

**UNDER THE HEALTH & DISABILITY
SERVICES ACT 1993**

**IN THE MATTER OF THE MINISTERIAL
INQUIRY INTO THE UNDER-
REPORTING OF CERVICAL SMEAR
ABNORMALITIES**

BRIEF OF EVIDENCE OF DR K J THOMSON

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Introduction

- 1 My full name is Kenneth John Thomson. I have the following qualifications: B.Med.Sc. in Pathology from the University of Otago. I hold the degree of Bachelor of Medicine and Bachelor of Surgery from the University of Otago and a Diploma in Clinical Pathology from that University. I am a Fellow of the Royal College of Pathologists of Australasia in Anatomic Pathology, and I hold the Diploma of Medical Jurisprudence in Forensic Pathology from the Society of Apothecaries of London. I practice as a pathologist in Wellington.
- 2 Over the period from October 1991 to December 1997 I was on the Medical Council of New Zealand and from the 1st of May 1995 to the 31st of December 1997 I was Chair of the Medical Council (latterly President of the Medical Council).
- 3 In preparation of this brief of evidence I have reviewed the Medical Council file relevant to Dr Bottrill.

Background

Complaint received by MPDC

- 4 Patient No. 1 made a claim under the Accident Rehabilitation and Compensation Insurance Act 1992 for “Medical Misadventure” to the Accident Rehabilitation and Compensation Insurance Corporation (“ARCIC”).
- 5 Section 5(10) of the ARCIC provides:

“Where the Corporation considers that medical misadventure may be attributable to negligence or inappropriate action on the part of a registered health professional it shall report the circumstances to the appropriate body with a view to the institution of disciplinary proceedings...”

- 6 By letter dated 20 November 1995 (“KJT/MCNZ/0001”) ACC wrote to the Secretary of the Medical Practitioners Disciplinary Committee (“MPDC”) and advised that under s5(7) of the ARCIC the Medical Misadventure Advisory Committee (“MMAC”) had found in respect of Dr Bottrill:

“That the misdiagnosis/misreporting of cervical smears is considered to have been due to a failure by the registered health professional to observe a standard of care and skill that was reasonable in the circumstances and in this case was negligent.”

The ACC forwarded a copy of its claim file to the MPDC (“KJT/MCNZ/0002”).

- 7 On 1 December 1995 Patient No. 1 authorised the MPDC to inquire into the professional conduct of Dr Bottrill (“KJT/MCNZ/0003”).
- 8 By letter dated 8 May 1996 Dr Bottrill responded to the MPDC (“KJT/MCNZ/0004”) and advised, amongst other things, that he had retired earlier in 1996 and had sold his pathology practice. Dr Bottrill also enclosed a copy of the report entitled “*Gynaecological Cytology Review*” (“KJT/MCNZ/0005”).
- 9 By letter dated 31 May 1996 Mr David Wilson, barrister of Hamilton, wrote to the MPDC (“KJT/MCNZ/0006”) and submitted that Patient No. 1’s complaint should be treated as one of professional misconduct or alternatively of conduct unbecoming that, in the public interest, should be inquired into by the disciplinary committee. Mr Wilson also responded to a number of the matters raised by Dr Bottrill in his letter of 8 May 1996.
- 10 On 10 February 1997 Mr Andrew Mackintosh of Auckland forwarded a copy of Patient No. 1’s medical notes to the MPDC (“KJT/MCNZ/0007”).

The MPDC hearing - 20 February 1997

11 The MPDC heard the matter on 20 February 1997. The Committee comprised Dr D C Williams (surgeon), chairman, and Drs J I Clayton (anaesthetist) and A M C McCoy (GP). The legal assessor was Mrs Kate Davenport. The hearing took one day and there was a verbatim transcript prepared (“KJT/MCNZ/0008”).

12 Patient No. 1 was represented by Mr D Wilson, and Dr Bottrill by Mr C J Hodson, both of whom were experienced barristers. Both have since become Queens Counsel.

