MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 178/00/61C/01/84C

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 **BERIS FORD** medical practitioner of Whangarei

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Miss S M Moran (Chair)

Mrs J Courtney, Dr J C Cullen, Dr U Manukulasuriya,

Dr A M C McCoy (Members)

Mr B A Corkill (Legal Assessor)

Ms K Davies (Hearing Officer)

Mrs G Rogers (Stenographer)

Hearing held at Wellington on Monday 17 and Tuesday 18 September 2001

APPEARANCES: Ms K P McDonald QC and Ms J Daniels for a Complaints Assessment Committee ("the CAC")

Mr A J Knowsley for Dr B Ford.

Application for Permanent Stay

1. Dr Ford is a medical practitioner practising in Whangarei. He has made application for orders permanently staying the hearing of six separate charges relating to six different complainants in respect of proceedings presently before the Medical Practitioners Disciplinary Tribunal (the Tribunal).

Jurisdiction

2. An issue as to whether the Tribunal had jurisdiction arose at the outset of the hearing of this Application. Ms McDonald, on behalf of the Complaints Assessment Committee ("CAC"), submitted that the Tribunal had only inherent statutory power rather than inherent jurisdiction; that it was not clear that the Tribunal could rely on that inherent statutory power to stay the charges, although that course had been followed in the past; and that whilst she specifically did not concede the point of jurisdiction she preferred to deal with the Application on its merits.

3. Mr Knowsley on behalf of Dr Ford submitted that the Tribunal had jurisdiction.

4. While the Medical Practitioners' Act 1995 ("the Act") does not contain an express provision regarding applications for stay, the Tribunal ruled that it had jurisdiction and would give its reasons (which it now does) following the hearing of the application for stay.

5. Section 97 of the Act refers to the functions of the Tribunal which are to consider and adjudicate on proceedings brought pursuant to Section 102 of the Act, and to exercise and perform such other functions, powers, and duties as are conferred or imposed on it by or under the Act or any other enactment.

6. Where a charge is laid before the Tribunal, section 102 (2) requires the chairperson to convene a hearing to consider the charge as soon as reasonably practicable after the laying of it.

7. Schedule I to the Act is also relevant.

8. Clause 5 to Schedule I sets out the procedure of the Tribunal as follows:

*"5. **Procedure of Tribunal** –*

(1) Subject to this Act and to any Regulations made under this Act, the Tribunal may –

(a) Regulate its procedure in such manner as it thinks fit; and

(b) Prescribe or approve forms for the purposes of hearings

(2) The Tribunal shall publish any rules of procedure made by it;

(3) The Tribunal shall observe the rules of natural justice at each hearing.

9. From clause 5 it follows that the Tribunal has:

9.1 the ultimate responsibility and discretion to regulate its own procedure; and

9.2 the obligation to observe the rules of natural justice.

10. Since the Tribunal is obliged to observe the rules of natural justice, it must necessarily act in a manner which is fair to all who might be affected by its determinations. In appropriate circumstances, that may require the imposition of a stay of proceedings (for example, to prevent an abuse of process).

11. There are a number of cases in which Courts have considered whether disciplinary tribunals have jurisdiction to grant a stay, for the purpose of preventing an abuse of process and ensuring fairness of process.

12. Those cases involving matters of a medical disciplinary nature are:

Herron v McGregor & Ors (1986 6 NSWLR 246 CA)

Walton v Gardiner (1993) 112 ALR 289 (HCA)

Bonham v Medical Council of New Zealand (HC, Wellington, CP 797 90, 21 September 1990, Gallen J)

Bonham v Medical Council of New Zealand [1990] 3 PRNZ 97 (Court of Appeal)

Faris v Medical Practitioners' Disciplinary Committee [1993] 1 NZLR 60 (HC)

E v The Medical Practitioners Disciplinary Tribunal and *The Complaints Assessment Committee* 12 April 2001, Goddard J, (High Court Wellington CP190/99).

13. In *Bonham* High Court (supra), the issue arose as to whether the Medical Council had power to grant stay or strike out charges. At page 10 line 21 Gallen J observed:

"There is no doubt that the power exists as far as Courts with inherent jurisdiction are concerned and there is authority to the effect that it also exists as far as the District Court is concerned. In my view it follows as a matter of analogy if not more, that a body such as the Council in this case, must have such a right. It would be absurd if persons were able to initiate and prosecute proceedings which amounted to an abuse of process and which could have a very serious effect on persons subject to them, without the body concerned having the appropriate powers to prevent such proceedings or to dispose of them. I do not think that it is any answer to that contention to say that there would be a right to proceed to the High Court. Why should a person who is subjected to such proceedings have to go through such a procedure? I am prepared again to accept for the purposes of this decision, that the Council did have the necessary jurisdiction and I again proceed on that basis."

