Medical Practitioners Disciplinary Tribunal

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DECISION NO: 112/99/39C

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 **WARREN WING NIN CHAN** medical practitioner of Auckland

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chair)

Dr F E Bennett, Ms S Cole, Dr A D Stewart, Dr B J Trenwith (Members)

Ms G J Fraser (Secretary)

Ms K G Davenport (Legal Assessor)

Mrs G Rogers (Stenographer)

Hearing held at Auckland on Thursday 23 and Friday 24 September 1999

APPEARANCES: Mr R Harrison QC for a Complaints Assessment Committee ("the CAC")

Mr C J Hodson QC for Dr W W N Chan.

1. THE CHARGE:

1.1 **IN** Decision No. 94/99/39C dated 29 October 1999 the Tribunal found Dr Chan guilty of professional misconduct. This Decision should be read in conjunction with that Decision. The finding of professional misconduct was made following the Tribunal's hearing of a charge laid by the Complaints Assessment Committee formed to investigate a complaint that during April and May 1996 at Auckland in the course of his management and treatment of his patient A, Dr Chan provided medical practice and management below an acceptable standard in regard to Ms A's care indicative of general poor medical practice in regard to other patients. In particular, the Tribunal found that:

(a) Dr Chan failed to obtain Ms A's informed consent to the liposuction operation conducted by him on 30 May 1996; and

(b) Dr Chan failed to undertake a satisfactory and effective consultation with and assessment of Ms A before the operation; and

(c) Dr Chan failed to maintain adequate records of operations undertaken including records of case management and pulse oximeter in the context of IV sedation.

1.2 **IN** relation to the latter finding, the Tribunal found Dr Chan guilty at the level of conduct unbecoming and that conduct reflected adversely on his fitness to practise medicine. However, having then considered the Charge laid in its totality the Tribunal was satisfied that

Dr Chan was guilty of professional misconduct. It should be recorded that the Tribunal also found that a number of the Particulars included in the Charge laid before the Tribunal were not established, and that the Charge was prosecuted as one of disgraceful conduct.

1.3 **THE** principal basis upon which the CAC relied in bringing the Charge at the highest level in the hierarchy of charges provided for in the Act, was that Dr Chan had faced disciplinary charges on two previous occasions (in 1995 and 1996), which resulted in findings of professional misconduct against him. Appeals against both of those findings were subsequently dismissed by the Medical Council, and in one case, by the High Court.

1.4 **THE** circumstances giving rise to the complaint which was the subject of the 1996 disciplinary proceedings were strikingly similar in many respects to those which gave rise to this present complaint. In finding Dr Chan guilty on that occasion, the Medical Practitioners Disciplinary Committee imposed a number of conditions on Dr Chan's right to practise as a medical practitioner. However, the lodging of an appeal, a course which was of course fairly open to him and for which the Tribunal intends no criticism, resulted in the imposition of conditions on his practice being stayed pending the hearing of the appeal.

1.5 **WHILST** the appeal was ultimately dismissed the Court determined that due to the passage of time since the conditions were imposed it would be unfair to order that the conditions take effect from the date of the judgement, and the conditions were permanently stayed. Thus, the effect of the lodging of an appeal was that Dr Chan was able to carry on his practice unimpeded by any conditions.

1.6 **THE** essence of the CAC's case against Dr Chan was that the conditions had been imposed for the protection of the public, and it was the message to Dr Chan which was inherent in the conditions which was important. Dr Chan had ignored authoritative warnings that his conduct, if repeated, was placing members of the public at significant risk. The CAC made submissions to the Tribunal that Dr Chan's conduct in this present instance was disgraceful for its wilful and flagrant disregard of the message inherent in the findings of both the MPDC and the Medical Council.

1.7 **THE** Tribunal carefully considered those submissions but determined that acceptance of them would be unfair to Dr Chan in the context of the hearing of the complaint. The charge before the Tribunal had to stand or fall on its own merits and it could not be elevated to a more serious charge than it warranted on its own facts and circumstances, by incorporating other offending which had already been dealt with by other tribunals.

1.8 **THE** fact that Dr Chan had been able to avoid censure and 'punishment' on a previous occasion by exercising rights he was legitimately entitled to, was not a fair and proper consideration for this Tribunal. The Tribunal continues to hold that view.

1.9 **HOWEVER**, as stated in Decision No. 94/99/39C (at paragraph 6.15) the Tribunal is satisfied that the evidence of previous findings of professional misconduct are relevant in the context of the Tribunal's deliberations as to penalty. It is satisfied that, in determining the appropriate penalty to be imposed in this present case, it may fairly take into account the fact that Dr Chan has been found guilty of professional misconduct on previous occasions, and that

those previous charges arose out of similar identified deficiencies in Dr Chan's practice. For example:

1.9.1 That Dr Chan's advertising material continues to imply that he is a vocationally registered practitioner, i.e. a "specialist";

1.9.2 That there are issues of concerns regarding his pre-operative consultations with patients, and his obtaining of consent;

1.9.3 There are concerns regarding the adequacy of his record-keeping.

2. SUBMISSIONS:

2.1 **IN** Decision No.94/99/39C, the Tribunal invited submissions from counsel as to penalty. It also expressed its view that the previous findings of professional misconduct, and the submissions made in this regard by Mr Harrison QC for the CAC, would be considered to be relevant in the event Dr Chan was found guilty of the Charge. The Tribunal has now received submissions from both Counsel, and carefully considered them.

