MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

PO Box 5249, Wellington • New Zealand
Ground Floor, NZMA Building • 28 The Terrace, Wellington
Telephone (04) 499 2044 • Fax (04) 499 2045
E-mail mpdt@mpdt.org.nz

NB: NAMES OF PERSONS OTHER THAN THOSE WHO GAVE EVIDENCE AT THE HEARING OR WHOSE EVIDENCE WAS ADMITTED BY CONSENT, ARE NOT TO BE DISCLOSED

DECISION NO: 161/00/68C

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 **JOHN RICHARD MACDONALD** medical practitioner of Ashburton

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chair)

Dr I D S Civil, Mrs J Courtney, Dr R S J Gellalty,

Dr J M McKenzie (Members)

Ms K Davies (Hearing Officer)

Mrs G Rogers (Stenographer)

Hearing held at Christchurch on Wednesday 2 and Thursday 3 May 2001

APPEARANCES: Mr C J Lange for a Complaints Assessment Committee ("the CAC")
Mr C J Hodson QC for Dr J R MacDonald.

The Charge

1. A CAC appointed by the Medical Council of New Zealand pursuant to s.88 of the Medical Practitioners Act 1995 ("the Act") charges that Dr MacDonald is guilty of professional misconduct in that:

(a) he implemented procedures at Ashburton Hospital for the taking of blood samples pursuant to section 58D of the Transport Act 1962 which were contrary to proper and accepted professional practice and/or law;

Particulars: [Dr MacDonald] instituted a "protocol" requiring that he be consulted on every occasion the Police requested an evidential blood sample, notwithstanding the presence on duty of other registered medical practitioners.

and

(b) Having usurped or assumed responsibility when on or about 25 November 1995 an evidential blood sample was requested in respect of a Mrs A, failed to ensure a blood sample was taken in accordance with section 58D of the Transport Act 1962.

Particulars: [Dr MacDonald] directed that the process be put on hold pending his attendance, but then despite his acceptance it was not prejudicial to the proper care or treatment of the patient, no sample was taken in the manner required by law.

2. Dr MacDonald denied the charge.

Factual background

3. The events which gave rise to the charge arose out of a motor vehicle accident, which occurred on the evening of 25 November 1995, involving a collision between the motor vehicle driven by Mrs A and that driven by Mr and Mrs B's son, C. The accident was caused by Mrs A's car crossing the median line. C B died shortly after the accident.

4. Mrs A suffered a period of unconsciousness of indeterminate length at the scene of the accident, chest injuries including a fractured rib, a fractured wrist and lacerations to her left forearm and left knee.

5. The accident occurred at approximately 6.50 pm. Mrs A admitted to drinking two glasses of wine in the course of an afternoon playing tennis. After she was brought into Ashburton Hospital's Acute Admissions Unit (AAU) about 8.00 pm she was seen by Dr Siew Siew Chua. At that time, Dr Chua was nearing the end of her first year as a House Surgeon and, in accordance with the relevant professional registration rules and requirements, she was practising under probationary registration.

6. At the AAU, a police officer who was investigating the crash asked Dr Chua to obtain an evidential blood alcohol sample from Mrs A. It seems likely that this request was made around 9.00 pm. Pursuant to s58D of the Transport Act (in the form in which it appeared in the statute in 1995), if requested to do so by a police officer, the registered medical practitioner who is in *"immediate charge of the examination, care, or treatment of a person who is in a hospital or doctor's surgery"* must take blood for testing, whether or not the person consents, and even if the person is incapable of giving consent.

7. These mandatory requirements are subject to the proviso that:

"the blood specimen shall not be taken from a person …unless the registered medical practitioner believes that the person is in the hospital as a result of an accident involving a motor vehicle and … has examined the person and is satisfied that the taking of the blood specimen from him would not be prejudicial to his proper care or treatment."

8. The taking, handling and storage of the blood for testing must also comply with all of the procedural requirements set out in s58D and s73 of the Transport Act. In 1994 Ashburton Hospital had implemented a protocol for the collection of evidential blood alcohol samples. The protocol was available in the AAU.