13 The charge against Dr Bottrill was:

“That Dr Bottrill’s misdiagnosis and/or inadequate reporting in November 1990, December 1990 and May 1992 of cervical smears taken from Patient No. 1 amounts to professional misconduct.”

14 Mr Wilson opened on behalf of Patient No. 1 and produced a chronology and index. Patient No. 1 gave evidence and Mr Wilson also called Drs Teague and Bierre.

15 The MPDC hearing was adjourned pending production by Dr Bottrill of his notes. The legal assessor’s directions to the MPDC were provided in writing (“KJT/MCNZ/0009”).

16 Dr Bottrill did not appear at the MPDC hearing, the grounds given being ill health. While not entirely unheard of at that level this was commented on adversely by the MPDC in its written decision dated 5 June 1997 (“KJT/MCNZ/0010”).

The MPDC’s findings

17 In a decision dated 5 June 1997 the MPDC found:

“Against Dr Bottrill and that the charge has been made out. All four slides were underreported but in particular the reporting of slides B and C was so seriously deficient that Patient No. 1 was denied the opportunity and therefore the advantage of earliest

treatment. The Committee finds that Dr Bottrill's conduct fell substantially below that expected of a senior consultant pathologist and the charges made out at a level of conduct unbecoming."

- 18 The written decision of the MPDC dated 5 June 1997 was received by the Medical Council on 9 June 1997. At that time the MPDC was awaiting written submissions which it had called for from counsel for Patient No. 1 and Dr Bottrill as to the penalty to be imposed.
- 19 In a written decision dated 23 July 1997 ("KJT/MCNZ/0011") the MPDC ordered that Dr Bottrill:
- (a) be censured;
 - (b) pay a penalty of \$400;
 - (c) pay the sum of \$7,910.39 which represented 45% of the costs of and incidental to the inquiry (by the MPDC); and
 - (d) in terms of s43(2)(a) of the 1968 Act, imposed the following condition on Dr Bottrill's right to practise as a medical practitioner:

"That Dr Bottrill, for a period of three years from the effective date of this finding, shall not read/report cytopathology slides except under the supervision of a senior cytopathologist."

- 20 The written decision of the MPDC as to penalty dated 23 July 1997 was received by the Medical Council on 25 July 1997.
- 21 The fact that an appeal was to take place was noted in Council's minutes of 17-18 September 1997.

The Appeal

Notices of appeal filed

- 22 Both the complainant, Patient No. 1, and Dr Bottrill appealed the MPDC decision.

- 23 Section 53(1) of the 1968 Act provided that appeals from MPDC findings were held before the Medical Council. There was a further right of appeal from the decision of the Medical Council to the High Court.
- 24 The Notice of Appeal by Dr Bottrill (“KJT/MCNZ/0012”) filed by Mr Hodson on his behalf (dated 5 August 1997) indicated that Dr Bottrill appealed against the finding that a charge of conduct unbecoming a medical practitioner had been upheld against him by the MPDC.
- 25 The Notice of Appeal by Patient No. 1 (“KJT/MCNZ/0013”), filed by Mr Wilson on her behalf (dated 14 August 1997) indicated that Patient No. 1 appealed on the grounds that the charge should have been found proven by the MPDC at the level of professional misconduct.
- 26 Patient No. 1 also appealed against the penalty imposed on Dr Bottrill however this aspect of the appeal was not proceeded with at the hearing before the Medical Council.
- 27 The Tribunals Officer of the Medical Council acknowledged both Notices of Appeal by letter dated 8 September 1997, and advised both lawyers of the dates which the Medical Council had set aside for the hearing of the disciplinary matters (being 10 November).
- 28 Counsel for Patient No. 1 was also provided with a copy of the leaflet “*Notes for Guidance of Persons Appearing Before the Council*” (“KJT/MCNZ/0014”).
- 29 The Medical Council had a policy of assisting complainants with their legal expenses and under that policy the Council met the costs of Patient No. 1’s legal representation at both the MPDC and Medical Council hearings.
- 30 The Tribunals Officer consulted and liaised with both lawyers by mail and fax during September to set a hearing date. Various suggested dates were not able to proceed because of the previous commitments

of one or both of the lawyers. In the end, 27 November 1997 was allocated for hearing the appeal.

