Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 5/97/1C

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 **E** registered medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chairperson)

Professor B D Evans, Dr A M C McCoy, Dr A D Stewart

Ms S Cole (Members)

Mr R P Caudwell (Secretary)

Mrs K G Davenport (Legal Assessor)

Mrs E Huse (Stenographer)

Hearing held at xx on Tuesday 27 May 1997

APPEARANCES: Ms R Hayward for the Complaints Assessment Committee ("the CAC").

Mr H Waalkens for Dr E ("the respondent").

WITNESSES: Mr R P Caudwell, Mrs A, Dr B,

Dr E

UPON ENQUIRING into the complaint brought by the Complaints Assessment Committee and after hearing evidence from the witnesses referred to, and after considering the submissions made by counsel for the Complaints Assessment Committee and Dr E,

THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL FINDS:

1. THE CHARGE:

1.1 '**THE** Complaints Assessment Committee pursuant to section 93(1)(b) of the Medical Practitioners' Act 1995 charges **E** of xx, Registered Medical Practitioner, with professional misconduct in that during the period between June 1993 and April 1996 in the course of his management and treatment of his patient, **A** he:

1. Failed to establish Mrs A on an on-going monitoring programme appropriate to her situation and appropriate to her being prescribed hormone replacement therapy.

2. Failed to inform or adequately inform Mrs A of the risks associated with the use of hormone replacement therapy.

3. Failed to keep any or any adequate records of a consultation with Mrs A when she first presented with breast symptoms in or about October 1993."

1.2 **AT** the commencement of the hearing, Counsel for the Complaints Assessment Committee (CAC) advised that following discussion with Dr E's Counsel, an alternative charge of conduct unbecoming a medical practitioner in terms of Section 109(1)(c) was to be laid and prosecuted at the hearing.

The Tribunal allowed that additional, alternative, charge to be brought and the hearing proceeded on that basis.

2. THE FACTS:

2.1 **MRS** A became a patient of Dr E in 1990. Mrs A visited Dr E on a number of occasions presenting with a multiplicity of symptoms, all of which were investigated by Dr E, and for which he either ordered laboratory tests or referred Mrs A on to appropriate specialist practitioners.

2.2 **IN** September 1990 Dr E referred Mrs A to Dr C, an obstetrician and gynaecologist. As a result of that visit, Mrs A was placed on a waiting list for a hysterectomy. That hysterectomy was performed by Dr C in May 1992.

2.3 **AT** that time both Dr E and Dr C apparently recommended that Mrs A commence hormone replacement therapy but she declined.

2.4 **MRS** A continued to suffer from multiple symptoms. She continued to undergo a variety of tests at Dr E's direction. Mrs A visited a number of doctors other than Dr E, both on referral and at Dr E's practice when Dr E was unavailable.

2.5 **IN** the course of a consultation on 18 June 1993, Dr E again recommended hormone replacement therapy. Dr E recorded in Mrs A's notes that "many of A's symptoms may [relate] to hormonal change. Try HRT Premarin."

2.6 **MRS** A gave evidence that at no time did she recall Dr E discussing or explaining any risks or side effects associated with hormone replacement therapy with her. Mrs A also gave evidence that Dr E did not undertake any breast examination at that time, nor did he inquire as to whether there was any history of breast cancer in her family.

2.7 **MRS** A was adamant that she would not have agreed to take hormone replacement therapy had she known that there might be any risk of cancer, particularly because her mother had died of cancer, although not of breast cancer.

2.8 **IN** September 1993 Dr E recorded his suggestion to Mrs A that she stop taking Premarin as there did not seem to have been any improvement in her symptoms.

2.9 **MRS** A gave evidence that in October 1993 she noticed a lump in her left breast. She was concerned about the lump but assumed that it was "another one of my many mysterious aches and pains". Mrs A said that she went to see Dr E on 13 October 1993. At that consultation Dr

E examined her breast and carried out a breast examination. Dr E told Mrs A that he could not feel any lump and that there was nothing to worry about.

Mrs A said that she was surprised at Dr E being unable to feel any lump as she could still feel it and that she asked Dr E about the possibility of her having a mammogram. Dr E apparently explained the local difficulties of obtaining mammograms within the public health system for patients in the absence of any family history of breast cancer or other clinical indicia. Mrs A could not afford to have a mammogram carried out privately. Mrs A did not follow up the possibility of her having a mammogram, nor did Dr E take any further steps to arrange a mammogram for Mrs A.

2.10 **MRS** A's medical records, of 15 October 1993 (records made by Dr E's associate in practice) record that Mrs A had felt a lump in the left breast and "T cleared it".

2.11 **DR** E's evidence was that Mrs A referred to the breast lump at the end of a consultation just as she was about to leave his office. The examination was undertaken by him after he had finished recording his notes of the consultation and he did not return to the notes and record either Mrs A's concerns, or his undertaking the examination, or the results of his examination.

2.12 **ON** 5 November Dr D a consultant rheumatologist, to whom Mrs A had been referred by Dr E, wrote to Dr E and, amongst other things, indicated that Mrs A "may choose to return to HRT". A prescription for Premarin was given to Mrs A on 8 November 1993, together with a suggestion that she remain on HRT for three years.

2.13 **THROUGHOUT** the period 1994-1995 Mrs A said she continued to take the hormone replacement therapy prescribed to her. Mrs A continued to visit Dr E regularly, her medical records maintained by Dr E's practice record visits at least two times each month, sometimes more. Mrs A continued to suffer from a variety of symptoms, ailments and "aches and pains". Mrs A also continued to monitor the lump in her left breast but apparently did not mention the lump to Dr E or to any of the other doctors to whom she was referred, or whom she saw at Dr E's practice.

2.14 **OVER** the time the swollen area on Mrs A's breast had got bigger and on occasions it was sore. She continued to assume there was nothing to worry about. However, in mid February 1996 Mrs A noticed that the nipple on her left breast had become inverted and she went to see Dr E on 25 March 1996.

2.15 **DR** E immediately referred Mrs A to a specialist and on 1 April 1996 Mrs A was diagnosed with breast cancer and subsequently underwent a mastectomy on 1 May 1996.

THE EXPERT EVIDENCE:

2.16 **DR** B, a general practitioner of xx and expert witness called on behalf of the CAC, gave evidence of the risks associated with HRT and produced the National Advisory Committee on Core Health and Disability Support Services' Report on Hormone Replacement Therapy (HRT). Dr B gave evidence as to an appropriate monitoring programme for patients prescribed HRT. Dr B's evidence was that the fact that Mrs A was being prescribed HRT did not of itself require that she be monitored more frequently. However she was over 50 at the time she began receiving HRT and in Dr B's opinion, she should have been on an ongoing monitoring

programme. She had also reported concern about a breast lump in October 1993, just prior to her recommencing HRT.

2.17 **DR** B gave evidence that an ongoing monitoring programme would have included:

Regular recordings of blood pressure;

Regular clinical breast examination (at least once every two years);

Regular mammograms

2.18 **DR** B also gave evidence of the pressures on mammography referrals in the public health system and the difficulty of obtaining mammograms for asymptomatic patients. However, it was Dr B's opinion, where the patient has felt a lump, even if the doctor cannot palpate it, then that patient is not asymptomatic and a referral is justified. In Dr B's view the fact that Dr E could not feel the lump did not exclude mammography referral. However Dr B conceded that she was unfamiliar with the particular circumstances surrounding mammography referrals in the xx region.

SUBMISSIONS ON THE CHARGES LAID:

2.19 **BOTH** Counsel made submissions as to the grounds upon which a medical practitioner may be disciplined under the Medical Practitioners Act 1995 (the Act). Section 109 provides:

"**Grounds on which medical practitioner may be disciplined -**

(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; or ....."

2.20 **THE** burden of proof is borne by the CAC. The standard is the civil standard, recognising that the level of proof required will vary according to the seriousness of the charges faced by the practitioner - the more serious the charge or charges, the higher the standard which must be met.

2.21 **ADDITIONALLY**, the authorities require that mere omission or error on the part of the practitioner will not suffice to establish an adverse disciplinary finding. In the parlance of the law of negligence, and disciplinary cases generally, the question is not whether an error is made, but whether the practitioner has demonstrated a reasonable degree of care and skill - did the practitioner's conduct constitute an acceptable discharge of his or her professional duties and obligations?

2.22 **IN** the context of professional misconduct charges (brought under the 1968 Act) the Court in *Ongley v Medical Practitioners Disciplinary Committee* [1984] 4 NZAR 369, expressed it thus -

"To return then to the words "professional misconduct" in this Act. In a general application of the words it is customary to establish a general test by which to measure a fact pattern under scrutiny rather than to go about and about attempting to define in a dictionary manner the words themselves. The test the Court suggests on those words in the scheme of this Act in dealing with a medical practitioner could be formulated as a question. Has the practitioner so behaved in a professional capacity that the established acts under scrutiny would be reasonably regarded by his colleagues as constituting

professional misconduct? With proper diffidence, it is suggested that the test is objective and seeks to gauge the given conduct by measurement against the judgment of professional brethren of acknowledged good repute and competency, bearing in mind the composition of the Tribunals which examine the conduct. Instead of using synonyms for the two words the focus is on the given conduct which is judged by the application to it of reputable, experienced medical minds supported by a lay person at the committee stage."

2.23 **BOTH** Counsel submitted that, in the absence of any change to the wording of "professional misconduct" in the new Act, the established test for professional misconduct is unchanged. The Tribunal agrees with this general proposition, it not being necessary in the present case (in light of the Tribunal's findings) to undertake any more detailed or substantive examination of Jeffries J's analysis.

2.24 **HOWEVER** the matter is not so straightforward in respect of the charge of "conduct unbecoming". In the 1995 Act there is an added requirement - conduct may not be found to be "conduct unbecoming" a medical practitioner unless that conduct "reflects adversely on the practitioner's fitness to practise medicine", Section 109(1)(c).

2.25 **COUNSEL** for the CAC submitted that the law was unchanged, the new words simply expressed the law as it was given effect to by the disciplinary bodies and the courts under the 1968 Act.

2.26 **MR** Waalkens, for Dr E, submitted that more serious misconduct is required to make a positive finding of "conduct unbecoming" under the new Act than was the case under its predecessor, but

noting, quite correctly in the Tribunal's view, that even under the 1968 Act, the courts, and the disciplinary bodies, recognised that, as a matter of common law, something more than mere error, omission or fault was required to establish a finding adverse to the practitioner.

2.27 **THE** Tribunal considers that both submissions have merit; they are not in conflict, if "something more" than mere error or omission, if present, indicates a lack of professional care and skill, or a deficiency in the practitioner's professional standards, which "reflects adversely on the practitioner's fitness to practise medicine". The Tribunal is guided in this conclusion by the analysis of Her Honour Elias J in *B v Medical Council* (HC 11/86, 8/7/96 at p15) that:

"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 the lower end of the scale, must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes 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 Mr Waalkens that a finding of conduct unbecoming is not required in every case where error is shown. To require the wisdom available with hindsight would impose a standard which is unfair to impose. The question is not whether an error was made but whether the practitioner's conduct was an acceptable discharge of his or her professional obligation. The threshold is inevitably one of degree. Negligence may or may not (according to degree) be sufficient to constitute professional misconduct or conduct unbecoming."

2.28 **IN** the event, again given the findings of the Tribunal on the factual matters placed before it in this case, it is not necessary for the Tribunal to undertake any definitive analysis of the implications, and the jurisprudential consequences, which may, or may not, result from the 'gloss' which Parliament has added to "conduct unbecoming" in Section 109(1)(c) of the Act, beyond the comments already made.

3. THE FINDINGS:

3.1 PARTICULAR 1:

"**THAT** Dr E failed to establish Mrs A on an ongoing monitoring programme appropriate to her situation and appropriate to her being prescribed hormone replacement therapy."

3.1.1 **THE** evidence was that Dr E did not establish Mrs A on a formal ongoing monitoring programme, as such was described by Dr B. However the Tribunal had the benefit of Dr E's notes and Mrs A's medical records and it was evident from those records that Mrs A was seen regularly, not only by Dr E but by a number of other medical practitioners. Whilst Mrs A was not on a formal monitoring programme, nevertheless, with the exception of mammography, Mrs A was, because of the treatment she received for her various other ailments, on what amounted to a 'de facto' monitoring programme. Dr E regularly recorded Mrs A's blood pressure during the period between the time when Mrs A first mentioned the breast lump and her breasts were examined by Dr E (October 1993), and the time at which Mrs A represented with the left breast nipple inversion (March 1996), a little over two years. Furthermore evidence was given to the Tribunal by Dr E that, in the xx area at that time, GP's could not request mammograms for asymptomatic patients without specialist referral.

3.1.2 **BOTH** Dr E and Dr B gave evidence that a patient presenting with a breast lump ought to have received a follow up check three to six months after the initial check, however Mrs A also gave evidence that, notwithstanding the frequency of her visits to Dr E and other medical practitioners, and her own continuing concerns, she did not mention the lump again on any visit following the October 1993 visit, until March 1996.

3.1.3 **BECAUSE** Mrs A was being seen so regularly by Dr E and others, she was, for all practical purposes, being 'monitored' and, in the absence of any comment from Mrs A regarding any concerns she had about the lump, which she apparently continued to self monitor, Dr E apparently, and quite reasonably in the Tribunal's view, assumed that the lump mentioned to him by Mrs A in October 1993 but not felt by him on examination, was no longer of any concern to Mrs A.

3.1.4 **THE** Tribunal was of the view that throughout the period during which Dr E was Mrs A's general practitioner, he diligently and carefully attempted to ascertain the cause of and to treat the multiplicity of the symptoms which Mrs A presented. He ordered all appropriate tests and he had referred Mrs A to specialists on each occasion a second opinion was indicated or requested by Mrs A.

3.1.5 **HAVING** heard and been able to question Mrs A, Dr E and Dr B, the Tribunal was not persuaded that Dr E's failure to institute a formal ongoing monitoring programme for Mrs A constituted either professional misconduct or conduct unbecoming a medical practitioner which would reflect adversely on Dr E's fitness to practise medicine.

3.1.6 **THE** Tribunal does not have any criticism of Dr E's actions in regard to this Particular and the Tribunal does not find it established.

3.2 PARTICULAR 2:

"**THAT** Dr E failed to inform or adequately inform Mrs A of the risks associated with the use of hormone replacement therapy."

3.2.1 **MRS** A gave evidence that at no time had Dr E explained hormone replacement therapy to her; either its benefits or risks. However the evidence was that Mrs A was offered hormone replacement therapy following her hysterectomy in May 1992. The recommendation apparently was made at that time by both Dr C and Dr E and, in the face of resistance from Mrs A, the Tribunal was not satisfied on the evidence that neither Dr E or Dr C would not have explained HRT, its benefits and risks, and their reasons for recommending it, to Mrs A.

3.2.2 **AT** the hearing Mrs A was shown a number of information pamphlets and brochures regarding menopause and HRT and recalled seeing at least one of these. Dr E's evidence was that he did not simply leave these brochures and pamphlets lying about available for his patients to pick up while visiting the surgery, but preferred to give the pamphlets and brochures to his patients so that he could explain them to the patient.

3.2.3 **ON** a number of issues, Mrs A had difficulty remembering events and/or discussions she might have had with Dr E, or any of the other doctors she saw. Whilst the Tribunal has no criticism of Mrs A for this, especially since several of these events and

discussions occurred some years ago, nevertheless in the face of a high degree of uncertainty on the part of Mrs A, the Tribunal is bound to give Dr E the benefit of the doubt.

3.2.4 **THE** standard of proof in matters of this sort is the civil standard, that is, the balance of probabilities but the seriousness of the charge against the medical practitioner will indicate that the Tribunal ought to require proof on the balance of probabilities at a higher level, although not beyond reasonable doubt. Notwithstanding Counsel for Dr E's submissions that, if there be offending on the part of Dr E, it was offending at the lower end of the scale, the Tribunal considered that it is bound to take into account the possible effects a finding adverse to the medical practitioner will have. The potential prejudice to the medical practitioner, weighed against the harm allegedly caused to the complainant, indicates, in this particular case at least, that any uncertainty on the part of Mrs A ought to be resolved in favour of Dr E.

3.2.5 **A** further factor which the Tribunal took into account was the length of time Mrs A was prescribed HRT. The current consensus of the information provided to the Tribunal was that a woman who has been using HRT for five years or less "probably has very little increased risk of developing breast cancer than a woman not on HRT".

3.2.6 **DR** B gave evidence that, after five years, a woman might be regarded as a long term user of HRT. Mrs A was prescribed HRT on two separate occasions, the longest period she was on HRT being from around October or November 1993 to April 1996. Thus, Mrs A was not a "long term" user of HRT in terms of the literature

presented to the Tribunal. Further Mrs A's records confirm that, at the time she recommenced HRT in 1993, the recommendation was that she remain on HRT for three years. Dr B's evidence was that "ideally" all women should have a mammogram at the time of initiating therapy, and that any increased risks associated with HRT indicate formal ongoing monitoring and advice for long term users.

3.2.7 **FINALLY**, Mrs A gave evidence of her own research about HRT, and of her going to the library to seek more information. Whilst as a general rule, a patient who is diligent about making her own inquiries or carrying out her own research ought not to be disadvantaged, or her general practitioner excused from his or her obligations to properly inform the patient, Mrs A's evidence of her own inquiries did not in the Tribunal's view, appear to be consistent with her other evidence that she had had no discussions with Dr E or Dr C about her taking HRT, or any risks associated with it. The Tribunal is supported in this view especially given Mrs A's no doubt considered refusal to take HRT following her hysterectomy in May 1992 notwithstanding that was recommended to her by her specialist obstetrician and gynaecologist Dr C.

3.2.8 **MRS** A's evidence on this point also was confused, if not contradictory. Mrs A gave evidence that her own research confirmed that women who are on HRT for more than five years tended to have a slightly increased risk of developing breast cancer. However, Mrs A was also adamant that, had she known of any increased risk, she would not have consented to commencing, or continuing, HRT.

3.2.9 **TAKING** into account all of these factors, the Tribunal is not satisfied that this charge was proven and accordingly this Particular is not upheld.

3.3 PARTICULAR 3:

"**THAT** Dr E failed to keep any or any adequate records of a consultation with Mrs A when she first presented with breast symptoms in or about October 1993."

3.3.1 **CLEARLY** Dr E did not record Mrs A's presentation of the lump in her left breast, or his examination of the breast at the consultation on 13 October 1993. However, the fact that Mrs A mentioned the lump and Dr E carried out a breast examination is not at issue. Dr E explained that the omission occurred because Mrs A mentioned the lump at the end of a consultation, just as she was about to leave, and after he had completed recording his notes for the visit.

3.3.2 **THE** note made by Dr E's associate on 15 October 1993 records Mrs A's self reference and that "T cleared it".

3.3.3 **HAVING** heard from Dr E and Mrs A on this Particular, the Tribunal is satisfied that Dr E failed to keep any record of this aspect of the consultation of 13 October 1993.

However the Tribunal is not satisfied that this failure constitutes either professional misconduct or conduct unbecoming a medical practitioner that reflects adversely on Dr E's fitness to practise medicine.

3.3.4 **AS** stated above, the established authorities require something substantially more than mere error or omission on the part of the medical practitioner before a finding adverse to him or her may properly be made. In the present case, and on the basis of all of the facts and circumstances presented in the evidence given to it, the Tribunal considers that Dr E's failure to record Mrs A's self referral, or his examination of her left breast on 13 October 1993, does not go beyond a "mere omission" and thus is, on its own, insufficient to found a finding of conduct unbecoming, in terms of Section 109(1)(c) of the Act.

3.3.5 **DR** E also gave extensive evidence of practices, including formal monitoring programmes and computer initiated checking of patients who require follow-up checks or monitoring, which he has instituted in his practice over the past two or three years, prior to Mrs A's complaint and, on the whole, the Tribunal was impressed with the standard and content of the records presented to it by Dr E.

3.3.6 **ACCORDINGLY**, this Particular was also not upheld.

3.4 **NONE** of the Particulars being upheld, the Tribunal does not find that either of the charges laid against Dr E have been established against him.

3.5 **THE** Tribunal had the advantage of having sufficient time at the conclusion of the hearing to adjourn for deliberation. It being able to reach a conclusion, it reconvened the hearing and announced its findings, with its reasons to follow.

3.6 **IN** light of the Tribunal's decision, there are no issues as to costs.

DATED at Auckland this 1st day of July 1997

.....

W N Brandon

Deputy Chairperson

Medical Practitioners Disciplinary Tribunal