9. Dr MacDonald took the view that, when he was the consultant surgeon on duty or on call, then he was the registered medical practitioner who was in *"immediate charge"* of the patient, and thus ultimately responsible for their safety and wellbeing while they are in the care of the hospital's AAU. Ashburton Hospital did not (and still does not) have registrars assigned to it. Its junior medical officers are house surgeons, and, in their first year as house surgeons, these practitioners practice under probationary registration.

10. In addition to the protocol, Dr MacDonald required that when he was the consultant on duty or on call all requests for evidential blood samples were to be referred to him.

11. If he was not at the hospital when a patient was admitted to the AAU, but he was the consultant rostered on call, he would come in and see the patient before making the decision whether or not to permit the blood sample to be taken. On the basis of the evidence presented at the hearing, it seems likely that Dr Chua telephoned Dr MacDonald shortly after 9.00 pm to report Mrs A's admission and condition. Dr MacDonald estimated that he examined Mrs A and instructed that the evidential blood sample could be taken within approximately 20 - 30 minutes of receiving the call from Dr Chua i.e. probably around 9.30 pm. Neither Dr Forster or Staff Nurse Cook, who were on night duty, recall seeing Dr MacDonald at the hospital when they arrived for duty, around 10.30 pm, so it was likely that he had left the hospital before then.

12. In any event, no evidential blood sample was taken from Mrs A. However a Laboratory Request Form for a *"blood alcohol level"* test was completed and dated 26 November 1995, and a clinical blood alcohol test was subsequently carried out and reported by the hospital laboratory. The factual circumstances of this request and report are confused and are discussed in more detail later in this decision.

13. Suffice at this point to state that it appears to the Tribunal that whoever took the blood sample from Mrs A and requested the *"blood alcohol level"* test from the laboratory did not appreciate the difference between an **evidential** blood alcohol sample and a **clinical** blood alcohol sample, and the particular legal and procedural requirements of the former.

14. In due course the laboratory reported that the level of alcohol in the blood sample taken from Mrs A was *"nil"*.

15. For completeness, it should be recorded that the Police subsequently investigated the events of 25 November 1995 in the context of a complaint made against Dr MacDonald. On 30 July 1997 Dr MacDonald was interviewed by Detective Inspector Pearce at Ashburton Police Station. The interview extended over approximately five hours and a transcript of the interview was provided to the Tribunal.

16. By letter dated 4 August 1997, Det Insp Pearce advised, amongst other things, that:

(a) *"4.6 There is some evidence that Dr Macdonald has a reputation for having, at times, an intimidatory manner and that to a greater or lesser degree both Police and hospital staff have felt threatened and intimidated by him.*

(b) *4.7 There is no doubt that Dr MacDonald's interpretation of s.58D of the Transport Act, particularly as it relates to the definition of 'immediate care' is inconsistent with the general interpretation and probably does not accord with the spirit and intent of the legislation.*

(c) *4.8 That this complaint of obstruction or attempting to pervert or defeat the course of justice can not be sustained on the evidence."*

Evidence for the CAC

17. Evidence for the CAC was given by S N Cook and R N Spicer, who were on duty on the evening of 25/26 November 1995; Snr Constable Gooding (the police officer who attended at Ashburton Hospital to uplift the evidential blood sample); Dr M W Ardagh, a fellow of the Australasian College of Emergency Medicine and senior lecturer at the University of Otago; Dr Chua; Dr Foster (both by video link) who were the house surgeons on duty at Ashburton Hospital on 25/26 November 1995; Mr Grant Moore, an

employee of Canterbury Health laboratories, and, by consent, Det Insp Pearce, Constable McIntyre, the police officer who requested that an evidential blood alcohol sample be taken from Mrs A.

Evidence for Dr MacDonald

18. Evidence for Dr MacDonald was given by Dr Michael Sexton, a specialist in General Surgery and by Dr MacDonald.

The law

19. Dr MacDonald was charged with professional misconduct, the middle of the range of professional disciplinary findings available to the Tribunal under s.110 of the Act. The test for professional misconduct is well-established. The most commonly cited formulation being that of Jefferies J *in Ongley v Medical Council of New Zealand*[1984] 4 NZAR 369:

"Has the practitioner so behaved in a professional capacity that the established acts under scrutiny would reasonably be regarded by his colleagues as constituting professional misconduct? With proper diffidence it is suggested that the test is objective and seeks to gauge the given conduct by measurement against the judgment of professional brethren of acknowledged good repute and competency, bearing in mind the composition of the tribunals which examine the conduct. Instead of using synonyms for the two words the focus is on the given conduct which is judged by the application to it of reputable, experienced medical minds supported by a layperson at the committee stage."