2.2 **ON** behalf of the CAC, Mr Harrison submits that the Tribunal should order Dr Chan to pay a fine in the maximum amount of $1,000 (the 1995 Act applies); 50% of the costs incurred by the CAC and the Tribunal; and strict conditions should be imposed on Dr Chan's right to practise, for the protection of the public. Mr Harrison has submitted that "*the Tribunal is in the best position to assess the necessary terms of an appropriate supervision order*".

2.3 **FOR** Dr Chan, Mr Hodson QC submits that the appropriate range for a fine would be $800 to $500 (being the range of penalty for cases of professional misconduct); the order for costs

should be "substantially less" than 50% on the basis that the charge was one of disgraceful conduct which failed, and several of the particulars supporting the charge were not upheld. On one of the particulars Dr Chan was found guilty of conduct unbecoming, the lowest available level of charge.

2.4 **MR** Hodson resists the imposition of any condition imposing a "supervision order". As he points out, the Act requires Dr Chan either to obtain vocational registration or to practice under oversight from 1 July 2001 in any event. Mr Hodson submits that in the areas of Dr Chan's practice causing concern, he has continued to review his forms and procedures, and that any repetition of failures will be deleterious to his practice. Finally, Mr Hodson submits that the Tribunal "*may wish to direct that he use no misleading material.*"

3. PREVIOUS OFFENDING:

3.1 **AS** stated above, this is the third occasion on which Dr Chan has been charged with disciplinary offences. On both previous occasions, and on this occasion also, the charges raised fundamental issues - failures to obtain informed consent, engaging in misleading advertising and a failure to keep adequate records.

3.2 **THE** incidence of charges and findings adverse to Dr Chan over a relatively short period of time (5-6 years) suggest either:

- that he is careless as to any shortcomings in these areas of practise; or
- he regards complaints as simply a 'natural hazard' in a high volume business; or

- he is unconcerned as to the opinions and standards of his profession beyond the effect that any complaints and adverse disciplinary findings may have on his business interests, i.e. any such 'failures' may be "*deleterious to his practice*."

3.3 **IN** light of the number of offences and the relatively short period of time involved the Tribunal derives little comfort from the assurances that Dr Chan has continued to review his forms and procedures. The Tribunal is not persuaded that any such internal review, unaided by any external supervision or monitoring, will adequately address the shortcomings in Dr Chan's practice identified in three successive hearings.

3.4 **THE** Tribunal is very aware that its approach to the imposition of a sanction in this case is not without its difficulties. In particular, the Tribunal in its deliberations has been concerned that it does not punish Dr Chan again for offending which has previously been dealt with, and in respect of which penalties were imposed (albeit not completed). The Tribunal is not intending to impose any penalty greater than it might otherwise simply because Dr Chan has previously faced similar charges and been found guilty.

3.5 **BUT** equally, the Tribunal is satisfied that the previous offending and adverse findings should not be ignored, and that it is not required to do so. The Tribunal, and its predecessors, have consistently adopted this approach and taken previous offending into account when determining the appropriate penalty in any particular case. This is especially the case taking into account the other relevant features of the offending:

(a) the fundamental nature of the identified shortcomings in the professional context;

(b) the similarity of the nature of the complaints and matters at issue; and

(c) the fact that the offending is repeated over a relatively short period of time.

3.6 **THE** Tribunal takes the approach that it is not required to ignore the previous cases and adverse findings against Dr Chan either as a matter of fairness to him, or if when exercising its discretionary powers to determine an appropriate penalty it takes into account the public interest in safe, ethical medical practice. The questions which the Tribunal considers it may properly ask in this present context are "*what, if anything, does this pattern of offending on the part of Dr Chan indicate in terms of the safety of his patients, and potential patients. Does the fact of the previous offending affect the character of the present charge?"*.

3.7 **AS** was submitted by Mr Harrison in his original submissions to the Tribunal, "*It is the spirit and intent*" of the conditions imposed on Dr Chan's practice as the result of the previous findings of professional misconduct which is important. Those conditions were a warning or a guideline to Dr Chan about how he should conduct his practice. The conditions were intended to educate and assist Dr Chan as much as they were imposed by way of sanction.

3.8 **IT** is the Tribunal's view that it is Dr Chan's "*wilful and flagrant*" disregard of that advice, evidenced by these subsequent charges and findings, which goes to the character of this present offending. The previous findings of professional misconduct, together with the additional features referred to, indicate to the Tribunal a predilection to adopt a cavalier approach to fundamental tenets of safe, ethical practice as well as a lack of care, and a casual adherence to acceptable professional standards.

3.9 **NOTWITHSTANDING** the Tribunal's finding that there is no evidence to suggest that Dr Chan is not a *technically* competent practitioner, it is not satisfied that, overall, Dr Chan can be said to be a *"safe practitioner"*. The Tribunal considers that it has a duty, for the protection of the public, to take all relevant factors into consideration, and to impose a sanction that is appropriate on that basis.

4. ORDERS:

4.1 **THE** Tribunal has no power to order Dr Chan's name be struck from the medical register. This is because he has not been found guilty of disgraceful conduct in a professional respect, the charge which was originally laid.

4.2 **THE** Tribunal does have the power to suspend Dr Chan for a period not exceeding 12 months, but has decided not to exercise that power.

4.3 **THE** Tribunal has decided that Dr Chan should be censured.

4.4 **DR** Chan is ordered to pay a fine of $975.00. The Tribunal accepts that this is a fine near to the maximum permitted but for the reasons outlined considers that a fine at this level is warranted. It is perhaps worth mentioning that had this charge arisen a mere 2 or 3 months later than it did, Dr Chan would be exposed to the penalties available under the 1995 Act, which penalties include a fine of up to $20,000.

4.5 **THAT** Dr Chan is to practise under the following conditions:

General oversight:

4.5.1 **MR** Harrison for the CAC has suggested that some sort of "*supervision order"* should be made. Mr Hodson in reply referred to the requirements of general oversight which is mandatory in the 1995 Act and which will take full effect on 1 July 2001. Because Dr Chan is registered on the General Register he is required either to obtain vocational registration or practise under oversight by 1 July 2001.

4.5.2 **OVERSIGHT** is intended as "*a key tool in the Act to ensure doctors' ongoing competence, which in turn helps protect the public*." Oversight is intended to provide "*an ongoing, supportive, educative and collegial relationship between two doctors, with benefits to both*," and no doubt, too with significant benefits to the public generally (Ref: *General Oversight - guidance for doctors receiving and providing general oversight*, Medical Council, 2000).

4.5.3 **TAKING** into account all of the matters referred to herein, the Tribunal has determined that it would be appropriate if general oversight of Dr Chan's practice was not postponed to 1 July 2001, but was to commence forthwith. Accordingly, the Tribunal ORDERS that Dr Chan is to commence practising under supervision and that this supervision should be in accordance with the model for General Oversight provided for in the Medical Council's publication referred to in paragraph 4.5.2 herein**.**

4.5.4 **THE** Tribunal considers that a requirement that Dr Chan commence practising under supervision in the nature of general oversight immediately is the most satisfactory and

appropriate mechanism to achieve the level of supervision and assistance for Dr Chan that the Tribunal is satisfied is warranted.

Ethical Review of Informational/Advertising Material and Forms -

4.5.5 **MR** Hodson has also suggested that the Tribunal "*may wish to direct that [Dr Chan] use no misleading material.*" Given that, first, Dr Chan may not as a matter of law use, disseminate or publish misleading material or information, and, secondly, that previous conditions imposed in this regard appear to have been of little effect, the Tribunal considers that it would be helpful both to Dr Chan and to the public generally if all of the material he uses in his practice, i.e. advertising brochures, Patient Information Sheets, Consent Forms and any material made available either at his business premises or by 'word of mouth' by way of endorsements to members of the public, is subject to the scrutiny of a review by the Ethics Committees of the Medical Association and the Medical Council. Both the Association and the Council have established ethics committees and the issue is clearly one of ethical standards, rather than of a clinical or technical standard of practice. Dr Chan is to meet the reasonable costs of obtaining this review.

4.5.6 **THE** Ethics Committees' review (which the Tribunal envisages being undertaken jointly by the Committees) is intended to enable scrutiny of all of the relevant material. The Committees are to advise Dr Chan of any amendments that they consider are required, approve the completion of same, and to report to the Association and the Council respectively that the review has been completed to their satisfaction.

4.5.7 **IN** the alternative, if this ethical review cannot, for any reason, be implemented as ordered, then this task may be undertaken by way of a Competency Review by the Medical Council of New Zealand or its appointee/s, if the Council considers such a Review would be a more practical or appropriate mechanism for achieving the ethical review which the Tribunal considers is required.

5. COSTS:

5.1 **TAKING** into account all of the factors referred to herein, the Tribunal considers that it is appropriate that Dr Chan pay 60% of the costs incurred by the CAC and the Tribunal, $41,140.58. This order requires that Dr Chan pay costs in the amount of $24,684.35.

5.2 **THE** Tribunal accepts that 60% is at the high end of the costs ordered in cases involving findings of professional misconduct. However, this is now the third occasion on which the profession has been required to incur substantial costs in prosecuting a complaint against Dr Chan and the Tribunal considers it only fair to the profession generally that Dr Chan be required to contribute a greater proportion of the costs incurred than would be the case if this was the first occasion a complaint had been made against him. In all the circumstances, the Tribunal does not consider that 60% is an unreasonably high proportion.

6. PUBLICATION:

6.1 **THE** Secretary of the Tribunal shall cause a notice under section 138(2) of the Act to be published in the New Zealand Medical Journal.

6.2 **THE** interim orders suppressing publication of the name of the complainant are made final.

DATED at Auckland this 17th day of March 2000

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W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal