MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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NB: PUBLICATION OF THE NAME OF THE RESPONDENT, COMPLAINANT AND THE NAMES OF ALL WITNESSES OTHER THAN EXPERT WITNESSES IS PROHIBITED

DECISION NO: 181/01/78C

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 A medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chair)

Ms S Cole, Dr R S J Gellatly, Dr U Manukulasuriya,

Dr J M McKenzie (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Auckland on Tuesday 30, Wednesday 31 October and Thursday 1 November 2001.

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

Mr A H Waalkens and Ms J Libbey for Dr A

The Charge

1. The Complaints Assessment Committee ("the Committee"), pursuant to Section 93(1) of the Medical Practitioners Act ("the Act") charged that Dr A, registered medical practitioner of xx, on 9 September 1998 at the xx A & M Clinic during consultation with his patient [the complainant]:

    (a) Failed to provide an explanation to [the complainant] as to why he performed a number of internal examinations on her and failed to take account of and be sensitive to the distress that such examinations were causing her; and/or

    (b) Performed a final internal examination which was unnecessary and for which there was no reasonable medical justification; and/or

    (c) Performed the final internal examination in such a way that his patient the complainant's clitoris was stimulated for which there was no medical justification; and/or

    (d) Subsequently failed to ensure the confidentiality of patient details including the complainant's name and address.

2. In addition it was charged that the conduct alleged in particulars (b) and (c) either separately or cumulatively amounted to disgraceful conduct in a professional respect. The

conduct alleged in particulars (a) and (d) either separately or cumulatively amounted to professional misconduct. Cumulatively, the conduct alleged in particulars (a)-(d) amounts to disgraceful conduct in a professional respect.

Background to the Charge

3. On 9 September 1998 the complainant attended an Accident and Medical Clinic in xx ("the clinic") at her mother's suggestion because her own GP was unavailable at a time that was convenient to her. The complainant had been feeling unwell for approximately one month and, by the date of the consultation had lumps in her groin and armpits as well as a headache. She had recently completed a course of antibiotics prescribed by her GP.

4. On her arrival at the clinic the complainant completed a patient details medical form and, after a short wait, was called into a consulting room by the respondent who was one of three doctors on duty at the clinic that evening. She told the respondent that she had lumps in her groin and in her armpits, and she was feeling unwell.

5. In the course of obtaining the complainant's history, the respondent asked if there was a history of either breast or cervical cancer in the family and also inquired about the complainant's sexual history.

6. The details of the history-taking and reporting were contested. The respondent stated that he gained the impression that the complainant was sexually active and it is clear that, from the outset, there was a good deal of misunderstanding and miscommunication between the complainant and the respondent.

7. It was the respondent's evidence that, because of the impression he had formed, he proceeded with the consultation on the basis that the complainant was sexually active.

8. However, the complainant was equally adamant that she made it quite clear from the outset that she had never had sexual intercourse. It was her evidence that she made this quite plain to the respondent by also telling him that she had 'never been penetrated'.

9. Having concluded his history-taking the respondent proceeded to a physical examination of the complainant. There were effectively, three stages to the physical examination. At the first stage of the examination the respondent examined the complainant's arms, neck and axilla area. The respondent asked the complainant to undress for this part of the examination. The examination also extended to each quadrant and tail of the complainant's breasts, apparently to examine for any abnormal pathology, or signs of infection or cancer.

10. The respondent then examined the complainant's groin area. It was common ground that the respondent asked the complainant if she wished to have a chaperone present for this examination, but she said that was not necessary. The respondent asked the complainant to remove her pants but not her underwear. The respondent proceeded to palpate the groin/lower abdominal region of the patient to ascertain whether the lymph-nodes in her groin were enlarged. The respondent detected enlarged and tender multiple lymph-nodes on both sides of the complainant's groin.

11. It was the complainant's evidence that the respondent then looked at her vagina and felt between her legs. The complainant alleged that the respondent moved her underpants to one side and inserted his finger into her vagina without warning her that he intended to do an internal examination. The complainant further asserted that the respondent told her that he could not see any genital warts.

12. It was the respondent's evidence that during this stage of the examination he did not touch or insert his finger into the complainant's vagina. He denied that he would have stated at this point that he did not see any genital warts as he did not undertake any inspection of the complainant's genital area until later in the examination.

13. The respondent then told the complainant that it was necessary to perform a pelvic examination. The respondent stated that, because he believed that the complainant was sexually active, such examination was necessary to examine her for any STDs or cancer. The respondent asked the complainant whether she had had such an examination before, and she told him that she had not. The complainant told the Tribunal that she was not asked whether she wished to have a PAP smear done but that the respondent simply told her that he would get the nurse to take a smear also. The respondent gave evidence that

he explained to the complainant that the examination would involve a digital internal examination as well as taking a smear. It was the respondent's evidence that he did not detect any concern on the complainant's part about his carrying out such an examination and, if he had done so, he would not have proceeded without further explaining or clarifying what was involved.

14. At this point the respondent left the consultation room and asked a nurse to attend the examination as a chaperone and to assist him. The respondent returned to the consultation room and waited for the nurse to attend. When the nurse arrived she asked the complainant to remove her shoes, trousers and underpants. The complainant lay on the examination table and the nurse placed a blanket over her. This stage of the consultation was referred to at the hearing as 'the second stage' of the examination. The nurse provided the respondent with a medium sized speculum and lubricating jelly. However the respondent had some difficulty inserting the speculum and asked the nurse to get a smaller one. The nurse left the consultation room and returned with a smaller speculum. The respondent prepared it with lubrication and again encountered difficulty inserting it into the complainant's vagina.

15. At this point the respondent again asked the complainant whether she had had sex before and to which she responded that she had not. It was the respondent's evidence that, as he thought that the complainant had previously indicated she was sexually active, this information confused him. He then asked the complainant whether she was a virgin and she said that she was.

16. The complainant stated that the respondent said that it was unusual that she was a virgin and sounded amused when he made this statement. The complainant also gave evidence that she felt that this comment was a "put down", and was derisory of her life choices.

17. At this point the respondent then took two "blind" swabs by taking vaginal wall swabs. The respondent took one swab for cylamydia and the other as a general swab. It was the respondent's evidence that he realised that the prospects of obtaining a successful/adequate swab would be hugely reduced without the use of a speculum but that

he thought it was better than nothing. The respondent handed the swabs to the nurse who packaged them and left the consultation room.

18. It was the respondent's evidence that, while writing his findings and labelling the swabs, the complainant spontaneously volunteered the information that while she had not had sexual intercourse, she had slept with her boyfriend and that she had had some penile contact short of penetration. The respondent said that, as a result of this information, it was necessary for him to complete the pelvic/internal examination that he had abandoned after the unsuccessful attempt to carry out a speculum examination. That is, it was necessary to perform a vaginal examination and a bi-manual palpation for the purposes of excluding an STD as the cause of the lymphadenopathy.

19. This evidence was disputed by the complainant. She said that she did not volunteer this information but that while she was putting her clothes back on after 'the second stage' of the examination she was interrupted by the respondent and asked to remove her jeans and get back onto the examination table.

20. The respondent told the Tribunal that he told the complainant that he was going to get the nurse to return to the consultation room but that she said it was not necessary. It was the respondent's belief that the complainant did not consent to the presence of the nurse for this stage of the examination. The respondent said that he thought that perhaps the complainant would have been embarrassed to have the nurse return given that she had told them both that she was a virgin during the speculum examination.

21. It was also alleged that the respondent failed to wear gloves for the internal examination. The respondent denied this allegation. The complainant also alleged that while he was examining her the respondent rubbed her clitoris in a way that felt like he was trying to arouse her. This allegation was denied by the respondent although he did accept that because of the way in which he carried out the examination it was possible that he may have touched the complainant's clitoris inadvertently.

22. It was the complainant's evidence that she felt very uncomfortable throughout this 'third stage' of the physical examination. She asked the respondent if he had found anything, to

which he responded "no". She asked again and asserted that the respondent replied that her clitoris was fine. The respondent denied that he would have said that her clitoris was fine although he may well have used the word "fine" when indicating that everything was alright. The respondent did not detect anything unusual or untoward during this examination and, at the conclusion of his examination, the respondent said that he removed the glove he had been wearing on his right hand only at that stage of the examination and proceeded to wash his hands.

23. The complainant then put her jeans and underpants back on and sat on a chair by the respondent's desk. It was the respondent's evidence that he then discussed his findings from the consultation with the respondent. He stated that he told the complainant that he had not detected anything sinister but that he may need to do further blood tests and/or a biopsy from the nodes. He did not have a firm diagnosis to explain her condition, particularly the enlarged lymph-nodes. He said that he had told the complainant that he still suspected the risk of an STD and advised her that she should not have sexual contact with her boyfriend until the results were known. Most of this evidence was contested.

24. The record made by the respondent at the time records:

"SUBJECTIVE

"c/o"
"lump **Ò***groin"*
"tender multiple"

OBJECTIVE

" - been feeling tender under both axilla"
"o/E Apyrexia Axillary LN - not palpable"
"bilateral tender LN groins"
"high vag. swabs for chlamydia & m/c/s"
"PV°tender CX No FAX of CX Ca"
"°discharge speculum not done as in the presence of PN - virgin"

PLAN

"Advice - Reassurance Explanation swab ®lab"
"Flucloxacillin 250 mg gid 5/7"

"Compocillin 250 mg gid 5/7"
"F/U 6/7 clinic""

25. The respondent apparently told the complainant that he wanted her to come back to see him again in five days' time, and that he wished to see her himself in order to achieve some continuity of follow-up and to avoid her having to see a new doctor. The clinic's Medical Director at the time gave evidence that encouraging patients to see the same doctor was good medical practice and something that was encouraged at the clinic, although the preferred practice was to send the patient back to see their own GP rather than to return to the clinic.

26. The respondent prescribed two antibiotics – flucloxacillin (250mg 4 times per day for 5 days) and compocillin (250mg 4 times per day for 5 days). The respondent stated that he prescribed these two antibiotics in order to give a wide range of coverage for the bacteria which he thought might be causing the infection and the reaction in the complainant's lymph-nodes.

27. The respondent then escorted the complainant out of the consultation room and returned to work with other patients. The complainant met her father in the waiting room and went to the pharmacy within the same complex to fill her prescription. The complainant became tearful at this point and left her father in the pharmacy to wait in the car. On the drive back to their house the complainant told her father that she did not like the way the respondent had touched her during her examination.

28. On the return to her home the complainant became very upset and explained to her mother what had happened. It was the complainant's mother's evidence that the complainant was extremely distressed and upset.

29. The complainant's father telephoned the police and ultimately the respondent was charged with sexual violation and indecent assault. He was acquitted of all charges after a High Court trial.

30. To complete the chronological evidence for the purposes of this charge, the complainant's father also laid a complaint with the clinic's owner the day after the consultation. The respondent was advised of this complaint in a telephone call from one of the administration personnel from the clinic's central office. He was told that there had been a complaint made to the police regarding an inappropriate genital examination on a female patient seen at the clinic the day before. He was not provided with the details of the complaint, except that it was a sexual harassment complaint.

31. The respondent stated that he was completely surprised and astonished that there had been a complaint. He received the telephone call at his home and immediately told his wife of the complaint. He said that he was puzzled and upset that a complaint had been made. He was not told the identity of the complainant.

32. Later that afternoon the respondent returned to work and endeavoured to find out from the computer what patients he had seen the day before. Having ascertained the identity of the complainant he spoke to the nurse who had attended at the examination and told her that he had been subject to a complaint. He asked her whether she thought he had done anything wrong and/or whether she thought the examination had been properly conducted. The nurse indicated that she did not think anything untoward had occurred. He then asked the nurse if she could find the patient's notes but they were unable to locate them. The respondent later ascertained that the clinic's administrators had uplifted the complainant's file on receipt of the complaint.

33. On 11 September 1998 the respondent spoke with the clinic's medical director who advised him to obtain legal advice. He also told the respondent not to discuss the matter with others in the meantime.

34. On the evening of 11 September 1998 the respondent's wife went to the complainant's house in xx and tried to speak to the complainant. She was not at home at the time and the respondent's wife spoke to the complainant's mother.

35. Both of the respondent and his wife gave evidence that the respondent did not know that she was going to visit the complainant's residence. It was the respondent's wife's

evidence that once she was told who the complainant was she obtained her address from the telephone book. It was her evidence that she did not see the complainant's medical notes at any time. The respondent asserted that he was not aware of his wife's visit to the complainant's home until he was contacted by the police.

Evidence for the Complaints Assessment Committee

36. Evidence for the Committee was given by the complainant; the complainant's father; the complainant's mother; the nurse in attendance during the 9 September 1998 consultation; Associate Professor Bruce Arroll from the Department of General Practices and Primary Healthcare, Auckland University Medical School and part-time GP; and Professor IRN McCormick, also a Professor at the Auckland University Medical School.

Evidence for the respondent

37. Evidence for the respondent was given by the respondent and his wife; Dr B, a registered medical practitioner of xx; Mrs C, registered nurse of xx, and Dr D, a registered medical practitioner, of xx.

The Law

38. The respondent was charged with disgraceful conduct in a professional respect, the most serious of the range of professional disciplinary findings available to the Tribunal. In Decision number 139/00/62D, this Tribunal considered whether or not certain conduct may be characterised as "disgraceful" in the context of the 1995 Act.

39. The Tribunal's decision in relation to that issue in that case was subsequently upheld on appeal (*Parry v Medical Practitioners Disciplinary Tribunal* NP4412/00, DC Auckland, 30/5/01 Judge Hubble) and in the High Court. However, the decision in the *Parry* case involved conduct occurring in the context of the practitioner's clinical management of his patient's care and treatment **only**. There was no suggestion of any professional impropriety and that case therefore involved very different considerations to those present in this case.

40. The Tribunal therefore approached its consideration of the legal issues present in this case by reference to those cases involving sexual misconduct referred to in submissions by the CAC and the respondent's counsel, Mr Waalkens. The decision of *Brake v Preliminary Proceedings Committee* [1997] 1 NZLR 71 is relevant; in that case, the High Court (Tompkins, Cartwright and Williams JJ) held that:

> *"The test for "disgraceful conduct in a professional respect" was said by the Court of Appeal in* ***Allinson v General Council of Medical Education and Registration*** *[1894] 1 QB 750, 763 to be met:*
>
> > *"If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency…".*
>
> *It is apparent from this test, and from the later cases in which it has been adopted, that it is an objective test to be judged by the standards of the profession at the relevant time.*
>
> *Mr Vickerman referred to the decision of the Privy Council in* ***Felix v General Dental Council*** *[1960] AC 704. The council was concerned with a charge of infamous conduct in a professional respect. It said that to constitute infamous conduct there must be some "element of moral turpitude of fraud or dishonesty" in the conduct complained of. Mr Vickerman submitted that the test for "disgraceful conduct" should be the same and that moral turpitude, fraud or dishonesty must be proved.*
>
> *We do not accept that submission. In* ***Doughty v General Dental Council*** *[1987] 2 ALL ER 843 at p 847, the Privy Council adopted the following passage from the judgment of Scrutton LJ in R v General Council of Medical Education and Registration of the United Kingdom [1930] 1 KB 562 at p 569:*
>
> > *"It is a great pity that the word 'infamous' is used to describe the conduct of a medical practitioner who advertises. As in the case of the Bar so in the medical profession advertising is serious misconduct in a professional respect and that is all that is meant by the phrase 'infamous conduct'; it means no more than serious misconduct judged according to the rules written or unwritten governing the profession." (Emphasis added)*
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> *In our view the same test should be applied in judging disgraceful conduct. In* ***Doughty*** *the Privy Council pointed out that Lord Jenkins' observation in* ***Felix*** *was in the context of a case in which dishonesty was very much the issue.*

In considering whether conduct falls within that category, regard should be had to the three levels of misconduct referred to in the Act, namely disgraceful conduct in a professional respect, s58(1)(b); professional misconduct, s43(2); and unbecoming conduct, s42B(2). Obviously, for conduct to be disgraceful, it must be considered significantly more culpable than professional misconduct, that is, conduct that would reasonably be regarded by a practitioner's colleagues as constituting unprofessional conduct, or as it was put in Pillai v Messiter (No 2) (1989) 16 NSWLR 197, 2000, a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner."

41. That passage setting out the test for disgraceful conduct has subsequently been adopted by this Tribunal in *White* (1) Decision number 63/98/24C; *White* (2) Decision number 69/98/36C, and in *Parry* (supra).

42. In *Parry*, the appellate Court confirmed that, when determining the appropriate test to apply, it is important to bear in mind that one of the main purposes of the Act (in fact the principal purpose – s.3) is to protect the health and safety of members of the public.

43. That principal purpose of the Act is of course consistent with the underlying purpose of the Medical Council's policy on sexual abuse in the context of the professional relationship. As was said in *Brake*, the medical profession has long recognised that the doctor/patient relationship is intended for the benefit of the patient. The proper conduct of the doctor/patient relationship requires the doctor to ensure that every interaction with a patient is conducted in a sensitive and appropriate manner, with full information and consent. The profession and the community properly expect total integrity on the part of doctors. All forms of sexual abuse in the doctor/patient relationship are regarded as disgraceful conduct with severe consequences for the doctor.

44. Clause 14(1) of the First Schedule to the Act provides that the Tribunal may, at any time during the hearing of the charge, amend the charge in any way.

The standard of proof

45. The standard of proof in professional 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 then the standard of proof may vary within a single case, particularly in a case such as this where the practitioner is defending a charge brought at the most serious level of professional disciplinary offences and where the credibility of the principle witnesses is an issue and much of the evidence is contested.

46. 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] 4NZLR 369, 375, 376.

47. This so called "sliding scale of probability" has recently been confirmed by the District Court in *Chan v The Complaints Assessment Committee* (MP 1638/01, DC Auckland, 8/8/01, Judge Doogue) a case on appeal from this Tribunal.

The burden of proof

48. The burden of proof is borne by the Complaints Assessment Committee.

The Decision

49. For the reasons given in this decision, the Tribunal has determined that Particulars 1, 3 and 4 of the charge are not established. However, Particular 2 is established and the Tribunal has determined that the respondent is guilty of conduct unbecoming and that reflects adversely on his fitness to practise medicine.

Reasons for Decision

Particular 1: [The respondent] failed to provide any explanation to [the complainant] as to why he performed a number of internal examinations on her and failed to take account of and be sensitive to the distress that such examinations were causing her.

50. The focus of the CAC's case was the alleged 'prurience' of the respondent's conduct. In large part, it appeared to the Tribunal that the CAC's case was a re-run of the criminal charges laid against the respondent. This was notwithstanding that it was also the CAC's case that the criminal proceedings were irrelevant other than by way of background. The Tribunal was not given a copy of the transcript of the High Court trial. However, both counsel quoted from the transcript on several occasions, and referred to evidence given by

the witnesses in that context. It was apparently also the case that the statements of evidence of the witnesses were the same as those prepared for the High Court trial.

51. However, the focus of the professional disciplinary jurisdiction is quite different to the criminal law, and quite specific. This Tribunal's task is to determine whether or not the respondent appropriately discharged his professional obligations owed to the complainant. In that context, the Tribunal's task is to consider both the respondent's professional conduct towards the respondent and the respondent's intention or motive. The latter being relevant to the extent that it is evidence of, or discloses, abuse of his professional status; a failure to meet accepted standards, and/or is unsafe.

52. For example, although it was not referred to by either counsel, the Medical Council's Statement to the Profession on Sexual Abuse in the Professional Relationship is relevant in the context of this charge. The Council's Statement fairly gives notice to the profession as to what constitutes acceptable professional conduct, the nature of the relevant obligations a practitioner owes his or her patients and the standards against which allegations such as those made against the respondent will be measured.

53. Having carefully observed both the complainant and the respondent giving their evidence, and being cross-examined, the Tribunal is satisfied that the complainant's distress was caused both by the fact of the examination, and the nature of it. However, while the Tribunal is satisfied that the examination(s) were inappropriate and medically unjustified, it is not satisfied, to the requisite standard of proof, that the respondent's motives and intent were improper or salacious.

54. In the course of the hearing, one of the witnesses described the circumstances of the complainant's examination as a situation *"ripe for misunderstanding"*. The Tribunal agrees with that assessment and considers that the respondent's proceeding with the examinations, given the circumstances and complainant's presenting symptoms, was foolhardy and insensitive.

55. However, the Tribunal is required to determined the charge against the respondent according to its terms (ie the Particulars) notified to him. In determining the charge, the

Tribunal is required to observe the principles of natural justice, which principles include the practitioner's right to be given notice of the charge and the allegations made against him and, while the Tribunal has the power to amend a charge in the course of the hearing, it appeared to the Tribunal that the Particulars of the charge fairly and accurately reflected the substance of the CAC's case, and the nature of the complainant's original complaint.

56. Accordingly, in determining this charge, the Tribunal has been especially careful to weigh the evidence in the context of the charge as particularised, bearing in mind both the gravity of the charge (disgraceful conduct) and the requisite standard of proof.

57. On that basis, the Tribunal is satisfied that, while the respondent's explanation to the complainant as to why he was performing the examinations which he did may have left much to be desired in the circumstances, it is not satisfied that the respondent failed to provide *"an explanation"* to the complainant, to the requisite standard of proof.

58. Similarly, the Tribunal is satisfied that the evidence given by both the complainant and the respondent is consistent in so far as the complainant did not disclose the distress that was caused to her by the examination in the course of the consultation.

59. The Tribunal is satisfied that the complainant was very distressed by the examinations; that her distress was genuine, and that she made her distress known to her parents immediately afterwards. The Tribunal also accepts the evidence of the nurse who was present during the unsuccessful speculum examination that the complainant was possibly the most apprehensive patient she had ever seen, but that, at the time, even she appears to have interpreted the complainant's demeanour as understandable in the circumstances.

60. The nurse, who is very experienced, gave evidence of ensuring that the blinds on the windows of the consultation room were closed and of assisting the complainant to undress and providing her with a blanket to cover herself on the examination table. All of that suggests that the nurse was appropriately concerned for the complainant's comfort and wellbeing and, if she had detected distress, or that the complainant was upset about the examination, then she would have taken appropriate action.

61. The complainant also said that she did not portray her distress to the respondent; she did not refuse or indicate any objection to the examinations at the time, nor did she attempt to leave, or ask to see another doctor. The complainant cannot be criticised in any way for the way in which she conducted herself in the course of the consultation, and whether or not a practitioner's conduct toward his or her patients is subsequently found to have been improper should not depend upon whether or not the patient raised any objection at the time.

62. However, the Tribunal has come to the view that it cannot find the respondent guilty of "*failing to take account of and be sensitive to the distress that the examinations caused the complainant*" in the circumstances as these were described to the Tribunal. He cannot be found guilty of failing to take account of and be sensitive to distress that does not appear to have been disclosed to him.

63. The Tribunal therefore concluded that Particular 1 was not established on the basis of the evidence presented to it.

Particular 2: [The respondent] performed a final internal examination which was unnecessary and for which there was no reasonable medical justification.

64. The Tribunal was satisfied that while virtually all of the examinations conducted by the respondent, including the breast examination, the failed speculum examination and the 'final internal examination' were clinically unwarranted on the basis of the complainant's presenting symptoms and the circumstances of the consultation, the final internal examination was certainly unnecessary and there was no reasonable medical justification for undertaking that examination.

65. By the time the respondent performed the final internal examination, he had examined the complainant's neck, axilla, groin and he had undertaken a failed speculum examination, and taken vaginal swabs. Whilst the Tribunal is satisfied, on the balance of probabilities, that the respondent believed the final examination was necessary and clinically justified, it is equally satisfied that it was not. However, the Tribunal is also of the view that the

respondent's conduct in carrying out the final internal examination is conduct that reflects a lack of confidence and/or competence on the part of the respondent, rather than sexual or moral impropriety. It was not conduct which was proven to have been "prurient".

66. The Tribunal is also of the view that there may be significant issues arising from cultural differences underlying what happened in the consultation giving rise to the charge, such differences arising as a result of the respondent's own background and experience.

67. Notwithstanding that the respondent is xx-trained and a xx graduate, his experience in the xx prior to moving first to xx, and subsequently to New Zealand, was relatively limited and his experience in the New Zealand context even more so. It appears to the Tribunal that the respondent made a number of flawed assumptions and formed seriously mistaken conclusions, whether as a result of clinical or cultural misunderstanding or a lack of medical knowledge. These were made early in the consultation and their effect was cumulative; the consultation went 'off the rails' from the outset.

68. It is the Tribunal's view that while the respondent has been through the general practice vocational training programme, has passed the primary membership examinations (NZREX) and is about to complete the advanced vocational training of the Royal New Zealand College of Practitioners, there is a gap between his theoretical knowledge and his practical experience or, at the very least, between his theoretical or 'academic' knowledge and his ability to practically and sensibly apply his knowledge.

69. In this case, it appears to the Tribunal that the respondent failed to apply his theoretical knowledge appropriately in the context of a busy A & M clinic, and in respect of a patient with a relatively straightforward clinical presentation and with whom he had no prior therapeutic relationship.

70. Further, in completing the Patient Details form, the complainant advised the clinic that she had a general practitioner, and that her general practitioner was to be notified of her visit to the A & M clinic, and the results of the consultation. Whilst the respondent may have been being thorough, and was concerned because he could not find a cause for the complainant's adenopathy, there was virtually nothing in his examination of the patient that

he could not have referred her to her own GP for checking and/or examination. In the circumstances of this consultation, there was simply no urgency, and therefore no clinical or practical necessity, for the breast examination, the failed speculum examination or the final internal examination which the respondent undertook.

71. By the time of the 'third stage' of the examination, the respondent had already thoroughly examined the complainant and, if he was concerned about the possibility of an STD, he could have pursued that inquiry without conducting another internal examination. For example by asking the complainant about any discharge, lesions or pain or if her partner had any symptoms or illness. In the absence of any positive responses to such further inquiries, the complainant could have been referred to her own GP for any further examinations which the respondent considered were necessary.

72. Given the clinic's practice of preferring patients to return to their own GPs for follow up visits, that made referral back to her own GP for any further examination the most obvious option for the respondent.

73. This is also especially the case given that the STDs which the respondent was examining for were rare and unlikely, particularly given the complainant's clinical presentation.

74. In all the circumstances therefore the Tribunal is satisfied that Particular 2 is established.

Particular 3: [The respondent] performed the final internal examination in such a way that his patient's clitoris was stimulated for which there was no medical justification.

75. In relation to Particular 3, the Tribunal's finding reflects its overall finding that the respondent's examinations of the complainant were not conducted for sexual gratification, or were prurient, but rather reflected the respondent's 'textbook' approach to the complainant's presenting symptoms.

76. It appears to the Tribunal that the respondent did not sift the presenting symptoms and the information given to him in the course of his history taking, or give any real consideration to what was reasonable in the circumstances and in the New Zealand situation generally. Rather, the respondent got 'hung up' on searching for a diagnosis, but without any real

differential diagnosis formulated prior to commencing his physical examination of his patient.

77. The Tribunal is satisfied that, given the respondent's explanation and demonstration as to how he went about conducting the final internal examination, and similar evidence given by the expert witnesses (both for the CAC and the respondent) the Tribunal is satisfied that any touching of the clitoris in the course of the final internal examination was inadvertent, albeit the respondent may have touched the complainant's clitoris a number of times and in such a way that she felt uncomfortable with, and became distressed by.

78. The Tribunal records that both the nature of, and rationale for, the final examination causes it to have some concerns about this particular practitioner. However, given its overall findings in relation to the respondent's motives, and the very high standard of proof which the CAC must satisfy in relation to such serious allegations, the Tribunal is fairly required to resolve any doubts it may have in favour of the respondent.

79. Accordingly, the Tribunal has determined that there was no deliberate or salacious intent on the part of the respondent to stimulate the complainant's clitoris and therefore Particular 3 is not established.

Particular 4: [The respondent] subsequently allowed the complainant's private medical records to be faxed to him at his home and failed to ensure the confidentiality of those notes.

(This particular was amended at the commencement of the hearing to delete the allegation that the respondent allowed the complainant's medical records to be faxed to him at his home, and the hearing proceeded on the basis of the allegation that the respondent ***"failed to ensure the confidentiality of patient details including the complainant's name and address"***.)

80. This Particular related to the disclosure of the patient's name by the respondent to his wife who was subsequently able to ascertain her address.

81. It was the respondent's evidence that his wife was present with him at his home when he received the telephoned call from the clinic's administrator to advise him that a complaint had been made against him. At that stage, he was unaware of the complainant's identity.

82. The Tribunal accepts Mr Waalkens' submission that any person in the respondent's position (particularly someone who believes they are innocent of the allegations) would tell his or her spouse about the complaint. This would particularly be the case if the person was shocked or surprised at being told about such a complaint.

83. The Tribunal is therefore not critical of the respondent in this regard. Having relayed that information to his wife at the time, it is equally understandable, having ascertained which patient it was who made the complaint, he might also discuss that with his wife. The Tribunal is satisfied that the respondent's disclosure of the patient's identity did not go beyond either his wife, or the clinic staff. In any event, once the complaint became known and the respondent was asked to take leave of absence from the clinic, it would seem to be a matter of practical reality that knowledge of the complaint, and the identity of the complainant, would be relatively common knowledge among the clinic staff.

84. The respondent's wife was equally adamant that she ascertained the complainant's address from the telephone book, and she went to visit the complainant's home hoping to persuade the complainant of her husband's innocence without telling her husband either that she had ascertained the complainant's address or of her intention to visit her.

85. That evidence was not shaken on cross-examination. The complainant's mother gave evidence of being initially fearful at the arrival of a car in the driveway of their home after dark and on a very 'wild night'. However, she answered the door and told the respondent's wife that the complainant was not at home and, while she was persistent and initially did not believe that the complainant was not in the house, the complainant's mother did not feel threatened, nor was the respondent's wife abusive or rude.

