Medical Practitioners Disciplinary Tribunal

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DECISION NO: 88/99/43C

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by 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 P J Cartwright (Chair)

Dr F E Bennett, Dr J C Cullen, Dr J W Gleisner,

Mr G Searancke (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Auckland on Tuesday 17 August 1999

APPEARANCES: Mr M McClelland and Ms K Crooks for Complaints Assessment Committee ("the CAC")

Dr D B Collins for Mr R F Phipps.

1. NATURE OF APPLICATION:

1.1 **THE** application has arisen in relation to current proceedings against Mr Phipps before the Medical Practitioners Disciplinary Tribunal (the Tribunal). The Complaints Assessment Committee has charged Mr Phipps in relation to his failure as a consultant surgeon to adequately supervise a junior doctor and his failure to attend an operation on Mrs Bosscher after being informed by telephone by that doctor that there was a problem.

1.2 **MR** Phipps has filed an affidavit alleging that the hearing of the charge would offend the principles of natural justice because:

There has been an inordinate and unreasonable delay in bringing the charge;

and

The charge is oppressive and unreasonable.

1.3 **ALTHOUGH** Mr Phipps has made no formal application, he appears to be applying for a stay or striking out of the charge.

1.4 **THERE** is no dispute that the Tribunal has jurisdiction to hear such a striking out/stay application: *Bonham v Medical Council of New Zealand* (1990) 3 PRNZ 97.

2. CHRONOLOGY OF EVENTS:

2.1 **A** summarised chronology of relevant events, which has been drawn from the material before the Tribunal set out in the affidavits of Mr Phipps and Dr J A Durham (on behalf of the CAC) follows:

• Feb 1994	Operation on Mrs Bosscher
• April 1994	Mr Phipps aware that case is being investigated by Professor Van Rij
• May 1994	Dr Dennett writes letter of complaint
• Aug- Oct 1994	RACS investigation
• Nov 1994	Mr Phipps dismissed
• Nov 1994 - Mar 1998	Judicial review proceedings re RACS report - still ongoing
• Dec 1994	Mrs Bosscher lodges ACC claim
• May 1996	ACC tentatively finds Dr Dennett at fault
• Oct 1996	Mr Phipps advised of ACC findings (adverse to him)
• Nov 1996	Medical Council advised of ACC findings
• Dec 1996	Mrs Bosscher gives consent for ACC finding to be treated as complaint to Medical Council
• Jan - May 1997	Medical Council repeatedly writes to Mr Phipps but no response is received
• July 1997 - July 1998	CAC investigation

- 20 Aug 1997 - 11 May 1998 CAC puts its investigation on hold at Mr Phipps' request
- 29 Jul 1998 CAC determines that charge should be laid
- March 1999 Mr Phipps advised of MPDT charge

3. APPLICANT'S CASE:

3.1 **DR** Collins advanced eight reasons why he considers the charges in this case are oppressive and unreasonable:

1. The matters alleged to have occurred on 26 February 1994 have been the subject of three investigations prior to the CAC commencing its inquiries. Those investigations reveal that those judging Mr Phipps' actions believed his conduct did not amount to a serious departure from professional standards. Professor Van Rij suggested it constituted *"conduct unbecoming a consultant general surgeon"*. The Royal Australian College of Surgeons (the RAC) use language which indicated that it was mildly critical of Mr Phipps. These views appeared to be confirmed by the CAC itself which suggests the charges should be framed at the level of *"conduct unbecoming"*. Thus, if proven, the matters complained of are unlikely to be viewed by the Tribunal as constituting a serious departure from professional standards.
2. Mr Phipps has already been disciplined in that this case, and others, formed the basis for his dismissal from Healthcare Otago Ltd.
3. He has been criticised by his professional brethren (in the RACS report).
4. He has been censured by his employer over this matter (as a result of Professor Van Rij's inquiries.
5. Mr Phipps no longer lives in New Zealand or practises medicine in this country. An attachment to Dr Durham's affidavit emphasises that disciplinary charges are normally

only brought against doctors no longer resident in New Zealand if charges relate to *"very serious"* matters.

6. The matters giving rise to this case have arisen against a background of extraordinary denegration of Mr Phipps and mismanagement of the Department of Surgery. Mrs Bosscher's surgery occurred in a *"dysfunctional"* environment in which surgeons were under enormous personal pressures. The extent of those pressures has previously been recognised and identified by the Medical Practitioners Disciplinary Committee (refer H v Phipps). Patients died in that environment, yet no disciplinary action has ever been brought in respect of any of the serious incidents which occurred.

7. Mr Phipps' career as a surgeon in New Zealand is concluded. He came to this country with very bright prospects and has left with no intentions of returning to practise medicine in this country again. The total circumstances of this case make the pursuit of this particular charge oppressive and unreasonable.

8. The patient, Mrs Bosscher, appears uninterested in the disciplinary proceedings and has not communicated with the CAC at all.

3.2 **IN** exercising its discretion, Dr Collins urged the Tribunal to take into account the following factors:

1. The antiquity of the allegations.

2. The delay that has occurred in bringing the charges.

3. The fact that there have been multiple investigations.

4. The allegations, if proven, are likely to amount to no more than a finding of conduct unbecoming.

5. Mr Phipps is no longer practising in New Zealand and has re-settled in the United Kingdom.

6. The matters giving rise to the charge were incorporated in a number of matters which were investigated by the RACS and which caused Healthcare Otago Ltd to summarily dismiss Mr Phipps.

7. Nothing is to be gained by pursuing this particular charge against Mr Phipps.

3.3 **WHEN** taken singularly, Dr Collins considers that the above matters might, by themselves, justify the Tribunal's staying the proceedings. In Dr Collins' opinion, considered cumulatively, their overwhelming effect is that allowing the charges to continue would be harsh, oppressive and constitute a breach of principles of natural justice because of the antiquity of the allegations and the delays which have occurred.

4. THE CAC's CASE:

4.1 **IN** opposing the application Mr McClelland submitted, in summary:

1. In order to strike out or stay proceedings in these circumstances, a Court or Tribunal must find that there has been an abuse of its process.

2. In relation to delay the two main periods of delay alleged relate, first, to the time in bringing the complaint, and secondly, the period following the determination made by the CAC to bring a charge.

3. That in order to strike out proceedings there must be some prejudice to the respondent. Such prejudice would normally be in the nature of prejudice to a defence due to difficulties in obtaining evidence following a delay. The anxiety of prolonging trial of a matter can also be considered prejudice.

4. In this case the prejudice to Mr Phipps is minimal if at all. The facts of the case are largely non-contentious, the only issue being whether Mr Phipps' actions/advice were appropriate in the circumstances. Any prejudice which there may be is by no means sufficient to override the public interest in having the matter heard.

5. As to alleged oppression or unfairness, the fact that the matter has been considered in other forums does not preclude the CAC from investigating the matter, in fact it has an interest and arguably a duty to do so. Issues of double jeopardy or issue estoppel do not arise, since the issue to be considered in disciplinary proceedings is quite different from that which has been considered in other contexts.

5. GENERAL COMMENT ON SUBMISSIONS

5.1 **MR** McClelland on behalf of the CAC provided characteristically thoughtful submissions which comprehensively addressed the legal principles. We have found the submissions on behalf of both parties to be particularly helpful and we record our appreciation.

6. ABUSE OF PROCESS : GENERAL PRINCIPLES

6.1 **IT** is well established that a Court/Tribunal may strike out or stay proceedings before a disciplinary Tribunal on the basis that continuance of the proceedings would constitute an abuse of process: *Faris v Medical Practitioners Disciplinary Committee* [1993] 1 NZLR60; *Herron v McGregor* [1986] 6 NSWLR 246.

6.2 **THE** ephemeral nature of the concepts of abuse of process and natural justice make it difficult to distil more than very broad statements of principle as to when this jurisdiction might be

exercised. In *Faris v Medical Practitioners Disciplinary Committee* Gallen J stated at page 73:

"My attention has been drawn by counsel to a very considerable number of cases where the Courts have intervened to stay proceedings but it is difficult and perhaps undesirable to attempt to draw any all-embracing rationale which provides some overall concept from which principles may be drawn as to when and how Courts will act in staying proceedings. The cases establish that the Courts have intervened to stay proceedings in a number of situations and each occasion has reflected the exigencies of the particular situation under consideration ... For the purposes of these applications, I approach the matter on the basis that the Courts will intervene generally to stay proceedings where circumstances establish that persons the subject of those proceedings cannot have the matters in dispute determined in accordance with accepted standards of justice and, in addition and specifically, where the behaviour of the initiating authority is for some reason unacceptable to the Court in a manner which justifies intervention."

6.3 **THE** staying or striking out of proceedings is not a step to be taken lightly. In *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA), while excepting that jurisdiction existed to grant a stay, Richmond P stated at page 470-471:

"However it cannot be too much emphasised that the inherent power to stay a prosecution stems from the need of the Court to prevent its own process from being abused. Therefore any exercise of the power must be approached with caution. It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the Court is itself being wrongly made use of."

7. DELAY:

7.1 **THERE** is no time limitation period specified in the Medical Practitioners Act 1995 (the Act) for the bringing of a charge to the Tribunal. Section 92(2) requires that a CAC make a determination *"as soon as reasonably practicable"* after the complaint is referred to it. This issue will be discussed later when dealing with reasons for the delay.

7.2 **IN** *Department of Social Welfare v Stewart* [1990] 1 NZLR 697, 713 Wylie J set out three principles relating to delay as an abuse of process in the criminal area:

"(3) Excessive delay may constitute an abuse. Whether it does will depend on the circumstances which will include the respective contributions of the parties to that delay.

(4) The period of delay to be considered in assessing the probability of prejudice or unfairness may include the period before filing of an information within the prescribed time limit as well as delay thereafter. It is the cumulative effect which is material, and this is not lessened by compliance with a statutory limitation period.

(5) Even in the absence of proved fault or contribution to delay by either party, if the delay is so excessive as to raise a presumption of prejudice or unfairness (and whether such presumption will arise may depend on the nature of the case) then there is an abuse and the Court must act to prevent it."

7.3 **THE** *Stewart* principles have been applied in the disciplinary context in *Faris, Mardon v Pharmacy Board of Appeal* [1991] NZAR 561 and other cases. A review of relevant disciplinary cases discerns the following further principles which can be applied:

7.4 **DELAY** is generally significant if it gives rise to prejudice, either presumptive or actual. (*K v Psychologists Board and others* (HC Wellington, CP 59-98, CP 133-98, Gendall J, 10 December 1998) p25).

7.5 **A** professional person's right to be tried without undue delay must be considered in light of the public interest in having the complaint properly adjudicated (*Staite v Psychologists Board and anor* (1997) 11 PRNZ 1, 4). The Court has to balance the interests of the public in ensuring that professional persons are required to answer disciplinary charges which are properly brought by their professional body, against whether that professional persons personal, private or professional interests require that he/she be exempted from such a hearing because of a failure of prompt adjudication (*K v Psychologists Board and Others* (supra) p27).

7.6 **THE** chronology referred to earlier in this Decision shows that in total just over five years have elapsed since the original incident took place. However the Medical Council has only been aware of the matter since November 1996, a little under three years ago. No formal complaint was made under the Act until November 1996.

7.7 **THE** first time lapse of significance occurred between December 1994 and October 1996 while the ACC investigation took place. Following notification to the Medical Council of the ACC findings, there was a further two year period while the CAC investigated the matter.

8. REASONS FOR THE DELAY:

Pre-complaint delay:

8.1 **AS** explained, there is a distinction between delay by a complainant and official delay in pursuing a complaint. This point was discussed in *R v M* (HC Christchurch, 24/5/91, T16/91 Fraser J), in which it was made clear that delay by a complainant can be an abuse of process, but that all the circumstances need to be considered including the nature of the charges and reasons for the delay.

8.2 **MR** Phipps has highlighted the fact that despite the complainant being aware of the outcome of the RACS report, no complaint was made until 1996, when ACC advised the Medical Council of its findings. It is not clear why there was this delay. It may be the complainant was unaware of the possibility of making a complaint to the Medical Council. This seems likely since it was the Medical Council who first contacted her regarding the making of a complaint, following a complaint from ACC.

8.3 **IN** these circumstances we consider that a delay of 2 ½ years is not inordinate, particularly given that Mrs Bosscher's first claim to ACC was made in November 1994, only 9 months after the operation took place. In *T v Preliminary Proceedings Committee of the Nursing Council* (supra) the complainant had delayed by 5-6 years. There was also some suggestion of improper motive in the complainant (the employer) bringing the complaint. The judge stated in relation to the complainant's delay that (p21):

"I consider that a delay of 5-6 years required an explanation and as Mr Parker pointed out, the explanation given does not provide a reason for delay in respect of all the incidents. Nevertheless, I do not think that such a delay, without more, could of itself amount to abuse of process and even when it is added to the suggestions of improper motivation, I do not think there is sufficient to bring the case within the principles set out in ***Department of Social Welfare v Stewart*** *(supra)."*

8.4 **SUCH** an approach could equally be applied in this case, since the delay is around half of the time that it was in that case.

8.5 **WHAT** is clear is that ACC carried out an extensive and careful investigation in which Mr Phipps played an integral part. At the end of that investigation the matter was forthwith referred to the Medical Council.

Delay by CAC:

8.6 **THE** second category of alleged delay is delay once a complaint had been made to the CAC. The chronology shows that the complaint was with the Medical Council from December 1996 to July 1998, and that the charge was notified to Mr Phipps in April 1999.

8.7 **SECTION** 92(2) of the Act requires that the CAC make a determination *"as soon as reasonably practicable"* after the complaint is referred to it. The case of *Grigson v*

Ministry of Fisheries [1998] 3 NZLR 202, which relates to a similar section in the Fisheries Act 1983, suggests that this may be an objective test, and that it is not necessary to establish prejudice.

8.8 **CLEARLY** what will be reasonably practicable will depend on the circumstances of an individual case. Dr Durham's affidavit provides further detail as to the events that took place after December 1996. These details show that a large amount of the delay can be attributed to Mr Phipps himself. From details provided by Mr Durham in his affidavit it is clear there was a lapse of some 9 ½ months between the time that the CAC requested information from Mr Phipps and the time he provided it.

8.9 **APPARENTLY** work and personal commitments meant that the CAC could not convene until 29 July 1998 to discuss this information. It was at this point, as indicated in the minutes of the CAC meeting held on 29 July 1998, that it determined in accordance with Section 92, paragraph 1(d) of the Act, that the complaint should be considered by the Tribunal.

8.10 **ACTION** was then taken to draft the charge. Communications with the CAC's legal advisor and drafting of the charge took until February 1999. The length of time taken was caused partially by the fact that the convenor of the CAC, Dr Durham, was overseas for several months. Shortly after he had circulated a copy of the draft charge to the CAC members on 5 October 1998, Dr Durham went to Europe for a holiday and did not return until mid January. Prior to his departure he did not finalise the draft charge. Dr Durham explained in his affidavit "*This was a complete oversight on my part*". On his return, once this oversight

was brought to his attention by the Council, Dr Durham wrote to the legal assessor noting certain CAC concerns in respect of her draft, and making some suggestions for change.

8.11 **DR** Durham's affidavit shows that the CAC had control of the complaint for a total of 19 months from July 1997 to February 1999, 9 ½ months at the very least of this time lapse being caused by or due to requests/delays by Mr Phipps.

8.12 **IN** these circumstances we agree with Mr McClelland it would appear unreasonable for Mr Phipps to rely on a delay in bringing a charge, when much of the delay has been caused by him. In order to comply with the principles of natural justice and the 1995 Act, the CAC was required to receive and/or hear Mr Phipps' comments. It made efforts to accommodate him in doing so. Unfortunately Mr Phipps now seems to be trying to take advantage of this to have the charges struck out.

8.13 **BEARING** in mind the above circumstances we consider that the delay cannot be said to be inordinate. There are a number of cases in which charges have been brought more than five years after the relevant incident took place, which were not struck out or stayed on application. Some examples are:

- *Faris* - 16-25 years (depending on start point). Some charges were struck out. Others were not.
- *Bonham* - 24 years
- *T v Preliminary Proceedings Committee of the Nursing Council* - 6 years.

8.14 **IT** is accepted that there are also cases where charges had been struck out after delays of less than five years. No general time limit can be imposed, but the cases mentioned indicate that it is not unprecedented for cases to be brought after this length of time.

8.15 **IMPORTANTLY**, this case is not one where no action had been taken since the incident took place. Mr Phipps' actions have been the subject of a number of inquiries. But the outcome of the ACC investigations was the first definitive finding that Mr Phipps had erred in his duties. The findings of the previous investigation had, in effect, been tainted by the judicial review action. Therefore disciplinary action was taken directly after the first definitive finding against Mr Phipps.

8.16 **ONE** case which appears to support Mr Phipps' case is *Herron v McGregor*. This is a case of the New South Wales Court of Appeal, in which charges were brought before the Medical Disciplinary Tribunal in respect of various events which had occurred between 9 and 13 years before complaints were made. The charges were struck out due to the delay. We believe this case can be distinguished on the basis that the charges have been brought at least 9 years after the relevant events had taken place. In addition the charges in that case involved a different kind of behaviour and responsibility. It is to be noted that *Herron v McGregor* was argued in both *Faris* and *Bonham*.

9. PREJUDICE:

9.1 **MR** McClelland argued this is not a case where prejudice can be assumed. He explained the total time period which has elapsed since the original operation is only five years, less than even the statutory limitation period.

9.2 **IN** *Faris* a period of 16-25 years had elapsed (depending on the deemed starting point). Gallen J found that given the circumstances there was no presumption of prejudice. In *K v Psychologists Board and others* at 26 Gendall J quoted a passage from *Hughes v Police* [1995] 3 NZLR 443 which stated that a presumption of prejudice would generally arise in cases where the delay was longer than in that case (around 5 years) or where the circumstances themselves lead to a conclusion that prejudice is likely.

9.3 **OF** significance to the Tribunal's consideration of Mr Phipps' application for stay is the fact that he does not seem to have provided any evidence in his affidavit as to the prejudice which he claims he has suffered. Apart from allegations that he had been treated harshly, and that his medical career in New Zealand has effectively been terminated, he has not referred to any other kind of prejudice, and certainly not in respect of this charge and/or his ability to defend it.

9.4 **IN** *Watson v Clarke* [1990] 1 NZLR 715, 723, Robertson J referred to the US case of *Barker v Wingo* 407 US 514 (1972). In that case Powell J discussed the concept of prejudice and stated:

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last, ... If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory however, is not always reflected in the record because what has been forgotten can rarely be shown."

9.5 **IN** this case pre-trial incarceration is not an issue. Mr Phipps may allege that he has suffered general hardship in terms of anxiety and concern. This type of prejudice was recognised in

K v Psychologists Board at p26. However in that case it was stated that the question will be whether such prejudice is sufficient to justify the Court's intervention. As Gendall J put it: *"It has to be a uniquely individual assessment."*

9.6 **WE** must conclude that intervention is not warranted in this case. Some anxiety and concern is inevitable in cases where disciplinary action is taken against a professional person. But such anxiety would need to be exceptional to warrant, on its own, the striking out of the proceedings. In this case Mr Phipps has not provided any evidence of exceptional hardship. The fact that delay has taken place, in itself, cannot be said to produce such exceptional hardship. Otherwise proceedings could be struck out in every case where there has been delay. Clearly this has not been the approach of the Courts. Some form of further prejudice must be shown to exist.

9.7 **EQUALLY** importantly Mr Phipps has provided no evidence that his defence is likely to be prejudice by the delay. In fact, it appears in this case, that the likelihood of this kind of prejudice is minimal, if at all.

9.8 **PREJUDICE** in making a defence is usually reliant on the fact that relevant witnesses may not be available, or that their memories may have faded with the passage of time, such that they are unable to recall the relevant events. However the importance of witnesses may vary in different cases.

9.9 **IN** this case the facts are not in significant dispute, and largely are documented. In this respect, this case is similar to that of *Faris* in which Gallen J stated that:

"The factual basis out of which those allegations arise, as distinct from questions of responsible participation, is largely if not wholly established by documentary material."

9.10 **IN** considering each of the part charges in that case Gallen J took account of the extent to which relevant witness evidence was not available. His analysis referred to the nature of the charge, and the necessity and relevance of witness evidence in light of the charge. Gallen J struck out some of the part charges. However he also declined to strike out some of the charges. These largely related to questions similar to the issue in this case - should the practitioners have reacted differently to the factual situation presented to them? For example at page 77 Gallen J described the nature of the second part of the charge as:

"When the matter is looked at in the round, the allegation can be put in terms of whether or not persons with the knowledge and background of the applicants bearing in mind the medical context of the inquiry, ought as medical practitioners to have reacted differently to the factual situation which was presented to them. If it is accepted that some other response was appropriate, then the applicants must at least put forward some basis on which the conclusion they arrived at can be seen as nevertheless appropriate.

9.11 **HIS** Honour declined to strike out this part charge, finding that any prejudice was entirely hypothetical and that the absence of certain witnesses was not significant as there was no suggestion that they would provide an explanation for the relevant conduct.

9.12 **MR** Phipps raises a number of background matters in his affidavit and states that there are two factual disputes. These disputes relate to whether Dr Dennett had telephoned Mr Phipps before commencing the operation, and what she said when she contacted Mr Phipps. But it is the CAC's position that it is not necessary to resolve these disputes. Mr Phipps accepts that he was made aware of the problems with the operation in the course of his conversation with Dr Dennett. The central issue so far as the CAC is concerned, is whether Mr Phipps was under an obligation to attend the hospital, after being made aware of problems with the

operation. We agree with Mr McClelland that the disputed matters referred to by Mr Phipps do not significantly bear on this issue.

9.13 **THE** affidavit of Dr Durham makes it clear that the only material that has been taken into account by the CAC was the information provided by ACC, along with information provided by Mr Phipps. The other background circumstances referred to by Mr Phipps in his response of 11 May 1998 (as expanded on in his affidavit in support of this application) were not seen as relevant by the CAC.

9.14 **DETERMINATION** of the charge against Mr Phipps seems to turn on the single question of whether Mr Phipps' actions in the circumstances were appropriate and adequate for someone in his position. Apparently there are no disputes as to the events that took place at the time. As a result the need for witnesses would appear to be minimal, and so the risk of prejudice also appears minimal.

9.15 **AS** a result of the RACS report, and the various other proceedings that have arisen out of the operation, the events that took place are well documented. Mr Phipps' affidavit attaches various documentary evidence, including notes made by Dr Dennett at the time, and parts of the RACS report. In addition, the matter has been kept fresh in Mr Phipps' mind throughout these various proceedings. He cannot and nor does he claim that he can no longer remember the circumstances surrounding the relevant incident.

10. OPPRESSIVENESS AND UNREASONABLENESS:

10.1 **MR** Phipps alleges in paragraph 2 of his affidavit that the bringing of the charges is oppressive and unreasonable. However it is not clear from his affidavit, exactly what his reasons are for claiming this. In his summary he states that Mrs Bosscher's case has been the subject of four separate inquiries, he no longer practises medicine in New Zealand and does not intend to return, and he has been subjected to *"unparalleled and extraordinarily harsh treatment"* by HCO and RACS, which have successfully terminated his career in New Zealand.

10.2 **THE** Courts have considered a variety of factors under the heading of abuse of process which may show general oppression or unfairness. Mr Phipps' claims also seem to be similar to a claim of unreasonableness in terms of judicial review. The classic requirement to establish a claim of unreasonableness in judicial review proceedings is that a decision is *"so unreasonable that no reasonable authority could ever have come to it"* (*Associated Provincial Pictures Ltd v Wednesbury Corporation* [1947] 2 KG 223 (CA), 229). If the Tribunal is to strike out a claim, it is essentially determining that the CAC's decision to bring charges was unfair or unreasonable. Arguably, in order to maintain consistency of approach, the Tribunal should apply this test in determining whether the bringing of the charges was an abuse of process.

10.3 **IT** is clear that previous criminal proceedings in relation to a particular matter do not bar later disciplinary proceedings on the basis of a double jeopardy argument, res judicata or issue estoppel, since the issues that are being considered are different to those in criminal proceedings: *In re a Medical Practitioner* (1959) NZLR 784. This approach was followed in *Mardon v Pharmaceutical Board of Appeal* (supra).

10.4 **IN** fact there are a number of cases where the same facts have given rise to disciplinary proceedings as well as internal or external investigation or inquiry, criminal proceedings, civil proceedings, employment proceedings, or other review. *Faris* is an example of a case where a committee of inquiry had already been appointed before disciplinary proceedings were brought. These cases show that there is no general principle that disciplinary action cannot follow other investigation or proceedings. In fact, if other such investigation has taken place, it is highly likely that the Medical Council will have an interest, and a duty, to investigate.

10.5 **THAT** there have been previous investigations has been held in fact to reduce prejudice to a respondent, since it highlights the possibility of disciplinary action being taken. In *Bonham v Medical Council of New Zealand* (supra) the Court of Appeal stated that:

> *"We were informed that much of this material was brought forward at the Cartwright Inquiry in which Professor Bonham himself was a principal witness. With that background and the subsequent publicity generated by the report, he could have been under no illusion about the likelihood of disciplinary charges being considered, although counsel point out that the report was concerned with the procedures at National Womens' Hospital itself, rather than with attempting to blame any particular individual."*

10.6 **THE** Court of Appeal dismissed the application for a stay in *Bonham* because no prejudice had been established. Therefore in order to show that the charges should be struck out, Mr Phipps will have to show particular oppressiveness or unfairness in this case.

10.7 **MR** Phipps states that Mrs Bosscher's case has been the subject of four separate inquiries, which he states have resulted in a warning and mild criticism of his actions. In fact none of those inquiries has in any way exonerated or excused Mr Phipps. The head of the Department of Surgery, Professor Van Rij, concluded that Mr Phipps' actions were unbecoming a consultant general surgeon. The report by RACS also criticised Mr Phipps'

actions ("*we believe Mr Phipps did not supervise his junior staff adequately in this case.*") On appeal from the High Court Decision to quash the report, the Court of Appeal reversed the High Court's decision, and made declarations as to certain minor errors contained in it. The validity of this report is still a live issue, currently on appeal by Mr Phipps to the Privy Council. Proceedings in the Employment Tribunal by Mr Phipps were settled between the parties. Similarly defamation proceedings brought by Mr Phipps were settled. Following investigation, the ACC Medical Misadventure Advisory Committee further found that Mr Phipps' actions amounted to a medical error in terms of the Accident Rehabilitation and Compensation Insurance Act 1992.

10.8 **MR** Phipps seems to be suggesting that because his conduct has already been investigated and questioned in other forums, the CAC is abusing the process of the Tribunal by bringing a charge against him. This cannot be correct. In light of the results of the prior investigations, the CAC clearly had a duty to determine that a charge be laid, if it considered that the Tribunal should consider the matter. If bringing of a charge is an abuse of process simply because the issue has been considered in other forums previously, the Medical Council would not be able to consider complaints against practitioners who have been convicted of criminal offences. This cannot be the correct position. The Medical Council, the CAC and the Tribunal have a particular public interest function separate from any function of the parties who have previously considered the matter, and therefore have a separate interest in investigating and hearing charges relating to medical practitioners. For these reasons it cannot be said that the CAC is abusing the process by bringing a charge which relates to a set of facts which have been investigated in other contexts previously.

10.9 **IT** follows that unless Mr Phipps can show that no reasonable CAC would have brought the charges, he cannot show that there has been any unreasonableness or unfairness. Given the results of the previous investigations, it would be very difficult to conclude that no reasonable CAC could have decided to lay charges.

10.10 **ANY** argument by Mr Phipps that a criticism of him has been *"mild"* is more appropriately addressed to the Tribunal in submissions relating to the outcome of the hearing and any penalty imposed. The incident is not so trivial that it could be said that no reasonable CAC could bring a charge. As Gallen J pointed out in *Faris* at 84:

"It is an unfortunate fact that misconduct will frequently relate to an isolated and perhaps a very short-lived situation."

10.11 **THE** second claim that Mr Phipps appears to be making is that because he is no longer practising in New Zealand and is now overseas, this proceeding has no relevance.

10.12 **THIS** exact issue was considered by the Court of Appeal in *Bonham*. In that case Casey J stated that:

"Nor do we think it relevant that an adverse finding on the charges will have no practical effect so far as he is concerned in his profession, as he is no longer practising. The fact is that the charges are brought at the instigation of the responsible body concerned, the New Zealand Medical Association, and accordingly it would not be appropriate to read into these proceedings the overtones of a witchhunt or of an attempt to find a scapegoat that appear to have been present in the case of Herron in New South Wales. In this field, as in others involving professionals in their dealings with the public, the fact that charges are brought and prosecuted to a conclusion is a salutary reminder of the need to maintain appropriate standards of conduct, and is an important matter of public interest."

10.13 **IN** addition to this public interest, the complainant also has an interest in ensuring that appropriate measures are taken to investigate a medical practitioner. They should not be able to evade investigation by a professional body simply by moving overseas.

10.14 **THE** relationship between Mr Phipps and HCO and/or RACS is not a matter of concern for the Medical Council and the CAC.

10.15 **SOME** of Mr Phipps' comments suggest that he is alluding to a *"witchhunt"* against him. However unless Mr Phipps can point to any evidence that suggests that any bias or improper motivation exists on the part of the CAC, there are no grounds for striking out the charges on that basis. The comments of the Court of Appeal set out above are relevant in this regard. In *T v Preliminary Proceedings Committee of the Nursing Council* (supra) the question of improper motive was also raised. However it was found that there was no evidence to suggest lack of independence by the investigatory body. The principle is relevant in this case. The CAC has taken measures to ensure that it has complied with the principles of natural justice, and has heard both sides of the complaint. These efforts contributed, in part, to the delays that occurred. There is no evidence of any bias or improper motive on the part of the CAC.

11. PUBLIC POLICY:

11.1 **IN** all cases where charges are struck out or stayed on the basis of abuse of process, the interests of the *"accused"* and the public interest in having the charges heard must be weighed.

11.2 **IN** *K*, Gendall J quoted from the Canadian case of *R v Morin* [1992] 1 SCR 771, (1992) 71 CCC (3d) 1 at 810:

"The task of a Judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that person is charged with offences are brought to trial against the accused's interests and prompt adjudication. In the final analysis the Judge, before staying charges, must be satisfied that the interests of the accused and society in a prompt trial outweighs the interests of society in bringing the accused to trial."

11.3 **IN** this case the interests of Mr Phipps do not outweigh the interests of society in bringing him before the Tribunal. The function of the Medical Council is to ensure that medical practitioners are competent to practise medicine. This is a matter which affects the community at large and which has been delegated to the Tribunal because of its specific expertise in an area which can be extremely difficult for lay people to make competent judgements about the adequacy of the actions of a practitioner.

11.4 **FOR** these reasons the public interest in having the Tribunal hear charges relating to misconduct is very strong. It is generally contrary to the principles of natural justice to allow a case to go unheard. In such circumstances it can be argued that the prejudice to the accused must be particularly strong to outweigh the public interest factors which are present.

12. CONCLUSIONS:

12.1 **IN** assessing the merits of this case, it must be remembered that in the end a balancing exercise between the interests of Mr Phipps, and the interests of the public in prosecuting claims must be undertaken. The process of the Tribunal must be in danger of being abused. In this case no clear evidence has been adduced that the process of the Tribunal is being abused.

12.2 **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.

12.3 **THE** application to have the charges stayed or struck out is dismissed.

DATED at Auckland this 9th day of September 1999

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P J Cartwright

Chair

Medical Practitioners Disciplinary Tribunal