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

DECISION NO: 197/01/85D

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by the Director of Proceedings pursuant to Section 102 of the Act against **ANDREW JOHN LOGAN** medical practitioner of Wellington

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chair)

Dr I D S Civil, Dr A R G Humphrey, Associate Professor Dame N Restieaux, Mr G Searancke (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Wellington on Monday 25 March 2002

APPEARANCES: Ms M McDowell, the Director of Proceedings

Mr C W James for Dr A J Logan.

The Charge

1. Pursuant to sections 102 and 109 of the Medical Practitioners Act 1995 ("the Act"), the Director of Proceedings (the "Director") charged that between 30 October 1996 and 30 April 1997 whilst treating his patient, Kim Herbison, Dr Logan failed to adequately inform her about the risks involved in the LASIK procedure he was to undertake and failed to obtain her informed consent prior to carrying out the procedure on her right eye and subsequently her left eye.

2. The particulars of the charge alleged:

*"1.1 **[That Dr Logan]** undertook Laser Assisted In Situ Keratomileusis (LASIK) surgery on both eyes of your said patient without obtaining her informed consent in that **[he]**:*

(a) failed to inform Kim Herbison that the degree of hypermetropia in her eyes was in excess of what was normally accepted as safe for LASIK surgery; and/or

(b) failed to adequately inform Kim Herbison of risks associated with LASIK surgery of hypermetropia in excess of four to five diopetres.

AND/OR

1.2 Inappropriately performed LASIK surgery on Kim Herbison's left eye having been informed by her that her vision following surgery to her right eye was fluctuating."

3. The charge further alleged that the "conduct alleged in particulars 1.1 and 1.2 separately or cumulatively amounts to professional misconduct."

4. At the commencement of the hearing, the Director indicated that, as a result of discussions with counsel for Dr Logan, the Director had agreed that the charge against Dr Logan could appropriately be dealt with at a level of conduct unbecoming a medical practitioner. The Director accordingly sought leave to amend the charge.

5. An amended notice of charge was filed with the Tribunal reflecting the change.

6. The amended charge (and all its particulars) were admitted by Dr Logan and the hearing proceeded on the basis of an agreed statement of facts.

7. Section 109 of the Act provides the Tribunal may make any one or more of the orders authorised by section 110 if the Tribunal, after conducting a hearing, is satisfied that the practitioner has committed one of the acts set out in paragraphs (a) to (g) of Section 109(1). Having heard submissions from both counsel and taking into account Dr Logan's admissions the Tribunal is satisfied that Dr Logan is guilty of conduct unbecoming a medical practitioner and that that conduct reflects adversely on the practitioner's fitness to practise medicine.

The Facts

8. In October 1996 Mrs Herbison was referred by her local ophthalmologist, Dr Loughlin, to Dr Logan in order to see if she would be a suitable candidate for LASIK surgery. This procedure (Laser In Situ Keratomileusis) involves the use of an excimer laser to reshape the middle of the cornea. Mrs Herbison had had hyperopia (long-sightedness) since she was born. She had used contact lenses since the age of 12. At the time, Mrs Herbison was a self-employed orchardist.

9. When Mrs Herbison phoned Dr Logan's surgery in November 1996 to make an appointment she was told by a staff member that she would not need an appointment prior to the surgery. She was advised to stop wearing hard contact lenses for six weeks prior to the surgery and was given an appointment time of 9.30am on 12 March 1997.

10. In either November or December 1996 Mrs Herbison received a two-page document from Dr Logan's surgery setting out pre-operative and post-operative instructions for the surgery. The document does not purport to set out any complications or risks associated with the proposed surgery.

11. Mrs Herbison telephoned Dr Logan's surgery three times in January in order to discuss the proposed surgery with Dr Logan. She was unable to contact Dr Logan directly and on each occasion she spoke with a staff member.

12. Mrs Herbison was accompanied by her parents to Wellington for the appointment on 12 March 1997. A nurse performed a topography examination on both eyes. The refraction readings were:

    right eye +9.75 (spherical) –1.50 (cylindrical) at 3 degrees;
    left eye +8.75 (spherical) -1.00 (cylindrical) at 179 degrees.

13. Dr Logan then called Mrs Herbison into his surgery for a pre-surgery examination, including a corneal, lens and retinal examination to exclude pathology. He also undertook a refraction to determine that the refraction agreed with the referring doctor's measurements. There was some discussion regarding a pterygium (a growth on the cornea) on Mrs Herbison's right eye.

