



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 272/03/110D

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 **THOMAS PAUL
O'FLYNN** medical practitioner of
Invercargill

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING: By telephone conference on 18 February 2004

PRESENT: Miss S M Moran (Chair)
Dr F McGrath, Dr C P Malpass, Mrs H White, Dr L F Wilson
(members)

APPEARANCES: Ms T M Baker, Director of Proceedings
Mr H B Rennie QC for Dr T P O'Flynn
Ms G J Fraser (Secretary)
(for first part of call only)

Decision of the Tribunal in response to Director of Proceedings Application for video link evidence to be taken.

Introduction

1. Doctor O’Flynn is a registered medical practitioner. On 5 June 2003 the Director of Proceedings laid a charge with the Tribunal alleging, amongst other things, Dr O’Flynn failed to adequately supervise Dr Fisher, a Medical Officer Special Scale who was a clinician for Mr Mark Burton. It is not necessary to traverse the charge and allegations in detail.
2. The case against Dr O’Flynn was initially scheduled to be heard on 24 November 2003. An earlier decision adjourning that hearing has been delivered. The hearing is now scheduled to commence in Invercargill on 29 March.
3. The Director of Proceedings has filed an application to have the evidence of Dr Colleen Anne Hall heard by way of video link. The Director’s application is opposed by Mr Rennie QC, counsel for Dr O’Flynn.
4. Doctor Hall is a retired consultant psychiatrist. She lives in Okarito. Doctor Hall is now 74 years old. Doctor Hall has sworn an affidavit in which she explains that her health is such that travel to Invercargill to give evidence would cause her significant hardship. It is not necessary to explain in detail Dr Hall’s medical condition. Suffice to say that Dr Hall suffers from cardiac conditions which have resulted in her being treated by a complex range of medications. Doctor Hall has explained in her affidavit that travelling to Greymouth to give video evidence would cause her considerable stress and anxiety which in turn could readily exacerbate her medical condition. Travelling to Invercargill would constitute a considerable ordeal for Dr Hall and may have a significant adverse effect on her health.
5. Mr Rennie has explained that the grounds for opposing Dr Hall being permitted to give evidence are:
 - 5.1 Doubts as to whether or not Dr Hall’s medical condition would necessarily create insurmountable difficulties for her travelling to Invercargill. Mr Rennie suggests that travelling to Greymouth may prove to be just as difficult as travelling to Invercargill.

- 5.2 Mr Rennie has considerable doubts about the relevance of Dr Hall's evidence.
- 5.3 Reservations which Mr Rennie has about the adequacy of evidence given by way of video link. This may include not only issues of reliability and credibility but also difficulties where documents are in issue.

Jurisdiction

6. The Tribunal's jurisdiction to grant an application for evidence to be given by way of video link is derived from clause 5(1)(a) of the First Schedule to the Medical Practitioners Act 1995 ("the Act"). That clause enables the Tribunal to regulate its own procedure in such manner as it thinks fit.
7. Clause 5(2) of the First Schedule of the Act also permits the Tribunal to publish any rules of procedure that it might make. Clause 5(3) of the First Schedule emphasises the Tribunal's over-arching duty to observe the rules of natural justice at any hearing.
8. On 13 August 2001 the Tribunal published a Practice Note concerning the procedure to be followed whenever a party seeks to have a witness give evidence by video link. That Practice Note was issued pursuant to clauses 5(1)(a) and 5(2) of the First Schedule of the Act. For convenience a copy of the Practice Note is annexed to this Decision.

Decision

9. The Tribunal frequently receives evidence by video link. The Tribunal has found that video links are an effective mechanism for witnesses to give evidence in circumstances where it is neither possible nor practicable for them to attend the Tribunal's hearing. Often the witnesses who give evidence by video link are busy medical practitioners who cannot be expected to travel to a hearing. The Tribunal is now quite used to hearing evidence from witnesses, as well as experts, by way of video link. The quality of the evidence given by way of video link does not appear to have been compromised through the use of video link technology.

10. The Courts have signalled a willingness to accept evidence by video link, even in criminal cases. In *R v Accused*¹ the President of the Court of Appeal referred to the High Court's inherent jurisdiction to allow evidence to be given by closed circuit television and the need for Courts "...to keep in the forefront Viscount Haldane LC's emphasis in *Scott v Scott*² ... on the paramount duty of the Court to adapt its procedure to ensure that justice is done. This adaptability should enable the adjustment of Court procedure to take advantage of technological advances."
11. In *B v Dentists Disciplinary Tribunal*³ the High Court held the Dentists Disciplinary Tribunal had jurisdiction to allow evidence to be given to that Tribunal by video link. In that decision Williams J traversed the experience of overseas jurisdictions which allowed evidence to be given by video link. He referred to the positive experiences of jurisdictions in Australia, Canada, parts of the United States and United Kingdom in allowing evidence to be given by video link and observed:

"In view of this considerable body of opinion and experience there is no need not to embrace this new technology." (p.107 l.10).

