# *Medical Practitioners Disciplinary Tribunal*

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**DECISION NO:** 54/98/31C

**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 **DHAMMIKA PRADEEPA DASSANAYAKE** medical practitioner of Christchurch

**BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

**TRIBUNAL:** Mr P J Cartwright (Chair)

Mr P Budden, Associate Professor Dame Norma Restieaux,

Dr A F N Sutherland, Dr L F Wilson (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Christchurch on Monday 28 September 1998

**APPEARANCES:** Mr C J Lange for the Complaints Assessment Committee ("the CAC")

No appearance by or on behalf of Dr Dassanayake

## 1. PARTICULARS OF CHARGE:

"**THE** Complaints Assessment Committee pursuant to section 93(1)(b) of the Medical Practitioners Act 1995 charges that Dr Dhammika Pradeepa Dassanayake Registered Medical Practitioner of Christchurch on or about the 18th day of December 1997 was convicted by the District Court in Christchurch of the following offences as set out in the attached certificate of conviction signed by the Deputy Registrar of the District Court at Christchurch each being an offence punishable by imprisonment for a term of 3 months or longer;

1. Uses a document for Pecuniary Advantage, section 229A(b) Crimes Act 1961 (Counts 1-15).
2. Forgery, section 265 Crimes Act 1961 (Counts 16 & 17)
3. Wilfully attempt to defeat the course of justice, section 117(d) Crimes act 1961 (Count 18)

and the circumstances of the offences reflect adversely on the practitioner's fitness to practice medicine."

## 2. BACKGROUND:

**2.1** **THE** delay in the delivery of this Decision is regretted. The reasons for such delay will become apparent when reading from paragraph 6.17 onwards.

**2.2** **THE** fifteen counts of fraud related to claims which Dr Dassanayake had made for general medical services (GMS) benefits covering a period of about one year from January 1993 to January 1994. Dr Dassanayake submitted claims in relation to services which he had not provided.

**2.3** **THE** forgery and attempting to defeat the course of justice charges arose from what Dr Dassanayake did when aware that his fraudulent GMS claims were subject to official scrutiny. He created false records purporting to confirm the counselling sessions for which he had claimed but which had never taken place. He then submitted these false records to Health Benefits Limited.

**2.4** **IN** the District Court Dr Dassanayake was sentenced to a total of 21 months imprisonment, and ordered to make reparation of $6,000.00. The prison sentence was made up of nine months concurrently on each of the 15 counts of fraud, together with 12 months imprisonment for the forgery and attempting to defeat the course of justice charges, concurrent inter se, but cumulative on the sentence of nine months.

**2.5** **ON** appeal to the Court of Appeal against both conviction and sentence, the conviction aspect subsequently not being pursued, the total sentence of 21 months imprisonment was found to be manifestly excessive. In allowing the appeal the fraud sentences were reduced from nine months imprisonment to six months imprisonment, and the forgery and attempting to defeat the course of justice sentences were reduced from 12 months imprisonment to six months imprisonment. The individual sentences in each group were made concurrent between themselves, but the sentences on the forgery and attempting to defeat the course of justice charges were made

cumulative on those in respect of the fraud charges. The effective result was that the total sentence was reduced from 21 months to 12 months imprisonment. The appeal against conviction, having not been pursued, was dismissed.

## 3. FINDING:

**3.1** **THE** Particulars of the charge laid by the CAC contain two elements. Pursuant to Section 109 of the Act the Tribunal needs to be satisfied that the practitioner first was convicted of an offence punishable by a term of imprisonment of three months or longer, and secondly, that the circumstances of the offence reflect adversely on the practitioner's fitness to practise medicine.

**3.2** **THE** details of Dr Dassanayake's conviction are set out in the Certificate of Conviction, the charges being detailed in the indictment contained in the brief bundle of documents filed by Mr Lange with the Tribunal. The first element is not in issue and is accepted.

**3.3** **THE** second part of the inquiry needs to relate to the circumstances of the offending and whether they reflect adversely on the practitioner's fitness to practise medicine.

## 4. CIRCUMSTANCES OF THE OFFENCE:

**4.1** **THE** subject matter of the charges can be separated into two categories. The first category is Counts 1-15 of the indictment, which are 15 charges of using a document to obtain a pecuniary advantage, the circumstances of which relate to general medical service (GMS) claims in relation to the periods contained in each count. In respect of the first category of charges Judge Abbott in his sentencing remarks stated (p2):

*"The 15 charges of using a document relate to claims which you submitted for General Medical Services ("GMS") benefits during the period from January 1993 to January 1994.*

*The focus of the charges was on the first six months of 1993, because 14 counts related to that period, while count 15 related to a week in January 1994. However, it was clear from the manner in which the Crown case was presented at trial that the essence of the case against you was that over a period of approximately two years, namely 1993 and 1994, you submitted false and fraudulent GMS benefit claims.*

*The substance of the allegation which the Crown made, and which the jury accepted, was that you made a number of claims for what was described as "counselling" in respect of patients to whom you did not provide such a service, either at all or on some of the dates for which claims were made.*

*Two of the four family groups, to use the expression which was used during the trial, were particularly highlighted in that context. A number of witnesses from those family groups gave evidence that you did not provide counselling to them at all, while others acknowledged that, although they may have had incidental discussions with you regarding personal matters, they did not regard those discussions as counselling, particularly in the contest of the explanation of your approach to counselling which you gave when you were interviewed by Mr Howell of Health Benefits Ltd. Other instances on which the Crown relied at trial related to alleged counselling of young children, some of whom were unable to speak or communicate at the time when the counselling was said to have been provided.*

*As I have said, by their verdicts the jury accepted the substance of the allegation which the Crown made. Given the weight and the compelling nature of the evidence which was put before the jury by the Crown, supported in some respects by evidence which was called on your behalf, the verdicts which the jury reached were hardly surprising. It is necessary for me to say that, because I am aware that there are people, in particular people who are close to you and who are supportive of you, who have taken, and no doubt continue to take, a different view. Put very shortly, the evidence against you on the 15 charges of using a document was simply overwhelming."*

**4.2** **IN** respect of the second category of charges Judge Abbott in his sentencing remarks noted at p5:

*"I turn now to the charges of forgery and attempting to defeat the course of justice. The essence of the allegation which was made by the Crown in respect of those charges is that, being aware that Health Benefits and the police were conducting investigations into your GMS claims, you dishonestly created forms which were described as confidential counselling records in respect of two of your patients for whom you had made claims in respect of counselling. The two patients in question both gave evidence during the trial, and they were adamant that you did not provide counselling services to them. That evidence was clearly accepted by the jury. The verdicts on counts 16 to 18 mean that the jury also accepted the evidence that you dishonestly created those confidential counselling record documents and provided them to Health Benefits.*

*The crucial evidence in respect of that allegation was the evidence which showed that the typed portions of the forms in question had been created at some time between 13 July and 21 August 1995. That evidence resulted from an analysis of the ribbon from your typewriter which was seized by the police and which was then subjected to forensic examination. The evidence was compelling and was clearly accepted by the jury. If the jury had been in any doubt whatever as to the reliability of that evidence, it would have been their duty to acquit you on all three charges which related to that general allegation.*

*In my view, the offending relating to those two forged documents is more serious that the initial dishonesty offending. When a person who is under investigation by the authorities deliberately creates a false and forged document with a view to either averting prosecution or obtaining a more lenient outcome from the prosecution process, such conduct must be viewed seriously. Actions of that nature strike at the very heart of the administration of justice in a community such as ours."*

## 5. EFFECT ON PRACTITIONER'S FITNESS TO PRACTISE MEDICINE:

**5.1** **WE** agree with Mr Lange that both categories of charge reflect adversely on a practitioner's fitness to practise medicine when considered either separately or cumulatively.

**5.2** **DISCIPLINARY** proceedings against a medical practitioner for GMS fraud were considered by the Tribunal in *Dr D Dalley* (Decision No. 8/97/4C) where the Tribunal found GMS fraud did reflect adversely on *Dr Dalley's* fitness to practise medicine.

**5.3** **THE** Tribunal is satisfied that the circumstances relating to the forgery and perverting the course of justice also reflect adversely on Dr Dassanayake's fitness to practise medicine. In particular in this case the steps taken by Dr Dassanayake included the preparation of a forged document, namely a confidential counselling record, and the completion of it included details of consultations made when no consultation took place.

