MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 156/99/43C

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 **ROBERT FRANCIS PHIPPS** medical practitioner of United Kingdom

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr G D Pearson (Chair)

Dr F E Bennett, Dr J W Gleisner, Mr G Searancke,

Dr B J Trenwith (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Wellington on Friday 9 February 2001

APPEARANCES: Mr M F McClelland for a Complaints Assessment Committee ("the CAC")

Mr R F Phipps was not represented.

1. THE CHARGE:

1.1 **MR** Phipps was a consultant surgeon practising at Dunedin. A Complaints Assessment Committee appointed under the Medical Practitioner Act 1995 ("the Act") notified this Tribunal of a charge against Mr Phipps. The charge relates to a surgical procedure undertaken in 1994. The Chairperson of this Tribunal issued a notice to Mr Phipps on 5 March 1999 informing him of the charge.

1.2 **THE** charge is in the following terms:

"The Complaints Assessment Committee pursuant to section 93(1)(b) of the Medical Practitioners Act 1995 charges that Dr Robert Francis Phipps Registered Medical Practitioner formerly of Dunedin failed to meet the standard of medical practice required of a consultant surgeon in that:

1. When notified by telephone by Dr Dennett that there was a problem with Mrs Bosscher's operation he failed to go to the operating theatre when as consultant surgeon on call on the 26th of February 1994 he:

(a) Had a duty to be available on that date, and
(b) Had a duty to ensure that the registrar Dr Dennett was properly supervised, and
(c) Should have gone to the operating theatre as soon as he was notified of the problem whether or not he was requested to attend by Dr Dennett and whether or not the advice given by him to Dr Dennett over the telephone was correct.

2. That the advice given by Dr Phipps when telephoned by Dr Dennett during the course of the operation on Christine Anne Bosscher being to insert a drain and close the abdominal incision without removing the appendix was not consistent with contemporary clinical practice as the patient was an acute appendicitis and not an appendix abscess.

Being conduct unbecoming a medical practitioner and that conduct reflects adversely on the practitioners fitness to practice medicine."

2. APPLICATION BY MR PHIPPS FOR AN ADJOURMENT:

2.1 **THE** hearing of this charge proceeded despite an application for an adjournment by Mr Phipps. The Tribunal's now records its reasons for declining the application for an adjournment.

2.2 **AFTER** the charge was brought Mr D Collins QC acted as counsel for Mr Phipps. On 23 January 2001 a letter was received that had been written on Mr Collins' behalf. The letter stated:

"Mr Phipps has been advised of the hearing date and he seeks an adjournment because he cannot travel to New Zealand for 8/9 February.

If the hearing does proceed on 8/9 February Dr Collins will not be at the hearing."

2.3 **EARLIER** a letter of 18 January 2001 had been received from Mr Collins, which stated *"I wish to advise I am no longer acting in the Bosscher matter and do not have any instructions."*

2.4 **THIS** correspondence was forwarded to prosecuting counsel, and in a letter dated 26 January 2001 the Prosecution opposed the adjournment, principally for the following reasons which were set out in that letter:

"We do not know why Mr Phipps cannot travel to New Zealand for the hearing but in any event he had had ample time to make appropriate travel arrangements since being first advised of the hearing date.

This charge relates to an operation which occurred in 1994. The hearing into the charge has been delayed for a number of years by numerous applications to the Tribunal and District Court by Mr Phipps; none of these has been successful.

The CAC is ready to proceed.

Mr Phipps' application for adjournment should not be granted.

We have today sent by fax to Mr Phipps (to the fax number at the bottom of Mr Collins' letter of 23 January 2001) the statements of evidence previously served on Mr Collins on 23 January 2001. Copies of these statements will also be forwarded to Mr Phipps by urgent courier tonight.

Once the bundle of documents has been finalised (by Monday, 29 January 2001) a copy will be forwarded by urgent courier to Mr Phipps.

We confirm that a copy of this letter is being forwarded to Mr Phipps."

