

IN THE PRIVY COUNCIL
APPEAL NO. 3 OF 2003

IN THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

MILES ROGER WISLANG

Appellant

- and -

MEDICAL COUNCIL OF NEW ZEALAND

First Respondent

- and -

MEDICAL PRACTITIONERS DISCIPLINARY
TRIBUNAL

Second Respondent

- and -

COMPLAINTS ASSESSMENT COMMITTEE
OF THE MEDICAL COUNCIL OF
NEW ZEALAND

Third Respondent

CASE FOR THE FIRST AND THIRD
RESPONDENTS

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Appellant in person

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1 Chronology

- 1.1 The factual background behind this appeal is not disputed. The Court of Appeal accepted and relied on the chronology below. Significant dates are highlighted.

<i>31 March 1994</i>	Appellant's Annual Practising Certificate ("APC") expires	
<i>1 July 1996</i>	Medical Practitioners Act 1995 ("the 1995 Act") comes into force after much publicity, education within the profession etc	
<i>April 1997</i>	Complainant, Andrew Inglis, complained to Health and Disability Commissioner ("HDC")	
<i>November 1997</i>	HDC decided to take no action in respect of the complaint	
<i>September 1998</i>	Medical Council receives complaint from Inglis: <ul style="list-style-type: none">▪ in respect of appellant's treatment; and▪ for practising medicine without current APC	
<i>13 May 1999</i>	Complaints Assessment Committee ("CAC") investigated complaint and brought charge of professional misconduct	Vol II P176 HC7 P82 L7
<i>11 June 1999</i>	Appellant advises Tribunal he formally admits the charge and that he only wished to be heard on penalty	Vol II P180 HC 8 P82 L19

**First & Third
Respondents'
Case
Record**

<i>27 August 1999</i>	Appellant applies to Medical Council for Annual Practising Certificate (“APC”) for year ending 31 March 2000	HC10 P82 L28
<i>1 September 1999</i>	Council advises appellant that as he has not held an APC during last three years application must be referred to the Council	Vol II P400
<i>3 September 1999</i>	Tribunal advises that charge has been amended and that appellant should take this into account when preparing submissions on penalty and that he may also wish to seek legal advice	HC11 P83 L3 Vol II P185
<i>7 October 1999</i>	First Tribunal hearing	HC14 P83 L30 Vol II P203-231
	Hearing adjourned and appellant interim suspended until final determination	HC14-16 P83 L43 Vol II P230, 254-259
<i>4 November 1999</i>	After correspondence and submissions from appellant and advice from a legal assessor, Tribunal rules (per Minute) that the amended charge should be further amended to as it was when first brought (reference to breach of s109(1)(f) therefore deleted and original charge reinstated	HC18 P88 L8 Vol II P295
<i>11 November 1999</i>	Interim suspension expires	HC23 P89 L30
	Tribunal conducts further hearing and finds appellant guilty of professional misconduct and orders:	Vol II P308-320 HC25-28 P90-96 Vol II P331-351
	<ul style="list-style-type: none"> ▪ that he be suspended for two months, effective from 11 November 1999 	

**First & Third
Respondents'
Case
Record**

	<ul style="list-style-type: none"> ▪ pay fine of \$8,500 ▪ contribute 35% to total costs of \$52,289 ▪ be censured 	
<i>9 December 1999</i>	Appellant appeals to District Court against Tribunal order in respect of quantum of costs only	HC29 P96 L3 Vol P353-358
<i>11 January 2000</i>	Two month suspension expires	
<i>7 February 2000</i>	Appellant provides further information (CV and affidavits from Drs Gilbert and Wilson) to Council in support of application for APC	
<i>2 March 2000</i>	<p>Council advises appellant that it proposes to issue APC subject to conditions</p> <ul style="list-style-type: none"> ▪ that he restricts independent practise to hair transplants ▪ that he nominates a general overseer who will agree to be his mentor 	HC32 P96 L10 Vol II P 404
<i>29 March 2000</i>	Appellant makes submissions in respect of the APC and proposed conditions	HC33 P96 L14 Vol II P407-428
<i>17 April 2000</i>	Appellant applies for APC for the year 2000	
<i>27 April 2000</i>	District Court dismisses appellant's appeal	Vol 11 P388
<i>10 August 2000</i>	Council conducts hearing into appellant's application; appellant represented by counsel	HC35 P96 L17 Vol II P430
<i>20 September 2000</i>	Council resolves to issue APC subject to ...	HC36 P96 L19 Vol II P437

conditions

- that he restrict his independent practice to hair transplants and the teaching of anatomy and bio-surgical research
- that he nominate a general overseer who will agree to be his mentor

*18 October
2000*

Appellant issues judicial review proceedings; except in respect of quantum of costs awarded by Tribunal, appellant does not exercise right to appeal against other parts of Tribunal's order or the Council's decision to impose conditions

1 July 2001

Oversight of all general registrants becomes mandatory

2 **The facts**

2.1 The appellant, Dr Wislang, is a medical practitioner based in Auckland. At the relevant times he held general registration. He specialises in the field of hair transplant surgery. In the course of this practice, the appellant practised medicine without an APC for a period of approximately four years commencing 1 April 1994 to late-April 1998 (ie his last valid APC expired on 31 March 1994).

2.2 During September 1998 the Council received a complaint concerning the appellant. The Council referred the complaint to a CAC pursuant to s87 of the 1995 Act, investigated the complaint and the CAC laid before the Tribunal a disciplinary charge of professional misconduct. Practising without an APC is deemed to be professional misconduct under s109(2) of the

CA3 P120 L30

**First & Third
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Record**

- 1995 Act. The appellant admitted this charge. On 30 August 1999, this charge was amended by the CAC to add a second alternative charge of practising medicine outside the extent permitted by or not in accordance with conditions of his registration or APC, contrary to s109(1)(f) of the 1995 Act by virtue of s110(2) of the 1995 Act. This amendment exposed the appellant to the risk of having his name removed from the register.
- CA3 P121 L10
CA4 P121 L15
CA5 P122 L5
- 2.3 The Tribunal originally convened to hear the disciplinary charge against the appellant who was not represented at Auckland on 7 October 1999. In the course of his evidence at the hearing the appellant variously admitted that his book-keeping was “hopeless”, his failure to get an APC was “reprehensible” and that his practice in an administrative sense had been “chaotic”. The hearing was adjourned because of difficulties arising out of the amendment of the charge. Although the appellant could not practise medicine lawfully at that time (having no APC), the Tribunal decided to interim suspend the appellant pursuant to s104 of the 1995 Act in the interests of public safety and to maintain the status quo, pending determination of the charge against him, it being of the view that the appellant “has demonstrated a lack of insight, judgment and ability or organise his affairs”.
- Vol II P214 L27
Vol II P215 L3
Vol II P218 L7
CA6 P122 L16
Vol II P258
CA18 P126 L1
- 2.4 By a minute dated 4 November 1999 the Tribunal determined not to proceed with that part of the charge alleging a disciplinary offence under s109(1)(f). The charge was again
- CA7 P122 L26

amended with the result that the charge against Dr Wislang was as originally framed and which he had previously admitted.

- 2.5 The hearing then resumed on 11 November 1999. At that hearing the appellant again admitted practising medicine without a current APC but did not admit this amounted to professional misconduct despite the deeming provision. The Tribunal adjourned and gave its final decision on 10 December 1999. The Tribunal found the appellant guilty of professional misconduct and made the following orders pursuant to s110 of the 1995 Act:
- CA8 P123 L1
- CA8 P123 L1
CA22-23 P127-128
- a. that the appellant's registration be suspended for a period of two months from 11 November 1999;
 - b. that he be censured;
 - c. imposing a fine of \$8,500.00; and
 - d. ordering the appellant to pay 35% of the total costs of investigating and prosecuting the disciplinary charge against him.
- 2.6 The appellant exercised his right of appeal to the District Court under s116 of the 1995 Act only in respect of the Tribunal's award of costs against him. This appeal was determined by a reserved decision of Judge Cadenhead dated 27 April 2000. The appellant did not appeal against any other order of the Tribunal. The appeal was unsuccessful. The appellant did not exercise his right to bring a second appeal in the High Court on questions of law pursuant to s121 of the 1995 Act.
- Vol II P388
CA9 P123 L12
- 2.7 Concurrently with those proceedings, the appellant applied to the Council for an APC for the year commencing 1 April 2000.
- CA10 P123 L19
CA36-37 P132 - 133

The Council's decision is contained in a letter dated 20 September 2000. The Council approved the appellant's application, subject to two conditions:

- a. that he restrict his independent practice to hair transplants and the teaching of anatomy and bio-surgical research; and
- b. that he nominate a general overseer to also agree to be his mentor.

- 2.8 Oversight was described by the Council in its letter of 20 September 2000 as being there to guide and help, "*a doctor providing oversight is like a mentor, although has not only a collegial duty but also a legal duty to monitor the performance of their colleague*". Vol II P439
- 2.9 The appellant has not exercised his right to appeal to the District Court under s116(1)(a) of the 1995 Act in respect of the Council's decision.
- 2.10 The appellant has not pursued his application for a new APC and is not currently registered to practise medicine. From 1 July 1996 the appellant would have been subject to oversight irrespective of the Council condition: s20(1) 1995 Act. However the appellant has at no time received or uplifted an APC under the 1995 Act. Vol I P48 L10
CA11 P124 L1
- 2.11 The 1995 Act has been repealed with effect from 18 September 2004 and replaced with the Health Practitioners Competence Assurance Act 2003 ("HPCA Act"). The HPCA Act which covers all health practitioners is largely based on the 1995 Act. The requirement for oversight is carried through into the HPCA Act where it is defined as meaning "*professional support and assistance provided to a health practitioner by a professional*

peer for the purposes of professional development”.

- 2.12 The appellant seeks that all orders of the Tribunal, except the order that he be censured, be declared unlawful and invalid, and that the second condition imposed on his APC by the Council also be declared unlawful and invalid.
- 2.13 By accepting the Tribunal’s order censuring him, the appellant necessarily accepts that he is guilty of professional misconduct and has been properly and lawfully convicted. Similarly, by accepting the first condition imposed on his APC, he necessarily accepts that the Council could lawfully exercise its powers under s54 of the 1995 Act.
- 2.14 Both the period of interim and final suspension imposed by the Tribunal have expired. In any event the appellant could not practise medicine even if he had not been suspended as at the time he did not hold a current APC.

3 Statutory Context

- 3.1 On 1 July 1996 the Medical Practitioners Act 1995 came into force. This repealed the Medical Practitioners Act 1968. The 1995 Act brought about a number of significant changes to the practice of medicine in New Zealand, two of which related to APCs and the assessment of competence.
- 3.2 Under the 1995 Act when a complaint against a medical practitioner was notified to the HDC the Council could take no action in respect of that complaint until it received advice from the HDC that no action would be taken (s86 of the 1995 Act).
- 3.3 Once the Council received a complaint the President was required to refer the complaint to a CAC (s87 of the 1995 Act). A CAC was appointed by the President (s88 of the Act) and it

then investigated the complaint pursuant to ss89-94 of the 1995 Act.

- 3.4 One of the determinations that a CAC could make was that the complaint should be considered by the Tribunal (s92 of the 1995 Act) in which case it was required to frame an appropriate charge and lay it before the Tribunal (s93(1)(b) of the 1995 Act). The CAC prosecuted the complaint before the Tribunal (s102(4) of the 1995 Act).
- 3.5 The Tribunal was established and its powers prescribed pursuant to ss96-112 of the 1995 Act. It was a specialist tribunal comprising medical practitioners and lay persons. The Chair was a barrister. The Courts readily acknowledge the expertise of such tribunal's and their reluctance to interfere with their decisions. See the Full Court in *Brake v Preliminary Proceedings* [1997] NZLR 71 at p 77.

“2. That [the Court] ‘ought to give due and proper weight to the expressions of opinion of Tribunals composed largely of medical men’: *Ongley v Medical Council of New Zealand* (1984) 4 NZAR 369, 375, citing the statement of Walsh J in *Ex Parte Meehan; Re Medical Practitioners Act* [1965] NSWR 30, 39: ‘although this Court must exercise its own judgment upon the case, it is right for it to give weight to the decision made by a Tribunal composed mainly of medical men whose knowledge and experience qualify them to evaluate the seriousness of the conduct of which the appellant was found guilty, and to assess the appropriate method of dealing with it. We should be slow to interfere with this judgment upon such a question’.”

- 3.6 The principal purpose of the 1995 Act was specified in s3 to be:

- “(1) The principal purpose of this Act is to protect the health and safety of members of the public by prescribing or providing for mechanisms to ensure that medical practitioners are competent to practise medicine.
- (2) Without limiting the generality of subsection (1) of this section, this Act seeks to attain its principal purpose by, among other things,—
- ...
- (b) Providing for the registration of medical practitioners, and the issue of annual practising certificates;
- ...
- (e) Providing for the disciplining of medical practitioners.”

3.7 This provision was new to the 1995 Act; the 1968 Act did not specify the principal purpose.

3.8 Under the 1968 Act it was an offence for a person registered as a medical practitioner to practise medicine under the style or title of surgeon or doctor without an Annual Practising Certificate:

“Annual Practising Certificates –

- (1) Subject to the provisions of this section, every person who is registered as a medical practitioner or conditionally registered commits an offence and is liable on summary conviction to a fine not exceeding \$100 for each day during which the offence continues who, not having obtained from the Secretary to the Council under this section a certificate which is then in force to the effect that he is registered under this Act, practises medicine or surgery, or any branch of medicine or surgery, under the style or title of a physician, surgeon, doctor, licentiate in medicine or surgery, bachelor of

medicine, or medical practitioner, or under any name, title, addition, or description implying that he holds any diploma or degree in medicine or surgery, or in any branch of medicine or surgery, or is otherwise specially qualified to practise medicine or surgery, or any branch of medicine or surgery.”

3.9 In the 1995 Act, s142 made it an offence (liable on summary conviction to a fine not exceeding \$10,000) to act in breach of s9 which provides:

“9. **Practice of medicine—**

No person shall practise medicine under the title of a medical practitioner (as defined in section 2 of this Act) unless he or she holds—

(a) Both—

(i) Probationary registration, general registration, or vocational registration; and

(ii) A current practising certificate.”

3.10 Section 109(2) provides:

“(2) For the purposes of subsection (1) of this section, a medical practitioner is guilty of professional misconduct if that medical practitioner,—

...

(b) Being the holder of probationary registration, general registration, or vocational registration, practises medicine while not holding a current practising certificate.”

3.11 Section 139 of the 1995 Act provides:

“Every reference to any enactment to a medical practitioner or registered medical practitioner or duly qualified medical practitioner shall, unless a different intention appears, be deemed to be a reference to a person registered under the Act who is practising in accordance with any conditions of his or her registration or practising certificate.”

3.12 Sections 51-59 set out the procedures to be followed in respect of APCs. An important and fundamental change from the 1968 Act was that under s52 the grant or renewal of an APC was not automatic and the Registrar was required to refer an application to the Council where doubts arose as to the practitioner’s professional competence or where the practitioner had not held an APC within the three years immediately preceding the date of application or had not engaged in the practice of medicine within the same three year period. Where an application was referred to the Council pursuant to s52, the Council could only grant an APC when it was satisfied that the practitioner was competent to practise medicine in accordance with his registration (or any conditions imposed on the APC).

3.13 The annual renewal of the APC under the 1995 Act was a new tool available to the Council to ensure the ongoing competence of all practitioners.

3.14 Additional new tools in the 1995 Act included the competence provisions (ss60-65 of the 1995 Act) which entitled the Council at any time to review a practitioner’s competence and where necessary develop a competence programme; and the fitness to practise medicine provisions (ss76-82) which required practitioners to provide notice to the Council where it was believed a practitioner was not fit to practise medicine due to some mental or physical condition.

3.15 In addition, s20 of the 1995 Act included for the first time the

requirement that all practitioners practise medicine subject to oversight (or a re-certification programme for those vocationally registered). From 1 July 2001 the oversight requirement was mandatory.

- 3.15 Competence, fitness to practise and oversight were not defined in the 1995 Act, it being left to the specialist body (the Medical Council) to determine and formulate policy to cover these aspects to ensure that the health and safety of the public is protected.

4 The Appellant's case

- 4.1 The appellant alleged in the High Court that the decisions of the Tribunal in respect of its interim decision to suspend his registration and in respect of its final orders and its decision of 10 December 1999 and the decision of the Council to impose the oversight condition on his APC were all subject to reviewable errors. It is not disputed that the decisions that the Tribunal and Council were exercises of statutory powers for the purposes of the Judicature Amendment Act 1972 and therefore subject to judicial review.

- 4.2 In the High Court for the *interim suspension order* the appellant alleged that:

HC41 P99 L28
Vol 1 P63 L21

- a. it was based on the amended charge which was invalid;
- b. it was based on the proposition that a medical practitioner who is not legally represented before the Tribunal demonstrates a lack of insight and judgment;
- c. it was based on the proposition that a medical practitioner who made an error of statutory interpretation in respect of charges laid before the

Tribunal demonstrated a lack of insight and judgment.

4.3 As to the Tribunal's *substantive decision* the appellant alleged that the Tribunal: HC57 P104 P1
Vol 1 P65 L25

- a. erred in law in holding that a person who is not legally represented before the Tribunal was imprudent and not sensible;
- b. in finding that the appellant failed to make adequate preparation for the hearing was unsupported by any evidence and/or was invalidated by drawing on his decision not to be legally represented at the Tribunal's hearing;
- c. erred in holding that the appellant was not a "medical practitioner" in terms of the Misuse of Drugs Act 1974, the Medicines Act 1981 and the 1995 Act;
- d. erred in misdirecting itself as to its own reasons for re-amending the charge against the appellant;
- e. erred in its award of costs in that:
 - i. it failed to remove from calculations the time and effort by all relevant parties in respect of the amended charge on which no finding of guilt was made;
 - ii. the finding of a "deluge" of material between the hearings was not supported by any evidence;
 - iii. the award was based in part on the erroneous conclusion that a medical practitioner who is not legally represented had not given "any

adequate preparation” for a hearing.

4.4 As to the *Council condition decision* the appellant alleged in respect of the second condition only that the Council: Vol1 P68 L5

- a. Erred in its understanding of “competence” for the purposes of s54(1) of the 1995 Act by including a practitioner’s “attitudes and judgment”;
- b. In that its decision was materially based on the Tribunal’s decision which itself was invalid;
- c. Erred in finding that the appellant had demonstrated a lack of overall ability to organise his affairs.

These allegations were effectively repeated in the Court of Appeal.

5 High Court decision

5.1 The High Court decision of Wild J noted the appellant sought to have all penalties except censure and one of the two proposed conditions on his APC quashed, recited the factual background in detail and then dealt with each of the appellant’s alleged errors of law. HC3 P81 L28
HC4-40 p82

5.2 In respect of the *interim suspension order* Wild J found:

- a. There was merit in the argument that as the interim suspension had expired it was pointless to declare that decision invalid but as the appellant’s submission was that that decision influenced the subsequent decisions under challenge he would consider the three errors alleged; HC44 P100 L11
- b. As to the first error, it was not the amended charge that HC 46-49 p100 L28

influenced the Tribunal but the appellant's acknowledgement that he had practised medicine, treated patients and prescribed and administered drugs and medicines for 4 years without an APC together with his explanations for not obtaining an APC (hopeless book-keeping, neglect) which gave rise to public safety concerns which led to interim suspension;

- c. As to the second alleged error, he found the nub of the Tribunal's concern was not that the appellant was not legally represented but his general professional disorganisation and his failure to grasp the seriousness of what he had admitted doing; HC51 P101 L30
- d. As to the third alleged error, he found that it was not misinterpretation by the appellant of the legislation that concerned the Tribunal but the fact that he had been practising for a number of years without a certificate as a result of professional disorganisation and neglect coupled with a failure to appreciate how serious that was; HC52-53 P102 L13
- e. He rejected the *Edwards v Bairstow* argument and concluded that a Tribunal acting judicially but not appreciating the invalidity of the charge could not responsibly have done other than suspend the appellant in the interim. HC 55 p103 L8

5.3 As to the *substantive decision* of the Tribunal Wild J:

- a. Found there was no need to address again the first two errors alleged; HC58 P104 L26
- b. As to the third alleged error, rejected the argument that the appellant could practise medicine due to the fact of HC 59-61 p105 L23

his registration alone and found that under the 1995 Act entitlement to practise medicine is determined by both registration and the holding of a current practising certificate (s9 of the 1995 Act) and that in the Medicines Act and the Misuse of Drugs Act the emphasis is on entitlement to practise medicine and that those who supplied drugs and medicines to the appellant believed he was entitled to practise medicine and he held himself out as being so entitled;

- c. In respect of costs, found that the Tribunal's reasons for amending the charge do not reflect those in the Minute and that this was relevant to the issue of costs;
- d. Accepted that the Tribunal's decision was not fair in that it seemed to blame the appellant for not first raising the invalidity of the amended charge nor acknowledge that it was only detected and corrected as a result of the appellant's submissions which followed the adjournment on 7 October 1999 (described as a "deluge"); HC66 P107 L5
- e. Found further that if the decision of the Tribunal was wrong in point of law then the remedy was appeal and not judicial review;
- f. And that as the appellant challenged the correctness of the Tribunal decision as opposed to the manner in which it was made the challenge to the award of costs could not succeed. HC 68-73 p107
L15

5.4 As to the *Council condition decision Wild J*:

- a. Found that "competence" should not be limited to clinical competence and subject to reasonableness the HC75-77 P109 L3

definition and bounds of competence is a matter for the Council;

- b. As to the second alleged error, found there is no error in the Council taking into account the Tribunal's decision; HC78 P109 L26
- c. As to the third alleged error. found that there may be some substance to some of the concerns raised by the appellant but that there was sufficient material to justify the Council in imposing the condition that there be a general overseer who agreed to be the appellant's professional mentor and that irrespective of the appellant's concerns Council was well justified in imposing the conditions. HC81 P110 L21
HC82 P110 L33
HC83 P111 L8

6 Court of Appeal decision

6.1 The Court of appeal found in respect of the *interim suspension order*:

- a. That the amended charge merely added a new element, either cumulatively or in the alternative, and the substance of the original charge remained and was a valid charge which was not invalidated by the amendment; and that therefore the Tribunal was entitled to interim suspend the appellant pursuant to s104 of the 1995 Act; CA 15 P125 L1
- b. Rejected the argument that the reasons for making the interim award relied on the appellant's unawareness when pleading guilty that the amended charge incorporated s109(1)(f);
- c. Noted that the Tribunal had referred to the appellant's CA16 P125 L8

admission that he had not held a practising certificate during the period April 1994 to April 1998 and had carried on his medical practice notwithstanding that he was aware that he had not obtained an APC including performing hair transplant operations, advertising his medical services, treating patients, prescribing and administering drugs, obtaining prescription medicines, and other drugs necessary for this practice in the knowledge that the pharmacists and drug suppliers thought he had an APC and that he was legally entitled to obtain the drugs and medication;

- d. Noted that the Tribunal had noted the appellant had applied to the Council for an APC so that he could recommence practice on his own account; CA17 P125 L26
- e. Referred to the Tribunal's determination that the appellant had demonstrated a lack of insight, judgment and ability to organise his affairs so that it was necessary and/or desirable to interim suspend him having regard to the health or safety of the members of the public; and
- f. Found that there was more than an ample basis for the Tribunal to form that view and that in the public interest there must be an interim suspension order and that it would be most unlikely that the appellant's confusion over the nature of the charge made any difference to the Tribunal's position. CA19 P126 L8

6.2 In addition it is submitted that the Court of Appeal (and High Court) was correct in respect of the *interim suspension order* for the following reasons among others:

- a. The Court of Appeal correctly found that the substance

of the original charge remained regardless of the amendment. The appellant had accepted that he had practised medicine without an APC over the 1994-98 period and pleaded guilty to the charge of professional misconduct. Irrespective of the amendment it was at all times accepted that a disciplinary offence had been committed and that the amended charge did not affect the validity of the original charge.

- b. The appellant has argued that the Tribunal's decision to interim suspend him was caused or influenced by its finding that his lack of legal representation reflected poorly on his attitudes and judgments. The Tribunal did not make such a finding. Even if it did, such a finding would be a finding of fact which the Tribunal was entitled to make on the evidence and one which was not a material influence on its decision to impose interim suspension. It is inconceivable that the Tribunal would not have ordered interim suspension but for the appellant's decision to appear without counsel: *Poananga v State Services Commission* [1985] 2 NZLR 385]. .
- c. Practising without an APC (and therefore outside the formal structure of 1995 Act) was conduct which posed a risk to the safety of the public. Further the appellant had indicated that prior to the 7 October 1999 hearing he had applied to the Council for an APC and that he intended to practise medicine on his own account. These risks were correctly identified by the Tribunal and confirmed by the High Court and Court of Appeal
- d. Under the Accident Rehabilitation and Compensation Insurance Act 1992 ("the ARCI Act") (which was

repealed from 1 July 1999 by the Accident Insurance Act 1998) cover was provided for personal injury resulting from medical misadventure. Section 5 of the ARCI Act defined medical misadventure as meaning "*personal injury resulting from medical error or medical mishap.*" "Medical error" was defined in section 5 as meaning "*the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances ...*". "Registered health professional" is defined in s2 ARCI Act as meaning: "*(a) Any person who holds a current annual practising certificate issued by the Medical Council of New Zealand ...*"

- e. By practising for four years without a current APC the appellant was potentially depriving his patients of cover under the ARCI Act. The appellant was seemingly unaware of this.
- f. Irrespective of the amendment to the charge it was inevitable that the appellant would be interim suspended.

6.3 As to the *substantive decision* the Court of Appeal:

- a. Noted that the appellant accepted that he was properly found guilty and censured, that a fine would be appropriate and that it was proper that an order for payment of costs be made but that he disputed the quantum of the fine and costs and the two months suspension order; CA20 P126 L23
- b. Referred to the Tribunal's reasons for ordering suspension; CA 22 p127 L8

- c. Found that the basis for the appellant's objection to the suspension order was that the Tribunal had taken into account an allegedly irrelevant consideration by referring to the potential consequences for innocent third parties, rejected the argument that a person registered as a medical practitioner under the 1995 Act is a medical practitioner for the purposes of the Medicines Act and the Misuse of Drugs Act irrespective of not holding an APC;
- d. Found by reference to s9 and 139 of the 1995 Act that whether a person is entitled to practise medicine is determined by registration and the holding of a current; APC CA25-26 P128 L32
- e. Referred to concessions by the appellant's counsel that by practising without a current APC the appellant placed pharmacists and drug companies as well as the appellant's patients (under the Accident Rehabilitation and Compensation Insurance Act 1992) in some jeopardy; CA27-28 P129 L18
- f. In respect of the review of the quantum of the fine and costs noted that judicial review is discretionary and will be refused when an appeal is more appropriate: *Wislang v Medical Practitioners Disciplinary Committee*; noted that judicial review proceedings are not consistent with the timeframes envisaged by ss116 and 118 of the 1995 Act; noted that the appellant has unsuccessfully appealed the costs decision to the District Court and then sought judicial review; CA 31-32 P130 L12
- g. Found that the matters raised by the appellant were factual matters which should be the subject of appeal not judicial review. CA 32 p130 L29

- 6.4 In addition it is submitted that the Court of Appeal (and High Court) was correct in respect of the *substantive decision* for the following reasons among others:
- a. The Court of Appeal found that the appellant could not lawfully practise medicine without a current APC. Section 142(1)(a) of the 1995 Act provides that it is a criminal offence punishable by a fine of up to \$10,000 to practise medicine otherwise than in accordance with section 9.
 - b. The Medicines Act and the Misuse of Drugs Act proceed on the basis that the practitioner is entitled to practise medicine, ie, in prescribing medicine the practitioner is acting lawfully. The consequences for third parties was potentially serious. Section 18(2) of the Medicines Act provides that no person may sell “*any prescription medicine otherwise than under a prescription given by a practitioner*”. This must refer to a valid and lawful prescription. Contravention of s18(2) is deemed an offence under s18(6). This prohibition was breached by every pharmacist who dispensed a prescription written by the appellant after his APC expired on 31 March 1994
 - c. The appellant was not legally entitled to order and receive the medicines that he did during the 4 years that he practised medicine without an APC. As found by the Tribunal this demonstrated a lack of judgment and raised serious public interest issues.
 - d. The appellant seemed to have no comprehension of the risk he was placing his patients and third parties in either at the time or subsequently.

- e. The appellant had been notified of the amended charge one month prior to the 7 October 1999 hearing and the option of seeking legal advice was expressly brought to his attention. The Tribunal found that had he taken the prudent step of seeking advice or alternatively researching the relevant provisions himself, then issues arising out of the amended charge could have been dealt with at the first hearing. On the evidence it was therefore open to the Tribunal to find as a fact that a person in such circumstances who has not sought legal representation before the Tribunal or carried out any relevant research is imprudent and not sensible.
- f. The appellant's challenge in respect to the quantum of costs in the High Court and Court of Appeal is in the same terms as argued at the appeal in the District Court, summarised by Judge Cadenhead in his judgment: Vol II P389 L16

“However the appellant contends that the Tribunal did not make a sufficient allowance or discount for costs arising from the extension of the hearings caused by the necessity to deal with the amended charge made against him. The appellant submits the substitution and subsequent withdrawal of the amended charge resulted in increased costs both to him and the Tribunal”.

Under section 116 of the 1995 Act an appeal to the District Court is by way of rehearing. The appellant's appeal was dismissed.

6.5 As to the Council condition decision the Court of Appeal:

- a. Referred to the Council's decision of 20 September 2000 noting that competence included not only whether a doctor was practising safely and had an acceptable level of knowledge and skills (including procedures and communication) but also the doctor's attitudes and judgment; CA36 P132 L6
- b. Noted that the appellant accepted the following factors were relevant to his application to an APC: his administrative organisational failure in not obtaining APCs from 1994 to 1998; his unawareness of how this failure would impact on his patients under the ARCIA legislation; and his unawareness of the representation in law that he held an APC when treating patients and dealing with wholesale and retail pharmacists; CA37 P133 L1
- c. Referred to *Ghosh v General Medical Council* and confirmed the same approach is appropriate in New Zealand; CA40 P134 L9
- d. Noted that competency is related to the principal purpose of protecting the health and safety of members of the public and encompasses any conduct which the Council reasonably considers may directly or indirectly affect their health and safety and that the issue must be viewed broadly; CA40 p134 L10
- e. Considered the Council was entitled to have regard to an applicant's ability to administer his or her practice CA40 P134 L26

when deciding on an APC;

- f. Noted that s60(2)(b) supports the view that competence encompasses more than possession of skill and knowledge and must involve all aspects of the conduct of the practice; CA41 p15 L1
 - g. Concluded that the Council's power to determine competency is subject to two controls: first, the matter of concern must relate to public health and safety; and secondly, the Council's determination and action must not be unreasonable; CA42 p135 L8
 - h. Observed that even if the three specific criticisms by the Council were not soundly based there was abundant evidence including the appellant's admissions for the Council to conclude that there was a lack of overall ability to organise a medical practice and that such disorganisation could impact upon the health and safety of his patients and indirectly affect his clinical performance. CA43 P135 L12
- 6.6 In addition it is submitted that the Court of Appeal (and High Court) was correct in respect of the *Council condition decision* for the following reasons among others:
- a. The Court of Appeal found that competence "*should not be restricted in the way suggested by the appellant.*" The Council is a specialist body comprised largely of medical practitioners (s124 of the 1995 Act). It is charged with protecting the public interest through, among other things, issuing APCs and reviewing competence (section 3 of the 1995 Act). Section 54(1) requires the Council when considering an application for an APC to satisfy itself as to the

competence of a practitioner to practise medicine. Consistent with this, section 60(2)(b) requires the Council when conducting a review of a practitioner's competence to consider not only whether that practitioner has the appropriate skill and knowledge but also whether that practitioner's practice of medicine meets the required standard. This is sufficiently broad to encompass matters such as a practitioner's insight, attitudes and judgment. The reference in section 60(2) to the Council's "opinion" is clear indication that Parliament intended it to have a wide degree of discretion to determine what is or is not relevant to competence.

- b. Similarly section 62(3)(f) provides that the Council when setting a competence programme may require a practitioner to do "*anything else that the Council considers appropriate*". Again, Council is given wide discretion when determining what is or is not relevant to competence. The practice of medicine includes many things other than and in addition to diagnosis, treatment and prescription. For example, public health medicine does not involve diagnosis, treatment and procedure. These would be excluded under the appellant's restricted approach to "competence".
- c. In finding that there was abundant evidence upon which to conclude that the appellant lacked overall ability to organise a medical practice the Court of Appeal was referring to the reasons provided by the Council in paragraphs 4.4-4.6 of its decision of 20 September 2000. It correctly finds that the three specific criticisms in paragraph 4.7 of the Council

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decision relating to change of address, payment of costs, and indecision about place of work were merely examples of the Council's concern. As accepted by counsel at the Court of Appeal these examples would "probably" not have materially influenced Council's decision.

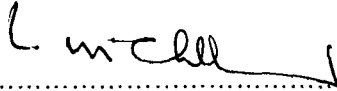
- d. Before the Council, the appellant's counsel accepted that conditions relating to the appellant's administrative systems in future practice and to meet his lack of knowledge of the implications of practising without an APC were appropriate, but that they should be imposed as a prerequisite to issuing an APC

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7 Discretion

- 7.1 Even if it were to be found that the Court of Appeal was wrong in one or more of the ways alleged by the appellant the issue arises as to whether any relief should be granted. This depends on the gravity of the errors found to be established in the context and circumstances of the case: *Hill v Wellington Transport Licensing Authority* [1984] 2 NZLR 314, 324.
- 7.2 It is submitted that the errors alleged by the appellant are trivial in the context of his admitted professional misconduct in practising without an APC. This was found to be more than an administrative oversight. Had Parliament intended practising without an APC to be considered a relatively minor disciplinary offence it would have deemed it to be conduct unbecoming rather than professional misconduct. The appellant has never disputed that he was correctly charged and found guilty of professional misconduct or that the censure, fine and imposition of costs were wrong (accept as to quantum). The errors of law alleged fall well short of being so

grave as to render it unjust to allow the decisions of the Tribunal and Council and the penalties and condition imposed to stand.



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Counsel for the First and Third Respondents
M F McClelland