COMPETENCE

Competence and Practising Certificate Conditions

129. Paragraphs 38-40 of the judgment of the Court of Appeal address the question of competence and cites the case of *Ghosh v General Medical Council.* It is considered that the reasoning of the Court of Appeal seems to be contradictory.

130. The Court of Appeal makes the point that in some extreme situation, a practitioner might (obviously depending on the facts) be so distracted by financial pressures that he does not perform his diagnosis and treatment satisfactorily. The Court then concludes that

> "It must therefore surely be permissible for the Council when considering the issuance of a certificate to interest itself in the applicant's ability to administer his or her practice".

Then it adverts at paragraph 43 to the proposition that

> "three specific criticisms may not have been soundly based".

The point made there was that none of them could impact on diagnosis etc and therefore could not impact on health or safety. If that is right then, again, following de Smith (in 6-086 on page 347) irrelevant factors would seem to have been taken into account.

131. The Court at paragraphs 41-42 then adverts to an apparent distinction made in s 60(2) between "skill and knowledge required to practise medicine" and "the practitioner's practice of medicine meets the standard reasonably to be expected of a medical practitioner". It suggests that skill and knowledge included abilities in diagnosis, treatment etc, and therefore the phrase "practice of medicine meets the standard" must refer to matters that do not relate to diagnosis and treatment etc. This, it is considered is (a) a non sequitur, and (b) inconsistent with the focus the Court in its (it is acknowledged rightly) identifying in this competence area protection of the health and safety of the public. It is submitted that for this reason, firstly, the Court's approach to the question of competence is flawed.

132. The Court's approach to the question of competence is further flawed by its confusing (again in paragraph 40) of the parameter of "competence" with the parameter of "fitness to practise medicine".

The Court's confusion is all the more surprising because of the fact that "Competence" and "Fitness to Practise Medicine" are so clearly distinguished in the Medical Practitioners Act 1995 by their having been made the subjects of separate review procedures under its Part V and its Part VII , respectively.

133. It is submitted that it is Part VII, not Part V, that addresses the unfitness to practice that the Court (at lines 19 to 23 in paragraph 40 of its judgment) tortuously, in terms of causation, and not quite fortuitously, suggests may arise from

> "For instance, the administrative mismanagement of a practice which leads to financial problems for the practitioner perhaps pushing him towards bankruptcy [which] may so distract him that it results in deterioration of his health and, as a consequence, his clinical abilities may be affected".

The particular and general effects of the Court's mistaking of "fitness to practice medicine" for "competence" here are in no way lessened but rather worsened by its immediately afterwards (in lines 23 to 25) incorrectly claiming that

> "This view is supported by the provisions of s60(2) which deals with the conducting of a review of a practitioner's competency and directs the Council in that connection to consider....."

the subsections (a) and (b), then cited by the Court, having nothing to do with the suggested cause of the hypothetical practitioner's suggested inability to exercise his knowledge and skills.

134. In paragraph 41 of its judgment, the Court of Appeal goes on to say

> "Clearly the drafter of the statute saw the practice of medicine to the reasonably expected standard as encompassing more than the possession of the skill and knowledge required to practice medicine"

It is submitted, however, that that "more"—additional to the skill and knowledge that is required for the safe practice of medicine---can be only something that the statute empowers the Medical Council to require to be reviewed in appropriate cases; that something being fitness to practice medicine.

135. Whatever the Court of Appeal has found to dislike about the statute's distinguishing of the concept and content of competence on the one hand, from that of fitness to practice on the

other, is neither here nor there. It must be simply accepted that from time to time in medical practice there will manifest some regrettable, even performance-impairing lapse of a practitioner's attention or deliberate conduct, or an effect of some other personal or professional problem he may have (such as transient or even chronic marriage problems, substandard administrative book-keeping, late paying of accounts, or difficulties managing staff) which does not come within the ambit of prescribed and practiced foundational or ongoing medical training, maintenance of medical skills, or the examination and assessment by any of those by the aforesaid statutory review procedures; and is therefore not to be held as reflecting in a professionally significant way on his insight, or his judgment, or his competence, or his fitness to practice medicine; but as reflecting only on his humanness including, sometimes, his busyness and ordinary difficulties with life at large.

136. It is suggested that unless an attribute or absence of an attribute in a practitioner can be properly the subject of a review of competence or fitness to practice medicine, it cannot be considered to be a relevant factor in the making of any statutorily permitted assessment by the Tribunal, the Medical Council or the CAC. The factors possibly relevant to an assessment of the appellant's fitness to practice at the material times in the instant case can be construed from a reading of Part VII of the Medical Practitioners Act 1995. That Part, it is submitted, nowhere alludes to what the appellant stood accused of, but only to diagnosable physical and mental conditions which could render a practitioner medically unfit to (impliedly safely) practice medicine; inquiry into which was rabidly pursued (eg lines 25-28, Record page 325) by counsel for the CAC, but in the event entirely forgone by the Tribunal and the Medical Council.

137. That said, it is however suggested that limits could and perhaps should be set as to the amount of interference individual practitioners' problems coming to the attention of family, colleagues, patients or the Medical Council itself, can, individually or in combination, be allowed to have on a practitioner's performance before they do impact on his health enough to adversely affect his fitness to practice medicine and some statutorily permitted intervention---hopefully only prophylactic---by the ruling professional body is called for. In appropriate cases those limits may be able to be determined by routine screening (not currently used by the Medical Council) and then, if indicated, by carefully individualized, timely statutory reviews done periodically and---other than in truly exceptional cases---restricted to areas of real concern. It is submitted that in the appellant's case there was little or no evidence that any of that was necessary at any time.

138. It is respectfully submitted that, in the appellant's case, the Court of Appeal, in its misidentification and then mixing of the two parameters and its subsequent hypothesising about the possible effects of anxiety (not, say, alcoholism or amnesia) upon clinical

performance (but not on the elements of competence), has simply but wholly plumped for the wrong parameter; fitness to practice; instead of competence, whose impugning by the Tribunal in the appellant's case the Court of Appeal---on the evidence of its woolly reasoning discussed above---appears arguably too eager to subtly confirm when it too manifestly lacked the evidence to.

139. Not unexpectedly, the Court of Appeal had nothing to say about the decision of the CAC early on not to recommend that the registration of the appellant be suspended; or about both the CAC and the Tribunal declining to determine that his competence and/or fitness to practise medicine were seriously in question and ought to be reviewed. It is also noteworthy that, despite its professed concern about hypothetical anxieties potentially affecting the appellant, the Court of Appeal itself refrained from recommending review of either parameter on referral back of the appellant's case to the Medical Council; a course which was clearly open to the Court even in the absence of a cross-appeal.

140. It is suggested that in its final analysis the Court of Appeal was failed by the initial courage of its convictions and avoided defining competence for practical purposes at all; but, tellingly, indirectly admitted in line 23 in paragraph 40 of its judgment (Record page 134) that the term does refer to "clinical abilities"; at the same time being careful not to equate the sum of those abilities with competence.

141. The vice of the approach to competence taken by the Court of Appeal was---with some extra-judicial assistance---famously characterised in humorous vein by Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at page 245.

142. In the instant case the question is, it is submitted, whether competence <u>can</u> be made to mean fitness to practise medicine, wholly or in any of its elements. It is respectfully suggested that the answer to that question is "No"; and that to answer it by a "Yes" would be to deny and frustrate the plain provisions of Parts V and VII of the Act and to turn any process of systematic, accurate, and safe assessment of competence completely on its head. To answer the question with a "Maybe" or a "Sometimes", as the Court of Appeal has essayed to do, would be to transform the term "competence" into a "portmanteau word" of the most chimeric and unserviceable kind, and to expose medical practitioners to caprices and whimsies of domestic, quasi-judicial and even high judicial decision-making of a sort too uncertain, if not actually too dangerous in its potential effects on public safety to be contemplated.

143. This can be said because of the plain example of the instant case. In it we have a practitioner, the appellant, who stands wrongly impugned by the Tribunal---in later chorus with the Medical Council itself---of lack of insight and judgment; possibly the two most publicly endangering defects a medical practitioner could suffer from. Yet the Medical Council, as the body exclusively responsible for ensuring the standards of practice and the continuing safe licensure of medical practitioners, purports to remedy the appellant's alleged medical dangerousness by attaching to his practicing certificate a condition for time-limited, periodic supervision by a colleague of his choice; and that over any geographic distance in New Zealand; while completely ignoring the statutory imperative (in the allegedly endangering circumstances) for the proper, statutorily provided-for reviews of his competence and fitness to practice medicine.

144. If the Medical Council truly believes itself safe in its convictions (now endorsed by the New Zealand Court of Appeal) the question becomes, it is submitted, "Where lies the real danger here ? "

145. If, as appears likely on the evidence, the Council does not believe itself safe in its convictions, it is submitted that its decision on the "safety" conditions it claims need to be attached to the appellant's practicing certificate, should be struck down. Such a course would not of course preclude referral back and ordering of a review of the appellant's competence or fitness to practise medicine if review is deemed still necessary in the absence of the Medical Council having required one to date.

146. Finally, addressing again the irregular in-hearing inquiries and eventual decision of the Tribunal on the subject of the appellant's competence, it is submitted that the dicta of Hutcheon J.A., delivering judgment for the Court of Appeal of British Columbia in *British Columbia (Milk Board) v Bari Cheese Ltd* [1991] 59 BCLR 2nd(47)(CA)---referred to again herein below on the subject of judicial discretion---on the identification of the source of statutory powers claiming to be exercised by a tribunal, apply, *mutatis mutandi,* in the instant case. On pages 80 and 81 the learned judge said

> "I am of the opinion that tribunals which have statutory powers coming from various legislative sources ought to make it plain on the face of their enactments which powers they are exercising. Only if that is known can there be a judgment as to whether the power is properly exercised. The citizen and a court, if a dispute arises, ought not to be left guessing what the tribunal is doing or to relying on an ex post facto assertion by the tribunal of what it was doing unsupported by any contemporaneous public expression of its intention. For us now to say that the

Board could have relied upon s. 39(2)(a)(ii) (subject to the question of the absence of a subsequent order in council), and therefore, it is of no consequence that it did not expressly do so, is to encourage administrative excess. We ought to, in exercising our obligation to keep tribunals within the powers conferred upon them by the laws of the Realm, to do so."

Determinations of Competence Invalid

147. Section 92 of the Medical Practitioners Act 1995 describes the mandate and modes of the CAC in its primary assessments and determinations of impliedly all complaints made against practitioners. Subsection 92(2) requires that the CAC shall make its determination as soon as reasonably practicable after the complaint is referred to it.

148. The first-described determinations (under subsections 92(1)(a) and (b)) that the CAC is required to make are in respect of the practitioner's competence to practise medicine and his ability (fitness) to practise medicine; and whether its parent body the Medical Council should (using its powers described under section 123 (c) and (d)) review one or other or both of those parameters.

149. Section 93 describes the procedure to be followed by the CAC after its assessment and determination of a complaint against a practitioner; and includes (under (1)(a)) the CAC's framing of a charge and the laying of that charge before the Tribunal.

150. The good reason, relating to public safety, for the first-listing (in section 92(1)) of that function of the CAC is made significantly plainer by Section 95(a) which provides for the CAC, upon its laying of a charge before the Tribunal against a practitioner, to recommend that the practitioner's registration be interimly suspended pursuant to section 104 of the Act.

151. Taken together, the above-described provisions of section 92, 93 and 95 describe a procedure for assessment and determination by the CAC which, on any reasonable reading of it is required to be enacted promptly and thoroughly; a procedure which, in the interest of public safety, is far from being inexact or toothless. In the case of the complaint made against the appellant, the CAC (but not its later

appointed prosecuting counsel) followed the specified assessment and determination procedures; it is submitted, correctly.

152. The CAC itself then promptly laid before the Tribunal a charge against the appellant; of practising without a practising certificate; a charge which correctly included the statement that according to the statute such manner of practising constituted professional misconduct. Following its assessment of the complaint against the appellant, the CAC did not determine that the Medical Council should review either his competence or fitness to practise medicine. Further, in laying the charge before the Tribunal the CAC (it is submitted again, correctly) did not recommend that the Tribunal suspend the appellant's registration.

153. In the light of the above, it is submitted that it was not for the Tribunal to begin to inquire into or, worse, attempt to secondarily establish the appellant's competence or fitness to practice medicine. The Tribunal's sole proper function was simply to hear the charge the CAC had laid before it; a charge to which the appellant promptly pleaded guilty, thereby obviating any substantive hearing of it and clearing the way for a straightforward hearing of submissions as to penalty only.

154. As the record shows, the Tribunal wrongly went further, very much further, in the process of pursuing the super-added false charge, second-guessing the CAC, and purporting to re-assess the appellant's competence and perhaps fitness to practice; thereby precipitating the cascade of further errors and injustices alleged herein above.

155. The Medical Council, after the misdirected hearing by the Tribunal, also wrongly went further and, in its hearing of the appellant concerning proposed practising certificate conditions, purported to adversely embellish the Tribunal's flawed findings on his competence. Consequently, the exclusive mandate of the CAC was over-ridden, and the clear purpose and adequacy of its assessment of the appellant's competence and fitness to practise was irregularly second-guessed now by both the Tribunal and the Medical Council; both of whom arrived at wrong conclusions on both issues; one more explicitly expressed than the other.

Multiplication of Disciplinary Proceedings Countermanded

156. The result was that the appellant was effectively subjected not to the statutorily prescribed CAC's single screening assessment of his competence and fitness to

practise, but to a second assessment (by the Tribunal); and then a surprise third assessment (by the Medical Council); neither of the second and third assessments being in any accordance at all with the statutory procedures set out for them in Parts V and VII, or authorised by any other provision of the Act.

157. The case of *McGoldrick v Brent London Borough Council* [1986], The Times L.R. October 24, 1986, registers the judicial condemnation of a second body's duplication of disciplinary hearing and contrary determination of matters already decided by a first body when the second body is not acting in an appellate role. In that case, Roth J granted the plaintiff a declaration that the second domestic body which purported to continue hearing a disciplinary matter was bound by the findings of the body which had already heard and determined the matter.

158. It is submitted that this principle applies to the present case, and that the application of it potentially invalidates the purported adverse findings of both the Tribunal and the Medical Council on the appellant's competence and fitness to practice medicine ~~appellant's competence~~, the first of those findings having being made in the disciplinary proceedings begun before the CAC, and the second of them (made by the Medical Council) deriving significantly from the first of them (made by the Tribunal).

159. Put simply, both the Tribunal and the Medical Council were bound by the no-negative findings of the CAC on the appellant's competence and fitness to practise medicine. Should either of the two first-mentioned bodies have wanted to take their concerns any further, the only way to do that was by the review procedures set down for those parameters by Parts V and VII of the Act; not to attempt to overturn, especially by irregular procedure, the most crucial and proper findings of the CAC.

160. Neither the Tribunal nor the Medical Council were or could have been acting an appellate role. In particular, in the context of the disciplinary proceedings against the appellant the Medical Council can be held to have acted already through its own CAC in any necessary assessment of his competence and fitness to practice, and was bound to go no further.

161. The purported determinations of the appellant's competence by both the Tribunal and the Medical Council were therefore made ultra vires, and stand to be declared invalid or to be quashed.

162. Further, the Medical Council's previous assertion of a need for clinical oversight of the appellant in his future working in his sub-specialty of Surgery would---according to the year 2003-2004 Annual Practising Certificate Guide sent out to practitioners by the Medical Council---now appear to be unsustainable; hair transplantation being categorized in the Guide as excepted from the vocational branches of medicine. A fortiori, supervision or oversight of the appellant in his bio-surgical research and basic medical science academic teaching roles cannot be claimed to be needed either; as against the Council's earlier insistence that, at least for him, it was.

Regulations

163. The term "competence" is not defined anywhere in the Medical Practitioners Act 1995 (as indirectly observed by Dr Taylor in paragraph 21 above) or in the Health Practitioners Competence Assurance Act ("HPCA") 2002 which has replaced it.

164. The reason for the absence of a definition of Competence in any one of the two non-generic and single generic Acts is understandable; individualization of the parameters of Competence being of primary importance as between the specialties and sub-specialties of Medicine itself ; and, more obviously, between and within the health practices of disciplines other than Medicine within the ambit of the HPCA.

165. But of real concern, it is submitted, should be the absence---from particularly the new generic HPCA---of a section requiring that the health agencies (including the Medical Council) charged with administering the Act, make regulations specifying assessment criteria and procedures for the positive, practical identification of the components and parameters of competence required of practitioners in the particular health providing activity; and describing protocols and standards for competence reviews, competence programmes, and recertification programmes.

166. Were such regulations required to be put in place for each discipline, then such errors as blighted the, albeit unauthorized, assessments of the appellant's competence by the Tribunal and the Medical Council in the instant case might be avoided in the future.

DISCRETION TO GRANT REMEDIES

167. The issue of the exercise of judicial discretion whether or not to grant a remedy or remedies in this case has been extensively canvassed by Dr Taylor in his submissions to the Court of Appeal; in paragraphs 67 through to 91 beginning on page 35 of these combined submissions. As with his other submissions, they are relied upon now by the appellant.

168. In addition to the cases cited by Dr Taylor, two others will be referred to below; *Wislang v Medical Practitioners Disciplinary Committee & Ors* [1974] 1 NZLR 29 (SC); and *Peters v Davison* [1999] 2 NZLR 164 (CA).

169. Referring to paragraph 31 of the judgment of the Court of Appeal, it was inevitable that the Court would seek to put its decision on the basis of discretion if it possibly could. This is what it does in paragraph 31. The reasoning of the Court of Appeal is as follows: all errors of law or fact, including all those relevant to judicial review can be raised on an appeal, therefore, appeal is the appropriate remedy; the Medical Practitioners Act prescribes a 20 working day appeal period and the direction that the appeal be heard "as soon as reasonably practicable". What the Court of Appeal appears to be saying is that these are inconsistent with, ie excluding of, judicial review.

170. Two points arise. First, section 4 of the Judicature Amendment Act expressly recognises that judicial review is available where there is an appeal right and the approach of the Court seems to be close to saying that where there is a right of appeal there is no judicial review. Secondly, reliance on the very common provisions of (a) an appeal period, and (b) the direction that the appeal be heard as soon as reasonably practicable seems to be countermanding the clear decision in the Judicature Amendment Act not to impose a time limit for bringing judicial review and also the consistent approach from the Court of Appeal itself. The view of the Court of Appeal as to the availability of judicial review when an appeal right exists is, with respect, submitted to be wrong. It is discussed further in the context of the following case:

Wislang [1974]

171. In his submissions, Dr Taylor, in making his case for the exercise of discretion in favour of the appellant, it is considered correctly, perceived no need to refer to the discussion on the matter by Speight J in *Wislang v Medical Practitioners Disciplinary Committee & Ors* [1974]; the judge's discretionary refusal of a writ of certiorari having been partly founded on perhaps injudicious withdrawal by the appellant and his counsel from the district disciplinary committee's hearing which they had assessed as going, procedurally, in terms of natural justice, prejudicially awry; a response (withdrawal) which, as the Record here shows, the unrepresented appellant was careful not to make in the face of the at least equally frustrating proceedings of the Tribunal.

172. The additional issue in *Wislang* [1974], also going to refusal of certiorari to quash the decision of the committee, was the domestic appealabilty of a decision which was a nullity by reason of breaches of natural justice in the procedure of arriving at it. On the latter point, Speight J chose (after much discussion on pages 44 and 45) in declining to grant the appellant certiorari, to recant on the breadth of the dictum he had innovated on the point in *Denton v Auckland City* [1969] NZLR 256 for which he had been cited with approval by Sir Robert Megarry (at F,G,H on page 446) in *Leary v National Union of Vehicle Builders* [1970] WLR 434.

173. More importantly, *Wislang* and *Denton*, along with other cases discussed in *Wislang* by Speight J, were cases which arose in settings in which the issue was the effectiveness of appeal in the "domestic" setting; and, most significantly in *Wislang*, whether the decision in such appeal, where breaches of natural justice had been demonstrated in the proceeding under appeal, was amenable to certiorari on the ground of nullity.

174. In the instant case there was of course no internal appeal available; the Tribunal being, in domestic terms, a tribunal of first and "final" jurisdiction.

175. The other question arises, "Should the appellant have been required to go to the District Court on an appeal in which the alleged errors of law and breaches of natural justice of the Tribunal---especially their "viciousness" in Speight J's terms--- might well not be addressed ?"

176. It is respectfully submitted that, even had the Medical Council not subsequently erred in adopting, embellishing and aggravating the adverse effects of the wrong judgments of the Tribunal concerning the competence of the appellant, the answer to the question is "No".

177. Further, the decision of the Medical Council on conditions it proposed for the appellant's new practising certificate, was communicated to the appellant (Record page 481) nine months after the supplementary decision with reasons (Record page 449) was handed down by the Tribunal. The Medical Council's decision was able to be reasonably anticipated as going to be following the Tribunal's in the results of its worst procedural errors, and so both decisions, being considered challengeable on very closely related and interdependent grounds, came properly within the ambit of the Judicature Amendment Act for the expeditious review of both decisions and attention to all of ancillary matters together in the same procedure.

178. It is therefore submitted that the mere existence of an alternative remedy, one for each of the above multi-facetted decisions, does not mitigate against the granting of remedies on judicial review of either of them, together or separately.

179. The question "How effective would be the alternative remedies of two separate appeals of the two decisions to the District Court compared to judicial review of both of them together?" is, it is submitted, easily answered by focussing on the errors of law and procedural unfairness at issue in both of them. The multi-facetted nature of the flawdness of both decisions, and the potential problem of their flaws not all being able to be characterised under the conventional grounds of judicial review (but perhaps in some aspects only under the innominate ground—see paragraphs 114-115 above), is considered to point up the relative ineffectiveness of pursuing appeals in the District Court as alternative "remedies".

Peters v Davison [1999]

180. The principal issue in *Peters* was whether or not the widely publicised report of a commission of inquiry (the Winebox inquiry)—claimed to be in parts highly prejudicial to the plaintiff's personal and professional reputation---was amenable to judicial review for error of law. The answer of Smellie J in the Auckland High Court was "No" and he

struck out the review proceedings. Peters appealed, the decision of the High Court was quashed, the matter was referred back under directions for judicial review in the result of which there was substantial declaratory relief granted to the plaintiff.

181. In its widely concurring judgments, of Richardson P, Henry, Keith, Thomas and Tipping JJJJ) the Court of Appeal strongly asserted the justification for the greater availability of the discretionary remedies on judicial review in cases where the public and professional reputation of a person involved with a public inquiry stood to be damaged by publication of the report of the inquiry.

182. The Court's opinion on the point was repeatedly and strongly stated throughout its judgment in terms such as:

> "In *Re Erebus Royal Commission (No 2)* [1981] 1 NZLR 618 in their joint judgment Cooke, Richardson and Somers JJ said at p 653:
>
> ""This is not an appeal. Parties to hearings by Commissions of Inquiry have no right of appeal against the reports. The reason is partly that the reports are, in a sense, inevitably inconclusive. Findings made by the Commissioners are in the end only expressions of opinion. They would not even be admissible in evidence in legal proceedings as to the cause of a disaster. In themselves they do not alter the legal rights of the persons to whom they refer. Nevertheless they may greatly influence public and Government opinion and have a devastating effect on personal reputations; and in our judgment these are the major reasons why in appropriate proceedings the courts must be ready if necessary, in relation to Commissions of Inquiry just as to other public bodies and officials, to ensure that they keep within the limits of their lawful powers and to comply with any applicable rules of natural justice."" (page 171)
>
> "The fourth factor is the central relevance in the major cases of claimed serious damage to reputation along with the absence of any of the usual remedies for that damage by way of appeal or defamation proceedings. One partial practical remedy which review proceedings have facilitated is the acknowledgment in their course by commissions of errors which have been recorded in the judgments in fairness to the reputations of the individuals affected: the *Erebus (No 2)*, *Thomas* and *Australian Drug* commissions – [1981] 1 NZLR 618 at pp 666 – 667; [1982] 1 NZLR 252 at pp 269 and 273; and [1984] NZLJ 42 [Royal Commission of Inquiry into Drug Trafficking (The

Stewart Commission) (1983)]. A more substantial practical remedy is of course for the Courts to declare that the report or some part of it is procedurally or legally flawed and that that flaw has led to damage to reputation". (page 185)

"In some situations condemnation of a person in a commission report will be scarcely distinguishable in the public mind from condemnation by a Court of law *(Re Erebus (No 2)* at p 666). Where a report calls a person's reputation into question in a direct way, both that person and the public generally have an interest in ensuring that any criticism is made upon a proper legal basis. It would be contrary to the public interest if the Courts were not prepared to protect the right to reputation in such a context *(Re Erebus (No 2)* at p 627). And once it is acknowledged that the Court should protect reputation or other proper interests by way of declaration after the report of a commission of inquiry has issued, there is no justification in principle in finding that review may be based on certain of the general grounds for review, but not on another: error of law." (page 187)

"The second hypothetical situation is to assume the reverse of what has in fact happened and that the Commissioner of Inland Revenue and his staff had been held by the commission of inquiry to be incompetent on a basis which was clearly wrong in law. With the Commissioner of Inland Revenue's reputation and career seriously damaged as a result of an error of law, it seems almost unthinkable that the Court would be powerless to intervene". (page 189)

"Such an approach recognises the reality that the report of a commission of inquiry may have a far-reaching impact, at times greater even than the impact of a binding decision. The report may seriously affect a person's reputation and, with that damage, affect his or her way of living and their very livelihood". (page 203)

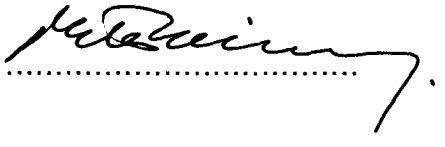
"A compelling way in which to illustrate the potential impact of the commission's report is to reverse his findings and suppose that he had found,

on the basis of equivalent errors of law, that the Commissioner of Inland Revenue was corrupt or incompetent. The finding would not be binding in the sense that a decision of a Court of law is binding, but the impact on the Commissioner of Inland Revenue would be devastating. His reputation would be lost. His job would be almost certainly forfeited and his career as a public servant would be ruined. His prospect of finding another job would be seriously impaired and his family life could be destroyed. It is difficult to believe that a formal decision of a Court to the same effect would have more serious consequences. It cannot be sensibly suggested that in such circumstances the Court would not have jurisdiction to review the report of the commission and issue such declaratory relief as it considered appropriate." (page 204)

183. On the above authority, inter alia, and for reasons advanced by the appellant herein above, it is respectfully submitted that the adverse findings, amounting to decisions, of both the Medical Practitioner's Disciplinary Tribunal and the Medical Council of New Zealand, on the appellant's medical competence and/or fitness to practice medicine should, by way of orders on review, be declared invalid or, in the alternative, quashed; and that the decision of the Court of Appeal ought to be reversed; and that the orders sought by the appellant on judicial review in the Wellington High Court ought to be granted at the discretion of your Lordships.

This completes my submissions.

Dated at London this 8th day of November 2004.



Miles Wislang
Appellant