



**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

**NB: PUBLICATION OF THE NAME OF THE DOCTOR AND ANY DETAILS WHICH MAY IDENTIFY THE DOCTOR AS A XX PRACTITIONER IS PROHIBITED**

**DECISION NO:** 223/02/95C

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

-AND-

**IN THE MATTER** of a charge laid by a Complaints Assessment Committee against “C” medical practitioner of xx

**BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

**HEARING** by telephone conference on Friday 14 February 2003

**PRESENT:**

D B Collins QC - Chair

Mr C J Lange for a Complaints Assessment Committee

Mr H Waalkens for respondent

Ms G J Fraser - Secretary

## Introduction

1. On 14 February counsel for Dr C filed with the Tribunal an application “For Urgent Discovery/Disclosure of Documents From the CAC”.
2. Dr C’s application should be viewed against the following background:
  - 2.1 On 1 October 2002 a Complaints Assessment Committee filed a notice of charge alleging Dr C was guilty of disgraceful conduct in a professional respect. The particulars of the notice of charge allege Dr C had sexual intercourse with a patient (or recent patient) in March 1985 and at about the same time supplied the same patient with illicit drugs.
  - 2.2 A directions conference was held on 4 November 2002. At that directions conference the parties agreed:
    - The hearing of the charge would take place in Christchurch on 4 and 5 February 2003;
    - To a timetable for dealing with name suppression applications lodged by Dr C and the complainant;
    - To a timetable concerning the exchange of briefs of evidence.
  - 2.3 The Tribunal’s decision concerning applications for name suppression by Dr C and the complainant were delivered on 26 November 2002.
  - 2.4 On 23 December 2002 a further directions conference was convened primarily because of difficulties that were emerging over discovery of documents. At that directions conference the Tribunal was advised of concerns that Dr C had about the adequacy of discovery from the Complaints Assessment Committee. The Tribunal was advised no formal orders were required at that juncture. However it was apparent to the parties and the Tribunal that the hearing scheduled for 3 and 4 February would not be able to proceed. A new hearing date of 18 and 19 March was set by the Tribunal.

3. The parties anticipated issues that existed in December concerning discovery and inspection of documents would be able to be resolved without further recourse to the Tribunal. That hope proved to be illusory.
4. Following receipt of Dr C's application on 14 February the Tribunal convened a further directions conference at 4.15pm on 14 February 2003. The following issues were dealt with at that directions conference:
  - 4.1 Disclosure of CAC documents;
  - 4.2 Scope of disclosure;
  - 4.3 Computer records of emails sent by and to the complainant.

#### **Disclosure of CAC documents**

5. Counsel for Dr C conveyed to the Tribunal his concern that not all relevant documents had been disclosed by the Complaints Assessment Committee. Counsel for Dr C was surprised notes made by members of the Complaints Assessment Committee and its legal adviser of interviews with the complainant and other witnesses had not been disclosed.
6. Counsel for the Complaints Assessment Committee advised the Tribunal he had disclosed everything relevant to the hearing that was held on the file he had received from the Complaints Assessment Committee.
7. There is no doubt counsel for the Complaints Assessment Committee fully understands his obligations and is doing all he reasonably can to ensure full and proper disclosure occurs. There appears however to be some uncertainty about whether or not all relevant documents have been made available to counsel for the Complaints Assessment Committee.
8. It is unusual for a disciplinary tribunal to direct that a party make full disclosure of the documents which are or which may have been in its possession or power. The order sought by Dr C is akin to the type of order which the High Court can make pursuant to Rule 297 of the High Court Rules. The Tribunal's jurisdiction to make an order requiring a

party to disclose in a verified list the documents which are or have been in its possession or power can be found in clause 5(1)(a) of the First Schedule to the Medical Practitioners Act 1995. That clause confers a very broad authority on the Tribunal to regulate its procedure in such manner as it thinks fit. The Tribunal believes that authority enables the Tribunal to direct that a Complaints Assessment Committee verify what documents they have, or have had in its possession or power which are relevant to the proceeding. The Tribunal believes it can exercise this jurisdiction to ensure the disciplinary process is conducted in a manner that is fair to all parties, transparent and accountable.

9. The Tribunal also has specific powers of investigation conferred by clause 7(1)(b)(c) and (2) of the First Schedule to the Act. Those provisions state:

*“(1) For the purposes of dealing with the matters before it, the Tribunal or any person authorised by it in writing to do so may - .....*

*(b) Require any person to produce for examination any papers, documents, records, or things in that person’s possession or under that person’s control, and to allow copies or extracts from any such papers, documents, or records to be made:*

*(c) Require any person to furnish, in a form approved by or acceptable to the Tribunal, any information or particulars that may be required by it, and any copies of or extracts from any such papers, documents, or records.*

*(2) The Tribunal may, if it thinks fit, require that any written information or particulars or any copies or extracts furnished under this clause shall be verified by statutory declaration or otherwise as the Tribunal may require.”*

These provisions can also be construed in a way which confers jurisdiction on the Tribunal to order a party to provide a verified list of the documents relevant to the case which are or have been in that party’s possession or power.

10. In this case the Tribunal will make an order of the kind sought. The Tribunal orders the Complaints Assessment Committee file and serve a list of the documents which are or have been in its possession or power that are relevant to the prosecution of Dr C. Documents which are no longer in the Complaints Assessment Committee’s possession or power are to be identified in a way which describes what has happened to the documents in question.

Documents which are subject to a claim of privilege must also be identified in a way which explains the basis upon which privilege is claimed. The list is to be verified by affidavit and filed and served by the 28<sup>th</sup> day of February 2003.

11. The Tribunal makes the order set out in paragraph 9 for the following reasons:

11.1 The charge brought against Dr C is very serious. If proven the charge could have extremely serious consequences for Dr C, his family and his practice.

11.2 It is essential Dr C be given a fair and reasonable opportunity to properly defend the charge by accessing all documents relevant to the proceeding which are discoverable by the Complaints Assessment Committee.

11.3 Where there is doubt or confusion over what documents exist, or have existed, it is best to avoid suspicion and uncertainty by requiring the Complaints Assessment Committee to make full written disclosure of the documents which it has, or has had in its possession or power.

### **Scope of Disclosure**

12. During the evaluation conference on 14 February it emerged there was a dispute over precisely what documents needed to be disclosed by the Complaints Assessment Committee. The issue related to two classes of documents, namely:

12.1 Notes made by the Complaints Assessment Committee and/or its legal adviser;

12.2 Medical notes relating to the complainant.

13. There was no debate that in general a Complaints Assessment Committee must disclose documents relevant to the hearing of the charge. Relevance in this context is similar to the test of relevance in civil proceedings, namely; documents are relevant if they:

*“... relate to matters in question in the [proceeding] which not only would be evidence upon any issue, but also which, it is reasonable to*

*suppose, contains information which may – not which must – either directly or indirectly enable [Dr C] to advance his own case or to damage the case [of the Complaints Assessment Committee] ...”<sup>1</sup>*

### **Complaints Assessment Committee “Jottings”**

14. In this particular case an issue focused on notes which members of the Complaints Assessment Committee and/or its legal adviser made or may have made when interviewing the complainant and other witnesses. The Complaints Assessment Committee suggested it was not obliged to provide these so called “jottings”.
15. It does not matter if the documents in question are “jottings” or more substantive records. What is important is the contents of the documents. If the documents contain a record or summary of what was said by the complainant or other witnesses to the Complaints Assessment Committee then they are relevant and must be made available to Dr C. If on the other hand the so called “jottings” are no more than expressions of opinions or thoughts of the Complaints Assessment Committee and its adviser, then they need not be shown to Dr C (but must nevertheless be properly identified in the Complaints Assessment Committee’s list of documents).

### **Complainant’s medical notes**

16. The Tribunal was advised medical notes relating to the complainant’s treatment for a psychiatric and/or psychological condition during the period July 1988 to January 1989 had been disclosed to Dr C’s counsel. Two issues arose from that limited disclosure:

16.1 Dr C now seeks:

*“all medical records of [the complainant] relevant to:*

- (a) her present and current psychiatric and/or psychological status;*
- (b) all medical and/or counselling records which may record or refer to [the complainant’s] complaints*

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<sup>1</sup> *Compagnie Financiere du Pacifiqu v Peruvian Guano Co* (1882) 11 QBD 55 at 63, see also *Bell v Auckland University* [1969] NZLR 1029