20. In *B v The Medical Council* (High Court, Auckland, 11/96, 8/7/96), and in the context of a charge of conduct unbecoming, Elias J stated:

"In the case of diagnosis or treatment, conduct which falls short of the mark will be assessed substantially by reference to usual practice of comparable practitioners. ..... Those standards to be met are, as already indicated, a question of degree; ..... I accept that the burden of proof is on the balance of probabilities. Assessment of the probabilities rightly takes into account the significance of imposition of disciplinary sanction. I accept that the court must be satisfied on the balance of probabilities that the conduct of the practitioner is deserving of discipline."

21. The relevant principles which can be distilled from these statements are:

(a) A finding of professional misconduct or conduct unbecoming is not required in every case where a mistake is made or an error proven.

(b) The question is not whether an error was made, but whether the practitioner's conduct was an acceptable discharge of his or her professional obligations (in all the circumstances of the particular case).

(c) The departure from acceptable standards and/or the failure to fulfill professional obligations must be significant enough to attract sanction for the purposes of protecting the public.

22. On the basis of *B* (supra) and *Ongley* (supra), both decisions given in the professional disciplinary context and on appeal from specialist tribunals, the question as to whether Dr MacDonald's conduct is conduct which is culpable, i.e. is conduct warranting an adverse finding, is a question to be determined by this Tribunal notwithstanding any other determinations made in a different context, for example, the decision made by the NZ Police not to prosecute Dr MacDonald for any criminal offence.

23. The Tribunal was also referred to a number of cases in which the meaning of the words *"in immediate charge"* (contained in s.58D of the Transport Act) were considered; *Alexander v Police* (1998) 4 HRNZ 632; *Police v Kotzikas* (23/5/85, Heron J, HC, Christchurch, M409/84, reported in Brookers Law of Transportation, para LT73.05); *Ministry of Transport v Trail* (18/3/85, Gallen J, HC, Rotorua Registry, M74/84); *Police v Irwin* (22/9/94, Ellis J, HC, Napier Registry, AP18/94); and *R v Cameron* (CA46/98, 15/6/98).

24. It is fair to say that the law on the precise meaning of the phrase is not definitive, and there is a tendency on the part of the courts to use the words *"immediate care"* and *"immediate charge"* interchangeably. For present purposes, the Tribunal is satisfied that there is a difference between being in *"immediate charge"* of a patient, and the patient being in the *"immediate care"* of any particular medical practitioner.

25. As a tribunal of first instance, the Tribunal is bound by judgments of the Court of Appeal. In this present case, it considers that it is bound by *Cameron's* case notwithstanding that it was decided in 1998, as it nevertheless interprets the law as it was at the time of the events under scrutiny, November 1995. Fortuitously, the Court of Appeal's determination in

Cameron is also the most relevant authority in the present context. The Tribunal is satisfied therefore that *Cameron* is both authoritative and applicable.

26. In *Cameron*, Tipping J stated:

"It is clear from this section that Dr Craig had to be in immediate charge of the Appellant at the time he took the blood specimen. Mr Horsley argued that the doctor also had to be in immediate charge at the time the request was made to him. We do not construe the section in that way. The crucial point is that it must be a doctor in immediate charge, who takes the blood specimen, or cause it to be taken,. That requirement was obviously introduced in the interests of the patient.

An enforcement officer may, of course, make a request to a doctor who was at the time of the request in immediate charge, if that occurs, there can be no suggestion of invalidity. If the enforcement officer makes a request to a doctor who is not then in immediate charge, we do not consider the request should be regarded as invalid. The request can properly be regarded as continuing so as to require that doctor, if and when he becomes in immediate charge, to take the blood specimen or cause it to be taken. Thus a request can be made to a doctor in anticipation of his becoming in immediate charge, whereupon it can be acted on.

Similarly, and to anticipate the next main issue, a request can be made to another person to be conveyed to a doctor in immediate charge. This construction of the section is open on its terms and is desirable to reflect the exigencies of life in a busy hospital or doctor's surgery." (p3)

27. The authors of Brookers Law of Transportation commentary confirm (at LT73.05) that the authorities evidence a gradual development of the courts' interpretation of s.58D, and that the Court of Appeal has adopted "*a wider, pragmatic approach to proof of compliance with the section*".

28. The result of the Court of Appeal's decision in Cameron's case in the present context is that Dr MacDonald was not required to be present when the request for an evidential blood alcohol sample was made, but he was required to be the medical practitioner "*in immediate charge*" of the patient at the time the sample was taken, or when it was caused to be taken.

The Standard of Proof

29. The standard of proof in disciplinary proceedings is the civil standard, the balance of probabilities. The standard of proof will vary according to the gravity of the allegations

founding the charge and the standard of proof may vary within a single case, such as this, where the credibility of the principal witnesses is in issue on certain key matters.

30. All elements of the charge must be proved to a standard commensurate with the gravity of the facts to be proved: *Ongley v Medical Council of New Zealand* [1984] 4 NZAR 369, 375 - 376.

The Burden of Proof

31. The burden of proof is borne by the CAC.

The Decision

32. Having carefully considered all of the evidence presented to it, the very helpful submissions made by both counsel, and the directions made by the Tribunal's legal assessor, Mr Corkill, and having had the opportunity to assess the credibility of each of the key witnesses, the Tribunal is satisfied that Dr MacDonald is not guilty of professional misconduct in terms of section 109 (1)(c) of the Act.

33. The Tribunal also considered whether or not it should amend the charge to the lesser offence of conduct unbecoming and that conduct reflects adversely on Dr MacDonald's fitness to practise medicine, and determined that an amendment was not warranted.

34. Accordingly, although for reasons to be given the Tribunal considers that, to a large degree, Dr MacDonald is the author of his own misfortune in terms of this charge, it is not satisfied that his conduct warrants an adverse finding on the charge.

Reasons for decision -

Part 1 of the charge:
[That Dr MacDonald] Implemented procedures at Ashburton Hospital for the taking of blood samples pursuant to section 58D of the Transport Act 1962 which were contrary to proper and accepted professional practice and/or law.

Particulars: [Dr MacDonald] instituted a "protocol" requiring that he be consulted on every occasion the Police requested an evidential blood sample, notwithstanding the presence on duty of other registered medical practitioners.

35. The Tribunal is satisfied that on the basis of the evidence presented to it, that Dr MacDonald did not implement any procedures at Ashburton Hospital which were contrary to proper and accepted professional practice and/or law.

36. As Dr MacDonald pointed out in his evidence, the protocol relating to the taking of evidential blood samples at Ashburton Hospital was not *"implemented"*, or drafted, by him. It was a standard procedural protocol prepared by the hospital to ensure that all such samples were taken in accordance with the relevant law.

37. The Tribunal is satisfied that Dr MacDonald had instructed that, when he was the Senior Medical Consultant on duty, or on call, all requests for evidential blood alcohol samples were to be referred to him. The Tribunal is satisfied that this instruction was part of a more general instruction to the House Surgeons working in the AAU that all admissions were to be referred to him when he was the Senior Medical Consultant on duty or on call.

38. The Tribunal is satisfied that Dr MacDonald routinely attended at the hospital when he was notified of an admission that he considered he should see, and that included all patients if a blood alcohol specimen was requested and/or if the patient was to be admitted. It was Dr MacDonald's evidence that one of the reasons why he instructed Dr Chua not to take the evidential blood sample until he had seen the patient was that *"on several occasions Dr Chua's assessment of the severity of the patient and mine had been different and determined to assess the severity myself before giving permission"*.

39. The Tribunal accepts that, if Dr MacDonald was on duty or on call, then without exception he regarded himself as being 'in charge' of the patient, in particular, once he has been consulted about a patient then he takes responsibility for that patient's care.

40. Both Dr Ardagh for the CAC, and Dr Sexton for Dr MacDonald, agreed that Dr MacDonald's close supervision of the House Surgeons at Ashburton Hospital could not be criticised. Dr Ardagh in particular agreed with the requirement that the House Surgeons were to contact Dr MacDonald to report admissions, and, in the context of Mrs A's admission and clinical condition, it was appropriate for him to review the patient personally.

41. Dr Ardagh characterised the close supervision by Dr MacDonald, given the probationary status of the house surgeon and the other relevant considerations, as *"laudable, that is excellent"*. The question was whether Dr MacDonald's position caused any unnecessary delay to the taking of the evidential blood sample.

42. Dr Chua's evidence was that she was very busy on the evening of 25 November 1995. She had been on duty since 8.00am that morning, and was rostered on until midnight. She had had to certify that C B was dead.

43. She had examined Mrs A on her admission to AAU, and the request for the evidential blood alcohol sample was made to her by Constable McIntyre. She agreed to take the sample, and was apparently about to do so when she was told by the nurses present that she should consult Dr MacDonald as *"he doesn't like them being done."*

44. Dr Chua confirmed that she told Dr MacDonald that the request had been made in the course of her reporting to him regarding Mrs A's admission and medical condition generally. Dr MacDonald told her not to take the specimen and that he was coming in to see the patient. He gave no reason for his instruction and Dr Chua considered that *"the topic was over for me."*

45. Dr MacDonald confirmed that he had told Dr Chua not to take the sample and that he was on his way in to see Mrs A. The clinical notes made later that evening record that [Mrs A] had been *"seen by Mac"*. It appears from the evidence that the period between Dr Chua's referring the request to Dr MacDonald, and his examination of Mrs A was probably in the order of 20-30 minutes.

46. On the basis of the evidence referred to above, the Tribunal is satisfied that:

(a) Dr MacDonald routinely exercised close supervision of the house surgeons working at Ashburton Hospital;

(b) for the purposes of s58D, Dr Chua could validly have taken the evidential blood sample from Mrs A, provided Dr Chua was satisfied that taking the sample would not prejudice her proper care or treatment, *Police v Irwin* (supra);

(c) it was not necessary for Dr MacDonald to be present when the request for an evidential blood sample was made;

(d) the 1994 protocol implemented by Ashburton Hospital did not require every request for an evidential blood alcohol sample to be referred to a senior medical consultant, but neither did it prevent any of the senior consultants from imposing that requirement on the junior medical officers;

(e) on the evening of 25 November 1995, Dr MacDonald, as the Senior Medical Consultant to whom Dr Chua reported, and to whom the request was referred, was the registered medical practitioner who was *"in immediate charge"* of Mrs A's care;

(f) in the circumstances, there was 'no undue delay' caused as a result of Dr MacDonald's decision to examine Mrs A himself and his instruction to Dr Chua not to take any evidential blood sample when they discussed Mrs A's case by telephone.

(g) to the extent that Dr MacDonald 'implemented' or perhaps more correctly 'supplemented', the procedures put in place at Ashburton Hospital by requiring that all requests for evidential blood alcohol samples be referred to him if he was the Senior Medical Consultant on duty or on call, that was not contrary to either proper and accepted professional practice, or the law.

Part 2 of the Charge:
Having usurped or assumed responsibility when on or about 25 November 1995 an evidential blood sample was requested in respect of a Mrs A, failed to ensure a blood sample was taken in accordance with section 58D of the Transport Act 1962.

Particulars: [Dr MacDonald] directed that the process be put on hold pending his attendance, but then despite his acceptance it was not prejudicial to the proper care or treatment of the patient, no sample was taken in the manner required by law.

47. It was Dr MacDonald's evidence that, having examined Mrs A and satisfied himself that the taking of the evidential blood sample could be taken without prejudicing her proper care or treatment, he instructed Dr Chua to take the sample.

48. For her part, Dr Chua does not recall the instruction being given to her. Dr Chua confirmed that she accompanied Dr MacDonald when he examined Mrs A, and she wrote

down his instructions, but did not keep her notes. The notes that are contained in Mrs A's hospital records are Dr Forster's, and some brief notes possibly made by Dr Chua when she came on duty the next morning. Dr Chua told the Tribunal that *"I think I told Martin Forster, I mentioned it to him I think in our house surgeon handover by the way the police asked for a blood alcohol but Mac said no"*.

49. In any event, it appears that it was Dr Forster who completed Mrs A's clinical examination and admission documentation. It appears that Dr Chua began the admission 'clerking', but the documentation and 'clerking' was completed by Dr Forster after he came on duty. He was rostered to start his duty at 2400 hrs, but it appears from the evidence that he may have arrived and started work by 10.30 pm.

50. Understandably given the passage of time, all of the witnesses' memories of the events of that evening are imprecise. The Tribunal is satisfied that all of the witnesses were truthful witnesses, but it was apparent that the AAU was very busy that evening, and no-one attached any particular significance to the events at the time, making recall at a much later time difficult.

51. For example, Snr Constable Gooding's evidence was that he arrived at the hospital around 11.30 - 12.00 pm to pick up the evidential blood samples. He went to the side door and was handed a box with the blood samples in it. He recognised immediately that the samples were not packaged in the 2 separate containers required for an evidential blood test done by the ESR.

52. He identified himself to the nurse, and asked for the evidential blood alcohol samples. He said that the nurse went away and then returned and told him that Dr MacDonald had refused to take the samples. He asked to see Dr MacDonald but was told that he (Dr MacDonald) would not see him. It is not necessary for the Tribunal to make any findings regarding this evidence. But Snr Constable Gooding did not make any note of these events, or of his discussion with the nurse, either at the time or subsequently by way of a file note. Dr MacDonald stated that if he had been told at the time that no evidential blood test had been obtained, then he would have instructed that one be taken.

53. However, somebody completed a laboratory request form asking for a *"blood alcohol level"* report (WY827D). The laboratory records produced by Mr Moore also record that on 26 November 1995, the laboratory was asked to do a blood alcohol test. The result was reported on 27 November 1995. Apparently it is also not unusual for a particular blood test to be requested by telephone, and a form faxed in to the laboratory, and, adding to the confusion, that appears to have occurred on this occasion.

54. Dr Chua confirmed that she had come back on duty at 8.00am on 26 November 1996, and that she had again been rostered to work through to midnight. Dr Chua and Dr Forster were the only house surgeons rostered to work at Ashburton Hospital that weekend.

55. The test was carried out on the blood taken from Mrs A by Dr Forster, which was received by the laboratory at 6.08 am on 26/11/95. It was Mr Moore's evidence that it is usual for two vials of blood to accompany the laboratory request form WY383P, and one could have accompanied the form WY827D had it been completed on the night of 25 November. Snr Constable Gooding recalled that he saw 3 test tubes of blood in the box handed to him that night, which would be consistent with the request form being completed, and the sample taken, on the night of 25/26 November 1995.

56. Both of these forms are dated 26 November 1995. WY383P is initialed by *"MRF"* (Dr Forster). WY827D is signed, but the signature is indecipherable. It could be Dr Chua's signature, but she was adamant that it is not, and it is somewhat different to her signature appearing elsewhere in the records. The same 'hand' appears to have initialled the bottom right corner of the laboratory report forms in Mrs A's medical records. Dr MacDonald stated in evidence that the house surgeons are required to initial the report forms before placing them on the patient's file to record that they have been received and seen by a doctor.

57. There is no record of any other house surgeon or doctor being on duty at the time, or involved in Mrs A's care who could have either signed WY827D, or the reports placed in Mrs A's file. Thus, if it was not Dr Chua, it is a mystery who requested the blood alcohol test, and who received the result.

58. In any event, it is clear from the evidence that a mistake was made and no evidential blood sample was collected. It is also possible that whoever requested the blood alcohol test did not understand that there were strict legal requirements and procedures to be followed if an evidential blood alcohol test was requested.

59. The medical evidence was that it is not uncommon to request a blood alcohol test for clinical purposes at the primary survey stage of the clinical examination. If a patient is unconscious, or suffering from an 'altered state of consciousness' it could be because they are intoxicated or due to a head injury or trauma. This test would have been done at the hospital laboratory, and could not be used for evidential purposes.

60. There was no evidence that a blood alcohol test for clinical purposes was indicated for Ms. A. Dr Forster confirmed that the signature on WY383P was his, and that he had taken the samples from Mrs A after he came on duty. The signature on WY827D was not his, and he did not recall specifically asking for a blood alcohol test for Mrs A.

61. Dr Forster had worked in New Zealand for only a short time, and he believes that he would have been unaware that evidential blood samples are collected in a separate kit. Dr Chua also gave evidence that she had never been asked to take an evidential blood sample before.

62. Dr Ardagh gave evidence that he is not aware of any formal training provided to medical students or junior doctors regarding the taking of evidential blood samples. It is simply something that is learned 'on the job'.

63. It was Dr MacDonald's position that he expects that the house surgeons will be familiar with all of the protocols and procedures implemented at Ashburton Hospital. He concedes that there are 'more than a hundred' of these, but does not consider that he has any obligation to check whether or not the house surgeon is familiar with any relevant protocol, or even to tell them of its existence.

64. Taking into account that house surgeons are the most junior doctors; they are still completing their medical training; they may be 'rotated' among different hospitals; they are rostered to work long hours and are kept very busy, the Tribunal considers that Dr MacDonald, like all senior practitioners who are responsible for supervising junior staff, has a responsibility not only to issue instructions from 'on high' but also to contribute to the junior doctors' professional education. If junior doctors must learn on the job, who are they to learn from?

65. However, for present purposes, it was established as a matter of fact that a blood alcohol test was requested, and a report obtained. There is no evidence that this test could have been sought for any other reason than to comply with the request made by Constable McIntyre to Dr Chua on 25 November 1995.

66. The fact that the test was requested must be construed in favour of Dr MacDonald. Accordingly, the Tribunal considers that it is more likely than not that Dr MacDonald did give his permission for blood to be taken for evidential purposes, and that he instructed Dr Chua to do this, she being in attendance when he saw Mrs A, and being the only house surgeon on duty at that time.

67. Dr Chua's evidence was that she did not remember Dr MacDonald giving her that instruction. She did not recall the request for an evidential blood sample being mentioned or discussed when Dr MacDonald came into the hospital to see Mrs A. However, Dr Chua did *"recall taking some blood samples from Mrs A during the night before Martin came on - I do recall taking some"*, she told the Tribunal. Dr Chua believed these samples were for blood count, likely a cross-match given the nature of Mrs A's injuries, probably electrolyte, that is 'standard ones'.

68. There is no record of the request being made, or the test sought, in Mrs A's medical records. Equally, there is no record of the request being refused by Dr MacDonald.

69. In terms of the charge, the Tribunal is satisfied that Dr MacDonald did assume responsibility for making the decision whether or not the evidential blood sample could be

taken, and, having satisfied himself that it could be taken without prejudicing Mrs A's care or treatment, he was legally required to take the sample, or cause it to be taken.

70. To the extent that the Tribunal has determined that Dr Chua could legally have taken the blood specimen (once she was satisfied that the proviso did not apply) but was prevented from doing so by Dr MacDonald's instruction, he did 'usurp' the responsibility for taking the sample, or for causing it to be taken.

71. Having determined to cause the blood to be taken by instructing Dr Chua to take the sample, Dr MacDonald's legal obligations did not immediately come to an end. What happened, in effect, was that he instructed Dr Chua to carry out his legal obligations for him, i.e. his obligation to take the sample or to cause the blood sample to be taken.

72. On that basis, Dr MacDonald was obliged to ensure that Dr Chua was familiar with all of the relevant legal requirements, i.e. that she was properly trained to carry out his legal obligations. It was not sufficient for him simply to expect that Dr Chua understood what was being asked of her. She was a very junior doctor, practising under probationary registration. He on the other hand is a very senior and experienced practitioner. The house surgeons working under Dr MacDonald's supervision are entitled to look to him for guidance and proper instruction.

73. On the basis of the factual evidence provided to the Tribunal, and the findings made in relation to Part 1 of the charge, it is satisfied that Dr MacDonald was legally required to ensure that an evidential blood sample was taken, and that he failed to do so. As a result, no evidential blood sample was obtained.

74. Having determined that the factual basis of Part 2 of the charge is established, the Tribunal then proceeded to consider whether or not Dr MacDonald's failure to obtain the evidential blood sample, or to cause the sample to be taken, constituted professional misconduct.

75. On the facts, the Tribunal is satisfied that the failure to obtain a sample which properly complied with all of the relevant legal requirements occurred as a result of an error, and not as a result of any deliberate obstruction or misconduct on the part of Dr MacDonald.