2.5 **MR** Phipps responded in a fax transmission dated 5 February 2001, forwarded to the Secretary of this Tribunal:

"On the 21st September 2000 I was dismissed from my employment. I have received no income since that date. I therefore have no monies available to finance travel or instruct counsel at this present time. I would like the disciplinary tribunal to be made aware of the following facts:

- *On the 28th June 2000 I was suspended from my post as consultant surgeon because "I had been struck off the New Zealand Medical Register." This allegation was refuted by the attached fax. The Chief Executive of Bradford NHS Trust has resolutely refused to reveal where this now proven malicious falsehood originated.*

- *The Chief Executive of Bradford NHS Trust on receipt of the fax from the New Zealand Medical Council did not sanction my return to work but proceeded to procure evidence that would justify my dismissal.*

- *The only evidence for this allegation was a letter from the Chief Executive of Health Care Otago. Attached.*

- *I have recently obtained (within the last month) a copy of the contract I signed on taking up my position of consultant surgeon with the then Otago Area Health Board in October 1990. Attached.*

You will appreciate that my suspension and ultimate dismissal was the result of incorrect information being conveyed to the Chief Executive of Bradford NHS Trust. My case is set in the employment court and will be heard in April of this year.

My fear is that incorrect information will be presented to the tribunal and I will be denied the opportunity to hear and challenge information presented as fact.

The tribunal should be aware that the ACC originally found in my favour. That decision was appealed by Dr Dennett and not Mrs Bosscher.

Should the hearing proceed in my absence and make a finding for Mrs Bosscher, Health Care Otago and other parties will use the decision to discredit me. I am aware that a documentary has been prepared and will be televised after the disciplinary hearing.

I would therefore ask the tribunal to reconsider my request for an adjournment (until the employment case is completed in the UK) taking into account the above information. It is a fundamental human right to be able to answer allegations and present evidence in support of a case."

2.6 **THE** Tribunal treated the material as an opposed application for an adjournment on the basis of the information contained in the correspondence, and the circumstances already known to the Tribunal. In respect of the latter, the Tribunal sets out the material circumstances already known due to the procedural history of this charge.

2.7 **THERE** have been a number of conferences dealing with procedural matters, and two formal applications to have the charge dismissed.

2.8 **THE** first application to have the charge dismissed was the subject of a decision of the Tribunal dated 9 September 1999. The application was made on the grounds that the charge would offend the principles of natural justice because:

- There had been an inordinate and unreasonable delay in bringing the charge, and

- The charge was oppressive and unreasonable.

2.9 **THE** Tribunal concluded:

"Mr Phipps has presented no compelling evidence of prejudice. His allegations of unfairness and oppressiveness are vague in the extreme. It is unclear from his affidavit exactly which grounds he is relying upon. In these circumstances the public interest in hearing the charges outweighs any possible prejudice which may arise due to delay or other factors alluded to by Mr Phipps."

2.10 **MR** Phipps appealed against that decision. The Tribunal was informed by counsel that at the commencement of the hearing of that appeal, on 20 June 2000, it became apparent that the District Court did not have jurisdiction to consider the appeal. Mr Phipps then indicated that the decision would be challenged by way of a judicial review in the High Court. Mr Phipps did not commence judicial review proceedings, and on 8 August 2000 prosecuting counsel wrote to the Tribunal and requested that the proceedings be set down, as Mr Phipps had made no progress with the proposed judicial review proceedings.

2.11 **ON** 11 August 2000 Mr Collins QC wrote to the Tribunal and said *"I am in the process of taking instructions from Mr Phipps as to whether or not he wishes to judicially review the MPDT's decision"*, and indicating that there might be an application to strike out or stay the charge on a new ground. On the same day counsel for the prosecution expressed concern about the further delay.

2.12 **ON** 16 August 2000 the Tribunal issued a minute indicating its concern that there must be no unnecessary delay, and accordingly Mr Collins should obtain his instructions and pursue any jurisdictional issues in the appropriate forum without delay. The Tribunal accordingly

set a timetable to deal with the events down to making any application to deal with jurisdictional issues. Due to difficulties with availability of counsel, the timetable was amended on 18 August 2000, by issuing a further minute.