86. There was no other evidence as to any disclosure of the complainant's personal details by the respondent to any person other than his wife and the clinic staff. Therefore, the Tribunal is satisfied that the respondent's disclosures were limited and they did not cause

the complainant any particular prejudice or harm. On that basis, while the Particular is established in a very narrow way, the Tribunal has determined that it does not warrant the sanction of an adverse finding in relation to this aspect of the charge.

Conclusions

87. On the basis of the findings outlined above, the Tribunal is satisfied that the respondent's conduct in the circumstances of the complainant's consultation is conduct that warrants sanction. The Tribunal is satisfied that the respondent's history-taking, information and explanation given to the complainant appears to have been hopelessly inadequate and, for that reason, exacerbated the potential for misunderstanding and confusion.

88. However, the complainant conceded, in relation to the failed speculum examination, that she did not recall what she was told about the examination. She thought she recalled the nurse explaining the speculum and that it was going to be inserted in her vagina, or words to that effect, but could not recall what was explained to her, or indeed even if anything was explained to her.

89. It is equally the case that there is a substantial body of research to the effect that patients recall very little information that is given to them particularly in circumstances where they may be shocked, ill and/or distressed. The complainant gave evidence that when the respondent told her that he was examining her for cancer, and then for a sexually transmitted disease, she was shocked and heard very little else that he said to her.

90. That is entirely an understandable reaction and one which a confident and competent practitioner should be aware of and be careful to take into account. The research that is available in this regard was referred to in evidence from all of the expert witnesses, in particular the CAC's experts both accepted that it is well-established that patients invariably have a very poor recall, especially in circumstances of stress and anxiety, and that errors in communication are known to occur without any fault or error on the part of the doctor. Professor McCormick told the Tribunal that studies showed patients commonly only recall three things that they are told in the course of a consultation.

91. The respondent's record of the consultation is also inadequate. As has been said on previous occasions in this Tribunal, poor record keeping on the part of the practitioner puts the practitioner at risk of an adverse finding. This is especially the case when credibility is an issue and there is conflicting evidence as to who said what and when, and the sequence of events.

92. In the context of this hearing, the Tribunal considers that the record of the consultation made by the respondent was unhelpful and inadequate.

93. In all the circumstances, and on the basis of all of the evidence presented to it, and counsel's very helpful and comprehensive submissions, the Tribunal is satisfied that notwithstanding it has found only one Particular of the charge is established, the respondent's conduct towards the complainant did fall short of accepted standards and warrants the sanction of an adverse finding against him.

94. However, the Tribunal is also satisfied that its findings in relation to Particular 2 are not sufficient to justify a finding at the level of disgraceful conduct. The Tribunal considered the level of the charge at length.

95. In determining the degree to which the Tribunal considered the respondent had 'fallen short' of acceptable standards, the Tribunal took into account the tests both for professional misconduct and conduct unbecoming that reflects adversely on the practitioner's fitness to practise medicine: as stated in *Ongley v Medical Practitioners Disciplinary Committee* [1984] 4NZAR 369; *Lake v The Medical Council of New Zealand* (High Court, Auckland Registry, 123/96, Judgment 23 January 1998) and *B v Medical Council* (High Court, Auckland, 11/1996, 8 July 1996) and *Complaints Assessment Committee v Mantell* (7 May 1999, Auckland District Court NP 4533/98), respectively.

96. Ultimately, the Tribunal came to the conclusion that, given its finding as to the absence of any sexual misconduct or prurient intent, and because only one of the four particulars of the charge was established, the respondent is guilty of conduct unbecoming and that reflects adversely on his fitness to practise.

97. Taking all of these factors into account, the Tribunal records that it considers that the respondent's conduct falls on the 'borderline' of professional misconduct and conduct unbecoming that reflects adversely on his fitness to practise medicine.

98. The Tribunal also records that, in this present case, it considers that the so called 'rider' to the charge is particularly applicable.

99. The Tribunal's decision is unanimous.

Orders

100. The Tribunal orders as follows:

(1) the charge laid against Dr A is established and he is guilty of conduct unbecoming and that reflects adversely on his fitness to practise medicine;

(2) the CAC is to lodge submissions as to penalty not later than 10 working days after the receipt of this decision;

(3) submissions as to penalty on behalf of the respondent are to lodged not later than 10 working days thereafter.

101. The Tribunal has made interim orders prohibiting publication of the respondent's name, the name of the complainant and the names of all witnesses other than those giving expert evidence. The Tribunal asks that counsel include in their submissions on penalty, submissions as to whether or not these orders should be made permanent.

DATED at Wellington this 10th day of December 2001

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W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal