MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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PUBLICATION OF THE NAME OF THE DOCTOR, COMPLAINANT AND WITNESSES IS PROHIBITED	**DECISION NO:**	281/03/116D
	IN THE MATTER	of the Medical Practitioners Act 1995
		-AND-
	IN THE MATTER	of a charge laid by the Director of Proceedings pursuant to Section 102 of the Act against K medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Ms P Kapua (Chair)

Dr R W Jones, Dr J M McKenzie, Dr A D Stewart,

Mr G Searancke (Members)

Ms K L Davies (Hearing Officer)

Mrs G Rogers (Stenographer)

Hearing held at Auckland on Monday 22, Tuesday 23, Wednesday 24 and Thursday 25 March 2004

APPEARANCES: Mr M R Heron and Mr J Tamm for the Director of Proceedings

Mr A H Waalkens and Ms C Garvey for Dr K.

The Charge

1. The Director of Proceedings designated under Section 15 of the Health and Disabilities Commissioner Act 1994 has reason to believe that a ground exists entitling the Tribunal to exercise its powers under Section 109 of the Medical Practitioners Act 1995 ("the Act"). The notice of the charge states:

"Take notice that pursuant ss102 and 109 of the Medical Practitioners Act 1995, the Director of Proceedings has reason to believe that a ground exists entitling the Tribunal to exercise its powers against [Dr K] and charges that between 1 August 1999 and 31 July 2000, [Dr K] being a registered medical practitioner, acted in such a way that amounted to disgraceful conduct in that [he] had an intimate and sexual relationship with [his] patient A."

Factual Background

2. Dr K acquired the practice of Dr B of whom Mrs A was a patient. Mrs A first consulted Dr K on 13 March 1996. He saw her again in 1997 and 1998 when she was diagnosed with ovarian cysts. As a result the possibility of surgery was discussed and in August 1999 a decision was made to have a laparoscopic tubal ligation and IUCD removal. That operation took place on 23 August 1999.

3. On 31 August 1999 Mrs A's stitches from the surgery were removed by Dr K.

4. Following that consultation there was numerous telephone calls between Dr K and Mrs A from September through to December 1999.

5. There were also a number of meetings that took place between them over this time in his consulting rooms and generally on a Thursday or a Saturday towards the end of the day. There are no records of these meetings.

6. Telephone communication and meetings continued through the first part of 2000 although at times Dr K was away and contact was curtailed.

7. In April 2000 Dr K returned to xx and some time around July or August 2000 he and his family went on a ski holiday.

8. Around the middle of the year, Dr K advised Mrs A that he could not continue with their relationship.

9. Dr K and Mrs A continued to have contact for the remainder of 2000 albeit not with the same intensity. On 29 November 2000 Mrs A had a further operation for a D&C and hysteroscopy undertaken by Dr K.

10. In December 2000 Dr K commenced counselling sessions with C.

11. In February 2001 Mrs A engaged D Limited, a private investigation firm to find out whether Dr K was having an affair with another woman. There was still telephone contact and the occasional meeting but they were general discussions relating to whether Dr K was involved in other relationships.

12. On 6 September 2001 E, the private investigator, rang Dr K posing as a friend of Mrs A. During the course of that conversation Dr K admitted to having a sexual relationship with Mrs A.

13. On 3 November 2001 Dr K and Mrs A met in the car park at xx Hospital and Mrs A taped the conversation. The tape was subsequently damaged and restorative work was carried out to retrieve the taped conversation.

In part of the retrieved conversation, Dr K stated:

"I have never ever been in a relationship with anybody outside my marriage other than you."[1]

14. A complaint was made to the Medical Council by E and on 30 August 2002 a formal complaint was made to the Health and Disability Commissioner by Mrs A's solicitor.

Evidence for the Director of Proceedings

15. Mrs A, in her evidence, stated that at the time of the operation on 23 August 1999 there was a change in the relationship between her and Dr K. She stated that he made comments about her being beautiful and linked hands prior to the surgery. This change continued the next day when he visited her at the hospital and again when he removed her stitches on 31 August 1999.

16. On 2 September 1999 Dr K telephoned her with the new contact details for Dr F, a breast and general surgeon. Dr K invited Mrs A to his rooms that day and they met at around 4.30pm in the afternoon. They talked of their attraction to each other although there was no physical contact.

17. From that time there was regular telephone contact between Dr K and Mrs A. Mrs A stated that Dr K generally rang her about twice a day, usually at around 8 am and again at around 3 pm.

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[1] BOD, p78

18. They met again on 9 September 1999 and there was physical contact. Meetings occurred again on 14 and 16 September between 5.00 and 6.00 pm. Although they were physically intimate with each other, sexual intercourse did not occur.

19. During the first three weeks of October Dr K and his family were out of the country in xx and xx and there was very little telephone contact during that time. Dr K was away again during a weekend in October but from the limited telephone records that were obtained (and these did not include Dr K's cell phone, home phone, private or mobile phone or Mrs A's cell phone prior to 26 February 2000) there is contact between them on approximately 20 days from 15 September through to 24 December. Given that Dr K was out of the country for most of October, that is a significant number of telephone calls and on a number of days, there were two or three calls made during the day.

20. On 20 November 1999 Mrs A states that they first had sexual intercourse which occurred on a Saturday afternoon. It was Mrs A's evidence that they had full intercourse on about six occasions from November 1999 until around July 2000.

21. Mrs A's evidence was that they both expressed their love for each other and she considered that she had fallen in love with him and that those feelings were reciprocated.

22. The meetings always took place at Dr K's consulting rooms and it was Mrs A's evidence that they had sexual intercourse either on one of the couches in his room or on the floor with the door locked.

23. Towards the end of 1999 Mrs A suggested that she should go to another xx because of their relationship. Dr K recommended Dr G and Mrs A met with her in December 1999 but did not feel comfortable with her and so remained as a patient of Dr K.

24. According to Mrs A, when Dr K returned from his ski holiday around July or August 2000, he called her to his rooms on a Saturday afternoon, sat her down and stated that he could no longer continue to have a physical relationship with her. She was shocked and distraught but Dr K had told her that he had realised that he could not continue the relationship as he stood over his mother's grave in xx and that it was not fair to his wife.

25. While the physical relationship ended, Dr K and Mrs A continued to have telephone contact throughout 2000 and Mrs A sought his help medically when she had heavy bleeding in November 2000. Dr K recommended a hysterectomy and Mrs A sought a second opinion. On 29 November 2000 Dr K carried out a hysteroscopy and dilation and curettage.

26. Following the surgery Mrs A asked Dr K why he had ended the relationship and she stated that his response was that he did not wish to talk about it.

27. Mrs A engaged the services of a private investigator because she believed that Dr K was having an affair with his receptionist, H or another patient that she had seen leave Dr K's rooms on one occasion when she had waited to talk to him. She wanted the private investigator to follow him and to watch him to see whether her suspicions were correct.

28. In April 2001 Mrs A had a discussion with Dr K that she had initially intended to tape but had not carried it through. She said that in that discussion she talked about how she did not believe that he was telling the truth about why he had ended their relationship.

29. On 3 November 2001 Mrs A did tape a discussion between herself and Dr K while she sat in his car in the xx Hospital car park. The tape was subsequently damaged by her dog and she sought the assistance of Mr I to salvage the recording.

30. Around 5 November 2001 Mrs A received a telephone call from Dr K's counselor who expressed her concern for Dr K and his emotional state and suggested that Mrs A should leave him alone.

31. Mrs A acknowledges that she had fallen in love with Dr K and was distraught by his change of heart and wished to know why it had occurred and did try to talk to him on a number of occasions about it.

32. In early 2001 Mrs A became suspicious that Dr K was involved in an affair with his receptionist or with another patient. She engaged E from D Limited and wanted confirmation that he was having an affair. A surveillance operation began but according to Ms E and her assistants, it was difficult, because of the nature of Dr K's practice and the fact that he shared offices with a number of other doctors, to determine whether Mrs A's suspicions were correct. As a response to that the private investigators encouraged Mrs A to tape a conversation with Dr K and although arrangements were made for that on 26 April 2001 Mrs A could not carry it through.

33. E had personally become concerned about the relationship that she had been told had occurred between Dr K and Mrs A. She contacted the Medical Council who advised her that strong corroborative evidence would be needed to pursue a complaint against the doctor. It is clear from the telephone records that Mrs A was in constant contact with D and Ms E stated that, for her own sake, she wished to speak to Dr K to get his side of the story in relation to Mrs A's allegations.

34. Therefore on 6 September 2001, Ms E posed as a friend of Mrs A and rang Dr K at around 7 pm in the evening. She spoke to Dr K on a speaker phone and her assistant, Mr J, was present. Dr K seemed to them to be relieved to be talking to somebody about the situation and made the comment that *"A is stalking me, she is everywhere I go…"*. Both Ms E and Mr J went on to state that Dr K said that how he had been seduced and that he was a victim. Ms E then told Dr K that Mrs A had told her that she had had sex with him in his office and that he was her doctor. Ms E stated that his reply was:

> *"Oh yes, yes I know, but it only happened a few times, I love my wife and told A it had to stop."*[2]

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[2] Para 26, Brief of Evidence of E

35. All in all the conversation took about 20 minutes with Ms E stating that she would be in touch with him again. Ms E reported her conversation to Mrs A the following day.

36. Mrs A then carried through with the taping of a conversation with Dr K which occurred on 3 November 2001. The discussion centered around whether Dr K had ended the relationship between them because of another woman. The tape was played to Mrs A's friend, L and E. However, Mrs A's dog removed the tape from her handbag and it was severely damaged. Mrs A took that tape to Mr I who attempted to retrieve part of the tape. Significant portions of the tape are inaudible but some parts of the conversation were able to be transcribed.

37. At one point in the discussion Dr K said:

"I have never ever been in a relationship with anybody outside my marriage other than you. That's all I can say …"[3]

38. Two days later Mrs A received a call from Ms C, who introduced herself as Dr K's counselor. Mrs A was unable to take the call at the time and rang her back from a friend's house later. Mrs A asserts that Ms C indicated her concern for Dr K and his emotional state and warned that she should not do anything more about this matter.

39. There was still some sporadic contact but in January 2002 Dr K stated that he wished to stop all contact with Mrs A.

40. A friend of Mrs A, L, gave evidence that at some time around November 1999 Mrs A had disclosed to her that she was in a relationship with Dr K. Mrs L confirmed that arrangements to meet were made following a phone call from Dr K and that they met and had sex on occasions in his rooms. It was Mrs L's understanding that Mrs A was in love with Dr K and that she was shocked and upset when Dr K told her he no longer wished to have a physical relationship with her.

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[3] Bundle of Documents, p78

41. Three investigators from D Ltd gave evidence confirming a meeting between Dr K and Mrs A on 26 April 2001 and the telephone conversation between Ms E and Dr K on 6 September 2001. Ms E confirmed that her company had been engaged by Mrs A to confirm or otherwise her suspicion that Dr K was deceiving her and had commenced another relationship with somebody else. From her engagement in February 2001, Ms E had been in contact with the Medical Council because of her concerns that Dr K was Mrs A's doctor at the time of the relationship. Ms E stated that as a result of information she had received she had decided to contact Dr K and pose as a friend of Mrs A. In cross examination Ms E was asked whether she had lead Dr K into making the confession for the purposes of assisting A to move on and she replied:

> *"Oh no, I didn't do this for A. A didn't ask me to make this call, I made this call for me, I needed to know. I wasn't going to continue with A, although I felt she was telling me the truth, but I didn't know her so I made that call for me not for her and I certainly didn't lead him into it."*[4]

42. The final witness for the Director of Proceedings was I who explained the process of restoring the damaged remains of the tape recording. His evidence was that his instructions were to recover as much as possible of the male voice on the recording.[5]

Evidence for Dr K

43. Dr K gave evidence that his meetings in his room with Mrs A were informal counselling sessions to deal with her low self-esteem and personal problems.

44. The informal counselling was undertaken by Dr K because he considered that he was a good listener and would therefore be providing some benefit. These informal counselling sessions were not kept in the appointment diary and neither was a charge made for them.

45. Dr K admitted that he may well have held Mrs A's hand as she went into surgery but it

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[4] Transcript p118, lines 19-23
[5] Transcript, pp170-171, lines 27-

was for no other reason than reassurance. Dr K's position was that at the appointment following the surgery on 31 August 1999 Mrs A made an *"improper approach"* to Dr K. He was, however, unable to indicate to the Tribunal the nature of that improper approach.

46. It was Dr K's evidence that the numerous telephone calls were predominantly in response to calls from Mrs A. However the amount of records that overlap do not indicate that that was always the case.

47. Dr K did confirm that Thursday was his on-call day and that would appear to account for the number of phone calls on that day and the fact that arrangements were often made at the last minute to meet and that at least on one occasion Dr K took a telephone call during this session.

48. Dr K contended that the period from May to July 2000 was the period in which he had determined that he would not continue with the informal counselling sessions. He stated to the Tribunal that while he had been in xx in about April 2000 and had visited his mother's grave he realised that he was not assisting Mrs A in her counselling sessions and he resolved at that point to end the counselling sessions.

49. It was Dr K's evidence that he had referred Mrs A to another xx *"because of her apparent reliance on me and expressly her comments regarding us having a sexual relationship."*[6] There were however, no notes to support that contention either on the file or in respect of the reporting letter from the other xx.

50. Dr K contended that his reason for ending the informal counselling was because of the overtures made to him by Mrs A and that he found himself in a situation that he could not extricate himself from.

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[6] Brief of Evidence of S N K, para 54

51. Dr K confirmed that he then treated Mrs A in November 2000 but said that he did so at her insistence because she had not found another xx that she was comfortable with.

52. Once Dr K had made the decision, in his evidence, to cease the informal counselling he acknowledged that he continued to have contact with Mrs A but stated that that was essentially in response to her calls.

53. In December 2000 Dr K consulted his general practitioner with a view to being referred for counselling because of the difficult situation with Mrs A. He was referred to C who he first consulted on 18 December 2000.

54. It was Dr K's evidence that he has, since the age of 11, suffered from periodic bouts of depression. He is currently on medication for depression.

55. Dr K considered that Mrs A was stalking him as she tried to speak to him as he left his rooms in February 2001 and he set out for the Tribunal the number of occasions on which he had seen Mrs A in the area. It was as he was leaving his premises on 9 February 2001 that Mrs A stopped him and accused him of having sex with the patient he had just consulted. Dr K then stated that it was at this particular meeting that Mrs A "*first accused me of having had sex with her*"[7]

56. Dr K confirms that on a number of occasions after that Mrs A continued with her accusations that Dr K was having an affair with another woman. Dr K stated that he denied these accusations to her and that in denying the sexual relationship Mrs A threatened to report him or harm herself if he ever "*talked her down*"[8] to anybody.

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[7] Statement of Evidence S N K, para 62
[8] ibid, para 63

57. Dr K's recount of the telephone conversation with Ms E on 6 September 2001 was that he did not agree with many of the statements in her evidence. He confirmed that she had stated that she was Mrs A's best friend and that he was relieved at the thought of a friend of Mrs A's being sufficiently concerned to contact him.

58. It was his evidence that he considered that Ms E may have been able to stop Mrs A from pursuing him.

59. Dr K told the Tribunal that Ms E had been extremely persuasive, had stated that she had never seen Mrs A so vengeful and that she was concerned that Mrs A may do something to hurt herself as she had left her husband. Dr K then stated:

> *"'M said that if I agreed to admit that I have had sexual relations with Mrs A then this in her view would enable Mrs A to move forward and she had no doubt that Mrs A would desist in her threats and behaviour."*[9]

60. On that basis Dr K stated that he therefore made a false confession regarding a sexual relationship with Mrs A.

61. On 3 November 2001 Mrs A telephoned Dr K and asked to see him urgently and they met in the car park at xx Hospital. It was during this meeting that Mrs A taped the conversation and Dr K agrees that a large part of the discussion centered around Mrs A's questions as to whether he was having an affair with another woman. That conversation also concerned Mrs A's view that Dr K had not been forthcoming in information about a reception job that she was interested in applying for.

62. Dr K stated that after a lot of badgering and threats from Mrs A he made the confession later on in the meeting. He stated that:

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[9] ibid, para 68

"I knew from experience that if I agreed to Mrs A's assertions/threats that she would stop."[10]

63. On 9 January 2002 Dr K returned a call from Mrs A after receiving advice from Ms C and advised her that he did not wish to speak to her again. Dr K heard nothing further until the complaint was lodged. Since that time he has had contact with Mrs A **(not for publication by order of the Tribunal)**.

64. Dr K also submitted to the Tribunal a number of character references from colleagues. They are generally supportive of his work and the manner in which he conducts himself and his practice.

65. The next witness for Dr K was N who was the theatre nurse at the time that Mrs A underwent her operation at xx Hospital on 23 August 1999. In essence her evidence stated that she did not hear Dr K make any statements about Mrs A prior to her going into theatre or observe that Dr K linked hands with her and that she did not in fact recall Mrs A at all. She stated that she would have recalled Mrs A if such events had taken place.

66. The next witness was C who is a clinical psychologist from xx and although not registered as a clinical psychologist in New Zealand, she practices as a psychotherapist.

67. Ms C's evidence included notes of her consultations with Dr K from 18 December 2000 and were corroborative of the evidence as to the relationship between Dr K and Mrs A as asserted by Dr K.

68. It is clear that during those sessions Ms C was advised by Dr K of the accusations relating to the physical relationship made by Mrs A and she had set out a number of strategies for him to deal with contact with her.

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[10] Brief of Evidence of S N K, para 73

69. In her statement of evidence, Ms C stated:

"Dr K consistently denied to me that he had had a sexual relationship with the patient."[11]

She did however qualify that statement by saying that Dr K did not consistently deny having a sexual relationship but that he consistently stated to her that Mrs A had accused him of leading her on and of having a sexual relationship.

70. Ms C did make a call to Mrs A on 5 November 2001 and she did confirm that she had expressed to Mrs A how distressed Dr K was and that she had advised him to have no further contact with her.

71. Ms C was questioned at length as to whether she was aware of the Code of Conduct in respect of expert witnesses and although she was not aware she did acknowledge that in terms of the role she had had as Dr K's psychotherapist, the basis of the information she had obtained from him and her actions on his behalf made her an advocate for Dr K rather than an independent expert witness.[12]

72. The final witness for Dr K was Dr O a registered psychiatrist who Dr K's general practitioner had referred Dr K to in August 2002.

73. Dr O confirmed that Dr K had a major depressive illness and was on medication. It was conceded by Mr Waalkens that Dr O's evidence as to the possibility of false admissions was not specific to Dr K's situation.

Legal Position

74. The test for disgraceful conduct is outlined in *Brake v Preliminary Proceedings Committee* [1997] 1 NZLR 71 where the High Court (Tompkins, Cartwright and Williams JJ) held:

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[11] Statement of Evidence K L C, para 7

"The test for 'disgraceful conduct in a professional respect' was said by the Court of Appeal in Allinson v General Council of Medical Education and Registration [1894] 1 QB 750, 763 to be met:

'If it is shewn that a medical man, in 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…'.

It is apparent from this test, and from the later cases in which it has been adopted, that it is an objective test to be judged by the standards of the profession at the relevant time.

Mr Vickerman referred to the decision of the Privy Council in Felix v General Dental Council [1960] AC 704. The council was concerned with a charge of infamous conduct in a professional respect. It said that to constitute infamous conduct there must be some "element of moral turpitude or fraud or dishonesty" in the conduct complained of. Mr Vickerman submitted that the test for "disgraceful conduct" should be the same and that moral turpitude, fraud or dishonesty must be proved.

We do not accept that submission. In Doughty v General Dental Council [1987] 3 AllER 843 at p847, the Privy Council adopted the following passage from the judgement of Scrutton LG in R v General Council of Medical Education and Registration of the United Kingdom [1930] 1 KB 562, at p569:

> *"It is a great pity that the word 'infamous' is used to describe the conduct of a medical practitioner who advertises. As in the case of the Bar so in the medical profession advertising is serious misconduct in a professional respect and that is all that is meant by the phrase 'infamous conduct'; it means no more than serious misconduct judged according to the rules written or unwritten governing the profession" [emphasis added].*

In our view the same test should be applied in judging disgraceful conduct. In Doughty the Privy Council pointed out that Lord Jenkins' observation in Felix was in the context of a case in which dishonesty was very much the issue.

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

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[12] Transcript, p268, lines 4-5

conduct, s4(2)(B)(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 colleague as constituting professional misconduct …

75. The standards of the profession are set out in the New Zealand Medical Council's *"Statement on Sexual Abuse in the Doctor/Patient Relationship"*. That statement says:

"Sexual behaviour in a professional context is abusive. Sexual behaviour comprises any words or actions designed or intended to arouse or gratify sexual desires.

The doctor must ensure that every interaction with a patient is conducted in a sensitive and appropriate manner, with full information and consent.

The Council condemns all forms of sexual abuse in the doctor/patient relationship for the following reasons:

- *The ethical doctor/patient relationship depends upon the doctor creating an environment of mutual respect and trust in which the patient can have confidence and safety.*
- *The onus is on the doctor to behave in a professional manner. Total integrity of doctors is the proper expectation of the community and of the profession. The community must be confident that personal boundaries will be maintained and that as patients they will not be at risk. It is not acceptable to blame the patient for the sexual misconduct.*
- *The doctor is in a privileged position which requires physical and emotional proximity to the patient. This may increase the risk of boundaries being broken.*
- *Sexual misconduct by a doctor risks causing psychological damage to the patient.*
- *The doctor/patient relationship is not equal. In seeking assistance, guidance and treatment, the patient is vulnerable. Exploitation of the patient is therefore an abuse of power and patient consent cannot be a defence in disciplinary hearings of sexual abuse.*
- *Sexual involvement with a patient impairs clinical judgement in the medical management of that patient.*

The Council will not tolerate sexual activity with a current patient by a doctor…

The Council rejects the view that changing social standards require a less stringent approach. The professional doctor/patient relationship must be one of absolute confidence and trust. It transcends other social values and only the higher standard is acceptable.

The Medical Council believes the issue of the power differential between patient and doctor means that consent of the patient is not a defence in disciplinary findings of sexual abuse. It may become an issue in consideration of penalties. Each case must be examined in relation to the degree of dependency between patient and doctor and the duration and nature of the professional relationship.

Definitions

For the purposes of disciplinary action, the Council has defined sexual abuse under three categories:

- *Sexual impropriety*
- *Sexual transgression*
- *Sexual violation."*

76. The Tribunal was also directed to the Medical Council of New Zealand's "Guidelines for Doctors Ending A Professional Relationship" which states:

"Where a doctor decides to terminate the professional relationship with a patient, the following steps are recommended. The process should ensure that the end of the professional relationship is clear, so that the patient no longer has any expectations of continuing care from the doctor.

The doctor should complete all of the following steps:

- *Tell the patient that the professional relationship is ended*
- *Note this termination in the patient's records*
- *Refer the patient to another doctor of the patient's choice (or in the case of a specialist, back to the usual general practitioner).*

- *Send a letter of referral or reporting letter and all relevant information about the patient to that new doctor or general practitioner."*

77. The burden of proof is on the Director of Proceedings. The standard of proof is the civil standard, that is, the balance of probabilities.

78. The Tribunal accepts the submission that the gravity of the particular matter will depend on the facts and the circumstances determined by the Tribunal.

The Decision

79. The Tribunal has carefully considered all of the evidence presented to it and acknowledges that it is faced with a situation where the complainant, Mrs A and the respondent, Dr K differ significantly in their evidence as to the nature of the relationship.

80. Mrs A underwent a relatively straight forward operative procedure in August 1999 and there was no evidence in Dr K's records that would indicate the existence of any psychological problems or any matters that she may have required counselling for. In fact, in the notes of his consultation following the surgery on 31 August 1999, Dr K merely notes that there should be a review in three months time.

81. The Tribunal does not accept that what occurred between Dr K and Mrs A was counselling.

82. There was no evidence of the need for counselling and Dr K's explanation of the counselling lacked credibility. When asked what the nature of Mrs A's problems that required counselling were, Dr K responded:

> *"I can't remember in great detail but they were relating to her impending menopause; she felt she wasn't as attractive as she had been, she spoke to me about career choices, also a little about her marriage, I remember two things – one thing: she found her husband controlling so she spoke about that, those sorts of things, in broad terms."*[13]

[13] Transcript, p236, lines 2-6

In essence it was Dr K's evidence that he was a good listener and he did not seem to have any appreciation of the nature or content of the counselling.

83. In essence, the intensity of the telephone calls, the after hours meetings that were not the subject of appointment or record or payment and Mrs A's diary notes confirming the meetings and the calls all point to an intense infatuation that developed into an affair.

84. In respect of the referral to another xx in 1999, the Tribunal had no evidence to confirm Dr K's explanation that he had referred Mrs A. In his evidence he states that at the end of 1999 he became concerned about her attachment to him and therefore referred her to another xx and yet he continued with the meetings with her.

85. While the transcript of the taped conversation was limited it is clear that Mrs A was accusatory and wanted Dr K to admit to her about affairs he was having with other women.

86. It is clear that his admission that his only relationship outside his marriage had been with her was in order to appease her accusations of other relationships and does not appear, on the face of it, to be based on pressure from Mrs A for him to admit to a sexual relationship with her.

87. Dr K's admission to Ms E does appear to have been made in an unguarded moment and on the basis of possibly having an ally to deal with his problem with Mrs A.

88. The Tribunal is of the view that from September 1999 Dr K and Mrs A began an affair that continued through until around July 2000 when Dr K chose to discontinue the physical relationship but continued to have telephone conversations with Mrs A.

89. It is also clear that Mrs A did not readily accept the ending of their relationship and appears to have continued contact on the basis that Dr K may in fact, continue their relationship in the future.

90. It appears to the Tribunal that following the surgery that Dr K performed on Mrs A in November 2000, Dr K then became aware of Mrs A's hopes for the relationship to resume at which point he sought the assistance of Ms C.

91. Mrs A, in her endeavour to understand how the relationship had ended, engaged the services of private investigators to find out if Dr K had ended the relationship because he had entered a new relationship with another woman.

92. In the Tribunal's view the evidence of Ms E was corroborated by the private investigators and by her friend L. The facts also suggest that the intensity of the contact was not that of a normal doctor/patient relationship but of an affair.

93. Dr K's actions are exacerbated by his decision to undertake further surgery on her in November 2000. By his own admission that was well after the time that he was aware of her attachment to him.

94. As Mr Heron pointed out at the start of his cross-examination, Dr K was able to deny the relationship in what was, for him, the most stressful situation he had been in, in his life. It is difficult for the Tribunal to accept that in a conversation in a car with Mrs A and in a telephone conversation with Ms E he felt pressured to the point of admitting to something he states was untrue.

95. It was also Dr K's evidence to the Tribunal that Mrs A had psychological problems, some of which gave rise to his assertion that he undertook informal counselling. If Dr K did in fact believe that Mrs A had psychological problems then the situation he entered into with her is even more serious. As Dr K agreed, if a doctor had a sexual relationship with a patient that he thought had psychological problems, then that would be disgraceful conduct.[14]

96. The Tribunal does not accept Mr Waalkens submission that the absence of notes is an

[14] Transcript, pp 182-183, lines 24-33

indication of Dr K's innocence. In this situation the Tribunal is of the view that this is precisely the case where accurate and detailed records are essential particularly if these were informal counselling sessions and Dr K believed that Mrs A had formed an unhealthy attachment to him.

97. In respect of the false admissions Mr Waalkens referred to Dr K's psychiatric history, particularly his depression. There was no evidence before the Tribunal that would suggest that a major depressive illness would necessarily result in a false admission.

98. In relation to the corroboration of Dr K's evidence by Ms C, it is noted that Ms C acknowledged that she never asked Dr K whether he had had an affair with Mrs A and took the information that was offered to her from him.

99. It is clear that throughout the period from September 1999 until December 2000 Mrs A was a patient of Dr K's and he remained responsible for her care.

100. In the Tribunal's view this is a very serious case, particularly as the intimate and sexual relationship took place within the consulting rooms of Dr K. The Tribunal has very grave concerns about any form of informal counselling as described by Dr K taking place within the context of his xx practice.

101. As stated in ***Brake*** the applicable test for disgraceful conduct is relatively straight forward and uncomplicated in that the doctor's conduct must be judged against the standards of the profession at the relevant time.

102. To that end Dr K's conduct in engaging in a sexual and intimate relationship with Mrs A while he was her medical practitioner would be reasonably regarded by his professional peers as disgraceful and dishonourable – that is serious misconduct according to the rules of the profession.

103. The Tribunal agrees that the Medical Council's policy on doctor/patient sexual relationships is expressed in unequivocal terms. All sexual behaviour in a professional context is abusive. The onus is on the doctor to behave in a professional manner at all times.

104. In terms of the Medical Council's categorisation of sexual abuse, Dr K's sexual relationship with Mrs A falls into the most serious of the three categories: sexual violation. It is to be noted that sexual violation is defined in the statement as *"doctor/patient sexual activity, whether or not initiated by the patient."*

105. The reasons for such a policy are fundamental. The ethical doctor/patient relationship depends upon the doctor creating an environment of respect and trust in which the patient can have confidence and safety. In the context of the relevant statutory regime, the primary purpose of which is stated to be to ensure the health and safety of members of the public generally, not just specific patients, it appears to this Tribunal that it must approach its task on the basis that misconduct of the kind alleged in this case constitutes the most serious breach of fundamental professional obligations.

106. On that basis, it may properly be categorised as disgraceful conduct unless there is evidence presented to the Tribunal which would make an adverse finding at that level unfair or unreasonable.

The Tribunal is satisfied that no such evidence has been presented in this case.

Orders of the Tribunal

107. The Tribunal orders are as follow:

(1) The charge laid against Dr K is established and he is guilty of disgraceful conduct;

(2) The Director of Proceedings is to lodge submissions as to penalty not later than ten (10) working days after the receipt of this Decision;

(3) Submissions as to penalty on behalf of the respondent are to be lodged no later than ten (10) working days thereafter.

108. The Tribunal has made permanent orders prohibiting publication of the complainant's name and that of Mrs L and Mr J. There is in place an interim order prohibiting publication of the respondents name and the Tribunal asks that counsel include in their submissions on penalty, submissions as to whether or not this order should be made permanent.

DATED at Auckland this 22nd day of April 2004

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P Kapua

Deputy Chair

Medical Practitioners Disciplinary Tribunal