2.13 **ON** 24 August 2000 Mr Collins QC indicated that Mr Phipps would pursue a second strikeout/stay application before the Tribunal. On 31 August 2000 the Tribunal issued a third minute, which gave a timetable for dealing with that application. As matters transpired counsel for Mr Phipps sought a formal hearing rather than a telephone conference for the application, and that took place on 21 September 2000. At that hearing it was submitted for Mr Phipps that because he had voluntarily removed his name from the register of medical practitioners, he was no longer subject to the Jurisdiction of the Tribunal. The Tribunal rejected the contention for reasons set out in the decision dated 3 October 2000.

In that decision the Tribunal made the following observations regarding progressing the hearing of the charge:

> ***"6.1*** ***THESE*** *proceedings have been delayed. The subject matter of the complaint involves a surgical procedure undertaken in February 1994. There have been various legal proceedings connected with the subject matter of the complaint. The proceedings have been in progress from November 1994 to 27 June of this year. Those proceedings have, apparently, affected the progress of what is now a charge before this Tribunal.*
>
> ***6.2*** ***IT*** *is not necessary to explore the reasons for the delay. Mr McClelland has expressed concern on behalf of the complainant that this charge should be heard soon. Mr Phipps prior to this present application applied to have the charge struck out on the grounds of delay.*
>
> ***6.3*** ***THIS*** *Tribunal wishes to hear and determine the charge at the earliest possible date.*
>
> ***6.4*** ***COUNSEL*** *have indicated that the hearing will take no more than two days, but it will be necessary to contact witnesses to establish when the hearing can take place. The hearing is to take place at Dunedin.*

6.5 ***AT*** *this point, the Tribunal can hear the matter on any of the following dates this year:*

- ***October*** *9 -12*
- ***November*** *13 & 14 or 30 & 1/12/00*
- ***December*** *11 - 15*

6.6 ***WE*** *request that counsel confer with each other and the Secretary of the Tribunal and agree on a date. If that is not possible within 5 days of receiving this Decision, counsel should notify the Tribunal of the dates available and a date will be set.*

6.7 ***WE*** *further direct that 14 days before the hearing, the CAC is to file and serve briefs of evidence, and 7 days prior to the hearing Mr Phipps is to file and serve briefs of evidence.*

6.8 ***LEAVE*** *is reserved for either party to apply to vary the directions regarding the filing and exchange of briefs of evidence."*

2.14 **THE** Tribunal records that at the end of the hearing of the application to strike-out Mr Collins QC for Mr Phipps indicated that should the Tribunal decline the application there was a good prospect that Mr Phipps would not be represented at the hearing.

2.15 **THIS** history of events is relevant to the application for an adjournment, as it is clear that:

- For whatever reasons, the hearing of this charge has been considerably delayed. It is an issue that Mr Phipps raised earlier, and it is also an issue that the prosecution has raised more than once recently.
- For some months prior to the hearing the Tribunal signaled clearly that the charge should be heard without further delay, and actively set timetables to conclude the proceeding.
- The Tribunal was informed at the most recent hearing relating to jurisdiction that the complainant was anxious to have the charge heard and determined.

2.16 **THE** Tribunal has considered the material in Mr Collins' QC letter of 23 January 2001 and Mr Phipps fax of 5 February 2001, and concluded that they do not advance any significant grounds for granting an adjournment in this case.

2.17 **MR** Phipps has not established any substantial reason for not being able to travel to New Zealand to attend the hearing. The only ground advanced was *"I therefore have no monies available to finance travel or instruct counsel at this present time"*. Mr Phipps did not present a statement of assets and liabilities, nor any information other than this assertion on his own behalf. Mr Phipps has known this charge has been pending for a considerable time, was apparently in a position to fund counsel to pursue the unsuccessful applications made, and at the second of them his counsel indicated that Mr Phipps may chose not to be represented at the hearing if it proceeded. Mr Phipps has not established any substance to his assertion.

2.18 **THE** remainder of the matters referred to in Mr Phipps' fax of 5 February 2001 appear to be more related to the effect of the charge being upheld prior to other proceedings scheduled to take place in April of this year in the United Kingdom. This Tribunal has no knowledge of Mr Phipps' current employment dispute in the United Kingdom, and it has no relevance to the hearing of this charge.

2.19 **THE** Tribunal concludes Mr Phipps has been given every opportunity to attend the hearing of this charge, and participate fully, and has chosen not to do so. No doubt it may be a considerable inconvenience to have to come to New Zealand, and a financial burden. However, the charge is a serious matter that arose while Mr Phipps enjoyed the privileges

and was committed to the responsibilities of registration as a medical practitioner in New Zealand. In the circumstances of this case which has been delayed already, Mr Phipps was on clear notice that he had to make out compelling reasons for an adjournment and he has not done so. Accordingly, the Tribunal decided that the matter would proceed. To reduce costs the hearing was moved from Dunedin to Wellington, and proceeded on Friday 9 February 2001, which would have been the second day of a two day defended hearing.

3. THE HEARING:

3.1 **MR** Phipps has not admitted the charge, accordingly the onus of proving the charge was borne by the Prosecution. It is well established that the standard of proof in disciplinary proceedings is the civil standard, namely, the Tribunal must be satisfied on the balance of probabilities that the material facts are proved. It is equally well established that the standard of proof will vary according to the gravity of the allegations, and the level of the charge. The facts must be proved to a standard commensurate with the gravity of what is alleged: *Ongley v Medical Council of New Zealand* [1984] 4 NZAR 369 @ 375-376.

3.2 **THE** Prosecution called 3 witnesses, namely:

- The complainant Ms C Bosscher.
- Ms E R Dennett, who at the material time was a basic trainee in general surgery. Ms Dennett performed the operation that is the subject of the charge. Ms Dennett is now an orthopaedic surgeon, at the time of the hearing she was in Australia, and her evidence was presented by affidavit.
- Mr P S Johnston, who is a consultant surgeon, trained in general surgery. Mr Johnston gave evidence regarding proper and appropriate conduct for a surgeon in

the circumstances in respect of the charge, and also as to the consequences of the course Mr Phipps took.

3.3 **AS** Mr Phipps had indicated, he neither attended nor had representation at the hearing.

4. THE EVIDENCE

4.1 **THE** evidence established:

- Ms Dennett was a surgical registrar in 1994, described as a "basic trainee" in her list of qualifications and experience. Ms Dennett's surgical training as a surgical registrar had apparently commenced in 1993.
- Ms Dennett met the complainant Ms Bosscher on 26 February 1994 at the Accident and Emergency Department at Dunedin Hospital. Ms Bosscher presented with symptoms, and a history that led to a diagnosis of appendicitis requiring excision of the appendix.
- Ms Dennett contacted Mr Phipps who was the surgical consultant on call on 26 February 1994. Mr Phipps was responsible for supervising Ms Dennett, and providing support for her, and he was required to come and assist her if necessary. It was the policy of the Hospital that a surgical registrar would contact the consultant on call before taking a patient to theatre for a surgical procedure, and Ms Dennett did that in compliance with the procedure. Mr Phipps was informed of the case and Ms Dennett's plan to excise the appendix. Ms Dennett said that Mr Phipps appeared not to be interested in the case, and said (contrary to the hospital policy) that he did not need to be contacted. Ms Dennett invariably complied with the

policy, and in Ms Dennett's experience Mr Phipps was the only consultant who took a contrary view.

- The operation proceeded, and complications ensued. First it was necessary to make a larger incision than the minimum. This was still within the routine range of events that may occur. The larger incision involved additional discomfort for the patient when recovering from the surgery, but that cannot be attributed to Mr Phipps. Ms Dennett explored the abdominal cavity for an hour and was unable to locate the appendix. To this point apart from the lack of proper inquiry on first contact, no criticism can be made of Mr Phipps. Ms Dennett's experience in this operation was also consistent with what would be expected of a capable and dedicated trainee surgeon. In some patients the appendix is very difficult to locate. There will be some patients in whom it will be impossible for a trainee to locate the appendix, however a fully qualified surgeon undertaking or supervising abdominal surgery should invariably be able to locate an appendix.

- When Ms Dennett failed to locate the appendix Mr Phipps was contacted, and Ms Dennett told him of the difficulties she was experiencing. Ms Dennett said:

  "I explained to him the difficulties I was having in locating the appendix and that he needed to consider allowing me to do a midline incision or he had to come in to help me complete the operation. Mr Phipps told me that he didn't think a midline incision was necessary and asked me if I was sure Mrs Bosscher had appendicitis so I gave him a relevant history, clinical and laboratory findings. Following this he told me to place a drain, close the wound and return Mrs Bosscher to the ward on triple antibiotic therapy and if she failed to settle, she would have to come back into theatre later. I left Mr Phipps in no doubt about the need for him to come back and help me, and he did not give any reason why he could not do so. I was not happy about his instructions …"

- Ms Dennett complied with Mr Phipp's instructions, closing the wound over a large Portex drain.

- The Hospital instructions governing the supervision of trainees included the following observations:

  "While we have the privilege of training juniors and benefiting from their assistance in looking after our patients we have a responsibility to them and to our patients to provide close supervision. While this will vary with the ability and maturity of these doctors and how well we know their attributes and our confidence in them the responsibility and consequences of delegation is ours.

  …

  Surgeons should be aware at all times of the responsibilities being taken by juniors on their behalf in particular when significant events occur or decisions need to be made with their patients especially when these are particularly sick. Similarly there should be a low threshold to attend these patients and to be available to the juniors when they express concern or are dealing with problems beyond their experience or ability. Any request by a junior for assistance must be attended immediately. Assistance should be offered when there is any sense of doubt by the trainee – it should always be provided where the surgeon has any doubt."

- As the first operation had not achieved its objective a second operation was performed on 28 April 1994. The incision for the second operation had to be made away from the scar tissue resulting from the first operation. Ms Bosscher was in hospital for two weeks when this operation was performed.
- The events caused difficulties for Ms Bosscher and her family. In total Ms Bosscher was off work for 16 weeks, and there were considerable problems looking after children while Ms Bosscher was unwell.
- In addition Ms Bosscher has been left with considerable, and apparently permanent complications from the surgical procedures. They include extensive scars and loss of tissue (the inevitable consequence to two operations), the loss of sensation in the abdominal area, damage to the abdominal muscles, and the possibility of further complications with scar tissue.

4.2 **THE** evidence of Mr Johnston has satisfied us that Mr Phipps had a clear obligation to attend the operation when Ms Dennett called for assistance in the circumstances identified. Mr Johnston put the matter in these terms:

> *"It is not acceptable by current or 1994 standards, for this to occur. An operation is a serious event which demands every effort for successful outcome. In this situation, where a junior surgeon fails to find the appendix after an hour of exploration, the consultant definitely has a duty to go directly to the operating theatre to assist or take over the operation. There is no reason why Mr Phipps should not have attended except if he was prevented by civil emergency, for example, making transport impossible or sudden illness on his own part, but even then he should have attempted to contact other surgeons to ask them to help."*

We accept that evidence, and consider it appropriately describes the duty on Mr Phipps at the material time. There should have been no doubt in Mr Phipps' mind that his decision not to attend was likely to result in his patient having to undergo a second major surgical procedure. The appendix had not been located, so if the operation was necessary at all, it was still just as necessary after the unsuccessful attempt to locate the appendix. The second procedure would inevitably cause considerable suffering, it would be likely to cause disruption to the patient's life, it would inevitably cause re-exposure to the small risk that every surgical procedure and application of a general anaesthetic carries, and it would cause the complications that follow from a second incision. We are satisfied from Mr Johnston's evidence that a competent surgeon would have foreseen the risk of muscular and nerve damage from a second incision, but the complications that in fact ensued may have been more severe than could have been anticipated. We of course evaluate the events from the perspective Mr Phipps had at the time of his actions, not with the benefit of hindsight knowing of the fortunate or unfortunate consequences of his actions.

