THE KATE DAVENPORT DISASTER: ACCIDENT or DESIGN ?

INTRODUCTION

When Dr Wislang appeared before the Medical Practitioners Disciplinary Tribunal for the agreed sole purpose of making submissions as to penalty on a simple charge he had already admitted to, he did so trusting that the Tribunal would conduct its hearing of him competently, in good faith and according to proper procedure and the principles of ordinary fairness.

He had no expectation whatever, even from his worst dreams, that he would have to defend himself against a maximally more serious replacement charge, completely unsustainable in law, trumped-up and irregularly laid against him by a prosecutor who, with the full cooperation of the Tribunal itself was hell-bent on proving it in order to have him struck off the medical register and barred from the practice of medicine, not temporarily, but for ever after.

Almost incredibly, that is what Dr Wislang was faced with on the day; a prosecutor-turned-hijacker of the Tribunal's proceedings whose charge-drafting and personal prosecutory maxims and potential excuses for her glaring misconduct in her prosecution of him can be justified by only one law; Murphy's.

Unbelievable? We encourage you to READ ONLINE or DOWNLOAD as Adobe PDF

(The facts proving Ms Davenport's prosecutory incompetence and presumptuouness are ones all agreed to by the active parties to the proceedings of judicial review by which Dr Wislang afterwards attempted to have the Tribunal's adverse ruling on his medical competence quashed and to thereby rescue as much as possible of his professional reputation. Those facts are to be found on this website in the Exhibits part of the Record of those proceedings which was submitted for his appeal to the Privy Council)

THE DISASTER

After its determination of a patient complaint against Dr Wislang, the Complaints Assessment Committee of the New Zealand Medical Council employed a legal assessor to help formulate the simple charge against him of practising without a practising certificate; a misdemeanour which, under the Medical Practitioners Act 1995, amounted to "professional misconduct", not a striking-off offence. That legal assessor was a Ms Bronwyn Klippel, barrister, of Auckland, who competently completed her work and billed the Committee for it in May 1999. The Committee then quite properly laid the charge before the Medical Practitioners Disciplinary Tribunal and, as required, arranged that Dr Wislang be informed of that and supplied him with a copy of their charge.

After it had laid its charge the Committee hired a lawyer to prosecute it before the Tribunal. That lawyer was Ms Kate Davenport, a 40-ish Auckland barrister with experience in medical disciplinary matters. It was the result of Ms Davenport's bizarre usurpation of the power, vested by the Act in the Committee only, to formulate and lay charges against medical practitioners, that things began to go horribly wrong in the Tribunal's proceedings and for Dr Wislang.

Not content with being simply the prosecutor of the Committee's charge laid before the Tribunal and admitted to by Dr Wislang, Ms Davenport, seemingly spontaneously, drafted a charge all of her own, emphasising her later-admitted sole authorship of it by writing it beneath the letterhead not of the Complaints Assessment Committee, but of herself as a lawyer in sole private practice.

By its heading, Ms Davenport's replacement charge purported to be an amendment of the original charge. It wasn't. In reality, it comprised the original charge cleverly combined with, but in a certain way neutralised by, an entirely new booby-trap charge which, if admitted by or proven against Dr Wislang would have exposed him to the penalty of being struck-off as a medical practitioner; which proof of the original charge would not have. This new charge was one which, on the facts of the case, could not and should not have ever been brought against Dr Wislang.

Of course the Tribunal should never have accepted Ms Davenport's charge as being properly conceived or laid or in any other way sustainable. The Tribunal, even if it did not recognise the procedural impropriety of Ms Davenport's laying of her charge before it, ought to have immediately detected its grave flaws and, under the exclusive power given to it by the Act, immediately rejected it or amended it back to the original charge. But the Tribunal did not do this, despite its chairperson Ms Wendy Brandon of Auckland, being, like Ms Davenport, a barrister.

It is a matter of record that the Tribunal in its supposed hearing of Dr Wislang's submissions as to penalty on his admission of the original charge only, went on to entertain Ms Davenport's bogus charge for a whole day, that is, for more than half the total time of its hearing. The Tribunal's acceptance of Ms Davenport's charge resulted in the proceedings being transformed from an adversary hearing into a highly irregular inquisitorial one resulting in, amongst other mistakes, a grave mis-assessment of Dr Wislang's medical competence.

The inquisitorial attack against Dr Wislang began with Ms Davenport taking two swipes against Dr Wislang's professionalism and general reputation. As to his professionalism, Ms Davenport early on laid before the Tribunal an affidavit which she had personally solicited only the day before from a visiting Australian doctor from whom the original patient complainant had sought and accepted surgery after leaving Dr Wislang's care. That affidavit was, of course, somewhat critical of Dr Wislang's treatment of the patient, but on unsustainable grounds already dismissed by the Health and Disability Commissioner of New Zealand. The affidavit also canvassed, from only one point of view, the question of whether the provider of the treatment as Dr Wislang had given his

patient needed to be a registered medical practitioner. The above points Ms Davenport attempted to make much of-all to Dr Wislang's detriment-before the Tribunal, until on Dr Wislang's counterings they were ruled irrelevant. But the spirit of Ms Davenport's prosecution had already branded itself as misguided and misguiding, if not actively malicious.

Ms Davenport's second attempt to discredit Dr Wislang with irrelevant documentation was even more inappropriate, inasmuch as she passed up to the Tribunal a photocopy of a New Zealand law report of a famous case in which Dr Wislang had sued for a writ of certiorari, in 1971 in the Supreme Court in Wellington, the Tribunal's predecessor the Medical Practitioners Disciplinary Committee. The case had no relevance whatever to the case before the Tribunal and in proffering it as "evidence" against him Ms Davenport was plainly attempting to paint a picture of Dr Wislang as a recidivist troublemaker against the medical establishment, and thereby set the minds of the Tribunal members against him.

Of course Dr Wislang quite properly objected to Ms Davenport's bringing up of the two abovementioned documents and after a brief exchange of submissions on their admissibility obtained the Tribunal's ruling that they would be wholly disregarded.

Ms Davenport's next attempt to discredit and entrap Wislang came when she asked the Tribunal that Dr Wislang be put on oath for oral evidence to be taken from him. The chairwoman of the Tribunal unhesitatingly agreed to this course and Dr Wislang took the oath. This prompted a veritable barrage of questions from the Tribunal members, including lay persons, many of them going to his medical competence. As this wholly improper inquisition proceeded Dr Wislang twice inquired of the chairwoman Ms Brandon whether or not his competence had become a matter for investigation by the Tribunal. Ms Brandon confusedly assured him that it had not, but allowed the inquisition to proceed.

Given the denial of Ms Brandon of her agenda on the point, who could have been more surprised than Dr Wislang when in her written decision for the Tribunal she ruled as adversely as possible on his competence?

Such fishing trips as conducted by a Tribunal such as Ms Brandon's fall within the description of the legal term Surprise, inasmuch as they are sprung on the accused; with all the worse results for him being, as Dr Wislang was, a legally unrepresented layman.

No less an authority than Sir William Wade has recently reaffirmed that:

> *"It is fundamental that the procedure before a tribunal, like that in a court of law, should be adversary and not inquisitorial. The tribunal should have both sides of the case presented to it and should judge between them, without itself having to conduct an inquiry of its own motion, enter into the controversy, and call evidence for or against either party. If it allows itself to become involved in the investigation and argument, parties will quickly*

> *lose confidence in its impartiality, however fair-minded it may be. This principle is observed throughout the tribunal system, even in the adjudging of small claims before social security local tribunals and supplementary benefit appeal tribunals by a departmental officer. Naturally this done not mean that the tribunal should not tactfully assist an application to develop his case, particularly when he has no representative to speak for him, just as a judge will do with an unrepresented litigant."*
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> Professor Sir William Wade and Christopher Forsythe in 9th Edition, 2004 of "Administrative Law", first published in 1961 and which has established a reputation for itself in the foremost rank of classic legal text books and is frequently cited with approval in the higher courts

Not only did the Tribunal appear ignorant or, in the alternative, contemptuous of Sir William's highly authoritative prescription, but as the record of the proceedings shows, in its impromptu, unauthorised and unwarranted inquiry into Dr Wislang's medical competence it appeared to permit and do everything it could to lead him down the garden path and into the incinerator of Ms Davenport's rabid attack on his person and professionalism.

Surely there must be an apt phrase to sum up the parts played by Ms Brandon and Ms Davenport in the Wislang case. We won't deprive our readers of the pleasure of finding it for themselves.

MS DAVENPORT MIS-INTERPRETS

It is one thing for a prosecutor to attempt to run a false charge of her own making before a statutory tribunal. It is entirely another for her, when caught doing it, to compound her error by attempting to defend her charge by invoking a blatantly erroneous interpretation of a section of the Act which she claims as her speciality and under which the prosecution is proceeding.

But this is exactly what Ms Davenport did when Dr Wislang, a mere layman who, when the flawedness of her charge became apparent to him, challenged its validity in submissions he made directly to the Tribunal in writing during its 3 week adjournment of its hearing.

Ms Davenport's defence of her charge was, to the very end, doggedly irrational. The end came when, in response to Dr Wislang threatening the Tribunal with proceedings of judicial review for a ruling on the invalidity of Ms Davenport's charge, employed a legal assessor of its own who summarily confirmed his opinion of the falsity of the charge and recommended the Tribunal amend it back to the original one. This the Tribunal did, but, as already stated, not before entertaining it for a full day of hearing.

One may well ask why Ms Davenport's charge, which was a nullity because of its total lack of foundation in fact and its having been illegally laid by Ms Davenport, was not immediately recognised such by the Tribunal and promptly rejected, and the original charge reinstated.

Throughout the 3 week adjournment period that the Tribunal permitted the false charge to persist, the Tribunal favoured, even encouraged, Ms Davenport's attempts in her several written submissions about it, to justify her false charge.

In those submissions Ms Davenport invoked a bizarre, unheard-of interpretation of Section 9 of the Medical Practitioners Act 1995. Ms Davenport's argument ran thus:

> 1. A person is not a registered medical practitioner unless they are the holder of a practising certificate.
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> Dr Wislang's counter to this was that only a registered medical practitioner can apply for a practising certificate, and be issued with one.
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> Dr Wislang submitted, as a corollary to the above, that as he was not at time the holder of a practising certificate, if Ms Davenport's interpretation of Section 9 was correct, he was not a registered medical practitioner at all, and therefore did not come under the jurisdiction of the Tribunal and stood not to be called up or heard or judged by it; a manifest absurdity.
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> 2. For a practitioner not to hold a practising certificate was a breach of conditions of his medical registration.
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> Dr Wislang's simple response to this was that (i) there never had been any condition applied to his registration or to any practising certificate he had held, and (ii) that holding a practising certificate is not a condition of medical registration, nor ever could be.

Had not the absurdity of Ms Davenport's arguments been exposed first by Dr Wislang, and later confirmed by the Tribunal's hastily hired legal assessor (Auckland barrister, Mr Raynor Asher QC), the apparent blindness of the Tribunal to the illegality of Ms Davenport's charge could easily have caused Dr Wislang to have been struck off the medical register, as provided for by Section 109(1)(f) in combination with Section 110(1)(a) and Section 110(2)(b) of the Act; none of which sections could, on the facts, have ever applied in Dr Wislang's case.

MS DAVENPORT'S DE-REGISTRATION DESIRE

The grossness and persistence of Ms Davenport's misguided campaign to have Dr Wislang convicted of her false charge and to be struck off the medical register needs some explaining. Some interesting pre-hearing background, further to that below

concerning Dr Wislang's ex-patient, may help this obviously burning desire of Ms Davenport to be better understood.

Dr Wislang's pre-hearing admission to the original charge had deprived Ms Davenport of anything substantively adverse to prove against him, leaving her with, as her only legitimate activity, the making of submissions as to the penalty to be imposed on him by the Tribunal. So what was she thinking of?

Given Ms Davenport's prosecutory extremism and antipathy to Dr Wislang as evidenced by her trumped up charge and various of her submissions and asides recorded in the transcript of the Tribunal's hearing, one can only wonder what were the pre-hearing instructions to her by her client, the Complaints Assessment Committee: To have Ms Davenport, without any authority under the Act, draft and lay a new and patently illegal charge against Dr Wislang? To peddle her weird interpretation of Section 9 of the Act in support of that charge? To try to have Dr Wislang diagnosed as mentally unfit to practise on the report of the psychiatrist Ms Davenport was so eager to have Dr Wislang examined by on recommendation of the Tribunal? To conduct the witch-hunt she did in search of evidence against him to warrant him to be struck off, never to be allowed to practise medicine again?

We think not. Surely, no reasonable and responsible Complaints Assessment Committee would for one minute have entertained the notion of instructing her to carry on against Dr Wislang in the way she did before the Tribunal. But in so doing, under the Committee's instructions or not, Ms Davenport has surely sullied the integrity and public image of the Committee's parent body, the Medical Council itself.

The failure to date of both bodies to publicly distance themselves from, if not condemn, Ms Davenport's prosecutory incompetence and imprudence is, to say the least of it, disconcerting. But the complete failure of the New Zealand High Court and Court of Appeal, and eventually the English Privy Council to even comment on them, is utterly dismaying.

One does not require to have an especially suspicious or nasty mind to wonder if there was perhaps some third person, not a member of the Committee, who had some agenda of their own that they wished to promote against Dr Wislang by secretly further inflaming Ms Davenport's arguable dislike of him. Not surprisingly, there is some evidence, undenied by Ms Davenport and her client the Complaints Assessment Committee, which strongly suggests that there was.

MS DAVENPORT'S OTHER CLIENT

The patient who complained against Dr Wislang to the Medical Council had, as the first step of the investigatory and assessment procedure required by the Act, his complaint referred by the Council to the Health and Disability Commissioner.

In the course of making his complaint he had consulted Ms Davenport in her private practise and no doubt had obtained advice from her about how to proceed. But he had been disappointed by the ruling of the Health and Disability Commissioner that there was to be no action to be taken concerning his allegation that Dr Wislang had treated him without informed consent and that his treatment was incompetent.

Naturally the complainant was unhappy with that outcome. But in the course of his complaining it emerged that Dr Wislang was not the holder of a practising certificate during the course of his treatment of him. It was that lack of a practising certificate, and only that lack, upon which the prosecution of Dr Wislang was able to proceed, from the result of which the complainant must have expected to gain some satisfaction.

Come the day of the hearing before the disciplinary tribunal, the complainant was seen sitting outside the entrance to the hearing room by Dr Wislang's friend at hearing who heard Ms Davenport reassuring the patient that she would ensure that Dr Wislang was struck off the medical register. This conversation was attested to in an affidavit put before the High Court as evidence in support of Dr Wislang's application for judicial review.

Upon inquiry by Dr Wislang to the New Zealand Law Society concerning Ms Davenport's prior professional involvement with the complainant and her current role as prosecutor, Dr Wislang was told by an officer of the society that there was no sustainable objection to Ms Davenport's role as prosecutor by virtue of her professional association with the complainant as a client. This Dr Wislang accepted.

However, Ms Davenport's virtual undertaking to her client complainant to get Dr Wislang struck off on her amended charge which she must have known was untenable at law, lends considerable weight to a judgment of her as being personally badly motivated, in concert with her client, towards Dr Wislang.

For a prosecutor being retained by the Complaints Assessment Committee of the Medical Council of New Zealand to make such statements as described above in the situation she did, that is, within earshot of members of the public, is to be regarded as professionally unbecoming if not reprehensible.

One need look no further for a clearer indication of a prosecutor's malice towards an accused person, in this case Dr Wislang.

Is there any evidence to suggest that Ms Davenport, in thinking up and so incompetently drafting and then laying her illegal amended charge against Dr Wislang, was not completely incompetent and unconscionable, but knew that what she was doing was wrong?

We believe there is. With Ms Davenport being a master of laws with honours and having sub-specialised in medical disciplinary cases for a number of years, and thus being very familiar with the Act under which she prosecuted Dr Wislang, to propose that she was unaware of her wrongdoing would be to strain to breaking point the belief of any

reasonable person. We leave it to our readers to sum up and pass judgment for themselves on the strangely misguided antics and culpability of Ms Davenport in this sordid affair as those go to her competence, professional integrity, barristerial ethics and personal morality.

THE OUTSTANDING QUESTIONS

Now what, you may ask, was the view taken by the New Zealand medical disciplinary establishment of Ms Davenport's caperings in the Wislang case? Well, we regret to inform you that view is considerably less than encouraging of confidence in the Medical Practitioners Disciplinary Tribunal (now incorporated within the Health Practitioners Disciplinary Tribunal) as a competent and impartial charge-amending, hearing and judging body.

Amazingly, with her bizarre behaviour as prosecutor in the Wislang case disapproved by no comment publicly from the Medical Council, the Tribunal or even one of the five involved courts right up to the Privy Council, Ms Davenport-mark the Perfect Woman-now sits on that self-same Tribunal as its deputy chairperson.

Her recent appointment as a member of the Committee of the Auckland District Law Society is, given the doubts one must entertain on at least her competence, is only somewhat less alarming.

How many other trumped-up charges of her own or others' creation Ms Davenport has prosecuted in like style in her heydays before the Tribunal, is anybody's guess. Perhaps in the interests of at least the vulnerable and now justifiably anxious doctor population and public of New Zealand, an audit of the cases she has conducted before it would not go amiss.

Dr Wislang had the courage, and public-mindedness to make the fallout of Ms Davenport's chicanery in his case the subject of a revealing application for judicial review in the High Court of New Zealand. But how many of his colleagues if similarly accused and judged would be fearful of following such a course or have already had their hopes for justice dashed and their courage ground out of them by beholding the anti-statutory prosecutory machinations of the likes of prosecutor-turned-judge Ms Davenport?

The grossness of the errors and incitings of Ms Davenport in the Wislang case cannot leave one but pondering how Dr David Collins QC, Wellington barrister and present chairman of the Health Practitioners Disciplinary Tribunal on which Ms Davenport now sits as his deputy, can rationalise and abide her presence on it.

Dr Collins can of course claim not to have known about her weird activities as prosecutor in the Wislang case, but he now has the opportunity to easily rectify that by perusing, online, the record of his predecessor Tribunal's proceedings against Dr Wislang, and to act according to his highly expert professional judgment, conscience and duty to ensure

the competence and visible integrity of the Tribunal whose chairmanship he has inherited.

Whatever Dr Collins does or does not advise be done about Ms Davenport, one can be reasonably sure that if Dr Wislang comes before his tribunal on any future charge, in the light of her demonstrated incompetence and likely bad motivation in her prosecution of Dr Wislang in 1999, he would ask that Ms Davenport be disqualified from sitting in judgment upon him.

On the same grounds so should anybody else.

Source: thewislangcase.com