoring stipulated to him by the Health Committee;
 - (c) Dr Gray may not, except with the prior written permission of the Medical Council of New Zealand, practice medicine as a sole practitioner and, in the event he wishes to move from his current practice and/or community, he may work only with such other practitioner or practitioners and in such place or places as have

from time to time been approved in writing by the Medical Council of New Zealand;

- (d) the Tribunal also considers that a period of mentoring would assist Dr Gray, such mentoring to provide support and some general oversight of Dr Gray's practice. The Tribunal intends that the nature of the assistance and support provided by a mentor must be provided in addition to, and separate from, Dr Gray's psychiatric care and treatment. The Tribunal considers that Dr Gray requires both mentoring and on-going psychiatric care and support to ensure the continued safety of his practice.

20. The Tribunal has determined that these orders shall remain in place for a period of three years but it reserves leave to Dr Gray to apply to the Medical Council for a review of the conditions which the Tribunal has imposed upon his practice after the expiration of two years. If Dr Gray does make such application, then the Medical Council may vary and/or remove any of the conditions stipulated after the expiration of two years if it determines that it is fair and reasonable to do so, taking into account Dr Gray's personal and professional circumstances, and the public interest.

21. Finally, the Tribunal orders publication of the above orders in the New Zealand Medical Journal pursuant to section 138 of the Act.

DATED at Wellington this 22nd day of November 2001

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W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal