

Medical Practitioners Disciplinary Tribunal

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NOTE:

DECISION NO: 104/99/52D

**THE NAMES OF
WITNESSES, OTHER
THAN DR YOUNG ARE**

IN THE MATTER of the MEDICAL PRACTITIONERS
ACT 1995

AND

**NOT FOR
PUBLICATION**

IN THE MATTER of a charge laid by the Director of
Proceedings pursuant to Section 102 of
the Act against **THOMAS RICHARD
YOUNG**, Medical Practitioner of
Kaitaia.

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL:

Mr G D Pearson	-	Deputy Chair
Ms S Cole	-	Member
Dr J C Cullen	-	Member
Dr L Henneveld	-	Member
Dr A M C McCoy	-	Member
Ms G J Fraser	-	Secretary
Mrs G Rogers	-	Stenographer
Mrs K Davies	-	Observer

HEARING

held at Whangarei, on Monday 6 December 1999

APPEARANCES:

Ms T W Davis	-	Director of Proceedings
Mr A H Waalkens	-	Counsel for Dr Young

1. THE CHARGE

1.1. **THE** Director of Proceedings designated under Section 15 of the Health and Disability Commissioner Act 1994 has reason to believe that a ground exists entitling the Tribunal to exercise its powers under Section 109 of the Medical Practitioners Act 1995 (“the Act”).

1.2. **THE** substance of the ground believed to exist, and the particulars of the charge against Dr Young, as notified to him are:

“That on or about 15 January 1998 while treating your patient, [**The Complainant**], you being a registered medical practitioner, acted in such a way that amounted to professional misconduct in that you struck your patient and provided services of an inappropriate professional standard.

IN PARTICULAR YOU:

1. Struck a xx year old female patient on her face.

AND/OR

2. Restrained the said patient by pulling her hair.

AND/OR

3. Called the said patient a “bitch”.

AND/OR

4. Spoke to the said patient and her support in an unprofessional and inappropriate manner during the consultation in that you intimated that the patient would go blind if you did not remove what was in her eye.

AND/OR

5. Intimidated the said patient through your words and physical actions specified in particulars 1 - 4 above.

AND/OR

6. Failed to apologise within a reasonable time to the said patient for your actions.”

2. DR YOUNG'S RESPONSE TO THE CHARGE

2.1. **DR** Young indicated at a preliminary directions conference that some of the allegations were admitted. Subsequently, by letter dated 26 November 1999, through his counsel Dr Young indicated that:

“Dr Young accepts [a] finding of professional misconduct against him is appropriate. He accepts the particulars numbered 1 and 2 and, to that extent, 5. He does not accept particulars 3, 4 and 6.”

2.2. **THAT** indication was confirmed at the hearing, accordingly the hearing concerned penalty, and necessarily, determining the facts in respect of the disputed particulars of the charge.

3. THE HEARING

3.1. **THE** burden of proving the disputed facts is borne by the Director of Proceedings. It is well established that the standard of proof in disciplinary proceedings is the civil standard, namely, the Tribunal must be satisfied on the balance of probabilities that the material facts are proved. It is equally well established that the standard of proof will vary according to the gravity of the allegations, and the level of the charge. The facts must be proved to a standard commensurate with the gravity of what is alleged: *Ongley v Medical Council of New Zealand* [1984] 4 NZAR 369 @ 375-376.

3.2. **THE** Director of Proceedings called the complainant, and the following members of the complainant's whanau - her mother, her cousin, and her Aunt. A Registered Comprehensive nurse who was a witness to the key events was also called. In addition a statement made to the Police by a xx who witnessed material events, but subsequently died, was produced. Dr Young gave evidence, and also produced an uncontested statement from an employee of the medical centre in which he practises, and a number of testimonials. Both parties produced a number of documents. The Tribunal has carefully considered all of the evidence. There were elements of inconsistency in the evidence. The Tribunal is satisfied that the inconsistency was a result of all of the witnesses having been party to a very distressing event, not any deliberate

manipulation of recall. In the circumstances it was not to be expected that the witnesses could have had an exact recall of the series of events. However, in respect of key issues, rather than matters of detail, there was a high level of agreement among the witnesses and the Tribunal has been satisfied as to the material facts at the appropriate standard.

