



## MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

PO Box 5249, Wellington • New Zealand  
Ground Floor, NZMA Building • 28 The Terrace, Wellington  
Telephone (04) 499 2044 • Fax (04) 499 2045  
E-mail [mpdt@mpdt.org.nz](mailto:mpdt@mpdt.org.nz)

**NB: PUBLICATION  
OF THE NAME OF  
THE RESPONDENT,  
COMPLAINANT  
AND THE NAMES  
OF ALL WITNESSES  
OTHER THAN  
EXPERT WITNESSES  
IS PROHIBITED**

**DECISION NO:** 191/01/78C

**IN THE MATTER** of the Medical Practitioners Act  
1995

-AND-

**IN THE MATTER** of a charge laid by a Complaints  
Assessment Committee pursuant to  
Section 93(1)(b) of the Act against A  
medical practitioner of xx

### **BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

**TRIBUNAL:** Mrs W N Brandon (Chair)

Ms S Cole, Dr R S J Gellatly, Dr U Manukulasuriya,

Dr J M McKenzie (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Auckland on Tuesday 30, Wednesday 31 October and  
Thursday 1 November 2001

**APPEARANCES:** Ms K P McDonald QC for a Complaints Assessment Committee ("the  
CAC")

Mr A H Waalkens and Ms J Libbey for Dr A.

### **Supplementary Decision**

1. In its Decision 181/01/78C dated 10 December 2001 ("*the substantive decision*"), the Tribunal found the respondent doctor guilty of conduct unbecoming a medical practitioner and that conduct reflects adversely on his fitness to practise medicine. This Supplementary Decision is the Tribunal's determination of penalty and should be read in conjunction with the substantive decision.
2. The substantive decision followed the hearing of a charge of disgraceful conduct laid against the respondent by a Complaints Assessment Committee. The allegations giving rise to that charge arose in the context of a consultation at an accident and medical clinic in xx in September 1998 and related to examinations which the respondent carried out in the course of the consultation, and the manner in which these examinations had been conducted.
3. The same allegations also resulted in the respondent being charged with sexual violation and indecent assault. Following a trial in the High Court at xx, the jury found him not guilty on all charges.
4. In July 1999, the respondent was notified by the Health and Disability Commissioner that the complainant's father had also laid a complaint with the Commissioner, which complaint was

subsequently referred to a Complaints Assessment Committee convened by the Medical Council.

5. In the substantive decision, the Tribunal determined that particulars 1, 3 and 4 of the charge were not established. Particular 2 of the charge was established, but the Tribunal was satisfied that its findings in relation to that particular did not warrant a finding against the respondent at the level of disgraceful conduct.
6. In its determination of the charge the Tribunal expressed some concerns about the respondent's professional practice. In summary, these related to concerns on the part of the Tribunal members that, while the respondent appears to have a relatively high degree of academic and theoretical knowledge and experience, there is a gap between his theoretical knowledge and his practical experience or, at the very least, between his theoretical or academic knowledge and his ability to practically and sensibly apply his knowledge, particularly in the context of a busy general practice.
7. Ultimately, the Tribunal came to the conclusion that, given its finding as to the absence of any sexual misconduct or prurient intent on the part of the respondent, and because only one of the four particulars of the charge was established, the respondent was guilty of the lesser charge, but that his conduct fell on the borderline of professional misconduct and conduct unbecoming a medical practitioner and that conduct reflects adversely on his fitness to practise medicine (paragraphs 96 and 97 of the substantive decision).

### **Submissions on penalty**

#### **Submissions on behalf of the CAC**

8. On behalf of the CAC, Ms McDonald submits that the Tribunal's criticisms of the respondent were significant, particularly the Tribunal's findings that he made a number of flawed assumptions and formed seriously mistaken conclusions, whether as a result of clinical or cultural misunderstandings or a lack of medical knowledge.

9. Ms McDonald also refers to the Tribunal's concerns regarding the respondent's history taking, and the adequacy of the information and explanation he had given to the complainant, which the Tribunal found to be "*hopelessly inadequate*". Ms McDonald also referred to the Tribunal's findings in relation to particular 2 that the examinations carried out were inappropriate and medically unjustified.
10. Ms McDonald submitted that, given the nature of these findings, this is an appropriate case for a significant penalty involving the imposition of conditions and/or supervision and a fine.
11. By order dated 2 August 2001 the Tribunal had made interim orders prohibiting the publication of the respondent's name and any identifying details. Ms McDonald sought the dismissal of those orders on the basis that the public is entitled to know of the charge and the findings against the respondent.

#### **Submissions for the respondent**

12. Mr Waalkens submitted that throughout the CAC's submissions Ms McDonald QC suggested that when considering the penalty in respect of the particular of the charge in relation to which the respondent was found guilty, the Tribunal should take into account some of the observations it had made in respect of particulars which were dismissed. Mr Waalkens submitted that this would be the wrong approach, that is, it would be wrong for the Tribunal to take into account observations made by it in respect of particulars which had been dismissed, or found not proven, when considering the penalty which ought to be imposed in relation to the single particular that was established.
13. Mr Waalkens submitted that the Tribunal should take into account the following factors:
  - (a) the time, place and circumstances in which the complaint arose (a busy A & M practice on a busy night);
  - (b) a situation which was "*ripe for misunderstanding*" – a point with which the Tribunal agreed at paragraph 54 of the substantive decision;

- (c) cultural differences;
- (d) the respondent was trying to do his best for the complainant;
- (e) the respondent has no previous convictions or adverse disciplinary (or related) findings against him;
- (f) to the best of his knowledge no other complaints have been made;
- (g) at the High Court trial he had called evidence as to how well he was regarded within the Accident and Medical Clinic by those with whom he worked. He was a hardworking doctor who had his patients' welfare at heart;
- (h) few doctors in this country have been through as much stress and upset in connection with a single incident as has the respondent in this case;
- (i) the respondent's present financial position is precarious, very much as a direct consequence of this subject case. This case has also put his life, practice and livelihood very much in jeopardy and, in many respects, on hold for a considerable period of time. The consequences for himself and his family have been significant;
- (j) the respondent cannot afford to pay a fine; he has had to sell his medical practice and his home; he presently has no savings and the only assets he and his family own are a motor vehicle and their household chattels and personal effects. They own no residential or other properties nor do they have any interests in such assets and have no investments or other assets. They do not even have life insurance;
- (k) the respondent is currently considering relocating/emigrating from New Zealand, most likely to Australia.

14. In relation to his ability to pay costs, it was submitted that the Tribunal should take into account that the respondent was charged with the most serious professional disciplinary offence, disgraceful conduct, and that 3 of the 4 particulars of the charge were found not to be established or proven at any level – one only being found to be established at the lower level of professional disciplinary offences.
15. Mr Waalkens also provided an extensive list of the Continuing Medical Education and Peer Review which the respondent has participated in over the past two years.
16. In conclusion, Mr Waalkens submitted that this is a case where it would be entirely reasonable for the Tribunal to impose no penalty, no costs and no conditions.
17. On behalf of the respondent, Mr Waalkens also sought permanent orders prohibiting publication of his name and any identifying details. Such orders have been made by the High Court following the criminal trial (ie. in relation to the same patient and same events) and inevitably, if the Tribunal lifts the interim orders it has made, the risk of impacting upon the High Court orders is high.

## **Decision**

18. Having reviewed the substantive decision and the various findings contained therein, and having taken into account all of the matters referred to in submissions, the Tribunal has determined that the following penalty should be imposed:
  - (i) it is appropriate that the respondent should be censured;
  - (ii) he is to pay a fine in the sum of \$500;
  - (iii) the Tribunal makes no order of costs against the respondent;
  - (iv) the Tribunal makes permanent orders prohibiting the publication of his name and any identifying details;

- (v) a copy of this decision and the Tribunal's substantive decision are to be forwarded to the Medical Council together with a request that the Council appoint an Educational Supervisor, who together with the Council will devise an appropriate plan and reporting structure to supervise, advise and assist the respondent for a period of not less than 2 years. A report to the Tribunal at six monthly intervals is requested, to ensure the Tribunal is kept informed about the supervision being undertaken;
- (vi) the costs of the Educational Supervisor are to be met by the respondent;
- (vii) the respondent is to participate in regular peer review of his practice to the satisfaction of the Medical Council and/or his Educational Supervisor for a period of not less than 2 years.

## **Reasons**

### **Name Suppression**

19. Given that this case involved allegations which can generally be characterised as involving sexual misconduct, the Tribunal would, in the normal course, be reluctant to make orders permanently suppressing his name. However, as has been said on virtually every occasion involving an application for name suppression, involving as it does the exercise of a discretion, each case must be considered on the basis of its own particular facts and circumstances. The Tribunal must weigh the competing interests of the respondent, the complainant and any other persons, and the public interest as that has been defined in the relevant cases.
20. In this case, because the allegations made against the respondent were of the most serious kind, reflected in the fact that he was charged at the level of disgraceful conduct, and those allegations, particularly the allegations involving sexual misconduct, were not established, the Tribunal considers that the prejudice and potential consequences to the respondent if his name were to be published, would be disproportionate to the Tribunal's findings.

21. It is also a relevant consideration for this Tribunal that the High Court considered it appropriate to make orders permanently suppressing the respondent's name in relation to the charges of sexual violation and indecent assault. Given the extent to which the High Court trial, and evidence given at that trial, was referred to at the hearing of the professional disciplinary charge, and in the substantive decision and this decision, it is inevitable that if the respondent was named in this present context there is a very real risk that the orders made by the High Court would be undermined and/or rendered ineffective.
22. Accordingly, the Tribunal is satisfied that in the circumstances of this case the respondent's interests fairly outweigh any other interests, including the public interest generally.

### **Censure**

23. The Tribunal is satisfied that it is appropriate that the respondent should be censured.

### **Fine**

24. Although modest, the fine is imposed at a level which the Tribunal considers is appropriate. In determining the level of fine, the Tribunal has taken into account the respondent's current financial position and that, in relation to a finding made at the most serious level (disgraceful conduct), the District Court on appeal from this Tribunal, recently reduced the fine imposed from \$15,000 to \$5,000, and that sum was upheld on appeal to the High Court; *Parry v MPDT* (Auckland District Court, NP 4412/00, Judgment dated 30/5/01, Hubble DCJ)

### **Costs**

25. In determining that it makes no order as to costs in this case, the Tribunal has taken into account the respondent's means, the nature and level of the charge laid, and the Tribunal's ultimate determination in relation thereto. In all the circumstances, particularly given that the most serious allegations of sexual misconduct were not upheld the Tribunal considers that this is not a case where an award of costs should be made against the respondent.



**Conditions**

26. The Tribunal considers that it is appropriate to order that conditions be placed on the respondent's practice. However, the Tribunal does not consider that conditions are warranted in order to punish the respondent in any way, but rather to assist him to remedy the deficiencies in his practice which the Tribunal referred to in its substantive decision, and to adapt to practice in New Zealand.
27. The Tribunal is anxious to ensure that the respondent receives practical assistance and advice, which concern on the Tribunal's part arises out of its finding that there is a gap between the respondent's theoretical and/or academic ability and his practical skills. The Tribunal considers that the appointment of an Educational Supervisor to supervise and assist the respondent would be of great benefit to him, and have positive benefits for his patients and potential patients.
28. The Tribunal is keen to ensure that the respondent receives practical assistance, particularly in relation to his general practice, and especially if he continues to work in an accident and emergency environment.
29. In the event there is any difficulty in appointing a Educational Supervisor, then the Tribunal reserves leave to the respondent and/or his counsel to seek that the condition be amended, as long as any such proposed amendment achieves the same purpose and objectives.

**Orders**

Accordingly, the Tribunal orders:

- (i) The respondent is censured.
- (ii) He is to pay a fine in sum of \$500.
- (iii) The respondent may, for a period of 2 years, practice medicine only in accordance with the following conditions:

- (a) he receive supervision, advice and assistance from an Educational Supervisor appointed by the Medical Council of New Zealand to the satisfaction of the Council;
  - (b) he is to participate in regular peer review of his practice to the satisfaction of the Medical Council and/or his Educational Supervisor for a period of not less than 2 years;
  - (c) he meet the cost of the Educational Supervisor; and
  - (d) that a report be given to the Tribunal at six monthly intervals to ensure the Tribunal is aware of progress and that the supervision of the Educational Supervisor is being undertaken.
- (iv) The interim orders made by the Tribunal prohibiting publication of the complainant's and the respondent's names and any identifying details are made permanent.
- (v) A notice under section 138(2) of the Act be published in the New Zealand Medical Journal with the names of, and any particulars which might tend to identify, the practitioner and complainant along with the names of all witnesses other than expert witnesses , being omitted because of the Tribunal's order for permanent suppression thereof.

**DATED** at Wellington this 19<sup>th</sup> day of March 2002

.....

W N Brandon

Chairperson

Medical Practitioners Disciplinary Tribunal