14. Dr Logan told Mrs Herbison that after the treatment her sight might be slightly under or over-corrected and that she may need glasses for reading. Finally, Dr Logan told Mrs Herbison that the long-term effects of the procedure were unknown. Dr Logan then asked Mrs Herbison if she had any questions, and she told him that she did not know what questions to ask.

15. Dr Logan and Mrs Herbison then went back to reception where there was a consent form on the counter for Mrs Herbison to sign. Mrs Herbison told Dr Logan that she had not seen the form before. Although the clinic's standard procedure was to send patients a patient information booklet and introductory letter about laser procedure prior to surgery, a member of staff told her that they had overlooked sending it out to her.

16. Mrs Herbison read through the consent form while standing at the reception desk. While Dr Logan and other staff waited Mrs Herbison signed the form and then went with Dr Logan and the other staff to have the treatment performed.

17. Following surgery Mrs Herbison was troubled with pain, blurry vision and fluctuating vision. She consulted Dr Loughlin on 27 March 1997 regarding her concerns. At that time her vision was blurry in the morning and then improved a little during the day but she could still not read or see clearly.

18. On 2 April 1997, notwithstanding Mrs Herbison's concerns, Dr Loughlin wrote to Dr Logan saying, "… she is very happy with the result to date…".

19. Mrs Herbison remained concerned about her vision and telephoned Dr Logan's surgery twice on 14 March 1997 and again on 24 March, 25 March and 27 March 1997. On each occasion she spoke with a staff member.

20. On 8 April 1997 Mrs Herbison went to Dr Logan's surgery for the performance of LASIK on her left eye. At that time Mrs Herbison reminded Dr Logan that her right eye was not settled and that she was having difficulties with vision.

21. Dr Logan tested Mrs Herbison's right eye noting that it was highly myopic. As a result Dr Logan indicated that he would change the treatment he intended for her left eye. Dr Logan told Mrs Herbison that her right eye would settle. The LASIK was then performed on her left eye.

22. On 11 April 1997 Mrs Herbison consulted Dr Loughlin as both of her eyes were very unsettled. Mrs Herbison continued to be troubled by fluctuating vision, blurred vision and pain, visiting her ophthalmologist for further consultations in April, June and July. During these visits it was noted that there was a large change in Mrs Herbison's refraction of her right eye throughout the day.

23. During a visit to Dr Logan on 16 July 1997 he too noted that there was a fluctuation in vision in the right eye between morning and evening.

24. Mrs Herbison consulted Dr Bannister, ophthalmologist in September and October. On 20 October 1997, he reported a 3-dioptre swing in the hypermetropic portion of the correction of the eye. A significant change in the keratometry from morning to evening was also recorded on 11 December 1997.

25. Since that time, the difficulties of vision with Mrs Herbison's vision in her left eye has settled. However, she continues to have trouble with her right eye. As a result of her problems, Mrs Herbison has given up her business as a self-employed orchardist. She found that the impairment of her sight was such that she, for example, did not feel safe with machinery, was not secure when reading strengths of sprays and had difficulty making the necessary distinctions in fruit colour.

26. Dr Logan has since apologised to Mrs Herbison and has refunded her the sum of $1,650.00.

The Law

27. Dr Logan was charged with conduct unbecoming a medical practitioner and that conduct reflects adversely on the practitioner's fitness to practise medicine under section 109(1)(c) of the Act.

28. In *B v The Medical Council of New Zealand* (High Court, Auckland Registry, HC 11/96, 8 July 1996), regarding conduct which constitutes *"conduct unbecoming"* Elias J (as she then was) stated:

> *"There is little authority on what constitutes "conduct unbecoming". The classification requires assessment of degree. But it needs to be recognised that conduct which attracts professional discipline, even at the lower end of the scale, must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes of protecting the public. Such protection is the basis upon which registration under the Act, with its privileges, is available. I accept the submission of Mr Waalkens that a finding of conduct unbecoming is not required in every case where error is shown. To require the wisdom available with hindsight would impose a standard which it is unfair to impose. The question is not whether error was made but whether the practitioner's conduct was an acceptable discharge of his or her professional obligations. The threshold is inevitably one of degree. Negligence may or may not*

(according to degree) be sufficient to constitute professional conduct (sic) or conduct unbecoming:.....The structure of the disciplinary processes set up by the Act, which rely in large part upon judgment by a practitioner's peers, emphasises that the best guide as to what is acceptable professional conduct is the standards applied by competent, ethical, and responsible practitioners. But the inclusion of lay representatives in the disciplinary process and the right of appeal to this court indicates that usual professional practice, while significant, may not always be determinative; the reasonableness of the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only practice but also patient interests and community expectations, including the expectation that professional standards are not to be permitted to lag. The disciplinary process in part is one of setting standards."

