Medical Practitioners Disciplinary Tribunal

PO Box 5249 Wellington Telephone (04) 499-2044 Facsimile (04) 499-2045
All Correspondence should be addressed to The Secretary

DECISION NO.: 8/97/4C

IN THE MATTER of Section 109(1)(e) of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by a Complaints Assessment Committee pursuant to Section 102(2) of the Act against **DONALD RICHARD DALLEY** registered medical practitioner of Christchurch

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr P J Cartwright (Chairperson)

Dr R S J Gellatly, Professor Dame Norma Restieaux,

Dr L F Wilson, Mr P Budden (Members)

Mr R P Caudwell (Secretary)

Mr J D Howman (Legal Assessor)

Mrs G Rogers (Stenographer)

Hearing held at Christchurch on Wednesday 11 June 1997.

APPEARANCES: Mr C J Lange for the Complaints Assessment Committee (the "CAC").

Mr C J Hodson and Mr G M Brodie for Dr D R Dalley ("the respondent").

1. PARTICULARS OF CHARGE:

A Complaints Assessment Committee pursuant to Section 93(1)(b) of the Medical Practitioners Act 1995 ("the Act") charged the respondent that on 23 August 1996 he was convicted by the District Court in Christchurch of 6 offences against Section 229A of the Crimes Act 1961 being in each case an offence punishable by imprisonment for a term not exceeding seven years, namely using a document with intent to defraud and the circumstances of the offence reflect adversely on the practitioners fitness to practice medicine.

2. SUMMARY OF AGREED FACTS:

2.1 **THE** respondent was engaged by Parklands Hospital as a house doctor and had been engaged in that capacity for a period of 12 years.

2.2 **THE** terms upon which the respondent was engaged are recorded in an agreement which is one of an agreed bundle of documents.

2.3 **PARKLANDS** Hospital provides long term care for elderly frail, terminally ill, and psycho-geriatric patients. On admission to the hospital a new patient could elect either to carry on with their present general practitioner or be attended to by the house doctor.

2.4 **ON** 22 August 1996 following a trial by Judge and jury, the respondent was convicted in the Christchurch District Court of six offences against Section 229A of the Crimes Act 1961. The respondent was found guilty on six charges of using a document with intent to defraud. The respondent was also found not guilty on thirteen similar charges. All nineteen charges related to general medical services or "GMS" benefit claims which he had submitted in respect of patients at Parklands Hospital, where he was employed on a retainer basis.

2.5 **THE** Trial Judge set out the basis of the jury's verdict in a Minute dated 16 September 1996 and his remarks on sentence of 17 September 1996. In summary the Trial Judge found:

(a) The jury was satisfied on the intent to defraud element of the charges only in respect of those patients who could not be seen by the respondent on the days in question that being because they were either dead or absent from the hospital.

(b) The verdicts should be interpreted that the jury were satisfied that the respondent was not entitled to claim for patients in respect of whom record of attendance was not made on a particular day but that the jury were not satisfied that the respondent acted dishonestly in submitting those claims.

2.6 Judge's Remarks on Sentence:

2.6.1 **THE** Judge's remarks on sentence are not determinative in terms of imposition of penalties by the Tribunal. Nevertheless they do provide some guidance in obtaining some appreciation of the gravity of the respondent's offending.

2.6.2 **SELECTED** extracts from those remarks which the Tribunal considers have some relevance in the context of these proceedings follow:

"Dr Dalley, one of the most difficult tasks which a judge is called upon to perform is to sentence someone who has achieved distinction and respect within his or her chosen profession and within the community generally. Your case is such a case.

..... I propose to impose sentence on the basis that the verdicts which the jury returned mean that they were satisfied that you submitted fifteen GMS benefit claims dishonestly, of which thirteen related to patients who had died and two related to a patient who was absent from Parklands Hospital at the time. While the verdicts reflect a significantly lesser degree of criminality than the basis on which the Crown advanced its case against you, the verdicts nevertheless mean that the jury accepted that you submitted dishonest claims on fifteen separate occasions over a period of approximately eight months.

In his submissions Mr McVeigh has asked me to consider discharging you without conviction pursuant to section 19 of the Criminal Justice Act, ...

Mr McVeigh's submission was in effect that the offences which the jury found that you had committed were on the overall scale of offending so trivial as to warrant consideration of a section 19 discharge, and in that context Mr McVeigh pointed out that the total amount which represents the loss to the Southern Regional Health Authority in terms of the guilty verdicts is in the order of $200, although on the basis on which I intend to sentence you the figure is slightly higher.

In this context I am also entitled to take into account the very real likelihood that disciplinary proceedings will be taken against you, and I can also take into account the likely effect of the convictions on your future career. That assessment must be made against the background of a hitherto blameless life, and, at the age of 57 years, and with the record of service to the community which is so amply demonstrated by the evidence which was given at the trial and in the material which has been put before me, you are entitled to call in aid that record of service to your profession and to the community generally.

On the other side of the coin, there are very real and compelling factors which tell against the granting of a section 19 discharge. The GMS benefit system depends largely on the honesty of the medical practitioners who make claims in respect of patients who are seen by them. That in many respects is of particular significance in the contest of your case, because the patients in question were all long-term patients at Parklands Hospital with conditions of a psycho-geriatric nature or similar conditions. The patients themselves therefore, generally speaking, would have had little knowledge of, or input into, issues relating to their medical care, although of course the authorities at Parklands certainly played an active role in that respect.

..... Taking all factors into account, in my view the appropriate sentence in respect of each of the six charges on which you were found guilty by the jury is a fine of $750. That makes a total or overall sentence in a financial context of $4500. I make no further orders in respect of issues such as costs of prosecution or matters of that nature,

because in my view such orders would be inappropriate in the context of the outcome of the trial. ....."

3. EVIDENCE:

3.1 **THE** respondent explained that the fine of $4500.00 has been paid and he has continued in practice in the St Albans Medical Centre since that date. His contract with Parklands Hospital was terminated in June of 1996. He said he has made strenuous efforts to rehabilitate himself following the conviction.

3.2 **SINCE** losing his position at Parklands Hospital and being convicted, the respondent explained that he has devoted his time and energy to his practice and it seems that his patients have not lost confidence in him. To his knowledge no patients have left his practice as a result of his conviction.

3.3 **HIS** partners have remained extremely supportive of him and he has not been requested to resign from the partnership. Also his partners provide practical ongoing support for him.

3.4 **THE** respondent explained that the prosecution has had severe financial consequences. He incurred legal fees of $90,000.00. He has not received any medical benefits, whether GMS, practice nurse subsidy, maternity benefit, flu subsidy, or otherwise since January 1996. The Southern RHA has recently determined that it does not propose to issue a notice under Section 51 of the Health and Disability Act which would entitle him to claim medical benefits in the future. He has instructed his solicitors to challenge that determination in the High Court. He faces a civil

claim by the Ministry of Health and the Regional Health Authority seeking recoveries at a level which he is advised simply cannot be sustained.

3.5 **HIS** financial position is at rock bottom and he would be bankrupt if it were not for the support of his partners. He is unable to make contributions to the overheads of the practice.

3.6 **HE** has been advised to sell his family home and purchase a much cheaper residence subject to mortgage, and he is indebted to his bank. He has had to liquidate all of his remaining assets.

3.7 **THE** respondent explained that if he was unable to practise medicine in general practice, he would face ruin. At 58 years of age he has no other means of making provision for an ongoing income or for his future if he is unable to practise medicine. He believes that the partners and management at St Albans Medical Centre would willingly cooperate with any requirement that all future benefit claims were independently certified before being lodged.

3.8 **IN** conclusion the respondent explained that the criminal procedure was harrowing. He has required psychiatric counselling and treatment. He has been under immense personal strain since the investigation commenced. Whilst sections of the profession, his partners and his patients have been very supportive, he has felt increasingly isolated and unwelcome amongst his peers. The strain on his marriage has been acute. There is no present end in sight, and he believes that he has been punished enough.

3.9 **THREE** witnesses were called to give evidence on behalf of the respondent.

3.10 **IT** was the evidence of Dr Selwyn Maister that he had known the respondent since the late 1970's when he became involved with sports medicine. Dr Maister described the respondent as "a man of vision, initiative and energy" who had directed this towards the benefit of sports medicine in Canterbury throughout the 20 years he had known him. Dr Maister said he believed that the respondent's contribution to sports medicine in Canterbury over the years had been of strategic importance and has stemmed entirely from his altruistic attitude towards the profession.

3.11 **DR** Michael McK Kerr, the senior partner in St Albans Medical Centre, described the respondent as "an outstanding GP over the past 30 years" who had built up a large practice as a result of hard work, enormous energy, a good personality and first class ability. Dr Kerr noted the respondent's special interests had included obstetrics, musculo-skeletal medicine and the care of the elderly. In Dr Kerr's view the respondent is still highly regarded by his colleagues, partners and patients. Noting that the respondent's patients are extremely loyal and regard him with great affection, Dr Kerr said it was his opinion that the respondent's health and confidence had been severely battered by the events of the past two years.

3.12 **FINALLY**, evidence was given by Dr I A Robertson which was generally supportive of the respondent with whom he had had a close professional association since 1972. Although not a personal friend of the respondent, Dr Robertson explained that the respondent was instrumental in the formation of an after hours general practice facility and that the respondent's efforts in this regard were deserving of acknowledgement.

4. SUBMISSIONS:

4.1 **IN** summary it was submitted by Mr Lange on behalf of the CAC:

4.1.1 **THE** motive for the fraudulent claims by the respondent was one of greed;

4.1.2 **IN** cases where a doctor acts in a position of trust and has been found to the criminal standard to be acting dishonestly, the Tribunal should consider removal of the doctor's name from the Register.

4.1.3 **THE** Tribunal should view the matter as one of grave impropriety. Disciplinary Tribunals of professional bodies owe a duty to their profession and the public to ensure the highest standards are observed by members not only in the present but also in the future.

4.2 **IN** summary it was submitted by Mr Hodson on behalf of the respondent:

4.2.1 **THE** circumstances of the offences are such as to demonstrate that 10 of the claims are susceptible of explanation and justification, and in the case of the remaining 8 the jury drew its own inferences.

4.2.2 **THE** task of prevention of fraud in the community and the deterrence of others is a matter for the Court. The question for the Tribunal is what additional penalty need be inflicted. In this context the Medical Council of New Zealand has always regarded rehabilitation as of primary importance and has thereby endeavoured to be constructive in the penalties it has imposed.

4.2.3 **BEARING** in mind the evidence of the respondent and the witnesses called on his behalf today:

(a) Removal from the Register is justified neither by the facts of this case, nor by any reference to precedent, and would be entirely destructive and overly punitive;

(b) Overall there is no good reason to suspend the respondent for a stated period;

(c) There is no reason to impose conditions on the respondent's practice. His ability to sign claims in the future must be a matter for resolution between himself and Health Benefits Limited.

4.2.4 **THE** proper and appropriate course is to allow the respondent to rehabilitate his professional life while settling his differences with Health Benefits Limited.

5. FINDING:

5.1 **THE** particulars of the charge laid by the CAC contain two elements. The first is the fact of the conviction, proved by the certificate produced by the prosecution. That element is not in issue and is accepted. For the charge to be made out, however, the second element must also be established, namely:

"The circumstances of the offences reflect adversely on the practitioners fitness to practise medicine".

In proceedings of this nature it is not for the doctor to admit or deny the charge. It is the duty of the Tribunal to determine whether the charge has been made out.

5.2 **AS** Mr Hodson observed, this provision is entirely new. There is no guidance in the Act on the meaning of the phrase "fitness to practise medicine". The offending arose out of the respondent's medical practice and the fact that he was in a position of trust. The offending reflects badly on all medical practitioners.

5.3 **THE** Tribunal's interpretation of the phrase "fitness to practise medicine" includes consideration of the ethical aspects of practise as well as those of a clinical nature.

5.4 **IN** the Tribunal's view the subject qualification has been included in Section 109(1)(e) of the Act to ensure that the Tribunal does not take steps against a practitioner unless the offending has a bearing on his or her fitness to practise. Subject to that the Tribunal considers that the words are widely drawn. A matter may reflect adversely on the practitioner's fitness to practise medicine without making him or her incompetent to practise, and without elevating, e.g. "conduct unbecoming" above "professional misconduct".

5.5 **FOR** the reasons given the Tribunal is satisfied that the second element of the charge has been established. It finds accordingly.

6. PENALTIES:

6.1 **IN** determining the appropriateness of penalties to be imposed, regard can be had to a number of factors.

6.2 **MEDICAL** practitioners are people of high standing in the community. It is expected of them that they will be honest in their dealings with funding authorities. Funding authorities should be entitled to rely on the certificates that claims are in all cases proper, and that medical practitioners act honestly in formulating and lodging those claims.

6.3 **THE** respondent was convicted of offences against Section 229A of the Crimes Act 1961. Accordingly this is not a case of simple inappropriate claiming. Rather it was established that the

respondent acted with intent to defraud. It was proved that the respondent acted deliberately with the knowledge that he was acting in breach of his legal obligations and without an honest belief he was entitled so to act.

6.4 **IN** determining appropriate penalties to be imposed, the Tribunal may have regard to the effect of fraud not only in the specific sense but also in the wider general sense.

6.5 **THE** victim in cases such as these is in effect the public health system. By defrauding that system, doctors are in effect defrauding not only the state but also those entitled to the benefits of those payments.

6.6 **THE** general medical services benefit system is funded by the tax payer. There is a constant and competing demand on the tax payer's money as well as on the administration of those funds.

6.7 **WHILST** total monetary gain in the matter currently before the Tribunal admittedly was not on a vast scale, the effect of fraud of this nature is an important factor in considering general deterrence. Improper GMS claiming by doctors can be committed with relevant ease. Unfortunately, however, it is difficult to detect and requires substantial resources to investigate.

6.8 **COUNSEL** addressed the subject of penalties in terms of Section 110 of the 1995 Act. The charge against the respondent is one which under the 1968 Act would have been considered by the Medical Council of New Zealand in terms of Section 58(1)(a) of that Act. Applying the transitional provisions of Section 154 of the 1995 Act, which perhaps counsels' submissions overlooked, the penalties available would be those in Section 58(2) of the 1968 Act. It is noted

that the penalties in that section are, apart from quantum of fine (which is not relevant in this case), essentially the same as those in Section 110(1) of the 1995 Act.

6.9 **IN** submitting that the Tribunal should consider removal of the respondent's name from the Register, Mr Lange cited two recent cases, those of Dr A G McNab and Dr R G Nash, both of whom were removed from the Medical Register.

6.10 **THE** Tribunal considers that removal of the respondent's name from the Register, although an option, is not justified in this case. Dr McNab was convicted in the District Court of 20 counts of using a document with intention to defraud under the Crimes Act 1961 and was sentenced to 20 months imprisonment. The charges involved fraudulent claiming of GMS benefits over a protracted period. Dr Nash, on the other hand, was convicted in the District Court of offences under the Crimes Act 1961 which involved the falsification of returns to ACC every month during a period of 2½ years. In the Tribunal's view these two cases are distinguishable in terms both of their respective facts together with the degree and seriousness of the offences in respect of which convictions were entered. Furthermore, as was argued by Mr Hodson, striking off tends to be regarded as an option of last resort when it may properly be considered that the doctor is incapable of rehabilitation. This is not considered to be so in this case.

6.11 **SUSPENSION** of registration for a period is an option which did receive serious consideration. In cases such as these the Tribunal notes that there is a need to consider the general deterrent effect of any penalty imposed. It is equally important to acknowledge, however, that the requirement for specific deterrence in imposing an appropriate penalty has already, in part, been met by the fact of the conviction.

6.12 **IN** endorsing Mr Lange's invitation that the Tribunal view this matter "as one of grave impropriety", Mr Hodson submitted that the Medical Council had always considered rehabilitation to be of primary importance, a submission which the Tribunal acknowledges will invariably have merit in appropriate circumstances.

6.13 **MR** Hodson cited the Judgement of the High Court in *Teviotdale v The Preliminary Proceedings Committee of the Medical Council of New Zealand* Auckland Registry HC2 21/96 delivered 19 July 1996. In that Judgement reference was made to in Re a medical practitioner [1959] NZLR 784 in which Gresson P said at 8.02:

"..... Though the imposition of a monetary penalty, or a suspension, or a striking off viewed realistically, is a punishment, nonetheless the primary purpose of such domestic tribunals and the powers given to them is to ensure that no person unfitted because of his conduct should be allowed to continue to practice the profession or to follow the particular calling ....."

6.14 **THE** Tribunal agrees with Mr Hodson that the suspension of the respondent, on the facts of this case, would be a punishment in excess of the Tribunal's primary purpose of ensuring no person unfitted because of his or her conduct should be allowed to continue to practice.

6.15 **IT** is common ground that the Tribunal should not, when considering penalties, have any regard to the Southern RHA's determination that it does not propose to issue a notice under Section 51 of the Health & Disability Services Act 1993 which would enable the respondent to claim medical benefits in the future.

6.16 **CAREFUL** and serious consideration has been given to the option of suspension. On the facts of this case the Tribunal has concluded that suspension, even for a short period, could impede the respondent's rehabilitation. The Tribunal perceives there to be a conflict between elements of punishment and deterrence which inevitably would follow from a period of suspension, and rehabilitation on the other hand which the Tribunal considers to be of greater importance. For these reasons the Tribunal has decided against imposition of a period of suspension.

6.17 **NO** evidence has been adduced or submissions made which has led the Tribunal to conclude that it is necessary to make an order that the respondent should practise medicine subject to conditions.

6.18 **THE** remaining penalty options are censure and an order that the respondent pay part or all of certain costs. As was explained by the Chairperson at the conclusion of the hearing, an official expression of disapproval must be an inevitable outcome of the respondent's offending. And although acknowledging that any order as to costs will have a severe effect in this case, likewise such an order must be inevitable.

6.19 **THE** Tribunal orders that the respondent be censured and that he pay 40% of the costs and expenses of and incidental to the inquiry made by and prosecution of the charge by the CAC and the hearing before the Tribunal.

6.20 **FINALLY** the Tribunal makes an order under Section 138(2) of the Act.

DATED at Auckland this 15th day of July 1997

.....

P J Cartwright

Chairperson

Medical Practitioners Disciplinary Tribunal