



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 222/02/97C

IN THE MATTER of the Medical Practitioners Act
1995

-AND-

IN THE MATTER of a charge laid by a Complaints
Assessment Committee against D
medical practitioner of xx

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

Mr A H Waalkens for Dr D.

Introduction

1. A Complaints Assessment Committee has charged Dr D with conduct unbecoming a medical practitioner. That charge has been laid under s.109(1)(c) Medical Practitioners Act 1995. The procedures for serving the notice of charge are set out in sections 102 and 103 of the Act.

The Charge Alleges:

2. The particulars of the charge state:

“The Complaints Assessment Committee pursuant to s.93(1)(b) of the Act charges that Dr D, registered medical practitioner of xx over the period 22 February 1995 and 28 March 1995 in the course of his management and treatment of his patient ...:

1. *Asked questions and made comments of an inappropriate and sexual nature; and*
2. *Performed five internal vaginal examinations in the course of six consultations which was inappropriate and not medically justified; and*
3. *Performed one or more of the internal vaginal examinations in an inappropriate sexual manner; and*
4. *First discussed and then suggested to his patient that he should use on her a ‘perineometer’ which he had made himself which was inappropriate and for which there was no medical justification; and*
5. *When confronted by his patient on or about 28 March 1995 destroyed or sought to destroy her medical notes; ...”*

3. The Tribunal has set aside the 7th and 8th April to hear the charge.

Proposed New Charge

4. On 5 February counsel for the Complaints Assessment Committee (Ms McDonald QC) emailed the Tribunal and counsel for Dr D (Mr Waalkens) with a new notice of charge which the CAC proposed bringing against Dr D. The new notice of charge has not yet been signed by the Convenor of the Complaints Assessment Committee. The significant change between the existing charge and the proposed new charge concerns the category of disciplinary offence levelled against Dr D. The proposed new charge alleges Dr D’s conduct constitutes disgraceful conduct in a professional respect (section 109(1)(a) of the Act).

5. An issue has arisen as to the procedure to be followed in relation to the laying of the proposed new charge. Mr Waalkens insists the Complaints Assessment Committee make application to the Tribunal to amend the charge and that Dr D be given an opportunity to oppose that application.
6. This ruling is confined to the process which is to be followed in relation to the laying of the proposed new charge.

Power to Amend Charges

7. Clause 14(1) of the first schedule to the Act states:

“Power to amend charges – (1) The Tribunal may, at any time during the hearing of any charge laid under s.102 of this Act, amend the charge in any way.” (emphasis added)

8. An issue immediately arises as to whether the hearing of the charge has commenced. The following chronology helps understand the issue:

19 November 2002	Notice of Charge laid with the Tribunal
25 November 2002	Notice of Charge sent to Dr D
11 December 2002	Dr D files name suppression application and supporting affidavit
19 December 2002	Dr D files application protesting the Tribunal's jurisdiction to hear the charge
28 January 2003	Directions Conference held in which: <ul style="list-style-type: none"> (a) the date for hearing the substantive charge was set; (b) Complaints Assessment Committee indicated it may amend the charge; (c) A timetable for dealing with the protest to jurisdiction was set; (d) The parties agreed to Dr D's name suppression application being dealt with on the papers.
4 February 2003	Dr D abandons his protest to jurisdiction
5 February 2003	Complaints Assessment Committee gives notice of proposed new charge

9. There have been a number of cases arising from the District Courts Summary Jurisdiction dealing with that Court's power to amend charges laid under the Summary Proceedings Act 1957 "during the hearing". All the cases have focussed on when a hearing ends (see for example, *Ministry of Transport v Nicol*¹ and the cases cited therein). None of those cases appear to assist in determining when a hearing of a charge commences.
10. The Tribunal is in no doubt that if the hearing of the charge against Dr D has commenced then Dr D should be given a fair and reasonable opportunity to object to the charge being amended.

Tribunal's Power to Regulate its own Procedure

11. The Tribunal proposes to resolve the issue in this matter without determining whether or not there has been a commencement of the hearing of the charge.
12. Clause 5(1)(a) of the first schedule to the Act empowers the Tribunal to regulate "its procedure in such manner as it thinks fit".
13. Whilst there does not appear to be any authority on the point, the Tribunal is satisfied that its "procedures" include the process of amending or substituting a charge prior to the hearing of submissions and evidence.
14. The Tribunal is concerned to ensure Dr D has a fair and reasonable opportunity to oppose the Complaints Assessment Committee's proposed course of action. The proposed amendment could have very serious consequences for Dr D. A charge of disgraceful conduct is the most serious disciplinary offence that can be brought against a doctor in New Zealand. It was observed in *Duncan v Medical Practitioners Disciplinary Committee*² that:

¹ [1980] 1 NZLR 436

² [1986] 1 NZLR 513

*“A charge of disgraceful conduct in a professional respect has been described by the Privy Council as alleging conduct deserving of the most strongest reprobation.”*³

In this case, the Complaints Assessment Committee chose to charge Dr D with “conduct unbecoming a medical practitioner”. Dr D should now have the opportunity to oppose the Complaints Assessment Committee’s intention to alter the charge to “disgraceful conduct”.

Procedure to be followed

15. The Tribunal directs:

15.1 The Complaints Assessment Committee file with the Tribunal, and serve upon Dr D’s counsel an application to amend the charge. That application, and any supporting submissions which the Complaints Assessment Committee may wish to make shall be filed and served by 20 February 2003;

15.2 Any notice of opposition and submissions in opposition should be filed and served by 27 February 2003;

15.3 The Tribunal proposes to deal with the application on the papers. If any party wishes the application to be dealt with by way of oral hearing they are required to give notice of this request, supported by written reasons within 48 hours of the release of these directions.

DATED at Wellington this 10th day of February 2003

.....
 D B Collins QC
 Chair
 Medical Practitioners Disciplinary Tribunal

³ Citing *Felix v General Dental Council* [1960] AC 704; *McEniff v General Dental Council* [1980] 2 All ER 461