IN THE SUPREME COURT OF NEW ZEALAND

SC 22/2007

BETWEEN	Z Appellant	
AND	A COMPLAINTS ASSESSMENT COMMITTEE Respondent	

Coram: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Hearing: 13 November 2007

Counsel: A H Waalkens QC and A L Credin for Appellant
B M Stanaway and A M Toohey for Respondent

CIVIL APPEAL

10.04pm

Waalkens Yes good morning Your Honours, I appear for the appellant, together with Miss Credin.

Elias CJ Thank you Mr Waalkens, Miss Credin.

Stanaway If Your Honours please, I appear for the respondent together with Miss Toohey.

Elias CJ Thank you Mr Stanaway, Miss Toohey. Yes Waalkens? Mr Waalkens I can't remember, is there a name suppression?

Waalkens I was just going to address Your Honours on that.

Elias CJ Yes, there is, yes.

Waalkens Well I don't know is the short answer. I phoned my office this morning and asked my secretary to look on the correspondence file and we can find correspondences but no copy of an order and I've just checked with my learned friend and they're largely in the same position, although there is no dispute about, and no opposition to a name suppression order being made and I recall in the District Court following the criminal trial acquittal, the order made was that there be no publication of the accused's name or any details that identify him, including location.

Elias CJ Justice Blanchard points out that there is a High Court order suppressing publication of the name.

Waalkens Correct.

Elias CJ Yes.

Waalkens And in the Court of Appeal also.

Elias CJ So it would be a matter would it for the, what's the body it goes to if it goes ahead?

Waalkens The Dentists Disciplinary Tribunal.

Elias CJ Yes.

Waalkens And it is made in order too. There's an order in the Dentists Disciplinary Tribunal on an interim

Elias CJ Right, pending determination.

Waalkens Interim basis pending determination, so every Court and Tribunal has made orders thus far and I think I'm correct in saying that there's none in the Supreme Court although I'm a bit surprised that that were so because I had understood

Blanchard J But we wouldn't need to make an order if the High Court order remained in force.

Waalkens That's correct Your Honour.

Elias CJ Yes.

Waalkens Yes I just recall from a previous one there had been an order made in this Court also.

Elias CJ Yes but it's not necessary if orders are holding the position.

Waalkens No, no I believe that's correct Your Honours.

Elias CJ Right, thank you. Yes.

Waalkens Now Your Honours subject of course to how you would prefer me to deal with it I would propose to in my submissions take you initially through some of the facts. I'm not going to be very long on the facts but I felt it would be useful to highlight a couple of key points on that and then move to the gravamen of the argument which is disciplinary proceedings standard of proof and Your Honours will have seen in my submissions I'm commending to you the suggestion that discipline is in rather a special category within the civil arena and that interfaces with having a high standard of proof be it a criminal standard as I'm commending to the Court or if it's the civil standard with a sliding scale, then at a level that ought to be akin to or close to the criminal standard. What has some significance perhaps is that I gather this is the last disciplinary charge under the Dentists Disciplinary Tribunal, or the Dental Act, so this will be the last of a number that have happened over the years, although having said that, that this case has very significant issues, not just a dentist under the old Act but health professionals and indeed other professionals generally.

Tipping J They were all under the Health Practitioners, whatever that Act's called

Waalkens Yes, the Health Practitioners Confidence Assurance Act Your Honour.

Tipping J Yes, yes.

Waalkens That covers all health practitioners now

Elias CJ That legislation doesn't specifically deal with the standard of proof does it?

Waalkens No.

Elias CJ So the same issues

Waalkens Absolutely so Your Honour

Elias CJ Yes

Waalkens In fact all of the Law Practitioners Act likewise doesn't deal with standard, it's what rules have been built up over the years through the common law. Now the first point I want to make in terms of the facts is to highlight the striking similarity between the two parts of the charges that we are comparing here with respect to the complainants *Ms P* and *Ms L*. The indictment Your Honours is at pages 77 and 78 and it would be useful if you could put your thumbs in or fingers in to

page 213 at the same time because that's the disciplinary charge equivalent.

Blanchard J Sorry, which was the disciplinary charge equivalent?

Waalkens The disciplinary charge Your Honour is at page 212 and onwards, so if you could go to 212 and also have open page 78 on the case on appeal you will see at page 78 – in fact I beg your pardon Your Honours, it starts at the bottom of page 77. For *Ms L* there were two allegations in the indictment, or two counts – the first at the bottom of page 77 was one of indecent assault by touching her breast over her clothing, and the second count, the sixth one on page 78 alleged indecent assault by placing her hand on his penis. And then if you go to page 212 of the disciplinary charges, it's actually headed *Disciplinary Charges Plural*, but in fact there is one charge of which it's got several particulars, or many particulars, and with respect to *Ms L*

Blanchard J It might be better if you didn't use the name given that that there will be a transcript being prepared

Waalkens Oh yes of course Sir.

Blanchard J The transcript writer will no doubt remove the name but it helps

Waalkens Of course Sir, alright I'll refer to her as *Ms L* then, would that be appropriate Your Honour?

Blanchard J Yes.

Waalkens *Ms L* you will see the allegation at the bottom 1.2.1

Elias CJ Can I just ask a related question? We have a default position in terms of broadcast in the Court that counsel can object, I don't know whether there is any

Registrar There is someone in the media room.

Elias CJ There is someone in the media room?

Waalkens Yes, there's someone from Radio New Zealand. I don't have a problem.

Elias CJ No of course not with the Press, but they need to be aware that there are suppression orders in force.

Waalkens I have spoken to the member of the Press and just indicated what the position was.

Elias CJ Thank you.

Waalkens So the *Ms L* disciplinary charge starts at the bottom of page 212. The relevant part is at page 213 and that is that 1.2.2 potentially endangered *Ms L's* wellbeing; 1.2.2.1, while she was under sedation inappropriately and with no clinical reason on two occasions exposed his penis and then caused her right hand to touch or come into close contact with his penis.

McGrath J That seems a slightly surprising way of charging. You can either charge under the 'affecting the wellbeing' which I would have thought related to adequacy of treatment or you can charge for 'professional misconduct'.

Waalkens Correct Sir.

McGrath J I would have thought this was more in the realm of 'professional misconduct'.

Waalkens It's a little

McGrath J I know it's not your charge but

Waalkens Yes it's a little unclear because if you look at the end of it about half way down that page 213, the conduct separately or cumulatively amounts to an act or omission that could have been detrimental to welfare and/or amounts to professional misconduct

McGrath J Oh I see

Waalkens So they've sort of covered them both

McGrath J They've covered everything?

Waalkens Correct Sir, and the disciplinary charge goes on to capture the second count being, or in fact the earlier count, and on once occasion touched *Ms L's* right breast. So there can be no doubt that it's exactly the very same conduct that's in question there and likewise as with the indictment, and likewise with respect to *Ms P*, who's indictment, or the count for her is the third count on page 77

Tipping J Well there's a difference between the precise allegation in count 2, or the sixth count, and the disciplinary count because it talks into close contact, whereas the other one actually involves contact.

Waalkens Yes, although Your Honour's correct, it does have a slightly different emphasis in terms of what the contact was but in terms

Tipping J No, one says contact, the other says close contact – it implies no contact. I mean it's rather elusive drafting but there seems to be a studied difference.

Waalkens It's not a studied difference I believe Your Honours because if you look at what *Ms L* has alleged, and we have her complaint as set out in the bundle here

Tipping J I don't think this is going to matter on jot frankly

Waalkens No.

Tipping J But if you think it's necessary to take us into this sort of detail

Waalkens No I don't believe it

Tipping J I just thought well

Waalkens No I don't believe it. Certainly on this point Your Honour's just raising I accept that there is a slight difference in the way they've drafted it.

Tipping J Well if we don't have to go into the detail why are we doing it?

Waalkens The point I wanted to emphasise was that the particulars in the count and the particulars in the disciplinary charge reflects the very same allegation as in the criminal charge and the point I'd made in the submissions is that unlike many medical or dental disciplinary cases this was not one of those where the criminal defence involved allegations of a defensive unintentional conduct or touching or for that matter, consent. This was simply 'did it happen or did it not', and I've made the distinction in my written submissions to one of the other complainant's cases where

Elias CJ Sorry what do you say should be the position where a different defence had been run?

Waalkens I concede Your Honours that whether there's a defence that raised issues of consent or unintentional touching for example in some, in fact there's a number of examples in the casebook, of particular types of medical consultations taking place where there's been touching of a type that's resulted in an acquittal of the criminal charge, the Courts have nonetheless recognised that that doesn't preclude a Disciplinary Tribunal from looking at whether the touching that took place albeit didn't meet the criminal standard nonetheless may have been inappropriate. And there's a splendid example of that in fact in the case on appeal. Justice Fogarty's High Court decision refers to re a medical practitioner, and that's at page 27 of the casebook, which Your Honours will see is quite a long quote and I'm not going to read it all out, but about half-way down the page, three words from the right-hand side there's a sentence starting 'the general verdict of not guilty' – do Your Honours see that?

McGrath J So are we in your authorities or the case of appeal?

Waalkens We're on the case of appeal Your Honour.

McGrath J Yes.

Waalkens The case on appeal at page 27 of Justice Fogarty's judgment

McGrath J At the bottom of the page, yes.

Waalkens In the High Court. Halfway down the page there's a sentence that starts three words from the right-hand side 'the general verdict' and my learned friend in his written submissions, para.84 cites those few sentences. 'The general verdict of not guilty decides nothing more than that there was a failure upon the part of the prosecution to establish all the necessary ingredients. Negatives every offence of which the accused could properly be found guilty on that particular indictment', and it goes on to say 'it may be founded upon any insufficiency in the proof', and that's the passage that my learned friend's submissions at para.84 quotes, but the judgment goes on to say, and this is the significance of the point I make, 'acquittal of the whole offence is not acquittal of every part of it, it's only acquittal of the whole' and then 'assuming that the accusation to be enquired into by the Medical Council', and that's referring to the particular facts in re a Medical Practitioner, was one of infamous conduct by reason of an indecent assault. Of the nature specified in the details given it would be competent for the Medical Council to hold that there had been infamous conduct even though some element necessary in law to constitute an indecent assault were lacking, eg, consent would negative indecent assault but not necessarily infamous conduct. An absence of intent or mens rea would negative indecent assault in law but maladroitness, which I had to look in the dictionary to see means clumsiness or a lack of dexterity towards a patient of such a nature has to be susceptible of being regarded as indecent so it might in the view of the Medical Council amount to infamous conduct. So there the Court of Appeal as that decision was re a medical practitioner and certainly some years ago and this decision's been referred to many times over the years, recognises the point I've just made that in a case for example as in one of the other counts of the indictment in this charge, where the dentist's defence didn't happen, this is patient *P*, where the allegation was that he pushed his penis against her hand whilst she was in the dental chair, his defence was that that didn't happen but that if it did happen it would have been accidental contact and I concede that a Dental Disciplinary Tribunal may find or see that although the conduct wasn't such as to amount to a breach of the criminal law, that is indecent assault, the dentist nonetheless acted inappropriately by having his body in that position, rubbing himself or pushing himself inadvertently or otherwise against the patient's arm.

Tipping J All this pre-supposes that the medical charge is exactly the same indecent assault?

Waalkens Or the elements of it are the same and the elements in these two are the same Your Honour.

Elias CJ But the elements will be the same but the defence might be different, and really what you're putting to us is that it would be necessary before deciding whether something's an abusive process to look back at the case and decide what the defence was - it may not be apparent.

Waalkens And that's why I'm not seeking an abusive process ruling from you with respect to the touching of the arm while the patient was in the dental chair. I've confined it just to those allegations where the only contest between the parties then in the criminal charge and now in the disciplinary charges did that conduct actually take place. Can the prosecution prove that that took place? There are no other arguments

Elias CJ No, I'm just trying to think of the practicalities, because we don't have pleadings in criminal cases, whether it will always be clear.

Waalkens Look I accept Your Honours that it will not always be clear, but there are a number of examples and my learned friend's authorities has a splendid example '*Phillips*' where it's very clear that the Council or the disciplinary body can look at and should look at the conduct even though there was an acquittal. There are also cases where it's clear and there are cases where the Courts in the UK have stayed or struck out disciplinary charges that replicate an allegation where the very same issue arises, even though Your Honour's point as to lack of pleadings in criminal charges and so forth exists.

Tipping J Although it might be wholly unpersuasive, what if the defence altered as between the criminal charge and the

Waalkens I'm sorry Your Honour, if the defence?

Tipping J If the defence alters. I mean say it's consent to the – I mean I'm just trying to look at this – what awkwardnesses we might be setting up if you're going to say well it can be an abusive process, it might not be an abusive process - we could be finding ourselves in very fine distinctions couldn't we?

Waalkens I believe not Sir because I'm not suggesting to you that there will be a one size fits all answer in this arena. That ultimately once the principles are identified

Tipping J Are you saying never mind what may be the case in other cases, in this case it would be an abuse of process?

Waalkens Correct, correct.

Tipping J Where the allegations are either the same or so close

Waalkens Correct.

Tipping J As to make no practical difference?

Waalkens That's exactly what I say Your Honour and I accept that there are number of aspects to this. One is the issue that it's not ideal that on my commendation to the Court there will be different standards of proof which we haven't yet analysed but we're about to come to, there'll be different standards of proof applied to different charges, different particulars indeed within a charge. That's one issue and the other is Your Honour Justice Tipping's point that well how do we define a principle that's going to apply to all cases, and I recognise that that does have its complications as to where you draw the line. What I say is that this indeed is one of these clear cases where the elements in the indictment are the same as or materially the same and substantially the same as those in the disciplinary charge.

Elias CJ And I suppose in answer to my query about practicality, it's really for the applicant for stay to demonstrate that?

Waalkens That's absolutely so Your Honours and that would be the mechanism by which in the future this is dealt with. For the moment here in New Zealand there is seemingly an approach that well the fact that there's been an acquittal does not permit the respondent practitioner in this case the dentist to seek to stay or stop parts of the charge so the issue cannot even be analysed.

Tipping J What if the acquittal is based on the view of a jury that it didn't quite get close enough to be an assault, but for medical purposes it might be very bad?

Waalkens And again, there might be cases where that is so but in this case the allegation in this case was that the dentist took the patient's hand, and that's the worst of the allegations, and placed it on his penis.

Tipping J Yes.

Waalkens There's no middle ground as to how he might have got close to that - it either happened or it didn't, and if the Crown hasn't proved that to the requisite standard so that the jury is not sure whether that happened, and if you accept what I'm arguing which is that in a disciplinary case where there's a grave allegation akin to a serious criminal offence then if the standard's only to be the civil standard, it's nonetheless of such a high level within the civil standard that the distinction between it and the criminal standard is an illusory one then there should not be a problem to Justice Tipping's proposition.

Tipping J I am still troubled that we're going to be in very very fine distinctions. How are we ever going to know the basis on which the jury acquitted?

Waalkens Well take a case like this. The only basis on which the jury can have acquitted in this case is that they weren't satisfied to the requisite standard that the conduct had occurred.

Tipping J That he had placed her hand on his penis. In other words there had been an actual touching?

Waalkens Correct.

Tipping J Well there might have been something close to a touching. I appreciate that in this particular case this may sound a little pedantic

Waalkens Yes.

Tipping J But I'm just worried that we're going to be setting up very very fine issues. He shouldn't be prosecuted because he was acquitted, but he might have got jolly close.

Waalkens Well can I illustrate the point that Your Honour's making about the jolly close as to how the Courts have dealt with this in other jurisdictions?

Tipping J Yes.

Waalkens There's not a problem. What I'm looking for is a general recognition that it is open for a stay of a disciplinary charge to take place where there are the same elements that I'm commending to the Court, and Your Honour seized upon the *L* example. The *P* example in this case – the two examples – doesn't have an allegation of close to, it's simply that he took her hand and placed it on his penis. That is the allegation on the second of the disciplinary charge. So it's a better example for me.

Tipping J Sorry, I was looking at the sixth count where the allegation was placing hand on penis.

Waalkens Yes.

Tipping J Then what was the difference

Waalkens I'll illustrate this Your Honour by the third count because the third count for patient *P* is also a disciplinary charge. The third count at page 77 was placing her hand on his penis.

McGrath J Could you at some stage just give us the particular cross-reference of each count to each paragraph of the charge? It just would

Waalkens Yes of course. That third count Your Honour relates to count 4.2.1.

McGrath J 4.2.1.

Waalkens 4.2.1 on page 214, so if we just look at that count for the moment. Again the count is placing her hand on his penis - the disciplinary charge 4.2.1 inappropriately and with no clinical reason caused her right hand to touch and move over his penis.

Tipping J Yes I accept that

Waalkens It's a better example

Tipping J But the other one is a classic example of the difficulties that this might

Waalkens Well it's

Tipping J Because you say that that's

Waalkens No it's not Your Honour because again the place where the judgment that I'm looking for this Court will kick in will be before the Tribunal, and in these hearings in the Tribunal there is an exchange of evidence and we have the evidence here and I can take Your Honours to the evidence of what patient *L* says. She doesn't say it was in close contact. That's never been any part of the case at all, it was that he placed her hand on his penis, that is the allegation. I recognise Your Honour the wording in the charge but there's never been a suggestion of it being close to it before, and again in the Disciplinary Tribunal

Tipping J But I'm worried about a case where, I know that's what she says but the jury may not be satisfied that that's actually what happened, but something did happen that was very very noticeable in the disciplinary context. Now on your thesis it's going to be an abusive process to charge anything like it.

Waalkens Well to reflect that same allegation – taking hand and placing it on penis. If in the disciplinary charge Your Honour the evidence put forward by the CAC, because they prepare a brief of evidence just like in a civil proceeding and hand to us or exchange their evidence before we respond, so we will get their evidence and if that sets out allegations that are different to the criminal indictment it won't be open for the accused or the defendant in that circumstance to say I'm seeking a stay, because it's the same allegation. So I can accept that if notwithstanding the way the charge is framed, the disciplinary charge is framed, the evidence to be called by the CAC turns out to be something different to what the indictment was and Your Honours highlighting the point about close to other than actually touching the penis, then that will be a more problematical case to attain a stay in, but if the evidence is to be called that the hand was placed on the penis then ipso facto – that's the very same allegation that he was

charged with in the criminal indictment and leaving to one side standard of proof, because that is an issue, there should be no reason why this man should be put through facing a disciplinary charge in respect to

McGrath J But Mr Waalkens there is another possibility in this isn't there that you're talking about evidence now, but let's say we went along with you on the basis of Professor Friedman's views or something of that kind

Waalkens Yes.

McGrath J And said it would be an abusive process to charge him with what was effectively indecent assault in this area, now wouldn't another possibility to say that the evidence that was directed towards an indecent assault could be called in relation to charges of over-prescribing, to show a motive for over-prescribing?

Waalkens Yes I have to accept that could be so, yes.

McGrath J And your response I gather would be that the evidence that was to be called would have to stop short of evidence of an actual indecent assault

Waalkens Correct.

McGrath J Is that your position?

Waalkens Correct, correct.

McGrath J It's getting a bit complicated isn't it, but another view might be well it would be an abuse of process grossly unfair to charge him with exactly the same offence again, but the evidence could be called if it was relevant to a different charge.

Waalkens And I've never suggested the evidence can't be called if it has some evidential relevance or issue to other remaining charges.

McGrath J But it would wouldn't it to the over-prescribing charge?

Waalkens If the CAC wanted to run the evidence on the basis that that was the modus operandi behind over-prescribing.

McGrath J Your submission would not preclude that?

Waalkens It wouldn't preclude that provided there was an evidential irrelevance basis to it, absolutely so.

McGrath J Thank you.

Anderson J Suppose

Elias CJ No you carry on

Anderson J Suppose a person were charged in the disciplinary proceedings before a charge was brought by the Police

Waalkens Right.

Anderson J And was acquitted before the Tribunal, would it be an abuse of process to then prosecute and if so why? Because it seems to me if the answer is no it's not in that direction then this must be the same answer going in the other direction.

Waalkens Well my answer would have to be yes then.

Anderson J Well that's why I said why. It would be a bit of a bonus being charged by the Disciplinary Tribunal first in those circumstances.

Waalkens Well the starting point Your Honour is that in all the disciplinary work that I've certainly been involved in, where there is a suggestion or any hint of a criminal charge that goes first, I've never ever seen a disciplinary case precede before.

Anderson J But I'm talking about juris prudential principle rather than practice.

Waalkens Yes that's the first point so it is a possibility there could be no reason in principle why a stay or an abuse of process argument couldn't be run where the disciplinary charge had resulted in an acquittal, particularly given the argument on the standard of proof which

Tipping J That might be a stronger case actually.

Waalkens It would be a stronger case because of the standard of proof issue, so that if it couldn't even meet the threshold to warrant a disciplinary finding

Anderson J Of the evidence at that hearing. Suppose more evidence pops up, you say oh well too bad you can never be prosecuted now. He can go out and confess if he wanted to but he can't be prosecuted, or she as the case might be.

Waalkens Yes it's important to bear in mind she as the case may be but they seem to all be male cases. Well in principle Justice Anderson there can be no reason why in the right case that couldn't happen. I must say for myself I haven't extensively researched the reverse situation as Your Honour's just asking me about, but in principle I can see no reason why that wouldn't happen. But coming back to this

Elias CJ Sorry but before you develop this, because I've had a query in my mind which I hadn't explored until now about this matter is before the Court, because on one view it's a bit odd to be talking about the standard of proof in proceedings that haven't yet been heard and I see from your statement of claim and from para.6, or perhaps para.6 of Justice Fogarty's judgment is the best place to look. I'm just wondering how these proceedings have really been constituted, but we're not being asked to look at the standard of proof in the abstract here are we? You have alleged at page 48 one of your grounds of review that CAC failed to pay any proper regard to those parts of the matters which duplicate the allegations and that's led to the Courts to look at what's the effect of an acquittal and whether it's an abuse of process to collaterally challenge an acquittal which takes you into one of the differences between a finding of guilt and an acquittal being the difference in standard of proof. I'm just trying to work out how we got here and what you're really seeking from the Court. Is that right, that we're really looking at judicial review of the Complaints Assessment Committee to refer the matter to the Tribunal for determination on a basis which you say is unreasonable because they didn't take any or sufficient regard of the fact that there had been an acquittal in respect of these charges.

Waalkens And acquittal and Your Honour I haven't looked at the pleadings with this in mind, but not just that there was an acquittal but that given the argument that has developed through this litigation about the standard of proof which is so important to bear in mind that those combined

Elias CJ But it's a subsidiary argument isn't it, because the real question is what is the effect of, well you say it's wider than acquittal, but I think probably it is just the fact of the acquittal, it can't be just the fact that he was tried, so the fact of the acquittal and that's how you get to the standard of proof, but there's a bigger issue isn't there and that is what is the status of an acquittal?

Waalkens That is correct, that's the ultimate question in this case and what I've been at pains to point out, and certainly I hope this is clear is that I do not suggest at all that an acquittal will be a one size fits all, there can be no disciplinary charge, or even that the facts of a case that resulted in an acquittal, even though to replicate that actual charge may be improper, that the facts I'm not suggesting are in every case unable to be reviewed or called in evidence or are made by the CAC with respect to the remaining particulars of the charge.

Elias CJ Where do you get, I mean do we have a decision of the Complaints Assessment Committee?

Waalkens Yes we do.

Elias CJ Sorry I haven't read it, I've only read the

Waalkens No, no, that's alright, no that's understandable Your Honour. It starts at page 177.

Elias CJ Do they just simply make no reference to the fact that there has been a trial?

Waalkens No, they make reference to it. At the bottom of 178 Your Honour you will see they refer to points that I drew to their attention, or to the legal assessor's attention, regarding the fact that he was acquitted. At 181 they refer to some of the evidence of the actual trial itself, so they were certainly aware of the trial.

Tipping J It was put to them presumably that because he'd been acquitted, at least in some respects he shouldn't be prosecuted before the Disciplinary Body. Is that the way they came to

Waalkens That's correct Your Honour.

Elias CJ Except your pleadings don't really put it in its absolute form, it's just that they haven't sufficiently considered that fact in coming to the conclusion to refer the matter.

Anderson J You should look at page 46, para.10, para.11(d) on the same page, and page 48, 11(b).

Elias CJ Well it was 11(b) that I was particularly looking at.

Anderson J It's on page 48.

Elias CJ Because that's the only allegation that ties into why we're here it seems to me.

Tipping J 11(b)

Anderson J It's 11(d)(b) on page 48.

Tipping J (d)(b).

Anderson J The proposition is that the CAC position is invalid for irrationality I suppose and it's irrational for the reasons set out on that paragraph on page 48.

Elias CJ Yes, but that's why I've asked to be taken to the decision because I'm not sure.

Tipping J Well there's no allegation of abuse of process in terms here is there?

Waalkens No there's not Your Honour, there's no allegation of abuse of terms at all – abuse of process.

Tipping J Just that it would be unreasonable.

McGrath J That really was a development in the Court of Appeal I think wasn't it?

Waalkens It was Sir, I mean I suppose I should be making an apology for the way it's come to this Court, but it started as a judicial review based primarily in the High Court on double jeopardy and was refined in the Court of Appeal to be one of abuse of process.

Elias CJ It's just that where I started with this is we are being invited to deliver an opinion on the proper standard of proof. The Tribunal hasn't really got to that point yet. You're seeking review of the Complaints Assessment Committee

Waalkens That's correct.

Elias CJ And for myself I would rather look at whether a Tribunal has applied the correct standard of proof in the context of a determination of the Tribunal, particularly if there's argument that it's a floating sort of standard commensurate with the seriousness of the charges, but as we've discussed I think really your point about the standard of proof is a subsidiary one

Waalkens Correct.

Elias CJ Or it's an argument in favour of why you say that there is an absolute bar where you've been acquitted on identical charges, only that isn't the basis of the claim.

Waalkens It's not explicitly pleaded as such but it's the implication from the pleadings that say that it was unreasonable or that they haven't adequately considered. I'll just find if I may

Elias CJ Yes, if there is some way in which they've dealt with it I'd be interested to see that. It may be that there is an omission which justifies your claim that they acted unreasonably.

Waalkens Yes, my learned friend points out 188 at the bottom of the page does raise the issue

Elias CJ Sorry, 188?

Waalkens 188 in the CAC's decision fully aware of the not guilty findings in respect of three complainants who were part of that trial and the objection by counsel having to respond to what he terms the same issues and same allegations. However the CAC, oh this is correct yes, the CAC feels these issues are inescapably bound up with the issues of sedation, and that's Your Honour's

McGrath J Yes.

Waalkens Your Honour Justice McGrath's point that the evidence with respect to levels of sedation is quite a different issue which the CAC feels the Tribunal should consider, and Your Honours will see that there is distinctly an allegation for each of the three, well certainly for these two that I'm attacking, that the levels of sedation were too high. So the rationale or the reasoning behind why they reject the allegation of the same terms and conditions is just demonstrably unreliable.

Tipping J But the allegation of failing to pay any or proper regards suggests a remission, that they do pay proper regard

Waalkens Well they haven't paid proper regard is my point

Tipping J Well you're trying to get it stopped aren't you?

Elias CJ As this evolved you're now saying that proper regard could only lead to the outcome that they couldn't have directed those charges be included.

Waalkens Correct, yes and the issue, it may not be before you in the most elegant of forms, but the issue is squarely brought before you and it's able to be dealt with in my submission by this Court, is an important one to deal with.

McGrath J And it focuses on the Committee's actions rather than any prospective actions of the Tribunal, that's the focus of your attack is it?

Waalkens That's correct, and in my submission it's a very useful exercise of this Court's jurisdiction to make a determination on the very issues that are in contest here albeit the disciplinary charge hasn't taken place, because it will obviously impact upon how the Tribunal look at the case, and for this appellant certainly and others, will determine some very useful principles.

Blanchard J Well that's presumably what the Judges who granted leave thought.

Elias CJ Yes I know

Tipping J Who were they?

Waalkens Yes I hadn't lost sight of that Your Honours.

Tipping J Well I'm with respect not too fussed about the way it arrived here. It seems to me that if your case would in certain respects be an abuse of the powers of the CAC to lay these charges, then obviously that has to be grappled with ahead of any Tribunal hearing.

Waalkens Yes, correct.

Tipping J And as you say the question of standard of proof is necessarily bound up in that.

Waalkens Correct.

Tipping J So we have to look at both.

Waalkens Correct.

Tipping J That provisionally is the way I would see it.

Elias CJ Well I don't disagree with that, I was just trying to unpackage it and in particular to identify why the standard of proof which you're starting with in your submissions,

Waalkens Yes.

Elias CJ Why that is the focus, because I would have thought it was a wider proposition.

Tipping J But you have to have the criminal standard literally don't you before it can become an abuse of process, because if it's any lower the point collapses?

Waalkens Well no Justice Tipping, it needs to get in the vicinity of it. It doesn't have to be the same as

Tipping J Within cooey.

Waalkens Within cooey.

Tipping J Well with great respect Mr Waalkens, what on earth does that mean?

Elias CJ Well it could mean the post-hunter and that sort of approach. An acquittal is to be treated as similarly to a conviction that the criminal process takes precedence. I mean you might need to go as far as that.

Waalkens Yes, and Justice Tipping there are other examples predominantly in the UK where even though the civil standard has been applied, the Courts have sensibly recognised that where there has been an acquittal it's not appropriate to charge with respect to those very same issues, and the *AA* case is one example. And there's one in Queensland in fact where

Tipping J Yes I appreciate there are precedents supporting you.

McGrath J The *AA* case, is that a Hong Kong case?

Waalkens It was the Irish case.

McGrath J Oh the Irish case, yes, yes I've read that, but what you're really saying I think it was summed up by one of the Hong Kong Judges that if in fact although by the civil standard route you end up with a standard in which any difference between that and the criminal standard is theoretical and illusory, something of that kind

Waalkens Illusory, yes.

McGrath J Then you have to then go on to deal with this question of whether there is an abuse of process along the lines of res judicata.

Waalkens That's precisely the point.

Tipping J Does that depend on how serious the criminal charge is perceived to be?

Waalkens It does depend on the seriousness of the charge and in particular I accept and I've said this for this to occur it needs to be a clear example is an allegation that's akin to a serious criminal charge.

Tipping J Well I was very troubled by that in *Guy* because there was a passage I think from one of Their Lordships of the Privy Council that basically said that and I remain at least provisionally still of the same mind that that adds yet another uncertainly into what is already by quarter to 11 a very uncertain juris prudence.

Waalkens Look Justice Tipping I don't deny that there is no easy answer to this. What I do

Tipping J Well there is an easy answer and that is to say it's not an abuse.

Waalkens That's an unfair answer though. That's an unfair answer.

Tipping J Well it's an answer that's been the position in New Zealand for quite a long time and it must have been unfair for a long time.

Elias CJ I suppose it depends what the identification of abuse is grounded on. It may not be sufficient, particularly given some of the more recent case law, to see it simply in terms of the different standards of proof. It may be a question of whether effectively it undermines the verdict obtained in the criminal process. I mean I'm just saying that that is the sort of line that I think has appealed perhaps in the UK, which may not have been sufficiently considered here, but it's a public interest argument. I mean I'm not sure that it does apply because you get back into what is the nature of an acquittal? Is it simply a failure to come up to the criminal standard of proof, or is it something that those who obtain a verdict of acquittal are entitled, and society, are entitled to rely on.

Waalkens Your Honour that is what I've suggested in my written outline that it's tantamount to a collateral attack on a criminal acquittal and in terms of the second part of Your Honour's proposition as to what does the acquittal mean, in a case like this where I had been focusing on the actual allegations in the indictment, the determination can only have been that the conduct wasn't actually proved or it wasn't proved to the requisite standard and based on all the juris prudence in real terms there being an illusory distinction between the civil standard if it's only to be the civil standard in a case involving a very serious criminal allegation, and the criminal standard being illusory, then there's every reason to in that sort of case find the proceeding would amount to an abuse.

McGrath J Well you've got in your favour I suppose the authority of the leading writer on double jeopardy who says that there should be

Waalkens Friedland?

McGrath J Yes, he says that the double jeopardy rule should apply in this context, but he says also the law doesn't seem to reflect that.

Waalkens No.

McGrath J I mean in terms of your saying there's a principle here, and you've got Professor Friedland, at some stage you should take us to his views.

Waalkens Yes

McGrath J I think it's clear that the coincidence of the allegations of fact that would have to sustain the two charges are identical and that we're at the extreme end if you like of a disciplinary allegation - one that is actually a straight charge of indecent assault.

Waalkens And that's what I'm suggesting here that you have before you the extreme example, and Justice Tipping I accept that there will be cases where there is more difficulty in drawing the line, but let's not lose sight of the fact that even on the existing law in New Zealand in terms of for example the standard of proof and where it's pitched, there already is no line or defined statement as to where you draw the line within the shifting civil standard, because this Tribunal's a very good example. It deals with conduct that may be, not in fact was, but may be detrimental to the welfare of a patient, so failing to put the drill bit in the right place and harming a patient which is a very minor disciplinary case, would be dealt with at a very low end of the civil standard in terms of standard of proof. So the Tribunal has no difficulty applying that principle with that shifting sand as compared with say a case involving a sexual allegation against a dentist which is right at the top end. So the concept of having to apply principles that reflect, as what I'm commending to you, fairness, should not be a problem.

Blanchard J What would be the position if one of the patients launched a civil proceeding against the dentist alleging a tort of assault and claiming damages for that and the only allegation was the touching of the penis? Would that be an abuse of process?

Waalkens Leaving to one side whether you're able to bring a claim like that because of course

Tipping J Exemplary damages.

Waalkens Yes.

Anderson J A battery.

Elias CJ Because that's where it does take you. You wouldn't be able to have – who's that fellow – the US murderer.

Blanchard J OJ Simpson.

Elias CJ That's really where it takes you. Effectively the argument you're putting is a huge argument. It's really about what is criminal process for? Does it exclude private pursuit of allegations which amount to crimes, and that can't be so

Waalkens No, I don't suggest it does and that's why I say that discipline's different Justice Blanchard.

Blanchard J Well what's the difference, because the purpose of the so-called penalties is the protection of the public by ensuring that something can't happen again.

Waalkens That's so but in real terms exemplary damages do focus I accept on punishment. The reality is way different from the type of penalties and the consequences for a dentist in a disciplinary case like this. It's not just his livelihood that's lost if it goes badly, but his life is ruined. He's struck off. He has name publication, fined and probably never able to practice again. It's a radically different

Blanchard J Pretty devastating if he lost a civil suit too.

Waalkens It would be but all he would have to do then is pay amount of damages. That in itself would be harmful and I accept Your Honours without patronising the significance of an exemplary damages award, but an exemplary award that orders him to pay $50,000 or $100,000 or so is significantly less devastating than the consequence of a disciplinary case. They just can't be comparable.

Tipping J But what happens if the Disciplinary Committee has let him off and at trial the Judge decides its proved, then we've got a real pickle haven't

we? I mean I'm not saying this is directly relevant to the present issue, but we're going into this sort of territory, if we get inconsistent, but it's understandable if the standard of proof is lower, but it becomes very difficult if the standard of proof is the same.

Waalkens Well as I say if the standard of proof is up there where I say it ought to be I accept that you can have those exemplary damages type proceedings, but I'm not

Tipping J But the whole thesis

McGrath J But you're not saying it should be the same standard of proof for exemplary damages are you Mr Waalkens?

Waalkens No I'm not, no I'm not at all.

McGrath J You don't want to go there. There seems to be some attraction for the bench in taking you there but you don't want to get into that at all.

Waalkens I'm not, I'm not suggesting that at all, I'm saying that discipline has its own special category where given the significance of it there ought be a very high standard established.

Tipping J Is this really a head-on attack on the previous principle that if the standard is lower, the purpose is lower? In other words the purpose is public protection therefore the standard is lower.

Waalkens Yes, yes.

Tipping J It's a head-on attack on this thesis isn't it really? I'm not saying it suffers for that. We must assess clearly on its merits.

Waalkens I'm pleased to hear that Your Honour, yes.

Tipping J I just want to make quite clear you have to attack that

Waalkens I do have to attack that principle. What I say is that the purpose of protecting the public and so forth must in some respects be subservient to the devastation to the individual and for the reasons that in the criminal arena there is recognised good reason why there ought be a high standard of proof, so to for discipline.

Elias CJ But I thought we were really at the point where we agreed we're not dealing with the standard of proof in the abstract. It's only as part of the argument as to why there is abuse of process in having different proceedings, and for my own part I can't see any difference. Your client may put greater emphasis because of his particular circumstances on the finding of the Disciplinary Tribunal, another person may find an adverse determination in civil proceedings are even more devastating. Somebody's who's not intending to carry on

practising but stands to lose everything. I can't see that there should be any difference in principle between the two, and for my part I'm not sure that the standard of proof distinction is not a distraction. I think that you really have to go for the very high ground which is patently not in accordance with law that where there are criminal proceedings there are no other forms of liability are able to rise out of the same

Waalkens No that's not the corollary of the argument though Your Honour.

Elias CJ Well I know it's not, I know it's not what you're putting because I don't think it works. Well perhaps you could first deal with the question I think Justice Blanchard was putting to you about what is the – I think you probably have dealt with it – but I'm flagging it's not to my satisfaction as to why there is a difference between civil proceedings and the disciplinary proceedings. You've just said the answer to that is that disciplinary proceedings impact very greatly, but so to do civil proceedings.

Waalkens But with all due respect Your Honour I can't really concede of a practitioner who in the ordinary course of events would regard a civil proceeding where there has been an award of damages and say an exemplary damages claim having anything like the effect or the devastation that's caused by the fall-out from these sort of disciplinary cases.

Elias CJ A practitioner who doesn't intend to carry on practising?

Waalkens He's struck off all the same.

Elias CJ Well it's still a finding. It's still a determination by a Court that he has been guilty of conduct which amounts to a crime, so the reputational issues that you have been speaking about are comparable.

Waalkens But Your Honour the reputational issues go way beyond just actually practising. Someone's who's been a dentist or a professional but who may no longer be practising, but who has that removed by his or her peers, is a significantly more serious matter.

Blanchard J But do you accept that it would be permissible to bring a civil proceeding of that kind where there is no public interest element and yet you would say that the criminal acquittal, the acquittal in the criminal trial bars a proceeding of this kind that we're dealing with here where there is a very definite public interest in having the matter looked at by a professional body.

Waalkens Yes I do.

Blanchard J I don't find that a very attractive argument.

Waalkens It's this particular case though given the identity of the elements of the

Blanchard J But the case that I gave you, the civil case, was designed to have exactly the same elements in as well, where there was only the one allegation of assault – very specific.

Waalkens Well as I say it doesn't fall into that category which I commend ought be treated like a contempt of Court proceeding which has a different treatment albeit a civil proceeding than other civil proceedings, that discipline is one and the same and there's dicta to that effect in the House of Lords and Others that certain disciplinary case ought to be treated in this category and there's authority for that.

Tipping J Sorry, in what category are you referring to?

Waalkens In the category where there ought be a very high standard of proof.

Tipping J So they're really fudging it and saying we're not going to call it the criminal standard but we'll effectively treat it as?

Waalkens Some of the decisions say it ought be the criminal standard but they at least take it to that it's a standard that is in all respects really illusory in being distinctive or different, and I don't accept at all that a body like this Tribunal which doesn't comprise anyone judicially qualified – they are three dentists, a lay person and a second lay person who at the moment happens to be a lawyer but doesn't chair the Tribunal – I don't accept at all that they have any special ability to deal with the niceties of standard of proof and what these things really in reality mean.

McGrath J But they will have some form of legal assistance.

Waalkens They have a legal assessor.

McGrath J Well that's the way that Disciplinary Bodies of this kind traditionally with that aspect.

Waalkens Yes, they do have a legal assessor.

McGrath J I mean all professional bodies in the medical field that I can recall at least in recent times in New Zealand have taken their guidance from what a legal assessor advises them as to the approach they should take on balance of proof and things like that.

Waalkens They don't now. Under the new Health Practitioners' Confidence Assurance Act there's no legal assessor.

McGrath J Well the Chairperson is a qualified lawyer.

Waalkens Is a qualified lawyer.

McGrath J So you don't need it?

Waalkens No.

McGrath J Well I just don't think there's anything in the point that this is a bunch of amateurs which you seem to be making.

Elias CJ Mr Waalkens where would you like to take us now? Do you want to take us into the authorities with the benefit of that discussion or did you want to develop any points further before doing that?

Waalkens No I think that would be a useful time to take you into the authorities. I really start in that regard in para.17. I've made the point about disciplinary proceedings being in a special category at 18 and I've already developed that in oral argument with you. I should in No.18 say that this puts rather than just disciplinary proceedings certain disciplinary proceedings into a special category. I omitted the word 'certain'. I don't say all disciplinary proceedings are in that category and in terms of standard of proof I accept of para.20 and my learned friend has identified this through the history of the Dental Act that the Act is actually silent and it doesn't give us any direction one way or other as to what the standard of proof is. There's a useful passage and this isn't in my written outline, but the point is certainly clear that there is no inflexible rule that in civil proceedings the standard has to be civil and I rely in that regard on the House of Lords in a relatively recent decision called *McCann* and Your Honours will see that's in tab 9 of my casebook.

McGrath J Which paragraph of your submissions are you at?

Waalkens I'm around para.21 Your Honour.

McGrath J You're adding something yes, *McCann*.

Waalkens Yes Sir.

McGrath J Sorry, whereabouts in the casebook is it?

Waalkens Tab 9, *McCann* at page 622 between lines (b) and (c).

McGrath J Sorry, it's page?

Waalkens 622.

McGrath J 622.

Waalkens This was a proceeding, a civil proceeding, involving what's called an anti-social behaviour order and the House of Lords considered there

was issue at line (b). Counsel's submission in the written case was that although the civil standard was a single inflexible test, the inherent probability or improbability of an event was a matter to be taken into account when the evidence was being assessed

Blanchard J I'm sorry I haven't got the place. Which paragraph?

Elias CJ Para.82.

Waalkens He maintained his view was consistent with the position for which he contended that these were civil proceedings which should be decided according to the civil evidence rules, but it is not an invariable rule that the lower standard of proof must be applied in civil proceedings. There are good reasons in the interests of fairness for applying the highest standard when allegations are made of quasi-criminal conduct which if proved would have serious consequences for the person against whom they are made. Now I do accept and I've

Tipping J That's from Lord Hope is it?

Waalkens Yes that's correct Sir. There's a useful passage just with that

Elias CJ I don't have too much difficulty with the standard of proof because I would have thought that the cases are relatively in agreement. I have difficulty with the linkage which says that because there may be some slight difference between the criminal standard and whatever high probability standard you have where there are serious allegations, there may or may not be an abuse of process in challenging a decision made in the criminal process collaterally. So it's that linkage where I think there is a divergence between the UK authorities and the New Zealand authorities.

Waalkens Yes, well I don't have any New Zealand authorities that have recognised this point Your Honour. What I have are the examples that I've given you and that my learned friend in his casebook have given you where the principle that I articulated is recognised, but I don't have any New Zealand authority on the point. It's in New Zealand the approach has been as I've set out and what follows in para.22 onwards that we've adopted what appears to be the, I'd call it the sliding civil standard - that's one that reflects the gravity of the allegation – which didn't meet with Lord Nicholl's approval in the *Re H* case – para.21 cited his criticism of this alternative which he looked at being the standard commensurate with the gravity of the allegation, saying that a formula to this effect has its attraction but I doubt whether in practice it would add much to the present test in civil cases and His Lordship said would risk causing confusion and uncertainty.

Blanchard J Well it doesn't seem to have caused confusion and uncertainty in New Zealand.

Waalkens No, that's my point Sir.

Elias CJ Or in *McCann* does it. Does that cause confusion?

Waalkens No

Elias CJ You're happy with that.

Waalkens I'm content with that, yes.

Elias CJ And that seems to accord with the New Zealand authorities. In fact it's almost word for word to what Justice Tipping said in *Guy* I think.

Waalkens Yes it is, it does, and in fact His Honour Justice Tipping in *Guy* cited, or agreed with the legal assessor's test which I've set out a little later in my submissions.

Tipping J I'm not sure that I agreed with it, I said that it more than passes muster. I thought it perhaps went further than was absolutely necessary but

Elias CJ But even on (h) it's still the linkage, it's the next step that's the troubling one. Even on (h) if you say the civil standard is actually lower and not as close together, so what, why is an abuse of process for the disciplinary proceedings to go ahead on the same factual basis? And it was there that I thought that the English authorities from what you'd said earlier and what's in your submissions, are more prepared to find abuse of process than traditionally has been the case in New Zealand.

Waalkens That's correct, and the English judgments that I have don't articulate why it's an abuse of process in as many words, but they do recognise that where you have a similarity of the standard, be it a shifting civil standard or a civil standard but reflecting gravity and so forth and the criminal standard, then where the allegations are the same there ought not be a disciplinary charge, and that's *Redgrave*, the English Court of Appeal's decision.

McGrath J *Redgrave*

Blanchard J Are you going to take us to that?

Waalkens Yes I will Sir, and also the *AA* decision. What the Court of Appeal has just before I leave the standard of proof, because Justice Elias perhaps it's worthy me moving away from standard of proof which I have quite a big discussion on in my submissions and if that's not going to be useful then I can certainly move over it.

Elias CJ Well others may find it useful.

McGrath J I think it is useful but I do think that we understand Mr Waalkens that there's various types of terminology here and sometimes people talk of sliding scale and other times these decisions seem rather to talk about how just on ordinary principles the civil standard of assessing the balance of probabilities requires greater care and attention when a very serious matter has to be proved than it does for a relatively trivial matter. Now as I say there's sort of linguistically different ways of describing that and I appreciate that you have to set this as a basis for your next stage which the Chief Justice is suggesting you might move to. But I think we understand all of that. We've read your submissions and I certainly feel that I have got aboard this element the civil standard for alleging a disciplinary offence that's a crime is very much akin in its effect to the criminal standard of proof beyond reasonable doubt.

Waalkens Just before I leave that I do emphasise the point that the Court of Appeal's adoption of *Re H* being the appropriate test to apply, I don't accept that, I don't agree with that, because it rather underplays the extent to which the higher civil standard, or the top end of the civil standard, is comparable to the criminal standard. That point if that's understood I'll take you to

McGrath J Well Lord Nicholls comment perhaps isn't the happiest way of expressing the point.

Waalkens No, no

McGrath J Some of the judgments in Hong Kong you would find better. Justice Becarri in one case for example.

Waalkens And the *McCann* case is another one where the House of Lords looked at *Re H* and actually cited with approval the point that the standard actually will very often be indistinguishable

McGrath J Yes.

Waalkens So that's the same point again. I won't traverse all that.

Elias CJ You really need to develop why it's an abuse of process. You are anticipating the argument that's put up against that proposition that well it's a different standard of proof. I really require to be convinced that it's an abuse of process and I'm not sure, depending of course what Mr Stanaway may say, but I'm not sure that the standard of proof is the element which fingers the abuse of process.

Waalkens Yes that said Your Honour, the standard of proof as an issue alone is also of importance in this jurisprudence and it's

Blanchard J But should it be?

Waalkens Of course it should be. The Tribunal

Blanchard J Well I don't know that I'm convinced by that. It seems to me that even if the standard of proof is identical, the important question is, is there an abuse of process?

Waalkens Yes sorry Your Honour, I wasn't clear, the point I was making there was that the identification that in these types of serious cases where there is an allegation made that's tantamount to a serious criminal offence, that the standard is much more than merely the civil standard or an ordinary civil standard is of itself an important point to develop and have understood.

Elias CJ Well we're actually not at that point yet because we're not looking at what the Tribunal's doing, so we are only looking at the standard of proof as an argument in identifying whether there's abuse of process in this case proceeding.

Waalkens I accept that. Now the Court of Appeal decision in *Redgrave* which is the one I just referred to a minute ago is at tab no.23, and you'll see it's a 2003 English Court of Appeal decision and it involved a Police Disciplinary case and this Police Officer had been charged with corruption, and you'll see the corruption charges at para.8 on page 1138, with the intention of perverting the course of public justice, conspired to do a series of acts which involved disclosure and so forth. I won't read the whole thing out. Now at para.9 you will see that the lower Court, the District Judge at the Bow Street Magistrates' Court decline committal and discharged the accused, the Police Officer, and that was followed up by a what I call a disciplinary charge of discreditable

Tipping J Also perhaps possibly importantly a Judge of the High Court refused leave to issue an indictment.

Waalkens Yes correct, at para.10.

Tipping J So failure to commit was reinforced by that step.

Waalkens Yes, so it was treated as an acquittal and in para.11

Elias CJ Sorry when you say it was treated as an acquittal, is that right, is that the right characterisation?

McGrath J It's more than just the acquittal though. The point that Justice Tipping's making is that in *Redgrave* there wasn't enough evidence to go to a jury

Waalkens Yes.

McGrath J On the basis of I think they burst in on the Police Officer and his girlfriend or something of that kind, but it was a very weak case indeed

Waalkens Yes the evidence didn't

McGrath J And it wasn't just a finding of not guilty by a jury, it was a matter that wasn't permitted to go to a trial.

Tipping J Not enough evidence to put him on trial.

Waalkens Yes, that's correct.

McGrath J And so the circumstances don't seem particularly akin to Dr Z's case.

Waalkens They're not the same, but the principle that I'm endeavouring to develop is of use I believe.

McGrath J Yes.

Waalkens You will see the disciplinary charges at para.11 and it doesn't allege the same factors as set out in the intention to pervert the course of public justice charge. It does traverse the same subject matter – 'viewed a copy of an interview and took steps to destroy the document' and the Court of Appeal at para.20 posed the question in an analysis of double jeopardy – this is the lower Court – *Moses J* in the section of his judgment headed "*Double Jeopardy"* addressed two specific issues first, whether the claimant's discharge was tantamount to an acquittal, and secondly whether the disciplinary charge now faced by the claimant is in substance the same as the criminal offence from which he was discharged, and the first issue was resoled in favour of the claimant, that is it's tantamount to an acquittal; the second against him.

Anderson J Paragraphs 37 and 38 are particularly germane aren't they?

Elias CJ What paragraphs?

Anderson J 37 and 38.

Elias CJ Oh I've got it. Are you taking us to any in between?

McGrath J He wants to go to para.35 I think don't you?

Waalkens Yes I am, well actually I want to do 23 first.

Elias CJ Well go ahead.

Waalkens You'll see with regard to the second issue, and if you go over the page the Judge said, and there were two important conclusions 54 and 57 at

the bottom of that paragraph on the next page, just before para.24 'in the instant case, it is not necessary for the prosecuting authority to prove either an intention or a tendency to pervert the course of justice' and 'I conclude that this Police Officer is not being tried for the same offence twice. It's not the same offence. The application fails'. So double jeopardy failed for that reason. Now over the page at page 1145 there's a discussion under that first main paragraph. It's

Elias CJ It's quite interesting what's said in granting permission to appeal, because that's really the bigger picture question isn't it? Sorry, carry on

Waalkens You'll see half-way down that right-hand column there's a review of the Principle of Double Jeopardy where it lines (c) and onwards some dependence is placed on the degree of proof required before a Disciplinary Tribunal, significantly less than in the criminal Courts, then the acquittal should probably have no effect, although it would surely influence the decision whether to commence proceedings

Elias CJ Sorry where is that, I'm lost?

Waalkens That's on page 1145 at line (c)Your Honour.

Elias CJ Oh yes, thank you.

Waalkens And then Justice Anderson's para.37 'that even assuming there has been an acquittal, the double jeopardy rule has no application save to other Courts of competent jurisdiction, therefore no bar to bringing of disciplinary proceedings in respect of the same charge. It's surely right that this should be so plainly it is so where the standard of proof is different' and then at line (h), 'but in my judgment it is right also even where the standard of proof is the same, ie, where the disciplinary charge too has been proved beyond reasonable doubt'.

McGrath J Now you've sort of gone by a little quickly Professor Friedland haven't you?

Elias CJ A little quickly for me I might say, I'm a bit slow.

McGrath J It's not a fully reasoned passage and I think that's part; of your problem, but in quoting what Mr Justice Popplewell was saying to double jeopardy, you've actually got a very well-known extract in a textbook which is in your favour haven't you? I just point that out.

Waalkens Yes Sir.

McGrath J The last part in particular at around about (d) which is a quote from Professor Friedland. Something I would have thought you'd be wanting to advance given the questions you've had from the bench.

Waalkens Yes I have got it highlighted and I'm sorry I haven't read that out. If I can just take you back to that line (d) 'On the other hand if much the same degree of proof is required in each case

Tipping J But 37 doesn't accept that seemingly.

Waalkens Well we need to follow it right through to the conclusion Your Honour

Tipping J Yes well so far anyway, yes.

Waalkens Yes, that's correct. Professor Friedland, as Justice McGrath has said, puts the point quite positively there.

Elias CJ This Judge seems to be raising the question that I put that there wasn't really more to what the standard of proof is.

Waalkens If I can just take Your Honour right through to the conclusion of it, because the Court does commend with a useful recommendation that's followed in other decisions and at para.38 'there are two main reasons why double jeopardy rules should not apply to Tribunals even where they apply the criminal standard of proof' and that's set out therein.

Tipping J Yes well that's character and purpose of the proceedings which is what you've got to suggest is wrong.

Waalkens Yes, yes.

McGrath J Yes but the second point is the more interesting one and can you make any of that. It's 'the material before the Tribunal is likely to be different'. It's not here is it?

Waalkens No there's no difference at all.

McGrath J It's the same evidence.

Waalkens That's what I was about to come to. It's the same evidence. The CAC have suggested in their submissions that there is another witness who's going to be, or another person who's going to be giving evidence who didn't give evidence in the criminal trial and whilst that's true there were two other complainants in the criminal trial who were not involved in this matter and not the subject of charges, so

Anderson J It doesn't mean they couldn't be called to give evidence if there was similar fact witnesses.

Waalkens No that's correct Justice Anderson, it doesn't prohibit that, but the other two were not similar fact witnesses, they were other allegations

of an indecency but not of a similar fact nature. I haven't heard it suggested that they're going to be called as similar fact witnesses, but

Elias CJ But I mean the much more difficult proposition to overcome seems to be the one that Lord Diplock cited for and that Popplewell J refers to, but it's not a comparable

Waalkens It's not strictly a double jeopardy.

Elias CJ Yes.

Waalkens Yes, and I've accepted that. I do accept that but the abuse of process argument goes much further and it's much broader than just double jeopardy and

Elias CJ Yes, but this case is about double jeopardy. I mean that's what they're discussing here.

Waalkens Yes, it's primarily about double jeopardy, but the gravemen of the judgment with our case in mind is at para.46 with a commendation to Disciplinary Boards of a Home Office Guidance and Your Honours will see at 3.70 at the bottom of that page 'in deciding matters of fact the burden of proof lies with the presenting officer and so forth' and about four lines, five lines down 'relevant case law makes it clear that the degree of proof required increases with the gravity of what is alleged and its potential consequences. It therefore follows that where an allegation is likely to ruin an officer's reputation, deprive them of their livelihood or seriously damage their career prospects, a Tribunal should be satisfied to a high degree of probability that what is alleged has been proved'. And it goes on to say 'where criminal proceedings have taken place for an offence and those proceedings resulted in the acquittal, that determination will be relevant in the decision whether to discipline an officer: (a) where the conduct under investigation is in substance the same as the criminal charge as determined, and where the alleged failure is so serious and the likely sanction serious such that it would be reasonable to look for proof to a high degree of probability. It would normally be unfair to institute disciplinary proceedings or (b) where the conduct under investigation is not in substance the same so determined it may nevertheless be unfair to proceed where a matter essential to proof of the misconduct was in issue in the criminal proceedings and had been resolved in the officer's favour'. Now that recommendation in *Redgrave*

Tipping J Is that really what you are relying on *Redgrave* for?

Waalkens Yes.

Tipping J Because nothing else in it seems to help you.

Waalkens No, this is not double jeopardy and double jeopardy was rejected in *Redgrave*, but that commendation has been cited and approved in other English authorities.

Tipping J They say it's unfair but they don't say it's an abuse of process. Are you suggesting that those should be equated?

Waalkens Indeed Sir.

Tipping J Normally be unfair. It's not unfair in this case.

Blanchard J And it's also in a different context. It's in the context of behaviour of police officers whereas we're looking at the behaviour of a health practitioner where there may be an even greater degree of public interest.

Waalkens Than in the police officer's case?

Blanchard J Yes. I say may.

Waalkens Yes

Tipping J As a matter of law this case is against you; as a matter of what this last passage I suppose its flavour is slightly for you, but is that what you rely on *Redgrave* for?

Waalkens Indeed, that's why I rely on *Redgrave*.

Elias CJ And this is directed at prosecutorial discretion. I mean this is the sort of language that you claim in your statement of claim that it's unreasonable for the proceedings to go forward without considering these matters because it could be unfair and the Complaints Assessment Committee therefore has to direct its mind to whether it would be unfair in the particular circumstances. This isn't a question of stay or anything like that here, this is about good practice?

Waalkens Yes, that's as far as *Redgrave* goes.

Elias CJ Yes, oh yes we could take the adjournment.

Waalkens I'll take Your Honours after the adjournment to the follow-on cases from this.

Elias CJ Yes, thank you.

11.35am Court adjourned
11.53am Court resumed

Elias CJ Thank you Mr Waalkens.

Waalkens Yes thank you Your Honours. That *Redgrave* passage that I've just taken Your Honours to before the break was also considered in the *Phillips* decision which is in my learned friend's casebook at tab no.12, and just moving very quickly through. *Phillips* was a Doctor. He had faced indecent assault type charges relating to 34 patients. You'll see that on the first page of the decision itself and the prosecution for some extraordinary reason were directed or ordered to select ten of those cases which went to a criminal trial. There ended up being – you'll see in para.4, at the end of it – eight of those charges, eight of those patients was ultimately all that the accused faced criminal trial for and he was acquitted with respect to each of those eight and at par.6 there was then a stay ordered with respect to the remaining 24 patients and it was in respect to those 24 patients that a disciplinary charge was then brought and at para. – I'm sorry Your Honours can I just have a minute? And there was a debate in the decision you'll see at paras.11 and 12 as to what was the difference between the issues before the jury and the issues which were to be determined by the PCC, which was the Disciplinary Committee division of the Medical Council in the UK that was going to consider this case, and the argument that criticised the Doctor's conduct you'll see at para.16 over the page

Elias CJ I don't seem to have paragraph numbers.

Blanchard J No, no you've got the wrong tab – *Phillips*.

Elias CJ Oh I'm sorry.

Waalkens *Phillips* in tab no.12 Your Honour.

Elias CJ Thank you.

Waalkens At para.16 the factual allegations were that the Doctor had contended it was acceptable medical practice that when investigating a neurological complaint that a full physical examination is appropriate and there was a debate about whether that was appropriate or not, and what the Court in that case, the Queen's Bench Division at parad.26 and 27 noted firstly *Dr Phillip's* evidence as to how he justified that conduct, saying 'as part of a general physical examination the Doctor carries out a breast and groin examinations'. Entirely standard approach was the argument that was put on his behalf and at para.27 the Court not surprisingly said that that's indeed something that must be considered by the General Medical Council whether that is appropriate, so it's a position quite different from the subject case here with this appellant where there is no adequacy of professional conduct type allegation other than the allegation of the actual assault. And at paras.37 and 38 the Court rejected the suggestion that the Tribunal could be precluded from relying upon the fact of the

acquittal, but in so doing cited with approval the *Redgrave* principle that I've just put to you and that picks up at 37, 'there is no rule of law which prevents a Tribunal such as the PCC of the General Medical Council, from investigating conduct which has been the subject matter of a trial and which has resulted in the acquittal of for example a Doctor of a criminal offence'. No dispute about that, and reference you'll see to *Redgrave*. There is general guidance given by Lord Justice Simon Brown in para.46 of his judgment and that's the paragraph that I just read to you, all of which of course is in point and there are earlier observations disclosing his reasons for concluding that what is sometimes called the double jeopardy rule has no application as such a strict rule, so that commendation thereof, the passage in *Redgrave* that I put to you albeit it was a guidance given in the *Redgrave* decision. A better example of the application of the principle that this is an abusive process that I'm suggesting to the Court is appropriate for you to follow in this case is in my casebook at para.24

Elias CJ So just summarising that – so *Phillips* is again entirely against you – it simply indicates that there's some guidance for prosecutors referred to in Lord Justice Simon Brown's decision?

Waalkens It's against me on the facts Your Honour because it's such a different

Elias CJ It's different on the facts,

Waalkens Completely different.

Elias CJ But in terms of the proposition it's supportive of the view that double jeopardy has no application as a strict rule.

Waalkens As a strict rule it's not double jeopardy, yes and I accept that. What I say is this is tantamount to an abuse of process and it's perhaps

Elias CJ But is your abuse of process a new double jeopardy? I mean what's the difference between the strict double jeopardy that you don't rely on and the abuse of process that you do rely on?

Waalkens The extent to which it's a collateral attack on the decision of the Court and in the Criminal Court in this case and as I say

Tipping J The more it's a collateral attack, the more it's akin to double jeopardy.

Waalkens It doesn't have to be double jeopardy on all fours though.

Tipping J But with respect I would have thought your proposition is at least prima facie counter-intuitive. The more like double jeopardy it is, the more like it is to be abuse of process.

Waalkens And double jeopardy would amount to an abuse of process

Tipping J Yes.

Waalkens But an abuse of process is broader than just double jeopardy.

Tipping J Yes but what the Chief Justice asked you is how do you distinguish in a case that is in essence a double jeopardy case when it not be double jeopardy it is nevertheless an abuse of process.

Waalkens That it amounts to a collateral attack.

McGrath J Can I suggest Mr Waalkens that the notion of abuse of process is really just simply being developed to overcome technical problems in running a double jeopardy defence such as the parties are different

Waalkens That the parties are different and strictly speaking there was an argument

McGrath J And punishment's not the principal focus

Waalkens Different purpose and arguably a different standard.

McGrath J It's obviously a sort of a close cousin as it were of double jeopardy.

Waalkens That's how the abuse of process argument developed to put in this case. But in the *AA* decision, which is my casebook tab 24, this is the High Court of Ireland in a very comparable case to the subject one you will see on page 2 this medical practitioner had been tried before a jury and was acquitted on two charges that he had sexually assaulted two patients. That's at para.i, or Roman numeral 1 I should say at the top of page 2. There then followed an inquiry as to whether there ought be a disciplinary charge and you will see on that same page Roman numeral 6, the argument was put that the proposed inquiry was an attempt to retry the applicant on the same facts in relation to the same events which was put as being oppressive and unfair, and a reference in the next paragraph to the Medical Practitioners Act which put into issue alleged professional misconduct, much which we have in this case, and over on page 6 the details of what this Doctor was charged with are set out. There were 10 component parts of the charge. Items 1 and 2 being assault and/or indecent assault and secondly sexual assault, and then some other issues that are numbered 3 through to 7 that I won't read out but I could characterise those as being ancillary issues to deal with the way the Doctor went about conducting himself at the time of the alleged medical consultations. So you have in 1 and 2 allegations that replicate what this Doctor had been charged with and acquitted in the criminal context followed by 3 through to 10 what I would describe as professional conduct type issues. And the significance of that Your Honours is that the Court in a relatively comprehensive review of the authorities, and I won't take Your Honours right through them, but they move pretty much through

to the conclusion of the last page. In fact on pages 36 and 37 and following you will see the Court referred to the New Zealand authority of *Re A Medical Practitioner*, the rather historical but all the same Court of Appeal decision on double jeopardy

Anderson J A sure point I think is that he agrees that it's not a case of double jeopardy and it's not a case of res judicata, but then he says in a conclusory way 'I don't think it's fair'. That's all the judgment stands for his personal view that it's not fair even though there's no legal impediment, and he doesn't even say why he thinks it's unfair.

Waalkens Well the inference from it is clearly supportive of what I've or what this appellant seeks from this Court, that is that it is unfair

Anderson J Not cricket?

Waalkens It's unfair.

Tipping J But there is a passage on page 15 where he cites another Irish case called *McCarthy*, apparently adopting the proposition cited there 'finding by jury of the verdict of not guilty in respect of criminal charges is more than a verdict of not guilty, it is a certificate of the person's uninterrupted innocence'. Now with great respect that seems to be a little be hyperbolic.

Waalkens Yes.

Elias CJ It's much better than the alternative.

Tipping J I mean if that's the jurisprudence of Ireland it's not surprising he came to the view that this was unfair.

Waalkens Except the Court whilst it refers to that argument it's part of the submission you will see Your Honour that's under the heading of *Submissions for the Applicant.*

Tipping J I see, sorry I hadn't noticed that.

Waalkens It starts on page

Tipping J So the Judge doesn't adopt it?

Waalkens No, he doesn't appear to Sir, no not on his

Anderson J He sets out the arguments for (a) then the arguments for (b) and then has a one page conclusion.

Tipping J Oh, one of those.

Anderson J One of those ones.

McGrath J That's true but what is perhaps interesting Mr Waalkens is that when you get to page 43 of the judgment and the reasoning starts at page 40 – Justice Anderson's point – but when you get to page 42 he knocks out complaints 1 and 2, he will allow 3 and 10 to run, but the evidence on 1 and 2 can still be called.

Waalkens Oh that's correct, yes.

McGrath J That was how Mr Justice, with the name I won't try to pronounce, dealt with the matter which is interesting, and their decision does support you, but it's perhaps not the highest authority in Ireland.

Waalkens No it's not, but all the same it's categorically supportive of this appellant's approach and indeed as I've said earlier there is no objection to provided there is some relevance associated to it to calling the same evidence.

Anderson J But that still involves the impugning of the earlier acquittals. It just impugns them in a different way, or for a different end rather.

Waalkens Well except the Court won't be called upon, or the Tribunal will not be called upon to adjudicate on whether or not there has been a touching of that type that's alleged, so it doesn't impugn the earlier decision at all just calling the evidence of what

Anderson J Well a finding will have to made on the evidence and it would be called in this case, say hypothetically, to show that not only was there an over-prescribing but there was an ulterior criminal motive if over-prescribed. There would have to be a finding on it whether the jury wouldn't be a jury decision, it would be a reasoned decision.

Waalkens Yes, as I say if that was put as the proper basis for it as a relevance issue Your Honour's right, there would have to be a finding on that.

Tipping J But then your client wouldn't have the same protection as if it were a charge. Because if it was a charge it would have to approved close to beyond reasonable doubt let us say, but if it was a finding of motive it could be much less. I don't know that this idea of letting it in for a certain purpose not specifically as part of a charge is actually very helpful to people in your client's position. I would have thought with respect you might be shying away from it rather than almost inviting it.

Waalkens Well

Tipping J But I don't have the grasp of the matter that you have Mr Waalkens. It may be that that's just

Waalkens I do suggest that it is drawing too long a bow to say that simply because of the acquittal that the evidence on the subject matter on which the acquittal was based cannot be called.

Tipping J If it can be called to show that he had a sexual motive in over-prescribing, then presumably punishment will follow, or consequences will flow on that basis, and your client will if anything be worse off than if it was a charge because he won't have the protection of the need for proof beyond reasonable doubt of it as a charge. I just have anxiety about this idea of letting it in for another purpose.

Waalkens As I say I'm simply just generalising and using this as an illustration. I don't accept that calling the evidence for that purpose would be right in this case. I've not heard any suggestion that that's the

Tipping J Well it might you see, my brother McGrath was the Judge who first raised this and it seems to be that it has respectable authorities to support it, that you can't charge it but you can lead evidence of it if it's relevant to something else.

Waalkens Yes, yes.

Tipping J Well I just have to signal some anxiety about that.

McGrath J I suppose Mr Waalkens you can say at least on that approach the Tribunal was not called on to decide whether this Dentist was guilty of an assault of which he's been acquitted by a Criminal Court

Waalkens That's correct.

McGrath J And so that there is a principle basis to that extent for this approach.

Waalkens And to that extent it's a much lesser evil for the Dentist to be not facing a charge that replicates what would be criminal offending than that being raised as an issue in the case.

Tipping J I wonder whether that isn't form over substance. There's no formal charge, but in substance he's been charged with over-prescribing with this sexual overtone.

Waalkens Well for this appellant that would be a significantly lesser evil than being charged with sexual abuse again.

Blanchard J Well I wonder about that.

Tipping J That's quite debatable and also

Blanchard J It seems optimistic to me.

Tipping J It's a pretty fragile and illusive basis to formulate any principle on but you can get it in through the back door but you can't get it in through the front door.

Waalkens As I say provided there would be a proper relevant basis for it to be introduced.

Anderson J But you'd want to reserve your position to challenge that if it got to that stage anyway wouldn't you in front of the Tribunal?

Waalkens Oh absolutely

Anderson J On a discretionary basis for example.

Waalkens The time to debate, and the Tribunal has all the discretions whether

Blanchard J Yes.

Tipping J But we've got to look at this overall and this idea that's inherent in one solution to the problem I think has to be addressed as a possibility.

Waalkens The concept of difficulty though with calling this evidence for a different or collateral purpose ought not stand in the way of addressing the real menace caused by the Dentist here having to face a replicated charge, that's the big concern.

Elias CJ Well it's the undermining of the acquittal because it will be said that the jury verdict was abhorrent and look a Tribunal of his peers found him guilty. That's the damage that you avoid.

Waalkens Yes.

Elias CJ I've been musing a little about the basis upon which you first framed this application for judicial review which was much more directed at a sort of prosecutorial discretion and whether it was unreasonable I suppose unfair to proceed where the two were so alike, and of course I'm not sure that you are going to take us to any authorities on prosecutorial discretion. In most cases the damage that you're looking at say in the criminal area will be met by double jeopardy which constrains the extent of the prosecutorial discretion. I just wondered whether in part you're suggesting that there should be closer supervision because those constraints are not available in the sort of context?

Waalkens Yes I must say I haven't developed an analysis of that point Your Honour.

Elias CJ It's prompted a little bit by the *Redgrave* citation of what seems to have been a manual for the guidance of people laying disciplinary charges.

Waalkens Yes.

Tipping J I thought that the Courts didn't get into prosecutorial discretion unless it would be an abuse.

Elias CJ But that is because perhaps there are these other doctrines of the law like double jeopardy which will protect against the undermining of verdicts obtained in the other place. I mean there clearly is a concern which was exercising the Judge in the *Redgrave* case which is why he referred to that manual.

Waalkens Yes that's obvious

Elias CJ But the authorities seem to be very much against you, definitely on double jeopardy and I've already flagged that I'm not sure that I see a difference between the abuse of process that you would inject to this, although I can see that around the edges there is some technical problems for double jeopardy, but if you're looking at the substance of it, it emerges out of the same facts.

Waalkens The abuse of process point, and the highest I can put it is what I've set out in my written outline, which is that I accept that an abuse of process following an acquittal, a previous acquittal is rare.

Elias CJ Yes.

Waalkens I recognise that, but these are rare circumstances in this case where on the two particulars that you're asked to look at there are such stand-out features that do play towards fairness and so forth.

Elias CJ Yes.

Waalkens And that's really as high as I can put it, but it is a proper case for the Court to recognise as happened in the *AA* case, and the concept that's referred to in the guidance or the directions in *Redgrave* ought be given some effect here.

Tipping J I don't quite understand why you say this is a rare case. Is it rare because of the precise coincidences you would put it of the count and the proposed charge?

Waalkens I don't

Elias CJ Or is it rare because prosecutors normally don't charge exactly the same offence?

Waalkens Well it's not reasonable that they would charge the same allegation. They can charge with respect to all the medical issues that might arise, like inappropriately conducting the examination, but to replicate an allegation for which he's been acquitted isn't reasonable.

Tipping J It may not be said to be reasonable in your client's terms, but why is it rare? I mean I would have thought these sort of things happen quite a lot don't they?

Waalkens Well the only cases that I know where it's happened Your Honour is where there are allegations of criminal offending and where there's been an acquittal, where there's been issues of consent or unintended contact. I've just conducted a rather unfortunate trial in New Plymouth where the Doctor was convicted. He was acquitted of a couple of the charges and those acquittals for example were in circumstances where his defence was 'I didn't mean to be touching in the way that was alleged. I conducted a vaginal examination for good medical purposes', a bit like what was identified in the *Phillips* case that we just looked at, and I do recognise as is in *Phillips* that it's open for a Tribunal, a Disciplinary Body, to look at the appropriateness of the way the vaginal examinations in that case were conducted

McGrath J In a manner that this does not contradict an acquittal, yes.

Waalkens It doesn't contradict it at all.

McGrath J Yes.

Waalkens Exactly, but this is a rare circumstance that I

Tipping J Because it contradicts the verdict.

Waalkens Because it contradicts the verdict and the elements of the indictment. The only reasonable conclusion on the verdict is one in stark contrast to what the disciplinary charge alleges on those particulars.

Tipping J Directly contradicts the verdict.

Elias CJ And is your concern in part, or do you suggest the Court should be concerned that its decision might give the green light to those formulating disciplinary charges that they don't need to be concerned about duplication because double jeopardy doesn't apply, everything's in their discretion and it's all on?

Waalkens That certainly is a concern. If you were to reject this appellant's appeal and be putting that message out would be a grave one but to the contrary as I've just articulated, it's very rare in my experience for an exact replication of the same charge to be put in the disciplinary matter.

Tipping J But if we were to say it's not an abuse but watch out in case it's unfair, what is the distinction between abuse and unfair?

Waalkens Well that is tantamount to an abuse, where it is unfair. With respect that's playing with words, whether you describe it as being unfair in the abusive sense or just unfair otherwise, it's an abuse of process.

Tipping J So that's really the kernel of your case that if it can be described as unfair in some appropriate then that equals an abuse?

Waalkens Unfair, unreasonable and as I say reflecting exactly the same issues meets that criteria that warrant a finding of abuse.

Tipping J And ultimately a Judge will have to say well he or she of the High Court on an application for stay, whether it is fair or unfair to prosecute before the Medical Tribunal or the Disciplinary Tribunal in these terms?

Waalkens And that would only be able to ever occur if there were clear facts as we have here of what the disciplinary charge is versus what the criminal indictment was.

Tipping J Only if exact or nearly exact equivalence to the acquitted facts?

Waalkens Correct. Acquitted charge.

Tipping J Yes.

Waalkens There's another case but I don't think I need to take you to it but it's in my learned friend's casebook, it's the *Purnell* case, it's the Queensland case, it's at tab no.8, and that's just yet another example, although the Court did not have to intervene, it's an example of a case where there was a stay given by the Tribunal because of the fact that the Doctor had been acquitted or there had been no charge in respect of certain counts in an indictment.

Tipping J What was that reference again, tab?

Waalkens Tab 8 Your Honour.

Tipping J Tab 8.

Waalkens 8 of my learned friend's casebook.

Tipping J Right. Did they equate abuse with unfairness in this *Purnell* case?

Waalkens No the Court didn't get into having to analyse that because the Tribunal stayed counts with respect to which the Doctor had been either acquitted or for which there had been no prosecution conducted

– a direction by the Court of no prosecution in respect to counts 1 to 5, excluding no.2, of an indictment and the Tribunal imposed a stay with respect to that because they were essentially not guilty verdicts.

Tipping J This was a similar fact type of situation was it?

Waalkens And the case then went ahead on a similar fact argument as to whether the evidence with respect to those counts 1 to 5 could probably be called a similar fact to bolster the remaining allegations for which the Doctor was facing a disciplinary charge.

Tipping J There was a case in New Zealand called *Begnam*. It has some similarity to this that simply because you're acquitted doesn't insulate you.

Waalkens No that's correct.

Tipping J Yes.

Waalkens Yes. This Doctor, in fact it's referred to in my learned friend's chronology, '*Doctor Z* has had the benefit of a decision from the Court of Appeal which stayed the calling of some similar fact in this case from complainants whose charges had been stayed in the District Court because of unfairness and so forth and there was a stay granted in this case of this evidence.

Tipping J So the witness had had proceedings stayed against her, sorry against him, now wait a minute which way round. Proceedings in which the witness was the complainant had been stayed but the witness's evidence was called in *Purnell*.

Waalkens Correct.

Tipping J Yes. Well that's quite conventional isn't it? There's an English case and

Waalkens Yes, there's nothing objectionable about that.

Tipping J Because the witness wasn't in jeopardy before the Disciplinary Tribunal?

Waalkens No, correct.

Tipping J No.

McGrath J Could you just give us the page numbers you particularly want us to look at in this *Purnell* case and I take it's the judgment of Justice Fitzgerald.

Waalkens It's page 367.

McGrath J Yes thank you but you don't need to go to the

Waalkens No, I mean it just simply illustrated the Tribunal staying cases and where there had been essentially an acquittal.

McGrath J Thank you.

Waalkens Now unless Your Honours have any other questions, that's what I propose to say.

Elias CJ Thank you Mr Waalkens. Yes Mr Stanaway.

Stanaway In my submission Your Honours the starting point is to go back to the decision of the Complaints Assessment Committee which is at page 188 of the case on appeal and we looked at this earlier and there is a reference at the bottom of the page to District Court proceedings. 'The CAC is fully aware of the not guilty findings by that Court in the cases of the three complainants who were part of that trial and the objection by counsel to Dr Z having to respond to what he refers to the same issues and same allegations. However the CAC feels these issues are inescapably bound up with issues of levels of sedation which the CAC also feels the Tribunal should consider. On balance the CAC feels the sexual abuse charges should be part of the consideration of the Tribunal'. And then in the concluding remarks at the bottom of page 195 'the CAC recommends on the evidence considered that all complainants should have their complaints considered by the Dentists Disciplinary Tribunal'. And it goes on then to consider

Elias CJ Is there some legislative source for that consideration? I mean is there some sort of particular complainant ownership issue?

Stanaway No Your Honour, it's a matter of the CAC assessing whether there is sufficient material requiring the matter to be referred to the Disciplinary Tribunal. The CAC in this case went to the length of actually interviewing each of the complainants.

Elias CJ Oh I see.

Stanaway And took statements from them and has made a number of observations about their reliability.

Tipping J So the CAC is a kind of initial filter?

Stanaway It's a screening filter which is one of the protections for a practitioner in cases such as this. It's recognised in England and referred to in a number of the UK cases that not all of the matters that are complained about ever get to the Tribunal stage, that there are screening filters. And this is an example of that. The starting point of my submission is

that CAC has considered that in light of the evidence which has been before them or placed before them relating to what has occurred, or allegedly occurred, in terms of the contact between the complainants and the practitioner, in the context of over-prescription it is relevant to look at those issues. The charging I accept is somewhat unhappily worded in that it's got a mix of allegations which relate to the criminal charges and over-prescription and the like, and it's perhaps somewhat unusual to have particular setting out that type of allegation distinct as they are but be that as it may that's the way it's been framed. It might perhaps have been more appropriate to have framed the charges individually without reference to the individual particulars, in other words to have separate charges which are now represented by the particulars.

Blanchard J Can the charges be amended by the Tribunal?

