



**MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

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**DECISION NO:** 124/99/54C

**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  
**RICHARD STRAWSON**  
**STUBBS** medical practitioner of  
Wellington

**BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

**TRIBUNAL:** Mr T F Fookes (Chair)  
Dr I D S Civil, Professor W Gillett, Dr J W Gleisner,  
Mrs H White (Members)  
Ms Kim Davies (Hearing Officer)  
Mrs G Rogers (Stenographer)

Hearing held at Wellington on Monday 27, Tuesday 28 and Wednesday  
29 March 2000

**APPEARANCES:** Ms K P McDonald and Ms J Daniell for a Complaints Assessment  
Committee ("the CAC")

Mr C W James for Dr R S Stubbs.

**FINAL DECISION OF THE TRIBUNAL:**

**1. INTRODUCTION:**

**1.1** IN the first part of its Decision in this case (Ref. 116/99/54C), with which this final part should be read in conjunction, the Tribunal found that the CAC had proved that Dr Stubbs failed adequately to inform the complainant of the possible risks and adverse effects of certain proposed surgery in that he failed to inform her of the material risk that the resumption of her course in mid-February 1994 could be jeopardised or even prevented if serious complications materialised, could not promptly be remedied and required a prolonged stay in hospital and/or further surgery.

**1.2** THE Tribunal noted that if the complainant had been advised of the material risk identified in 1.1 above she would then have been able to make an informed choice as to whether she accepted and was prepared to run the risk that she might not be able to resume the course as scheduled or whether she preferred to put up with the symptoms, until she had completed the remaining twelve weeks of the course, and reconsider the issue of surgery thereafter.

**1.3** **THE** Tribunal found that Dr Stubbs' failure meant that the complainant's choice to undergo the surgery was not informed and that Dr Stubbs did not obtain her informed consent.

**1.4** **IT** dismissed a charge of professional misconduct but found that the proven conduct was conduct unbecoming a medical practitioner and that such conduct reflects adversely on Dr Stubbs' fitness to practise medicine.

**1.5** **HAVING** made such findings the Tribunal requested counsel to make submissions as to penalty and those have now been received and considered by the Tribunal.

**2. AVAILABLE PENALTIES:**

**2.1** **S.154** of the Medical Practitioners Act 1995 relates to disciplinary offences committed before the commencement of that Act. The effect of s.154(f) is that if a person is found guilty of a disciplinary offence in respect of conduct engaged in before the commencement of that Act the person may be dealt with under that Act but, except with the consent of that person, neither the Tribunal nor any Court has power to impose on that person, in respect of that conduct, a penalty that could not have been imposed at the time when the person engaged in that conduct.

**2.2** **THE** conduct which the Tribunal has found proven in this case occurred in 1993, i.e. prior to the commencement of the 1995 Act. At that time the Tribunal could order all or any of the following in a case of professional misconduct or conduct unbecoming:

- (a) Payment of a penalty not exceeding \$1000;
- (b) Censure;

- (c) Conditions (for a period not exceeding three years) on the right to practise;
- (d) Payment of any costs or expenses of and incidental to the inquiry.

**2.3** **S. 110(1)(e)** of the Medical Practitioners Act 1995 permits a fine not exceeding \$20,000 to be imposed in the cases to which it applies but such a fine cannot be imposed in this case because of s. 154(f) and because Dr Stubbs, as is his right, has not consented to the imposition of any greater penalty than could have been imposed in 1993. The maximum available fine in this case is, therefore, \$1,000.

### **3. SUBMISSIONS:**

**3.1** **MS McDonald QC**, on behalf of the CAC, submitted that while the question of penalty was for the Tribunal a fine at the upper end of the available level together with censure and an order for costs (at an appropriate level) were appropriate.

**3.2** **MR James**, on behalf of Dr Stubbs, did not join issue with that submission but submitted that in assessing penalty, including fine and costs contribution, the Tribunal should take into account fifteen specific matters. In summary these matters included reference to:

- (a) the Tribunal's findings;
- (b) the hearing having been painful and stressful for Dr Stubbs;
- (c) the nature of the publicity which Dr Stubbs had had to endure in connection with the charge and the hearing and the "pain and suffering" it had caused him;
- (d) the punishment from the very fact of appearing before his peers and being found wanting;

- (e) the steps which Dr Stubbs has taken within his practice as a result of this matter (which include changes to his brochure and the consent form signed by the patient, being more detailed and careful in his documentation and recording, including in letters to referring general practitioners statements confirming discussions with the patient about risks and pitfalls as well as benefit and also confirming the patient's understanding of this advice);
- (f) the evidence of three witnesses (which was dealt with in the first part of the Tribunal's Decision) and an unsolicited letter sent to the Tribunal by the wife of one of Dr Stubbs' patients;
- (g) Dr Stubbs' professional pride and reputation;
- (h) much of his disposable income during the last seven years having gone into a non-profit trust for the purposes of research and supporting a research team;
- (i) his regret and sorrow that the complainant has undergone such a series of set-backs requiring many operations and resulting in such pain and suffering, his recognition that she "has had a truly ghastly time" and the fact that he feels for her.

**3.3** **THE** Tribunal is indebted to counsel for their helpful submissions.

#### **4. PENALTY**

**4.1** **THE** Tribunal has considered the submission of counsel for the CAC that Dr Stubbs should be censured, notes that Mr James (while not formally accepting it) has not disputed it and is in any event satisfied that Dr Stubbs' proven conduct warrants the formal sanction of a censure.

**4.2** **THE** Tribunal has also considered the submission that Dr Stubbs should be fined at the upper end of the available level.

**4.3** **THE** Tribunal considers that this is an appropriate case for the imposition of a fine. The primary reason for this is the importance of informed consent. Obtaining it is at the heart of the practice of medicine. It is a fundamental aspect of proper medical practice and any failure to obtain it is likely to be regarded seriously. That is certainly the case when the failure occurred against the background of difficult surgery with a high potential for things to go wrong and when it was known to the practitioner that resuming the course was important to the complainant. (She was not able to resume it and the consequences of that were serious - see 16.3 of the first part of the Tribunal's Decision.) The Tribunal does not consider that in this case the imposition of a censure and an order for costs would be sufficient.

**4.4** **IN** arriving at its decision as to the amount of the fine to be imposed the Tribunal has taken into account the following matters:

- (a) the maximum penalty of \$1,000 applied to cases of both professional misconduct and conduct unbecoming;
- (b) the decision as to the amount of the fine must be arrived at on the basis that the conduct which resulted in the charge being upheld was a failure to warn that serious complications might result in:
  - (i) an extension of hospital stay;
  - (ii) a need for further surgery;
  - (iii) the scheduled resumption of the complainant's course being jeopardised

and just as the Tribunal did not consider that, in the circumstances of the case, such conduct warranted the "severe label" of professional misconduct so it does not consider that a fine at or near the available maximum is called for;

- (c) the charge of professional misconduct having been dismissed the Tribunal does not consider it appropriate that, having been found guilty of the lesser charge, Dr Stubbs should nevertheless be fined as though he had been found guilty of the more serious charge;
- (d) the Tribunal is satisfied that:
  - (i) the steps which Dr Stubbs has taken within his practice and which are set out in the submissions of his counsel represent a positive response to the lessons to be learned from this case;
  - (ii) the Tribunal's three-day hearing was a painful experience for Dr Stubbs (as was also the case for the complainant during the time she was present);
  - (iii) Dr Stubbs has already endured considerable publicity (prior to, during and since the hearing) in relation to this case and has found some, and perhaps most, of it distressing;
  - (iv) there is clear evidence that on other occasions Dr Stubbs has been diligent and forthright in his exposition of the risks involved in proposed surgery. (In this connection it is important to bear in mind that a practitioner must disclose not only risks inherent in the procedure, even if it is skilfully performed, but also risks which are material because of the particular circumstances of the patient which circumstances are known to the practitioner.)

**4.5** **THE** Tribunal also takes into account that this appears to be the first adverse finding against Dr Stubbs by a medical disciplinary body.

- 4.6 BALANCING** the need to reflect the seriousness of any failure to obtain informed consent with the factors in Dr Stubbs' favour, bearing in mind that the operation of s. 154(f) means that the maximum fine available for a case of proven professional misconduct which occurred prior to the 1995 Act is \$1,000 and taking into account that this is not such a case but is one of conduct unbecoming a medical practitioner which reflects adversely on the practitioner's fitness to practise medicine, the Tribunal considers that a fine of 70% of the available maximum, i.e. \$700, should be imposed on Dr Stubbs.
- 4.7 COUNSEL** for the CAC did not suggest that any conditions should be imposed on Dr Stubbs' practice but the Tribunal has nevertheless considered whether any should be. Having observed Dr Stubbs giving evidence and having since learned of the changes he has made within his practice, the Tribunal considers it unlikely that he will re-offend and, taking into account not only that but also all the circumstances of the case and having regard to public safety, it is not satisfied that for the protection of the public or in his own interests any conditions on his right to practise as a medical practitioner are called for. None will therefore be imposed.
- 4.8 THE** Tribunal has the power to order payment of any costs or expenses "of and incidental to the inquiry" which wording differs from that used in s. 110(1)(f) of the 1995 Act.
- 4.9 THE** costs of which the Tribunal is aware, prior to its consideration of the penalty submissions and the preparation of this final Decision, total \$71,112.56. The Tribunal has considered the various components of that sum. All of them appear to be costs and expenses of and incidental to the inquiry and Mr James, who was advised of them - and the amount of each - before he lodged his submissions on penalty, has not disputed or questioned any of them.



**4.10** **SOME** costs were incurred as a result of a previously scheduled hearing being adjourned at the request of the CAC. Such adjournment was opposed by Dr Stubbs and was not in any way his responsibility. Those costs have accordingly been separated out and are not included in the sum of \$71,112.56 referred to above.

**4.11** **MR** James' submissions included a sentence which averred that "*Dr Stubbs does not have much in the way of assets*". No details of his assets, of what was meant by the word "much" or of whose assets Dr Stubbs' assets were being compared with (in this context "much" seems to the Tribunal to be a relative term) were provided. It was said that in the last seven years most of his disposable income has gone into the non-profit trust earlier referred to. No details relating to his income were provided. The Tribunal is not persuaded by the mere statement that Dr Stubbs does not have "much" in the way of assets that there is any reason why it should refrain from making an appropriate order as to costs. Considerably more information would have had to be provided to justify the adoption of such a course and it is in any event noted that Mr James did not submit that there should be no order as to costs but only that in assessing fine and costs contribution various matters, which he specified, should be taken into account. All those matters have been considered.

**4.12** **HAVING** considered all the relevant circumstances and the submissions of counsel, and noting that in conduct unbecoming cases the Tribunal has frequently made orders at the level of 30% to 35% of actual costs, the Tribunal considers that Dr Stubbs should be ordered to pay \$24,000, or approximately one-third, of the costs and expenses incurred. If he needs time to pay, he should make that known and that question can then be considered.

**5. PUBLICATION**

**5.1** **THE** Tribunal has decided that pursuant to s. 138(2) of the Act the Secretary shall cause the notice there referred to to be published in the New Zealand Medical Journal.

**6. SUPPRESSION ORDERS**

**6.1** **THE** orders prohibiting publication of the names of, and any particulars which might tend to identify, the complainant, her husband, her sister or the two former patients of Mr Stubbs who made affidavits in this proceeding remain in force. Publication of the statements of the former patients remains prohibited.

**7. ORDERS**

**7.1** **FOR** the foregoing reasons the Tribunal orders that:

- (1) Dr Richard Strawson Stubbs, having been guilty of conduct unbecoming a medical practitioner which conduct reflects adversely on his fitness to practise medicine,:
  - (a) be and is hereby censured;
  - (b) pay a fine of \$700;
  - (c) pay \$24,000 towards the costs and expenses of and incidental to the inquiry.
  
- (2) The Secretary is to cause a notice pursuant to s. 138(2) of the Act to be published in the New Zealand Medical Journal.

**DATED** at Wellington this 4<sup>th</sup> day of August 2000

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T F Fookes  
Senior Deputy Chair  
Medical Practitioners Disciplinary Tribunal