Council appointed to hear the appeal

- 31 At the time of the hearing in November 1997 the Medical Council appointed under the Medical Practitioners Act 1968 (as amended) had completed its term and only five members of that Council were serving on the new Medical Council appointed under the 1995 Act (which came into force on 1 July 1996). Under the 1968 Act the Medical Council continued in existence only for the disciplinary matters commenced under the 1968 Act which had not been concluded as at 1 July 1996.
- 32 The 1968 Act, as amended in 1982, provided for a total of 12 members on the Medical Council, only one of whom was not a medical practitioner.
- 33 At any time two of those Council members formed part of the Preliminary Proceedings Committee investigating disciplinary complaints and therefore could not take part in disciplinary hearings. This left effectively only ten members from whom to make up a quorum for a disciplinary hearing.
- 34 The hearing of an appeal from the findings of the MPDC to the Medical Council required a quorum of six members appointed under the 1968 Act.
- 35 Where the matters heard related to a particular medical speciality there was always an attempt to ensure that one of the Council members who heard the case had expertise in that particular area. Because of the limited number of Council members this was not always possible.
- 36 The members of the Council who heard the appeal were myself as Chair, Dr M M Herbert a senior Auckland general practitioner, Dr R Gudex a Hamilton obstetrician and gynaecologist, Professor J Morton

of Christchurch and Dr C Maclaurin of Auckland, both surgeons and Dr J Eastwood of Wellington. Dr Eastwood was a doctor from the Ministry of Health and appointed by the Director General of Health to sit on this appeal as her alternate. With the exception of Dr Eastwood, all members of the Council had sat on many disciplinary cases in the past.

The appeal hearing - 27 November 1997

- 37 The procedures adopted at hearings of MPDC appeals before the Council were relatively formal. Section 53(3) of the Medical Practitioners Act 1968 provided that “every such appeal shall be by way of rehearing...”.
- 38 Members of the Medical Council who sat on the appeal received, in advance of the hearing date, the following material:
- (a) the MPDC file, being:
 - (i) the original letter of complaint and ARCIC file attached;
 - (ii) Patient No. 1’s consent form;
 - (iii) letter of explanation from Dr Bottrill dated 8 May 1996;
 - (iv) copy of response from Mr Wilson on behalf of Patient No. 1 dated 31 May 1996;
 - (v) Dr McFarlane’s records (numbered pages 1-71);
 - (vi) Dr Mackintosh’s records (numbered pages 72-75);
 - (vii) Dr Bierre’s records (numbered pages 76-83);
 - (viii) closing submissions Mr Wilson (for Patient No. 1);
 - (ix) closing submissions Mr Hodson (for Dr Bottrill);
 - (x) written directions of legal assessor Ms Davenport;
 - (xi) submissions on penalty Mr Hodson;
 - (xii) submissions on penalty Mr Wilson;

- (xiii) MPDC findings and findings as to penalty;
 - (b) the transcript of the hearing before the MPDC;
 - (c) exhibits 1-7 tabled at the MPDC hearing;
 - (d) Notice of Appeal - Patient No. 1;
 - (e) Notice of Appeal - Dr Bottrill;
 - (f) written Points on Appeal - Mr Wilson (for Patient No. 1) (“KJT/MCNZ/0015”);
 - (g) written Points on Appeal - Mr Hodson (for Dr Bottrill) (“KJT/MCNZ/0016”).
- 39 Mr G D Pearson of Wellington (now Deputy chairperson of the Medical Practitioners Disciplinary Tribunal) attended the hearing as legal assessor.
- 40 Where an appeal is conducted on the basis of being a rehearing no witnesses or new evidence are called unless leave is given by the Medical Council. In this case neither party sought to call any witnesses or evidence that had not been before the MPDC.
- 41 Neither Patient No. 1 nor Dr Bottrill was present at the hearing.
- 42 Counsel for the parties presented their submissions, in which they focused on matters of law.
- 43 As required under the 1968 Act, disciplinary hearings before the Medical Council, including appeal hearings, were conducted in private. The Council itself was not comfortable with the closed hearing structure under the 1968 Act and this was one of the areas that was targeted for reform in the new legislation. The change in the 1995 Act to a presumption that disciplinary hearings before the Medical Practitioners Disciplinary Tribunal would be held in public, was supported by the Medical Council.

- 44 A verbatim transcript of the appeal hearing was kept (“KJT/MCNZ/0017”).
- 45 As the transcript shows (“T2”) I raised at the commencement of the hearing the fact that Dr Teague had been a partner of mine for several years. I made the point that I do not practise in the area of cytology but nonetheless felt it appropriate to raise my association so that if either counsel had any objection to me being on the tribunal he could raise it then. Neither counsel raised an objection.
- 46 As I have stated, Dr Bottrill did not attend the hearing. Dr Bottrill’s counsel provided the explanation that Dr Bottrill was unwell and in the course of the hearing the Council was referred to a medical report prepared by a physician in respect of Dr Bottrill. On the basis of that report Council was satisfied that Dr Bottrill was not well enough to attend the appeal hearing.
- 47 However, Dr Bottrill’s absence was not in itself unusual. There was no suggestion that the appeal should be postponed because of Dr Bottrill’s ill health. Because of the rehearing nature of appeal hearings, and the costs in time and financial terms of attending, more often than not, neither the complainant nor the doctor was present, but were represented by their counsel.
- 48 Following the submissions by the lawyers for the parties the Council was addressed by Mr Pearson who directed us as to legal aspects of the appeal hearing.

Council decision on appeal

- 49 Immediately at the conclusion of the appeal hearing the Council members deliberated. The decision of the Council (“KJT/MCNZ/0018”) was unanimous. In cases where there were disagreements amongst Council members, a dissenting decision was included.

- 50 There was nothing before the Medical Council to suggest that this case was anything other than a very unfortunate episode involving one patient. At no stage was any evidence submitted to the Council that suggested that there was a pattern of inappropriate reporting. The Medical Council understood that Dr Bottrill was no longer practising cytology or indeed as a pathologist, having retired and sold his practice in 1996. In any event, the decision of the MPDC which was ultimately upheld by the Council (Patient No. 1 having, in effect, withdrawn her appeal against penalty), prohibited Dr Bottrill from practising in cytopathology for the maximum period (under the 1968 Act) of three years, except under the supervision of a senior cytopathologist.
- 51 The Medical Council upheld the MPDC decision and penalty imposed against Dr Bottrill.
- 52 The finding of “conduct unbecoming” rather than “professional misconduct” was in keeping with previous practice under the 1968 Act where the more serious findings of misconduct and disgraceful conduct tended to be reserved for inappropriate behaviour on the part of the doctor rather than issues of competence. Occasional cases where there were patterns of poor performance had led to findings of professional misconduct at the lower end of the scale, but the evidence before the Medical Council was that this was a case relating to a single patient.
- 53 While the \$400 fine could be regarded as small, the maximum fine available under the 1968 Act was \$1,000 which had to apply to the most serious cases of disgraceful conduct.
- 54 While substantial orders for costs had been imposed in the past (in excess of \$200,000 in one instance) the High Court, in previous decisions, had made it clear that the Council could not consider the award of costs part of any penalty imposed.

- 55 No order for publication was made. No request for publication was made. The 1968 Act provided only for publication in the New Zealand Medical Journal and not in the public press. In any event, cases where the finding had been conduct unbecoming were never, customarily, published.
- 56 As far as I am aware neither party appealed the Medical Council decision to the High Court.

Dr K J Thomson
16 June 2000