

Medical Practitioners Disciplinary Tribunal

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DECISION NO: 115/98/59C

IN THE MATTER of the MEDICAL PRACTITIONERS
ACT 1995

AND

IN THE MATTER of a charge laid by the Complaints
Assessment Committee pursuant to
Section 102 of the Act against M,
Medical Practitioner of xx.

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL:	Mr G D Pearson	-	Deputy Chair
	Ms S Cole	-	Member
	Dr G S Douglas	-	Member
	Prof. Dame N Restieaux	-	Member
	Dr B J Trenwith	-	Member
	Ms K Davis	-	Secretary

HEARING Telephone conference held, on Tuesday 21 March 2000

APPEARANCES:	Mr M F McClelland	-	Complaints Assessment Committee
	Mr C Hodson QC	-	Counsel for Dr M

A. THE APPLICATION

1. **THE** Application before the Tribunal is an application to withdraw a charge. The particulars of the charge are that Mr M:

“Failed to obtain from his patient A appropriate informed consent prior to performing on 5 April 1993 a total left thyroid lobectomy in which operation a Recurrent Laryngeal nerve injury took place and in particular that he failed to warn or inform her of the potential for damage to the Laryngeal nerve resulting in voice alteration this being a well known complication of such surgery.”

2. **THE** application was supported by a memorandum in which Mr McClelland set out the grounds in support of the application to withdraw the charge.

B. THE CIRCUMSTANCES

3. **IN** early 1997 a Complaints Assessment Committee (“CAC”) was appointed to investigate a complaint received from the Accident Rehabilitation and Compensation Corporation. The complaint related to a consultation and operation that had taken place in April 1993.
4. **ON** 21 August 1997 the CAC interviewed Mrs A and her solicitor, and also Mr M and his counsel. The CAC believed the complaint should be the subject of conciliation pursuant to s.92(1)(c), which had the potential to resolve the complaint on an inter-party basis by agreement pursuant to s.94 of the Act.
5. **THE** conciliation proceeded, but was not successful in resolving the complaint, and the matter proceeded as a charge before this Tribunal.
6. **THERE** were judicial review proceedings in which Mr M challenged the validity of the CAC’s actions, and hence the lodging of a charge before this Tribunal. The CAC defended those proceedings, but they have not come on for hearing.

7. **MRS A** pursued civil proceedings in the District Court making some type of claim against Mr M. This Tribunal has not been fully informed as to the details of those proceedings, but they apparently relate to the events, or some of the events, to which the charge relates. It would appear that the District Court proceedings might have been commenced before the CAC received the complaint.
8. **ON** 21 October 1999 Mrs A wrote to the CAC informing it that from her point of view the complaint was resolved. Mrs A wrote in these terms:

“I wish to advise you that I have now settled the proceedings which I filed in the District Court against Mr M.

The proceedings related to the same issues, as are being dealt with by the Medical Practitioners Disciplinary Tribunal and, in view of the settlement I wish to advise you that, from my point of view, the complaint is now also resolved.”

9. **MR McClelland** indicated that the CAC considered that the appropriate course was to withdraw the complaint, as he did not consider that the charge could be successfully prosecuted, if Mrs A was compelled to give evidence as an unwilling witness. In that regard, the length of time since the material events, and the absence of other witnesses were factors. Furthermore, the complaint (as reflected in the earlier decision to make the complaint subject to mediation) was one which could be resolved appropriately between the parties, without determination by this Tribunal. In these circumstances, Mr McClelland indicated that substantial costs could be incurred in an unnecessary, and probably unsuccessful, prosecution if the charge was not withdrawn.
10. **MR Hodson QC** participated for part of the telephone conference and then withdrew, as Mr M did not wish to be heard on the application. Mr Hodson indicated that Mrs A had contractually bound herself not to give evidence before this Tribunal. On that basis Mr Hodson contended that the charge must be withdrawn as it could not be advanced.

C. THE TRIBUNAL'S JURISDICTION

11. **THERE** is no specific statutory mechanism dealing with withdrawal of charges. However, there are situations where that is inevitable. The most obvious being where an essential participant dies. In our view, an application to withdraw a charge is a situation where the Tribunal should “regulate its procedure” (First Schedule to the Act, clause 5(1)(a)), and in appropriate cases give consent to a charge being withdrawn.
12. **IT** would of course be possible for the CAC to simply offer no evidence in support of a charge rather than apply to withdraw a charge. To that extent the CAC has some significant control over whether a charge proceeds, subject to legal duties upon the CAC, and the Tribunal’s powers of investigation. Regardless of that, when the Tribunal is asked for leave to withdraw a charge, we consider that the application should be the subject of some scrutiny, rather than simply assenting to the application as a matter of course. That is because the Tribunal’s functions have a significant public interest component; and fairness requires that the Tribunal be satisfied that neither the practitioner, nor the patient have a sound objection to the charge being withdrawn.
13. **IN** terms of the public interest component, the Tribunal would be concerned if a patient had their individual claim satisfied by financial compensation, and that by way of consideration for that compensation, entered into any contract or agreement which sought to prevent a charge which might involve any serious issues of public safety from proceeding to a hearing. It is important to keep in mind that compensation and the professional disciplinary process serve very different and discrete purposes.
14. **THE** professional disciplinary process involves wider issues such as patient and community interests and expectations, and the safety of the public. As has been said on numerous occasions, the disciplinary process, in part, is one of setting standards; *B v Medical Council of New Zealand* (HC, Auckland, HC11/96, Elias J.), and s.3 of the Act makes it explicit that the Act’s principal purpose is to protect the health and safety of members of the public. The Tribunal’s task therefore is as much about identifying conduct warranting sanction as it is about setting standards and ensuring that professional practice, and the conduct of

professional relationships, does not lag behind or frustrate community expectations and interests.

15. **AN** issue of significant public interest could develop in circumstances where a practitioner offered to pay compensation to a patient, contingent upon them not co-operating with the advancement of a professional disciplinary charge. Such conduct might, in itself, amount to serious professional misconduct.
16. **IN** this case, Mr Hodson reports that Mrs A has been contractually bound not to give evidence before this Tribunal. We do not consider that such a contract would be enforceable. The Tribunal considers, on the information available, that Mrs A is a compellable witness, and that a private agreement cannot override statutory obligations. However, the Tribunal does not know anything of the circumstances in which Mr M and Mrs A came to enter into such an agreement, or the terms of their agreement. Accordingly, the Tribunal is not in a position to comment on the propriety, or otherwise, of this particular arrangement, other than to express its preliminary view that it doubts the extent to which it could bind Mrs A in the manner submitted by Mr Hodson.
17. **ACCORDINGLY**, before granting leave to withdraw any charge, the Tribunal must be satisfied that the parties have no sound objection to that course, and that there are no outstanding public interest issues that properly require to be the subject of inquiry by the Tribunal, regardless of the attitude of the parties.

D. DECISION

18. **HAVING** heard from counsel and being given the background to, and reasons for, the application, the Tribunal considers that in this case it is appropriate to grant leave to withdraw the charge.
19. **FIRST** the Tribunal is satisfied that both parties, Mrs A, and Mr M, have no objection.

20. **SECOND**, the charge is not one where the Tribunal has reason to be concerned that there are wider public interest issues unresolved by the charge being withdrawn. In that regard, it is significant that the CAC considered, even before the charge was put before the Tribunal, that the complaint was one which could be resolved by agreement between the parties. The referral to mediation with a view to inter-party resolution clearly points to that.
21. **IN** addition, the complaint involves a single charge relating to a complaint of a failure to obtain “informed consent”, and appears to be potentially one that primarily concerns the rights and interests of the individual patient complainant, rather than wider issues relative to the safety of the public at large. Accordingly, the complaint does not, on its face, indicate any wider public interest issues. This view of the Tribunal, on the basis of the limited information before it, should not be seen as suggesting that a failure to obtain informed consent may be a less serious incidence of professional disciplinary offences; it is not. The Tribunal is simply satisfied, in this case, that there is nothing before the Tribunal to suggest the subject matter of the charge is not confined to a complaint which arose in the context of one patient/doctor encounter and a single episode of care.
22. **THE** Tribunal, of course, can make no assessment as to whether or not the charge would have been established had it proceeded, and the practitioner is entitled to the presumption of innocence unless or until a charge is proven.
23. **ACCORDINGLY**, the application for leave is granted, and the charge may be withdrawn.

DATED at Wellington this 6th day of April 2000.

G D Pearson

Deputy Chair

Medical Practitioners Disciplinary Tribunal