*against Dr C which is the subject of the disciplinary charge against him”.*

- 16.2 Dr C's counsel seeks that he be relieved of an undertaking he gave not to disclose to Dr C and his expert advisers, the medical records he has now received.
17. It is convenient to first dispose of the second of these two issues.
  18. The Tribunal understands counsel for Dr C provided counsel for the Complaints Assessment Committee with an undertaking not to disclose to Dr C the psychiatric/psychological notes relevant to the complainant for the period July 1988 to January 1989.
  19. Having obtained those notes counsel for Dr C believes the notes in question satisfy the test of relevance and that they may assist Dr C in conducting his defence by enabling issues to be raised about the reliability of the complainant's recollection of the events said to have occurred in March/April 1985.
  20. The Tribunal has not seen the medical notes in question and cannot determine whether or not they will assist the Tribunal in assessing whether or not the complainant's recollection has been adversely affected.
  21. Counsel for the Complaints Assessment Committee stridently urged the Tribunal to rule that before granting Dr C's request Dr C needed to prove that the complainant's medical condition and treatment from July 1988 to January 1989 in fact affected her ability to recall the events of March/April 1985 which form the basis of the charge.
  22. The Tribunal is in no position to require Dr C prove at this juncture that the complainant's condition and treatment has affected her recollection of the events complained of. If there is any foundation to this concern the Tribunal will need to hear evidence on the topic before reaching any conclusion. Suffice to say for present purposes if there is any realistic possibility the complainant's medical condition and treatment from July 1988 to January 1989 has affected her recollection of the matters said to have occurred in March/April 1985, then the information is relevant.

23. The Tribunal is acutely aware that the information relevant to the complainant's psychiatric/psychological condition is intensely private and may be very sensitive. The Tribunal must balance the complainant's well founded desire to preserve her privacy with the need to ensure Dr C has a fair and proper opportunity to defend the charge.
24. The Tribunal proposes to rule that Dr C's counsel can disclose to Dr C and his expert advisor(s) the information that has already been made available to Dr C's counsel.
25. The Tribunal also orders that any other medical records concerning the complainant which may assist in determining whether or not the complainant's recollection of the events of March/April 1985 has been impaired must also be disclosed to Dr C and his legal adviser and any expert(s) retained by him. That order must be made against the complainant because the Complaints Assessment Committee apparently does not have records of the kind sought by Dr C.
26. The Tribunal fully understands the complainant may be distressed by the nature of this order. The Tribunal wishes to assure the complainant that it has made the order so as to ensure any allegations that her recollection of events is impaired can be fully and properly evaluated by the Tribunal.
27. The Tribunal also wishes to assure the complainant that it will exercise its power to suppress publication of any intimate and distressing information about the complainant which may emerge from the records in question (if any exist).

### **Computer Records**

28. At the evaluation conference held on 23 December 2002 an issue emerged as to whether or not the complainant had fully disclosed email communications between herself and Dr C. Counsel for the Complaints Assessment Committee advised the Tribunal that arrangements could be made to verify all email records had been disclosed. The process for undertaking this exercise involves a forensic examination of computer hard drives. Counsel for the Complaints Assessment Committee wanted to know from counsel for Dr



C if it was necessary to engage computer forensic experts to undertake the exercise of verifying that all relevant emails had been disclosed.

- 29. At the evaluation conference held on 14 February 2003 counsel for Dr C advised he was not yet in a position to confirm whether or not he accepted that all relevant emails have been disclosed.
- 30. No formal orders were sought by the Tribunal concerning this point. If it becomes an issue the parties should apply to the Tribunal for an urgent hearing.

**Date of Hearing**

- 31. The Tribunal reminded the parties that the hearing dates of 18 and 19 March were confirmed and would not be altered unless extraordinary circumstances were advanced for granting an adjournment.

**Conclusion**

- 32. The Tribunal orders the Complaints Assessment Committee provide a list, verified by affidavit, of all documents that are or have been in its possession and power relevant to the charge brought against Dr C.
- 33. That any medical records concerning the complainant which may be relevant in assessing whether or not the complainant's recollection of events of March/April 1985 have been impaired are to be disclosed by the complainant.

**DATED** at Wellington this 18<sup>th</sup> day of February 2003

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D B Collins QC

Chair

Medical Practitioners Disciplinary Tribunal