4. BACKGROUND

- 4.1. **THE** events which gave rise to the charge occurred in the course of a consultation on 15 January 1998, when the Complainant attended Dr Young's surgery with sand or silt in her eye requiring treatment.
- 4.2. **THE** Complainant had been attending a Hui Rangitahi at xx. She was attending the Hui with two cousins and an Aunt, and other relatives were present. While playing, some boys threw sand, and some of the sand lodged in the Complainant's eye. The Complainant was in pain, and distressed because she was fearful that she might go blind (she was xx years of age at the time). First the Complainant went to her cousin for help; she too was a relatively young person, about to begin her xx form year at school. The Complainant and her Cousin were close, and regarded each other like sisters. The Complainant's Cousin then got a nurse who was attending the Hui. The nurse was not previously known to the Complainant, and had no significant contact with her family before these events. The Nurse attempted to examine the Complainant's eye, but she could not get her to open it properly. Accordingly, the Nurse decided that a Doctor should see the Complainant.
- 4.3. **THE** Complainant, her cousin and the nurse all went to the nurse's car. A xx happened to be at the car. The xx was closely related to the Complainant, but they had met for the first time at the hui. The xx has died since the events in question, but a statement she supplied to the police before her death was received in evidence. The four people: the Complainant, her Cousin, the Nurse, and the xx all travelled to Dr Young's surgery in the Nurse's car.
- 4.4. **THE** four people entered Dr Young's surgery, and remained present with Dr Young while he attended to the Complainant.

- 4.5. **DR** Young had not met the Complainant before, and she was still distressed. The Complainant had her eyes tightly shut, and was very reluctant to open them. She was assisted and supported, principally by her cousin. After some initial discussion, Dr Young commenced attempting to remove the sand or silt from the Complainant's eye. First Dr Young administered anaesthetic eye drops, and then began cleaning her eye. During this time the Complainant remained in pain, and was distressed. Accordingly, while the details are disputed, the Complainant may have been moving, not continuously opening her eye to facilitate cleaning, and moved her hand in a way that could have hindered the cleaning process.
- 4.6. **WHILE** cleaning her eye Dr Young became frustrated, and slapped the Complainant on her face. It was a slap with an open hand. The Complainant said it was "hard enough to make my face tingle". When it was suggested that it was not a hard strike, she said it was "half and half". Then Dr Young took hold of the Complainant's hair, and pulled her head onto the examination table where she had been lying. Those events took place with the five people present: Dr Young, the Complainant, her Cousin, the Nurse, and the xx.
- 4.7. **AT** that point it would appear that all of the persons present became very distressed. The Nurse then took the Complainant to her clinic and washed out her eye. Later that day the Complainant's Aunt took the Complainant to xx Hospital, and a doctor examined her eye and prescribed some ointment.

5. THE TRIBUNAL'S FINDINGS

Use of the word "bitch"

- 5.1. **DR** Young denied using the word "bitch" in respect of the Complainant at any time during the course of treating the Complainant. The Complainant, her cousin, and the Nurse all gave evidence that the word had been used. They gave varying accounts as to when, and the number of times the word had been used.

- 5.2. **THE** Tribunal has considered the evidence of all the witnesses, and has concluded Dr Young did use the word 'bitch' in respect of the Complainant. The word may have been used more than once, but the Tribunal is satisfied to the requisite standard that it was used on one occasion; being at or about the time Dr Young hit the Complainant and pulled her by her hair.
- 5.3. **THE** Tribunal has not concluded that Dr Young was being untruthful when he denied using the word "bitch". Dr Young has been very frank in respect of the events that took place. The Tribunal has concluded that Dr Young used the word once, at the point in time when he lost control of himself, and that he genuinely does not now recall using the word.
- 5.4. **THERE** was some evidence that the word was used at an early point in the consultation. The Tribunal's conclusion after having considered all of the evidence is that the early part of the consultation was professional, and involved no inappropriate language or actions. Again, the Tribunal has not taken the view that any of the witnesses have given other than truthful evidence, to the best of their recollection. However, it is clear that all of the parties present in Dr Young's surgery were distressed by the events, and not unexpectedly the details of the recollection of the witnesses does vary. Some witnesses referred to a degree of hysteria resulting.
- 5.5. **ACCORDINGLY**, the Tribunal has concluded the use of the word "bitch" was a verbalisation of the anger and frustration that Dr Young was simultaneously expressing physically. For that reason, the Tribunal does not consider that the use of the word significantly alters the gravity of the slap and pulling of the Complainant's hair. They were seriously inappropriate actions, that would clearly cause the Complainant hurt and distress. The simultaneous use of an abusive term, while on its own a serious matter, was in this case, an integral part of an abusive act that was primarily physical.
- 5.6. **THE** Tribunal is satisfied that the Complainant was difficult, but only in a way that was to be expected for a young person who was in physical pain, and, not unreasonably, frightened. The Tribunal has considered the evidence relating to the complainant struggling, not opening her eyes, and attempting to impede the cleaning process. The Tribunal, while accepting the

circumstances caused Dr Young a great deal of frustration, does not consider that there was anything the Complainant did that mitigated Dr Young's actions in respect of either the physical or verbal abuse.

Unprofessional and inappropriate threat of blindness

- 5.7. **THE** case for the Director of Proceedings alleged that Dr Young had unprofessionally caused the Complainant distress by telling her that she would go blind if he did not remove the material from her eye. The case apparently being that this was used as a threat to secure greater co-operation, when it was in fact a baseless threat that caused greater distress.
- 5.8. **THE** Tribunal is satisfied that the word "blind" was used. Dr Young was inclined to believe that he had not used the word, but the Tribunal is satisfied that he did use the word. The Tribunal is also satisfied that it was entirely appropriate that Dr Young should use the word "blind", and furthermore that he had an obligation to convey to the Complainant and the persons looking after her that the foreign material must be removed from her eye, and removed soon.
- 5.9. **DR** Young gave evidence of his experience of complications arising from foreign bodies remaining in eyes, which led to visual impairment. Dr Young explained that he applied a principle that a foreign body should never be allowed to remain in an eye overnight.
- 5.10. **THE** Tribunal is satisfied that consistent with Dr Young's approach, the Complainant was seen promptly, and at some point in the consultation received a necessary warning, that as events transpired, should have led to her receiving treatment when his own attempts at treatment failed. Accordingly, the Tribunal is not satisfied that there was anything unprofessional or inappropriate about reference to blindness.

Particular 5

5.11. **PARTICULAR 5** is a compendium particular of intimidation arising out of the preceding particulars. As the Tribunal has not found particular 4 established, the particular is upheld only to the extent of deriving support from particulars 1 to 3.

Failure to apologise

5.12. **THE** final particular of the charge alleges that Dr Young failed to apologise to the Complainant in a reasonable time.

5.13. **THE** first opportunity to apologise was immediately after the incident. The situation was however clearly very emotional and there was a good deal of noise, the Tribunal is not satisfied that Dr Young had an opportunity to apologise at that point. Almost immediately after, the nurse accompanying the Complainant made a complaint with the Manager of the Medical Centre where Dr Young's surgery is located. The Nurse gave evidence that this complaint was not treated seriously at the time, but there is no evidence that Dr Young even knew of it. Accordingly, the Tribunal is not satisfied that there was a further opportunity at that point.

5.14. **THE** evidence was that Dr Young received one or two telephone calls later during the day the incident occurred. First, the Complainant's Aunt called Dr Young, the details of the first part of that telephone call are not now entirely clear in the Aunt's mind. The Aunt does clearly recall that the call ended with Dr Young excusing himself during the call, and then leaving the telephone until it was hung up. Second, Dr Young recalls a telephone call in which he believed a woman introduced herself as the Complainant's mother had a discussion with him. Dr Young does not recall the conversation in which the Complainant's Aunt called him.

5.15. **IT** is clear that the Complainant's Mother did not call Dr Young, she gave evidence, she was at Hamilton at the time, and did not have a telephone.