76. It seems clear that the failure to obtain the evidential blood sample did not become an issue until some time after November 1995. Dr MacDonald stated that having given the instruction for the sample to be taken, he thought no more about the matter until he was contacted by the Police in February or March 1996. It is not known when Dr Chua first became aware of the issue, but she left Ashburton Hospital in late 1995.

77. As stated above, it is well-established that not every error will be culpable, or warrant the sanction of an adverse professional disciplinary finding. The opinions expressed to the Tribunal by Dr MacDonald's professional peers regarding his close supervision of junior doctors and his willingness to accept that responsibility are uniformly positive. However, whether or not a practitioner is guilty of professional misconduct, is an objective test and is to be determined by the Tribunal.

78. On the basis of both *B* (supra) and *Ongley* (supra), the question as to whether Dr MacDonald's conduct is culpable, i.e. is conduct warranting an adverse finding, is a question squarely for determination by this Tribunal. While the evidence of expert witnesses is, given its uniformity, a useful guide, perhaps even the best guide, it is no more than that, and must be weighed against the judgment of this Tribunal, comprising as it does a mix of lay persons and medical practitioners.

79. That is the process followed by the Tribunal on this occasion. Having considered all of the confusing, and at times conflicting, factual evidence, the Tribunal is satisfied that Dr MacDonald did not act improperly or illegally in taking it upon himself to decide if the evidential blood sample could be taken from Mrs A, and for causing it to be taken.

80. Notwithstanding that the evidential blood sample was not obtained, the Tribunal is satisfied that occurred as a result of an error, and that it is not possible to determine whose error that was. Certainly Dr MacDonald must bear the ultimate responsibility, and he did not appear to resile from that.

81. However, the Tribunal is satisfied that omissions on the part of Dr MacDonald which contributed to the failure to obtain the evidential sample do not constitute such a departure

from acceptable professional standards that they warrant an adverse finding against Dr MacDonald.

82. Accordingly, the Tribunal is satisfied that Dr MacDonald's conduct in this matter does not warrant the sanction of a finding of either professional misconduct, or the lesser charge of conduct unbecoming that reflects adversely on his fitness to practise medicine.

83. Although the following finding was not determinative in the context of the charge, the Tribunal wishes to record that when it is deliberating on a charge the Tribunal's focus is on the practitioner's conduct, and the allegations which found the charge. The outcome of the events and/or conduct at issue is largely irrelevant. The issue as to whether or not the outcome might have been different had the practitioner's management of the patient's care been different, will not determine whether or not a charge is proven.

84. Thus, the central issue for the Tribunal's inquiry is to ascertain whether or not the practitioner's conduct and management of the case (at the relevant time) constituted an acceptable discharge of his or her professional and clinical obligations.

85. In the circumstances of this case, the Tribunal considers that it is appropriate to record that it is satisfied that the blood alcohol test carried out by the laboratory was carried out using the blood taken from Mrs A on the night of 25 November 1995. Given that:

(a) the sample was taken within hours of the accident;

(b) the period of delay caused by Dr MacDonald's instruction to Dr Chua not to take the evidential blood sample is estimated to have been around 30 minutes (bearing in mind that it is not possible to identify who took the sample, or when, except that it was taken after Dr MacDonald saw Mrs A (post-9.00/9.30 pm) and before Snr Constable Gooding arrived to collect the evidential sample around 11.30 - 12.00pm), and,

(c) the degree of degradation of the sample that could have occurred between the time of taking the sample and the time of testing would have been minimal,

it is the view of the Tribunal's medical practitioner members that the result reported of *nil* alcohol present would have been a fair and accurate report.

86. Therefore, taking into account all of the relevant facts and circumstances, the Tribunal is satisfied that Dr MacDonald's conduct did not materially prejudice or affect the police inquiry into the causes of the accident which resulted in the death of C B., i.e. even if the mistake had not been made and the evidential blood sample taken, it is unlikely that the ESR evidential result would have been significantly different to that recorded by Canterbury Health Laboratory.

Orders

87. The Charge of professional misconduct laid against Dr MacDonald is dismissed.

88. As a result of the Tribunals' decision there are no issues as to penalty or costs.

DATED at Auckland this 25th day of May 2001

.....

W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal