



## **MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

PO Box 24463, Manners Street, Wellington • New Zealand  
13th Floor, Mid City Tower • 139-143 Willis Street, Wellington  
Telephone (04) 802 4830 • Fax (04) 802 4831  
E-mail [mpdt@mpdt.org.nz](mailto:mpdt@mpdt.org.nz)  
Website [www.mpdt.org.nz](http://www.mpdt.org.nz)

**PUBLICATION OF  
THE NAME OF THE  
DOCTOR AND  
COMPLAINANT  
IS PROHIBITED**

**DECISION NO:**

252/03/107C

**IN THE MATTER**

of the Medical Practitioners Act

1995

-AND-

**IN THE MATTER**

of a charge laid by a Complaints

Assessment Committee pursuant to

Section 93(1)(b) of the Act against

M medical practitioner of xx

### **BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

**TRIBUNAL:**

Dr D B Collins QC (Chair)

Ms S Cole, Dr U Manukulasuriya, Dr A A Ruakere, Dr L F Wilson

(Members)

Ms G J Fraser (Secretary)

Ms P Dunn

Hearing held at Wellington on Friday 26 September 2003

**APPEARANCES:** Ms K P McDonald QC for a Complaints Assessment Committee.

Mr H Waalkens for Dr M

### **The Charge**

1. Dr M is a general medical practitioner in xx. On 26 May 2003 a Complaints Assessment Committee (“CAC”) laid a disciplinary charge against Dr M. The charge is very serious. The charge alleges Dr M acted in a manner which constituted disgraceful conduct in a professional respect. The particulars of the charge allege that on 6 January 1983 Dr M:
  - 1.1 *“...conducted a vaginal examination of the complainant ... without wearing gloves”. And*
  - 1.2 *“In the course of the examination [Dr M] inappropriately manually stimulated the complainant’s clitoris and then later in the examination when placing the speculum in the vagina slid the instrument in and out of the vagina and manually stimulated her clitoris, without any clinical or medical justification”. And*
  - 1.3 *“In the course of the examination Dr M inappropriately asked the complainant if what he was doing ‘felt good’ or words to that effect”.*
2. On 31 July 2003 Dr M filed an application to have the charge struck out or stayed. That application was amended on 24 September 2003. Dr M’s application was supported by affidavits sworn by Dr M (on 21 July and 11 September) and an affidavit from Dr G (also sworn on 21 July).

3. The application to strikeout/stay was opposed by the CAC. An affidavit from the complainant (dated 5 September 2003) was filed by the CAC in support of its position.
4. The application to strikeout/stay was heard by the Tribunal on 26 September. At the same time the Tribunal heard and considered an application from Dr M for orders suppressing his name and anything which could identify him. The CAC consented to interim orders suppressing Dr M's name and identifying features pending determination of the application to strikeout/stay the charge. The approach taken by the CAC towards the application for name suppression was entirely appropriate in the circumstances of this case. Even if Dr M's application had been opposed it is likely the Tribunal would have granted his application because of the force of the medical evidence filed in support of Dr M's application. The CAC's approach confirms the wisdom in ordering that Dr M's name (and any identifying features) be suppressed. The Tribunal accordingly orders pursuant to s.106(2)(d) Medical Practitioners Act 1995 ("the Act"), that Dr M's name (and any identifying features ) be suppressed.
5. The complainant also made application for orders suppressing her name and identifying features. In view of the emphasis in s.106 and 107 of the Act to ensure complainants enjoy privacy in cases where matters of an intimate or distressing nature are inquired into, the Tribunal has had no hesitation in granting the complainant's request that her name and identifying features be suppressed.

### **Basis of the Application to Strikeout/Stay the Charge**

6. The amended notice of application identifies six specific grounds advanced in support of the application to strikeout/stay the charge. Those grounds are:
  - 6.1 The delays on the part of the complainant in making the complaint are so excessive that Dr M is prejudiced in being able to adequately defend the charge and/or there is a real risk he will not receive a fair hearing.

- 6.2 The delays on the part of the CAC in considering its investigation are so excessive that Dr M is prejudiced in being able to adequately defend the charge and/or there is a real risk he will not receive a fair hearing.
- 6.3 Dr M is prejudiced by the overall delay (general or presumptive prejudice).
- 6.4 Dr M has suffered particular (specific) prejudice caused by the inability of witnesses to remember important events. The witnesses in question include Dr M, Dr G, the (previous) partners of the complainant, and the receptionist of Dr G's medical clinic. The application based on specific prejudice also refers to the unavailability through death in February 1997 of the complainant's mother.
- 6.5 The complaint did not include the allegations set out in the first particulars of the charge that Dr M conducted the vaginal examination without wearing gloves.
- 6.6 The CAC's determination that the complaint should be considered by the Tribunal was invalid in that the evidence was not sufficient to justify a disciplinary charge and/or the CAC did not have reasonable belief that grounds existed entitling the Tribunal to exercise its power to discipline under the Act.

### **Summary of Dr M's Case**

7. The following chronology explains the factual basis upon which Dr M's application is founded:

<i>Date</i>	<i>Event</i>
05.01.83	Complainant, then 18 years old, consults Dr M in relation to suspected pregnancy. Dr M was a xx in the xx training scheme working at Dr G's surgery in xx.
06.01.83	Complainant consults Dr M again. Termination of pregnancy is discussed. An internal examination is conducted.

07.01.83	The complainant and her mother confer with Dr G and raise concerns about the way Dr M conducted the vaginal examination the previous day. Dr G wrote the following in the complainant's medical records:  <i>"Talked with [complainant] and mother. Alleged sexual stimulation by [Dr M] during exam. Clearly this was accidental. Long discussion. They are not entirely convinced but no action is contemplated. Ring for [termination of pregnancy] appointment".</i>
February 1997	Complainant's mother passes away.
15.05.02	Complainant lodges her complaint with xx Police. The Police investigate the complaint for 5 months. The Police investigations include interviews with Dr G and the practice receptionists, as well as two former boyfriends of the complainant.
25.05.02	Complainant writes her letter of complaint to the Medical Council.
28.06.02	Medical Council brings complaint to the attention of Dr M.
05.07.02	Dr G makes his first statement to the Police.
30.08.02	Dr G makes his second statement to the Police.
23.09.02	Dr M's counsel seeks disclosure from the CAC.
26.10.02	The Police advise they "... have completed their investigation into these allegations. There has been no evidence found to support the allegations made by [the complainant]."
01.11.02	Dr M's counsel writes again to the CAC seeking disclosure.
19.11.02	The CAC writes asking to meet with Dr M on 5.12.02.
22.11.02	Dr M's counsel writes again to the CAC seeking disclosure.
25.11.02	The CAC responds to the request for disclosure saying it has no records other than the letter of complaint and medical records held by Dr M. The CAC also advised it wished to meet Dr M.
10.12.02	Dr M's counsel repeats his request for disclosure, and in particular records held by the complainant.
22.12.02	The CAC responds setting out the documents it held and repeated its request to meet Dr M.
03.02.03	Dr M's counsel writes to the CAC.
05.02.03	The CAC writes again to counsel for Dr M.
21.02.03	Dr M and his counsel meet the CAC.
19.02.03	The CAC advises it has another witness to interview.
27.05.03	The CAC advises that it has unanimously determined the complaint should be referred to the Tribunal as a charge.
30.05.03	Dr M's counsel seeks an explanation of the CAC's reasons for deciding to charge Dr M.

04.06.03	Dr M's counsel writes to the solicitors for the CAC concerning disclosure.
09.07.03	Dr M's counsel seeks notes made by the CAC.
21.07.03	Counsel for the CAC conveys her instructions that all relevant documents have been disclosed.
31.07.03	Dr M files his application to strikeout/stay the charge.
31.07.03	Counsel for the CAC provides counsel for Dr M with further documentation including two CAC typed reports and a handwritten note from the CAC.

8. Dr M obtained and put before the Tribunal copies of Police job sheets compiled by the Police when investigating the complainant's allegations. The job sheets comprise interviews with the complainant, Dr G and two former boyfriends of the complainant.
9. The Police job sheets record Dr G was first spoken to by the Police about this matter on 26 June 2002. When he was first questioned about this case Dr G said he could not remember the complainant, her mother or the complaint. A more detailed statement was given to the Police by Dr G on 5 July 2002. In his statement Dr G again said he did not recall the complainant at all. He emphasised he was not trying to be "deliberately vague", he simply could not recall the complainant. Dr G explained he started at the xx in 1974. He was there for 16 years. He believed Dr M was his xx for about 6 months in approximately 1981 (the year the complainant initially said the incidents she complained of occurred). Dr G explained Dr M purchased his practice in about 1990.
10. The medical notes relating to the events of 5 and 6 January 1983 were located after Dr G made his first statement to the Police. When the notes were made available to Dr G he made a second statement in which he said he could now vaguely remember the complainant and that he did not believe the complaint at the time and that the incident was "clearly accidental".
11. Dr G swore an affidavit in which he confirmed that at the time he was first spoken to by the Police he genuinely had no recollection of the complainant, her mother, or the complaint. Dr G also said:

“14. I also feel very disadvantaged at having to now remember the detail of the meeting with [the complainant] and her mother on 7 January 1983. I was then aged xx and my memory was certainly a good deal better than it is now at age xx. I say that in addition to the fact that memory obviously dims with the passage of time.

15. Although I can now remember the complaint, there can be no doubt that my recollection has been adversely affected by the length of period of time that has passed since the matters in question. Even if [the complainant] had made the complaint within five or six years of its event, my ability to remember all the detail would be far better than it is today.”

12. Dr M also drew the Tribunal’s attention to statements made by the complainant. In her letter of complaint to the Medical Council dated 25 January 2002 the complainant said:

*“In late August or September 1981 I attended an appointment with Dr M during which he did sexually violate me”* (emphasis added).

The letter of complaint is detailed and refers to the meeting the complainant and her mother had with Dr G the following day. The complainant recalls Dr G saying that the “touching of [the complainant] must have been accidental”. The complainant also said she told Dr G she knew what he was saying “... however under no circumstances, were [Dr M’s] actions accidental”.

13. The complainant was first interviewed by the Police on 7 June 2002. During that interview the complainant said she visited Dr M approximately 21 years ago (ie in approximately 1981) when she was 15 to 16 years old. She also said that she spoke to her boyfriend at the time and explained what had happened. It is appropriate to identify that former boyfriend by his initials (“MG”). The complainant also said that she told a subsequent boyfriend (“KS”) about her understanding of what had occurred.
14. The Police made efforts to contact MG and KS. In the meantime the complainant telephoned the Police and said she had spoken to MG and that he “at first said he could recall [the incident] very clearly, because he was there, but then he rang her back saying that he didn’t want anything to do with it, and would tell the Police that he can’t remember anything” (emphasis added).

15. On 24 June the investigating officer received a telephone call from MG who stated:

*“... I did tell the complainant that I would tell the Police that I cannot remember any such complaint, because that is the truth, I can’t remember it ... I told her I would try and remember but I cannot. I then rang her back to say that I cannot remember her ever saying anything like that to me.*

*[The complainant] is a liar, ... I feel very sorry for this doctor and his family. She is trying to cause trouble ....*

*I do not remember [the complainant] ever telling me about this doctor ... I can hardly remember my son’s birthday let alone something that supposedly happened 21 years ago.*

*[The complainant] only told me about the doctor and what she claims to have happened the other day on the phone. I did not know about it before this call.*

*I cannot help you, I am telling the truth when I say I cannot remember [the complainant] ever telling me something happened to her by the doctor.”*

16. The Police made contact with KS on 24 June 2002, who had also been spoken to by the complainant during the previous day. He told the Police he could recall the complainant saying something to him about a doctor but he could not remember what she said.

17. In his affidavits Dr M explained his deep concerns about:

17.1 “The excessive delays on the part of the complainant ... in bringing the complaint ...”

17.2 “The delays on the part of the CAC in investigating the complaint and bringing it to the point where the CAC determined to commence this disciplinary charge ...”

17.3 The fact that the first particular of the charge (concerning Dr M’s alleged failure to wear gloves during the vaginal examination) was not part of the complaint.

17.4 The delay experienced in obtaining full and complete disclosure of documents from the CAC.



17.5 The CAC's decision to bring the charge, particularly in light of the information disclosed by the CAC on 31 July 2003 which refers to the CAC's apparent concerns about inconsistencies in the complainant's evidence to the CAC.

18. It is not necessary to elaborate further on Dr M's evidence. In particular, the Tribunal has not found it necessary to comment on the CAC's investigation, or reach any conclusions about the concerns Dr M has raised about the CAC's processes and responses to the request for discovery.

### **Summary of CAC's Case**

19. The CAC filed an affidavit from the complainant. The contents of that affidavit can be summarised in the following manner.

20. The complainant explains she lodged her complaint with the Medical Council and the Police without the benefit of seeing her medical records.

21. The complainant and her mother met Dr G the day after the alleged incident. The complainant explains that "in making [her] complaint to Dr G within a day of the examination in question [she] believed at the time that [she] had done all [she] possibly could have done to bring [her] concerns to the attention of the appropriate people. [She] thought that as Dr M's superior, Dr G would do something about [her] complaint: [she] thought that it was mandatory that he did something."

22. The complainant suffered a number of distressing and unsettling events in her life which caused her concerns about Dr M to be placed "into the background" whilst the complainant dealt with other pressing issues in her life. The events which dominated the complainant's life were described in detail in her affidavit and can be succinctly recounted in this decision.

22.1 At the time of her consultation with Dr M in January 1983 the complainant had already been through a termination of pregnancy. She was living in a flat in xx with MG and had a 9 month old baby.

- 22.2 The complainant describes herself at this time as being “a shy, impressionable young woman who was very scared about the prospect of having to go through another termination.”
- 22.3 The week after the consultation with Dr M, the complainant split up with MG because she could not cope with what she had experienced when consulting Dr M.
- 22.4 The complainant’s parents separated in January 1983. Soon after separating from MG the complainant went to live with her father in xx. The complainant records she was focusing on bringing up her young son and trying to come to terms with the consequences of termination of two pregnancies, separation from MG and her “... loss of self respect after Dr M’s examination”.
- 22.5 The complainant’s father died on 14 September 1988. This added to the stress in the complainant’s life. This stress was further compounded when she learnt that her sister had had a sexual relationship with her then partner.
- 22.6 During the 1980’s and into the 1990’s the complainant battled anorexia and bulimia. She was not healthy and developed a dependency on cannabis and valium.
- 22.7 The complainant’s mother died in February 1997. She was found dead in what was initially thought to be suspicious circumstances. This was very distressing for the complainant who had by this time lost both her parents.
- 22.8 In 1999 the complainant was found to have abnormal cervical smears which resulted in surgery.
- 22.9 The complainant continues to suffer anorexia and bulimia. She also mentions in her affidavit that she suffered depression but that she did not seek treatment for this condition.

23. In January 2002 the complainant consulted her general practitioner in xx and told her of her concerns about what Dr M had done almost 20 years previously. An effort was then made to obtain the complainant's medical records from the xx. That effort was unsuccessful. The complainant became "angry and depressed" about the fact her records could not be found.
24. In mid February 2002 the complainant realised she needed help and so contacted the xx Rape Crisis Centre where she was seen by a counsellor. The complainant explains that "the counselling lady helped [her] to gain the courage and strength finally to make and pursue her complaint about Dr M to the Police and to the Medical Council".
25. In summary, the complainant explains that at the time she saw Dr M in January 1983 she was "... a very shy, impressionable and distressed young woman". Between 1983 and 2002 the complainant went from one distressing event in her life to another. She describes herself as being fragile and lacking the courage or strength to take her complaint further. She did not know she could make a complaint to the Medical Council until she went to the xx Rape Crisis Centre in February 2002.
26. The complainant has now matured. She is a grandmother and has initiated her complaint "for the sake" of her family and herself.

### **Legal Principles**

27. The legal principles applicable to an application to strikeout/stay of proceedings on the grounds of delay are well established.
28. In *W v R*<sup>1</sup>, Randerson J summarised the principles relevant to staying criminal charges on the grounds of delay. His Honour referred to *R v The Queen*<sup>2</sup>, *S v R*<sup>3</sup> and *R v Steedman*<sup>4</sup> when identifying the following principles:

---

<sup>1</sup> (1998) 16 CRNZ 33

<sup>2</sup> [1996] 2 NZLR 111

<sup>3</sup> Unreported, HC Hamilton T17/93, 10.9.93, Penlington J

<sup>4</sup> Unreported, HC New Plymouth T9/97, 14.11.97, Robertson J

- “(1) *That an order for a permanent stay of proceedings in the exercise of the Court’s protective inherent jurisdiction on the grounds of delay is only to be made in exceptional cases.*
- (2) *That the onus will normally be on the accused to show on the balance of probabilities that, owing to the delay, he will suffer prejudice to the extent a fair trial is now impossible.*
- (3) *That how the accused discharges that onus will depend on all the particular circumstances of the case.*
- (4) *That where the period of delay is long it can be legitimate for the Court to infer prejudice without proof of specific prejudice.*
- (5) *That ultimately the pertinent issue is whether despite the delay an accused can in the particular circumstances of the case still receive a fair trial.*
- (6) *The reasons for the delay and its consequences should be examined.*
- (7) *The merits of the case are relevant to the overall assessment.*
- (8) *There may arise two types of unfairness to the accused. Specific prejudice such as through the death or unavailability of a witness or general prejudice through long delay such that it would be unfair to put the accused on trial at all.*
- (9) *Logically, general prejudice in the sense described must be prejudice which is additional to that which the accused would have faced through tolerable delay.*
- (10) *In considering whether it is fair to put the accused on trial at all through general prejudice arising from long delay, the process will normally involve the balancing of the accused’s interests with those of the public and the complainant. Bearing in mind the starting point of no statutory limitation as to time, a case must be ‘truly extreme’ before the inherent jurisdiction can be invoked on this basis. That is, on the basis of general prejudice.*
- (11) *The Court should exercise its discretion in a flexible manner so as to secure the overall objective of ensuring the accused receives a fair trial despite delay, and, as Robertson J put it in R v Steedman ensuring the trial will be “permeated with the necessary integrity”.*

29. Randerson J also referred to the following observations of Tipping J in *R v The Queen* when he said:

- “1. *The accused is entitled to a stay if he can show that the delay has caused specific prejudice jeopardising a fair trial to the extent that there is a serious risk of a miscarriage of justice if the trial proceeds.*
2. *Even if he cannot show that, the accused is entitled to a stay if, in all the particular circumstances, the delay is so long and unjustified that it would be an abuse of process to put him on trial at all”.*

30. The leading cases on the principles applicable to strikeout/stay on the grounds of delay involved criminal prosecutions. Disciplinary proceedings are not criminal prosecutions<sup>5</sup>. Nevertheless the principles developed in the criminal courts concerning strikeout/stay on the grounds of delay have been adopted in the disciplinary arena.<sup>6</sup> The Tribunal and the High Court have recognised the Tribunal’s jurisdiction to strikeout/stay proceedings because of delay<sup>7</sup>. Both counsel accepted the Tribunal did have the jurisdiction to regulate its own process and to strikeout/stay the charge if it was satisfied that Dr M suffered either specific or general (presumptive) prejudice.

### **Specific Prejudice**

31. The application to strikeout/stay is based upon a concern Dr M will suffer specific as well as general prejudice in defending the charge. It is convenient to first examine the question of specific prejudice before addressing general prejudice in relation to the circumstances of this case.

---

<sup>5</sup> *Re A medical practitioner* [1959] NZLR 782; *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139, *Guy v Medical Council of New Zealand* [1995] NZAR 67

<sup>6</sup> *E v Medical Practitioners Disciplinary Tribunal and CAC* (Unreported, HC Wellington, 190/99 24.4.01, Goddard J); *Ford v Medical Practitioners Disciplinary Tribunal* (Unreported, HC Wellington, CP268/01, 18.2.02, Gendall J)

<sup>7</sup> *CAC v Phipps* 88/99/43C, *E v Medical Practitioners Disciplinary Tribunal and CAC* (supra), *Ford v Medical Practitioners Disciplinary Tribunal* (supra)

32. Dr M has raised a number of points when claiming he will suffer specific prejudice in defending the charge. The concerns he has raised relate to:
  - 32.1 The inability of Dr M to recall important details;
  - 32.2 The inability of Dr G to recall important matters ;
  - 32.3 The inability of MG and KS to recall important matters;
  - 32.4 The inability of the receptionist at Dr G's practice to recall important details;
  - 32.5 The death of the complainant's mother in February 1997.
33. In the Tribunal's view there is one crucial matter which strongly suggests Dr M will suffer specific prejudice in trying to defend the second and third particulars of the charge. That particular relates to the alleged sexual nature of the clinical examination and comments made by Dr M during the course of conducting the vaginal examination on 6 January 1983. The event which does raise a serious issue of specific prejudice is the fact the complainant's mother can no longer provide crucial evidence about key matters. Before explaining why the Tribunal believes that factor is likely to cause specific prejudice to Dr M the Tribunal will briefly explain why the other matters identified in Dr M's application do not pass the threshold to establishing specific prejudice in this case.
34. The fact Dr M, Dr G, MG, KS and the practice receptionist may have difficulty in recalling events said to have occurred 20 years ago are not factors which satisfy the criteria for specific prejudice when considering an interlocutory application to strikeout/stay the charge. Before the Tribunal could be satisfied that the witnesses in question do not have an ability to recall specific matters the witnesses would, in the circumstances of this case, need to give evidence to the Tribunal so as to enable the Tribunal to assess the extent (if any) to which the witnesses' memory have been impaired. If that course of action were taken it is possible the CAC's case would be significantly eroded. The Police job sheets reveal considerable scope for cross examination about whether MG was in the vicinity of the surgery on 6 January 1983, and whether or not he does have a recollection of the

complainant raising concerns with him. Similarly Dr G's evidence, if he were required to testify, might prove very helpful to Dr M as it is apparent from the Police records that Dr G believes the complaint is based on a misunderstanding. These observations illustrate why applications to strikeout/stay are rarely granted in circumstances where there has been no opportunity to assess and test the strength of the evidence.

35. As previously indicated, there is however, one important feature to this case which creates a specific risk of prejudice to Dr M in trying to defend the charge. Regrettably the complainant's mother cannot give evidence. Her recollection of what the complainant said immediately after the consultation on 6 January 1983, and her understanding of the discussions held with Dr G on 7 January 1983 would be crucial in assisting the Tribunal determining the second and third particulars of the charge. Similarly, her evidence, if it could be obtained, might be very significant in assisting Dr M defend the charge. Obviously it is now not possible to ascertain what the complainant's mother's evidence would have been if she were still alive. The fact she would have been a crucial witness, and is no longer alive, creates a serious risk of prejudice to Dr M in the circumstances of this case.
36. There is some similarity between the circumstances of this case and those considered by Randerson J in *W v R*. In that case serious criminal charges were stayed because of the death of an important witness, namely the complainant's grandmother. The Court noted:

*"It is probably a case where we will never know what she could have said but where the evidence is finely balanced such as in the present case, even minor assistance in evidence can tip the balance in favour of the accused by raising a reasonable doubt. The accused has been deprived of that possibility.*

*In these circumstances, I am satisfied that the death of the grandmother does create specific prejudice or at least a potential for specific prejudice which is significant in the circumstances of this particular case."*

These observations apply with equal force to the second and third particulars of the charge faced by Dr M.

### **General (Presumptive) Prejudice**

37. The Tribunal believes that the delays on the part of the complainant create general prejudice in relation to Dr M's ability to defend the first particular of the charge.
38. The first particular has not been struck out by the Tribunal on the grounds of specific prejudice because there is no suggestion the complainant's mother could have provided any assistance in determining whether or not Dr M conducted the vaginal examination on 6 January 1983 without wearing gloves.
39. In striking out the first particular of the charge on the grounds of general prejudice the Tribunal is conscious that it should be extremely cautious before invoking its jurisdiction to strikeout a charge on this ground. The reasons why the Tribunal has invoked its jurisdiction to strikeout the first particular of the charge on the grounds of general prejudice are:
  - 39.1 The complainant's delays in bringing this issue to the attention of the appropriate authorities has been so long that the passage of time which has elapsed in itself creates serious difficulties for Dr M in defending the charge. It is now likely to be almost impossible for Dr M to recall whether he did or did not wear gloves during the examination he performed on 6 January 1983. The difficulties which people have in recalling details of this nature are illustrated by the fact that in this case the complainant initially thought the consultation occurred in August or September 1981. The fact the complainant could be so mistaken about when the alleged events occurred demonstrates how difficult it is for any witness to accurately record the details of events said to have occurred so long ago.
  - 39.2 It would appear questions first arose about whether or not Dr M wore gloves when conducting the vaginal examination when the complainant was interviewed by the CAC. The complainant does not appear to have specifically raised this issue in her letter of complaint. That fact is in itself not determinative. It is however a consideration the Tribunal has taken into account in assessing the



overall prejudice which Dr M would suffer if he were required to defend this aspect of the charge.

39.3 Whilst it is very important that medical practitioners wear gloves when conducting vaginal examinations, if Dr M did not do so on this occasion then his omission would definitely not constitute disgraceful conduct in a professional respect. Indeed, if this issue were the only matter which the CAC were required to consider there is a strong likelihood it would be decided that because of the antiquity of the events in question there was little or no merit in referring that issue to the Tribunal as a disciplinary charge.

40. In reaching the conclusion that the first particular of the charge should be struck out because of a general prejudice the Tribunal has refrained from deciding whether or not the first particular could have been incorporated into the charge because it was not specifically referred to in the complainant's letter of complaint to the Medical Council. In *CAC v R*<sup>8</sup> the Court of Appeal raised doubts about whether matters not referred to in a letter of complaint could legitimately form the basis of a charge before the Tribunal. In the present case the Tribunal has assumed the CAC could have inquired into the question of whether or not Dr M wore gloves but has nevertheless dealt with the strikeout on the basis of general prejudice.

### **Reasons for Delay**

41. The Tribunal believes it important to convey to the complainant that it understands the reasons why she delayed complaining to the Police and the Medical Council. The Tribunal sympathises with the complainant and appreciates that it is not an easy matter for any woman to raise issues of alleged sexual abuse. The difficulties associated with pursuing matters of that kind has been compounded in this case because of the traumatic events which have dominated the complainant's life. The Tribunal is very aware of the complainant's circumstances and understands the reasons why she did not pursue her complaint until she started to receive counselling in 2002. The fact the charge has been

---

<sup>8</sup> CA 282/01, 10.6.02

struck out should not be construed as a criticism of the complainant. Nor should the complainant assume that her complaint has been struck out because of any doubts about the sincerity of her concerns. The charge has been struck out without the Tribunal reaching any conclusions about the facts.

### **Summary**

42. The Tribunal orders that the first particular of the charge be struck out on the grounds of general prejudice.
43. The Tribunal orders that the second and third particulars of the charge be struck out on the grounds of specific prejudice.
44. The Tribunal directs that nothing be published which identifies Dr M's name, or the fact that he is a general practitioner in xx.
45. The Tribunal directs that nothing be published which identifies the complainant.
46. The secretary is directed to publish a summary of this decision in the Medical Journal of New Zealand.

**DATED** at Wellington this 22<sup>nd</sup> day of October 2003.

.....

D B Collins QC

Chair

Medical Practitioners Disciplinary Tribunal