



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 312/04/124C

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 J medical practitioner of

xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: D B Collins QC (Chairperson)
Dr R J Fenwicke, Dr R W Jones, Dr J M McKenzie and
Mr G Searancke (Members)
Ms K L Davies (Hearing Officer)
Mrs G Rogers (Stenographer)

Hearing held at Auckland on Thursday 12 and Friday 13 May 2005

APPEARANCES: Ms K P McDonald QC and Ms J Hughson for the CAC
Mr C H Toogood QC for Dr J.

Introduction

1. Doctor J is a registered medical practitioner. He lives in xx. A Complaints Assessment Committee (CAC) has laid a charge against Dr J. The charge, laid pursuant to s.93(1)(b) Medical Practitioners Act 1995 (the Act) alleges Dr J verbally and physically abused a professional colleague (Dr X).
2. The details of the charge are explained in paragraph 4 of this decision. The evidence for both parties was heard in Auckland on 12 and 13 May, 2005. Regrettably the hearing could not conclude in the two days allocated for the fixture. Counsel for the parties helpfully filed written submissions after the hearing on behalf of their respective clients. The Tribunal considered those written submissions on 5 July and determined the charge has not been established to the requisite standard.
3. In March 2005 the Tribunal granted Dr J interim name suppression. The interim name suppression orders were made pending determination of the charge against Dr. J. Now that the charge has been determined in favour of Dr J the interim name suppression orders will continue for 7 days from the date of this decision during which time Dr J can seek further orders from the Tribunal if he wishes to do so. The Tribunal has also granted applications suppressing the name of the complainant (Dr X), the witnesses called by the CAC and the Medical Centre where Dr J and Dr X practised at all relevant times. Those orders will remain in force.

The Charge

4. The charge alleged that on or about 3 February 2004, Dr J “...in an intimidating manner verbally and physically abused his colleague and business partner ...” causing Dr X “....to suffer physical and emotional injuries”. The CAC alleged such conduct amounted to “conduct unbecoming a medical practitioner and reflected adversely on [his] fitness to practise medicine.”¹
5. From the outset the Tribunal records the events in question occurred on 5 February 2003. The Tribunal has, on its own volition, amended the date in the charge from 3 February 2004 to 5 February 2003. That amendment has been made pursuant to clause 14 of the first schedule of the Act. It is very clear Dr J is not prejudiced in any way by this amendment to the charge.

Background

6. The events that occurred on 5 February 2003 can not be stated with any degree of precision. The reason for this is that Dr J and Dr X were the only persons present when the incidents complained of occurred. Their accounts and explanations of what took place have little in common.
7. Both Dr J and Dr X immigrated to New Zealand after obtaining their medical degrees in their country of birth. Both eventually worked at a practice in the greater xx region. For reasons alluded to later in this decision, the relationship between Dr J and Dr X deteriorated significantly. On 5 February 2003 a serious incident occurred in the office of Dr J. The incident resulted in Dr X suffering facial abrasions, a black eye, cuts to his mouth and a fracture of his lower alveolar (jaw) bone and dislodged teeth. He had to have extensive dental treatment. Dr J suffered a broken ankle and bites to his right forearm and beneath his left arm pit. It is the events of 5 February 2003 that eventually resulted in the CAC charging Dr J with “conduct unbecoming a medical practitioner”.

¹ Section 109(1)(c) of the Act

Doctor X's versions of events

8. Dr X and Dr J were directors of a company established in October 2002 to own and manage a medical practice. Three other doctors were also directors of the company. They are referred to in this decision as Dr W, Dr Y and Dr Z.
9. In December 2002, Dr W, a co-founder of the practice decided to take approximately 8 weeks leave. The management of the company was vested with Dr J. It was the evidence of Dr X, and other members of the practice called by the CAC that Dr J was simply to be the “acting” chairman of the board of directors of the company during Dr W absence.
10. Dr X, and other witnesses called in support of his claims said that when Dr J assumed responsibility for managing the business Dr J became autocratic, dictatorial and totally unreasonable.
11. Dr X told the Tribunal that he telephoned Dr J on the evening of 3 February 2003 to discuss the division of a capitation payment received by the practice from a primary health organisation for January 2003. Dr X said that during this conversation Dr J yelled and berated Dr X. Dr X said that he was concerned by Dr J's conduct but that as Dr W was returning the next day he decided he would raise his concerns about Dr J's behaviour with Dr W. Arrangements were made for Dr X to meet with Dr W on the 5 February 2003. However, before that meeting took place Dr X said he was seriously assaulted by Dr J.
12. The evidence given by Dr X was that at about midday on 5 February 2003 Dr J asked Dr X to come to his office to discuss something important. Dr X said he had concerns and reservations about seeing Dr J alone in Dr J's office but he did go into Dr J's room.
13. Dr X told the Tribunal that as soon as Dr X went into Dr J's room, Dr J became very aggressive. Dr X said Dr J stood over Dr X and made threatening statements in English and the language of their country of birth. Dr X said he did not respond to Dr J's abuse but tried to defuse the situation by standing quietly. Dr X said that Dr J then sat down and raised the issue of the capitation payment. Dr X said that was a

topic that ought to be discussed by the whole board with Dr W present. Dr X said that Dr J responded to this suggestion by further abusing Dr X who said that he responded by calmly telling Dr J to settle down and to stop abusing him. Dr X said that Dr J then suddenly leapt from his chair swearing in the language of their country and punched Dr X on the left side of his face and mouth. According to Dr X, Dr J then further punched Dr X about the face and head and pushed Dr X backwards against the door of the room. Dr X said that a struggle then ensued and that in order to defend himself Dr X bit Dr J on the right forearm and on his upper left chest. Dr X said that he then pushed Dr J away and that as he did so Dr J tripped on a rug and fell backwards onto the floor. Dr X said that in this process he was dragged on top of Dr J and that he lost his spectacles in the melee. Dr X said that he managed to pick himself up quickly and dash out of the room.

14. Dr X told the Tribunal that he was in a state of shock as a result of the assault. He had a sore eye, bleeding gums and dislodged front teeth.
15. Dr X saw Dr Z outside of Dr J's room. Dr Z gave Dr X tissues to support his dislodged teeth and to stop the bleeding. That afternoon Dr X was taken to a dentist by Dr W. Later that same day Dr X went to an accident and medical centre. An ACC claim form and medical notes completed at the time recorded Dr X's injuries as being:
 - (a) Abrasions to his face.
 - (b) Laceration to his lower jaw.
 - (c) Damaged lower left incisor teeth.
 - (d) A painful big right toe.
 - (e) A tender left shoulder.
16. A dental report presented to the Tribunal confirmed Dr X suffered a fracture of the lower alveolar bone and had two teeth dislodged.
17. The following day Dr X reported the assault to the police. Dr X said "*the police did not pay any attention to the case until mid 2004 when they eventually interviewed Dr*

[J]”. Ultimately the police decided not to charge anyone in relation to the incident of 5 February 2003.

Dr Z

18. The CAC called Dr Z as a witness. Dr Z confirmed Dr X’s account of the tensions within the practice prior to 5 February 2003 which he attributed to Dr J’s unfortunate management style. Dr Z did not witness the events of 5 February 2003 but he could confirm that he saw Dr X at sometime between 12.00 and 12.30 that day at which time Dr X had an injured eye, bleeding gums, broken teeth and that he “looked extremely shocked”. Dr Z immediately thought that Dr J had assaulted Dr X because Dr J had been behaving in an aggressive manner and he was concerned “...that something could happen if Dr [J] was confronted about an issue such as payments”.
19. Dr Z told the Tribunal that he comforted Dr X as best he could and that Dr X told him that he had been assaulted by Dr J. Dr Z encouraged Dr X to go home and rest. Dr Z then continued to see patients. He was told a little later that Dr J had suffered a broken ankle. Dr Z went to Dr J’s room where he saw Dr J being attended to by Drs Y and W as well as a nurse. By this stage Dr J was on a stretcher and an ambulance was present. Dr Z then went to a nearby dentist where he saw Dr X. Dr Z told Dr X about Dr J’s broken ankle. This appeared to be the first time Dr X learnt about the extent of Dr J’s injuries.

Dr Y

20. Dr Y gave evidence for the CAC. Dr Y explained to the Tribunal all of the directors of the company had concerns about Dr J’s behaviour and style of management during the some of time Dr W was overseas. Dr Y said that Dr J had on occasions abused and physically intimidated those who disagreed with him.
21. The first Dr Y knew of the events of 5 February was when he went into Dr J’s office shortly after midday. Dr Y saw Dr J lying on the floor in pain and obvious discomfort. Dr Y asked Dr J what had happened and was told “*don’t tell anyone, just say I fell off the chair*”. Dr Y said Dr J’s response did not make any sense as

there was no evidence he had fallen off his chair and Dr J was lying on the opposite side of the room to his desk and chair. Dr Y called in Dr W and then went and arranged for an ambulance to take Dr J to xx Hospital.

Dr W

22. Dr W told the Tribunal about how he and another doctor established the practice in 1990. Dr J joined the practice in the second half of 2001. In October 2002 Drs Z, X and Y joined Drs W and J as directors of the new company that purchased the practice. Arrangements were made for Dr J to be the chairman of the company. Dr W described this arrangement as being temporary and that he would resume chairmanship of the company when he returned from extended leave early in 2003.
23. Dr W said that on his return Dr Z expressed concerns to him about the way Dr J had behaved while Dr W was away. Later that day Dr X contacted Dr W to discuss “serious problems he said he had had with Dr [J]”.
24. Dr W told the Tribunal that at about midday on 5 February he went looking for Dr X and found him in the treatment room. Dr W was told at that stage by Dr Y that Dr J was injured. Dr W went to Dr J’s room and found Dr J lying on the floor with an obviously broken ankle. Dr W asked Dr J what had happened and was told Dr X had “...attacked me He tried to kill me”. Dr W said words to the effect “*what are people going to think*”, to which Dr J said “*it would be better if it were said that he had fallen off a chair*”.
25. After Dr J was taken to hospital Dr W went looking for Dr X and found him outside the local dentist. It was only then Dr W realised the full extent of Dr X’s injuries. Dr X gave Dr W a brief description of the altercation saying that Dr J had attacked him and punched him in the face.
26. Poignantly Dr W told the Tribunal that having spoken to both protagonists on 5 February 2003 it was not possible for him to reconcile at that time their respective explanations of the altercation.

Final CAC Witness

27. The CAC also presented evidence from the practice accountant who also saw Dr J after the altercation. The accountant's description of Dr J's position and injuries was consistent with the evidence given by Drs Z, Y and W. The accountant also saw Dr X after the events in question and described his bloodied lips, broken teeth and bruised face.

Doctor J's version of events

28. At the conclusion of the CAC's evidence Dr J applied to have the charge dismissed on the basis that there was no case to answer. The Tribunal considered that submission and concluded the CAC had established a prima facie case against Dr J and that he therefore had a case to answer. Dr J then gave evidence.

29. Dr J's explanation of what occurred in his room on the 5 February 2003 completely contradicted Dr X's account of events.

30. Dr J told the Tribunal that he was elected chairman of the company that owned and managed the medical practice. He insisted that his appointment was not temporary. Dr J pointed to a letter sent by Dr W to the practice staff in August 2002 describing Dr J as the new chairman as from 30 September 2002. Dr J said it was only after the events of 5 February 2003 that suggestions were made that his appointment was temporary.

31. Dr J said in evidence Dr X contacted him by telephone on the evening of 3 February 2003. Dr J said Dr X "...was extremely agitated and loud, and sounded out of control. He complained he had been underpaid for January". Dr J said he tried to calm Dr X down and told him to discuss his concerns with Dr Y.

32. Dr J's recollection of the events of 5 February 2003 was that he invited Dr X to his office to discuss roster allocations. He said he wanted to talk to Dr X to "...resolve the matter in [a] civilised, direct communication" (sic).

33. Dr J said that when Dr X entered Dr J's office, Dr J remained seated on his swivel chair and that Dr X stood in front of him and refused to sit down. Dr J said that when he broached the subject of the distribution of the primary health organisation's capitation fee, Dr X became "angry and loud" and that he "had a weird look in his face and eyes"
34. Dr J told the Tribunal that he asked Dr X to sit. Dr J said that instead of sitting Dr X tore up the roster and turned to leave. At that point Dr J said they would need to have a board meeting to discuss issues. Dr J said Dr X responded to this suggestion by turning and advancing very quickly to Dr J shouting "*shut up your mouth*" three times. Dr J said Dr X then raised his hand and smacked Dr J in the face, breaking his glasses. Dr J said he was still sitting in his swivel chair at this time, and that he tried to stand and grab Dr X's hand to stop him striking Dr J again. At this point, according to Dr J, Dr X grabbed Dr J's tie, pulled it, and started to choke Dr J. Dr J said he tried to desperately get away from Dr X. He said that the next development was that Dr X "*opened his mouth wide and bit [him] viciously on [his] right forearm*". Dr J said he screamed from the pain and shouted "*you are biting me*" and pulled hard against Dr X. Dr J said he managed to stand but Dr X pushed him back into the chair at which point Dr X bit him again, just beneath his left arm pit. Dr J said that as he stood again, Dr X pushed him over and fell on top of Dr J, trapping Dr J's right leg under the support of his swivel chair. At that point Dr J said he felt a terrible pain. Dr X was at this time standing over Dr J. Dr X is then said to have turned and left the room.
35. Dr J said he was in so much pain from his injuries that he could not clearly recall the details of what happened after that. He said Dr W gave him some pain relief and that he was taken by ambulance to hospital. A practice nurse accompanied Dr J to hospital.
36. Dr J said that he and Dr W discussed what should be said and that it was agreed they would say Dr J fell from his chair. Dr W wrote a referral note for a local hospital saying Dr J "*fell from a chair and has sustained an ankle fracture and/or dislocation (r side)*". A practice nurse completed the ACC claim form and described the cause of Dr J's injuries as occurring as a result of Dr J "*standing on*

chair loss of balance fell onto ground injuring r ankle". Dr J said he signed the form, but did not read it, when he was in the ambulance.

37. Dr J told the Tribunal that Dr W visited him at hospital and at his home when he was recuperating. Dr J said Dr W encouraged him not to complain of the assault because it could damage the practice badly. Dr J said that Dr W assured him "*that the whole issue could be sorted 'in house'* ".
38. Regrettably, the events of 5 February, and a number of other deep seated differences between Dr J and his colleagues at the practice were never resolved.
39. Dr J could not work for three and a half months. Dr J said that during his absence Dr X and others conspired to remove him from the practice. Dr J is convinced that as part of that conspiracy Dr X lodged complaints against Dr J with the police and Medical Council. Dr J has not returned to the practice since 5 February 2003.
40. The practice in question was very profitable. Dr J told the Tribunal that the directors each received fees of approximately \$320,000.00 per annum. Dr J is deeply aggrieved that, according to his account, he has received no return on his capital and has been deprived of a very high income because Dr X and the other doctors in the practice removed him from the business.

Practice Nurse

41. Dr J called two witnesses. A practice nurse explained how she found Dr J lying in his office on 5th February 2003. She said Dr J's clothing was twisted, his tie was so tight she had difficulty removing it, and his right leg was at a right angle. The nurse said Dr W told her Dr J had fallen off his chair. The nurse accompanied Dr J to hospital.

Dr J's Wife

42. Dr J's wife, also a medical practitioner presented the Tribunal with an affidavit in which she explained the effects of the events of 5 February 2003 on Dr J. She summarised her evidence by telling the Tribunal Dr J "*.....is still on pain killers, and*

will never be well enough to carry on his normal activities like before. He lost his job; his income; and his self esteem”.

Other Issues

43. The evidence heard by the Tribunal primarily focused on the events of 5 February 2003. The Tribunal was grateful to counsel for their strenuous efforts in trying to ensure that the evidence put before the Tribunal related directly to what occurred on the 5 February. Notwithstanding counsels efforts, witnesses occasionally introduced unrelated topics which merely underscored how entrenched the protagonists have become.

Standard of Proof

44. Before commenting further on the evidence, the Tribunal will explain the standard to which the CAC is required to prove a charge of this nature. As will be explained later in this decision, the Tribunal’s application of the appropriate standard of proof has resulted in the Tribunal concluding that the charge has not been proven.
45. It has been accepted for many years that those who prosecute health professionals are required to prove the allegations on the basis of the civil and not the criminal standard of proof. That is to say, allegations need only be proven on the balance of probabilities, and not on the basis of proof beyond reasonable doubt. This statement of the law is qualified in one respect, namely that the civil standard of proof must be tempered, “having regard to the gravity of the allegations”. Serious allegations require a high degree of proof.
46. In *Re A Medical Practitioner*² the Court of Appeal unanimously rejected a submission that disciplinary proceedings before the Medical Council were criminal or quasi criminal proceedings. The President of the Court of Appeal said that in exercising its disciplinary powers the Medical Council was not acting to punish a doctor “...but rather to enforce a high standard of propriety and professional conduct. My conclusion is therefore that the proceeding before the Medical Council are neither criminal nor quasi criminal”.

47. *Re A Medical Practitioner* was followed by a full bench of the High Court in *Gurusinghe v Medical Council of New Zealand*³ where it was said :

“the analogy between criminal jury trials and disciplinary proceedings against a doctor involving sexual offences against patients, though significant, is not compelling because the nature of the charge is different.....the standard of proof is the civil standard having regard to the gravity of the allegations and the Tribunal is a statutory tribunal”.

48. The approach articulated in *Gurusinghe* had been previously endorsed by the High Court. In *Ongley v Medical Council of New Zealand*⁴ in which Jeffries J. adopted the following passage from the Judgment in *Re Evatt : Ex parte New South Wales Bar Association*⁵ .

*“The onus of proof is upon the Association but is according to the civil onus. Hence proof in these proceedings of misconduct has only to be made upon a balance of probabilities; Rejtek v. McElroy*⁶. *References in the authorities to the clarity of the proof required where so serious a matter as the misconduct (as here alleged) of a member of the Bar is to be found, is an acknowledgement that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved”.*

Similarly, Greig J in *M v. Medical Council of New Zealand (No. 2)*⁷ noted:

“The onus and standard of proof is upon the [respondent] but on the basis of the balance of probabilities, not the criminal standard, but measured by and reflecting the seriousness of the charge”

In *Cullen v. The Medical Council of New Zealand*⁸ Blanchard J adopted the directions given to the Medical Practitioners Disciplinary Committee by its legal assessor , Mr W Gendall (as he then was) :

² [1959] NZLR 784

³ [1989] 1 NZLR 139

⁴ [1984] 4 NZAR 369

⁵ (1967) 1 NSWLR 609

⁶ [1966] ALR 270

⁷ (unreported HC Wellington M239/87 11 October 1990)

“[The] standard of proof is on the balance of probabilities. As I have told you on many occasions where there is a serious charge of professional misconduct you have got to be sure. The degree of certainty or sureness in your mind is high according to the seriousness of the charge, and I would venture to suggest that it is not simply a case of finding a fact to be more probable than not, you have got to be sure in your own mind, satisfied that the evidence establishes the facts”.

49. The Tribunal has referred to these cases because in *F v MPDT*⁸ William Young J said that in disciplinary proceedings, proof beyond reasonable doubt is required. His Honour was the only Judge out of three who said disciplinary proceedings should be governed by the standard of proof applicable to criminal proceedings. His Honour approved a recent decision of the Privy Council in *Campbell v Hamlet*¹⁰ in which their Lordships held that the criminal law standard of proof was applicable to discipline proceedings.
50. The Tribunal records its deep respect of William Young J but also observes his comments were not adopted by the other members of the Court of Appeal. The Tribunal believes that New Zealand Courts have overwhelmingly applied the standard of proof test described in paras. 48 and 49 of this decision for at least the past two decades. In these circumstances the Tribunal believes New Zealand authorities require the Tribunal to assess culpability on the basis of the civil standard of proof, bearing in mind serious allegations require a high standard of proof.
51. The charge faced by Dr J contains serious allegations. The charge alleges criminal behaviour. In these circumstances the Tribunal believes that it needs to be satisfied to a high degree before reaching an adverse finding. The Tribunal has, in these circumstances, traditionally said that the evidence must be “compelling”. Both counsel suggested in their oral submissions this approach was appropriate in the present case. Mr Toogood QC, in his written submissions also urged the Tribunal to adopt the standards suggested by William Young J in *F*.

⁸ (unreported H C Auckland 68/95 20 March 1996)

⁹ (CA 213/04, 4 May 2005)

¹⁰ [2005] UK PC 19

Applying the Standard of Proof to the Evidence

52. Counsel for the CAC and Dr J have filed very helpful and detailed submissions analysing the evidence. In particular, both counsel have stressed inconsistencies in the evidence of opposing parties and urged upon the Tribunal reasons why the evidence of witnesses called by their clients should be preferred to the evidence given by witnesses from an opposing party.
53. Ultimately the Tribunal has found that it accepts aspects of the evidence presented by Dr J and Dr X. Similarly, the Tribunal has concluded that aspects of the accounts presented by both Dr J and Dr X cannot be accepted.
54. The Tribunal has a number of concerns about the explanations given by Dr X about the bite marks and ankle injuries suffered by Dr J. Dr X could not provide a satisfactory explanation for his toe injuries. It is not appropriate to elaborate upon the Tribunal's concerns about Dr X's evidence. Dr X was not a party to the hearing and was not represented. In these circumstances it would not be fair to Dr X to elaborate on the Tribunal's concerns about his evidence.
55. The Tribunal has a number of concerns about Dr J's evidence.

Dr J's position on the floor

If Dr J broke his ankle when his foot got wedged under his office chair, it is highly unlikely Dr J would have been found lying on the floor of his office almost 2 metres from his chair.

Dr X's injuries

The Tribunal believes it highly unlikely Dr X's lower jaw would have been broken, and two teeth dislodged without the application of considerable force. The Tribunal believes those injuries probably occurred by Dr J punching Dr X and that those injuries are unlikely to have occurred when Dr J was sitting in his chair.

Dr J's tie

Dr W said that when he found Dr J, his tie was loose around his neck. Dr W said the tie was so loose that a jug could be passed through it. This evidence strongly refutes Dr J's suggestion that he was choked by his own tie during the melee. The Tribunal's views about this aspect of the evidence are reinforced when it is noted that Dr J did not complain to anyone about a sore neck or throat when he was asked what happened on the 5 February 2003.

56. Considerable time could be spent analysing the respective accounts of Dr J and Dr X. The Tribunal does not propose to indulge in that exercise for the following three basic reasons:

56.1 It may never be possible to accurately determine what happened in Dr J's office on the 5 February 2003.

56.2 Having listened to and examined all the evidence the Tribunal is satisfied responsibility for the incident should be shared.

56.3 The Tribunal's doubts about what occurred are such that the Tribunal can not be satisfied to the requisite standard that the charge has been proven.

57. Having reached this conclusion, the Tribunal wishes to record two additional matters.

58. The first matter concerns the fact that medical practitioners in New Zealand are expected to conduct themselves in a more appropriate manner, even where there are disagreements between the practitioners.

59. The final observation which the Tribunal wishes to make is that notwithstanding the Tribunal's concerns about what occurred, there is no evidence to suggest that either doctor failed to discharge their professional responsibilities to their patients. This is not a case in which patient safety or clinical standards have been compromised.

DATED at Wellington this 25th day of July 2005.

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D B Collins QC

Chair

Medical Practitioners Disciplinary Tribunal