14. While that decision related to the Medical Practitioners' Act 1968 under which the Medical Council had different powers from this Tribunal, nonetheless the situation is analogous. Gallen J's observations are equally relevant to this Tribunal and the proceedings before it.

15. In *Walton v Gardiner* (supra) the High Court of Australia considered the provisions of the Medical Practitioners' Act 1938 of New South Wales, legislation similar to our present Act. In that case, the Medical Tribunal exercised the power of stay without any adverse comment from the High Court of Australia.

16. In *E v MPDT and CAC* (supra) Dr E had applied to the Tribunal under the present Act to have charges against him stayed. He was unsuccessful and applied to the High Court for a review where he was successful. There is nothing in Goddard, J's judgment which would suggest that the Tribunal did not have the jurisdiction to grant a stay should it have been minded to do so, nor do counsel appear to have raised any question of jurisdiction.

17. We refer also to a decision of this Tribunal in the matter of *Phipps* No. 88/99/43C dated 9 September 1999 where the Tribunal considered and determined an application for stay and stated:

"There is no dispute that the Tribunal has jurisdiction to hear such a striking out/stay application" (para. 1.4).

18. In *Birss v Secretary for Justice* [1984] 1 NZLR 513 Richardson, J when commenting on the obligation to observe the rules of natural justice stated at page 516:

"The requirements of natural justice depend on the nature of the power being exercised, the effect which the decision may have on persons affected by it, and the circumstances of the particular case; where they find it necessary to do so in order to ensure that the procedure is fair in all the circumstances the Courts will require the adoption of appropriate procedures for the supplementation of the procedures laid down in the legislation."

19. In *Furnell v The Whangarei High Schools Board* [1973] 2NZLR 705 (Judicial Committee of The Privy Council), Lord Morris observed at page 718 line 12:

"It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules (see the speeches in ***Wiseman v Borneman*** *[1971] AC 297; [1969] 2 ALL ER 275). Natural justice is but fairness writ large and juridicially. It has been described as "fair play in action". Nor is it*

a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker, LJ in ***Russell v Duke of Norfolk*** *[1949] 1 ALL ER 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration."*

20. In *Moevao v Department of Labour* [1980] 1NZLR 464, the Court of Appeal considered the matter of a stay in criminal proceedings. Richardson J identified two related aspects of the public interest which were relevant. The first was the public interest in the due administration of justice, which necessarily required that the Courts processes be used fairly by the state and citizen alike. In exercising a jurisdiction to stay proceedings, a Court was protecting its ability to function as a court in the future, as well as in the case before it. The second was the public interest in the maintenance of public confidence in the administration of justice. It was considered to be contrary to the public interest to allow public confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice.

21. As stated above, it must be remembered that the Tribunal is obliged to regulate its procedures and processes so that it maintains such public confidence and does not lend itself to oppression and injustice.

22. In accordance with that obligation, the Tribunal is satisfied that it does have the necessary jurisdiction to hear and determine the application for stay.

Grounds of Application for stay

23. The general grounds upon which Dr Ford relies are:

23.1 He is prejudiced by the delay between the incidents giving rise to the charges and his being notified of the details of the complaint.

23.2 A fair hearing of the charges cannot take place due to the prejudice suffered.

23.3 Proceeding with hearing the charges would be an abuse of process.

24. The specific grounds are:

24.1 There are no notes for the patients F and E.

24.2 Dr Ford has no memory of patients F, E, D and C

24.3 Dr Ford has no memory of the consultations where improper actions (pre 1995) are alleged for any of the patients.

24.4 Dr Ford's practice nurses at the times of the (pre 1995) allegations have no memory of the relevant patients nor consultations.

Nature of the Complaints

25. All of the complaints relate to allegations of a sexual nature and are historic in that they occurred between 9 and 30 years ago.

26. The nature of the charges and the dates of the alleged incidents are as follows:

26.1 Conduct unbecoming a medical practitioner - On a date unknown in 1970 or 1971 – unnecessary and inappropriate examination of , and inappropriate question toward patient F.

26.2 Professional misconduct – In or about December 1981/January 1982 – unnecessary and inappropriate examination of, and inappropriate conduct towards patient E (formerly G).

26.3 Conduct unbecoming a medical practitioner – on 12 April 1984 – inappropriate treatment of, and inappropriate comment toward patient D.

26.4 Professional misconduct – on a date unknown in 1984 – inappropriate and unnecessary examination of, and inappropriate conduct towards, and lack of informal consent regarding patient C.

26.5 Conduct unbecoming a medical practitioner – in or about 1984 – inappropriate and unnecessary examination of, and inappropriate comment toward patient B (formerly H).

26.6 Disgraceful conduct – between 10 October 1989 and 20 May 1992 – inappropriate touching of and comments towards patient A.

Legal Principles

27. The legal principles which apply in applications for a stay (and which we adopt and apply), are not in contention. Many cases were cited by counsel during the course of their submissions but it is not necessary for present purposes to refer to all of them.

28. We think the position is conveniently summarised in *Faris v Medical Practitioners Disciplinary Committee* [1993] 1 NZLR 60.

At page 73 Gallen J stated:

"My attention has been drawn by counsel to a very considerable number of cases where the Courts have intervened to stay proceedings but it is difficult and perhaps undesirable to attempt to draw any all-embracing rationale which provides some overall concept from which principles may be drawn as to when and how Courts will act in staying proceedings. The cases establish that the Courts have intervened to stay proceedings in a number of situations and each occasion has reflected the exigencies of the particular situation under consideration. … The problem is complicated by the fact that different considerations arise in different cases and comments which may be appropriate to the particular situation under consideration may be inappropriate as a basis for definition or a general concept. … For the purposes of a judgment at this level, it may be enough to say that the cases illustrate a number of concrete situations where the Courts have intervened to prevent processes continuing, that it is possible to establish principles which apply to particular categories of case but that it is very difficult and perhaps undesirable to arrive at some overall formula which delineates exhaustively situations in which Courts will intervene."

29. The many cases in which the relevant principles have been reviewed include *S v The Queen* (T 17/93) High Court Hamilton 10 Sep. 1993 Penlington J; *R v B* (T 54/93) (1993) 11 CRNZ 174 High Court Tipping J; *S v R* (T 6/93) (1994) 12 CRNZ 78 High Court Holland J; *R v The Queen* [1996] 2 NZLR 111, 112 Tipping J; *S v R* (T 17/93) 10 Sep. 1993 High Court Hamilton Penlington J*; The Queen v R* (T 311/96) 5 May 1997 High Court Auckland Penlington J; *T v Attorney General* (175/97) 27 August 1997 Court of Appeal; *R v Fahey T* 75/99 17 March 2000 High Court Christchurch Hansen J.

30. In *W v R* (T 2/98) (1998) 16 CRNZ 33, where the accused applied for a stay of proceedings in relation to criminal charges of varying forms of sexual abuse, Randerson J reviewed the relevant principles and, at pages 36 and 37, set them out as follows:

> *"(1) That an order for a permanent stay of proceedings in the exercise of the Court's protective inherent jurisdiction on the ground of delay is only to be made in exceptional cases.*
>
> *(2) That the onus will normally be on the accused to show on the balance of probabilities that, owing to the delay, he will suffer prejudice to the extent that a fair trial is now impossible.*
>
> *(3) That how the accused discharges that onus will depend on all the particular circumstances of the case.*
>
> *(4) That where the period of delay is long it can be legitimate for the Court to infer prejudice without proof of specific prejudice.*
>
> *(5) That ultimately the pertinent issue is whether despite the delay an accused can in the particular circumstances of the case still receive a fair trial.*
>
> *Tipping J also made the following further points:*
>
> *(6) The reasons for the delay and its consequences should be examined.*
>
> *(7) The merits of the case are relevant to the overall assessment.*
>
> *(8) There may arise two types of unfairness to the accused. Specific prejudice such as through the death or unavailability of a witness or general prejudice through long delay such that it would be unfair to put the accused on trial at all :* ***R v Accused*** (CA 160/92) [1993] *1 NZLR 385 (CA), at p.392.*
>
> *(9) Logically, general prejudice in the sense described must be prejudice which is additional to that which the accused would have faced through tolerable delay.*
>
> *(10) In considering whether it is fair to put the accused on trial at all through general prejudice arising from long delay, the process will normally involve the balancing of the accused's interests with those of the public and the complainant. Bearing in mind the starting point of no statutory limitation as to time, a case must be "truly extreme" before the inherent jurisdiction can be invoked on this basis, that is, on the basis of general prejudice.*
>
> *I would add a further point:*

(11) The Court should exercise its discretion in a flexible manner so as to secure the overall objective of ensuring the accused receives a fair trial despite delay and, as Robertson J put it in ***R v Steedman*** *14/11/97, Robertson J, HC New Plymouth T9/97, ensuring that the trial will be "permeated with the necessary integrity".*

31. In *R v O* [1999] 1 NZLR 347, Blanchard J, when delivering the judgment of the Court of Appeal and dealing with abuse of process in a criminal case of sexual offending regarding delay, observed at p.350 line 30:

"Some prejudice to an accused is always likely when a prosecution is brought long after the event. There is an obvious inherent problem of memory for witnesses and accused alike. There will be very occasional cases where the lapse of time is so exceptionally long that it will clearly be impossible to have a fair trial. But ordinarily passage of time alone will not be sufficient to found a successful application to have a prosecution stopped. Avoidance of prosecution for a period does not diminish the criminal nature of the act alleged against an accused, though the advanced age of a defendant may have to be taken into account in sentencing if there is a conviction. As the Judge observed, there is no limitation period and no presumption that after a particular time memories will be too unreliable for the purposes of a criminal trial. Whatever the length and cause of delay, the central question is whether a fair trial can still take place in the particular circumstances. Are important defence witnesses no longer available? Have relevant documents been lost or disposed of? Has the accused's physical or mental condition deteriorated to a point where it would be unfair to expect him to defend himself? Is the complainant's evidence so fraught with memory problems that the accused is unfairly faced with trying to defend himself against accusations which are insufficiently specific in relation to place or circumstances?"

32. Most of the forementioned cases have related to criminal charges and, in some cases, allegations of intra-familial sexual offending, but the exercise of the discretion with regard to cases of a disciplinary kind is not dissimilar.

33. In *Walton v Gardiner* (1993) 112 ALR 289 the High Court of Australia when comparing a stay in criminal proceedings and in disciplinary proceedings observed at p.300 line 35:

"As was pointed out in ***Jago****, the question whether criminal proceedings should be permanently stayed on abuse of process grounds falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations. Among those factors and considerations are the requirements of fairness to the accused, the legitimate public interest and the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice. The question whether*

disciplinary proceedings in the tribunal should be stayed by the Supreme Court on abuse of process grounds should be determined by reference to a weighing process similar to the kind appropriate in the case of criminal proceedings but adapted to take account of the differences between the two kinds of proceedings. In particular, in deciding whether a permanent stay of disciplinary proceedings in the tribunal should be ordered, consideration will necessarily be given to the protective character of such proceedings and to the importance of protecting the public from incompetence and professional misconduct on the part of medical practitioners."

34. The more recent decision involving a disciplinary tribunal and an application for stay which is also of assistance is *E v The MPDT and The CAC* (supra) in which the High Court cited with approval *Walton and Gardiner*.

35. In *K v Psychologists Board and The CAC* (CP 59/98) 10 December 1998 High Court Wellington, Gendall J when dealing with the issue of delay on the one hand and the public interest on the other stated at page 27:

"The Court has to balance the interests of the public in ensuring that professional persons are required to answer disciplinary charges which are properly brought by the professional body, or whether the psychologists' personal private or professional interest require that they be exempted from such a hearing because of a failure of prompt adjudication"

Reasons for Delay

36. Before considering the grounds upon which Dr Ford relies, it is appropriate to consider the reasons for delay.

37. Dr Ford makes no complaint about the role of the CAC in prosecuting the complaints, once made.

38. We have seen the affidavits of the convenor of the CAC (Mr Currie) and the Assistant Registrar of the Medical Council of New Zealand (Ms Turfrey) in this regard, and agree that there could be no valid criticism.

39. The delay of which Dr Ford complains is the delay by the complainants between the alleged incidents and the making of the complaints.

40. F has said that at the time of the consultation (in 1970 or 1971) she was then about 15 or 16 years old, and was accompanied by her mother, she was suffering weight loss and tiredness, had a tendency to be anaemic and had erratic periods. Her mother was asked to leave the room. During the consultation Dr Ford examined her breasts. When her mother was called back into the room, he asked F if she had a boyfriend. She replied yes. Her boyfriend had driven her to the surgery and following the consultation she told him that she had had a breast examination. Her boyfriend, to whom F is now married, has sworn an affidavit confirming this. Many happy years passed. In 1992 F returned to the work force and had access to confidential information concerning Dr Ford. She also heard around that time some hearsay comment about him. When she saw an article published in a local newspaper (in late 2000) about Dr Ford facing a disciplinary matter, she wrote to the Medical Council on 3 October that year disclosing the fact of the breast examination and seeking advice as to whether this was appropriate practice at that time. In her letter, she has stated that her letter was a *"notification only (not a complaint)"* as she could not ascertain if his methods of practice were right or wrong at that time and that the Council could therefore decide whether her experience aligned with or showed a pattern of misconduct with other women's experience. In her affidavit she stated she had not thought to complain earlier primarily because in the early days she accepted whatever examination a doctor carried out and because she had not been left with any emotional scars about the examination. Her experience only re-surfaced when other instances came to light of other women and she felt it necessary to raise the matter with the Council.

41. E was either 15 years or had just turned 16 years at the time of the consultation in or about December 1981/January 1982. She had recently left home and was living in accommodation where she was employed. She wished to commence a relationship with her boyfriend and wanted a prescription for the contraceptive pill, hence she did not consult the family doctor but selected Dr Ford's name at random. She said that during the consultation Dr Ford told her she needed a breast examination, told her to remove her top clothing, performed a physical examination in an inappropriate manner, and made inappropriate comment. She is able to recall the incident in detail. She did not tell anyone of her experience about the consultation because she did not know how to approach the situation or whether anyone would believe her. Ten years ago she told her husband and

sister-in-law when the matter arose in the context of a personal discussion. Her husband has confirmed this in an affidavit. When she read an article in the local newspaper in 2000 about Dr Ford facing a disciplinary charge she decided to take the matter further and lodged a formal complaint. She states she did not tell anybody about what had happened at the time because she was embarrassed about what had occurred during the consultation and about having sought a prescription for the pill as, at that time, she did not want her parents to know for personal reasons and did not want to get into trouble. She felt silly that the matter had occurred and was very embarrassed. She believed that one should be able to trust one's doctor and she was confused by Dr Ford's conduct. She did not think people would believe her and did not know how to go about making a complaint or where to make one. When she disclosed the matter to her husband 10 years ago and he suggested she complain to the police she did not think she could do so as Dr Ford had a high profile in the area and he had been the police doctor for a number of years.

42. D, at the time of the consultation in 1984, was 41 years old. She sought an appointment with Dr Ford for the specific purpose of a breast examination due to breast cancer publicity at the time concerning women in her age group. He undertook the examination using both hands but left her exposed prior to and following the examination without offering any covering. She says Dr Ford made an inappropriate remark regarding her breasts. She felt the way he conducted the interview was "sleazy". She says that following the consultation she left it in a confused state. She told her husband about it when she got home but did not discuss it with anyone else. She says in the climate at that time (1984) one simply did not question the actions of a doctor and that she was brought up to trust professionals. Even if she had thought to complain she would not have known to whom to complain. In or about September 2000 she read an article about Dr Ford in the newspaper and felt a sense of relief that someone had the strength to complain and it was then that she decided to notify the Medical Council of her experience. She says she was stronger, older and wiser and had her husband's support.

43. In September 1984 C had just turned 18 years. She consulted Dr Ford, who was not her usual GP, for a sore throat. He told her to remove her top clothing and gave her a breast examination which she says was not necessary and was carried out in an inappropriate

manner. He also asked if she needed a vaginal smear, which she declined. Her father had died when she was 13 and she had only just left home. She did not have a close family although she got on well with her sister (to whom she made the disclosure a few years later). She thought that people would think she was stupid and says she knew that what Dr Ford had done was wrong but she had nothing to compare it to as she had never previously had a breast examination. In about 1991 or 1992 she told her partner about what had occurred as he could not understand why she was so reluctant to see a male doctor. In about 1996 her partner suggested she raise the matter with the police and, on 8 January 1996, provided the police with a formal statement but they took the matter no further. Accordingly she did not pursue the matter and concentrated on pressing family matters including the health of her child. She read an article in her local newspaper about a charge against a general practitioner in Whangarei and thought it would be Dr Ford which was subsequently confirmed when a policeman visited her home and told her she could make a complaint to the Medical Council. She felt confident enough at that stage to do so, and did.

44. In 1984 B was then 16 years old. Dr Ford had been her family doctor for some time. She had had a number of previous consultations with him. With regard to the consultation in question she believes it was the first occasion she attended without either of her parents. She saw Dr Ford for a sore throat. He told her to take off her clothes except for her underpants. He provided no covering. She says he apparently had to check the glands under her arms which he did. She was then permitted to dress. He made an inappropriate comment about her physical development. She says she is by nature a shy and timid person. She raised the matter with her mother who did not seem particularly concerned about it. Dr Ford had been the family doctor for a number of years. He was attending her father who was unwell and her parents had a good relationship with him. Nothing further was done about it. Although Dr Ford remained the family doctor, B refused to see him again. The incident continued to trouble her and about five or six years ago she telephoned the hospital at Whangarei to speak to somebody about what had happened. She did not know whether she should do anything about it or how she should go about making a formal complaint. She does not know who she spoke to at the hospital but she recollects that the man to whom she spoke told her she should discuss the matter with the doctor in

question. She did not consider that appropriate and let the matter lie. Had she known that she could have made a complaint to the Medical Council by simply writing a letter, she would have done so. She did not raise the matter again until early in 1998 when she was seeing a counsellor who suggested she discuss the matter with her new doctor, Dr xx. She did so and Dr xx wrote to Dr Ford and obtained from him a letter of apology. (It is not clear if Dr Ford was aware that B was the recipient of the letter as it is addressed to "Dear Madam,"). The matter was left there until she read an article in the local newspaper about Dr Ford (in 2000). She telephoned the reporter who gave her the name of the legal adviser to the CAC whom she contacted and was referred to the Medical Council to whom she made a written complaint.

45. A consulted Dr Ford between October 1989 and May 1992 initially for a skin disorder and then as her GP. During the course of one or more consultations she says Dr Ford invaded her personal boundaries by sitting with his knee interposed between her legs; inappropriately touched parts of her body; and made inappropriate comments about her body. She says that at the time she had only been in New Zealand for a relatively short time, had recently married and was feeling quite vulnerable. She had no knowledge of how to make a complaint or to whom. She chose to dismiss Dr Ford's actions from her mind and tried to convince herself she was wrong. It was only when she saw Dr xx in 1999 that she raised the matter again. He counselled her about her rights as a patient and explained to her what her options were and the avenues for complaints to be lodged. On 31 July 2000 on her behalf he wrote to the legal adviser for the CAC regarding the matter.

46. We consider the explanations given and reasons advanced by E, C, B and A for the delay to be understandable.

47. With regard to F, while we accept she was only 16 years old at the time and understand the reasons why she did not make a complaint, we consider that in the particular circumstances the 30 year delay in making it has given rise to unfairness. This is a situation where the delay in the particular circumstances is relevant to prejudice and can amount to abuse of process. (See *T v Attorney-General* (supra)).

48. Again, with regard to D, while we also understand her reasons for not making the complaint, taking into account her maturity at the time and the particular surrounding circumstances, we think the 16 ½ year delay has given rise to unfairness.

General or Presumptive Prejudice

49. In respect of all charges, Mr Knowsley contended that general or presumptive prejudice can be inferred due to the loss or dimming of memory over time not only, but especially so, in those charges where recollection cannot be aided by contemporaneous documentary evidence.

50. Mr Knowsley stated that Dr Ford had suffered presumptive prejudice particularly in relation to the complaint by F, E, D and C due to the passage of time and the attendant loss of memory which meant that he could not remember any of the patients or the consultations which they allege took place or any details of the consultations, and nor could his practice nurses.

51. Mr Knowsley referred to the observations of Gallen J in *Faris* (at p.74) that *"There might well be cases where the time lapse is so great that that of itself will lead a Court to the conclusion that prejudice must be presumed without any actual prejudice being established."*

52. He referred also to the comments of Tipping J in *R v The Queen* (supra) and to those of Penlington J in *S v R* (supra) (at p.11) that *"By any standards, 25 years is a long time. … As a matter of commonsense and every day experience, no ordinary person can remember with precision the fine details of his own or other person's conduct which occurred so long ago especially if the recollection is not aided by contemporaneous writing or photographic record or the like."* He referred also to the comments of Young J in *B v Christchurch District Court* (HC, ChCh 26 July 1998 CP 49/98) *…"Too firm an insistence on specific prejudice erodes, almost to the point of non-existence, the jurisdiction to stay proceedings for abuse of process. …"*

53. Ms McDonald stated that it was not altogether clear what Dr Ford was saying about general prejudice but he appeared to be relying simply on a general lack of memory on his part and on the part of his practice nurses. She said that was to be contrasted with the complaints which are detailed and quite specific. In most of the cases, the complainants had not seen Dr Ford as their regular doctor or had not had much prior contact with him. Most were young women at the time aged between 15 and 18 years. Dr Ford would be in no different position now than he would have been had the hearing been held 10 years ago after the events alleged because his memory would not be any different. (*R v The Queen* (supra)).

54. Ms McDonald submitted that Dr Ford's defence to all charges was a complete denial of the allegations, that even where he had notes and recollection he still maintained a complete denial and that it was difficult to see how his position would be different with access to notes or specific memory of consultations.

55. We accept there is some force in that submission, particularly where the complaint involves conduct which is unlikely to be recorded in contemporaneous notes. However, there will be occasions when the existence of notes can be of assistance in determining the merits of the complaint.

56. Ms McDonald reminded us of the observations of Elias J in *T v Attorney-General* (supra) at p.9 "*While absence of excuse for delay and the strength of the Crown case may in some circumstances be relevant to an assessment of whether the accused has been prejudiced by delay, such cases are likely to be rare. The sufficiency of reasons for a delay in a complaint are not to be elevated too highly …*". In that case Elias J cautioned against consideration of the merits of the case in the context of an application.

57. We accept that the cases where a stay will be granted on the ground of presumptive prejudice are rare. We do not regard any of the present charges as falling clearly within that category. We approach the delays in these matters on the basis that delay is a matter to take into account and weigh in the balance.

58. In reaching this view, we are aware that we must not impose arbitrary time limits but in appropriate cases there is a recognition that *"the line must be drawn somewhere"* (see *R v The Queen* (supra)).

Specific or Actual Prejudice

59. Under this heading, Mr Knowsley has relied on the same matters which he raised under presumptive prejudice.

60. Regarding F, he also relied on absence of clinical records and the fact that the complaint is so old Dr Ford has not been able to identify or locate who the receptionist or practice nurse was and who might have been able to throw some light on the matter had the complaint been made at an earlier stage.

61. With regard to E, Mr Knowsley states Dr Ford is also hampered by the absence of medical notes. He does have an affidavit from the practice nurse at that time who can give evidence of a general nature regarding Dr Ford's work practices but who, like Dr Ford, has no recollection of the patient or the consultation.

62. With regard to the complaints made by D, C, B, and A, medical records are available but Mr Knowsley states Dr Ford has suffered specific prejudice because he cannot now prepare a proper defence to the complaints made of making inappropriate comments because of his inability to remember the circumstances and the context of the consultations giving rise to the complaints.

63. Mr Knowsley says that the practice nurses who have given affidavit evidence covering the periods of the complaints (except that of F) are also hampered in that they have no recollection of either the particular patients due to the lapse of time or any details relating to the particular consultations, although they can give evidence of Dr Ford's conduct regarding his general practice.

64. Ms McDonald stated that Dr Ford appeared to be relying on lack of notes under this heading but submits that even if such notes did exist that they would not have been of any assistance to him. She said that in the cases of F and E the visits were one-off occasions

about routine matters and any notes would not provide him with assistance. The issue in all cases was one of credibility, that is, whether or not Dr Ford had inappropriately touched the complainants. He either did or did not do that and notes would not assist him.

65. She submitted that the Courts have recognised on many occasions that there are special reasons why women, particularly those who are young, in the context of sexual abuse allegations, may delay, sometimes to a significant extent, the period before they make a complaint; and that in the context of criminal trials juries are directed that they should not draw any adverse inference in such cases. Matters such as age, nature and personality of the complainants and their relations with those to whom they might have expected to tell are all relevant considerations.

66. Ms McDonald stated that it would be contrary to the interests of justice and community expectations to stay the complaints and to deny the complainants the opportunity to tell their account to the Tribunal and that there needs to be a full assessment on the merits of the case.

Onus

67. It is not in dispute that the onus falls on Dr Ford to establish the appropriateness for the orders of stay and, because such orders are only made in exceptional circumstances, that the onus is a heavy one.

Orders of the Tribunal in Relation to each Specific Complaint

68. F complaint. We consider that this complaint should be stayed. The complainant cannot remember the year or the date. In her letter to the Medical Council of 3 October 2000 (attached to her affidavit) F made no complaint about the manner in which the examination was carried out. She described his approach as "professional". Her query was whether it should have been carried out at all and whether Dr Ford was entitled to ask her (in the presence of her mother) if she had a boyfriend. Such examination and such question may well have been appropriate in the circumstances of the cause for the consultation at the time which included erratic periods. It appears that Dr Ford was a locum at the time. He has no memory of the complainant or of the consultation. He has no medical records. He

is not able to identify the practice nurse or receptionist at the time. F had ample opportunity in the intervening period to complain. When she did raise the matter in October 2000 she did not do so as a complaint but rather as a query as to what might or might not have been appropriate practice 30 years ago. We also note that in her letter to the Council she refers to a "similar breast examination" by another doctor in 1973 and that this examination brought back memories of Dr Ford's "and the similarity". This is to be contrasted with her affidavit of 23 August 2001 in which she refers to the two examinations being "significantly different". We accept that while this may be a credibility issue it is to be weighed in the balance. In F's case we are not fully satisfied that all ingredients of a charge exist in any event. It is not our role to decide the complaint but we can consider the merits of it as one of the factors among others which we can take into account when making an overall assessment. In the circumstances, we do not think that Dr Ford could now obtain a fair hearing regarding this charge.

69. E complaint. We consider this charge should proceed to a hearing. E was very young at the time and she is very specific about the nature and detail of her complaint. Her explanation for delay is not unreasonable. The practice nurse is available to give evidence even if it is only of a general nature as to Dr Ford's work practices. Although there is an absence of medical records, it is arguable that because of the nature of this complaint they are less likely to be of assistance. Essentially the issue comes down to one of credibility which is more appropriately dealt with at hearing. We accept that to some extent Dr Ford will be prejudiced due to the passage of time and loss of memory and the absence of any notes but we do not think in our overall assessment that in consequence Dr Ford will be unable to obtain a fair hearing.

70. D complaint. We consider that it would be unfair to put Dr Ford to a hearing on this complaint. At the time of the alleged incident D was a mature woman aged 41 years. She specifically consulted Dr Ford for a breast examination. While she thought the way in which Dr Ford conducted the consultation was "*sleazy*" neither her letter of complaint nor her affidavit asserts inappropriate touching. Rather, the charge amounts to a complaint that Dr Ford did not offer her any cover for the upper part of her body immediately prior to or following the examination. She says she had to sit on the bed with her upper body

exposed for an inappropriate period of time during which Dr Ford is said to have made an inappropriate comment regarding the shape of her breasts. We note also that during the consultation which is the subject of the charge, Dr Ford carried out a vaginal smear of which no complaint is made and that D consulted Dr Ford on three subsequent occasions. Neither Dr Ford nor his practice nurse has any recollection of D or of the consultations although medical records are available. With regard to the allegation of the inappropriate remark, even if proved, it is one at the lower end of the scale. Taking into account all of the relevant and surrounding circumstances including the delay of 16 ½ years, the maturity of the complainant at the time, and the merits of the case, it is our overall assessment that this complaint should be stayed.

71. C complaint. We consider that this charge should go to a hearing. The complainant was young. Her complaint is very specific. Her reasons for delay in making the complaint are understandable. While neither Dr Ford nor his practice nurse has any memory of either the patient or the consultation, medical records are available and the practice nurse can give evidence as to general practise. In the overall circumstances of this charge, the delay is not such as would prevent a fair hearing.

72. B complaint. We consider that this charge should go to a hearing. The complainant was young. Her complaint is very specific. Her reasons for delay in making the complaint are understandable. While Dr Ford does not have memory of the consultation, he does have some memory of the patient and medical records are available. His practice nurse can give evidence as to his general practise. In the overall circumstances of this charge, the delay is not such as would prevent a fair hearing.

73. A complaint. We consider that this charge should proceed to a hearing. The allegations are specific. Dr Ford does have medical notes of the consultations and has general recollections of Mrs A of some matters that took place during consultations. Some of the particulars in the charge relate to matters of practice about which Dr Ford can give evidence. Other particulars can be assisted by clinical records. Further, his practice nurse during the period in question confirms that she had close dealings with Dr Ford and his patients and is available to give evidence as to his style and manner of practice. In our

overall assessment, it cannot be said that Dr Ford cannot obtain a fair hearing on this charge.

Conclusion

74. In respect of the charges we make the following orders:

(a) F – charge to be permanently stayed.

(b) E – application for stay declined.

(c) D – charge to be permanently stayed.

(d) C – application for stay declined.

(e) B – application for stay declined.

(f) A – application for stay declined.

DATED at Wellington this 26th day of October 2001

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S M Moran

Deputy Chair

Medical Practitioners Disciplinary Tribunal