**5.4** **HAVING** regard to the nature of the doctor/patient relationship where a doctor creates false consultation records in respect of a patient, and then forwards those to an investigating authority,

and further seeks at a criminal trial to substantiate those records by cross-examination of the patient, in such case the Tribunal is satisfied that such conduct does reflect adversely on that doctor's fitness to practise medicine.

**6. PENALTIES:**

**6.1** **PURSUANT** to Section 110 of the Medical Practitioners Act 1995 Dr Dassanayake is liable to the following penalties:

- **AN** order that his name be removed from the Register (Section 110(1)(a) and 110(2))
- **SUSPENSION** of registration for a period not exceeding 12 months (Section 110(2)).
- **TO** practise medicine subject to conditions for a period not exceeding 3 years (Section 110(1)(c)).
- **CENSURE** (Section 110(1)(d)).
- **COSTS** (Section 110)(1)(f)).

**6.2** **AT** Dr Dassanayake's request his name was removed from the Register of Medical Practitioners pursuant to Section 44 of the Act on 15 July 1998. Prior to the hearing the Chair asked Mr Lange to address in written submissions the effect, in the context of a disciplinary hearing, of the removal of the name of a medical practitioner from the Register where that practitioner is the subject of proceedings before the Tribunal.

**6.3** **WE** agree with Mr Lange that where a practitioner's name is removed from the Register pursuant to Section 44 of the Act, that such removal does not prevent the continuation of the disciplinary proceedings. Furthermore we agree with Mr Lange that a medical practitioner cannot avoid the disciplinary process and the liabilities which may follow, simply by applying for removal from the

Register. Such an interpretation of Section 44(3) of the Act is consistent with the wording of the relevant provisions of Part (viii) of the Act, and the purpose of the Act.

**6.4** **THE** principal purpose of the Medical Practitioners Act 1995 is set out in S.3. It provides:

*"3.* ***Principal purpose*** *-*

*(1) The principal purpose of this Act is to protect the health and safety of members of the public by prescribing or providing for mechanisms to ensure that medical practitioners are competent to practise medicine."*

**6.5** **ONE** of the mechanisms by which the principal purpose of the Act is attained, in company with a number of measures which include registration and competence review, is provision for the disciplining of medical practitioners. That purpose is in part achieved by the disciplinary process.

**6.6** **WHILST** it is acknowledged that at first glance there may be little merit in making an order pursuant to Section 110(1)(a) following voluntary removal, having regard to the purpose behind the Act and reading the Act as a whole, that notwithstanding voluntary removal, the Tribunal may still make such an order. In particular, Section 44(3) of the Act provides:

*"The removal, under this section, of a practitioner's name from the Register or any part of the Register does not affect that practitioner's liability for any act done or default made before the date of the removal."*

**6.7** **IN** looking at Section 110(1)(a) of the Act it is important to bear in mind the wording *".... order that the name of the medical practitioner be removed from the Register ....."* The order that a name be removed has consequences not only as regards practice in New Zealand, but also in other jurisdictions. Part of the protection of the public is protecting not only the New Zealand public now, but prevention of a doctor leaving New Zealand and going, for example to Australia,

being able to get Registered there and, unless a removal order be made, using Australian registration as a pre-requisite for re-registration in this country. We agree with Mr Lange the scheme of the Act is such that there are consequences which flow from the making of a removal order under Section 110 of the Act that go beyond simple removal from the Register on request, pursuant to Section 44 of the Act.

**6.8** **FOR** the reasons given the Tribunal is satisfied that a Section 44 voluntary removal does not suspend the disciplinary process, part of that process being the imposition of penalties.

**6.9** **INVARIABLY** medical practitioners are people of high standing in the community. It is expected of them that they will be honest in their dealings with funding authorities. Funding authorities should be entitled to rely on certificates that claims are in all cases proper, and that medical practitioners act honestly in formulating and lodging their claims.

**6.10** **IN** the circumstances of this case there has been not only a breach of trust reasonably to be expected by the funding authority, but also a breach of the doctor/patient relationship. Patients should be able to rely on doctors to complete fair and accurate records of their consultations. There is a breach of patient trust when doctors make false records of consultations, and where those records contain information obtained from the patient or other family members, to give them an appearance of validity by reference to the consultation notes.

