MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO:	**341/02/95C**
IN THE MATTER	of the Medical Practitioners Act 1995
BETWEEN	**A COMPLAINTS ASSESSMENT COMMITTEE**
AND	**DR C** a medical practitioner

DECISION OF THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

Hearing held at Christchurch on Monday, 23 November 2009 through to Friday, 27 November 2009

TRIBUNAL: Miss Sandra Moran (Chair)

Professor Wayne Gillett, Dr Alistair Humphrey, Dr Janice McKenzie, Ms Jennifer Robson (Members)

Ms Kim Davies (Executive Officer)

APPEARANCES: Mr Christopher Lange, counsel for the Complaints Assessment Committee

Mr Harry Waalkens QC and Ms Aimee Credin, counsel for Dr C

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Introduction and charge

1. Dr C (Dr C) is a general practitioner. On 1 October 2002 a Complaints Assessment Committee (CAC) laid a charge against Dr C pursuant to s.93(1)(b) of the Medical Practitioners Act 1995 (MP Act) that:

> *1. In or about March 1985 had sexual intercourse with his patient A, then aged 16 who was at the time or who had been until recently his patient; and*
> *2. That on occasions in or about March/April 1985 supplied to A marijuana, cocaine and nitrous oxide for which there was no medical reason or justification.*
> *being disgraceful conduct in a professional respect when each Particular is considered separately or the two Particulars are considered cumulatively."*

Suppression orders

2. On 26 November 2002 the Tribunal made a permanent order suppressing the name and any identifying details of Ms A (217/02/95C).

3. On 26 November 2002 the Tribunal made an interim order suppressing the name of Dr C. The Tribunal also directed that nothing be published which identifies Dr C as a xx practitioner pending determination of the charge by the Tribunal (216/02/95C).

4. During this hearing between 23 and 27 November 2009 the Tribunal made, as the hearing proceeded, a number of suppression orders as follows:

4.1. An interim order of non publication of any evidence relating to matters regarding Ms A's mental health (tscpt 39/5-20).

4.2. Those passages of the cross-examination of Ms R (formerly W) referred to at paragraphs 108 to 111 inclusive of this decision (tscpt 73/9-20; 76/7-24)

4.3. Paragraphs 75 to 81 of Dr C's written brief of evidence with some exceptions (tscpt 104/8-23; 116/14-34; 117/1-30).

4.4. The illnesses of Dr C's children.

4.5. A permanent order of non publication suppressing the name of Ms H and Mrs S (tscpt 197/3-16).

4.6. While it appears from the transcript that it was understood by counsel there had already been an order of non publication regarding Ms A's medical records, it does not appear that any formal order was made. Accordingly, there will be a permanent non publication order regarding the medical records of Ms A which were produced to the Tribunal at the hearing (tscpt 39/5-20).

4.7. Orders of non publication on an interim basis for the following persons, names of places, and other details which may identify either the complainant or Dr C (tscpt 4/15-34 and 5/1-33):

4.7.1. Mrs C

4.7.2. Ms R (formerly known as Mrs W)

4.7.3. M

4.7.4. U

4.7.5. Mrs T

4.7.6. Mrs L

4.7.7. x

4.7.8. aa

4.7.9. bb

4.7.10. cc

4.7.11. dd

4.7.12. ee

4.7.13. xx

4.7.14. ff

4.7.15. gg

5. Following completion of the draft decision the Tribunal agreed that further orders of non publication should be made on an interim basis until the further order of the Tribunal regarding the following persons, names of places, and other detail which may identify either the complainant or Dr C:

5.1. Dr W
5.2. Dr Y
5.3. All email addresses of Ms A and Dr C
5.4. The precise dates of birth of Ms A and Dr C
5.5. The reference to Ms A being the xx child in a family of xx.

6. The Tribunal also agreed, following completion of the draft decision, to make an interim order of non-publication of the entire decision for a period of seven days from the date of delivery of the decision to the parties and their counsel to enable counsel to confer to ensure that all the interim and permanent suppression orders which were made either prior to or during the hearing or in this decision are appropriately reflected in this decision.

Legal principles

Burden and standard of proof

7. The burden of proof is on the CAC, as counsel accepted.

8. With regard to the standard of proof, the appropriate standard is a civil standard, that is, proof to the satisfaction of the Tribunal on the balance of probability rather than the criminal standard which is proof beyond reasonable doubt.

9. However, the degree of satisfaction called for in regard to the civil standard varies according to the gravity of the allegations. The greater the gravity of the allegations the higher the standard of proof:

> *Ongley v Medical Council of NZ* (1984) 4 NZAR 369;
> *Gurusinghe v Medical Council of NZ* [1989] 1 NZLR 139, at 163; and
> *Cullen v Medical Council of NZ* (Unreported, High Court, Auck. 68/95, 20 March 1996).

10. The Tribunal refers to the Court of Appeal decision of *Z v Complaints Assessment Committee and Anor* (22 March 2007, [2007] NZCA 91) (affirmed by the majority of the Supreme Court (SC 22/2007 [2008] NZSC 55) where the Court of Appeal concluded after a careful review of all the relevant authorities that the approach in Re *H* [1996] AC 563 at 586 per Lord Nicholls of Birkenhead (set out below) was correct:

> *"The balance of probability standard means that a Court is satisfied an event occurred if the Court considered that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation."*

11. The Tribunal must consider each particular separately, and then cumulatively, in the context of the charge. This is described in *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, and in *Chan v Medical Practitioners Disciplinary Committee* (CA 70/96, 8 August 1996).

12. The Tribunal, when considering the charge and each element of it, applied a very high standard of proof before making its findings.

Credibility

13. The test for "credibility" was stated by a Canadian appellate court (*Farynia v Chorny* [1952] 2 DLR 354 (BCCA)) as being that the real test of the truth of the story of a witness must be at harmony with the preponderance of the probabilities which are practical, and which an informed person would readily recognise as reasonable in that place and in those conditions.

14. Accordingly, the Tribunal, where relevant, must consider such factors as:

    14.1. The manner and demeanour of the witness when giving evidence.
    14.2. Issues of potential bias, that is, the extent to which evidence was given from a position of self interest.
    14.3. Internal consistency or, in other words, whether the evidence of the witness was consistent throughout, either during the hearing itself, or with regard to previous statements.
    14.4. External consistency or, in other words, was the evidence of the witness consistent with that given by other witnesses.
    14.5. Whether non-advantageous concessions were freely tendered.

15. Essentially, what is involved is an analysis of all the evidence, rather than merely asserting that one party rather than another is to be believed.

Inferences

16. Inferences are logical conclusions from proved facts. It is well established that a fact finding body such as the Tribunal can properly draw logical inferences, providing it does so on the basis of facts which are proved to its satisfaction. It cannot speculate or guess.

Lies

17. While professional disciplinary proceedings are civil rather than criminal they can be in some aspects more analogous to criminal proceedings and from time to time the Tribunal will have regard to the criminal rules for procedure (*Gurusinghe v Medical Council of NZ* (above) at p155 and *Collier v Director of Proceedings*

[2001] NZAR 91 at para.8). It has been established over time in criminal proceedings that lies are rarely evidence of guilt (*R v Guy* [1990] 1 NZLR 528; *R v Federici* (16 June 2005, Court of Appeal 394/04); and s124 Evidence Act 2006), but it is also accepted that if it is proved that an accused person has lied this can be used to affect adversely his or her credibility.

The role of experts

18. The correct approach to the consideration of expert evidence, which has been consistently followed by this Tribunal, is as follows:

18.1. While expert evidence may guide the Tribunal, the views of experts do not necessarily determine the ultimate outcome.

18.2. The Tribunal can depart from even unanimous expert opinions if it forms the view that the expert opinion or evidence as to the usual practice of other similar practitioners does not reflect the appropriate professional standards.

18.3. Any standards the Tribunal sets will appropriately be subject to the exercise of each practitioner's clinical judgment and the particular circumstances of individual cases.

Disciplinary threshold

The Medical Practitioners Act 1995

19. The charge against Dr C was laid on 1 October 2002 under the Medical Practitioners Act 1995 (MP Act) prior to the coming into force of the Health Practitioners Competence Assurance Act 2003 (HPCA Act) on 18 September 2003.

20. The charge was framed as "disgraceful conduct in a professional respect" pursuant to s.109(1)(a) of the MP Act. Section 109 also provides for two other categories of conduct, namely, "professional misconduct" (s.109(1)(b)); and "conduct unbecoming" (s.109(1)(c)).

21. When considering a charge laid under s.109(1)(a), it is open to the Tribunal to find the conduct, if proved, to be at the lower level of either s.109(1)(b) or (c).

22. As the present charge was laid under the MP Act, the Tribunal must consider the charge under that Act and whether the conduct, if proved, amounted to disgraceful conduct in a professional respect or at either of the lower levels, that is, professional misconduct or conduct unbecoming.

The appropriate standard and professional misconduct

23. The Courts and Tribunals, over the years, when seeking to define professional misconduct have started by having regard to the judgment of Jefferies J in *Ongley v Medical Council of New Zealand* (above) where His Honour formulated the test 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? … 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 position of the Tribunal which examined the conduct."*

24. In *Pillai v Messiter* [No. 2] (1989) 16 NSWLR 197, the New South Wales Court of Appeal indicated a slightly different approach to judging professional misconduct from the test articulated in *Ongley*. The President of the New South Wales Court of Appeal (Kirby P) considered the use of the word "misconduct" in the context of the phrase "misconduct in a professional respect". He stated the test required more than mere negligence (at p.200):

> *"The statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner."*

25. In *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720, 724-725, the High Court had regard to the appropriate disciplinary threshold and observed:

> *"Although, in respect of different professions, the nature of the unprofessional or incompetent conduct, which will attract disciplinary charges, is variously*

> *described, there is a common thread of scope and purpose. Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public, and the profession itself, against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them; …"*
>
> *"The very nature of the professions mentioned indicates the significance of the subject matter for the public. Obviously and distinctly, it is in the public interest that in respect of such professions and callings, high standards of conduct should be maintained."*

26. In *B v The Medical Council* (Unrept. HC Auckland, HC 11/96, 8 July 1996) Elias J observed, in relation to a charge of "conduct unbecoming" when addressing the role of the Tribunal Her Honour observed:

> *"The structure of the disciplinary processes set up by the Act, which rely in large part upon judgment by a practitioner's peers, emphasises that the best guide to what is acceptable professional conduct is the standards applied by the competent, ethical and responsible practitioners. But the inclusion of lay representatives in the disciplinary process and the right of appeal to this court "…indicates that usual professional practice, whilst significant, may not always be determinative: the reasonableness of the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only practice but also patient interests and community expectations, including the expectation that professional standards are not to be permitted to lag. The disciplinary process in part is one of setting standards."*

27. In referring to the legal assessor's directions to the Psychologists Board in *Staite v Psychologists Board* (1998) 18 FRNZ 18, Young J stated (p.31):

> *"I do not think it was appropriate to suggest to the Board that it was open, in this case, to treat conduct falling below the standard of care that would reasonably be expected of the practitioner in the circumstances – that is in relation to the preparation of Family Court Reports as professional misconduct. In the first place I am inclined to the view that "professional negligence" for the purposes of Section 2 of the Psychologists Act should be construed in the Pillai v Messiter sense. But in any event, I do not believe that "professional negligence" in the sense of simple carelessness can be invoked by a disciplinary [body] in [these] circumstances …".*

28. In *Tan v Accident Rehabilitation Insurance Commission* (1999) NZAR 369 Gendall and Durie JJ considered the legal test for "professional misconduct" in a medical setting. That case related to a doctor's inappropriate claims for ACC payments.

Their Honours referred to *Ongley* and *B v Medical Council of New Zealand.* Reference was also made in that judgment to *Pillai v Messiter* and the judgment of Young J in *Staite v Psychologists Registration Board*.

29. By October 2002, the Tribunal had stated on a number of occasions, and immediately thereafter (*Van Rhyn* 214/01/74C, 26 November 2002; *Frizelle*, 219/02/94D 3 December 2002, D221/02/97C 14 May 2003), the test as to what constitutes professional misconduct had changed since Jefferies J delivered his judgment in *Ongley*. In the Tribunal's view the following were the crucial considerations when determining whether or not conduct constituted professional misconduct:

29.1. The first portion of the test involved an objective evaluation and answer to the following question:

> Had the doctor so behaved in a professional capacity that the established acts and/or omissions under scrutiny would be reasonably regarded by the doctor's colleagues and representatives of the community as constituting professional misconduct?

29.2. If the established conduct fell below the standard expected of a doctor, was the departure significant enough to attract a disciplinary sanction for the purposes of protecting the public and/or protecting the standards of the medical profession and/or punishing the practitioner?

30. The words "representatives of the community" in the first limb of the test are essential because in 2002 (and now) those who sit in judgment on doctors comprise three members of the medical profession, a lay representative and chairperson who must be a lawyer. The composition of the medical disciplinary body has altered since the observations of Jeffries J in *Ongley*. The Tribunal must assess a doctor's conduct against the expectations of the profession and society. The Tribunal's role, in part, is also one of setting standards.

31. In *McKenzie v MPDT* (HC Auckland, CIV 2002-404-153-02, 12 June 2003, the High Court Venning J, endorsed the two question approach taken by the Tribunal in determining whether or not a practitioner is guilty of professional misconduct.

Disgraceful conduct in a professional respect

32. In *Allison v General Council of Medical Education & Registration* [1894] 1 QB 750, 763, the Court of Appeal held that the test for "disgraceful conduct in a professional respect" was met:

> *"If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency …".*

33. In *Brake v PPC* [1997] 1 NZLR 71 at p77, the High Court set out in its judgment the test laid down in *Allison*. It stated it was an objective test, to be judged by the standards of the profession at the relevant time. The Court specifically rejected a submission that the test for disgraceful conduct required fraud, dishonesty or moral turpitude to be proved. The court stated at p.77:

> *"In considering whether conduct falls within that category, regard should be had to the three levels of misconduct referred to in the Act, namely disgraceful conduct in a professional respect, s58(1)(b); professional misconduct, s43(2); and unbecoming conduct, s42B(2). Obviously, for conduct to be disgraceful, it must be considered significantly more culpable than professional misconduct, that is, conduct that would reasonably be regarded by a practitioner's colleagues as constituting unprofessional conduct, or as it was put in Pillai v Messiter (No. 2) (1989) 16 NSWLR 197, 200, a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner."*

34. The test expressed by the New South Wales Court of Appeal in *Pillai v Messiter* (1989) 16 NSWLR 197, 200 (referred to above) related to "*misconduct in a professional respect*" contained in the Medical Practitioners Act 1938 of that state. The President of the Court (Kirby P) observed that while the court must bear in mind that the consequences of an affirmative finding are drastic for the practitioner, the purpose of providing such drastic consequences is not punishment of the practitioner but protection of the public. He stated at p.201:

> *"The public needs to be protected from delinquents and wrong-doers within professions. It also needs to be protected from serious incompetent professional people who are ignorant of basic rules or indifferent as to rudimentary professional requirements".*

35. The High Court here re-stated the test for disgraceful conduct in a professional respect. In *The Director of Proceedings v Parry and MPDT* (Auckland High Court, AP 61-SW01, 15 October 2001) Paterson J stated (para. 44):

> *"… There is more than one way of describing the test for "disgraceful conduct in a professional respect." The full Court in Brake [above] determined that such conduct could include "serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner." Although a single act of mere negligence could never, in my view, constitute disgraceful conduct, I see no reason for departing from the full Court's view that serious negligence of a non-deliberate nature can in appropriate cases constitute disgraceful conduct. It is not difficult to envisage cases where this could be so, or cases where only one act of serious negligence can amount to disgraceful conduct. …".*

36. The relevant principles therefore are:

36.1. Disgraceful conduct is very serious misconduct, whether deliberate or not-deliberate.

36.2. The departure from acceptable standards and/or the failure to fulfil professional obligations must be "*significant enough*" to attract sanction for the purposes of protecting the public.

<u>Conduct unbecoming a medical practitioner</u>

37. In *B v The Medical Council* (above) Elias J referred to what comprised "conduct unbecoming":

38. Her Honour observed:

> *"There is little authority on what comprises "conduct unbecoming". The classification requires assessment of degree. It needs to be recognised 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 a sanction for the purposes of protecting the public. Such protection is a basis upon which registration under the Act, with its privileges, is available."*

Witnesses

39. The CAC called the complainant, Ms A (Ms A), her mother Mrs T (Mrs T), Ms R (formerly Mrs W) and Mr John Thackray, a computer forensic investigative analyst and the director of Thackray Forensics Limited based in Auckland, as an expert.

40. Dr C gave evidence on his own behalf and called his wife, Mrs C (Mrs C), and two character witnesses, Ms H (Ms H) and Mrs S (Mrs S). He also tendered two written references.

The evidence

Mrs T

41. Mr and Mrs T have xx xx of whom their daughter, A, is the xx.

42. Mrs T explained how she and her family (including A) came to be patients of Dr C. In November 1981 the family moved from bb, xx, to cc, xx.

43. Following their move, Mrs T telephoned the xx Medical Centre (the Centre of Dr C's practice), where Dr C practised, to find out if it would accept her and her family, as patients as a family group. Having been accepted, Mrs T then organised with the previous doctor, with whom she and her family had been patients for many years, to transfer to the Centre all medical notes of the family. Mrs T confirmed that their notes were "*definitely*" transferred and that this would have occurred within three months of their move.

44. Mrs T confirmed that the doctor whom they had *"enrolled with"* at the Centre was Dr C, who became her, her husband's and her children's general practitioner. In answer to a tribunal member's question, Mrs T clarified what she meant by

"enrollment" in 1981 as ensuring that the whole family could be accepted and that all medical records would be transferred from previous doctors. Mrs T said that Dr C's father, was a xx in xx at the time and that C was *"like next down the line"*. If her daughter, A was sick, and she had needed to arrange an appointment then it "*definitely*" would have been C whom she called.

45. She said the T family, including her daughter A, remained the patients of Dr C until August 1985 when Mr and Mrs T sold their home in cc and moved elsewhere. She arranged for the transfer of their medical notes to their new general practitioner concerning those members of her family who moved with her at that time.

46. Mrs T was not able to recall the number of visits her daughter, A, would have had to Dr C but that they would have been *"for typical adolescent ailments"*. In cross-examination, it was put to Mrs T that she really was not able to remember any particular consultations that A had with Dr C. She said that was right, and when it was put to her that it might be that her daughter had not seen him at all, Mrs T said she could not comment because she did not know.

47. Mrs T was asked whether any of her children may have seen other doctors at the Centre. Mrs T recalled another of her daughters (whom she named) seeing a female doctor at the practice who had raised that daughter's "instant ire". Mrs T elaborated that this particular consultation was a *"one off"* and when she (Mrs T) told Dr C about it he *"rolled his eyes"*. Other than that, she did not recall any of her children having seen doctors at the Centre other than Dr C. For herself, she saw only Dr C.

48. While Mrs T could not recall how many house calls Dr C may have made to their home, she did recall him making two specific house calls. One was when he went to see her and her husband who were both struck with giardia and another was when one of her sons (then 12 years old) had campylobacter. She thought those house calls were arranged by her telephoning the Centre and added that in those days doctors did make house calls.

49. Mrs T said that in addition to Dr C being her family's general practitioner, A also babysat for Dr C and his wife. She recalled an occasion when Ms A went with the C family and their children to ee on holiday. Mrs T could not recall how the

babysitting arrangement came about. She thought, although she could not be sure, that a friend of the Cs recommended Ms A to them. She was not sure if the Cs rang her home to organise the first babysit.

50. In 1985, when A was in the 7th Form at school, she attended a concert at dd. At 2am Mrs T received a call from the police informing her that her daughter had been raped. The police took Ms A to the xx police station where she was seen by the police doctor and where questioning took place, following which Mrs T said they were able to take their daughter home.

51. At that time, and for a number of years, Mrs T worked at hh Hospital as an occupational therapist. Her duties included working with persons who had been sexually assaulted. She formed the view her daughter should see a counsellor, it being Mrs T's preference that she see a female counsellor. However, Ms A told her mother she wanted to see Dr C. Mrs T agreed that, by then, Dr C and his family had become something of a family friend towards her daughter. When asked if her daughter had then gone to Dr C for counselling, Mrs T stated it all seemed to be "*rather ad hoc*" and that the little she knew about it seemed somewhat casual in that it took place in "*unexpected places like going to the beach and that sort of thing*", which she thought "*was a bit odd*".

<u>Ms A</u>

52. Ms A is the complainant. She was 13 years old when her parents moved to cc and, at the time of the alleged initial conduct in the charge, she was just short of her 17th birthday.

53. Ms A confirmed her mother's evidence that following the move her mother "*registered*" the family with the Centre and that Dr C became her and the family's general practitioner.

54. Her first recollection of seeing Dr C was soon after the move when her mother took her to see him as she was anaemic. After that she saw him for "*usual illnesses*" during her teenage years. Ms A supposed it was several times a year, depending on

how well she was. She remembered seeing him for a *"strep throat"* and having various ailments but did not have *"a chronic condition or anything like that"*.

55. She recalled Dr C making house calls, one of the first being shortly after they had moved house when she had a *"sore tummy"* – an abdominal pain on her left side - which persisted for weeks. Ms A said when he went to their home it was if one of them was *"too sick"* to go and see him or if he was *"just being nice perhaps [to] make it easier because there were so many of us"*. She also remembered him attending their home to see her brother when he had campylobacter; and to see her mother when she had a giardia bug.

56. Ms A was sure Dr C was their family doctor. She did not have any recollection of being seen by another doctor associated with the practice.

57. In February 1985 she saw Dr Y at the police station in her role as the police doctor following the rape incident. Ms A said she did not know, until recently, that Dr Y had worked at the same practice as Dr C.

58. Ms A did not know what had happened to her medical records from Dr C's practice. She was aware the CAC had asked the Centre for them but they did not have them. The CAC tried another practice (to whom her parents had transferred after they left cc) without success. She said that the medical records which she had been able to locate had been produced for the purposes of this hearing.

59. Ms A said when she was 14 years Dr C telephoned her home and asked if she could babysit his two young children, M and U.

60. Ms A said she would babysit for the Cs about once a fortnight on weekend nights - Friday or a Saturday. She would be picked up around 6.45pm and afterwards would either go home or, if the Cs were going to be late, she would stay the night at their place. It was a two storey home with the bedrooms upstairs and she would either sleep in one of the bedrooms depending on where the children were sleeping; or sometimes she would sleep on the sofa (downstairs).

61. In August 1984, when she was 16 years, she accompanied the C family on a holiday to ee to look after their children (and two other children of another couple).

62. On 26 February 1985 Ms A attended a music festival at dd (name of place suppressed) where Ms A said she was raped. The police were called and she was looked after by the police and a police doctor, until her parents arrived at the police station to take her home.

63. In her written brief, Ms A stated, following discussions with her mother, she started to see Dr C, his role initially being that of a counsellor. She stated she and Dr C talked daily either on the phone or at his home or her home or his surgery. Although it had commenced formally, over time she said it became less formal and that she and Dr C talked about anything and everything, how she was feeling, what he was doing, his family, her family, friends, music, travel and books. When she went to Dr C's home she was not sure it was strictly counselling as it was a loose arrangement like going to see a friend, and she would not describe it as formal counselling appointments. In answer to a question from the Tribunal she was not sure that the term "*counselling*" had been used at the time as this term was a *"sort of legalese"*. What she understood by counselling was maybe going to somebody's office and talking to them but she would not have felt very comfortable with talking about what had happened to her with strangers. She was able to distinguish between what might have been a conversation with a family friend and actual counselling. She had understood that Dr C was their family doctor and he was helping her by her being able to talk to him about what had occurred.

64. From that time on, Ms A stated she began to see a lot more of Dr C - he took her to the beach, to a rock concert, to visit friends of his, and sometimes drove her around in his car and also visited her at her home.

65. Ms A stated that during this period of time Dr C often gave her cannabis to smoke or alcohol to drink. Before this she had never taken drugs. With regard to alcohol, Ms A said that when she attended at the C home they offered her wine whether it was in the afternoon or whether she was going there to babysit or when they arrived home from where they had been while she had been babysitting.

66. Approximately a month after the alleged rape incident (on 26 February 1985) Ms A said she babysat again for Dr and Mrs C. They had been to a party and when they arrived home, Mrs C went upstairs to bed while Dr C stayed downstairs talking to her. She said Dr C talked about his travels; his love of music; how he had been unhappy as a child; how stressful it was having a young son who was often sick; how he thought he had married too young and that marriage *"wasn't easy";* about drugs and how he had tried most kinds of them which were readily available to doctors; that he particularly enjoyed cannabis and cocaine; that he was so angry with the man who had raped her that he had talked to a friend about hiring a hit man. He gave her a glass of wine and then another and told her that he had been attracted to her since he had first met her and that the reason he had asked her to babysit for him was so he could get to know her better.

67. She said Dr C kissed her and that progressed into sexual intercourse on the sofa in their living room. She said she did not know what to do or think but remembered feeling quite drunk and that she did not have a choice as he had been nice to her and she should do what he wanted. She said he told her he loved her. After a while she said he went upstairs to bed and she slept on the sofa for the night. He came downstairs early the next morning and kissed and hugged her and later he went to his rooms at his practice to collect a morning after pill for her. She said she did not tell anyone what had happened at that stage.

68. Two weeks later Ms A said she went to babysit for the C children again and later in the evening slept in a spare bedroom upstairs while Dr and Mrs C were still out. When they arrived home she was awoken by the sound of loud music playing downstairs where she went and saw Dr C lying on the floor of the living room. She said he leapt up and kissed her and soon they "*had sex again*". He played songs called "She was only 16" by Dr Hook and some Neil Young songs which he said summed up how he felt about her and told her he loved her. Following this she said she went back upstairs to bed and went to sleep.

69. On x x 1985 it was Dr C's birthday. Shortly after he threw a party, with a punk theme, at his home and invited her to attend. She said she was the only teenager there as the other guests were in their 30s and 40s. At this party she said she was given alcohol and cannabis and Dr C encouraged her to inhale laughing gas. Later

in the evening when she became very sleepy, she went upstairs to the spare bedroom and lay on the bed. She awoke to find Dr C kneeling beside the bed, kissing her and urging her to snort some cocaine which he had brought up and which she inhaled.

70. Then a friend of his, L, came into the room when Dr C got up and walked out. Ms A said she had met Mrs L through a drama class and that Mrs L had also been at the music festival the night she had been raped and had been supportive of her after this.

71. On x x 1985 (precise date of birth suppressed but not the year) Ms A turned 17 years. Dr C gave her two books by John Fowles.

72. Ms A said she and Dr C continued seeing each other with either her popping in to see him at the surgery or him going to her home and taking her out. She said several times he took her to the home of his friends, Dr and Mrs W. Mrs W is now known by her maiden name of Ms R. On occasion she also babysat the W's two small children and Mrs W always chatted to her as though she were a friend of her own age.

73. On one of these occasions she talked to Ms R (then Mrs W) at the latter's home about having slept with Dr C twice. She said she felt as though everything was a big mess and that she was in a relationship without wanting to be but unsure how to get out of it. Ms A said that about a couple of days after this, in about May 1985, she telephoned Dr C at the surgery and told him she thought that they should not keep having an affair. She said she remembered him saying *"Oh dear, who have you been talking to?"* She told him she had spoken to Mrs W and that he was very concerned and told her she should go to his surgery to see him right away, which she did. When at his surgery Ms A said she talked a little while there and then Dr C drove them to a nearby park and they talked some more. She did not remember everything that was said but she did remember getting very upset and crying. She said it was a confusing situation to cope with and she did not feel able to tell any of her friends or family. She had wanted to trust Dr C to help her to come to terms with being raped but instead she felt more confused than ever as if there was not anyone she could trust.

74. In June 1985, Ms A moved to ii to take up a place at a d school. The last time she saw Dr C was during a college break when she returned to xx and went to visit him and his family at their home. At the end of that year she moved to jj, to take up a d position, where she spent a year.

75. In early 1987 she moved to kk and in mid 1988 she returned to xx for around nine months. In February 1989 she left New Zealand to travel, first to ll for a couple of months and then in April to mm for a year.

76. While in kk and in mm she said she had occasional contact with Dr C by corresponding with him by letter.

77. On 22 July 1989 Dr C wrote to Ms A while she was in mm at which time he was in ff (Ex 2 tab. 3). The letter is typewritten and contains detail and opinion about Dr C's family, his employment circumstances, and the culture of the country where he was living and working. It commences:

> *"Dear A, Thanks for your letter. I was wondering which part of the world you had got to by now …*

Part way through it contains an apology in the following terms:

> *"The biggest strain was actually U's first 18 months. As you know, I went a bit mad after that and behaved very badly. I'm sorry and can reassure you that it won't happen again. I have turned into a boring but more sensible old bugger I'm afraid."*

It concludes:

> *"If there is anything I can ever do to help you, A, just let me know. Love x C."*

78. On 3 September 1989 Dr C, while still in ff, wrote again to Ms A while she was in mm (Ex 2 tab.4). He sent her a draft for US$1,500 (Ex 2 tab.5). The letter is in Dr C's handwriting and records:

> *"Dear A,*
>
> *I am sorry that it's taken so long to send this but I didn't get my final pay until this morning. I am also sorry that it's in US dollars, but the bank here*

couldn't do anything else – it should only take a day or two for you to get cash.

Thank you for your letter. I hope that things work out in mm.

This money is between you and me. If you become a rich woman, pay me back. Otherwise ce ne fait rien, as they probably say in nn.

Lots of love and keep in touch, C"

79. Ms A stated that around the time of this letter Dr C also forwarded her a reference (Ex 2 tab.6). This reference is typed on gg letterhead and records:

"To Whom It May Concern:

This is to certify that A worked for my family both as a nanny and child-minder in New Zealand.

She was always conscientious, willing and responsible and was well-liked by my children.

I would have no hesitation in employing her again and would unreservedly recommend her for any similar position."

80. Ms A continued her travels, arriving in oo in April 1990.

81. In 1991 she married and lived with her husband in oo until May 2000 when they set off to travel for several months. In September 2000 they arrived in New Zealand, settling in ii the following month.

82. In November 2000 Ms A sent Dr C a short note to say hello. She said he responded immediately by email and with great enthusiasm saying he was delighted to hear from her and that over the years he had thought about her often. She said she was keen to maintain contact with him but had a dilemma in that she felt the email might upset her husband and although she felt the contact was innocent she was sensitive to the fact that they had only just arrived in New Zealand, her husband did not know anyone here and that it would not be very nice for him if one of the few contacts they had was someone with whom she had had an affair.

83. Ms A set up a hotmail account, with her and Dr C "talking" by email daily. After about three weeks she said Dr C emailed her saying he loved her and for the next couple of months they emailed each other regularly. She said he told her he loved her, had always loved her, had thought about her constantly over the years, had had nightmares about being caught for having sex with her and the like.

84. About a month or so later she said she set up a second hotmail account as she was receiving unwanted emails (spam) at the first email address. She used both of those accounts solely to communicate with Dr C who also set up an account for their communications so that staff at his surgery would not see their emails.

85. She said Dr C wanted to see her and arranged to stop in ii for a day on his way to a conference overseas. She agreed to see him but when the date came around she no longer wanted to see him although she was not sure why. She said he phoned her at her place of work and was very disappointed when she told him she could not make it to see him.

86. A few weeks later she was going to be in xx for work and emailed Dr C to tell him she would call on him when she was down there but as matters transpired she said she was too busy to meet him although she did try to call him but was not able to get through. She said he phoned her the next day when she was back in ii and suddenly she felt she no longer wanted any contact with him.

87. During the period she and Dr C corresponded by email she said his address was either pp (at his practice) or qq. Her email address was either rr or ss or tt. This last email address appears to have been set up around 31 December 2000 (see email of that date Ex 2 tab. 39)**.**

88. After April 2001 she had no contact with Dr C. In May 2001 she said she still felt confused about the relationship and unsure how to make sense of matters. She said by then she was 32 years old - being the age that Dr C would have been when they had their affair - and she was trying to understand how he could even have considered having a relationship with a 16 year old, *"never mind a patient"*.

89. She and her husband were thinking about having children and she thought how she would feel if a doctor had treated her children in the way that Dr C had treated her. She thought she would feel outraged and that was when she decided to make a complaint about his behaviour as a doctor when she was in his care. She decided she did not have to cope with the matter on her own anymore and that medical authorities could sort it out for her.

90. In May 2001 she made a complaint to the Health & Disability Commissioner.

91. About 4 December 2001 one of the email accounts she had used to communicate with Dr C was tampered with and all the emails were deleted. She changed her password on the second account but on or about 13 February 2002 the second account was also tampered with and the emails were deleted. However, by then, she had printed off some of the email messages.

92. In 2001 the home computer on which she had received emails from Dr C and from which she had sent emails to him, ceased to function. She was able to access four emails which she had either forwarded to her computer at work or had already printed off.

93. On 1 October 2002 a Complaints Assessment Committee laid the present charge against Dr C.

94. On 17 February 2003 Dr C's counsel (Mr Waalkens) informed counsel for the CAC that the authenticity of parts of some of the emails was in issue. As a result, the CAC arranged for Ms A's home computer to be examined by a forensic computer analyst.

95. Thackray Forensics Limited uplifted Ms A's computer from her home. As a result of their analysis, Ms A became aware that emails dated Monday 11 December 2000 (Ex2 tabs.7 or 13), Thursday 28 December 2000 (Ex 2 tab.36), and Friday 29 December 2000 (Ex 2 tab.38) from Dr C to Ms A were recovered from the hard drive and, in addition, a number of other emails between her and Dr C (Ex 2 tabs.8-49), of which she did not have copies were also recovered from her home

computer's hard drive. The last email was one from Dr C to Ms A dated 31 January 2001.

96. The four emails which Ms A printed and referred to as part of her complaint were produced by consent together with the emails which Thackray Forensics recovered from Ms A's home computer.

97. Extracts from some of those emails which refer, directly or indirectly, to the events complained of are set out later.

98. As well as making a complaint to the medical authorities, on 11 November 2003 Ms A issued civil proceedings in the District Court against Dr C, filing a Statement of Claim (Ex 4) seeking exemplary damages of $120,000 for breach of fiduciary duty arising out of the alleged conduct (which is the subject of this charge) and as a further alternative cause of action seeking exemplary damages in the sum of $75,000 for breach of Dr C's duty of care to her as her doctor. The solicitors engaged in the preparation and filing of proceedings were not the firm of solicitors representing the CAC in this matter. On 18 February 2004, Ms A entered into a settlement agreement with Dr C, to which the Tribunal refers later in this decision. Mr Waalkens acted as Dr C's counsel regarding this agreement.

99. Mr Waalkens challenged Ms A on several aspects of her evidence (which the Tribunal refers to more fully later in this decision).

100. These included, among other things, the timing when she started babysitting for the Cs, how the babysitting arrangement came about, that she came from a somewhat dysfunctional family, that she became more attached to the C family than her own, that she was never a patient of Dr C, that Dr C did not make house calls, that Dr C was never in the role as a formal counsellor to her, that he did not have sexual intercourse with her, that her disclosure to Ms R was nothing more than one-upmanship as she was in competition with Ms R for Dr C, that there was no spare bedroom in the C household where she could sleep, that he did not take her on outings to the extent she claimed, that he did not give her drugs at all, that she had mental health issues, and that she had manipulated certain emails. The Tribunal addresses these matters when evaluating the evidence in detail.

Ms R (formerly W)

101. In 1985 Ms R (formerly known as Mrs W) and her then husband, Dr W knew and socialised with Dr C and his wife and family.

102. She knew Ms A through the C family and confirmed that Ms A had babysat at that time for her own children.

103. She recalled an occasion when Ms A went to visit her and was upset and, in the course of a conversation, Ms A told her of having had sexual intercourse with Dr C. Due to the passage of time since then, Ms R could not recall much of the detail surrounding that conversation and only recalled the discussion about the sexual intercourse.

104. Ms R added verbally to her written brief. She was not aware that following this conversation Ms A had moved to ii. However, about a year later, Ms R said Ms A (when in xx) *"popped in to say hi and check how my children were"*. That was when she learned Ms A had been living in ii. Ms R confirmed that the conversation which they had had when Ms A told her she had had sexual intercourse with Dr C had taken place before Ms A had moved to ii.

105. Since then Ms R had no further contact with Ms A.

106. Ms R confirmed she had attended Dr C's birthday party (with the punk theme) at the C household. She recalled Ms A being present. When asked whether she was aware of any drugs being present at the party Ms R said *"marijuana but that was all that I saw"*. She said she was not aware of the presence of a canister of nitrous oxide.

107. In answer to a question from the Tribunal, Ms R said she was *"quite shocked"* when Ms A told her she had had sexual intercourse with Dr C but thought that as Ms A had babysat for Ms R's children twice before, that was probably why she had talked to her about it.

The evidence in the next four paragraphs is suppressed.

108. **[Suppressed by order of the Tribunal]**

109. **[Suppressed by order of the Tribunal]**

110. **[Suppressed by order of the Tribunal]**

111. **[Suppressed by order of the Tribunal]**

Evidence for Dr C

112. Dr C graduated in 1975. He was subsequently registered as a general practitioner and practised as such at the Centre from 1981 to 1986. Between 1986 and 1989 he worked overseas. He resumed practice at the Centre in 1989 and has continued in practice there since that time.

113. He stated that he first met Ms A in 1984. Her mother had been a patient of his at the practice and he vaguely recalled her father as a patient but he did not recall seeing her siblings as patients. He had no recollection of ever seeing Ms A herself as a patient.

114. Between 1984 and 1986 he practised at the Centre with six other full time registered general practitioners. He said patients were not exclusively the patient of any particular GP and it was not uncommon for members of the same family to be seen by different doctors at the Centre.

115. He said the most common category of patients for whom he would undertake house calls would be the elderly who were unable to attend the surgery or nursing home patients. It would be extremely uncommon for him to make such calls regarding teenagers.

116. He had caused a full search to be made for any records relating to Ms A but had been unable to locate any or any reference to the fact she was a patient of the Centre at the time. He stated the practice had retained all its patient records from that period of time as they did not destroy them. If the records were transferred then it was possible the practice may not have kept copies. He kept appointment records and diaries for no longer than 10 years. If he had kept them they would have shown that there were no appointments for Ms A and it would have corroborated his belief

that she did not have the number of outings and trips with him which she had alleged.

117. He confirmed that Ms A babysat for his two children, U and M, on many occasions between 1984 and 1985 but that she could not have been doing so earlier than 1984 because U was very ill when he was first born and they did not have anyone babysitting him until he was about two years old in 1984. He recalled that Ms A had been their babysitter for a few months prior to a family holiday which they had in ee for a week in August 1984 when she accompanied them as a nanny to the children.

118. Dr C referred to Ms A coming from a rather large and dysfunctional family and not having a very close relationship with her mother. For his part, he described himself as having a *"soft spot"* for Ms A and saw himself *"in something of a father figure relationship with her"*. He and his wife were happy to provide her with friendship and support as they gained a sense of her wanting to be close to their family more than her own. He described Ms A as being very good with his two children who were fond of her and that she appeared to have formed a very strong bond with them as well as with him and his wife. He referred to her frequent visits to their home after she began babysitting for them and being included in all manner of family occasions such as children's birthday parties; and that she would often turn up without warning, just seeming to be happy to play with the children or be included in their family life.

119. He recalled learning about Ms A's allegation of rape early in 1985 as he had been away for a week or so and learnt about it upon his return, not from his wife but from Dr Y who was the doctor who had seen Ms A. He recalled going to see Ms A at her home in the early evening at least a few days after the rape, attending not as a doctor but as a friend and concerned member of her wider "*family*". He was sure he had never provided her any medical attendances or support in regard to the alleged rape and did not counsel her in any formal way.

120. As a result of her friendship and attachment with his family he did talk with Ms A from time to time but not on a one-to-one basis as she had suggested in her evidence, and he did not meet with or talk with her about the rape at his surgery. Sexual abuse

counselling required special training which he would not attempt to do himself. He recalled advising Ms A to go to the Rape Crisis Centre.

121. With regard to Ms A's evidence that he took her to the beach, to a rock concert, to visit friends of his and sometimes drove her around in his car and also visited her at home following the rape, Dr C said he attended only one rock concert with Ms A (a Neil Young concert) at which his wife, and the Ws and some others were present; and that he was not alone with Ms A at any time.

122. While he would have driven Ms A around in his car with him, it would have been with his children and family present. He recalled driving her and his two sons to the beach on one occasion only. Her suggestion that they went for walks along the beach was not correct.

123. It was more common for his wife to collect Ms A for babysitting and drive her home afterwards although he would have driven her home occasionally. He denied regularly visiting her at her home.

124. Dr C added orally to his written brief. His counsel referred him to the email (Ex 2 tab.36, 28 December 2000) where he had stated:

> *"I can't drive up x without thinking of that night up there, that was my best night with you."*

125. Dr C explained that sometime early in 1985, after the rape incident, around 11pm Dr C drove Ms A to her home after she had been babysitting. He made a detour towards x and drove to the top of the hill where he parked. He said they got out of the car, sat on the swings and there was *"some low level kissing and hugging, but no other sexual contact"*. The time involved at x was around 15 to 20 minutes.

126. At that time he shared the car with his wife and that there was no opportunity for him to *"go driving around"* as Ms A had alleged. It was his wife who had more frequent use of the car than him because she needed it with the children and he was able to cycle to work.

127. Dr C referred to the incident on his couch at his home where Ms A said they first had sexual intercourse. He said he recalled the occasion well confirming that, after his wife and he returned home, Ms A stayed up with him. He could not remember what they talked about but was certain they would not have talked about him having an unhappy childhood because he was not an unhappy child and would not have spoken about it. He would never have talked about drugs or that he thought he had married too young. The suggestion that he had said he had "*tried most kind of drugs"* was incorrect. He had never used cocaine.

128. He denied Ms A's evidence that he wanted to hire a *"hit man"* to retaliate against the man who had allegedly raped her and added he had no knowledge of his identity in any event.

129. Dr C rejected emphatically the inference that he had plied Ms A with wine or that she was *"quite drunk"* but said it was true that they had sat together on the couch and that after a while they had kissed each other. He agreed they had *"fondled each other"*. He recalled *"touching her breasts and her genital area and she touched my genital area"*. He stated no clothes were removed and sexual intercourse did not take place. He stated he fell asleep sitting up with Ms A head on his shoulder, that his wife came downstairs looking for him and woke him up in that position and he went with her to their bedroom upstairs and went to bed.

130. He did not recall Ms A saying to him *"Ms C's here"* as Ms A had stated or that he had said *"it's alright she never comes down"*. He said it was not correct that his wife, having seen him and Ms A together, had turned around and walked out of the room. He said he did not get a cloth and he did not wash himself as there was no bathroom downstairs, the only one being immediately adjacent to their bedroom upstairs.

131. Mr Lange put to Dr C several times that kissing and touching Ms A on his couch (which he admitted) was, in the circumstances, a breach of trust in his relationship with Mrs T (the complainant's mother) whom, he accepted, was his patient. Dr C said it was inappropriate (and entirely inappropriate) and he was very ashamed of it but he did not think it had anything to do with Mrs T senior. He denied he had had *"sexual relations"* with Mrs T's daughter describing it rather as *"low grade sexual*

contact". He said he was not seeking to justify it but Ms A was not his patient. He said he was not proud of it but as Ms A was not his patient he could therefore not be sure how it amounted to a breach of trust, although, finally, Dr C did concede it was a breach of trust - *"I suppose I would have to answer yes"*.

132. Dr C denied going to his surgery the following morning to collect the morning after pill for Ms A.

133. He could not now remember precisely when, but at some time after that incident, and within a few days, his wife and he spoke about Ms A *"evidently becoming too attached"*. His wife said to him she thought it appeared obvious that Ms A *"was developing a crush"* on him. His wife asked him about the incident where he and Ms A had fallen asleep on the couch and what had happened *"as she was obviously suspicious"*. He told his wife nothing had happened, and added his wife told him they "*should distance [themselves] from Ms A*"

134. Dr C then addressed the second occasion where Ms A stated that within a couple of weeks they had sexual intercourse again.

135. Dr C said they had already arranged for Ms A to babysit for them around that time. When he and his wife arrived home they found Ms A had gone to bed. His wife went to bed and he sat up listening to some music. He recalled Ms A coming downstairs and that they sat and talked for a while. He said to Ms A he was sorry he *"had behaved badly the previous week"*. He stated Ms A replied that was fine, that she loved him and that she tried to start kissing him again. He said he did not reciprocate but got up and turned off the music. He could be sure that Ms A's evidence he played her the Dr Hook song *"She was only 16"* was most certainly wrong as he had never owned any music by Dr Hook and nor did he have it at his home. He confirmed Neil Young was one of his favourites but the suggestion he told Ms A Neil Young songs summed up how he felt about her was not correct. He said he got up and went straight to bed, and the suggestion they had sex was wrong. His wife was in the bedroom immediately above them and only a few metres away and had been aware of the previous incident. The allegation that sexual intercourse took place on this occasion "*simply did not happen"*.

136. Dr C stated that following this second incident he spoke to Ms A and told her they would no longer be using her as a babysitter but he could not now remember exactly what he said to her but recalled her being very upset.

137. The next day or shortly after, Ms A telephoned him at his practice and asked if she could go and see him and did so. Dr C said she was unhappy that he and his wife had decided she could no longer babysit for them. He told Ms A they were concerned that "*she appeared to be getting too close"* and that it was sensible to do this. He stated Ms A was very angry and accused him of leading her on.

138. Dr C denied the circumstances in which Ms A said she had telephoned him, namely stating she thought they should not keep having an affair and had asked to visit him at his surgery. He said the visit to his surgery arose in the circumstances which he had outlined.

139. Dr C stated Ms A had got the chronology of events wrong. He confirmed that he held a party with a punk theme. They did not invite Ms A although she was present at it and this was because she had the habit of attending their home while she was their babysitter. He could not recall if she were the only teenager there but he referred to his sister and her boyfriend also being there who were at the time in their early 20s although most of the guests would have been in their 30s.

140. He observed, later in the evening, that Ms A *"had drunk too much"*. He had no recollection of her being given cannabis and did not see anyone give it to her and did not give it to her himself. He remembered there was cannabis at the party which he referred to as being not uncommon for parties in the mid 1980s.

141. He recalled that at one of his parties (although he could not be sure it was this one) someone had brought along a cannister of nitrous oxide (laughing gas). He said he and his wife were shocked and were unhappy this had occurred and he told the person to remove it, which that person then did. He denied he encouraged Ms A to inhale the laughing gas.

142. He said he did not see any cocaine at the party nor take any himself and that he has never done so.

143. He denied Ms A's evidence that he entered the room where she was sleeping upstairs that evening, or that he kissed her or gave her cocaine.

144. He recalled Ms A going to ii which he estimated would have been a couple of weeks or so after he had spoken to her at his surgery about getting *"too close"*.

145. In 1986 he and his wife moved overseas for three years, living in ff in 1989. He had not heard anything further from Ms A but *"somehow she had tracked down"* his contact details. She telephoned him to say she was living with a family in mm, working for them as a nanny and was in danger of being sexually abused by the man who employed her. She was crying and upset. She said she had no money to leave and that he was the only person to whom she could turn. She specifically asked for mm $2,000 which equated to USA$1,500. He said he told Ms A he would help her.

146. He confirmed he sent her the money.

147. Dr C stated he told his wife at the time both the fact he was sending Ms A the money and the reason for it.

148. Dr C stated the next contact he had with Ms A was in November 2000 when she wrote him a letter saying she had thought about him for years and had been close to writing several times on earlier occasions and hoped they could re-establish contact. She was by now living in ii and her letter gave him her email address to which he replied.

149. He stated *"this initial email chatty correspondence"* continued and by December had turned into an email affair. He recalled her posting him a photograph of herself.

150. Dr C referred to some of Ms A's emails as being erotic and some very suggestive with him replying in kind. He stated that the email exchange became intense for a relatively short period of a month or so during which they also had some telephone discussions where they planned to meet in either xx or ii.

151. With regard to the email correspondence, Dr C stated he deleted from the "Deleted Items" folder all the emails at the time they were received or sent so that there was no record of them on the computer.

152. After the complaint was made and the CAC commenced investigating it, he contacted a computer specialist who services his computers at work to try and trace or locate their exchange of emails, the reason for doing so being to try to access a complete and true copy of them.

153. He understood this could not now be done. The computer system he operated at the Centre at that time had been changed three times since then and the server or system which they used at the Centre meant that discarded messages were only held on the system for two weeks after which they were deleted and were permanently lost.

154. Dr C stated many of the emails Ms A had sent him had not been included in those which had been disclosed by her. He stated, through his counsel, that he tried to obtain all of the emails from both Ms A and the CAC but they had not been produced.

155. He could not now remember exactly what he had said in all the email correspondence with Ms A in 2000 but he knew that "*some of the things in the emails are not correct and were not said by me*". He believed they had been added to or altered. He admitted sending emails to Ms A and saying things in them which were suggestive and inappropriate about which he was embarrassed and distressed.

Mrs C

156. Mrs C stated that Ms A became their babysitter in 1984, not earlier as Ms A had alleged. Their son, U was born with some severe medical condition as a result of which they did not employ a babysitter until he was two years old in 1984. Prior to that, Dr C's parents or widowed aunts fulfilled that role.

157. Mrs C stated that as far as she was aware there was *"no hint at all"* by her husband, Ms A, or anyone else, that her husband had seen Ms A as a patient or met her

beforehand. She added the first she had heard Ms A was a patient of her husband was when she made her complaint.

158. Mrs C described as *"not true"* Ms A's evidence that she (Mrs C) had told Ms A that they had got her to babysit following their return from overseas when they did not have a babysitter) as her husband had told her that there was this *"lovely, lovely girl who comes into the surgery, I'll ask her"* and that was how Mrs C knew Dr C had found Ms A as a babysitter.

159. Mrs C stated it was she who always telephoned to get Ms A as a babysitter and it was her husband who usually collected Ms A and she herself who usually drove her home as she (Mrs C) did not drink much.

160. Mrs C confirmed that Ms A went on holiday with them when they shared a house in ee with friends who also had two children so that Ms A was employed as a nanny to all four children. Mrs C added that Ms A was their *"third choice for this position"*.

161. Mrs C recalled the party with the punk theme which Ms A claimed to have attended. Mrs C said she did not recall inviting Ms A and did not recall seeing her at the party at all.

162. With regard to the presence of nitrous oxide at the party, she said she confirmed her husband's evidence and was furious when they noticed someone had brought it and that her husband had had it removed.

163. Mrs C stated she had never seen cocaine other than on television and believed she would have known if there had been cocaine at any of their parties, least of all on the occasion which Ms A had referred to. She referred to and recalled the category of persons invited to that party as she had pictures of persons who had attended it in her photo album.

164. She said she clearly remembered the *"alleged rape"* of Ms A concerning which she said Ms A had made no secret of it, although by saying that she did not wish to sound like she was criticising her. She confirmed that at the time her husband was

on holiday with their children. She was at home because of her work commitments and that Ms A had approached her and talked to her about it.

165. She stated that she did not believe her husband and Ms A had driven around together frequently as had been suggested by Ms A because at that time her husband and she had only one car. She had started part time work and with their young children attending kindergarten or crèche they always knew where each other was with the car.

166. Mrs C said she remembered the occasion when she found Ms A and her husband asleep on the couch in their home. This was after Ms A had babysat for them during an evening when she and her husband had been out. After they returned home she stated she went downstairs when her husband had not gone to bed and she saw him and Ms A *"both fully clothed and asleep on the couch, she with her head on his shoulder"*.

167. She elaborated in her oral evidence that it was his left shoulder and denied Ms A's description that they were lying on the sofa when she saw them rather than sitting upright and that she just said *"Oh"* and walked out again. She said that was not the sort of thing she did and when she told her husband to go upstairs he went up immediately after her.

168. Following this incident, Mrs C stated she cautioned her husband about Ms A *"appearing to be developing a crush"* on him and it was around this time that she suggested that they stop using Ms A as their babysitter for this reason.

169. Mrs C stated she and her husband agreed that he would discuss the matter with Ms A. She recalled this would have been in or about May 1985, sometime after the punk theme party for her husband's birthday which they had held in late April.

170. She stated they were both concerned to approach Ms A in a kindly way and that after Dr C had spoken to Ms A as agreed, she recalled him reporting to her that Ms A had visited him at the surgery and that she was angry he had confronted her about this. She stated it was a difficult time for them because they liked Ms A very much and treated her like a member of the family.

171. Mrs C said there were a number of reasons why she did not believe the truth of Ms A's statement that Ms A and her husband had sexual intercourse in the C home. One was that following the incident when she saw them on the couch together her *"antennae was up", "that [her] husband had gone straight to bed after [she] had seen them together", "that there was no smell of sex on him", that he did not cover himself in any way", "that he did not wash himself which [she knew] because [they] had no shower in [their] home in those days and the only bath was immediately adjacent to [their] bedroom"*. While she could not recall how long it was between the time they had arrived home and her finding them on the couch, she remembered having a strong sense at the time that it was not long after she went upstairs to bed. Further, their bedroom was right above the lounge where Ms A had said that the sexual intercourse had occurred and that the couch itself was immediately below where their bed was in those days. She added she was also a very light sleeper at that time.

172. With regard to the money that her husband had sent to Ms A while she was in mm, she stated she was well aware of this at the time as her husband had discussed it with her before he sent the money. She stated she remembered her husband telling her that Ms A had told him she was scared of her employer and was afraid of being sexually assaulted and had no-one else to turn to.

173. Mrs C referred to a serious accident that her husband had had in 1999 when they were overseas following which he had undergone a quite marked personality change and that it had taken him some years to seemingly recover. While she remembered speaking to him about it she thought everything was alright and did not do anything about it at the time but now wished she had. She said her husband did a number of things at that time that were out of character, he had resigned a number of positions which he had previously enjoyed being involved in, his sleep had become disrupted since the accident including recurring nightmares and tossing and turning; and that he had become less sociable and had lost some of his sense of humour.

174. In her written brief, Mrs C stated that her husband had told her that he had kissed and fondled Ms A on the couch on the occasion when she had found them sitting together on the sofa asleep. However, Mrs C confirmed, when asked in cross-

examination, that Dr C only told her about the kissing and fondling when the complaint came out in 2001, and not before.

Ms H

175. Ms H is the Director of uu in xx. She has known Dr C since 1997 when she was employed at the xx Health Centre as a Practice Nurse and subsequently as a Nurse Manager. She stated that he has always maintained clear professional boundaries with both staff and patients, always using a chaperone as deemed appropriate. She has found him professional in his manner with an impeccable professional reputation. According to her observations she considers Dr C to be sincere and honest in his dealings with both staff and patients.

176. When cross-examined she stated that she had travelled with him on numerous occasions when she had found him to be completely appropriate in his relationship with her. With regard to her knowledge of the allegations against him, she said she was aware of them through what Dr C had told her, her discussion with his lawyer, and subsequently what she had read or heard via the news media. She had not been shown or seen a copy of the complainant's brief of evidence or Dr C's brief of evidence or of the full content of the email exchanges that occurred between him and the complainant.

Mrs S

177. Mrs S has known Dr C since 1977 when she was employed for five years at the xx Health Centre as a Medical Secretary for another doctor there. She returned to the Centre in 1991 to manage it, in which position she still remains.

178. She referred to Dr C as an upstanding citizen who is a very respected general practitioner in the area in which he practises. She referred to his other medical and social interests and referred to him as well respected by all members of staff at the Centre, always maintaining a correct professional relationship with his patients and staff. During her time as Manager she had not received any complaints with regard to his conduct or medical expertise.

179. When cross-examined, she confirmed she did not know of Ms A's family having left the practice at the end of 1981 and not having returned until 1991. She agreed with the proposition that when she had worked at the practice in the earlier period it was the philosophy of the practice to undertake home visits and that this practice still prevailed if it were needed.

180. Mrs S had not been shown a copy of either the complainant's brief of evidence or of Dr C's, or of the emails which had been exchanged between them.

Written references

181. Dr C also produced to the Tribunal written references from two medical practitioners, both who have known him since medical school in 1971. One of the practitioners referred to Dr C as a very well regarded general practitioner. He was unaware of any criticism of his behaviour or his professional ability and has been impressed by his professionalism and his strong advocacy for patients. He regarded him (and said others did as well) as a man of high integrity and honesty. He referred to the allegations as being out of character. This referee appears to be the same person who Dr C has referred to as his *"good friend"* and with whom he socialises (email 21 December 2000 Ex 2 tab.30 last paragraph).

182. The other medical practitioner made similar observations about Dr C.

Expert evidence

Mr John Thackray

183. In view of the assertions made by Dr C, after Ms A's complaint had been brought to his attention, that his emails had been altered or tampered with in some respect, the CAC called John Thackray the Principal Computer Forensic Investigation Analyst and Director of Thackray Forensics Limited (TFL) based in Auckland.

184. Mr Thackray is a computer forensic investigative analyst of international repute. His qualifications and experience were set out in his brief of evidence (Ex. 8). The Tribunal accepted his expertise, which was not challenged.

185. The CAC commissioned TFL to make a forensic clone of the computer which Ms A had at her home.

186. On 21 February 2003 Ms A's computer was received by Mr Cameron Farquhar, at that time an employee of TFL, from Ms A at her home address. The computer was switched off and the company was advised it had not been working for some period of time. It was immediately transported to TFL's laboratory company where the computer system was subjected to a forensic examination. The computer was subsequently returned to Ms A's address on 24 February 2003 where it remains. Throughout the time the computer system was in possession of TFL, it was secured in the Forensics Exhibits Store and Laboratory.

187. The CAC commissioned TFL to conduct a forensic analysis of the computer system in order to identify the following data:

187.1. Any email correspondence between Ms A and Dr C.

187.2. Any evidence that would indicate the manipulation of any emails sent by Dr C.

187.3. Any evidence to suggest that emails dated 11, 28 and 29 December 2000 provided by counsel for the CAC had been manipulated.

187.4. Any difference between the composition of emails found on the computer and the printed versions provided by counsel for the CAC.

188. Mr Thackray's evidence was based on, and followed almost word for word, the report prepared by Mr Farquhar on 18 March 2003 for the CAC regarding the allegations of manipulation which Dr C had made. A copy of Mr Farquhar's report had been made available in 2003 to Mr Waalkens.

189. After Mr Thackray had given his evidence-in-chief at this hearing, Mr Waalkens put to Mr Thackray that his evidence was based on Mr Farquhar's report, with which Mr Thackray agreed. It was also put to Mr Thackray that, as it was Mr Farquhar who had prepared the report, Mr Thackray could not answer any questions as to what

steps or tests that Mr Farquhar did at any particular stage to reach the conclusions which he had without Mr Farquhar being present. While Mr Thackray agreed that the majority of the work was done by Mr Farquhar, he stated it was always peer reviewed and done as a team rather than individually. In re-examination Mr Thackray was asked how common it was to have other people assisting in forensic examination of computers. Mr Thackray said at all times. He referred to Mr Farquhar's report, stating that the document would not have left TFL without his having peer reviewed and checked it personally, purely because of the public liability and professional indemnity involved.

190. Mr Thackray explained that Mr Farquhar had left TFL since he had prepared the report in 2003. Mr Thackray added that he was aware of the systems in place in his laboratory to undertake all the tests referred to in the report. He stated that he taught the products that TFL uses and that he had implemented forensic laboratory processes around the world so that they were using the same techniques now as were being using when Mr Farquhar undertook the analysis in 2003.

191. Mr Thackray confirmed that his peer review involved firing up the computer, looking through the data which Mr Farquhar had found and, basically, testing Mr Farquhar's opinions, his observations and what he had found to make sure it was there and it was not something of make believe from Mr Farquhar's own mind before accepting with Mr Farquhar's opinion and conclusions and putting them on paper.

192. Mr Thackray added that he, personally, peer reviewed every report which left TFL.

193. Mr Thackray's evidence and Mr Waalkens challenge to it is evaluated later in this decision.

Emails

194. At the date of her complaint, Ms A was able to provide the CAC with only three emails. Following the forensic examination in 2003, TFL was able to recover a number of emails, which Ms A had not been able to access at the time of her complaint. All the recovered emails were produced at the hearing through Ms A.

195. Set out below are extracts from some of them which, directly or indirectly, refer to events in question:

195.1. Monday 11 December 2000 8:03pm (Ex 2 tabs.7 or 13)

Dr C to Ms A

. . . . . .

"… ruby in the dust is a line from a neil young song (cowgirl in the sand). you won't remember but I used to play it when you were around 15 yrs ago. it was still playing on one particular occasion but, again, you won't remember that …"

. . . . . .

"… don't get me wrong about the nightmares i used to have. it was the same dream each time with 2 variations. In one of them I had buried you under the floor in the wardrobe, in the other in the garden. There were two overwhelming feelings associated with it: guilt and fear of discovery. We (Doctors) have had it drummed into us that any sexual contact with a patient (especially a 17 year old) is predatory and criminal (they call it zero tolerance, I will call my first novel that) and that every such relationship must be interpreted according to that paradigm. Any suggestion that feelings of love or fondness might come into it is simply denial and a refusal to accept that one's behaviour is unacceptable. But it wasn't like that for me. I remember you with very warm feelings. You were, and still are, a special person in my life. However, there is always this nagging doubt (I hope you can see my point) that what I did was predatory etc and that my interpretation of it as something special is simply denial. So … you can see that talking to you again and reading what you have to say has made me incredibly relieved and happy that you are such a wonderful, clever and entertaining person and I didn't fuck you up after all! An extension of the zero tolerance paradigm is that if you had any mental illness over the last 15 yrs and you saw a psychologist then they would interpret your problem as being intimately tied up with all of the above. Sorry, I'll stop going on about it, but I really wanted to say all that. I think that that's the reason that video hit a nerve with me – it was all about love and guilt, or at least those were the themes that I picked up on. Yeah, it was great sex. Anyway, topic closed."

195.2. Tuesday 12 December 2000 4:25pm (Ex 2 tab.14)

Dr C to Ms A

. . . . . .

"… Well we are getting down to the nitty gritty, aren't we. Without wishing to sound too much like a counsellor type person, it's probably very healthy to talk about this. W's analysis of what happened was not correct. It may have been how she saw things but it was not what was happening from my point of view. Things were messy and complicated but i had very strong feelings for you which have lain dormant for some years and have now resurfaced with quite surprising intensity. Quite why a 32 year old man got into that situation with a 17 yr old girl is open to all sorts of speculation and everyone will interpret it according to their own frame of reference but I felt love for you then and I do again now. …" "i really don't want to hurt Mrs C. She is a very good person and, despite my behaviour then and, probably, now we have a good marriage. but i can't stop this just now. i have to see you and take it from there …"

. . . . . .

195.3. Tuesday 12 December 2000 4:57pm (Ex 2 tab.15)

Ms A to Dr C

"I know what you meant about the film, of course I do, it's just that I still have a hang up that what happened between us was a bit meaningless for you … so I still hold back sometimes. The fact that you remember what song was playing is quite comforting to me."

Dr C's reply was:

"meaningless???!!! Fuck me, it's one of the moments (two actually) I remember most vividly of my whole life."

195.4. Sunday 17 December 2000 5:30pm (Ex 2 tab.19):

Dr C to Ms A

"i read your email at 8am (it is now 11) and i have had a smile on my face ever since. the nurses must wonder what is going on as i am not usually at my best on monday morning. if i'm moderately apprehensive about having lunch with you then i would be absolutely screamingly terrified about the prospect of bed. of course i would love to more than anything else i could think of but … at age 47 one begins to bear a more than passing resemblance to saggy baggy the elephant and sex in a marriage of 26 years has more to do with affection and comfort as opposed to passion so i'm very out of practice. in other words it would be the worst fuck you'd ever have (?3rd worst). i mean you write all these articles about things like the g-spot and all that stuff."

. . . . . .

195.5. Tuesday 19 December 2000 10:21pm (Ex 2 tab 20)

Dr C to Ms A

. . . . . .

"… You know, when you were raped, my friend B wanted us to go round and beat the crap out of the guy. I demurred, mainly on the grounds that I didn't want to go to prison for GBH, but I wished I had. Then I later thought you hypocritical prick, you were no better but I am now coming to realise I wasn't that bad after all …"

. . . . . .

195.6. Wednesday 20 December 2000 6:01pm (Ex 2 tab.23)

Ms A to Dr C

. . . . . .

"Well that is very impressive that you never get sick. you are obviously doing everything right. i hope i wasn't too much of a pain when i was one of your patients. i try not to bother doctors and are generally perfectly well – just ear things which have had all my life. had a nice spanish doctor in oo who worked at the surgery behind our place and lived next to it, he was a bit difficult to understand but very sweet.

nope, never take drugs. do you? after xx (and you) i went to ii, no drugs, then jj, drug overload – (not a lot else to do and was getting my heart broken by a drug dealer), vv – one coke thing and that's it forever. along the line i decided not to because i am quite hopelessly oversensitive and it gets worse on drugs. i'm not completely anti them or anything, just find i do better without them. though e would be nice with you.

so that's all for today. I think work is going to be okay. The girls are all so sweet. you would love it, they are all very pretty and tight t-shirts are very much in evidence. i am still expecting knives to land in my back as per oo xx but am assured it's different here.

much love to you, xx"

Dr C's reply to Ms A (Ex 2 tab.22) at 4.16pm:

"I've never tried e mainly because none has fallen into my lap. I still love the occasional smoke, justifying this on the old boys-will-be-boys basis, usually on the annual rugby trip with my friends and the odd party and occasionally on my own listening to music. I have dabbled with harder stuff at times over the years but can't be bothered anymore. if restricted to one drug my choice would be red wine. i also like cuban cigars,indonesian cigarettes and calvados.

. . . . . .

195.7. Wednesday 20 December 2000 4:45pm (Ex 2 tab.24)

Dr C to Ms A

. . . . . .

"You are not getting carried away. I am madly in love with you."

195.8. Wednesday 20 December 2000 6:43pm (Ex 2 tab.24)

Ms A to Dr C

"Do we count all the years involved, too?"

Dr C replied (6.43pm)

"Ok, ok, 15 yrs and 3 weeks. I still love you."

195.9. Wednesday 20 December 2000 7:13pm (Ex 2 tab.26)

Dr C to Ms A:

. . . . . .

"my mobile number is ------. if i answer very non commitedly it will mean i'm in a situation where i can't talk. i'd love to talk to you again. please ring."

195.10. Thursday 21 December 2000 3:21pm (Ex 2 tab.30)

From Dr C to Ms A

"… I want what you want but to save this getting into one of those ever revolving discussions I will be more specific. I want you, a discreet place, champagne and talking and laughing for hours and catching up on 15 missed years and looking at you and holding you."

195.11. Ms A wrote to Dr C (Ex 2 tab.35)

. . . . . .

"what did you think when you received my letter? i was going to ask you this before because after your 2 glasses of champagne, you wrote that it was one of the best moments of your life. but i still don't know what you were thinking or what it meant to you. you have to tell me now because i've told you.

put it in the context of me knowing what happened with us and yet being told by someone else it wouldn't have meant anything to you, being told that you had had other affairs and not knowing whether it was a regular thing. it doesn't change what i felt and do feel, but it did make me afraid to believe in you."

whatever you say, i still love you."

Dr C replied 28 December 2000 11:39am (Ex 2 tab.36)

"whew, what an email. it's very difficult to explain what i felt when i got your letter, mainly because I'm not used to writing down or saying such emotionally explosive stuff. when i said it was one of best moments of my life that is, for me, quite a big thing to say. er, i'm not doing very well here but you have been a constant presence for me for the last 15 years. i can't drive up x without thinking of that night up there (that was my best night with you), i couldn't (until recently) see the word mm without wondering if you were still there. i often drive down ww st and see that bloody great house you used to live in and think of all that we did and might have done. and there was that damn guilt thing and the nightmares and the fear that i had done something really bad to you. so when you wrote (i still have the letter sitting under my computer at work, stupid i know) it was like (searches for suitable metaphor) like a dam bursting or something exploding. my first reply to you was cautious, i didn't know how you felt or what you wanted but then a few phrases started slipping through in your emails (slices of perfect happiness) and i got a bit less cautious and i couldn't see what was coming either and just look what has happened. you said you have ripped open your heart to me. well this is me doing it back again. i love you, i fucking love you and i want to be with you and hold you and talk and laugh and hold you some more.

i haven't had a string of affairs. there was a nurse in aa in 1978 and you and w and one other woman in ff in 1989 when i had a couple of months there on my own and that has been it. You don't have to believe that but it

is true. i was in love with my first real steady girlfriend, then Mrs C, then you. i was in lust with w and that's different. writing this is extremely difficult. i know that when we meet i might disappoint you. The corollary to opening up myself like this to you is that i expose myself to you in a way i've never exposed myself before and the fear of hurt starts to sit there in the background. well, i don't think i can write much more like this.

i am here til 3pm. please reply with nicely reassuring loving email.

love xxxx Dr C."

195.12. Friday 29 December 2000

Dr C to Ms A

"That first night is imprinted on my brain. I can visualise us sitting on the sofa and listening to music and then me plucking up enough courage to kiss you. You were so lovely."

195.13. Tuesday 23 January 2001 4:30pm (Ex 2 tab.48)

Dr C to Ms A

In an earlier email, Dr C had referred to a forthcoming medical conference in zz. Ms A emailed asking where in zz and could she come. Dr C replied:

"… in z in july … unfortunately, mrs c has expressed an interest in that one. i feel really bad writing that but i suppose it is a fact of life i can't ignore."

195.14. Wednesday 31 January 2001 9:37am (Ex 2 tab.49)

Dr C to Ms A

"Dear A, if you want a break or to stop altogether that's ok. Just remember I meant everything I wrote. With love C"

Application by CAC to amend the charge

196. At the close of the evidence, counsel for the CAC sought to amend the charge in three respects.

197. With regard to particular 1, he sought to amend the charge in two respects, first by substituting the words "sexual relations" for the words "sexual intercourse" and secondly, by adding to the words "his patient" the words "or the daughter of a patient".

198. Mr Waalkens objected to the proposed amendments on various grounds including prejudice to Dr C.

199. With regard to particular 2, which read *"That on occasions in or about March-April 1985 [Dr C] supplied to A marijuana, cocaine and nitrous oxide for which there was no medical reason or justification"* counsel sought to amend it by limiting it to marijuana only. Mr Waalkens objected to the proposed amendment on certain grounds including that it was prejudicial and that the charge was framed in such a way as to imply *"a job lot"*, that is, that all three drugs had to be supplied because they were not individualised in sub-particulars by a reference to *"and/or"*.

200. The Tribunal observed that the charge had been laid over eight years previously with amendments being sought only after the close of the evidence and just prior to addressing final submissions. The Tribunal concluded the amendments would be prejudicial to Dr C which could not be cured at that late stage.

201. Accordingly, the Tribunal declined to amend the charge in any respect.

202. As a result, before the parties presented their final submissions, the CAC withdrew particular 2 of the charge.

Case for the CAC

203. The CAC submitted that there were, in essence, two factual issues which the Tribunal needed to determine.

204. The first was the issue of the professional relationship between Dr C and the complainant. While there was no dispute that Ms A was at least the daughter of a patient, it was the CAC's submission that the evidence established a direct

doctor/patient relationship between the two. Counsel referred to the various pieces of evidence (which the Tribunal will later evaluate) regarding the first issue.

205. The second issue was the extent of the sexual relationship which occurred; whether it was limited to kissing and touching of the complainant's genital and breast areas and her touching the doctor's genital area on one occasion or whether it extended to sexual intercourse on one or two occasions. Again, counsel referred to the various pieces of evidence (which, again, the Tribunal will evaluate) as establishing that sexual intercourse occurred on two occasions.

206. Counsel submitted that the conclusions the Tribunal reached would depend on its findings of credibility and reliability of witnesses. He submitted that while human memory was not perfect it is often more reliable on central detail of important events than on peripheral detail.

207. If the Tribunal found the essential element of the charge proved then that would be regarded, both in 1985 and equally today, as disgraceful or dishonourable conduct; and that in turn would warrant a disciplinary sanction. The fact that these matters did not come to light until 2001, some 16 years after they occurred, was not a basis on which to find they did not warrant disciplinary sanction.

Case for Dr C

208. Mr Waalkens submitted that the CAC had to prove each element of particular 1 of the charge, that is, that the conduct occurred (a) in or about March 1985, (b) that Dr C had sexual intercourse with Ms A, (c) that she was then aged 16 years, and (d) that Ms A at the time had or until recently been his patient.

209. He cautioned the Tribunal that it must guard against hindsight and he emphasised that the common ground in this case was primarily one of credibility.

210. Mr Waalkens referred to evidence on a number of aspects which he referred to as *"key aspects"*, submitting that Ms A's evidence was wrong and that, consequently,

the Tribunal should conclude that her evidence was unreliable and the CAC had not discharged its onus of proof to the requisite standard of seriousness. The Tribunal refers to the various aspects of evidence and its findings later in this decision.

211. Mr Waalkens submitted there was a complete lack of evidence that Ms A was Dr C's patient and that at its highest, the evidence established no more than Ms A was a patient of the practice. Mr Waalkens submitted that the Tribunal had to assess not only whether a doctor/patient relationship had been established but more particularly its intensity/nature against the sexual relationship in question in order to make a balanced "*threshold*" assessment.

212. In this regard he referred to a number of decisions including the MPDT majority decision in *Wiles* (155/00/65D) which was upheld by the District Court and in turn in the High Court, the recent decision in *Dr YZ* (225/Med07/65D) and in the more recent judgments of the High Court of Justice Duffy in *Dr G v DP* (CIV-2009-404-951 – 13/10/09).

213. Mr Waalkens submitted that even if the Tribunal found a doctor/patient relationship had been established during the operative period (which was denied), the sexual relationship was not one arising from or sufficiently related to the doctor/patient relationship. Rather, it was one arising out of Ms A's role as a babysitter for the C household and the fact that Dr C was a family friend.

214. Mr Waalkens also addressed the issue of the Medical Council's views about sexual abuse in the doctor/patient relationship in 1985 and that the appropriate policy, statements or guidelines of the Medical Council had not been proved by the CAC.

Credibility issues

215. Both counsel submitted that this case is primarily one of credibility.

216. The respective accounts of Dr C and Ms A differ markedly in certain respects raising issues which the Tribunal must determine.

217. Counsel for Dr C has submitted that it is not simply a matter of whose evidence the Tribunal prefers – if Dr C's evidence is accepted, then plainly, the charge cannot succeed, but that the converse does not follow, that is, if Dr C's evidence is not accepted this does not prove the charge; the complainant's evidence remains unsatisfactory.

218. Mr Waalkens referred to fundamental credibility issues with Ms A's evidence on key aspects and submitted it would be improper for the CAC, essentially, to invite the Tribunal to "cherry-pick" the evidence. The only conclusion was that the CAC's evidence on primary credibility issues failed to discharge the serious onus of proof.

219. Counsel for the CAC has submitted there were the time, place and opportunity for sexual intercourse to have occurred and there was no need for corroboration because, as has been accepted in the jurisdiction of the criminal Courts, such acts usually occur in private.

220. Whilst the Tribunal accepts credibility was a central issue, it does not accept this was simply a case where witnesses were in conflict and that there was no other evidence to assist the Tribunal in determining which account was to be preferred on the issues in contention.

221. In applying the principles in assessing credibility the Tribunal has earlier set out, it found the emails to be of particular importance in determining where the truth lay in the matters at issue. Before turning to consider the two central issues identified by counsel for the CAC, namely whether intercourse took place as alleged and whether Ms A was Dr C's patient at that time, the Tribunal now considers the significance of the emails and the challenge made to them by Dr C.

Tenor of emails

222. On several occasions during the hearing, Dr C emphasised his emails were very embarrassing for him. But they were more than that; they supported Ms A's versions of events and contradicted his.

223. That is why, in the Tribunal's view, Dr C sought to distance himself from them by either challenging their authenticity or describing them as exaggerated, boasting and even *"made up"*.

224. Initially only four emails were available to Ms A when she made her complaint in 2001. Once he had been provided with copies of them, Dr C asserted three had been manipulated. This contention is evident from clause 1.2c of the report of Mr Farquhar of TFL dated 18 March 2003 (scope of the report) which records:

> *"Identify any evidence to suggest the emails dated 11, 28 and 29 December 2000 provided by Mr Lange [counsel for the CAC] had been manipulated."*

225. By the time of the hearing, Dr C was no longer asserting that the emails of 28 and 29 December 2000 had been manipulated. He was still maintaining the one of 11 December 2000 had been, and added another, that is, the email of 12 December 2000 (Ex 2 tab.15) which he claimed he had not written at all.

226. With regard to the emails he admits he did write, Dr C referred to the exchanges with Ms A turning *"into a sort of fantasy game where I made all sorts of extravagant claims and remarks. I over-romanticised and exaggerated the nature of our previous relationship where there had been sexual contact but no sexual intercourse"* (BOE 67); *"I've exaggerated and made up situations at times"* (tscpt 140/3-4); *"Again with the emails I exaggerated and made up situations that didn't actually happen."* (tscpt 140/12); *"there were many exaggerations in the emails. There was an element of fantasy, of boasting, there was an element of making an otherwise boring life seem more exciting"* (tscpt 167/16-22).

227. In his emails, Dr C revealed a significant amount of detail including reference to individual patients and their reasons for consulting him (even naming one of them) (Ex 2 tab.30), his practice in general, his friends and his acquaintances making revealing, personal and, in some cases, derogatory comments about them, his wife, his children, his affairs, his social activities – music, food, wine, travel, drugs, his loves, likes and dislikes. Most significantly he refers to his past relationship with Ms A in 1985, his feelings and concerns arising from that relationship, his desire to re-kindle it, and plans to pursue it. It is his admissions and comments relating to his past sexual relationship with Ms A in particular from which Dr C has sought to

distance himself, either by claiming that he did not write the email or some aspect of it or that the interpretation being placed on them was wrong or that he made up situations or exaggerated them.

228. The Tribunal deals with each of those emails in more detail later, but, in summary, finds Dr C wrote all of them.

229. It finds that in their construction, language, theme and expression the emails have a consistency to them and a ring of truth about them which is compelling. The Tribunal is not persuaded that they were altered or added to by Ms A or anyone else.

230. On the contrary, the Tribunal finds that the emails contain a description of true events as they were occurring in Dr C's life at the time he wrote them, and in 1985, and were a genuine expression of his thoughts and feelings on a wide range of matters, both past and present, and, in particular, of his relationship with Ms A in 1985 and what he was experiencing in 2000/2001.

231. While he variously referred to them as *"foolish"*, *"silly"* and *"distressing"* (among other things) that did not and does not detract from their validity or their cogency as reliable evidence.

Challenge to emails

232. In this section, the Tribunal evaluates Mr Thackray's expert evidence and the challenge made by Dr C to that evidence. The Tribunal's conclusions and findings apply to all the emails and, in particular, the two which Dr C specifically challenged.

233. Mr Waalkens did not object to the admissibility of Mr Thackray's evidence. However, he did challenge the weight to be given to it and, in particular, whether it was proper for the Tribunal to rely on certain conclusions Mr Thackray reached and the opinions he gave, given he had not himself undertaken the retrieval of the emails from Ms A's computer.

234. The Tribunal accepts the onus fell on the CAC to prove the emails were sent by Dr C and that if there was a substantial question of the emails having been altered, it was for the CAC to satisfy the Tribunal that they had not. However, the Tribunal considers Dr C could not demonstrate there was a substantial issue simply by questioning the authenticity of the emails without providing specific evidence to cause real doubts as to their authenticity.

235. Dr C did not call any expert evidence to challenge that led by the CAC. It emerged that he consulted an expert at one stage. The Tribunal does not draw any inference from this fact beyond that, though he had sought expert advice, he was content to rest his challenge on those matters his counsel sought to raise in cross-examination. The Tribunal deals with these challenges when considering the specific emails to which they relate.

236. The Tribunal was impressed with Mr Thackray as an expert witness. He made concessions, about possibilities, where appropriate, as one would expect from an expert and impartial witness. It does not accept Mr Waalkens' submission that it cannot accept Mr Thackray's evidence because Mr Farquhar was not called. Mr Thackray, as he explained (above), undertook all the appropriate steps when he peer reviewed Mr Farquhar's report. The Tribunal accepts Mr Thackray had sufficiently informed himself personally and was in a position to give the evidence which he did at the hearing and which the Tribunal accepts.

Further challenge to emails

237. Mr Waalkens submitted the emails plainly formed part of the factual matrix but cautioned the Tribunal about the appearance of entrapment referring to the timing of the stopping of the emails, when the complaint was made, and the subsequent damages claim.

238. With regard to timing, the Tribunal observed that Ms A did not arrive back in New Zealand until September 2000 and did not settle in a particular locality until October 2000. By November 2000, she sent Dr C a short note to say hello. The Tribunal accepts she was keen to make contact with him but is not satisfied it was for the purposes of entrapment.

239. On the Tribunal's findings, their relationship, although some 15 years earlier, had been an intense one when she was still 16 years, or just on 17 years, and was young and impressionable. For her, the Tribunal accepts, however it is categorised, that the relationship was significant. From late 2000, she and Dr C communicated by email (and occasionally by telephone) until around the end of January 2001. While Ms A was keen to make contact again with Dr C once she had settled back in New Zealand, after having the email exchange with him she had reached the point *"suddenly"* where she felt that she no longer wanted any contact with him. It was not until 4 May 2001 that Ms A wrote a letter of complaint to the Health & Disability Commissioner. A charge was laid on 1 October 2002 before this Tribunal but Ms A did not issue civil proceedings until 11 November 2003. The Tribunal accepts Ms A's evidence that by May 2001 she still felt confused about the relationship and unsure how to make sense of it. By then she was the same age (32 years) which Dr C was when he had the relationship with her when she was 16. She was thinking about having children and thought how she would feel if a doctor treated one of her children the way Dr C had treated her. The Tribunal accepts this could have been a significant trigger for Ms A to take the matter further.

"Zero tolerance" email 11 December 2000 (Ex 2 tabs.7 or 13)

240. The *"zero tolerance"* email was sent on Monday 11 December 2000 at 8.03pm. It comprised some six paragraphs with a considerable amount of detail relating to Dr C's personal, social and domestic activities and, in particular, his thoughts and feelings about his and Ms A's relationship when she was 17 years old.

241. Dr C maintained he wrote all of the email except some words contained within paragraph 5 of it. During the hearing, Dr C made several attempts to identify the words in the email which he said he did not write and which he maintained had been added or altered, allegedly by Ms A. His attempts to identify the actual words were made in his oral evidence-in-chief, cross-examination and re-examination. When Dr C's re-examination concluded, the Tribunal took the luncheon adjournment. When the hearing was resumed, members of the Tribunal asked Dr C some questions. When it appeared that the Tribunal had concluded its questions, Dr C asked if it

were possible for him to revisit this email and, despite objection from the CAC, the Tribunal allowed it.

242. Dr C went through the email again with the Tribunal. The fifth paragraph of the email is set out below and the words which Dr C maintained he had not written and which he maintained were added and/or altered by Ms A, are highlighted in bold type (tscpt 175/4-34; 176/1-21):

> *"… don't get me wrong about the nightmares i used to have. it was the same dream each time with 2 variations. in one of them i had buried you under the floor in the wardrobe, in the other in the garden. there were two overwhelming feelings associated with it: guilt and fear of discovery.* ***we (Doctors) have had it drummed into us that any sexual contact with a patient (especially a 17 year old) is predatory and criminal (they call it zero tolerance, i will call my first novel that) and that every such relationship must be interpreted according to that paradigm****. any suggestion that feelings of love or fondness might come into it is simply denial and a refusal to accept that one's behaviour is unacceptable. but it wasn't like that for me. i remember you with very warm feelings. you were, and still are, a special person in my life. however, there is always this nagging doubt (i hope you can see my point) that what i did was predatory etc and that my interpretation of it as something special is simply denial. so …. you can see that talking to you again and reading what you have to say has made me incredibly relieved and happy that you are such a wonderful, clever and entertaining person and i didn't fuck you up after all !* ***an extension of the zero tolerance paradigm*** *is that if you had any mental illness over the last 15 yrs and you saw a psychologist then they would interpret your problem as being intimately tied up with all of the above. sorry, i'll stop going on about it, but i really wanted to say all that. i think that that's the reason that video hit a nerve with me – it was all about love and guilt, or at least those were the themes that i picked up on. yeah, it was great sex. anyway, topic closed."*

243. In his closing submissions, counsel for the CAC said that Dr C's defence and explanation regarding this email was a *"shifting sands"*. He then went through the various attempts Dr C made to identify the words he said he did and did not write.

244. Mr Waalkens, in his closing submissions, said that when Dr C had said in cross-examination that he had written certain words which he previously claimed he had not written this was because he had been giving evidence for some hours at that stage and was confused. However, it was during Mr Waalkens' re-examination that Dr C made certain admissions adverse to his defence in that he said he had written some of the words in the email which he had maintained earlier he had not written; but which he later sought to correct. (tscpt 170/11-28 and refer to paragraph 241 above).

245. Mr Waalkens referred to his cross-examination of Mr Thackray in which he had said that with regard to any alteration, from what had been presented from the home computer of Ms A which he analysed, one could not say it definitely was not altered and one could not say it definitely was (tscpt 95/1-23).

246. Mr Waalkens referred to other aspects of Mr Thackray's evidence, during his cross-examination, where he agreed that very computer literate people are able to alter emails (tscpt 94/15) and that where one has several email addresses - the Tribunal observes Ms A had three (although the third one was not set up until 31 December 2000 (Ex 2 tab.39), which was 20 days after the 11 December email) - it was possible to send on or forward emails within that email address within one's various emails in the process altering the text of them (tscpt 94/24-28).

247. Mr Waalkens further submitted Mr Thackray had conceded that, without Mr Farquhar being present to answer questions, Mr Thackray himself could not say exactly what steps or tests Mr Farquhar did at any particular stage to reach conclusions that were set out in his report because Mr Thackray would have to ask him. Mr Waalkens put to Mr Thackray that the importance of this was that Mr Thackray could not say conclusively that the emails had not been altered; all he could say were there were no signs detected by the person who did the investigation work of any alterations. However, the Tribunal observes Mr Thackray stated that, from the peer review he undertook himself, he could say there was no evidence to support the assertion that there were alterations (tscpt 91/27-34; 92/1-2).

248. Mr Waalkens referred to an assertion by Dr C, with which Mr Thackray agreed, that it was known in the industry that apart from the computer time itself being out by an hour or whatever happens on one's computer at times, one can manipulate the computer clock and change the times as they appear (tscpt 92/24-28).

249. Mr Waalkens submitted that the CAC did not provide any evidence as to Ms A being a "normal user" of a computer and that Mr Thackray was not asked to assess this either.

250. Mr Waalkens relied on the fact that Ms A had been a d for 20 years, had been a d and had denied any knowledge of the term "zero tolerance".

251. The Tribunal was not satisfied there was any reasonable basis for concluding that the email may have been altered or added to, let alone by Ms A.

252. It would appear from Mr Farquhar's report and Mr Thackray's evidence-in-chief, that the *"zero tolerance"* email was one of three emails which Dr C challenged in 2003. The other two were the email (*"x"*) dated Thursday 28 December 2000 (Ex. 2 p.36) sent by Dr C to Ms A (referred to below) and the email (*"Neil Young … played it that first night"*) dated Friday 29 December 2000 (Ex. 2 p.38) sent by Dr C to Ms A (referred to above), neither of which Dr C challenged at the hearing.

253. With regard to the *"zero tolerance"* email, both Mr Farquhar in his report and Mr Thackray stated that it was recovered from within the ghost image file on Ms A's computer and that to modify this file without corrupting the web page would require a good working knowledge of web page coding. The conclusion was that there was no evidence to indicate that such manipulating process had taken place.

254. With regard to the *"x"* email, Mr Thackray stated that during the editing process it is common to find text fragments or copies of the subject email. These are associated with the user's intervention or application processes. No text fragments or copies of the web page were identified within the subject hard disk or the ghost image contained within it. To edit the file without corrupting the web page would require a good working knowledge of web page coding. Regardless of whether a user possessed such knowledge, one would expect to find text fragments or additional copies as described above. No such evidence was discovered on the computer's hard disk drive.

255. Mr Thackray reached a similar conclusion regarding the *"Neil Young"* email

256. A series of questions were put to Mr Thackray by Dr C's counsel that he could not emphatically conclude that there had been no alteration to any one or other emails. Mr Thackray agreed that from what had been presented from Ms A's computer one could not say definitely that they were not or definitely that they were. However, no traces were found of any alterations of the emails during the forensic examination (tscpt 98/15-28).

257. Mr Thackray was asked by the Tribunal whether one could overwrite an image that was already present. Mr Thackray stated that when they undertake the forensic analysis the image itself is what they create, that is, the copy. He then provided an analogy to footprints in the snow explaining that when there is fresh snow one can leave a perfect impression of a footprint. If then a brigade of ghurkas walked over the footprints they would destroy those footprints but if one looked closely enough they would still find some fragments of the original footprints provided they had not been totally destroyed. He said it was the same with the computer hard drive in that his company lays perfect files onto the computer which are visible and working and once they tell the computer to delete them it does not delete them, it just says you can use this space (tscpt 100/3-10).

258. Mr Thackray stated that the forensic examination did not reveal any traces of alterations to the emails, which the Tribunal accepts.

259. With regard to the *"zero tolerance"* email, the Tribunal was also entitled to take into account the entire email in its context. The words which Dr C did write, which immediately precede and succeed the ones which Dr C said he did not write, relate to his fear of the nightmares he has had about what he had done regarding Ms A and his two overwhelming feelings associated with it, that is, *"guilt and fear of discovery"*, and that any suggestion that feelings of love or fondness which might come into it was simply a denial and refusal to accept that his behaviour was unacceptable and the relief he felt having spoken to Ms A (by telephone) and reading her emails that he did not *"fuck [her] up after all!"*. During cross examination, Dr C said the guilt and fear of discovery related to what his wife might find out. The Tribunal does not accept that explanation. The Tribunal did not accept Dr C's answer that the words *"sexual contact"* (which he said he did not write), did not equate to *"sexual intercourse"*, which are the words in the charge.

260. It is understandable why Dr C wanted to dissociate himself from the *"zero tolerance"* extract. It is a damning admission. It refers to Ms A being a patient, at the relevant time (when she was 17 years) and Dr C's own knowledge that what he did was contrary to his medical training and medical ethics.

261. The Tribunal accepts Ms A's evidence that she did not alter or add to this email. There was no evidence to establish she had the necessary technical expertise to make the alterations without leaving a trace, as explained by Mr Thackray. The fact she had been a d for 20 years (although not continually according to the evidence) does not of itself establish she altered the email, or even knew how to.

262. The Tribunal had no difficulty in concluding, to a high standard, that Dr C wrote all of this email.

263. The Tribunal finds the email meant what it said, that is, that Ms A was his patient in 1985, that he had sexual contact with her (which the Tribunal finds was sexual intercourse), that he was aware due to his medical training that it was wrong, and that he had had feelings over the years of guilt and discovery about what had occurred between him and Ms A.

"Meaningless???!!! …" Email 12 December 2000 (Ex 2 tab.15)

264. In the *"zero tolerance"* email (referred to above), Dr C used the email address of *"qq"* which he had set up to communicate with Ms A rather than using his email address at his practice where, possibly, staff might become aware of the email exchange.

265. The third paragraph of the *"zero tolerance"* email reads:

> *"ruby in the dust is a line from a Neil Young song (cowgirl in the sand). you won't remember but i used to play it when you were around 15 yrs ago. it was playing on one particular occasion but, again, you won't remember that. i still play a lot of Neil Young."*

266. Ms A sent an email in reply to Dr C the full content of which reads:

> *"i know what you meant about the film, of course i do, it's just that i still have a hang up that what happened between us was a bit meaningless for you .. so i still hold back sometimes. the fact that you remember what song was playing is quite comforting to me. x"*

267. The CAC produced an email dated Tuesday 12 December 2000 from Dr C to Ms A in reply to that which reads in full:

> *"meaningless???!!! fuck me, it's one of the moments (two actually) i remember most vividly of my whole life."*

268. The inference to be drawn from the composition of the emails and, in the context of the entire email exchange, was that the reference to (*"two actually")* was a reference by Dr C to the two occasions of sexual intercourse which Ms A said had occurred between Dr C and her in 1985.

269. In answer to a question from his counsel during evidence-in-chief, Dr C stated he did not believe he sent the 12 December email, adding *"It's not how I either talk or write"* (tscpt 115/24-26).

270. However, in cross examination, it was put to Dr C that this was one of two emails which he had claimed the complainant had "*altered*' to which he replied *"Yes"* (tscpt 123/7-9). Later in cross examination he denied that the reference to one of the most vivid moments of his life (*"two actually")* was referring to the two previous occasions when sexual intercourse had occurred. Dr C did not accept that and did not accept he wrote this email (tscpt 163/7-10).

271. In cross examination Dr C conceded that *"meaningless"* was a word he could use but the word *"fuck"* or *"fuck me"* was not a usual phrase of his although it was a word he had used.

272. Dr C was referred in cross-examination to three further emails, all of which he accepted he had written and sent to Ms A. There was an email to Ms A on Tuesday, 5 December 2000 at 3.26pm (Ex 2 tab.12) in which he commenced with the words *"Fuck!!! My computer just deleted all my inbox items … please re-send your last email";* on Sunday, 17 December 2000 at 5.30pm he wrote an email to Ms A (Ex 2 tab.19) in which he referred to the future prospect of going to bed with Ms A as *"it would be the worst fuck you'd ever had (?3rd worst) …"*; and again on Tuesday, 26 December 2000 at 11.13pm (Ex 2 tab.35) Dr C wrote to Ms A in which he indicated there could have been any of five responses to her initial letter to him one of which could have been *"Fuck off you silly bitch"*.

273. Dr C had to concede that, despite his earlier denial, this kind of language was the kind of language he was using in his emails to Ms A.

274. The Tribunal also observes Dr C used similar language in a further email to Ms A on Monday 22 January 2001 (Ex 2 tab.47) in which commenced with the words *"fucking usa.com doesn't seem to be working …"*

275. The Tribunal finds that the *"meaningless???!!! …"* email (Ex 2 tab.15) was not written or altered by Ms A as Dr C claimed but was written by Dr C and sent by him to Ms A.

276. The Tribunal further finds that the reference by Dr C to two of the most vivid moments he remembered in his whole life was a reference by him to the two occasions of sexual intercourse which Ms A alleged took place between them in 1985, in the context of this email and the one from Ms A which preceded it, and in the context of the entire email exchange between him and Ms A and in the context of the evidence before the Tribunal.