12. The evidence relied upon in *B v Dentists Disciplinary Tribunal* has now been superseded by a further decade of experience of using video links to facilitate the giving of evidence in Courts and Tribunals. This experience has established that video link facilities can significantly assist Courts and Tribunals in hearing evidence from persons whose evidence might not otherwise be able to be heard.
13. Unlike criminal courts, the Tribunal has power similar to those of a Commission of Inquiry when determining what evidence it should receive. Subject to its overriding duty to observe the rules of natural justice, the Tribunal:

*"...may receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not it would be admissible in a Court of law".*⁴

¹ [1992] 1 NZLR 257, 262 Cooke P

² [1913] AC 417, 437-438

³ [1994] 1 NZLR 95, 105-107

⁴ Clause 6(1) First Schedule Medical Practitioners Act 1995

14. This clause is moulded on s.4B(1) Commissions of Inquiry Act 1908. In *B v Dentists Disciplinary Tribunal*, Williams J said the language of that section was broad enough to encompass the jurisdiction to receive oral evidence by means of video link. The Tribunal's powers to receive evidence are broader than those enjoyed by regular Courts and accordingly, while assistance is derived by referring to the principles and procedures for receiving evidence in regular Courts, the Tribunal ultimately has a discretion to accept evidence that may not be admissible in regular Courts, provided of course the principles of natural justice are not breached by the Tribunal.
15. As has been previously emphasised, the Tribunal's primary duty is to ensure it adheres to the principles of natural justice when hearing the charge against Dr O'Flynn.
16. The Tribunal proceeds on the basis that if Dr O'Flynn is prejudiced in the conduct of his defence by allowing Dr Hall's evidence to be given by video link then the Tribunal could be exposed to a challenge that it was breaching the principles of natural justice.
17. None of the reasons advanced by Mr Rennie QC lead to the conclusion Dr O'Flynn will be prejudiced if the Tribunal permits Dr Hall's evidence to be given by video link.
18. If Dr Hall's evidence is to be challenged and if she is to be questioned (possibly at length) then that can be achieved by video link. If Dr Hall's credibility and reliability are put in issue then the Tribunal will do its best to resolve those issues after assessing Dr Hall by video link.
19. As noted in *B v Dentists Disciplinary Tribunal* (p.108 l.32) it is difficult:

“... to see how the system that is to be employed would prevent the assessment of the demeanour of the witness because ... the witness will be seen giving [her] evidence to the same extent, or to no significantly lesser extent than if present in a Court or in a hearing room.”
20. If the Tribunal is not able to resolve issues of credibility and reliability by receiving Dr Hall's evidence by video link then Dr O'Flynn will not be disadvantaged. The Tribunal will not be able to draw any conclusions adverse to Dr O'Flynn if it is unable to draw any conclusions about Dr Hall's credibility or reliability (if in issue) because of deficiencies (if any) in the technology employed to convey her evidence.

21. As regards the reference to or production of any documents, there will be produced by consent an agreed bundle of documents and the Tribunal's Practice Note (referred to at para 8 hereof) provides at clause 4 as to how documents are to be dealt with by video link. Further, Counsel can agree as between themselves as to what further, if any, measures they consider will be of assistance.
22. In the circumstances of this case the Tribunal accepts Dr Hall's evidence that it would be impracticable and unreasonable to expect her to travel to Invercargill to give her evidence. The Tribunal also believes there does not appear to be any basis for believing Dr O'Flynn will be prejudiced by allowing Dr Hall to give her evidence by video link.
23. Mr Rennie has indicated that should the Tribunal direct that Dr Hall's evidence be given by video link then he would be prepared to travel to Greymouth to undertake his cross-examination of her there. The Tribunal does not consider this to be either necessary or appropriate in the circumstances. The Tribunal considers that the only persons present in the facility where evidence is to be given (other than Dr Hall) should be those operating the video and facsimile facilities and a person to assist with the implementation of any directions or requests given or made by the Tribunal hearing the evidence, in accordance with Clause 8 of the Tribunal's Practice Note (referred to at paragraphs 8 and 24 hereof).
24. The parties attention is drawn to the procedure to be followed where evidence is to be taken by video link in Schedule 1 to the Practice Note **attached** to this Decision. The Practice Note is similar to the requirements stipulated by the High Court in *B v Dentists Disciplinary Tribunal* before the Dentists Disciplinary Tribunal could receive evidence by video link. The parties in this case are expected to adhere to the procedure set out in the Practice Note.

DATED at Wellington this 5th day of March 2004

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S M Moran

Senior Deputy Chair

Medical Practitioners Disciplinary Tribunal