**6.11** **DR** Dassanayake was convicted of offences of using a document with intent to defraud, forgery and attempting to defeat the course of justice. Conviction for those offences means it was proved that Dr Dassanayake acted deliberately with the knowledge he was acting in breach of his legal

obligations and without an honest belief that he was so entitled to act when submitting his GMS claims. Also it was proved that confidential counselling records were made knowing that they were false.

**6.12** **IN** determining appropriate penalties to be imposed the Tribunal may have regard to the effect of fraud, not only in the specific sense, but also in the wider general sense. The victim in cases of GMS fraud is in effect the public health system. By defrauding that system doctors are in effect defrauding not only the State, but also those entitled to the benefit of those payments. The GMS system is funded by the tax payer and there is a constant and competing demand on the tax payers money as well as on the administration of those funds.

**6.13** **THE** offending in this case was not of an isolated nature but continued over a considerable period of time. While improper GMS claiming by doctors can be committed with relative ease, it goes without saying that it is often difficult to detect, and requires substantial resources to investigate. There can have been no other motive for the fraudulent claims made by Dr Dassanayake than greed, as opposed to need.

**6.14** **WE** view the offending in this case with very grave concern. We consider we have a duty to the profession and the public to ensure that the highest standards are observed at all times. Dr Dassanayake has forfeited the privilege to remain as a practising member of the medical profession. Accordingly it is ordered that his name be removed from the Register pursuant to Section 110(1) of the Act.

**6.15** **WHEN** the Tribunal makes a striking off order under section 110 of the act, it may in that order, pursuant to section 111, exercise either or both of the following powers:

1. Fix a time after which that person may apply to have his name restored to the Register;
2. Impose one or more conditions that must be satisfied by the practitioner before he may apply to have his name restored to the Register.

**6.16** **IMPOSITION** of conditions as a pre-requisite to application for name restoration is not considered by the Tribunal to be an option in this case. However we are mindful that it may assist the Council if the Tribunal is able to fix a time after which Dr Dassanayake may apply to have his name restored to the Register. That said, it must be acknowledged by the Tribunal that restoration to the Register is solely a matter for decision by the Council.

**6.17** **TO** the end and intent of fixing an appropriate time, certain inquiries were undertaken by the Secretary at the request and on behalf of the Tribunal. Those inquiries sought to elucidate similar cases in which medical practitioners have been removed from and re-instated to the Register.

**6.18** **IN** New Zealand two doctors have been struck off for fraud since 1985. Dr Nash, removed from the Register in August 1995 following conviction for falsification of ACC documents, was re-registered on 1 March 1996. Dr McNabb was removed from the Register on 12 July 1996 following conviction for using a document with intention to defraud. Dr McNabb remains unregistered, one application for re-instatement having been declined in February 1997.

**6.19** **IN** the Tribunal's view the stand down periods in the cases of Doctors Nash and McNabb provide little indicative guidance.

**6.20** **OUR** inquiries were then widened.

**6.20.1** **THE** New South Wales Medical Board provided a list of doctors restored to the Register along with details of the length of time between de-registration and restoration, following complaints relating to fraud. The average period was 8 years, with a high of 18 years, and a low of 3 years.

**6.20.2** **THE** South African Medical and Dental Council does not prescribe any specific period before an applicant may apply for restoration. During consideration of an application cognisance will be taken of an applicant's conduct over a period in order to establish whether complete reformation/rehabilitation has been effected.

**6.20.3** **THE** Medical Board of Queensland indicated:

> *"The Tribunal has not set down any minimum period before a person may apply for review of an Erasure Order, and considers all such applications on their merit. While a view had been held in some legal circumstances that erasure can be regarded as a 2 year removal from the Register, the Tribunal has pointedly refuted this notion"*.

**6.21** **FINALLY** the advice of the General Medical Council of Great Britain was that any doctor whose name has been erased from the Register may apply for restoration after a period of at least 10 months has elapsed. If an application is unsuccessful a doctor may make further applications 10 months after the previous application.

**6.22** **PERHAPS** all that can be gleaned from the inquiries made is that overseas medical jurisdictions have varying requirements for restoration to the Register.

**6.23** **IN** the case before us the Tribunal's difficulty is that Dr Dassanayake seems to have little if any insight into his offending behaviour. At the hearing when Dr Dassanayake was struck off, he neither appeared on his own behalf nor was represented by Counsel. Consequently we have not been able to make any assessment of Dr Dassanayake's character.

**6.24** **ALL** that is available to the Tribunal is a letter from Dr Dassanayake to the Tribunal dated 26 October 1998 in which he describes himself as a member of a class of *"...other doctors who are being terrorised by the State..."*.

**6.25** **IN** these circumstances the Tribunal has determined that a period of 3 years from 28 September 1998 (date of the hearing of this charge) must elapse before Dr Dassanayake may apply to have his name restored to the Register. At that time among factors which the Council may take into account, could be whether Dr Dassanayake has any insight into why the misconduct happened, his behaviour since erasure, and objective evidence that he has kept up-to-date with developments in medical practice since his name was erased, and testimonials, especially from other doctors who can give first hand evidence that he is fit to resume practice.

**6.26** **FINALLY** it is ordered that Dr Dassanayake pay 40% of the costs and expenses of and incidental to inquiry made by the Complaints Assessment Committee in relation to the subject matter of the charge, prosecution of the charge by Mr Lange on behalf of the Complaints Assessment Committee and the hearing by the Tribunal, the sum of $5,592.81.

**6.27** **THE** ability of Dr Dassanayake to make a contribution to the costs and expenses of these proceedings has been another area of contention.

**6.28** **BEING** mindful of a comment made by the Court of Appeal that Dr Dassanayake's *"financial circumstances are extremely precarious"*, he was asked by the Secretary to provide the Tribunal with an authenticated statement of assets and liabilities, and income and expenditure. In his unauthenticated letter of reply which is dated 26 October 1998 Dr Dassanayake provided various financial details which paint a very gloomy picture of his financial position. Again because we have not been provided with any financial information which is capable of being checked, the Tribunal is in the dark concerning Dr Dassanayake's financial situation.

**6.29** **IN** his submissions Mr Lange explained, similar to a court proceeding, that where someone does not provide necessary financial information, the Court can assume an ability to pay. Thus by analogy Mr Lange invited the Tribunal to make what it considers an appropriate order for costs.

**6.30** **IN** a recent letter to the Tribunal Mr Lange explained:

*"Health Benefits following discussions with myself advise that we cannot directly challenge the assets and liabilities set out in Dr Dassanayake's letter of 26 October.*

*Enquiries have revealed, however, that Dr Dassanayake is residing at 68 Weston Road, Christchurch. We note that this is the address set out on his letter of 26 October.*

*Enquiries into the ownership of that property indicate that the Registered owner is P.B. and L S Dassanayake and annexed hereto is a copy of the certificate of title. It would appear that this is the same persons referred to as being owed $150,000.00 in Dr Dassanayake's letter of the 26 October. We are not aware whether or not they are actual owners or owners as trustees for a trust.*

*It is of course, a matter for the Tribunal if they wish to make further enquiries. We further draw to the Tribunal's attention that notwithstanding the current financial position claimed by Dr Dassanayake, during the period of 1 July 1992 to 30 June 1995 Health Benefits Limited paid to Dr Dassanayake pursuant to his s51 advice notice the sum of*

*$339,913.00 (GST inc). While that sum would reflect Dr Dassanayake's income from Health Benefit payments, it does not, of course, include:*

1. *His practice income;*
2. *Income from ACC benefits;*
3. *Income from other sources.*

*Health Benefits Limited estimates that Dr Dassanayake's gross annual income for the period of 1996 and 1997 averaged in excess of $200,000.00 per annum.*

*It is, of course, open for the Tribunal to obtain details from ACC as to his ACC income and to obtain other information relating to his financial income prior to his convictions in the District Court."*

**6.31** **THE** Tribunal has decided that it would be pointless to initiate any further enquiries into Dr Dassanayake's financial position. Given his lack of co-operation in all respects down to the present time, the Tribunal considers the interests of justice will best be served by delivery of this Decision without further delay.

**6.32** **THE** Chair is of the view, in the circumstances outlined, that an order for contribution towards costs, on a nominal basis only, is warranted. However he accedes to the determination of the majority, that the contribution be 40% which amounts to $5,592.81. We are of the view that Dr Dassanayake's lack of co-operation, bordering almost on arrogance, disentitles him to any further indulgence from this Tribunal.

**DATED** at Auckland this 23rd day of December 1998.

.....

P J Cartwright

Chair

Medical Practitioners Disciplinary Tribunal