"(? 3rd worst) …" email Sunday 17 December 2000 (Ex 2 tab.19) to Ms A

277. The email is a lengthy one encompassing some seven paragraphs. It contains a significant amount of information personal to Dr C – his thoughts and feelings, his domestic and family and personal activities, and other personal matters. Dr C agreed with counsel for the CAC that this was his own email and that there was no suggestion that Ms A had anything to do with its composition.

278. In the first paragraph Dr C refers to an email which Ms A had sent him as a result of which he had had a smile on his face all morning such that the nurses at his practice must wonder what was going on as he was not usually at his best on Monday morning. Dr C refers to the fact that if he were moderately apprehensive about having lunch with Ms A then he would be *"absolutely screamingly terrified about the prospect of bed"* with her adding that he would love to more than anything else he could think of but that at his age of 47 *"one begins to bare more than passing resemblance to saggy baggy the elephant"* – that he was very out of practice and that *"in other words it would be the worst fuck you'd ever had (? 3rd worst) …"*.

279. In cross examination Dr C denied that the statement (*"3rd worst")* was, by implication, a reference to the two previous occasions of sexual intercourse which Ms A said had occurred between them (tscpt 163/3-6).

280. In re-examination, when led by his counsel, Dr C stated that when he wrote this email he was referring to one of the worst occasions of intercourse which Ms A had had with someone else, not with him. His counsel then referred him to an email which Ms A had sent Dr C (Ex 2 tab.46) in which she had stated she had done "*some very bad things*", one of which was sleeping with her boss's husband in mm adding *"He wasn't even that hot"*. Dr C then said this was what he was referring to. This email is undated, being one of the emails retrieved by Thackray Forensics Limited. However, the Tribunal observes that this email of Ms A's also comments *"… you've had affairs before so you know what you're doing. I don't'."* This appears to be a response to the affairs which Dr C said he had had in his email to Ms A of 28 December 2000 (above). Mr Waalkens then asked Dr C about the second occasion but was cautioned by the Tribunal not to lead the witness. Dr C then stated he could not recall what the second worst "*fuck*" he would have been referring to was in his 17 December 2000 email to Ms A.

281. The Tribunal finds and is satisfied that in the context of the email exchange between Dr C and Ms A, and taking all the evidence into account, Dr C and Ms A were planning to meet at some later stage convenient to both when sexual intercourse might take place and further finds that when Dr C referred to the *"(?3rd worst) …"*, he was alluding to the two previous occasions of sexual intercourse which Ms A said took place between them in 1985 and the possibility that if there were now a third occasion of sexual intercourse it may be a disappointing one for Ms A.

"*x*" email 28 December 2000 (Ex 2 tab.36) to Ms A

282. In her written brief, Ms A referred to her seeing a lot more of Dr C once she started going to his home following the dd incident. She stated he took her to the beach, to a rock concert, to visit friends of his, and sometimes just drove her around in his car (BOE 15).

283. Mr Waalkens took Ms A through this evidence.

284. He put to Ms A that Dr C had taken her to the beach only once and that was with his children. She recalled that occasion but said there was a second occasion after she had babysat one evening when Dr C had driven her to x. She agreed with Mr Waalkens it was around 11 o'clock at night. She agreed there was a park with swings which was below but she said they parked above it.

285. Mr Waalkens put to Ms A that once at x, they got out of the car, hopped onto swings, kissed and cuddled, and that this incident occurred immediately before the occasion on Dr C's couch.

286. Ms A was adamant that the time at x was before the rape incident at dd and that no sexual contact took place on that occasion. When pressed how she could be sure, Ms A said it all changed after the rape incident following which Dr C *"would be more putting*" his arm around her and that did not happen at x.

287. Mr Waalkens referred her to Dr C's email to her of Thursday 28 December 2000 at 11.39am (Ex 2 tab.36 second page) in which he wrote *"i can't drive up x without thinking of that night up there (that was my best night with you) …"*. She agreed the evening at x was significant for both of them. When asked why it was for her, she said she thought it was nice because they sat in the car and talked and it was night time (tscpt 21/20 to 23/1-30).

288. Ms A agreed in re-examination that x was out to the coast beyond b. The time she had at the beach with Dr C and the children was at b. The time at x was with Dr C alone. The park was below but where Dr C parked and where they chatted was above the park. To get there, she said he had to drive up the road where there was a lookout off the road overlooking back into b (54/8-27).

289. Dr C, in his oral evidence in chief, referred to the x email. He said this was a reference to one night about 11pm when *"we"* made a detour towards there and drove to the top of the hill; and it was *"certainly after her alleged rape but before we finished with her as a babysitter"*; and before the incident on the couch. He said they got out of the car, sat on the swings, *"there was some low level kissing and hugging, but no other sexual contact"*. He thought they possibly spent about 15 to 20 minutes there (tscpt 110/5-34).

290. In cross-examination, Dr C had to admit it was not just a *"detour"* to x but was in the opposite direction to Ms A's home and was a long way out of the way (tscpt 128/15-21).

291. The Tribunal observes that for a family doctor to conduct himself in this way with a 16 year old who was seeking comfort after an incident of rape, to be entirely inappropriate, if it did occur on that occasion. It is an incident which one would have expected Dr C to have remembered and referred to in his written brief. The Tribunal finds it most surprising that an incident as significant as this was omitted from Dr C's written brief, which was exchanged with counsel for the CAC prior to the hearing, and only added in his oral evidence.

292. Mr Waalkens put to Ms A that she was attracted to Dr C and referred to her email to him (Ex 2 tab.14) in which she had recorded (referring to 1985) *"… I felt something long before anything ever happened …"*. Ms A agreed stating *"I liked him and I felt special because he showed a lot of interest in me"*, and was aware he was interested in her (tscpt 24/17-30).

293. Having considered all the evidence, the Tribunal accepts Ms A's version as to timing, that is, that the time at x was before the incident at dd, and that there was no sexual contact on this occasion, but rather Ms A was pleased that Dr C should take her there, talk with her at night, and take an interest in her, and that this made her feel special.

294. The Tribunal does not accept Dr C's evidence that sexual contact, in the way he described, took place at x. It prefers Ms A's evidence in this regard. The Tribunal was left with the distinct impression that Dr C was seeking to place an interpretation on this email (referring to x) in an effort to detract from and downplay his references in his other emails (including *"… quite why a 32 year old man got into that situation with a 17 year old girl …"* Ex 2 tab.14 and *"(?3rd worst) …"* Ex 2 tab.19) which imply sexual intercourse took place between him and Ms A on two occasions.

The charge (first particular) - introductory

295. To establish the charge, the CAC needed to prove two fundamental facts, first that Dr C had sexual intercourse with Ms A in or about March 1985 and secondly, that she was his patient. The Tribunal deals with each in turn.

Did sexual intercourse take place?

296. Courts and Tribunals are not infrequently faced with one party claiming a sexual act has taken place with the other denying it. Proof of the act can be difficult, particularly where the alleged act has occurred several years before a complaint is made. Proof is rendered more difficult because mostly such acts, in circumstances where they are considered to be illicit, usually occur in secret or in private without witnesses and without any form of corroboration.

297. Here, as is apparent from the preceding consideration by the Tribunal of the emails, there are several pieces of proved evidence which, in the Tribunal's view, establish and satisfy it to a high standard, that sexual intercourse took place between Dr C and Ms A in or about March 1985 on two occasions.

<u>The incident on the couch</u>

298. According to Ms A the first occasion sexual intercourse took place was about a month or so after the incident at dd which was on 25 February 1985. This would therefore place the occasion in late March 1985 or thereabouts. Dr C stated in his written brief, he thought that Ms A had got the chronology of events wrong. The Tribunal addresses this later.

299. While there is a direct conflict on the level of sexual contact between Ms A and Dr C, and precisely what occurred when Mrs C found them subsequently on the couch together, what is significant is that there is agreement on many of the basic facts.

300. It is not in dispute that the Cs had been out - Ms A said to a party. They arrived home late - according to Dr C, probably some time between 11pm and midnight (tscpt 129/5). Mrs C went upstairs to their bedroom. Dr C remained downstairs. He agreed he often played music. He was not sure on this occasion whether he did or did not play music, answering *"Possibly, probably"* (tscpt 129/15). They sat

together on the couch in the lounge. According to Mrs C it is a four-seater couch. He agreed that he talked to Ms A (tscpt 129/17). He said he started kissing Ms A, touching her breasts and her genital area and that she touched his genital area. He agreed that the touching was intimate (tscpt 129/20-30).

301. Dr C did not dispute Ms A's evidence that on this occasion he talked about his travels and his love of music. He disagreed he said he had married too young and that marriage was not easy (adding that the age at which he had married was common for those times) and denied he said he had been unhappy as a child. He denied he liked to talk about drugs or that he had tried most kinds of drugs which were readily available to doctors and he particularly enjoyed cannabis and cocaine, (tscpt 146/32-34).

302. It is readily apparent from the emails which Dr C sent Ms A in 2000/2001 that he does like to talk about his travels and his love of music. He has made frequent references in those emails to the illnesses of his children. He has made some unfortunate comments in relation to his marriage. He has talked about drugs. And it is readily apparent, not only from the references in the emails, but from Dr C's own evidence, that in 1985 he did smoke cannabis which was available both in his household and, according to him, readily available elsewhere.

303. The Tribunal finds that Dr C did discuss these particular matters with Ms A on this occasion.

304. Ms A in her written brief said Dr C told her on this occasion he was so angry with the man who had raped her at dd that he had talked to a friend about hiring a hit man (BOE 18).

305. In his written brief (BOE 42) Dr C denied that he ever wanted to hire a hit man or said this to Ms A, adding that he did not have any knowledge of the identity of the person who allegedly raped Ms A. However, in his email to Ms A of Tuesday 19 December 2000 at 4.51pm (Ex 2 tab.20), Dr C wrote at paragraph 6 (and he did not deny writing it):

> *"… you know, when you were raped, my friend B wanted us to go round and beat the crap out of the guy. i demurred, mainly on the grounds that i didn't*

want to go to prison for gbh, but often wished i had. then i thought later you hypocritical prick. you were no better but i am now coming to realise i wasn't that bad after all. thank you for doing that for me.

i love you. there, i said it. xxxx C"

306. When this was put to him by the CAC, Dr C agreed he did discuss this with Ms A at the time when they were sitting on the couch together. He added it was hardly organising a hit man, as Ms A had suggested, but it was probably a natural reaction by him to someone who had been harmed by an alleged rapist and agreed he felt angry on Ms A's behalf at that time.

307. The Tribunal finds, contrary to Dr C's initial denial, he did tell Ms A, as she stated in her written brief, that he was so angry with the man who had raped her that he had talked to a friend about hiring a hit man.

308. Ms A stated that on the occasion when they were sitting on the couch together, Dr C gave her a glass of wine and then another and told her he had been attracted to her since they first met and the reason he had asked her to babysit for him was so he could get to know her better and then he kissed her and that progressed into sexual intercourse on the sofa in their living room. Ms A stated she did not know what to do or think but did remember feeling quite drunk, that he told her that he loved her, that he had been nice to her that she did not have a choice and she should do what he wanted.

309. Dr C denied providing Ms A with wine. However, as referred to, the evidence established that both Dr and Mrs C made wine available to Ms A when she attended at their home. The Tribunal finds that Dr C provided wine to Ms A on this occasion.

310. The Tribunal also believes and accepts Ms A's evidence that Dr C told her he had been attracted to her from when he had first met her and that he told her that he loved her. These sentiments are consistent with his own admitted actions of kissing and fondling Ms A and allowing her to respond in kind in the intimate manner he described.

311. Further, these are the very same expressions he repeated in his emails to her in 2000/2001, expressing his love for her and how she has been a constant presence for him in his life since 1985.

312. Ms A said that Dr C then kissed her and that this progressed into sexual intercourse on the sofa in their lounge.

313. Dr C said that what occurred between them *"was some low grade sexual contact"* but that he did not have *"sexual relations with her"* (tscpt 130/9-11).

314. Counsel for the CAC put to Dr C that the reference in the email of 19 December 2000 to *"… hypocritical prick, you are no better …"* was a reference to the sexual intercourse which had taken place between them in 1985.

315. Dr C accepted that it did relate to what occurred between them in 1985, but denied what happened amounted to sexual intercourse. He stated the reference to *"hypocritical"* was that he was covering it up and did not let his wife know about it and that there were certain things he wished he had done and had not done (tscpt 147/1-18).

316. The Tribunal finds that the reference to *"… hypocritical prick, you are no better …"* was a reference to his having had sexual intercourse with Ms A on the occasion in 1985 as alleged by her.

317. It appears that following the sexual activity that occurred between them, Dr C fell asleep. Dr C in his written brief stated *"I fell asleep sitting up with A's head on my shoulder. My wife Mrs C came downstairs looking for me and woke me up in that position. I went with her to our bedroom upstairs and went to bed."* (BOE 43)

318. In Mrs C's written brief (BOE 10), she stated she remembered the occasion when she found her husband and Ms A on the couch in their house. She went downstairs when her husband had not gone up to bed, stating he and Ms A were both fully clothed and asleep on the couch, she with her head on his shoulder. She also referred to the door in the lounge being closed before she entered.

319. Mr Waalkens cross-examined Ms A about why she had not told the Tribunal that Mrs C had come downstairs and found her and Dr C on the couch together. Ms A readily agreed that Mrs C had come into the lounge, but did not know why it was not in her statement stating she supposed it was *"neither here nor there"*. She added that she remembered Mrs C walking in when she and Dr C were lying on the sofa and she remembered thinking *"Shit"* when Mrs C walked out again. She stated she was quite worried. She said she had earlier said to Dr C several times *"Mrs C's here, Mrs C's here"* and he had said *"It's alright, she never comes down"*.

320. When pressed why she had not referred to this piece of evidence when it had happened, she stated she did not know whether it was important or whether it made any difference. She did not agree that Mrs C told Dr C to *"get upstairs"* as it was put to her in cross-examination. She said Mrs C just walked out again. She did not agree that Dr C walked out straight after her and went upstairs. She said he stayed on the couch and said *"It was very strange"*. She said what happened was that Mrs C walked in, they were lying on the sofa, they had their clothes back on and Mrs C walked in and said *"Oh"* and walked out again and that was it.

321. It was put to her that Dr C had not gone and washed himself or cleaned himself. Ms A said he went and got a cloth. When asked how she remembered that she said *"I think you remember strange events in your life more vividly than others"*. When it was put to her that she was just making up about Dr C getting a cloth, she said that she was not and it was true. She was adamant that Dr C did not go straight back upstairs but that Mrs C walked out immediately and Dr C continued lying there. Ms A said she must have been awake because she remembered seeing Mrs C coming in and going out. When Mr Waalkens put to her that her clothing never came off on that night she said that it did. It was put to Ms A that her statement that she did not have a choice and felt quite drunk (BOE 19) was her attempt to put a *"negative spin on this event"* in order to suggest it was not consensual. Ms A said it was her attempt to explain how it was as accurately as she could (tscpt 31/33-34; 32/1-34; 33/1-31).

322. In her written brief Mrs C said in relation to finding them asleep on the couch together, she cautioned her husband about Ms A *"appearing to be developing a crush on him and that it was around this time that she suggested they should stop*

using Ms A as their babysitter for this reason." (BOE 10) She said she and her husband discussed this and they agreed that her husband would discuss this with Ms A which she recalled would have been *"in or about May 1985"*, sometime after the punk theme party for Dr C's birthday which they held in late April.

323. In her written brief (BOE 20) Mrs C stated that Dr C had since told her that he did kiss and fondle Ms A on the couch on the occasion when she found them together and, in cross-examination, said this disclosure was about eight years ago when the complaint by Ms A was made. It was put to Mrs C that Dr C had initially denied any involvement of a sexual relationship with Ms A. Mrs C said it depended on what one said a *"sexual relationship is"*. She said Dr C told her he had never had sex with Ms A but he did tell her about the kissing and fondling when the matter came out eight years ago.

324. Mrs C was further asked in cross-examination whether she asked any questions of her husband at all after she observed them on the couch together. She answered *"Not really, no. I mean they were sitting there and it was - - they were fully clothed and she had her head in a sort of companionship way on his, on his shoulder"*. (tscpt 189/1-3)

325. However, in her written brief (BOE 14) Mrs C stated that her *"antennae was up"* after she had seen Dr C and Ms A on the couch as she had described. This does not appear, to the Tribunal, to be consistent with her statement that what she saw on the couch was purely innocent.

326. Mrs C agreed in cross-examination that there was nothing unusual for her to go to bed and leave her husband downstairs listening to music whether they had had a babysitter or not. She confirmed he loved his music and that it could be *"slightly"* heard upstairs.

327. It was put to her that she did not know how long it was between *"the sexual activity finishing"* and her going downstairs. Mrs C answered *"I don't think there was any sexual activity on what you are meaning. Maybe there was a bit of kissing and cuddling, but I don't think what you are insinuating there actually happened and*

there was not much of a time difference". When asked how she knew that she stated *"I don't, I have a feeling. I can't say exactly."* (tscpt 189/32-34; 190/1-4).

328. The Tribunal finds Mrs C had no knowledge of any time differential.

329. As well as stating that she cautioned Dr C that Ms A appeared *"to be developing a crush on him"*, she stated she remembered clearly about the alleged rape (BOE 8) when Dr C and their children were on holiday while she was at home due to work commitments. She said that Ms A spoke to her about it and had also spoken to others about it and that all were well aware that each other had been told about it by Ms A who made no secret of it adding that she did not mean to sound like she was criticising her in that regard. However, during cross-examination, when it was put to her that over the ensuing weeks after the rape incident at dd that Dr C had provided Ms A with help by someone she could talk to about it, Mrs C agreed but added that she still liked to talk to other people as well and that *"She was very much the centre of attention"* (tscpt 186/16-17).

330. The Tribunal, in an effort to understand why Mrs C cautioned her husband if she thought the relationship with them was quite innocent, asked her to elaborate on her reasons for this. She stated it was a number of different things such as Ms A turning up at their house unexpectedly and that she looked at Dr C *"with adoration"* and she *"just felt that we could move on, I was back working, I had access to students that wanted to babysit, you know, that sort of thing"* (tscpt 193/23-28). When asked if it ever occurred to her that there could be a mutual attraction between Dr C and Ms A she thought not because she *"had W sort of throwing herself at him … she was older and I just sort of thought, yeah"* (tscpt 193/32-34; 194/1-2).

331. Mr Waalkens submitted that Ms A's credibility was fundamentally flawed. He referred to Mrs C's evidence about finding Dr C and Ms A on the couch which *"said it all"*. He submitted that first Ms A made no mention of it herself and when asked thought it was not important and made no difference; and that Ms A's description of what occurred could only be construed as *"a deliberate untruth"*. He submitted that Ms A also anticipated Mrs C's evidence about an absence of evidence of Dr C washing himself when she referred to Dr C going and getting a cloth and her evidence about this.

332. The Tribunal found Ms A's evidence to be credible.

333. If anything, the evidence of Mrs C of finding her husband and Ms A on the couch together was corroborative of Ms A's evidence as to time, place, and opportunity. It enhanced, rather than diminished, Ms A's evidence, in the Tribunal's view.

334. The Tribunal accepts Ms A's evidence that she did not understand that it was a significant piece of evidence in that it was important or made a difference. As she stated on previous occasions when asked about pieces of evidence which may not have been contained in her overall brief, she did not necessarily understand the significance in a legal sense or was not asked. As she said in answer to another question from Mr Waalkens, there was a lot more she might be able to add if she were asked.

335. When the evidence about Mrs C entering the lounge was put to Ms A, she did not seek to suppress or evade it, but readily answered it.

336. Further, the Tribunal has found Mrs C's evidence regarding the issue about finding Dr C and Ms A on the couch together to be somewhat inconsistent and which has caused the Tribunal to have reservations about the credibility of her evidence. On the one hand she has insisted that it was entirely innocent while on the other that her antennae were up and she was cautioning her husband about distancing himself from Ms A. The Tribunal finds it difficult to understand how Mrs C can consistently maintain both these views.

337. Further, according to her own evidence, Mrs C did not ask Dr C any questions about the incident and did not know anything untoward had occurred until his disclosure about eight years ago after the complaint by Ms A was made.

338. This is also consistent with the evidence that following this incident on the couch Ms A babysat for them a week or two later when the second occasion of alleged sexual intercourse was said by Ms A to have taken place.

339. The Tribunal does not accept Mr Waalkens' submissions that Ms A's evidence regarding this aspect of the chronology of events has demonstrated that Ms A's credibility was fundamentally flawed or that she was telling a deliberate untruth.

340. Mr Waalkens also challenged Ms A's credibility in respect of her evidence that Dr C collected a "*morning after*" pill (a contraceptive pill) following the first time sexual intercourse occurred (BOE 20).

341. Mr Waalkens put to Ms A that the pill *"just didn't happen"*. Ms A confirmed it did. She said Dr C got it from his *"surgery on his way to drop [her] home. It was more than, I think it's two pills"*. (tscpt 33/32-34). After the luncheon adjournment Ms A was cross-examined again on this subject. It was put to her whether she was sure it was two pills rather than four. Ms A said she was not sure. She knew there was more than one *"… I was just trying to explain it's not just one pill, you have to take them - - you take one or two and then you take one or two again later is what I remember"*. She did not know what the position was today regarding the dosage (tscpt 43/4-13).

342. In cross-examination Dr C said that the morning after pill was not available at his practice at the time. They had to write a prescription for it (tscpt 149/1-33). However, when asked by a member of the Tribunal (Dr Gillett – gynaecologist) *"Did your practice or surgery have any packets of the oral contraceptive pill at the time?"* Dr C replied *"We would have done so, yes. We used them as teaching aids for young women who start the pill."* (tscpt 172/4-6). Dr C then confirmed that his practice used oral contraceptive pills (Neogynon) as morning after pills.

343. The Tribunal accepts the evidence of Ms A.

344. It found her evidence to be consistent and spontaneous whereas the Tribunal found Dr C changed his evidence from the pill not being available at his practice to it being available.

345. It finds that the morning after the first occasion of alleged sexual intercourse took place, Dr C took Ms A home and on the way there stopped at his practice to collect

the morning after pill (in the appropriate dosage) which he gave to Ms A for her to take.

346. In summary, for the reasons already given, the Tribunal finds that sexual intercourse did take place on the occasion when Dr C and Ms A were on the couch together and prior to Mrs C entering the lounge.

Second occasion of alleged sexual intercourse

347. Ms A's evidence was that sexual intercourse occurred on a second occasion about two weeks after the first occasion. Again this occurred in Dr C's living room.

348. Dr C disputed this. He stated that Ms A had got the chronology of events wrong (BOE 54), although it is not clear on what he based that assertion.

349. Mrs C, in her written brief, stated that she cautioned her husband after she saw him and Ms A on the couch and it was around that time that she suggested to Dr C they should stop using Ms A as their babysitter and that he would discuss this with Ms A. Mrs C recalled this would have been in or about May 1985 some time after the punk theme party for Dr C's birthday which she said was in late April 1985 (BOE 10, 11).

350. However, this does not accord with Dr C's evidence. In his written brief, he refers to the occasion when they were on the couch together (BOE 43) following which he said his wife said they should distance themselves from Ms A (BOE 45).

351. In his written brief Dr C refers to a subsequent babysitting engagement for Ms A. Clearly, Dr C did not tell Ms A that she could no longer act as their babysitter before this event which was at least a week or two after the event on the couch. It is at this subsequent babysitting engagement that Ms A alleged sexual intercourse took place between them a second time.

352. Dr C confirmed that Ms A was still babysitting for them one to two weeks later. He refers to Ms A's description of the second occasion and confirms that she did babysit on this occasion stating "*We had already arranged for A to babysit for us a*

week or two later" (BOE 47). The Tribunal accepts Ms A's evidence of the chronology.

353. Dr C stated in his written brief that when he and Mrs C arrived home they found Ms A had gone to bed, that his wife went to bed and that he sat up listening to some music. He recalled Ms A coming downstairs and sitting and talking with him for a while.

354. Thus far, this evidence accords with Ms A that there was a second occasion when she was babysitting following the incident on the couch.

355. Ms A said she was woken by the sound of the music playing downstairs, went down and saw Dr C lying on the floor of the living room (lounge), that he leapt up and kissed her and soon they had sex again. The reference to *"sex again"* is a reference to sexual intercourse as that was how Ms A presented her evidence throughout.

356. Dr C stated he told Ms A he was sorry that he had behaved badly the previous week to which he says Ms A responded it was fine and she loved him and she tried to start kissing him again and he remembered that he did not reciprocate but got up and turned off the music, and went to bed.

357. Ms A said that he played songs called *"She was only 16"* by Dr Hook and some Neil Young songs which Ms A said Dr C told her it summed up how he felt about her; that he told her he loved her and that afterwards she went back upstairs to bed and went to sleep.

358. Mrs C, when cross-examined, stated that there was nothing unusual for Dr C to go downstairs or lie downstairs listening to his music, which he loved, whether they had a babysitter or not; that he regularly listened to music at night and there was nothing unusual if she went to bed and he stayed downstairs listening to music. When asked whether it could be heard upstairs she said "*slightly*" (tscpt 189/17-31).

359. Dr C stated that her suggestion the he played the Dr Hook song *"She was only 16"* was most certainly wrong as he has never owned any music by Dr Hook or had it at his home. While he added that Neil Young was one of his favourites, he said the

suggestion that he told Ms A that Neil Young songs summed up how he felt about her was not correct.

360. Ms A was cross-examined about her statement and her letter of complaint that Dr C had played *"She was only 16"* by Dr Hook. Mr Waalkens put to her that she was embellishing her evidence because Dr C did not play nor did he ever have any recordings by Dr Hook. Ms A responded by saying that she did not know if she knew who the song was by but she knew he played that song and talked about it. She said that somebody later told her that the song was by Dr Hook and she conceded that she had made an assumption in her letter of complaint that it was the Dr Hook version which Dr C had played to her.

361. In his submissions, Mr Waalkens stated this was a clear embellishment and was an aspect of her evidence which adversely reflected on her credibility.

362. The Tribunal accepts that there is a difference over this aspect of Ms A's evidence in that Dr C said he has never owned or had any music at his home by Dr Hook, but he did not deny a song *"She was only 16"* was played.

363. However, the Tribunal finds that Dr C did play music and accepts Ms A's evidence that he played songs by Neil Young and further accepts her evidence that he told her that some of his music summed up how he felt about her.

364. The Tribunal accepts that Dr C enjoyed listening to his music and frequently either remained downstairs to listen to his music or went downstairs to listen to it in the evening while Mrs C went to bed.

365. It is also readily apparent from the exchange of emails between Ms A and Dr C in 2000/2001 that Neil Young is probably his favourite composer as there are references in more than one of his emails to his love of Neil Young's music. The Tribunal observes that the rock concert which Dr C took Ms A to along with Mrs C and the W's was one by Neil Young.

366. It also refers to the email of Friday 29 December 2000 (Ex 2 tab 38) which Dr C sent to Ms A and in the third paragraph of which he states that if Ms A wants to play

his favourite track after all these years and so much music *"it's still Neil Young's (the version with crazy horse) like a hurricane. I played it that first night …"*.

367. More significantly, in his *"zero tolerance"* email (referred to later in this decision) Dr C refers to the particular Neil Young song which he played *"on one particular occasion"* when Ms A was *"around 15 years ago"* – referring to 1985 (Ex 2 tabs.7 or 13).

368. These references to playing music by Neil Young are consistent with Ms A's evidence.

369. The Tribunal finds that sexual intercourse took place between Dr C and Ms A around one to two weeks after the first occasion of sexual intercourse.

Disclosure to Ms R (Mrs W)

370. Ms A's evidence that Dr C had sexual intercourse with her was consistent with her near contemporaneous disclosure of that fact to Ms R.

371. Following the punk theme party Ms A said she continued to see Dr C by either popping in to see him at the surgery or by him going to her home and taking her out. She said he took her to the home of his friends, Dr and Mrs W and occasionally she babysat their small children. She said Ms R always chatted to her as though she were a friend of her own age.

372. Ms A described her feelings as feeling as though everything were a big mess and that she was in a relationship without wanting to be but unsure how to get out of it. She went to Ms R's home and told her what had occurred with Dr C and that she had *"slept with Dr C twice"*.

373. Ms R did recall Ms A visiting her at her home and being upset and in the course of a conversation telling her she had had sexual intercourse with Dr C. Due to the passage of time Ms R could not recall much of the detail surrounding that conversation but did recall the disclosure. She confirmed that Ms A had babysat her own children.

374. It is clear from the evidence that the discussion which Ms A had with Ms R would have been in May 1985 prior to Ms A leaving to reside in ii in June of that year.

375. The Tribunal found Ms R to be a reliable and honest witness. If anything, she was a reluctant witness in that she had nothing to gain by giving evidence and found it distasteful being cross-examined about her own personal life.

Other submissions by Dr C

<u>When babysitting commenced, sleeping arrangements, and quality of babysitting</u>

376. Mr Waalkens submitted Ms A was *"absolutely insistent"* she was 14 years when she began babysitting for the Cs and was *"unwilling to concede she may be wrong"*. The Tribunal finds this submission incorrectly characterises Ms A's evidence.

377. Ms A had stated in her brief she was 14 years when she began babysitting for the Cs.

378. Dr C stated that they did not have anyone babysitting their son until he was "*about*" 2 years because he was very ill when he was first born. The Tribunal observed his son was not 2 years until August 1984. Dr C also stated, contradicting his own evidence, he could remember Ms A having been their babysitter *"for a few months"* prior to the family holiday they had in ee in August 1984 (BOE 15). Mrs C stated Ms A became their babysitter in 1984. In cross-examination it was put to her that by the time of the ee holiday in August 1984 she would have been babysitting for a number of months. Mrs C said she could not say and agreed it was difficult remembering back then (tscpt 184/12-15).

379. Both Dr C and Mrs C referred to their younger son's symptoms **[suppressed by order of the Tribunal]**. Dr C thought the x persisted for *"about a year or two years"* after he was born. In his oral evidence-in-chief he said anyone who had anything to do with his son knew the x was a significant feature and that this lasted until his son was 2½ years of age. This would mean Ms A did not start babysitting until February 1985 which would not only contradict his own evidence but that of Mrs C as well. Mrs C thought the x had finally faded away after *"12 months, 18 months"*. This would take the date to March 1984 at the latest.

380. Ms A said when she first babysat for the younger son it was in the night when he was usually in bed asleep. She did not have time with him during the day until she went on holiday with them in August 1984. She did not recall the x or the x but remembered being told at the outset that there were things **[suppressed by order of the Tribunal]**.

381. When challenged in cross-examination about her age Ms A thought she was sure she was 14 years but when she read Dr C's brief on this she appropriately conceded *"you know, it's possible I'm wrong"*.

382. Ms A agreed with Mr Waalkens that she did not have any corroborative records from which to check dates and was relying on her memory, but explained in re-examination that she was not given any records by the Cs when she babysat. While she could not think of any specific incident on which to place a date when she first babysat for the Cs, she did recall they wanted her to accompany them with the children to ee (in August 1984) by which time she had been babysitting for them for some time and she did not think they just wanted to hire *"somebody out of the blue"* (tscpt 20/8-24).

383. Ms A said that prior to the rape incident in February 1985 she would usually babysit once a fortnight – usually on a Friday or Saturday evening. She would usually be collected about 6.45pm to 7pm and either return home afterwards or, if the Cs were going to be late, she would stay the night at their home.

384. Mr Waalkens put to Ms A on behalf of Dr C that there was no spare bedroom in the C household as the children had a bedroom each, with Dr and Mrs C occupying the third bedroom. This was not correct. Ms A said they moved the children around and she had slept in two of the bedrooms depending on where the children were sleeping, and confirmed this in re-examination. On occasions, she also remembered at times sleeping on the sofa downstairs as well (tscpt 53/4-14). Contrary to Mr Waalkens' assertion, Mrs C confirmed Ms A's evidence saying they would make up a bed for Ms A in one of the bedrooms if she were going to stay overnight if they thought they were going to be late (tscpt 191/4-12).

385. The Tribunal does not find that Ms A's reference to her being 14 years old when she commenced babysitting reflected adversely on her credibility.

386. Dr C himself thought Ms A was 15 years when she started babysitting for them (tscpt 128/8-9). The Tribunal is satisfied and finds Ms A commenced babysitting for the Cs no later than April 1984 when she still could have been 15 years old.

387. Both Dr and Mrs C referred to Ms A as being their *"third choice" as* a nanny for the four children on the holiday to ee in 1984. The Tribunal finds the phrase contrived.

388. The Tribunal finds that the reference to Ms A being a *"third choice"* does not reflect on Ms A's suitability as a caring and responsible nanny and child minder to the C children, particularly as when Dr C was in ff he provided a typed reference on gg letterhead to certify that Ms A had worked for his family both as a nanny and a child minder in which he described her as *"always conscientious, willing and responsible and was well liked by my children. I would have no hesitation in employing her again and would unreservedly recommend her for any similar position"*.

Dysfunctional family

389. Dr C maintained Ms A appeared to come from a rather dysfunctional and large family and did not have a good relationship with her mother. He stated she told them on many occasions how much she enjoyed the warmth and camaraderie in the C family as compared with her own.

390. While Ms A's acknowledged to Mr Waalkens her family was unusually big and her mother was rather strict this did not mean it was dysfunctional. Dr C may well have gained the impression that Ms A was emotionally neglected and somewhat needy. If so, then this should have made him aware Ms A could be vulnerable. Indeed, he acknowledged the power imbalance in their relationship when he describes himself as "*something of a father figure*" in his relationship with Ms A.

The issue of counselling

391. In her written brief, Ms A stated that following discussions with her mother after the dd incident she started to see Dr C and that his role initially was that of a counsellor (BOE 12). When she went to his home she was not sure if it was strictly counselling, but described it as a loose arrangement like going to see a friend and not formal counselling appointments (BOE 14).

392. When cross-examined she stated that when she was at the C household after the alleged rape she had increasing amounts of time there and agreed that she had become a family friend of theirs but not in an equal way as he was *"our family doctor"* and that she babysat for them (tscpt 19/14-25).

393. Ms A agreed with Mr Waalkens that as Dr C was also a family friend that was the reason he was called following the rape. Ms A said her mother knew that she liked Dr C and was comfortable with him and that she thought her mother was trying to help her. She agreed it was not accurate to describe Dr C's role initially as a counsellor (tscpt 19/26-34; 20/1-7)

394. In re-examination, Ms A was asked how she would describe her relationship with Dr C after the rape incident. She said *"He was our doctor and we had a nice relationship. I thought in that we were quite friendly, he was known to our family and I trusted him, I was actually a bit confused about what it was, but he was - - I wanted some sort of comfort and he offered that, yeah. He definitely was not a formal counsellor."* (tscpt 53/28-34) When asked how that comfort was provided she responded that it was providing her with company and that if she wanted to talk about it or something else, Dr C encouraged her to spend time with him (tscpt 53/34; 54/1-2).

395. A member of the Tribunal referred Ms A to her initial statement in her written brief (BOE 12) that she had started to see Dr C and that initially his role was that of a counsellor. She said she thought that this term was a *"sort of legalese"*. She was not sure what she understood the role of a counsellor to be but *"maybe going to somebody's office and talking to them. I didn't feel very comfortable with that, I wasn't very comfortable talking about what had happened with strangers or anything."* When asked if she were able to distinguish between what might have been a conversation with a family friend and what actual counselling was, Ms A

stated that she understood that Dr C *"was our family doctor and that he was helping us in that way"* (tscpt 58/26-34; 59/1-10).

396. Mr Waalkens was somewhat critical about Ms A's evidence regarding the role of Dr C and whether or not he was a counsellor. The Tribunal was of the view that Ms A was open and frank about the matter. It did not find that she was seeking to suggest that Dr C was acting in a formal role as a counsellor regarding the alleged rape.

397. The Tribunal finds on the evidence that Ms A may not have fully understood at that time what the role of a counsellor was but that she trusted and liked Dr C and felt safe and comfortable with him both as the family doctor and as someone whom she came to look upon as a friend in the context of her own role as babysitting for the C children.

398. Mr Waalkens submitted that this aspect of the evidence did not stand up to scrutiny in that the relationship did not arise out of the doctor/patient relationship but that the weight of evidence unquestionably and clearly supported a finding that the call to Dr C after the rape clearly and unquestionably supported a finding that Dr C and his family had developed a friendship with Ms A through the babysitting/ family contact and that it did not arise through the allegation by the CAC of the doctor/patient relationship.

399. The Tribunal does not agree with this submission.

400. While the Tribunal accepts that Dr C's role was not that of a formal counsellor the Tribunal does find that the principal reason why Ms A wanted to see Dr C and talk to him about the matter was because she trusted him as the family doctor and saw him as a person who could provide comfort and that it suited her preference to discuss matters with him rather than to talk with strangers about the incident, which she did not want to do.

401. While the Tribunal accepts that a friendship had grown up between Dr C and Ms A in her role as a babysitter for his children, it also accepts Ms A's evidence that as the family doctor he was someone whom she trusted and from whom she sought comfort. While there may have been some blurring in her own thinking processes

about what the role of a counsellor was, she sought his assistance and comfort from her level of trust in him as their family doctor.

402. The Tribunal further finds, for reasons given later in this decision, that there was a doctor/patient relationship between Dr C and Ms A before the rape incident at dd in February 1985.

Alcohol; cannabis; nitrous oxide; cocaine

403. Although the second particular was withdrawn, some discussion is necessary as Mr Waalkens submitted the evidence in regard to it reflected adversely on Ms A's credibility.

404. In her written brief, Ms A stated that after the dd incident when she saw a lot more of Dr C he *"often gave [her] cannabis to smoke, alcohol to drink"*. She stated she had never taken any drugs before this.

405. Ms A, when referring to her attendance at the punk theme party, said she would have had alcohol because she was always offered alcohol at the C household (tscpt 27/31-32).

406. During cross-examination Mr Waalkens put to Ms A that the Cs had a rule that she was able to have a wine at night when she was with them. Ms A did not accept Dr C's evidence that they let her have a glass of wine with dinner because she did not eat dinner with them other than when she was on holiday with them. She explained that if she went to the C house they offered her wine whether it was the afternoon or whether she was going there to babysit or when they got home from where they had been (tscpt 25/33-34; 26/1-8).

407. The evidence established Ms A was provided with wine at the C household. Dr C stated that on occasions he and his wife would let Ms A have a glass of wine *"with dinner or whatever"* (BOE 35); and agreed in cross-examination that it was not unusual to offer Ms A wine (tscpt 128/33-34; 129/1-3).

408. The Tribunal finds that Ms A did have access to alcohol at the punk theme party and did consume some alcohol.

409. With regard to the cannabis, when pressed in cross-examination, Ms A said there were two occasions which she could recall when she had some cannabis. One was at the Neil Young Concert where Dr and Mrs C were present as well as Dr and Mrs W. She said they all had some cannabis as well. The second occasion was at the punk theme party. She accepted that she should have said that Dr C had given her cannabis twice rather than "often" (tscpt 24/31-34; 25/1-32).

410. In his written brief, Dr C stated that Ms A's suggestion that he often gave her cannabis to smoke was incorrect; that he had never seen her taking drugs of any kind, cannabis included (BOE 35); and he personally had never given her cannabis.

411. It was put to Dr C in cross-examination that cannabis was brought to the punk theme party. Dr C stated that cannabis may have been present and added that *"At a party in 1985 that would not have been uncommon"*. When pressed whether it *"may"* have been present or was actually present, Dr C repeated that in 1985 it was not uncommon. When pressed further whether cannabis was present at the punk theme party, Dr C stated that *"It is quite likely there was"*. The exchange continued for some time with counsel for the CAC seeking a direct answer whether cannabis was or was not present. Dr C repeated his earlier answers. It was put to Dr C why he had stated therefore in his written brief (BOE 56) that he remembered there was cannabis at this particular party. Dr C replied there was cannabis at the party and it was not unusual in those days, in fact it was quite common (tscpt 154/8-24). He agreed it would have been available to those persons attending that party. Dr C also agreed that he did use cannabis in the 1980s and that he did have access to it but denied he had ever offered it to Ms A.

412. When asked whether she was aware of any drugs being available at the "punk themed party" Ms R said marijuana was present.

413. The CAC referred Dr C to his email of Wednesday 20 December 2000 at 16:45pm to Ms A (Ex 2 tab.22) in which he stated in the first paragraph that he had never tried "e" (which he confirmed later in evidence was the drug ecstasy) because none

had ever fallen into his lap but he *"still loved the occasional smoke justifying this on the old boys-will-be-boys basis; usually on the annual rugby trip with my friends and the odd party, and occasionally on my own listening to music"*. Dr C then referred in his email to having *"dabbled with harder stuff at times over the years but can't be bothered any more"* and that if he were restricted to one drug his choice would be red wine. He added he also liked Cuban cigars, Indonesian cigarettes and calvados. Counsel for the CAC put to him that his reference to the "*occasional smoke"* in this context was a reference to cannabis. Dr C denied it was, stating that by 2000 he was not using cannabis at that stage in his life. Dr C said he was referring to Cuban cigars or Indonesian cigarettes. When it was put to him that they were mentioned in the email as separate matters Dr C denied this. When it was put to him that he had dabbled with the *"harder stuff"* Dr C said that was *"an extreme exaggeration"*. When it was put to Dr C that if something did not suit his version of events, then his explanation for it in his emails was that it was an exaggeration, Dr C said there were many exaggerations in his emails – *"There was an element of fantasy, of boasting, there was an element of making an otherwise rather boring life seem more exciting"*. (tscpt 166/5-34; 167/1-22).

414. In answer to a question from the Tribunal, Dr C was asked what he was referring to when he said cannabis was commonly available in 1985. He agreed he was referring to social functions in a wide range of settings and confirmed, when asked, it included his own home (tscpt 176/22-34; 177/1-3).

415. Mrs C, in cross-examination, said she could not remember cannabis being at the punk party but *"[assumed] it was, and people probably went outside if they –"* (tscpt 187/4-6). Mrs C did not finish her sentence as counsel asked her another question.

416. With regard to the reference to *"harder stuff"* Dr C stated he was referring to drugs other than cannabis but that that statement was not true. When asked if he was making it up he said he was, that is, that he had taken no harder drugs as outlined in the email. When asked what he meant by *"harder stuff"* he stated there was a wide range of drugs that people can use and that he was perhaps boasting that his range of experience was broader than it really was (tscpt 177/27-34; 177/1-12).

417. The Tribunal finds that cannabis was present on occasions in 1985 at Dr C's home, and was present at the "punk themed party" held there in April 1985. However, the Tribunal was not satisfied there was any clear evidence that Dr himself supplied Ms A with drugs.

418. In view of these findings, while the Tribunal accepts that Ms A's reference to "often" should be confined to "two times" as that was all she could remember; the Tribunal does not find that the reference to being given cannabis "*often*" in the context of her evidence, reflects adversely on her credibility. Cannabis was available in Dr C's home in 1985. He said so. This was not an invention by Ms A.

419. The Tribunal has had significant difficulty in accepting Dr C's interpretation of his own email (Ex 2 tab.22 above) that "*the occasional smoke*" in the context of his email refers to Cuban cigars or Indonesian cigarettes. The inference which the Tribunal has drawn is that he was referring to cannabis.

420. Similarly, with regard to his reference to "*having dabbled with harder stuff*" the Tribunal draws the inference that in the context of his email, Dr C was referring to drugs that he perceived as "*harder*" than cannabis. Whether he was "*boasting*" about harder drugs or had "*dabbled*" in them was not established to the satisfaction of the Tribunal.

421. The Tribunal now addresses Ms A's statement that at the punk theme party Dr C encouraged her to inhale laughing gas (nitrous oxide). When it was put to Ms A under cross-examination that this was nonsense, Ms A said it was true and as far as she could recall she had "*one go*" at it. She said what was clear in her mind was she remembered seeing it on the table and Dr C telling her about it and offering her some. She remembered being quite "*overwhelmed*" later at the party from alcohol and drugs and going upstairs to lie down. It was put to her she was overwhelmed because she was drunk. She said she was drugged and tired and possibly drunk and that by overwhelmed she meant generally by the events of the evening but that she would have had alcohol because she was always offered it at Dr C's (tscpt 27/18-32).

422. Ms A was asked by a member of the Tribunal to elaborate on her description of using the laughing gas. She said what she could remember was that there was a

container on the table and Dr C told her what it was and everyone thought it was funny. When asked if she could remember using it she said she could not actually remember. She said she had written it (in her statement) that she had it, but now she could not remember how she had it or been given it.

423. Dr C stated that he did remember an occasion at one of the parties at his home (although he could not be sure it was the punk theme party) that someone had brought a cannister of nitrous oxide to the party. He said he remembered it well because he and his wife were shocked this had happened and they told the person to remove it from the party which he did; and that he and his wife were unhappy this had happened (BOE 56). In cross-examination Dr C was asked who brought it to the party but he declined to answer. When asked if it were a medical practitioner he said *"That is possible, yes"*. Dr C declined to identify the person. When it was agreed that he need not identify the person but just confirm the person's occupation, he declined to answer other than saying it was possible the person was a medical practitioner. He stated the nitrous oxide was present in the form of a small gas cylinder and agreed it was the type of cylinder one would find in a medical practice. When asked whether it was available for use at the party he said it was available for a short time but the person involved who brought it was quickly sent away again with it (tscpt 152/22-34 to 154/1-7).

424. When Mrs C was asked in cross-examination whether she remembered nitrous oxide being present she confirmed she did, saying it was *"terrible"* and she was upset about it when it arrived. She described it as one of those situations in life over which one had no control and when they found out about it they asked the particular person to remove it and he did very quickly. When asked how far into the party they were when she first became aware of the cylinder being present she said she could not remember how long but she thought it was not long (tscpt 187/7-16).

425. The Tribunal does not agree with Mr Waalkens' submission that Ms A evidence about the nitrous oxide reflected adversely on her credibility. The Tribunal accepts that her memory was limited regarding the incident which she appropriately conceded when questioned about it. The fact that she did not mention the laughing gas in her email exchanges with Dr C in 2000 and 2001 again does not affect her credibility, as Mr Waalkens appears to have been contending in his submissions.

426. In view of Ms A's evidence, the Tribunal cannot find that Dr C encouraged her to inhale the nitrous oxide. However, the Tribunal does not accept that this evidence reflects adversely on Ms A's credibility. The fact remains that a cylinder of laughing gas was present and, the Tribunal finds it was present at the punk theme party. This was not an invention by Ms A but a reality. The Tribunal finds that she may well have been "*overwhelmed"* by the events of the evening, including having had some alcohol and cannabis. It would appear on the evidence that she was the only teenager present and would still have been 16 years old at the time.

427. With regard to the issue of cocaine, Ms A had stated in her written brief that later during the evening of the punk theme party, when she became very sleepy, she went upstairs to the spare bedroom and lay on the bed, waking to find Dr C kneeling beside the bed, kissing her and urging her to snort some cocaine which he had brought up and which she inhaled.

428. It was put to her in cross-examination that Dr C did not offer her cocaine at all. Ms A said he went upstairs, he woke her up and was kneeling beside the bed kissing her and saying *"here, here"* and *"sniff this"* and *"just sort of stuck it up my nose"*. She said that was when L came into the room and said *"What's going on?"* It was put to Ms A that she was making this up. When challenged about what Mrs L saw, Ms A thought she probably would have seen what occurred. She said Dr C sort of leapt up and left the room when Mrs L said *"What's going on?"*

429. It was put to Ms A that when she wrote her letter of complaint to the CAC she had not suggested in it that Mrs L saw Dr C kissing her. The extract from her letter was read to the Tribunal. It did refer to Mrs L going into the room and Dr C getting up and walking out. In her letter, Ms A had stated that Mrs L had asked her what Dr C had been doing and she told her, and that she (Ms A) could not remember what happened after this (tscpt 131/16-23).

430. It was put to Ms A that if there were any truth in the suggestion that Mrs L had seen Dr C kissing her then Ms A would have included that in her letter of complaint. Ms A stated that she could not be sure what someone else saw and that she could only tell what she knew which was that Mrs L had gone into the room when Dr C was kneeling beside her kissing her and that she imagined that Mrs L saw that. Mrs L

had asked Ms A what Dr C was doing but Ms A said she could not tell the Tribunal for sure what Mrs L saw. Ms A denied she was making up the evidence about Mrs L seeing Dr C kissing her.

431. Ms A was asked by a member of the Tribunal how she knew it was cocaine she inhaled that evening. Ms A said she did not know how she knew. She supposed it was cocaine because she had snorted it, and understood that was what one did with cocaine.

432. Mr Waalkens submitted that Ms A's evidence about the cocaine and Mrs L reflected adversely on her credibility. With regard to the cocaine he said all she could say was that Dr C had lifted a finger and told her to sniff this, but that she had no knowledge what it was. Further, he submitted that her evidence about Mrs L was unreliable because she had never mentioned in her letter to the CAC that Mrs L had seen Dr C kissing her.

433. Again, the Tribunal does not consider that this evidence reflects adversely on Ms A's credibility.

434. The Tribunal finds that Ms A did go upstairs to a bedroom and lie down and went to sleep. It also finds that Dr C entered the room and, at some stage, Mrs L was in the vicinity. However, it is not satisfied to the appropriate standard of proof that Dr C gave Ms A cocaine to sniff or that Mrs L saw Dr C kissing Ms A.

435. The fact that Ms A did identify Mrs L in her letter of complaint to the CAC is consistent with honesty of purpose because she was providing the CAC with the name of someone who might be able to provide relevant evidence and who might be able to assist the CAC with its investigation. What Mrs L wrote to Dr C (as the Tribunal was told that she had written to Dr C) or what she told the CAC is not known.

436. While it is not clear to the Tribunal to the appropriate standard of proof what actually occurred in the bedroom that evening between Dr C and Ms A, Ms A readily conceded when questioned why she thought the substance was cocaine and why she could not be sure.

Subsequent discussion between Ms A and Dr C

437. Ms A stated that within a couple of days of speaking with Ms R, she telephoned Dr C at his surgery and told him she did not think they should keep having an affair to which she remembered him saying *"Oh dear, who have you been talking to?"* and that when she told him she had spoken to Ms R he was very concerned and said she should go to his surgery and see him right away, which she did.

438. She said they talked a little while there and then he drove her to a nearby park where they talked some more. She did not remember everything that was discussed between them but she did remember getting very upset and crying, finding it a confusing situation to cope with and that she did not feel able to tell any of her friends or family. She had wanted to trust Dr C to help her come to terms with being raped but instead felt more confused than ever, as if there was not anyone she could trust.

439. Dr C stated it was after the second incident at his home when he stated he rejected Ms A's advances that he spoke to Ms A and told her they were no longer using her as a babysitter but could not now remember what he had said to her but remembered she was very upset.

440. Dr C did not clarify where or when this discussion took place but stated it was the next day or shortly after Ms A rang him at his practice and asked if she could go and see him, which she did.

441. It would appear from Dr C's evidence that it was on this occasion he told her that he and Mrs C were concerned that she appeared to be getting too close and that they had decided they would no longer use her as a babysitter at which Ms A became angry and accused him of leading her on.

442. He denied Ms A's version of events.

443. The Tribunal does not accept either Dr C's evidence or Mrs C's that Ms A got the chronology of events wrong. It accepts Ms A's chronology of events.

444. It found Dr C's evidence confused and his thinking muddled regarding the chronology.

445. Mrs C was adamant that in May 1985 she separated from her husband for a short period because she believed he and Ms R were having an affair and that her decision to separate from her husband had nothing to do with Ms A.

446. When asked in cross-examination *"And after finding your husband on the couch with the babysitter in that situation you didn't ask him any questions whatsoever?" "I don't think that has any relevance to what was happening with Mrs W, what was happening with A, that I didn't know about."* (tscpt 189/13-16)

447. According to Mrs C's evidence, she did not think that anything had taken place between Ms A and her husband; did not ask him any questions; and he made no disclosures to her until about eight years ago.

448. The Tribunal finds that Mrs C therefore would not have had to try and construe a chronology of events until around 2001 which was some 16 years after what Ms A said occurred in 1985. Therefore the Tribunal has reservations about Mrs C's evidence regarding this.

<u>Payment of US$1,500 and reason for it</u>

449. Ms A stated in her written brief that in early 1987 she moved to kk. In mid 1988 she returned to xx for around nine months and in February 1989 she left New Zealand to travel, first to ll for a couple of months and then, in April, to mm for a year; and during that time she had occasional contact with Dr C. She said they corresponded by letter when she was in kk and in mm.

450. When cross-examined, it was put to Ms A that she did not have regular contact with Dr C at all. She said she did not think it was regular but it was occasional and only by letter. She denied that the first contact she had with Dr C was in ff and said she had been in contact with him when she was in kk (tscpt 37/12-34; 38/1-13).

451. In his written brief, Dr C said he and his wife moved overseas in 1986 for three years and, in 1989, were living in ff (although in one of his emails to Ms A he said he had two months on his own there). In his written brief he also stated he had not heard anything from Ms A but *"somehow she had tracked down [his] contact details in ff*" (BOE 62).

452. However, when giving his oral evidence-in-chief he referred to his typed letter of 22 July 1989 to Ms A (Ex 2 tab.3) which commenced *"Thanks for your letter. I was wondering which part of the world you had got to by now. Most people who go to mm seem to enjoy it so I hope you do too. …"*

453. Dr C then stated when he read that letter *"it seems I must have received an earlier letter telling me about where she was, and I replied to that."* (tscpt 113/17-18).

454. In the Tribunal's view this is another example of the contradictory nature of Dr C's evidence.

455. The Tribunal accepts Ms A's evidence that she kept in occasional contact with Dr C corresponding by letter when she was in kk and in mm.

456. In answer to a question from the Tribunal regarding the payment of US$1,500 and how that came about, Ms A said that what she remembered was she and Dr C had some contact; that they had had a letter or two and Dr C asked her if there was anything he could do for her and then she asked him if she could borrow some money because she had been offered a job in another city. She said she did not know how much it was going to be and he sent the money. When asked, she said she understood the payment was something between her and Dr C (tscpt 56/6-18).

457. Dr C in his written brief stated that she telephoned him to say she was living with a family in mm, working for them as a nanny and was in danger of being sexually abused by a man who employed her; that she had no money to get away and that he was the only person she knew who she could turn to (BOE 62).

458. Mrs C stated in her written brief that she was *"well aware at the time that Dr C had sent the money to Ms A when in mm and that he discussed it with her before he sent*

the money". She stated she remembered Dr C telling her that Ms A had told him she was scared of her employer and was afraid of being sexually assaulted and had no-one else to turn to (BOE 15).

459. Counsel for the CAC showed Mrs C the handwritten letter which Dr C sent to Ms A on 3 September 1989 together with the bank draft in which it stated *"This money is between you and me"*. (see para 78 above). Mrs C stated she knew about the money, stating they have a family history of helping people when they are in strife. When it was put to her that the recipient of that letter would believe that others did not know about it, Mrs C did not answer directly but kept saying she knew about it (tscpt 190/9-22).

460. However, it was readily apparent to the Tribunal when Mrs C was shown the letter, that she was physically upset and somewhat distracted. The Tribunal asked Mrs C whether that was the first occasion she had seen that letter. Mrs C replied she heard about it that Dr C had written a letter. When asked again whether that was the first occasion on which she had seen the letter, Mrs C said it was (tscpt 194/27-32).

461. The Tribunal accepts Ms A's evidence regarding this matter and finds that Dr C had previously communicated to her that if there was anything he could do for her he would; that the reason she gave him was that she wanted to borrow some money so she could move to another city because she had been offered a position there; and that she did not state that her employer might sexually abuse her.

462. The Tribunal rejects Dr C's evidence that Ms A gave him the reason that her employer might sexually abuse her. It considers his evidence on this to be opportunistic in order to paint Ms A in an adverse light.

463. The Tribunal had significant reservations about Mrs C's evidence. While the Tribunal cannot know what Dr C told Mrs C, if anything, about the payment of US$1,500.00 or the reason for it, it is entitled to draw reasonable inferences.

464. If Mrs C's evidence about Ms A were to be accepted, that is, that her (Mrs C's) *"antennae"* were up; that Ms A had a *"crush"* on her husband; that she looked at him with *"adoration"*, that they should *"distance"* themselves from Ms A; and that

Ms A's reason for seeking the payment was because she was in a situation of potential sexual abuse, then the Tribunal finds it would indeed be surprising that Mrs C would agree to family funds of US$1,500.00 being paid to Ms A.

465. The confidence imparted in the letter from Dr C to Ms A was this was something between the two of them and that Ms A did not have to pay him back unless she became a rich woman. It was essentially a gift and not a loan. He signed with lots of love and asked her to keep in touch. This clearly suggested that it was intended as a secret payment between him and Ms A.

466. This, together with Mrs C's reaction when she saw the letter, leads the Tribunal to the conclusion that Mrs C did not know about the details surrounding the payment at the time it was made.

467. This is further fortified by Dr C's apology in his earlier letter of 22 July 1989 to Ms A (Ex 2 tab.3) for *"behaving very badly"*.

468. The Tribunal also considers this payment, which would have been a substantial amount at that time, in the circumstances of his apology and the assurance it would not happen again, as an acknowledgement that what happened between him and Ms A was not just some *"low level sexual contact"*, but something much more intense. It also implies the relationship was ongoing and deep.

Settlement Agreement

469. In his written brief (BOE 85-88), Dr C stated that it was his belief Ms A was *"out to get [him]"*; and that she had manipulated the facts and encouraged the salacious email correspondence in order to extract money from him. He stated by November 2003 she had instructed lawyers to pursue a claim against him. He received a letter from them via his counsel attached to which was a copy of a Statement of Claim (Ex 4).

470. The Statement of Claim alleged Dr C, as Ms A's and her family's doctor, breached his fiduciary duty of care to her by, among other things, having sexual intercourse with her when she was his patient, causing her damage, and for which she sought exemplary damages.

471. On 18 February 2004 Dr C and his wife and Ms A and her husband signed an agreement (the Settlement Agreement Ex 13) settling all claims, complaints and matters of Ms A against Dr C. The agreement records that Dr C emphatically denied the allegations and was entering the agreement with a denial of liability.

472. Ms A undertook forthwith to withdraw the complaint and all actions or steps which may reasonably be necessary to ensure the complaint and the charge before this Tribunal were abandoned and discontinued by the CAC and that the Tribunal accepted the charge had been dismissed or struck out. She was to use her best endeavours to obtain this outcome. If the Tribunal did not discontinue the complaint Ms A was free to give evidence. If the Tribunal discontinued the complaint, Dr C would pay the $50,000 within seven days, and Ms A would seek permanent suppression of his name and any identifying details.

473. On 17 February 2004 Ms A emailed counsel for the CAC (Mr Lange) that she had decided not to proceed with her complaints against Dr C because she had reached a private agreement with him which she said was not an easy decision to make and that she very much appreciated all Mr Lange's efforts in bringing the case. She said she needed to obtain written confirmation that the CAC would not be proceeding with her complaint and asked Mr Lange if he could arrange this for her.

474. Dr C, in cross-examination, stated he believed the request for settlement was made to him/his counsel but eventually accepted he instructed his counsel to settle the matter, adding that if settlement could have been obtained then that would have been *"a very useful approach"* for him. He accepted there was little point in settling the claim if the charge before the Tribunal were to go ahead.

475. In his submissions, Mr Waalkens said that counsel for the CAC was very critical about Dr C entering into the Settlement Agreement having submitted it was an effort by Dr C to make the charge go away. Mr Waalkens referred to the email from Ms A

to Mr Lange (Ex 5) in which she had disclosed to him about the agreement so that any suggestion that this was *"all done behind closed doors"* was not reasonable.

476. The Tribunal does not accept Mr Waalkens' submission on this. Clause 11 of the Agreement makes clear that it was incumbent on Ms A that she had to agree that there could be no disclosure to others "*including the CAC, its solicitors, Disciplinary Tribunal, or any other person (except to her husband …)* and, if she did disclose, then she and her husband would be liable not only to repay the $50,000 but an additional sum of $10,000 as a penalty for breach.

477. This agreement therefore, on the face of it, was very clearly *"behind closed doors"*.

478. It was to Ms A's credit that she disclosed to counsel for the CAC immediately, contrary to the proposed agreement, that she was entering into such an agreement.

479. Mr Waalkens submitted the CAC did not call evidence about the negotiations and how settlement came about and therefore it would be wrong for the Tribunal to be critical of Dr C in a matter which involved the settlement of those proceedings which were civil ones as there was nothing inappropriate in that.

480. In the Tribunal's view it was inappropriate to the extent that Ms A had made a complaint to a regulatory authority which had caused a charge to be laid before a disciplinary tribunal. If she were to make any disclosure of the agreement, she would not only have to refund the settlement moneys but would be penalised in the form of a sanction by having to pay a sum of $10,000.

481. Further, the Tribunal is not required to know what the negotiations entailed in reaching a settlement agreement. The settlement agreement speaks for itself. If Ms A believed there had been a breach of her civil rights then she was entitled to sue. Further, Dr C did not have to enter into any settlement agreement. It was open to him to decline to enter into such an agreement.

482. It is clear Dr C had throughout, the assistance of his counsel, Mr Waalkens. On the facing sheet at the bottom of the agreement it refers to Mr Waalkens as counsel

acting and with all his contact details. When asked by the Tribunal if his office had prepared the agreement, Mr Waalkens confirmed it had (Transcript p.49 l 1-3).

The complainant's mental health

All of this subject to a suppression order (tscpt 39/16-18)

483. **[Suppressed by order of the Tribunal]**

484. **[Suppressed by order of the Tribunal]**

485. **[Suppressed by order of the Tribunal]**

486. **[Suppressed by order of the Tribunal]**

"Cherry-picking" the evidence

487. Mr Waalkens submitted it would be improper for the CAC to have the Tribunal *"cherry pick"* through the items of Ms A's evidence to show that she was credible when in fact there were very strong pointers to the contrary.

488. In support of this submission, Mr Waalkens referred to the recent and reserved judgment of Priestley J in *F v G* (CIV-2007-404-004416 – 13 November 2009 Auckland High Court). That case involved a claim by a daughter against her father of continual sexual abuse from the age of 2½ years until she was 17 years. At the time the plaintiff made her claim she was in her mid 50s and her father was in his late 70s. However, that case, like all cases, was fact specific. Much of the plaintiff's evidence was extremely dramatic and highly embellished. The Judge reached the conclusion *"after much anxious thought and consideration"* that certain key aspects of the plaintiff's narrative had to be rejected.

489. In his judgment (paragraph [189]) the Judge stated that given the serious nature of the plaintiff's allegations and what the civil standard required, he could not *"cherry-pick"* some aspects of the plaintiff's narrative but reject other critical aspects which he rejected because they were fanciful or against the weight of evidence. The Court concluded that it may well be in the plaintiff's childhood she was sexually abused by

her father but the Court had no proper way of knowing and if she were, then regrettably she had embellished and dramatised her narrative to the extent that the Court found it to be unreliable.

490. That case is distinguishable in many significant and key respects from the present case.

491. Overall, the Tribunal has found Ms A to be an honest and reliable witness. Almost all matters to which she has referred have not been an invention by her. There have been some matters which she could not appropriately remember or which had become blurred or where she may have got something wrong but concerning which she readily made concessions. On key aspects of the matters referred to in particular 1 of the charge the Tribunal has found Ms A to be a consistent and reliable witness.

492. The Tribunal is not able to make those observations concerning Dr C's evidence. It found much of his evidence evasive, unreliable and contradictory, as has been shown by the findings which the Tribunal has made.

493. The Tribunal finds that sexual intercourse took place between Dr C and Ms A on two occasions around March 1985. While it is possible that the second occasion may have taken place in April 1985, that does not affect the validity of the wording of the charge or prejudice Dr C. Ms A was not 17 years until xx by which time the Tribunal finds both acts of intercourse had taken place when Ms A would still have been 16 years. Dr C's admissions in his emails of Ms A being 17 years again does not, in the Tribunal's view, affect the validity of the wording of the charge or prejudice Dr C. By the time Ms A had discussed the matter with Ms R and then Dr C it would have been after the punk theme party and closer to May 1985 by which time Ms A had turned 17 years.

Was the complainant a patient of the doctor?

494. The CAC submitted that there were four crucial pieces of evidence, that is, the evidence of the complainant's mother Mrs T, the evidence of the complainant herself, the letter which Dr C wrote to the CAC on 10 April 2002, and the email of 11 December 2000 from Dr C to the complainant.

495. Counsel for Dr C submitted there was a complete lack of evidence specifying the basis of the assertion that the complainant was a patient of the doctor and contended that the evidence at its highest was no more than that Ms A was a patient of the Centre.

Mrs T

496. The Tribunal has already set out in some detail the evidence of Mrs T. The Tribunal found Mrs T to be a straightforward witness whose evidence it accepts.

497. The Tribunal accepts that following her move to the area in November 1981, Mrs T, her husband and her children (including the complainant) transferred to the Centre and became the patients of Dr C specifically, and that this remained the position until August 1985 when the family moved elsewhere. While there was some debate in the evidence about the appropriate terminology of whether patients were "enrolled" or "registered" this did not, in the Tribunal's view, affect the position that they were accepted as Dr C's patients.

498. Mrs A, quite appropriately, conceded during cross-examination that she was not able to remember any particular consultations Ms A had with Dr C and that she could not comment on whether her daughter might not have seen him at all. Those answers were not surprising. It was evident that Mrs T was not prepared to say anything about particular consultations unless she could remember them specifically. The Tribunal would not expect Mrs T to be able to recall every consultation in general which either the complainant or her other children had with Dr C unless there was something about them which particularly stood out.

499. By way of example, Mrs T was asked whether any of her children had seen any other doctors at the Centre. She referred to an incident when one of her daughters saw a female doctor at the Centre which her daughter reported to Mrs T as being most unsatisfactory (above). Mrs T's ongoing relationship with Dr C was such that at her next consultation she raised this with Dr C when he *"rolled his eyes"*. The Tribunal is satisfied this supports the conclusion that Mrs T and her family had an ongoing doctor/patient relationship with Dr C with whom she felt sufficiently

comfortable that she could raise these matters; and that he had an interest in knowing about them as her family's doctor.

500. Apart from that daughter's *"one-off"* visit to that particular doctor, Mrs T could not recall any of her children having seen doctors at the Centre other than Dr C.

501. Mrs T could also remember specific consultations regarding herself and her husband when they were struck with giardia and when one of her sons, then aged 12, had campylobacter. The Tribunal accepts those were the sorts of particular consultations she would recall due to the significance of the illness.

502. Mrs T was asked that, as the complainant's mother, if Ms A was sick and she had to arrange an appointment for her to see a doctor who she would have called. Mrs T answered *"Dr C definitely"*.

503. The Tribunal is satisfied that Mrs T's evidence that Dr C was the doctor for herself, her husband and her children (including Ms A) between November 1981 and August 1985 was correct.

<u>Ms A</u>

504. Soon after her parents moved to the area, Ms A stated her mother took her to see Dr C for medical treatment which was when she first met him and that he continued in that role until she moved to ii in June 1985. Her first recollection was seeing him when she was about 13 years old when she was anaemic, and then for usual illnesses during her teenage years. In this regard, Mrs T, although she could not recall specific consultations, referred to them having been for *"typical adolescent ailments"*. The complainant did recall, shortly after the move, Dr C attending at their home because she had a *"sore tummy"* which persisted for weeks and which she referred to, when asked by a member of the Tribunal, as an abdominal pain on her left side. When the Tribunal asked for an estimate of how often she saw Dr C she supposed it was several times a year depending on how well she was. She remembered seeing him for a strep throat and various ailments but did not have a chronic condition *"or anything like that"*.

505. The Tribunal accepts Ms A's evidence that she consulted Dr C from time to time as her and her family's doctor.

"… Our family doctor …"

506. This was addressed above under the "Issue of Counselling".

507. What is significant is that when Ms A saw Dr C after the alleged rape she stated it was not in his role strictly as a counsellor in that formal sense and not in an equal way with her as a friend but rather because he was *"our family doctor"* (tscpt 19/14-25); and that he *"was our family doctor and that he was helping us in that way"* (tscpt 58/26-34; 59/1-10).

House calls

508. Mr Waalkens put it to the complainant that Dr C did not make house calls and she had got that wrong. Ms A was adamant he did.

509. The Tribunal asked the complainant to elaborate on her reference to house calls. She said Dr C went to their home if one of them was too sick to go to see him or *"if he were just being nice perhaps"* to make it easier because *"there were so many of us"*. She remembered him calling when she had a strep throat and had been very sick. She remembered him seeing her brother once who had campylobacter and she remembered him going to see her mother when she had giardia bug. She added it was not just concerning her that Dr C made house calls but to other members of her family as well.

510. As noted earlier, Mrs T also recalled Dr C making house calls to their home.

511. In his written brief, Dr C stated he found Ms A's reference to his making occasional house calls surprising as it was very unusual for him to perform them. In his oral evidence in chief he was asked if there were any particular type of patient for whom he would make house calls in those days. He said the most common categories were for elderly patients who were unable to get themselves to the surgery or nursing

home patients. With regard to young people in their teens he said that would be extremely uncommon and he could not recollect doing so.

512. With regard to Mrs T's evidence relating to the giardia bug, Dr C said he had no recollection of visiting their home about that, although he vaguely recalled the presentation of the illness but could not recall any particular details.

513. Mrs S (above) was asked in cross-examination about house calls. She agreed that the philosophy of the Centre when she was there between 1977 and 1981 was to do home visits. Since her return to the Centre in 1991 down to the present time she agreed this was still the position in that a home visit by a doctor is always available for patients if required. When asked if the letter "V" in the medical notes indicated a home visit Mrs S thought it was now "HV" but it could have changed during the time she was not there although her recollection was it was "HV" for a home visit. What Mrs S's evidence does confirm is that it has always been the philosophy of the Centre to make house calls when required.

514. In cross-examination a document (Ex 12), which purported to be Mrs T's medical notes covering the period 1 March 1983 to 25 March 1985 was put to Dr C. There were 10 separate entries during this period. While the document did not have any name on it, during an exchange in cross-examination Dr C agreed that it was likely to be that of Mrs T, although he could not say that with certainty. The Tribunal finds that this document did relate to Mrs T. There was an entry for 29 January 1985 with the reference *"Giardia from stools"*. With regard to this particular consultation it is the only one which has, in a separate column, the letter "V". The Tribunal finds that the "V" referred to visit, meaning home visit. It was the only entry with this reference.

515. The Tribunal is satisfied on the evidence before it that Dr C did make house calls from time to time to the T's home.

<u>Dr C's correspondence with the CAC</u>

516. With regard to the complainant's medical records Dr C stated that if Ms A had been seen at the Centre as a patient, medical records would have been kept for those consultations. He stated he had caused a full search for any records for her to be made but had been unable to locate any or any reference to the fact that she was a patient of the Centre at any time. He stated the Centre had retained from that period of time all its patient records which they do not destroy, but that if the records were transferred it was possible they may not have kept copies. However he would expect the practice to which the records were transferred to have kept them and that they should be available.

517. When the CAC investigated Ms A's complaint, Dr C, as was his right, declined to engage in the investigation or put forward his version of events.

518. On 28 February 2002 the convenor of the CAC wrote to Dr C enclosing a copy of a consent form signed by the complainant asking for copies of the medical records pertaining to Ms A. Having had no reply to that letter, the convenor wrote again to Dr C on 27 March 2002 requesting copies of the records (Ex 2 tab.50).

519. On 10 April 2002 Dr C forwarded a hand written note to the convenor which stated *"Thank you for your letter. We have no medical records for Ms A. She has not been a patient here for 17 years. There is no record of where they might have been sent. Yours …"*

520. The CAC submitted that the logical inference to be drawn from Dr C's reply, taking into account the date of the letter and the reference to 17 years, was that he knew that Ms A had been a patient but had not been for 17 years, that is, since 1985 (when she moved to ii).

521. The CAC submitted that that logical inference should be compared with the written and oral evidence of Dr C, which Mr Lange described as *"shifting sands … moving the whole time"*. In that regard, Mr Lange referred to Dr C's initial evidence in his written brief that he had no recollection of seeing Ms A as a patient, submitting that by the time it came to cross-examination, Dr C's evidence had changed in that it was no longer "he had no recollection" but that he was quite clear he had never seen her as a patient and, then later still, he did not know what doctor she was seeing at the

practice and then further on he did not believe she was a patient [of the practice] but she might have been (tscpt 134/32; 135/26; 136/3).

522. Dr C's explanation was that he was responding to the CAC letter in an effort to be helpful, he had looked for any medical records around the time in question and that Ms A may well have been a patient of someone else's in the practice but not his.

523. Mr Waalkens submitted that Dr C's response to the CAC's letter was understandable because when the CAC had first written to him on 28 February 2002 it had stated that the complainant was alleging inappropriate behaviour by Dr C when she was a patient of his in 1985 in the following terms *"… In the meantime we can say that the complainant alleges inappropriate behaviour by you when the complainant was a patient of yours in 1985. It would be very helpful to the CAC if it could have copies of any medical records for Ms A you have in your possession or at the health centre. …"*; and that his letter to the CAC on 10 April 2002 only acknowledged she may have been a patient of the Centre, not that she was his patient.

524. The Tribunal agrees that Dr C's evidence was like *"shifting sands … moving the whole time"* and finds that when Dr C wrote the letter of 10 April 2002 to the CAC, he was aware that Ms A had been a patient at the Centre though not since 1985.

The *"zero tolerance"* email

525. As further evidence of the doctor/patient relationship, the CAC referred to the email of 11 December 2000 which Dr C sent to Ms A, in particular, the words *"We (Doctors) have had it drummed into us that any sexual contact with a patient (especially a 17 year old) is predatory and criminal (they call it zero tolerance, I will call my first novel that) and that every such relationship must be interpreted according to that paradigm. … An extension of the zero tolerance paradigm …"*.

526. As to the words *"zero tolerance"*, in opening, Mr Lange attached to his written submissions an extract from the booklet "Medical Practice and Professional Conduct in New Zealand" by David Cole published in August 1984 and produced with the assistance of the Medical Protection Society (MPS). The extract was entitled

"Behavioural Misconduct" under which were four headings, the first of which was "Unduly Close Relationships between Doctors and Patients".

> *"A doctor is particularly vulnerable to accusation of undue intimacy.*
>
> *Every effort must be made to avoid incidents between a doctor and a patient (or a member of the patient's family) which disrupts the patient's family life or otherwise damages the maintenance of trust between doctors and patients. Inevitably medical consultation necessitates quite close personal relationships and meticulous care is needed to avoid misplacing the trust involved.*
>
> *The Medical Council has always taken a serious view of a doctor who uses his professional position in order to pursue a personal relationship of an emotional or sexual nature with a patient or the close relative of a patient. Such abuse of a doctor's professional position may be aggravated in a number of ways. For example, a doctor may use the pretext of a professional visit to a patient's home to disguise his pursuit of the personal relationship with the patient (or where the patient is a child, with the patient's parent). Or he may use knowledge obtained in his professional role of the patient's marital difficulties to take advantage of that situation. These are merely examples of particular abuses.*
>
> *The question is sometimes raised whether the Council will be concerned with such relationships between a doctor and a person for whose care the doctor is contractually responsible but has never actually treated, or between a doctor and a person whom the doctor has attended professionally in the distant past. In view of the great variety of circumstances which can arise in cases of this nature the Council's judicial position has prevented it from offering specific advice on such matters. It can however be said that the Council is primarily concerned with behaviour which damages the crucial relationship between doctors and patients, and that this relationship normally implies actual consultation."*

527. In his oral evidence-in-chief Dr C said he was not a member of the MPS at the time. He was a member of the Medical Defence Union (MDU) and became a member of the MPS when the MDU ceased to exist, which he thought was about ten years ago. He had not seen the David Cole extract until the opening day of the hearing.

528. With regard to the phrase *"zero tolerance"* in his 11 December 2000 email (Ex 2 tabs.7/13) Dr C said it was a term with which he was not familiar (tscpt 114/25).

529. When it was put to Dr C in cross-examination whether he was saying he was unaware it was inappropriate for a doctor to be in a sexual relationship with a

patient, he replied he was aware it was inappropriate but that *"it was neither predatory nor criminal"*.

530. He accepted that as part of his practice he received bulletins such as the Medical Council's news publications on matters such as doctor/patient relationships which he usually read. He said he knew the Council viewed such relationships as inappropriate.

531. Overnight, during his cross-examination, Dr C was asked to read articles of 1992 and 1994 which had been published in Medical Council News and which referred to the Medical Council's view of *"zero tolerance"* regarding a sexual relationship between a doctor and a patient or a member of a patient's family. Dr C said he believed the term *"zero tolerance"* was an expression used in the medical profession but he had also heard it used in other contexts relating to domestic violence and policing in certain cities. It was put to Dr C that by 2000 he was certainly aware of the phrase *"zero tolerance"* being used regarding sexual relationships between doctor and patient. Dr C did not answer directly but said he was aware of the *"zero tolerance"* expression applying *"to a number of things"*, but accepted, when pressed, he was aware of it applying to the doctor/patient relationship. When it was put to him that he had said the previous day during the hearing that *"zero tolerance"* was a phrase with which he was not familiar, Dr C replied it was a phrase he had heard used in a number of situations, he had heard it used applied to doctor/patient relationships; and *"it was not a phrase I generally use myself"* (tscpt 140/23-34; 141/1-12).

532. Mr Waalkens submitted that the extract from Cole in August 1984 was not adequately proved and that the CAC should have called an expert witness to prove relevant and appropriate standards at the time.

533. The Tribunal is entitled to have regard to the Cole paper and the Medical Council news articles in 1992 and 1994. They are relevant not only to standards as they applied in March 1985 (see paragraph 573 below) but to what Dr C must have known when he wrote his email on 11 December 2000.

534. The Tribunal is satisfied that Dr C was not prejudiced by that material as he was provided with adequate opportunity during the hearing to respond to it.

535. The Tribunal found Dr C was unduly evasive regarding his knowledge and awareness of the phrase *"zero tolerance"* regarding the Medical Council's view in respect of sexual relationships between doctors and their patients. The Tribunal finds Dr C was fully aware by March 1985 that the Medical Council viewed such relationships as inappropriate and was fully aware by 2000 (at the latest) the Medical Council had been using the phrase *"zero tolerance"* in regard to such relationships.

536. For reasons already given, the Tribunal was satisfied that Dr C wrote those words.

537. The Tribunal agrees with the submission of the CAC that this statement by Dr C shows that he was aware that Ms A was his patient when she was 17 years old and at the time he had had sexual intercourse with her. In reaching that conclusion, the Tribunal has also had regard to the statement not only in the context of the email itself, but also in the context of the other emails produced.

Mrs C's comment *"… lovely, lovely girl …"*

538. In her written brief (BOE para 4), Mrs C stated that at the time she and her husband employed Ms A as a babysitter for their children in 1984, there was no hint at all by Ms A or Dr C or anyone else that her husband had seen Ms A as a patient or met her beforehand, and that the first she ever heard that Ms A was a patient of her husband's was when Ms A made her complaint (giving rise to this charge).

539. In cross-examination, Ms A did not accept Mrs C's evidence. While Ms A said she doubted they would have talked about any patient issues, they all knew her family were patients of Dr C's and that was how they met. She recalled Mrs C telling her that they had got her to babysit because the Cs had recently returned from overseas and did not have a babysitter for their children and Dr C had said *"There's this lovely, lovely girl who comes into the surgery. I'll ask her."* Mr Waalkens put to Ms A she was making it up and she had known *"for a long time one of the burning issues in this case is whether you were ever a patient of Dr C's"*. Ms A denied *"making it up"* and, although agreeing she then knew whether or not she was Dr C's

patient was a *"burning issue"* said she had not known that for a long time but possibly only a year. When Mr Waalkens asked her why she had never mentioned this piece of evidence before if it were true, Ms A replied she did not know and perhaps it was because no-one had asked her.

540. Mrs C denied saying this to Ms A. She said she could not remember everything going back 25 years. She accepted that there was no reason why either Dr C or Ms A would discuss with her the topic of Ms A being a patient.

541. Mr Waalkens submitted that Ms A's failure to raise this item of evidence, at any previous time, was a *"fundamental"* credibility issue. The Tribunal did not draw that inference or have the impression at all that Ms A was *"making this up"*, as Mr Waalkens alleged.

542. Until Mrs C's brief of evidence was served on counsel for the CAC, which would have been shortly before the hearing commenced, neither the CAC nor Ms A would have known Mrs C's evidence was that she personally had not been aware that Ms A was Dr C's patient until she learned of Ms A's complaint. Whilst it would have been open to the CAC to prepare briefs of evidence in reply, the fact that it did not do so does not affect the credibility issue. The Tribunal accepts as credible and truthful Ms A's explanation *"I don't know;, perhaps because no-one's asked me"*. She may not have been asked to comment on Mrs C's evidence prior to giving her own at the hearing. She is a witness, not legal counsel. Further, in cross-examination, Mrs C herself was, to some extent, equivocal in her own answers as to precisely what she might have said 25 years ago.

543. In cross-examination of Mrs C, it was established that Dr C had told her he had a patient who had a number of children, one of whom was a nanny and there was a 16 year old who did babysitting. When asked to agree that the discussion with her husband related to a contact through the surgery, Mrs C replied *"I agree with you that her mother was a patient of C's"* (tscpt 183/33-34; 184/1-2).

544. Mr Waalkens submitted that Ms A's evidence on this particular matter was at odds with her mother's evidence when, in answer to a question from the Tribunal, her mother said that she remembered *"a friend of the Cs recommended her [daughter]*

to them". But Mrs T was not so certain and qualified her evidence by saying *"Well, I mean I wouldn't like to swear to this, but what I'd say I remember is that a friend of the Cs recommended her to them whose name I can't recall, but I think it came about that way, it wasn't through me"*.

545. The Tribunal accepts Ms A's evidence that Mrs C told her that Dr C had said the words or words to the effect of *"there's this lovely, lovely girl who comes into the surgery"*.

Email *"… when I was one of your patients …"*

546. The Tribunal's attention was also drawn to the email Ms A sent to Dr C on 20 December 2000 (Ex 2 tab.3) in which she stated *"I hope I wasn't too much of a pain when I was one of your patients."* to which he replied that day. Dr C did not dispute Ms A's assertion she was his *"patient"*. Rather, he concluded his email reply *"I am madly in love with you"*.

Nobody's patient

547. In answer to a series of questions from a member of the Tribunal, Dr C accepted Mr and Mrs T were his patients by virtue of the fact that he had seen them at some point in time. He was asked what the position was for the children in a family that went to a general practice - which doctor's patient were they, everyone's or no-one's, if they had not seen any particular doctor. Dr C stated in that situation he would regard them as patients of the practice but would not regard them as patients of any one doctor in particular. In his view, therefore, if Ms A had not seen any individual doctor at the practice while she was a patient of the practice, she was not any particular doctor's patient at the practice.

548. The Tribunal does not accept that a patient can be enrolled or registered with a general family practice but not be the responsibility of any doctor at that practice. In the absence of any clear delineations of responsibility, patients of a general practice are to be treated as the professional responsibility of *all* staff and members of that practice. This applies in all areas of care and professionalism, particularly in the area of sexual relations with a patient.

Medical records

549. The Tribunal refers to the submissions by Mr Waalkens that Dr C was prejudiced by the absence of medical records.

550. In a series of questions from a member of the Tribunal regarding the medical records of the T family, Dr C's understanding or assumption was that they did exist and were transferred elsewhere in 1985 – *"So if I can just make sure that I've got this clear. So there were patient records for A and her parents and her siblings and your understanding, or your assumption, was that they were transferred in 1985 to somewhere else? Yes."* (tscpt 179/1-4)

551. He stated the position was that in 1985 records would be transferred to another practice by the practice manager providing there were no outstanding unpaid accounts.

552. While the Tribunal acknowledges it does not have any clinical records for any consultation between the complainant and Dr C, there is other evidence to which the Tribunal is entitled to have regard and has had regard in satisfying itself that Ms A was a patient of Dr C at the relevant time. The Tribunal is satisfied to a high standard on the evidence before it that Ms A was a patient of Dr C from the time Mrs T arranged for herself, her husband and her children to be patients of Dr C specifically at the Centre shortly after her move to the area in November 1981 until the family moved in August 1985.

Submissions of counsel regarding issue of "patient"

553. Mr Waalkens submitted that in order to establish the charge the CAC had to prove not only the doctor/patient relationship but also the timing of such in proximity to a finding of sexual intercourse. He submitted that there was no evidence as to timing in this regard whatsoever and, further, in the absence of any medical records it was not only highly prejudicial to Dr C but an impassable hurdle for the CAC on proof issues. At the highest, the evidence would only establish that Ms A was a patient of the practice at some stage.

554. Mr Waalkens referred to the recent decision of Duffy J in *Dr G v Director of Proceedings* (CIV-2009-404-000951 16 September 2009 Auckland High Court). In that case, the majority of the Tribunal found that Dr G had engaged in a sexual relationship with Ms N in circumstances where the sexual relationship developed in part through the doctor/patient relationship and at a time when the doctor/patient relationship subsisted. The minority disagreed and found it was a case where the doctor employer had engaged in a sexual relationship with his employee and then unwisely had given medical treatment to that employee. Duffy J upheld the doctor's appeal and set aside the decision of the majority of the Tribunal.

555. Mr Waalkens relied on Her Honour's observation (at paragraph [22]) *"… Whilst a patient's subjective view of who is her current doctor will be relevant, I consider that an objective analysis of the reasonableness of this view is required before it can be relied upon by the Tribunal. If a patient has seen the same doctor more than half a dozen times over the same number of years, the frequency of the contact may be obvious enough to indicate an ongoing relationship to most persons. But it will be a matter of degree as to whether or not infrequent contact can still indicate an ongoing relationship, as opposed to a relationship that ends and then starts anew when further contact occurs. The duration of doctor/patient relationships is usually indeterminate. The medical profession must have some indicia by which doctors determine when a patient has ceased to be a current patient."*

556. Mr Waalkens also referred to where Her Honour said at paragraph [23]: *"The majority took account of Dr G's concession that Ms N was a patient but not a regular patient, as well as the statement to the employee of the primary health care organisation that he was going to employ one of his patients as his health assistant. Once again, the majority do not say why this evidence influenced their decision. Naturally, the doctor's understanding of the currency of the doctor/patient relationship is relevant. But just as with the patient's subjective view, before any effective reliance can be placed on the doctor's view, the Tribunal needs to assess and evaluate how this view fits with the facts. It is not enough for the Tribunal to simply take the doctor's view and apply it as part of its decision-making."*

557. Mr Waalkens submitted that the vague evidence from the CAC was a fatal flaw in the case and that Ms A's subjective belief was not determinative. He referred to an

answer in cross-examination from Ms A when she agreed the only reason Dr C was called after the rape was because he was a family friend and they were quite friendly. However, the Tribunal does not accept that this particular answer accurately reflected all of Ms A's evidence let alone all of the evidence before the Tribunal.

558. Mr Waalkens submitted that the Tribunal needed to assess not only whether a doctor/ patient relationship had been established but also its intensity/nature as against the sexual relationship in question in order to make a balanced *"threshold"* assessment. Mr Waalkens submitted that the Tribunal had to consider the context of the sexual relationship developing out of the babysitting relationship and not that of the doctor/patient relationship.

559. In this regard he referred to the MPDT decision in *Wiles* (above) (upheld on appeal in the District Court and High Court). In that case, Mr Waalkens submitted that Dr Wiles was found to have entered into a sexual relationship with a current patient but the majority of the Tribunal rightly identified in that case that the true nature of the sexual relationship developed out of the landlord/tenant relationship which co-existed alongside the doctor/patient relationship, and although the majority of the Tribunal was critical of the relationship developing, it found the *"threshold"* was not met to warrant a disciplinary finding.

560. Mr Waalkens also referred to the case of *Dr YZ* (above). In that case Dr YZ was charged with having a sexual relationship with Ms N (known as Mrs R) while she and/or her husband and/or her children were Dr YZ's patients.

561. The Tribunal found there was a sexual relationship and that Ms N and one of her children were Dr YZ's patients whilst that relationship existed.

562. The Tribunal was satisfied this amounted to malpractice and to the bringing of discredit to the profession, but did not consider the threshold warranting disciplinary sanction had been reached because the parties lived in a small community with common social contact and a shared musical interest, out of which the sexual relationship arose, the only established consultations for Ms N were for relatively minor matters, the nature of which did not place her in the position of being unduly

vulnerable and did not give rise to the sexual relationship, there was serious delay in bringing the matter to the point of consideration for professional disciplinary purposes, following the complaint Dr YZ had stood down from obtaining a senior office within his profession (which was a matter of importance to Ms N), and there were no ongoing practice issues requiring protection of the public.

563. The Tribunal accepts the test as to whether there is a doctor/patient relationship is an objective one (as Duffy J found). However, each case must depend on its own facts, and there is a danger in attempting to draw similar conclusions from ostensibly similar cases where the facts are different.

564. The Tribunal is satisfied that the various items of evidence, to which it has referred above and made findings, establish that the doctor/patient relationship between Dr C and Ms A existed from the time Mrs T enrolled the family in November 1981 until Ms A left to live in ii in June 1985. The Tribunal does not simply rely on what Ms A may have believed or what Dr C may have believed.

565. Ms A gave evidence Dr C visited the family home on one occasion to treat her. She gave evidence of several consultations with him whilst a teenager. She gave evidence she consulted Dr C as her family doctor after the rape. The Tribunal accepts her evidence and rejects that of Dr C. Further, the Tribunal does not accept Dr C's explanation of the "zero/tolerance" email. The sentiments Dr C expressed in that email were a clear recognition that the doctor/patient relationship existed. His concern was primarily with that; the age differential was a secondary, albeit added concern.

566. Further, after hearing and observing Dr C, the Tribunal was satisfied Dr C knew there was a doctor/patient relationship and sought to distance himself from that by suggesting, without any evidence at all, that Ms A had inserted the compromising words into that email.

567. The Tribunal rejects the submission that the sexual relationship between Dr C and Ms A arose out of the babysitting relationship and not the doctor/ patient relationship.

568. The cases to which Mr Waalkens referred need to be considered in appropriate context. There, the women patients involved were mature adults and there were other distinguishing facts. For example, in *Wiles* the finding was that although there was some sexual contact whilst the doctor/patient relationship existed, sexual intercourse did not occur until after that relationship had ceased. Here, the patient, Ms A who was 16 years old had made an allegation of rape concerning which there had been a police investigation. Her mother, Mrs T, had worked for a number of years at a local hospital as a health practitioner, including working with persons who had been sexually assaulted, was of the view that her daughter should see a counsellor. Ms A decided to go to Dr C as a counsellor.

569. It is clear that he was able to provide some form of comfort and reassurance to Ms A as the family doctor, as he himself admitted that following the allegation of rape he had visited Ms A at her home.

570. The Tribunal does not accept that in these circumstances Dr C, a mature professional man of 32 years, can maintain that his sexual relationship with Ms A arose out of the babysitting relationship. The doctor/patient relationship preceded the babysitting relationship; the latter grew out of the former which continued to exist. Ms A's own answer when challenged about this in cross-examination was that she went to the C household to babysit but that this was not in an equal way because she regarded Dr C as their family doctor (Transcript p.19 l 24-25). The Tribunal finds that his conduct in initiating a sexual relationship with Ms A was opportunistic. They were not on equal terms.

Professional misconduct

571. Having found Dr C had sexual intercourse with Ms A when she was his patient, the Tribunal now turns to the question as to whether that amounted to either disgraceful conduct in a professional respect or professional misconduct or conduct unbecoming.

572. In considering that issue, the Tribunal has adopted the approach taken in the authorities earlier set out. The test is objective.

573. The Tribunal is satisfied that in 1985, it was well accepted within the medical profession that a medical practitioner should not engage in a sexual relationship with a patient. As already stated, the Tribunal is also satisfied Dr C knew there was a "zero tolerance" for such a relationship.

574. As stated in *Brake v Preliminary Proceedings Committee of the Medical Council* [1997] 1 NZLR 71, the medical profession has long recognised that the doctor/ patient relationship is intended for the benefit of the patient and that the onus lies on the doctor to act with integrity, given that the relationship is not one of equals, and sexual behaviour between a doctor and a patient when the relationship exists is "unacceptable" and any serious breach is to be regarded as disgraceful conduct.

575. In *Director of Proceedings v MPDT and Wiles* (AP No. 33/02 H.C. Auckland 24 November 2002 Ellen France J) emphasised what *Brake* set out were general principles only and that every case had to be considered on its own facts. In that regard, the degree of power imbalance and the extent of any exploitation were relevant in assessing the degree of culpability, i.e. at what level any charge had been established. In *Wiles*, there was no exploitation or power imbalance.

576. The present case is clearly distinguishable from those where a doctor had a sexual relationship with an adult patient. There are a number of aggravating factors in the present case. Ms A was still a teenager. The sexual relationship commenced shortly after she had been raped, a fact which he accepted and concerning which he felt protective and angry, and she was clearly emotionally distressed. Though he advanced it for other reasons, Dr C himself must have known she was at risk, as he described her as being from a dysfunctional family. This required him to be more concerned for her welfare, not exploiting her vulnerability for his own gratification. The fact that she babysat his children was a further reason why he should not have taken advantage of her. He expressed himself as being something of a father figure to her. It hardly needs stating that exploiting her sexually was utterly inconsistent with that sentiment. The fact that she turned to him for comfort and solace following the rape only highlights her need for protection, not exploitation. In short, there was both a power imbalance and exploitation.

577. The Tribunal was satisfied that the proved conduct was a serious breach and, on an objective analysis, that Dr C's conduct amounted to disgraceful conduct in a professional respect.

578. The Tribunal is satisfied that his conduct warrants a disciplinary sanction.

Conclusion and orders

579. The Tribunal finds particular one proved in that it amounts to disgraceful conduct in a professional respect (s.109(1)(a) of the Act); and that it warrants a disciplinary sanction.

580. The interim orders prohibiting publication of Dr C's name (and others) and any details which may identify them are to remain in place until the further order of the Tribunal.

581. The Tribunal draws attention to the suppression orders made at paragraphs 2 to 6 inclusive above.

582. Counsel for the PCC shall have 14 days from the receipt of this decision to file submissions on penalty and any suppression orders.

583. Dr C shall have 14 days from receipt of the PCC's submissions to file submissions in reply.

584. Both counsel are requested to address in their submissions, the issue of permanent name suppression in regard to all interim orders in place at present. This request is not to be taken, one way or the other, regarding the Tribunal's view as it has not yet deliberated on this matter.

DATED at Wellington this 4th day of June 2010.

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Sandra Moran
Chair
Medical Practitioners Disciplinary Tribunal