



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 259/03/110D

IN THE MATTER of the MEDICAL
PRACTITIONERS ACT
1995

AND

IN THE MATTER of disciplinary proceedings
against **THOMAS PAUL**
O'FLYNN medical practitioner
of Invercargill

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Dr D B Collins, QC (Chair)

Ms G J Fraser (Secretary)

Hearing held at Wellington on Friday 31 October 2003

APPEARANCES: Ms McDowell, Director of Proceedings

Mr A Lewis for Dr O'Flynn

Decision on the application for Telephone Conference or Video link

Introduction

1. Doctor O'Flynn is a registered medical practitioner. On 5 June 2003 the Director of Proceedings laid a charge with the Tribunal alleging, inter alia, Dr O'Flynn failed to adequately supervise Dr Fisher, a medical officer special scale in his capacity as clinician for Mr Mark Burton. It is not necessary to traverse the charge and the allegations.
2. The case against Dr O'Flynn is scheduled to commence in Invercargill on 24 November 2003.
3. On 30 October 2003 the Director of Proceedings filed an application to have the evidence of a witness heard by way of telephone conference or video link. The Director's application was ardently opposed by Mr Lewis who appeared as counsel for Dr O'Flynn when the application was heard on 31 October 2003.
4. The witness whose evidence is the subject of the application is Dr Salanguit, a psychiatrist who will be in the Philippines at the time the charge against Dr O'Flynn is to be heard.
5. At the end of the hearing on 31 October the parties were advised that the Director of Proceedings' application to have Dr Salanguit's evidence presented by way of video link was granted. No decision was made in relation to the alternative application to have the witness's evidence presented by telephone conference.

Jurisdiction

6. The Tribunal's jurisdiction to grant the application is derived from clause 5(1)(a) of the First Schedule to the Medical Practitioners Act 1995 ("the Act"). That clause enables the Tribunal to regulate its own procedure in such manner as it thinks fit.
7. Clause 5(2) of the First Schedule of the Act also permits the Tribunal to publish any rules of procedure that it might make. Clause 5(3) of the First Schedule emphasises the Tribunal's over arching duty to observe the rules of natural justice at any hearing.
8. On 13 August 2001 the Tribunal published a practice note concerning the procedure to be followed whenever a party seeks to have a witness give evidence by video link and telephone conference. That practice note was issued pursuant to clauses 5(1)(a) and 5(2) of the First Schedule of the Act. For convenience a copy of the practice note is **annexed** to this decision.
9. Clause 5 of the First Schedule, and the practice note refer to "the Tribunal". The hearing on 31 October was, by arrangement, conducted before the Chairperson of the Tribunal. Both parties accepted that in this case it was appropriate for the Chairperson to deal with the application on behalf of the Tribunal thereby avoiding the need to convene a full Tribunal.

Grounds for Application

10. The memorandum filed in support of the application explains Dr Salanguit has been subpoenaed to give evidence. She apparently left New Zealand in October 2003 and she will be travelling in the Philippines (at no fixed abode) during the week the charge is to be heard against Dr O'Flynn. Doctor Salanguit is scheduled to travel to the United States after she leaves the Philippines.
11. The Director of Proceedings submits that Dr Salanguit's evidence is "contextual". A copy of Dr Salanguit's evidence was made available at the hearing. Whilst there is a significant amount of "contextual" evidence in her brief, aspects of her evidence may

prove to be contentious and it is highly probable that Dr Salanguit will be cross examined about a number of matters in her brief of evidence.

12. The Director of Proceedings submits that because Dr Salanguit will be travelling in the Philippines at the time of the hearing the most practicable way for her evidence to be heard is by way of telephone conference.

Grounds of Opposition

13. In his submissions Mr Lewis firmly opposed the application. He submitted the Tribunal's hearings were quasi criminal and that in criminal trials key witnesses of fact are expected to give their evidence from the witness box so as to enable those required to determine facts to assess the witness's credibility.

Reasons for Decision

14. The Tribunal frequently receives evidence by way of video link. The Tribunal has found that video links are a very effective mechanism for witnesses to give evidence in circumstances where it is not possible or practicable for them to attend the Tribunal's hearings. Often the witnesses who give evidence by video link are busy medical practitioners who cannot be expected to travel to a hearing. The Tribunal is now quite used to hearing evidence from witnesses of fact, as well as experts, by way of video link. The quality of the evidence given by way of video link does not appear to have been compromised through the use of video link technology. An examination of the Tribunals' hearings over the past 12 months indicates that videoconference facilities were used in one in every four hearings (approximately).
15. Mr Lewis's reasons for opposing the application were firmly put. However his submissions did not overcome the following points:
 - 15.1 Whilst the criminal law provides very powerful guidance to the Tribunal in relation to aspects of its jurisdiction, the overriding thrust of the case law

makes it clear that medical disciplinary proceedings are civil, not criminal proceedings.¹

15.2 The Courts have signalled a willingness to accept evidence by video link, even in criminal cases. In *R v Accused*² Cooke P referred to the High Court's inherent jurisdiction to allow evidence to be given by closed circuit television and the need for Courts “.. to keep in the forefront Viscount Haldane LC's emphasis in *Scott v Scott*³ ... the paramount duty of the Court to adopt its procedure to ensure that justice is done. This adaptability should enable the adjustment of Court procedure to take advantage of technological advances.”

15.3 In *B v Dentists Disciplinary Tribunal*⁴ the High Court held the Dentists Disciplinary Tribunal had jurisdiction to allow evidence to be given to that Tribunal by video link. In that decision Williams J traversed the experience of overseas jurisdictions which allowed evidence to be given by video link. The Learned High Court Judge referred to the positive experiences of jurisdictions in Australia, Canada, parts of the United States and United Kingdom in allowing evidence to be given by video link and observed “*In view of this considerable body of opinion and experience there is no reason not to embrace this new technology.*” The evidence relied on in *B v Dentists Disciplinary Tribunal* has now been superseded by a further decade of experience of using video links to facilitate the giving of evidence in Courts and before Tribunals. This experience has established that video link facilities can greatly assist Courts and Tribunals in hearing evidence from persons whose evidence might not otherwise be able to be heard.

¹ *Re A Medical Practitioner* [1959] NZLR 782, *Gurisinghe v Medical Council of New Zealand* [1989] 1 NZLR 139, *Guy v Medical Council of New Zealand* [1995] NZAR 67

² [1992] 1 NZLR 257

³ [1919] AC 417

⁴ [1994] 1 NZLR 1995

- 15.4 Unlike criminal courts, the Tribunal has powers similar to those of a Commission of Inquiry when determining what evidence it should receive. Subject to its overriding duty of observing the rules of natural justice, the Tribunal “... *may receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not it would be admissible in a Court of law*”⁵ (emphasis added). This clause is moulded on s.4(b)(i) Commissions of Inquiry Act 1908. In *B v Dentists Disciplinary Tribunal* Williams J said the language of that section was “*broad enough to encompass the jurisdiction to receive oral evidence by means of video link*”. The Tribunal’s powers to receive evidence are broader than those enjoyed by regular Courts and accordingly, whilst assistance is derived by referring to the principles and procedures for receiving evidence in regular Courts, the Tribunal ultimately has a discretion to accept evidence that may not be admissible in regular Courts, provided of course the principles of natural justice are not breached by the Tribunal.

Natural Justice

16. As has been previously emphasised, the Tribunal’s primary duty is to ensure it adheres to the principles of natural justice when hearing the charge against Dr O’Flynn.
17. The Tribunal proceeds on that basis that if Dr O’Flynn is prejudiced in the conduct of his defence by allowing Dr Salanguit’s evidence to be given by video link then the Tribunal could be exposed to the challenge that it was breaching the principles of natural justice.
18. Mr Lewis was not able to advance any grounds upon which it could be said Dr O’Flynn would be prejudiced by enabling Dr Salanguit’s evidence to be given by video link.

⁵ Clause 6(1) First Schedule Medical Practitioners Act 1995

19. If, as Mr Lewis indicates, the evidence of Dr Salanguit is to be challenged and she is questioned (possibly at length) then that can be achieved by video link. If Dr Salanguit's credibility and reliability are put in issue then the Tribunal will do its best to resolve those issues after assessing Dr Salanguit by video link.

20. As noted in *B v Dentists Disciplinary Tribunal* it is difficult "...to see how the system that is to be employed would prevent the assessment of the demeanour of the witness because ... the witness will be seen giving [her] evidence to the same extent, or to no significantly lesser extent than if present in a Court or hearing room". If the Tribunal is not able to resolve issues of credibility and reliability by receiving Dr Salanguit's evidence by video link then Dr O'Flynn will not be disadvantaged. The Tribunal will not draw conclusions adverse to Dr O'Flynn if it is unable to draw any conclusions about Dr Salanguit's credibility or reliability because of deficiencies in the technology employed to convey her evidence.

21. In the circumstances of this case the Tribunal believes it is impracticable for Dr Salanguit to be required to travel to Invercargill to give her evidence. The Tribunal also believes there does not appear to be any basis for believing Dr O'Flynn will be prejudiced by allowing Dr Salanguit to give her evidence by video link.

22. The parties' attention is drawn to the procedures to be followed for evidence to be taken by video link set out in Schedule 1 to the practice note **attached** to this decision. The practice note is similar to the requirements stipulated by the High Court in *B v Dentists Disciplinary Tribunal* before the Dentists Disciplinary Tribunal could receive evidence by video link. The parties are expected to adhere to that procedure in this case.

Telephone Conference

23. No decision has been made in relation to the Director of Proceedings alternative application to allow Dr Salanguit to give her evidence by telephone conference. It will be apparent from this decision the Tribunal would strongly prefer Dr Salanguit's evidence be given by video link rather than by telephone conference.

DATED at Wellington this 3rd day of November 2003

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D B Collins QC

Chairperson

Medical Practitioners Disciplinary Tribunal