5.16. **THE** Tribunal is satisfied that Dr Young did attempt to apologise to the woman he believed was the Complainant's mother. The Tribunal can only speculate as to who this call was from, it would appear most likely to be a woman who identified herself by reference to her relationship with the Complainant's mother - with Dr Young hearing the word "mother" and mishearing the further explanation.

5.17. **FURTHERMORE**, the Tribunal is satisfied that Dr Young has been genuinely remorseful about his loss of self control, that he was minded to apologise at the first opportunity, and believed that he had taken matters as far as he could with the Complainant's mother.

6. PENALTY

Grounds

6.1. **THE** charge that has been admitted is a serious one. For a practitioner to strike a xx year old patient under any circumstances is plainly a serious matter. To his credit Dr Young has recognised that by admitting the charge. Dr Young is plainly distraught at his loss of self-control.

6.2. **IN** relation to the circumstances the Tribunal is satisfied that the following matters are important in characterising the true significance of the offence:

a.) The striking, pulling of the Complainant's hair, and the use of the word "bitch" all took place in the presence to 3 responsible persons, including a health professional. This is not a case of a young person being abused when there were no witnesses, followed by a denial.

b.) The Tribunal is satisfied that the loss of self-control was completely unjustifiable, but momentary. This is not a case where a course of conduct was premeditated and carried into effect.

c.) The three events founding the charge were individually, and cumulatively, serious and abusive, but the level of physical violence was not extreme.

6.3. **THE** Tribunal is satisfied that Dr Young has had a long and distinguished career, he is highly regarded in his community for both his professional and wider contribution. The events giving rise to this charge were an isolated event, which was out of character. Dr Young has supplied testimonials and a statement from an employee at the Medical Centre where he works they attest to the high regard in which he is held in his community.

Penalty

6.4. **HAVING** regard to the circumstances of the offence, the fact that Dr Young has acknowledged the offence, that he has shown genuine remorse, his previous exemplary record, and the impact of the charge being established and related publicity, the Tribunal has determined that the appropriate penalty is:

a.) Dr Young is censured for his actions,

b.) A fine of \$6,000 is imposed.

Costs

6.5. **THE** Tribunal has considered the level of costs, and determined that a lower level of contribution than is normal for an offence of professional misconduct is appropriate. Dr Young admitted the charge, and his case was conducted in a manner that did not go beyond the particulars in issue. Furthermore, in respect of the three particulars in issue, Dr Young has successfully defended two of them. Accordingly, the Tribunal has concluded that Dr Young will contribute 30% of the costs of the prosecution.

7. SUPPRESSION ORDERS

7.1. **THE** following orders are in effect:

“The name of the Complainant is suppressed pending further order of this Tribunal;

The names of all witnesses called by either party are suppressed pending further order of this Tribunal; **provided** that the name of the practitioner, **Thomas Richard Young** is **not** suppressed;

There shall be no publication of any details that might lead to the identification of the Complainant, or any witness called by either party, **except** the identification of the practitioner, **Thomas Richard Young**, pending further order of this Tribunal.

7.2. **THERE** will be no further order. In respect of the witnesses for the prosecution, there is no opposition to the order suppressing their names and identity. The Tribunal is satisfied that the orders are necessary to protect the identity of the Complainant. There is one witness called for the defence also affected. That witness’s statement was accepted without being required for cross-examination. The Tribunal is satisfied that it is appropriate for her name and identity to be suppressed. There is some criticism in the evidence of a person who may, or may not, be the person who gave evidence. The issue is peripheral, as it did not directly concern Dr Young, it related to the handling of a complaint. It would not be satisfactory for the witness to be put at risk of adverse publicity, without having even been present and answering the point specifically.

8. ORDERS

8.1. **THE** Tribunal finds, on Dr Young’s admission, the charge of professional misconduct is established, and orders that:

- a.) Dr Young is hereby censured for his actions,
- b.) A fine of \$6,000 is imposed on Dr Young, and

c.) Dr Young is required to contribute 30% to 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 by the Tribunal.

8.2. **THE** Tribunal makes no further order regarding suppression of name and identity, and leaves the existing orders standing.

DATED at Wellington this 16th day of December 1999

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G D Pearson

Deputy Chair

Medical Practitioners Disciplinary Tribunal