4.3 **WE** are conscious of the fact that Mr Phipps was not present at the hearing, and that we are entitled to consider a wide range of material as evidence, of course giving it the weight that is appropriate. The materials have included explanations advanced by Mr Phipps to the Accident Compensation Commission. We have considered the material produced at the hearing that includes such material. Mr Phipps disputed that he had been contacted prior to the operation, we are satisfied on the evidence before us that he was. Accordingly we take no account of this claim. There is also considerable discussion in material apparently written by Mr Phipps regarding protocols for the supervision of staff, our view of the charge does not turn on what protocols were in place. In our view the extracts from the protocol we have quoted above properly reflects the obligations that consultant surgeons have when supervising trainees. However, those obligations exist without the need for protocols to express them. A consultant surgeon's professional obligations to patients, colleagues and the community demand no less.

5. DECISION :

Legal principles:

5.1 **SECTION** 109 of the Medical Practitioners Act 1995 provides that this Tribunal can impose disciplinary sanctions in the following circumstances:

> *"(1) Subject to subsections (3) and (4) of this section, if the Tribunal, after conducting a hearing on a charge laid under section 102 of this Act against a medical practitioner, is satisfied that the practitioner—*
>
> *(a) Has been guilty of disgraceful conduct in a professional respect; or*
>
> *(b) Has been guilty of professional misconduct; or*
>
> *(c) Has been guilty of conduct unbecoming a medical practitioner, and that conduct reflects adversely on the practitioner's fitness to practise medicine; …"*

There are certain other circumstances also, but they are not material to the present case. Each of the sub-paragraphs (a) to (c) has particular elements in the definition of conduct that affects its application. In addition, there is a decreasing level of seriousness of the charge, paragraph (a) dealing with "disgraceful conduct" being the most serious, reducing down to paragraph (c) dealing with "conduct unbecoming" (Refer: *Brake v PPC of the Medical Council of New Zealand* [1997] 1 NZLR 71 – dealing with former legislation with the same hierarchy of charges).

5.2 **THE** charge was brought at the lowest of the three levels, conduct unbecoming a medical practitioner and that conduct reflects adversely on the practitioner's fitness to practise medicine. The Tribunal has the power to amend charges. However, if a charge is to be increased natural justice requires that the parties be notified, and given an opportunity to be heard. In the present case, while Mr Phipps chose not to defend the charge at the level of conduct unbecoming, he may well have chosen to defend the charge at either of the higher levels. He would have every right to do so.

5.3 **WE** were satisfied that the charge was made out at a higher level than conduct unbecoming, the level the charge was brought at. However, we do not consider that this is an appropriate case in which to amend the charge. We refer to the preceding discussion regarding the need for the matter to be resolved without further delay, having regard to the time that has already passed since the events subject to the charge.

5.4 **IN** relation to the question of whether the charge has been established at the level of conduct unbecoming, we have applied the principles in *B v Medical Council* 11/96, Elias J, 8/7/96, and in particular these observations:

"There is little authority on what comprises 'conduct unbecoming'. The classification requires assessment of degree. But it needs to be recognised that conduct which attracts professional discipline, even at that lower end of the scale, must be conduct which departs from acceptable professional standard. That departure must be significant enough to attract sanction for the purpose 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 [counsel for the Practitioner] that a finding of conduct unbecoming is not required in every case where error is shown. … 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 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 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 to determine, taking into account all the circumstances including not only usual 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."

Conclusion:

5.5 **MS** Dennett could only undertake the surgical procedure she did under supervision of a qualified surgeon. That surgeon was Mr Phipps, and he was fully aware of that. We are satisfied that Ms Dennett performed properly, competently, and to the best of her ability as a trainee. Importantly, Ms Dennett called for the assistance of her supervisor when she struck a difficulty that she knew could best be handled by a consultant surgeon.

5.6 **INDEED** we note that Ms Dennett alternatively called for authority to make a "midline incision" to better access the abdomen to locate the appendix. That is exactly what was required in the second operation. Mr Phipps instructed Ms Dennett not to undertake that procedure. Accordingly, Ms Dennett was not only denied the assistance she required, she

was instructed not to use the technique that very likely was required to locate this particular appendix.

5.7 **MR** Phipps has offered no explanation to the Tribunal as to why he did not attend the operation. We accept the view of Mr Johnston that only the most pressing of circumstances could have justified not attending the operation when called upon. We are neither obliged nor entitled to speculate, but taking the most generous view of the facts from Mr Phipps' point of view, there is no apparent justification. If Mr Phipps had thought that it was not necessary to remove the appendix, then he was responsible for authorising an unnecessary operation. If the drain was directed as Mr Phipps thought there was source of infection or other complication, we accept the evidence of Mr Johnston that was indicative of the need for proper surgical investigation – and accordingly demanded Mr Phipps' presence.

5.8 **WE** have concluded that the evidence establishes Mr Phipps placed his own interests over his obligation to his patient. We do not know what Mr Phipps chose to do instead of attending his patient, in the absence of an explanation there is certainly nothing that would justify non-attendance. We are satisfied that Mr Phipps knew or certainly should have been aware that his failure to attend the operation would cause his patient to be likely to suffer:

- Discomfort,
- Loss of time from work and family,
- To have additional scarring, additional nerve and muscle damage, and

- Have the small but real risk of mortality inherent in having a second surgical operation.

5.9 **WE** find both limbs of the charge established. Mr Phipps had a duty to be available while the operation was undertaken, supervise Ms Dennett in an appropriate way, and attend the operating theatre when he was informed of the difficulty Ms Dennett was having. Mr Phipps failed to discharge each of those duties. Second, the advice to insert a drain and close the abdominal incision without removing the appendix was wrong and unacceptable, we accept the evidence of Mr Johnston in that regard.

5.10 **ACCORDINGLY**, in our view on the evidence before us the charge is established. We consider that Mr Phipps failure to attend and either take over or personally supervise the operation was a very serious and obvious breach of his duty to his patient Ms Bosscher. Mr Phipps' failure to meet his professional obligations is unacceptable in terms of the ethics of the medical profession, and the public are entitled to a considerably higher standard of conduct than that exhibited by Mr Phipps on this occasion. The failure in this case clearly reflects adversely on Mr Phipps' fitness to practise medicine. There are few things that more clearly reflect adversely on fitness to practise medicine than serious dereliction of duty, which a practitioner knows, or ought to know, will be detrimental to the welfare of a patient.

5.11 **IN** addition, we record that Mr Phipps had a professional obligation to Ms Dennett. It is a difficult and stressful experience for a practitioner in a learning situation to fail to achieve the result a patient is entitled to expect. Ms Bosscher gave evidence that Ms Dennett,

when discussing what happened after the operation was frank, sympathetic, and suffered from the experience herself. In contrast, Mr Phipps passed off what had happened to Ms Bosscher as one of the inevitable risks of such surgery. That was false, and Mr Phipps knew or ought to have known it was false. There is no indication in the evidence that Mr Phipps has been prepared to accept any responsibility for his failure to meet professional obligations to either his patient or his colleague Ms Dennett.

6. PENALTY:

6.1 **AT** the hearing the Tribunal indicated that the charge was established, and invited submissions on penalty.

6.2 **THE** Tribunal has power to impose the following penalties:

- Order the registration of Mr Phipps be suspended for up to 12 months,
- Order that Mr Phipps practice for a period of up to 3 years subject to conditions,
- Order that Mr Phipps be censured,
- Order that Mr Phipps pay a fine up to $1,000 (the events preceded the coming into effect of the 1995 Act, when the level increased to $20,000).

6.3 **THE** Tribunal is conscious that it must impose a penalty on the basis of the charge, conduct unbecoming; regardless of the evidence establishing that the offending was at a level more serious than the upper limit of a charge of conduct unbecoming.

6.4 **MR** Phipps is not now on the New Zealand register, and has left New Zealand, apparently permanently. At an earlier hearing Mr Phipps' counsel suggested the Tribunal

does not have the power of suspension when Mr Phipps is already removed from the register. We do not consider it necessary to determine that issue. We consider that having regard to the fact that Mr Phipps is not in New Zealand and unlikely to be in New Zealand in the foreseeable future, it would be pointless to either suspend Mr Phipps, or impose conditions on him, which would only apply in New Zealand.

6.5 **ACCORDINGLY**, the only realistic penalties available are a fine of up to $1,000 and censure.

6.6 **MR** Phipps is hereby censured.

6.7 **WE** impose the maximum fine of $1,000. We are conscious of the fact that a fine must reflect the level of offending, there are particular reasons in this case why a fine of the maximum is appropriate.

6.8 **MOST** significant is that the only appropriate penalty in this particular case is a fine, whereas had Mr Phipps been in New Zealand the more significant penalty of imposing conditions on his practice, and possibly suspension would have been available and applied in addition to the fine.

6.9 **IN** addition, the offence established is at the most serious level of conduct unbecoming, accordingly the penalty is appropriately at the highest level.

6.10 **FINALLY**, by 1994 the maximum penalty of $1,000 had become nominal only, which is demonstrated by the fact that the maximum fine increased to $20,000 when the 1995 Act came into effect (not of course retrospectively). The imposition of the monetary cost could not be regarded as a significant penalty or deterrent. When a penalty is only nominal in that way, it is more appropriate to impose the maximum penalty. In such circumstances the maximum penalty primarily serves the purpose of identifying offending as serious, and deserving of condemnation. This is such a case. The offending exhibited an indifference to the inevitable suffering, and medical risks that Mr Phipps caused his patient to suffer by not giving his patient's interests priority. While we are conscious that Mr Phipps chose not to give evidence or an explanation, the evidence discloses no mitigating factors.

7. COSTS:

7.1 **THE** Tribunal recognises the power to impose costs must not be used as a penalty. The guideline has been that costs will not usually exceed 50% of actual costs, though the Courts have increased the levels of costs to commonly be 60% of actual costs. In each case, costs must be considered with regard to the overall circumstances.

7.2 **IN** the present case there have been two applications dealing with jurisdiction, each failed, and while Mr Phipps was fully entitled to advance them, they cannot be regarded as strong applications. Having regard to the additional costs of those applications, the contribution to costs should be increased. The fact that the prosecution was put to proof when the facts were clear provides no opportunity for discounting the contribution by reason of Mr Phipps' conduct of the proceedings. Accordingly, it is appropriate for costs to be at a

higher than the usual level. Having regard to the actual costs of $50,805.96 we consider that 60% of the actual costs is appropriate in this case, being a sum of $30,483.58.

7.3 **ACCORDINGLY**, the Tribunal orders that Mr Phipps pay 60% of the costs of the complaints assessment committee in relation to the subject-matter of the charge, the prosecution of the charge by the complaints assessment committee, and the costs of hearing by the Tribunal; being in total the sum of $30,483.58, as particularised in the schedule to be forwarded to Mr Phipps with this decision.

8. NOTIFICATION TO THE MEDICAL COUNCIL:

8.1 **WE** record that if Mr Phipps was on the New Zealand medical register the Tribunal would impose the condition on Mr Phipps' practice that he not be permitted to supervise trainee staff for a period of 3 years. We consider that such a condition is necessary to protect the public.

8.2 **WE** make this observation so that the Medical Council is aware of the Tribunal's view. Accordingly, should Mr Phipps apply for restoration to the register, the Medical Council can consider whether it has power to impose conditions, and what those conditions might appropriately be at that point in time.

9. PUBLICATION

9.1 **THE** Tribunal Orders publication pursuant to Section 138(2) of the Medical Practitioners Act 1995 in the New Zealand Medical Journal.

DATED at Wellington this 5th day of March 2001

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G D Pearson

Deputy Chair

Medical Practitioners Disciplinary Tribunal