29. Decisions since that time have established that it is not sufficient to show that a practitioner has been guilty of conduct unbecoming. It must also be proved that the conduct reflects adversely on the practitioner's fitness to practise medicine, in terms of the "rider" added to the charge of "conduct unbecoming" in the 1995 Act; for example, *CAC v Mantell* (District Court, Auckland, NP 4533/98, 7/5/99).

30. In that case the Court (Judge Doogue) concluded that:

"The section requires assessment of standards of conduct using a yardstick of fitness. It does not call for an assessment of individual practitioner's fitness to practise."

31. The Court also said in the context of section 109(1)(c) of the Act that:

"The test of the rider in my view makes it clear that all that the prosectuion need to establish in a charge of conduct unbecoming is that the conduct reflects adversely on the practitioner's fitness to practise medicine...The focus of the enquiry is whether the conduct is of such a kind that it puts in issue whether or not the practitioner whose conduct it is, is a fit person to practise medicine...The conduct will need to be of a kind that is inconsistent with what might be expected from a practitioner who acts in compliance with the standards normally observed by those who are fit to practise medicine. But not every divergence from recognised standards will reflect adversely on a practitioner's fitness to practise. It is a matter of degree."

32. In *Ongley v Medical Council of New Zealand* [1984] 4 NZAR 369, the High Court (Jefferies J) held that:

"The structure of the disciplinary processes set up by the Act which rely in large part upon the judgement of a practitioner's peers, emphasises that the best guide to what

is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners."

33. As has been stated on previous occasions, the relevant principles which can be distilled from these statements (*Ongley, B v Medical Council*) are:

(a) A finding of professional misconduct or conduct unbecoming is not required in every case where 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 fulfil professional obligations must be *"significant enough"* to attract sanction for the purposes of protecting the public.

The Standard of Proof

34. The standard of proof in disciplinary proceedings is the civil standard, ie the balance of probabilities. All elements of the Charge must be proved to a standard commensurate with the gravity of the facts to be proved: *Ongley*.

The Burden of Proof

35. The burden of proof is borne by the Director.

The Decision

36. Having carefully considered all of the evidence presented to it the Tribunal is satisfied that Dr Logan has been guilty of conduct unbecoming a medical practitioner and that that conduct reflects adversely on the practitioner's fitness to practise medicine.

Reasons for the Decision

37. As to Particular 1.1 the Tribunal is satisfied that it has been proved to the required standard that Dr Logan's admitted failure to inform Mrs Herbison that the degree of hypermetropia in her eyes was in excess of what was normally accepted as safe for LASIK surgery, was an unacceptable discharge of his professional obligations, of sufficient significance to attract sanction for the purpose of protecting the public, and that it constitutes conduct unbecoming a medical practitioner.

38. As to Particular 1.2 the Tribunal is also satisfied that Dr Logan failed to adequately inform Mrs Herbison of the risk associated with LASIK surgery or hypermetropia in excess of 4 to 5 dioptres and that such a failure is of sufficient significance to attract sanction for the purpose of protecting the public, and that it constitutes conduct unbecoming a medical practitioner.

39. Informed consent has been described by the Tribunal in *Stubbs* (Decision No. 99/54C) as "… a cornerstone of the practice of medicine …."

40. Counsel for the Director referred the Tribunal to the Statement for the Medical Profession on Information and Consent published by the Medical Council of New Zealand stating:

> *"the Medical Council of New Zealand takes the view that (except in an emergency or a related circumstance) the proper sharing of information, and the offering of suitable advice to patients, is a mandatory prerequisite to any medical procedure instituted by a medical practitioner."*

41. The fact that Mrs Herbison contacted Dr Logan's surgery several times prior to the procedure being carried out confirms that she did seek information about the procedure. However, she did not receive any information about the risk involved with the procedure prior to the day of the procedure being carried out.

42. Dr Logan accepted that he failed to explain that the procedure was normally carried out on people with myopia and that when LASIK is performed on people with hyperopia, it is usually not performed where the dioptre reading is more than +4. Further, Dr Logan did

not advise Mrs Herbison that he had only performed the procedure on one patient with a high level of hyperopia.

43. While Mrs Herbison saw a consent form while at the surgery, the risks listed on that form related to risks involved with a different laser procedure and refers to myopia, not hyperopia. Additionally, the Tribunal agrees that having the patient read the consent form while the medical staff stood by waiting to perform the procedure did not afford an adequate opportunity for her to raise any concerns or to decide whether or not to proceed to undergo the procedure.

44. In *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 the Court of Appeal held that:

> *"When there is a comprehensive charge as well, the counsel should go on to consider it after determining the separate charges. Having made the findings on the separate charges, they should arrive at a conclusion as to the overall gravity of the conduct of which they have found the practitioner guilty."*

45. In this case the Tribunal has found in the case of both Particulars that it has been proved to the required standard that the conduct alleged therein amounts to conduct unbecoming a medical practitioner.

Mitigating Factors

46. It is necessary to refer to a number of matters which both counsel referred the Tribunal to as mitigating factors.

47. The Director of Proceedings acknowledged that Dr Logan had apologised to Mrs Herbison and refunded her $1,650.00. She also acknowledged that Dr Logan entered a guilty plea at the earliest opportunity, thereby reducing the cost of the proceedings, as well as relieving Mrs Herbison of the necessity to give evidence.

48. Dr Logan has also made significant changes to his practice since the complaint was made. Counsel for Dr Logan indicated that Dr Logan no longer treats hypermetropic patients and

that he has reduced the upper level of short-sightedness that he will treat, significantly below what is now accepted as an upper limit of treatment by other practitioners.

49. The Tribunal also heard from Dr Logan at the hearing and it is satisfied that he regrets the outcome of the surgery and the consequences for Mrs Herbison and that he undertook a careful review of his practice and procedures as a result.

50. Dr Logan also advised that he has presented to his surgical colleagues this case and the lessons he has learned and discussed the issue with the Royal College of Surgeons so that other surgeons can learn from this unfortunate experience.

51. Dr Logan told the Tribunal that he has made significant changes in the process for giving informed consent. For example, he now sees patients on two separate occasions prior to surgery, with time between the visits to allow reflection and consideration by the patient. Office procedures have been altered to ensure that there is no possibility of patients not receiving all of the relevant documents prior to their first consultation.

Censure

52. It is appropriate that Dr Logan should be censured.

Fine

53. Taking into account all of the circumstances described above, and like cases, the Tribunal considers that a fine in the amount of $2,500.00 is fair and reasonable.

Costs

54. Counsel for the Director accepted that the related costs and expenses had been reduced significantly by Dr Logan's admission of the charge. She referred to the following passage in *Cooray v Preliminary Proceedings Committee* (High Court, Wellington Registry, AP 23/94, 14 September 1995) at page 9:

"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken fifty percent of total reasonable costs as a

guide to a reasonable order for costs and has in individual cases where it has considered it as justified gone beyond that figure. In other cases where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment."

55. She submitted that the Director sought costs to be paid for the investigation and prosecution of the charge. She advised that those costs and expenses were of the order of $10,947.52.

56. The Tribunal decided that in the particular circumstances of the case, Dr Logan should pay $4,670.83 being 25% of the costs and expenses of and incidental to the Health and Disability Commissioner's investigation, the prosecution of the charge by the Director of Proceedings and the hearing by the Tribunal.

Orders

57. Accordingly, the Tribunal orders as follows:

(a) that Dr Logan is to be censured;

(b) that Dr Logan is to pay a fine of $2,500;

(c) that Dr Logan pay 25% of the costs and expenses referred to in paragraph 56 above.

(d) that a notice under section 138(2) of the Act be published in the New Zealand Medical Journal.

58. The Tribunal is satisfied that the steps Dr Logan has taken to amend his practice in the (almost) four years it has taken from the time of the events that are the subject matter of the charge and the hearing, appropriately address the various factors giving rise to this charge and therefore no conditions should now be imposed on his practice.

DATED at Wellington this 1st day of May 2002

....

W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal