

NOTE: Copyright in this transcript is reserved to the Crown. The reproduction, except under authority from the Crown, of the contents of this transcript for any purposes other than conduct of these proceedings is prohibited.

40001/5 S&C

D1

REVISED

MEDICAL TRIBUNAL OF NEW SOUTH WALES

5 DEPUTY CHAIRPERSON: JUDGE GRAHAM

MEMBERS: DR J KENDRICK
 DR R SPARK
 MS J HOUEN

10

THURSDAY 26 MAY 2005

IN RE DR JONATHAN BENTLEY AND THE MEDICAL PRACTICE ACT

15 **JUDGMENT**

DEPUTY CHAIRPERSON:1. This is an application for relief under section 92 of the **Medical Practice Act** 1992. The application relates to an order and what remains of two of the conditions imposed upon the applicant at the conclusion of a hearing in the medical tribunal on 21 June 1996, in relation to a number of matters of complaint, then before the tribunal.

20

ORDER 2

2. The application, in the first instance, relates to order 2 made on that occasion.

25

3. Having made findings of both professional misconduct and unsatisfactory professional conduct in relation to different aspects of the complaints, the tribunal suspended the practitioner for a period of six months commencing on 1 July 1996.

30

4. That was an order which the tribunal was empowered to make under section 64(1)(b). In reaching that conclusion, the tribunal took into account not only the professional misconduct which it then found, but also, the unsatisfactory professional conduct. The latter would not, of itself, have enlivened the power under section 64

35

subsection (1). 5. The second order was in these terms:

5 "We direct that the respondent promptly seek and accept treatment at his own expense, from a psychiatrist approved by the Medical Board of New South Wales, such psychiatrist to report forthwith to the board, any adverse finding regarding the respondent."

10 Although couched as a direction, it is clear that the intention of the tribunal was not to treat that direction as constituting a condition under section 61(1)(c). Rather, it should be treated as having been intended to constitute an order, "that the person seek and undergo
15 medical or psychiatric treatment or counselling", pursuant to section 61 subsection (1) paragraph (b).

6. The next order set out in the findings and orders of the tribunal, was an order that he attend, at the board's expense, a psychiatrist appointed by the medical board
20 "for such period and at such intervals as the board may require". Again, that is both in form and in substance, an order, pursuant to section 61(1)(b).

7. The vesting in the board of a power to determine the period and intervals meant that that was an order which
25 could, in effect, be brought to an end in its operation by a decision of the Medical Board. In fact, the applicant attended the board-appointed psychiatrist, Dr Orsmond until early in 2004. Dr Orsmond reported during that time. 8. Order 4 made in 1996, ordered the practitioner
30 to submit to the medical board, a report of each of the psychiatrists "before the period of suspension expires". Upon the submission of such reports, that order ceased to

have effect six months from 1 July 1996.

9. The need to seek any review of order 2, only became apparent in recent times. The reason for that is that on 8 July 1997, the applicant was advised by a letter from
5 the head of Professional Conduct and Health of the New South Wales Medical Board, that the medical board had resolved that certain requirements were "to apply". The first of those requirements related to order number 2. The letter sets out in summary form that order and then
10 says, "The Medical Board is satisfied that you need not continue to attend a treating psychiatrist." On the strength of that letter it was assumed, not only by the applicant but also by the Medical Board, that order number 2 was spent.

15 10. The solicitor for the Health Care Complaints Commission has, however, recently drawn the attention of the applicant's legal advisers to the difficulty that the order itself does not confer upon the Board the power to terminate it or to treat it as no longer relevant or of
20 effect.

11. However, there is no suggestion, particularly in the light of the continued interviews with the board-appointed psychiatrist, that there is any utility or point in that order continuing at the present time. The tribunal will
25 return to that issue later.

CONDITIONS

12. The tribunal is also asked to review what remains of two of the conditions imposed. There were three conditions imposed by the tribunal. The language and

nature of those orders makes it clear that the tribunal was intending to rely upon the power conferred in section 61(1)(c) to direct "that such conditions relating to the persons practicing medicine as it considers
5 appropriate be imposed on the person's registration".

13. The first of them was in these terms: (1) "he shall not use intravenous sedation otherwise than in a registered hospital or day procedure centre." That condition remains in force. 14. The second condition
10 required the applicant to submit to the medical board within six months of 21 June 1996:

15 "A plan for his continuing medical education, including resuscitation procedures appropriate to his practice, and shall present written evidence of his compliance therewith at intervals and for a period to be determined by the board."

That condition no longer applies, having been removed by
20 the Board in April 2004, that removal being contemplated by, and sanctioned by, the concluding words of the order itself.

15. The third condition was originally in these terms, as imposed by the tribunal in June 1996:

25 "The respondent not to conduct examinations of any female per vagina, per rectum or of the breast other than in the presence of a chaperone; the respondent to keep for a period to be determined by the board
30 and produced to the board on request a record of such chaperone's attendances."

16. The restriction on the conduct of the specified examinations remains in force but is the only part of that

condition presently still applicable.

17. By a letter dated 5 August 2004, the monitoring coordinator of the New South Wales Medical Board advised the applicant that the board's Conduct Committee had
5 resolved to ease the conditions that the board had been delegated the power to review and that the matters had been resolved at a meeting held on 20 April 2004. The committee resolved to remove the requirement that he attend the board-nominated psychiatrist, Dr Anthony
10 Orsmond, and thus, in relation to the orders referred to earlier, only order number 2 remained in force.

18. Relevantly, also, the committee resolved to remove the requirement for the applicant to maintain and submit chaperone records to the board. It follows, then, that
15 the condition in relation to such examinations now simply reads (as that letter and the evidentiary certificate exhibit C set out) "That Dr Bentley is not to conduct any examinations of any female per vagina, per rectum, or of the breast other than in the presence of a chaperone."

20

THIS APPLICATION

19. The applicant seeks to have both order number 2 and conditions 1 and 3, as they presently stand amended, removed on this review. In respect of each of those matters, the Medical Tribunal is the appropriate review
25 body: See section 93(1). As is provided in section 94A(1), a review under this division is a review to determine the appropriateness, at the time of the review, of the order concerned. The legislation goes on to provide in subsection (2):

5 "The review is not to review the decision to make the
order or any findings made in connection with the
making of that decision unless significant fresh
evidence is produced that was not previously
available for consideration and the appropriate
review body is of the opinion that, in the
circumstances of the case, the decision to make the
order or any finding on which the decision was based
10 should be reconsidered."

The application in the present case has simply sought to
rely upon the general provision in subsection (1) and has
not sought a review in the terms contemplated by
15 subsection (2). It is appropriate therefore to turn to
the background for the imposition, the making of the
relevant order and the imposition of the relevant
conditions. Ultimately the 1996 tribunal had before it
three principal matters of complaint. The first related
20 to patients A and B and in particular their treatment by
way of diathermy of the cervix. Patient A on 30 March
1994 and patient B on 5 May 1994. In each case the
procedure was performed under intravenous sedation.

25 **COMPLAINTS AS TO TREATMENT**

21. Originally the complaints in respect of each of the
patients alleged a lack of adequate knowledge, skill,
judgment or care in the practice of medicine. Particulars
of that complaint were, in relation to patient A: (a) that
30 he failed to ensure there was another person trained in
resuscitation procedures continuously present during the
procedure; (b) failed to use a pulse oximeter during the
procedure and recovery; and, (c) failed to ensure that
patient A had fasted prior to performing the procedure.

22. The particulars in relation to his treatment of patient B were in the same terms save that there was no allegation such as that in paragraph 3(c) concerning patient A. 23. That complaint, relating to matters of
5 knowledge, skill, et cetera, was augmented by additional particulars (which related to both patients A and B) alleging that he performed surgical procedures on those patients without first ensuring the immediate availability of appropriate equipment including, (and there follow a
10 list from paragraphs (a) through to (l)) various items of furniture, equipment, drugs.

24. There is a further additional particular alleging that he permitted both patients to leave his rooms after sedation without following the established post-sedation
15 recovery guidelines set out in paragraph (5) of the protocol of the Faculty of Anaesthetists, and in particular that he discharged the patients before an appropriate period of recovery and observation had occurred.

20

CONVICTIONS

25. While the matter was pending in the tribunal further complaints were made of professional misconduct and/or unsatisfactory professional misconduct relating to his conviction on 16 offences under section 128A(1) of the
25 **(Commonwealth) Health Insurance Act 1973** at the Downing Centre Local Court on 12 October 1995.

IMPROPER CONDUCT

26. However, the more important allegations, so far as the tribunal's findings on that occasion were concerned,

related to alleged improper and unethical conduct in the course of those procedures involving patients A and B.

27. The allegation in relation to patient A was that, during the procedure and after the patient had been
5 sedated, the applicant: (a) taped the patient's eyes shut; and, (b) asked patient A questions concerning her sexual practices and experiences, which questions: (1) were asked by the practitioner for his own sexual gratification; and/or, (2) were likely subsequently to cause patient A
10 distress and embarrassment.

Paragraph (c) alleged that he failed to terminate discussion with patient A concerning her sexual practices and experience, which discussion: (1) was continued by the practitioner for his own sexual gratification; and/or (2)
15 was irrelevant to the procedure; and, (3) was likely subsequently to cause patient A distress and embarrassment.

28. In relation to patient B the allegation was in similar terms except that it included an allegation that
20 the applicant had masturbated, during the procedure and after the patient had been sedated.

29. It was those allegations of what might be described as sexual misconduct on the part of the applicant which led, ultimately, to a finding of professional misconduct
25 and justified the order for suspension for six months, which was then made.

THE 1996 FINDINGS

30. The Tribunal found that the particulars relating to the conduct of the procedure were proved and, in relation

to the additional particulars, found a number of those matters established as well. 31. So far as the improper and unethical conduct was concerned, in respect of each patient, the tribunal was satisfied that the applicant had
5 taped each patient's eyes shut during the procedure and after the patient had been sedated, found that there was no proper therapeutic purpose for that act but, whilst regarding it with some suspicion, considered that it may have been due to some lack of understanding on his part
10 and, accordingly, did not regard that as evidence of improper or unethical conduct.

32. So far as the questioning was concerned, in respect of each patient, that was found to be proved. In relation to patient B the allegation of masturbation was not
15 proved.

33. In essence, therefore, the finding of unethical and improper conduct related to questions which were irrelevant to the procedure, likely subsequently to cause distress and embarrassment to the patient and, in each
20 case, were asked by the practitioner for his own sexual gratification. Some indication of the nature of the questions is to be found in a passage in the judgment of the tribunal dealing with what were said to be similarities between questions asked of each of the
25 patients; those questions relate to whether the patient engaged in oral sex with a particular male and in each case, whether there was ejaculation in the mouth, as a result of that activity.

PROFESSIONAL MISCONDUCT

34. On those findings, the tribunal regarded the applicant as "clearly guilty of professional misconduct". It followed, of course, that that finding involved a finding that the conduct was sufficiently serious to justify suspension or deregistration: S.37. The tribunal however, correctly noted that such a finding, and the availability of such orders, does not mean that the tribunal must impose one or other of those orders.

10

UNSATISFACTORY PROFESSIONAL CONDUCT

35. The Tribunal concluded that, in relation to the matters concerning clinical practice, the findings made against the applicant amounted to unsatisfactory professional conduct. In relation to the convictions under the Health Insurance Act, that complaint was made out and the tribunal considered that it also amounted to unsatisfactory professional conduct.

36. The extent to which the matters concerning the applicant's clinical practice constituted unsatisfactory professional conduct is reflected in some remarks of the tribunal. For example, the failure to ensure that there was another person trained in resuscitation procedures continually present, was regarded by the tribunal as "extremely serious". The applicant admitted that failure, but the complainant accepted that it amounted to no more than unsatisfactory professional conduct. The Tribunal viewed that concession:

30 "With some disquiet. This and at least one other of the clinical deficiencies could have been the cause

of a disaster. In the light of the concession, the tribunal will not go on to consider whether it should find this, by itself, a sufficiently serious matter to justify suspension or deregistration. It was an omission that flew in the face of P9, which though not of the force of law, is widely accepted amongst medical practitioners as setting out the appropriate conduct."

(The reference to P9 is a reference to the protocol of The Faculty of Anaesthetists). 37. Thus, the tribunal clearly considered at least some aspects of those clinical practice matters as being quite serious, but nonetheless found only that they constituted unsatisfactory professional conduct.

THE 1996 ORDERS

38. In considering what action should be taken in relation to the finding of professional misconduct relating to the improper questioning during the procedures, the Tribunal indicated that it had given "anxious thought" to the appropriate order and had decided, "with some misgivings" that deregistration was not called for. In reaching that decision, the tribunal took into account

(1) The fact that there was no improper physical contact with either patient proved; (2) that the applicant, a young married man with a family, had some obvious abilities and can be rehabilitated; (3) that he had a large practice which would be lost to him if he were deregistered. In those circumstances, it concluded:

"We feel that the public is sufficiently protected if we suspend him for a period and impose appropriate conditions."

5

39. In those circumstances, both the condition relating to intravenous sedation and the condition relating to examinations of female patients were imposed as a result of what was clearly regarded by the Tribunal as a case of
10 unsatisfactory professional conduct, at the upper end of that range, though not in the more serious category of professional misconduct, and as to the requirement for a chaperone, after the very serious finding of improper and unethical conduct on the part of the applicant, on the two
15 occasions, when he inappropriately questioned patients about sexual matters whilst they were under sedation and for his own sexual gratification.

THE ONUS ON THE APPLICANT HERE

40. In seeking to have the order revoked, and the
20 conditions deleted, the onus of proof rests upon the applicant. He must satisfy the tribunal that it would be consistent with the protection of the public that the order be revoked, or the conditions deleted. He must satisfy the tribunal, and comfortably satisfy the
25 tribunal, that it is no longer appropriate that that order remain, or that those conditions be attached to his registration.

In assessing the application, the protection of the public is paramount, and the protection the medical

profession itself is also an important consideration.

ORDER 2

41. So far as order 2 is concerned, the applicant
complied with the requirement to submit to the treatment
5 of his own nominated psychiatrist, approved by the Board,
but as early as 1997, the Board concluded that there was
no need for him to continue to attend the treating
psychiatrist.

That determination was, unfortunately, not within the
10 power of the Board to make. However, the Tribunal notes
that that was the view reached by the board at the time,
on the merits of that issue. In addition, the Board
contemplated some continuing assessment by the board's own
nominated psychiatrist, on a 12 monthly basis. A number
15 of reports from Dr Orsmond have been provided to the board
and copies of them are included in the material relied
upon by the applicant.

42. Without going into the detail of those reports, it is
fair to observe that there is nothing in them to suggest
20 that there is any need for him to seek any treatment from
a psychiatrist at the present time. Indeed, it would seem
that his progress, as detailed in those psychiatric
reports and in other material placed before the
Tribunal, has been such that the requirement for treatment
25 from his own psychiatrist has not been a significant
matter for many years.

43. The Tribunal's task in relation to that order is essentially put as being, in these circumstances, simply to give formal effect to the conclusion reached by the Medical Board as long ago as 1997. The difficulty which
5 has arisen is simply that the Medical Board itself was not in a position to resolve that that order was no longer required to be complied with. The applicant and the Board both continued in that belief, however, until the applicant was recently informed that there might be some
10 problem with that order.

The applicant has sought to expand his application today to seek to have order 2 revoked, quashed or otherwise disposed of, in order to complete the formalities in relation to that issue.

15 **THE TRIBUNAL'S POWER TO REVIEW ORDER 2**

44. One difficulty which might arise is what power this tribunal has to make such an order. The right of review of that order is clearly vested in the Tribunal by section 93(1) as being the "appropriate review body".

20 45. Section 92(1) permits an application for review of an order as to suspension, removal or non re-registration, or placing conditions on a person's registration.

Order 2 is not an order which can be categorised as falling within any subparagraphs (a), (b) or (c) of
25 section 92(1). However, subsection (2) appears to confer power on a person to apply to the appropriate review body for a review of an order made "under this Division". Some difficulty might arise in relation to what orders are covered by that provision. On one view of it, it may

apply only to orders made under section 94 subsection (1), they being orders which can be made under Division 3. On the other hand, there is no other apparent mechanism by which an order of the Medical Tribunal, other than one
5 relating to suspension, deregistration or imposing conditions, can be reviewed otherwise than, perhaps, on appeal to the Court of Appeal.

46. Section 94(1) permits an application for review to be the subject of an inquiry and the appropriate review body,
10 in the present case, the Medical Tribunal:

"May then do any of the following: (a) dismiss the application, (b) by its order terminate or shorten the period of the suspension concerned, (c) make a
15 reinstatement order, (d) make an order altering the conditions to which the person's registration is subject, including by imposing new conditions."

Subsection (2) deals with certain provisions relation to
20 reinstatement orders.

47. The difficulty in the present case is that the period of suspension has long ago expired and is not the subject of any application for review on this occasion. The applicant does not need to seek any reinstatement order.
25 He has remained on the register since 1987 albeit with the period of suspension of six months in 1996. He is not seeking an order altering the conditions to which his registration is subject, at least in relation to order 2. Order 2 is an order rather than a condition.

30 48. The parties are content that this tribunal might revoke that order, order number 2, if the substance of the application is meritorious. As already indicated, if the tribunal has power to do so, then it is clearly

appropriate to revoke that order. It no longer has any useful work to do and the parties have, in good faith, acted upon the assumption, for the last eight years, that its purpose and force are spent.

5 49. Whilst there may be some doubt about the power of the Tribunal to affect any order which does not amount to a suspension, deregistration, or the imposition of conditions, in the absence of any other mechanism, it would be appropriate to proceed on the assumption, which
10 this Tribunal makes, that such a power exists.

If for no other reason than that the record could now properly be corrected, the tribunal proposes to accede to the application in respect of order number 2.

50. In reaching that conclusion it should not be assumed
15 that the Tribunal is fully satisfied that the review mechanism provides a sure foundation for such an application to be granted, but that is a matter which might await an occasion where parties wish to more fully argue the point.

20 51. An appropriate step to take in relation to order 2 is to declare that it is no longer appropriate and then to order that it be revoked.

THE SEDATION CONDITION

52. So far as the conditions are concerned, condition 1
25 relates to the question of intravenous sedation. The tribunal has already referred to the basis of the findings made by the tribunal in 1996. Given the findings that were made then, the Tribunal was clearly justified in treating the matter as one which required appropriate

conditions for the protection of the public. Condition 1 was, of course, augmented by the second condition which required a plan of continuing medical education, including resuscitation procedures appropriate to his practice.

5 53. The applicant has not used intravenous sedation since that time.

54. He has provided the tribunal with a substantial body of material indicating steps which he has taken, particularly over the last 10 years, including conferences
10 and courses, to improve his skills and knowledge as a practitioner. The material is supportive of his claim that since 1996 he has worked hard at maintaining appropriate professional standards. He complied with the conditions laid down in the tribunal and indeed complied
15 with the orders, particularly in relation to psychiatric care, assessment, treatment and reporting.

55. He is presently the chair of the Standards and Accreditation Committee of the Eastern Suburb Division of General Practice, has been responsible for introducing the
20 Royal Australian College of General Practitioners' standard for practice accreditation both the family health care centre at which he practices and at other practices within the eastern Sydney division of general practice. He works with final year medical students in the faculty
25 of medicine at Sydney University as a clinical associate and also as a clinical tutor.

56. Since his appearance before the tribunal in 1996 there has been a further complaint in relation to his performing colposcopy without a colposcope. An inquiry

into that matter in 2000 resulted in the imposition of further conditions relating to colposcopy and cervical biopsies. Ultimately, the conditions imposed on his registration relating to those procedures were removed
5 following his voluntary undertaking to have his technique assessed by an obstetrician and gynaecologist in October 2004. He was satisfactorily assessed by that doctor at the colposcopy clinic, the Royal Prince Alfred Hospital. The removal of other conditions by letter of August 2004
10 has already been noted.

57. In relation to the intravenous sedation condition, he asserts that he has complied with that condition since 1996 and that, after the medical tribunal decision in 1996, he ceased operating all together and has not carried
15 out any proceedings requiring intravenous sedation. A patient requiring such a procedure is referred to a specialist. He says that he has no desire or intention to resume performing procedures requiring sedation and will continue to refer such patients to the appropriate
20 specialist. He asks for the removal of that condition because it is no longer relevant to his practice.

58. In relation to that condition he has today tendered a statutory declaration, intended to be treated as an undertaking to the Medical Board, that he will not use
25 intravenous sedation otherwise than in a hospital or day procedure centre. That undertaking reflects the terms of the present condition. He also says in that document that, if in the future he decides to undertake procedures performed under intravenous sedation in his rooms, he will

notify the board prior to implementing those changes to his practice.

59. In other words, he has complied with the condition thus far, has appropriately referred patients who might
5 otherwise require intravenous sedation to a specialist and for the future proposes not to use intravenous sedation otherwise than in accordance with the restrictions imposed in the present condition, but reserving to himself the right to do so, provided he notifies the board before
10 changing his practice in that fashion.

60. In the light of the conduct of the applicant since 1996, including the furthering of his medical education, his participation in professional associations and academic work and his undertaking to the Medical Board,
15 the Tribunal is able to reach the conclusion, having regard to the protection of the public it is comfortably satisfied that it is no longer appropriate for that condition to be attached to his registration.

61. In reaching that conclusion, the Tribunal is, of
20 course, conscious that the undertaking is not absolute or indefinite in the sense that the applicant may resume the use of intravenous sedation, provided he first notifies the medical board. However, the process of notification itself will draw the board's attention to his proposal to
25 change that aspect of his practice, and even absent any pending disciplinary proceedings, or the continuation of any order, that requirement of notification will have significant benefit in the public interest, in that the board will be in a position, upon such notification, to

provide any further information or counselling to the practitioner which may be necessary, and may, in general terms, keep a supervisory eye on his practice, should that be necessary.

5

THE EXAMINATION CONDITION

62. So far as the second condition is concerned, what remains of that condition is simply a requirement that the relevant examinations be conducted in the presence of a chaperone. The requirement to keep records of the attendance of chaperones has been dispensed with by the Board.

10

ITS SIGNIFICANCE

63. The remaining requirement is, itself, clearly, a serious condition to be imposed on a practitioner's registration. Serious in its impact on the way in which that practitioner may conduct his or her practice of examining female patients.

15

But serious, also, in the sense that such a condition is imposed in circumstances only where there is serious misconduct on the part of a practitioner.

20

64. This condition was imposed in June 1996, that is, prior to the decision of the Court of Appeal in **Health Care Complaints Commission v Litchfield (1997) 41 NSWLR 630**. In that case, the Court of Appeal concluded that the necessity for imposing a condition prohibiting a doctor from seeing a female patient, except in the continuous presence of a female chaperone, demonstrates that he is unfit to practise. At page 639, the court said this:

25

5 "The majority thus found that the appellant could not
be trusted to observe proper professional standards
in his conduct towards female patients, unless a
female chaperone was present throughout. With the
greatest of respect, the necessity for imposing such
conditions on the appellant's registration,
demonstrated that he was unfit to practise medicine.
In those circumstances, the only appropriate order
was one dismissing his appeal. The dissenting
10 judgment of Priestley JA entirely correct, and the
majority decision should be over-ruled."

65. The reference to "the majority decision" was a
reference to the majority of decision of the Court of
15 Appeal in **Richter v Walton, Court of Appeal**, (15 September
1993) unreported. In other words, that decision
represented a significant shift in the view of the Court
of Appeal as to the seriousness of conduct which justifies
the imposition of a chaperone condition. The judgment of
20 Priestley J, which was said to be "entirely correct",
included the familiar passage (referred to in many
decisions of this Tribunal) as to the relationship between
patient and doctor. At pages 8 to 9 His Honour said:

25 "The degree of trust which patients necessarily give
to their doctors, may vary according to the condition
which takes the patient to the doctor. Even in
regard to the most commonplace medical matters, the
trust the patient places in a doctor is considerable.
30 In some cases, of which the present seems to me to
be an example, the patient's trust cannot help but be
almost absolute. The doctor's power in regard to the
patient in such cases, is also very great. I do not
mean power in an abstract way, but as a matter of
35 fact, the extent of the power will vary according to
the temperament of the patient. The doctor, with
some patients, and for limited periods, because of
the relationship in which they are temporarily
placed, is in a position to do whatever the doctor
40 wants with the body of the patient. This is one of
the reasons why doctors are subject to
correspondingly great obligations, and are expected
to maintain very high standard, all this being very
much in the public interest."
45

66. In the present case, not on an isolated occasion, but on two separate occasions, and with two separate patients, the applicant here, whilst performing an intimate procedure on patients under sedation, inappropriately
5 asked them questions of a sexual nature, such as those referred to earlier in this judgment. It was an instance of a person in a position of trust, where the patient was in each case, particularly vulnerable because of the nature of the procedure and the sedation, obtaining sexual
10 gratification for himself by abusing the trust of that patient, and by asking questions which were both demeaning and offensive.

67. It is not to the point that the tribunal's decision in 1996 might have been different, had it been delivered
15 in 1997, after the Court of Appeal's decision in *Litchfield*. The court is not called upon, in this case, to review the decision of the tribunal. Reference is made to the principles in *Litchfield*, simply to emphasise the seriousness of the finding which was made against this
20 applicant in 1996. The general principles in ***Litchfield*** have been reaffirmed more recently by the Court of Appeal in the ***Health Care Complaints Commission v Abou Hatoum and another [2004] NSWCA 30***.

68. The imposition of conditions, in any event, is a
25 serious matter.

As the tribunal said in the case of **Dr Le**,
20 September 2001, at paragraph (95):

30 "Conditions are imposed on the registration of

5 medical practitioners in the public interest. As
with disciplinary proceedings generally, such
conditions are intended to maintain proper ethical
and professional standards, primarily for the
10 protection of the public, but also for the protection
of the profession. The effect of such conditions may
be to prohibit or regulate the conduct of a
practitioner in various ways, commonly in relation to
15 areas of practice, the prescription of certain types
of drugs, the forms of permissible employment as a
practitioner, requirements of supervision, training,
or notification, or providing for the monitoring of
aspects of a practitioner's life, such as conditions
20 concerning the use of alcohol or drugs. Invariably,
they superimpose on the usual collection of
responsibilities expected of all practitioners, added
burdens or restrictions. Moreover, those burdens or
restrictions are imposed for reasons peculiar to the
25 individual practitioner and create burdens or
restrictions, particular to that practitioner,
particularly when imposed in a disciplinary context.
Such restrictions are not lightly imposed, nor may
they be treated lightly. Any practitioner whose
30 registration is subject to conditions could not
reasonably hold any view of those conditions other
than that they must be scrupulously observed.
Repeated wilful breaches of conditions are treated by
the Medical Tribunal as the most serious finding
against a practitioner containing as it does a grave
criticism of the standard of the practitioner's
conduct."

(Citations of authority omitted)

IS THE CONDITION STILL APPROPRIATE?

35 69. In the light of those principles, the tribunal turns
to consideration of the continuing appropriateness or
otherwise of the chaperone condition. The starting point
is that that condition has been in force for almost nine
years, initially, in a more rigorous form requiring the
40 keeping of the provision of records. But the substance
and essence of the condition has remained in force
throughout that period.

The mere passage of time does not, of itself,
demonstrate that the condition is no longer appropriate.

However, it is one factor but, more particularly, a factor reinforced by what has occurred since. The conduct itself occurred in early 1994, some 11 years ago. Since that time, the applicant has practised without any relevant
5 complaint. The matters relating to colposcopy do not have any direct bearing on this issue. Thirdly, the applicant asserts, and he is not challenged in this, that he has always complied with that condition, that is, despite the fact that, on average each month, he estimates that he
10 would carry out between 10 and 20 examinations of females per vagina, per rectum, or of the breast.

70. He continues to deny the conduct alleged by the two patients in the tribunal hearing in 1996. He denies the conduct took place. That is a matter of some relevance
15 though it is not a matter which necessarily stands in the way of a conclusion that an applicant for relief from conditions has established a case for such relief, just as the continuing denial of the conduct leading to
deregistration is, of itself, not a bar to
20 re-registration, see **Zaidi v Health Care Complaints Commission (1998) 44 NSWLR 82**. Moreover while maintaining that stance, the applicant has nonetheless accepted the orders which flowed from the finding that he had been guilty of that conduct, not only in relation to the
25 chaperone condition, but also in relation to the provision of documentary evidence about the use of a chaperone, and in compliance with the other orders and conditions made in 1996.

71. In any event, he proposes to continue using a

chaperone in the future, not because of any risk to female patients, - because he believes there is no such risk, - but because he has now been using a chaperone since August 1994 and it has become an accepted part of his practice to use the chaperone when carrying out these relevant examinations.

74. Again, in relation to that aspect of the conditions, his statutory declaration contains an undertaking to the board that he will continue to conduct such examinations with a female chaperone, but, if he decides to conduct such examinations in the absence of a female chaperone, then again, he will notify the board prior to implementing such a change to his practice.

75. Having regard, also, to the various reports of the board appointed psychiatrist; to the period of some almost 11 years of apparently satisfactory conduct of his practice in this regard, with the presence of a female chaperone, and his intention to continue that practice, whether he is bound to, or not, the tribunal could be comfortably satisfied that, in the interests of the protection of the public, that condition is no longer appropriate.

76. It should be noted that, in reaching that conclusion, the tribunal is conscious of the circumstances which gave rise to the necessity of the imposition of such a condition. This was not an isolated incident, it occurred on two occasions, with two separate patients, and the conduct occurred whilst the patients were in that vulnerable situation of having an intimate procedure

conducted whilst under sedation. Clearly, those were serious matters. However, in terms of the conduct, the inappropriate conduct was in the questioning. As the tribunal in 1996 observed, it was not conduct which
5 involved physical contact with the patients. That would tend to put the conduct here in a less serious light than many other incidences of such misconduct in the course of procedures or examinations. There is no indication of any likelihood of repetition, and it would seem that the
10 expectation of rehabilitation expressed by the tribunal in 1996 has been adequately met. In those circumstances, the tribunal considers it no longer appropriate that that condition be attached, particularly in the light of the undertaking to the Medical Board.

15

PROPOSED ORDERS AND COSTS

77. So far as the proposed orders are concerned, the parties have had an opportunity to comment on the orders which have been drafted. As to the costs of these proceedings, no application for costs is made by the
20 applicant. However, the respondent, Heath Care Complaints Commission, seeks an order for its costs in relation to this application.

78. The Tribunal has power to award costs pursuant to schedule 2 clause 13 of the Act. That provision has been
25 held to be a provision to be applied in accordance with ordinary rules relating to costs: in the first instance, that the making of such an order is compensatory in its nature, rather than operating in some punitive fashion. Secondly, the tribunal is entitled to proceed on the basis

that, ordinarily speaking, a party successful in the tribunal will be entitled to costs; in other words, the general rule applicable in most courts that costs follow the event is a rule of application in proceedings in this
5 tribunal as well. Those principles are derived from the decision of the Court of Appeal of **Ohn v Walton**: Court of Appeal, 28 February 1995.

79. In relation to applications for reinstatement or relief in that general category, into which category
10 applications for the removals of conditions might be placed, the practice of the tribunal has not been particularly consistent. The commission has been able to dig out three cases today which resulted in the commission being awarded costs in such applications on two occasions
15 but not on a third.

80. It might be considered that a person seeking reinstatement to the medical register or a practitioner seeking the removal of conditions is in a position analogous to that of a person seeking an indulgence from a
20 court, such as an applicant for the extension of a limitation period which has expired. That analogy does have some superficial attraction in relation to proceedings of this kind.

81. In the present circumstances, however, the applicant
25 in relation to one order, was essentially seeking to formalise a state of affairs which had, by mutual mistake, arisen some many years ago in relation to order 2. In relation to that order, no opposition was offered. In relation to the conditions, the commission submitted that

it was a matter for the tribunal. But the submissions made, whilst not actively supporting the application, were certainly not submissions which could be treated as suggesting any opposition to the orders. In other words, the role of the commission in these proceedings has been to assist the tribunal by referring to relevant considerations but not to oppose the application. A similar view, expressed by the Medical Board, was conveyed through the solicitor for the Health Care Complaints Commission.

82. In substance, then, the role adopted by the Health Care Complaints Commission, as respondent to this application or as a quasi-respondent to the application, was one, essentially, of a submitting nature. The commission did not file any material in advance, though it did assist by providing the evidentiary certificate from the Medical Board today. In those circumstances, where there was no real contest as to the orders and where, prima facie at least, the applicant for those orders has succeeded and would ordinarily be entitled to costs following the event, it seems to the tribunal appropriate to simply make an order that there be no order as to the costs of either the applicant or the respondent.

ORDERS

83. The tribunal unanimously makes the following orders:

- (1) (a) A declaration that order 2 made by the tribunal on 21 June 1996, that is, an order relating to psychiatric treatment, is no longer appropriate.

(b) An order revoking that order.

(2) An order deleting all remaining conditions to which the practitioner is subject.

(3) No order as to the costs of either the applicant or the respondent.

5

10

**Judge G J Graham
Deputy Chairperson
For and on behalf of the
Medical Tribunal**

15