Stanaway Yes the Tribunal generally incorporates the provisions of the District Courts' Act and the like relating to amendment. The general criminal procedure is when necessary adopted there would be ability to amend with notice.

Elias CJ Can you take us to the Complaints Assessment Committee's function in settling the charges? The statute's not in the material is it.

Stanaway No.

Elias CJ Oh well perhaps it's not worth taking time to go to but

Stanaway It's in the materials, I think it's at, sorry it's not in the materials but it is in the Act around s.54.

Tipping J This is of the Dental Act 19

Stanaway 88.

Tipping J 88.

Stanaway Yes.

Elias CJ And do they formulate the charge?

Stanaway No generally it's formulated by the prosecutor or counsel for the CAC.

Elias CJ Well then it's formally the CAC that adopts the charges is it?

Stanaway It is as I understand it, yes.

Elias CJ So it's a bit like the proceedings commissioner. Is the Complaints Assessment Committee, does that actually appear before the Tribunal?

Stanaway No.

Elias CJ No, okay.

Stanaway Well I'm sorry, I stand to be corrected.

Waalkens Yes Your Honour I can help you on this. The 1988 Dental Act is a bit clumsily worded in this regard but in practice what happens is the CAC frame the charge. They send it to the Tribunal; the Tribunal Chair under the Act has to issue the disciplinary charge and this charge that we've got will be signed by the Chairperson but it's actually drafted by the CAC, yes that's the case, and then the CAC prosecute it.

Elias CJ Yes, yes that's the normal pattern isn't it in these medical cases, yes.

Stanaway Well I'm obliged to my friend.

Elias CJ So it is a prosecutorial determination this?

Stanaway Yes.

Elias CJ Yes.

McGrath J Mr Stanaway can I just take you back to the top of page 189. I certainly understand the finding in this report the issues that go straight to the allegations of assault are inescapably bound up with levels of sedation and I suppose a need for the Tribunal to hear evidence on those matters. When it says on balance it felt the sexual abuse charges should also be part of the consideration by the Tribunal, what were the factors that it was balancing? Is there anything we can infer?

Stanaway Yes there is, the passage that's been quoted in the Court of Appeal case, that is the concern by the CAC as to the number of complainants who, whilst under sedation, appeared to have had sexual fantasies which were both site specific and mode specific.

McGrath J Yes.

Stanaway And I think that was the concern.

Elias CJ But that concern is directed at the verdicts isn't it?

Stanaway It is, I have to accept that. There is a slight difference here of course in that we've now got an additional witness and complainant who was not at trial and I deal with that later when I am endeavouring to distinguish the evidence that was adduced at trial and that which would be adduced at the Disciplinary Tribunal hearing.

Tipping J Yes I'd like some help on that as to what happens if you get some more evidence than was before the jury, but you're coming to that.

Stanaway I am. I take it Your Honours that it's really appropriate for me to move straight to the abusive process issue rather than the standard of proof.

Elias CJ I think so, yes thank you.

Stanaway In my submission the authorities, the United Kingdom authorities, the Canadian, Australian, Irish and New Zealand authorities cited by both parties indicate that an acquittal on criminal charges does not necessarily prevent the laying of disciplinary charges focusing on the practitioner's fitness practice and relying either on the same or similar allegations. The justification for that approach in my submission is likewise consistent in the various jurisdictions and that is firstly that a challenge to an acquittal in civil proceedings is seen as less offensive than that as a challenge to a conviction and in part the rationale for that in my submission is that a not guilty verdict in the absence of evidence of the jury's basis for arriving at that verdict cannot be interpreted than anything more than that a jury was not convinced beyond reasonable doubt of an element of the crime charged or on proof overall. In New Zealand without special verdicts, without the common place request for a special verdict, we are left simply with a not guilty verdict without any inquiry into the basis on which the jury have arrived at that verdict. There is power for the request of special verdicts but in my submission it is very rarely used now. We are then left with a situation where the best that can be said about the acquittal is the jury were not satisfied to the requisite standard or to proof overall. That may well mean in the context of this case in my submission that the jury came to the view that it was very likely that the allegations made by the complainants at trial had occurred. It was very likely that those events had occurred but they were not satisfied to the requisite high standard and they would have been directed of the need to be sure in terms of proof beyond reasonable doubt and so on. There is the added complication in this case of course of the defence being advanced that Hypnovel is an hallucinogenic and that there are well documented cases of patients who are over-prescribed Hypnovel suffering sexual hallucinations. That's the issue of course that's taxing the CAC who from their experience and knowledge, their in-built knowledge, are concerned about the appropriateness of firstly over-prescription, but secondly the likelihood that four patients – all women – would have had site specific and mode specific hallucinations.

Tipping J Was that defence sufficiently foreshadowed at the criminal trial that the Crown was given the opportunity to rebut it?

Stanaway Yes, the Crown called an expert who to put it mildly did not stand up to the defence expert particularly well.

Tipping J I see.

Stanaway The defence I think imported an English expert, but he was quite exceptional. But in any event the Crown did have some foreshadow of the defence and endeavoured to cover it off but did not succeed, so in my submission the jury may well have come to the view that they thought these events had occurred but they had some misgivings about the issue of sexual fantasies or hallucinations and just simply weren't sure.

McGrath J Where in the report are these matters traversed by the Committee? You've referred to the Court of Appeal judgment. I've read the Court of Appeal judgment, just give me the page references please.

Stanaway The bottom of page 189.

McGrath J Thank you, I can see that.

Stanaway I haven't actually referred you to the specific quote that is incorporated in the Court of Appeal judgment but I'll ask my junior to try and find it.

McGrath J Yes I've read it in the Court of Appeal judgment but that's just

Stanaway I thought this was the only one. Oh maybe not. Mr Stanaway since you've been interrupted, I'm just trying to think of the converse or the implications I suppose. I'm just wondering if you're right and the two processes are distinct why would not the Police in some cases, or the complainants come to this view themselves that in cases where the criminal standard is going to be a bit onerous and you have a professional man, or a woman, why wouldn't you say well look don't let's worry with the criminal process, we will go to the Complaints Assessment Committee and we'll have this matter effectively prosecuted with some pretty devastating affects through that process?

Stanaway Is Your Honour talking about a decision made by the Police or the complainant?

Elias CJ Well I'm just wondering where the public interest lies in all of this because on one view it might push prosecutions into the disciplinary process

Stanaway Well I don't accept that for a minute Ma'am, because in my submission there is a duty on the Police and those that advise them to ensure the proper exercise of the discretion to prosecute and it would be entirely inappropriate to bypass the criminal process utilising the

Disciplinary Tribunal process in order to secure an outcome. If we look perhaps at the Police Disciplinary Tribunal

Elias CJ Well aren't we doing that? If this man's been acquitted isn't the effect the same that vindication of the complaint is now being sought in another forum.

Stanaway We're not looking for vindication of the complaint in my submission

Elias CJ Well the Complaints Assessment Committee does indicate that because they say that they believe the complainants are believable and they say something almost exactly to that effect.

Stanaway That's the way in which

Elias CJ That the complainants are entitled to take this line.

Stanaway Philosophically in my submission we are looking at not a vindication of the complainants but we need to focus on what it is really about which is the fitness of the practitioner to practice, and that's really what the Tribunal proceedings are about - is he a fit person to practice? And whilst the CAC may have couched in those terms, in my submission it is quite clear that they appreciate the regulatory and standard setting nature of their obligations and what they are endeavouring to achieve. In my submission we're not talking here about an attempt by the CAC to get around the jury trial outcome. They are looking at it, and appropriately so, in terms of practice fitness and general regulation of the profession.

Tipping J They're looking at it from the point of view that the over-prescribing was no doubt evidentiary significance in the criminal trial but had no independent guilt attached to it but in this context the whole thing must be seen as a package if you like, of circumstances reflecting on this man's fitness.

Stanaway Exactly, and importantly at the jury trial the man's fitness was not an issue at all. There was no consideration of whether he was a bad dentist; whether he had been too close to his patients; whether he conducted himself in a way which was inconsistent with normal procedure, and no doubt the trial Judge directed the jury on that to the effect that that wasn't the consideration. Whatever his practices were they really had to focus on the issue of whether or not the allegations, the serious criminal allegations, had been proved to the requisite standard, and it's the corollary of that, it's the complete reverse of course of what we're looking at here.

Tipping J And his defence at trial presumably was putting it very simply this didn't happen, they dreamt it?

Stanaway Yes, yes, well it might be more than that with respect but

Elias CJ It was an assisted dream on any view.

Stanaway Yes.

Tipping J Well yes it was, but the essence was it didn't happen and to the extent they believe it happened it's because of the Hypnovel.

Stanaway The Hypnovel that's right. That was it in essence, and as I submit there's very little that can be read into the acquittal based on that. My learned friend seeks to draw a distinction between that defence and the one run for the third complainant, but in my submission the distinction is largely illusory.

McGrath J When you emphasise the fitness to practice issues in the disciplinary process, are you really saying that there should be no restraining influence on a body like the Committee from laying charges if there is a complaint, where the complaint has not been accepted by a jury? I can understand in this case you've got over-prescribing and that may bring in some special features and that's referred to in the report, but it just

Stanaway There are in-built filters of course as is demonstrated in this case in that

McGrath J Tell me more about those, yes.

Stanaway In that the CAC has personally interviewed the complainants and looked at their evidence and assessed for themselves what the response to that evidence is. It simply is not a case of them sitting down and saying well we're going to have another go at what occurred in the trial, we're going to simply rely on the evidence that was adduced at trial as a basis for charges. They have actually filtered the process by interviewing them themselves and then exercising their own judgment, particularly as practitioners with knowledge and experience in determining whether or not the charges should go forward.

Elias CJ So too would the Police Prosecution Agencies.

Stanaway Well they would be required to.

Elias CJ If the complainants had come first to the Complaints Assessment Committee, would the Complaints Assessment Committee have in your view been able to take the complaint forward without saying no this is a criminal matter, you must go to the Police with it or we won't pick it up – is there any

Stanaway Well generally across the board Ma'am I would have thought that a responsible investigative screening body would require serious

allegations of this to at least be considered by the Police and would notify the complainants that you are making serious criminal allegations, the appropriate for that is an investigation by the Police.

Elias CJ And then isn't there a corollary they must actually consider the verdict before determining whether to go on?

Stanaway Yes and in my submission it's been done here.

McGrath J What say the complainants say well we prefer to give evidence in a private forum rather than the public Court of law?

Stanaway Well it does happen.

McGrath J Sorry?

Stanaway Well it does happen.

McGrath J Course it does.

Stanaway From time to time, particularly in Police Disciplinary Tribunal matters and in my submission it requires advice to be provided to the complainants as to what their rights are and indeed their obligations, but if at the end of the day they decide they are not going to take the matter further because of embarrassment or concerns about publicity, and there are a myriad of reasons why not, then they can't be forced to.

Elias CJ But what's the position then of the Complaints Assessment Committee? It can pick up those complaints?

Stanaway Yes in my submission it can, and would be entitled to recommend it to the Disciplinary Tribunal for hearing and laying charges.

Tipping J Mr Stanaway, the people who comprise the CAC presumably have their own conscientious duties to perform and if after they've looked at it carefully and interviewed as you say the complainants, they are in good faith satisfied that there is a case that should be put before the Disciplinary Tribunal, I am just struggling to see what case there is against doing that simply because there has been an acquittal on the part of some jury somewhere.

Stanaway Yes.

Tipping J I mean it seems to me it's getting close to saying that whatever the CAC may think in their honest appraisal of the case, they are bound by their acquittal and I would find that a difficult proposition to accept because they presumably have duties themselves and they're there for a very precise reason; and their expertise is there for a very precise

reason but I think Mr Waalkens does get quite pretty close to the idea that they are bound, despite their own statutory duties.

Stanaway Yes.

Tipping J Now I don't know whether that's

Stanaway It comes back to the issue of what the nature of the Tribunal is and what its purposes are

Elias CJ And what the nature of criminal processes is.

Stanaway Exactly.

Tipping J Yes, and what is the status of an acquittal. Is it an *in rem* sort of concept. It seems to be

Elias CJ Well obviously it's not, but we're talking about a prosecutorial discretion and whether the fact of an acquittal should weigh quite heavily in that.

Tipping J But with respect we are talking about that in a sense but what I am having difficulty with is seeing a line that says it's not an abuse but it would still be a prosecutorial discretion to proceed. It can still be restrained. That's where I'm having my difficulty. I just flag it.

Stanaway Well I accept that. It is particularly difficult in my submission to say where the line is between unfairness and fairness in terms of taking a matter to the Tribunal. In other words does it have to be case specific as to whether or not it's unfair to proceed where these allegations have been made. In my submission we are just buying into problems in trying to set a test that's going to meet all appropriate cases, all future cases.

McGrath J It may be difficult Mr Stanaway but I suppose I have just a lingering doubt as to whether it is fair in a case where all that the Complaints Committee would be putting up is exactly the same circumstances without anything additional relating to professional practice such as over prescription of drugs, but the straight question of whether a sexual assault occurred or not, leading the same evidence, and expecting in effect to have another go at securing some accountability. It seems to me that the system somehow should require the Complaints Committee to have regard to the acquittal in those circumstances, but I'm not quite sure how one can do that.

Stanaway How one formulates that?

McGrath J Yes.

Stanaway It will no doubt be foremost at the mind of the Tribunal and they will be reminded no doubt by my learned friend if it gets to that point about that

Anderson J All you could say is that they shouldn't prosecute if it would be unfair to do so. You can't refine it more than that because it then becomes case-specific.

Stanaway It does.

McGrath J I realise that this may be the answer that in the end there are limits on what Courts can do when there is an overbearing prosecution or overbearing charges in a prosecution and things of that kind that the Courts may just have to get on with it and decide it and it may be that they should be very hesitant to interfere with a specialist body that has this different focus as you say, but I just feel that in some respects what Lord Simon Brown was saying in the case Mr Waalkens took us to had some merit is a fact that should be taken into account.

Stanaway In terms of caution, in terms of overall fairness requiring a consideration of whether or not it is fair on all the circumstances, well quite how one formulates that in the context of this case in my submission is not easy.

Elias CJ Well you perhaps don't formulate it by saying 'on balance it should go ahead'. I mean you have to grapple with the issue a bit more perhaps.

Stanaway It's apparent in this case in my submission that a good deal of thought has been given to the issue, to the fact that the man has been acquitted of criminal charges, there's no doubt about that and it's been very much at the forefront of their consideration

Tipping J The reason they gave surely in essence was because we've got a rolled up situation here; we've got alleged sexual misbehaviour, coupled with over-prescribing.

Stanaway Yes.

Tipping J That's why we should go ahead.

Stanaway That's right, very much so. We've got our obligations under the Act where a Body which is required to regulate our own practice, our own practitioners, we are required to set standards. Alone the over-prescription causes us grave concern, but in a context of what's been alleged were of even more concern arising from whether or not the facts are actually proven, the fact that the complainants have had these fantasies or the events have occurred. Now the next matter that I was wishing to refer to in terms of acquittals as not being a bar to disciplinary charges is of course the nature of the proceedings are

quite different. The criminal proceeding is aimed at determining the criminal liability of the accused and punishing him if found criminally liable. In my submission a Disciplinary Tribunal process such as we are involved with here is quite distinct and in particular is looking at self-regulation via the Body; standards of fitness and at general practical requirements and regulation and standard setting. Now whilst I accept that the Disciplinary Tribunal's hearing of disciplinary charges may result in some penalty aspect, they are not in my submission punitive in the sense that they are not aimed at punishing the appellant or the practitioner for alleged charges. They are in a nature conceptual and in my submission related to regulation and standard setting of the profession. Now the next matter that I point to is the conduct of the inquiry itself. The conduct by the Tribunal that will in my submission be different to the Criminal trial. The Tribunal will not be required to act as jurors, as simple lay persons. They will in my submission be required to utilise their experience and knowledge as members of that profession and there are hints of that of course in the CAC's decision where they observe as practitioners for a number of years that Hypnovel can be a drug which creates sexual fantasies but that that is in over-prescription situations and that they are not at all convinced that you'd have four people who would have the same fantasy at the same time and at the same place in relation to the same type of fantasy.

Elias CJ So Jolly and Fraser are professional are they and Judd I know is a lay person, but the other two are professional people are they?

Stanaway They are required under the Act to be Dentists.

Elias CJ Yes.

Stanaway Yes.

Elias CJ Yes thank you. Sorry that's what I meant.

Stanaway In my submissions for the reasons that I've advanced in my submissions under the heading *Abuse of Process*, no abuse of process arises in this case irrespective of the standard of proof to be applied by the Disciplinary Tribunal, and as I've outlined I rely on the following, this is at para.92 of my submissions that while not determinative in abuse of process arguments, the parties in the case are distinct in the criminal proceedings and the disciplinary proceedings - there could be no doubt about that in my submission. Secondly the relevant interests in the finality of litigation and protecting public confidence in the administration of justice apply less stringently when there was a previous acquittal as opposed to a conviction, and that arises in my submission from the inability of those considering the acquittal to determine the nature of acquittal and what has led to it. And of course one of the factors that relates very much to conviction attacks and collateral attacks on a conviction is the ability of either one or other of

the parties to appeal. In this case what we're dealing with here, the appeal rights of the Crown were particularly limited and were confined probably to s.380 of the Crimes Act in relation to an acquittal. Thirdly the Dental Act 1988 has in my submission a distinctive protective purpose aimed at maintenance of professional standards and public confidence in the profession, and about that in my submission that there can be no doubt. Fourthly the evidence to be adduced at the Disciplinary Tribunal hearing may materially differ from that given at the Criminal Trial. Firstly we have the evidence that will be led from Ms M, who is an additional witness and who did not give evidence at trial. If issues of similar fact in the like arise at the Disciplinary Tribunal hearing, that will be an additional consideration, that is if her evidence will be entitled to be included in the mix of the number of persons who have had these particular events occur to them and whether or not that additional complainant added to the other three tends to support the contention that this was yet another hallucination and related to an event which did not occur.

McGrath J How does Ms M's evidence differ from that that the Court of Appeal's already decided she'll be excluded?

Stanaway Not greatly I accept that.

McGrath J Are you expecting a skirmish of that?

Stanaway I think there will be.

McGrath J I hope it's not going to lead to another round of litigation Mr Stanaway.

Stanaway Well I won't be involved Sir.

McGrath J You just might be retiring from old age before the matter comes along.

Stanaway Yes. Involved in that factor that I've referred to though as to the nature of the Disciplinary Tribunal hearings, I do go back to what I said earlier, or submitted earlier, and that is what is expected of the members of the Tribunal at the time, that they're not expected to be simple lay jurors, that they are expected if not obliged to exercise judgment based on experience, knowledge and competence and practice in the particular discipline. I refer to

McGrath J I can see that's important in terms of what's the appropriate level of anaesthetic that's involved, but I'm not really quite sure how that bears on the issue of whether or not he committed an indecent assault.

Stanaway It is relevant in terms of issues such as appropriate proximity to a complainant for instance, enabling there to have been at least alleged contact between hand and penis and the like. Is it appropriate for a

male Dentist for instance to have placed himself that close to a complainant's hand? Issues such as that arise in my submission.

Blanchard J And presumably they'd have some expertise on the effect of the drug too.

Stanaway Of yes undoubtedly.

McGrath J Well there's no doubt about that but the other aspect you've referred to, the significance of that escapes me at the moment but then I'm not a Dentist I suppose.

Stanaway Well I'm turning my mind to the issue of the defences that were run at the trial and in particular the issue of whether or not the particular position of the Dentist at the time was such that these events could have occurred. In my submission the matters relied on by my learned friend do not amount to an abuse of process, nor do they amount to a situation where it is so unfair that the Court should intervene. I'm not sure the distinction between abuse of process and unfairness in the context of what we're talking about here but having regard to the particular facts of this case and indeed the obligations of the CAC, in my submission it is neither an abusive process nor unfair for them to proceed in the way they are and to lay counts which include particulars which relate to refer to the alleged criminal conduct at the trial. In my submission the CAC is not essentially a Disciplinary Tribunal endeavouring to determine whether or not that those events occurred. They are much more concerned with the issue of what standards and what regulatory conduct is required to be considered in the context of the allegations.

Elias CJ Of course they are but on the way there they have to consider whether these events occurred.

Stanaway They do to a lesser standard in my submission.

Elias CJ Alright, would it be convenient to take the lunch adjournment now? Thank you.

1.02pm Court Adjourned
2.23pm Court Resumed

Elias CJ Thank you Mr Stanaway. I'm very sorry we were late, it was me.

Stanaway Your Honours I can indicate that I was near a conclusion in any event before the luncheon and if I can be brief, I am endeavouring to speak to my submissions – I do rely on my written submissions – and I'm endeavouring to encapsulate the matters that have arisen in argument today as best I can. I wanted to conclude unless there's any particular

matters that I should answer by referring to the Court of Appeal judgment at pages 17 and 18 which in my submission is really what we are needing to focus on here, and under the heading of *Abuse of Process* from paras.38 onwards in my submission the reasoning of the Court of Appeal on this issue is correct and is not shown to be in error. If I can look at for instance para.40, the abuse of process doctrines is a broad one applicable in varied circumstances and *Chamberlains v Lai* refer to the decision of this Court and the background to the Court's decision. Unlike issue estoppel and res judicata, abuse of process if not limited to the same parties. I've acknowledged that. As the appellant says the Court's duty to prevent abuse of process is not limited to fixed categories, *Chamberlains v Lai* at para.63. The majority of the Supreme Court in *Chamberlains v Lai* took the view that a collateral challenge to a subsisting conviction will usually be an abuse of process. There may be exceptions. The underlying concern reflected in the position is that it is not helpful to have inconsistent Court decisions on the questions of guilt. Now the Court then went on to deal with the issue of finality and litigation in protection public confidence in the administration of justice and the indication that applies less starkly where the situation is that an acquittal has arisen and that is the submission that I've made. In the case of *Daniels v Thompson* at page 50, or para.50, it's noted in respect to an acquittal that it merely embodies the conclusion that the elements of a criminal offence have not been established to the requisite standard, which in my submission is the case here that is all that can be read into the decision of the jury. Para.42 'for that reason the Court in *Daniels* said that at para.50 that an acquittal does not operate as a general bar to civil proceedings based on the same act or omissions'. And 'the majority in *Chamberlains v Lai* emphasised the place of appeals as the means of correction in the criminal justice system. The appeal opportunities following an acquittal are limited', and I've made that point here that in my submission following an acquittal the Crown was limited to an application for the noting the appeal point under s.380 of the Crimes Act and probably during the course of the trial, not subsequently. The Court then refers to the different protective purpose of the Disciplinary Tribunal proceedings and that that tells against an abuse of process and as noted the Dental Act expressly envisages parallel proceedings, that is the situation where it's contemplated that following a conviction the Dental Disciplinary Tribunal may consider the matter to determine whether or not the conviction in the facts relied on their amount too misconduct which would fall to the action under the provisions of the Dental Act. It's actually one of the provisions itself. So not only is the Dental Act requiring the Tribunal to look at conviction but whether or not it is conduct which requires condemnation in terms of the obligations of the Tribunal.

Tipping J That of course is not quite the same with an acquittal is it?

Stanaway No it's not.

Tipping J The reasoning here is perhaps it doesn't give quite enough force to the point you've quite properly drawn to our attention. It doesn't necessarily work the same way?

Stanaway Not necessarily.

Tipping J No.

Stanaway It is acknowledged in the reasoning of the Court of Appeal, para.43, the possibility that a particular combination of facts in the Dental Disciplinary Tribunal may give rise to an abuse of process. However those situations are likely to be rare. But there's not a great deal of elaboration on that and that I suspect is possibly the concern raised by Your Honour Justice McGrath in what guidance if any can be given to Disciplinary Tribunals looking at using an acquittal on the facts giving rise to an acquittal as the basis for consideration of Disciplinary Tribunal matters. In my submission it really needs to be case specific. Each case must be looked at on a case-by-case basis. It's almost impossible to conceive of a test that would appropriately apply across the board. That it is best left for determination on a case-by-case basis rather than to try at this stage to endeavour to put in place a test that's going to have general application to all fact situations. The reference to broad merits-based judgment comes from *Johnson v Gore Wood* which is referred to, and in my submission is clearly indicating that what's required is an overall assessment, taking into account all the public and private interests and all of the facts. It may be that what has been contemplated here is to an extent a collateral attack on the judgment, but it is a permissible collateral attack having regard to the nature of the proceedings, having regard to what's endeavoured to be obtained and what the purpose is of the proceedings are. In *Re a Medical Practitioner* para.44 is a similar case to this in relation to a medical practitioner who was acquitted of a charge of indecent assault, who raised issues of *autrefois acquit* at appeal stage, that was as is referred to in *AA*, the Irish case and not accepted and it was held that there was no bar to the proceedings continuing. The emphasis being placed by the then President at para.45 in *Re a Medical Practitioner* was on the purpose of the disciplinary proceedings, the fact that the disciplinary proceedings were not criminal or quasi-criminal, and the limited effect of an acquittal. The fact that there was no power to remove the Doctor's name from the register as is now the case with this Disciplinary Tribunal was noted but in my submission is not a major feature. And the Court then turns to the particular facts of this case and a consideration of the judgment in the High Court and came to the conclusion on what was in my submission a broad merits-based judgment. But this did not amount to an abuse of process. In my submission the reasoning is correct and appropriate in the context of this case.

Elias CJ Para.49 of the Court of Appeal decision, this is a discretionary matter. Well relief is discretionary of course but it couldn't have been suggested that the determination is a matter of discretion.

Stanaway No I accept that.

Elias CJ So on its face that's actually an error of approach, but they're clearly agreeing with him but it's unfortunately put.

Stanaway Yes, and in my submission it doesn't overly effect the reasoning that I've sought to support.

Elias CJ Yes.

Stanaway Well they are the submission that I wish to make and unless there's anything in particular I can respond to.

Elias CJ Thank you Mr Stanaway. Do you want to be heard in reply?

Waalkens Yes very briefly if I may Your Honours subject of course to any issues you wish me to raise. I agree Your Honours that this is a case specific and this appellant does not bring this case for the purposes of the dental profession, or for that matter, health professionals generally. It is a case specific example and as the Court of Appeal in para.43 of this case have already identified a broad merits-based assessment or judgment must surely identify this if ever there is a case warranting the relief that I've sought for the appellant based on an acquittal this would have to be it, because the identity of the particulars in both the disciplinary charge and the indictment

Tipping J Are you saying in effect that if we don't regard this as an abuse there won't be any cases of abuse?

Waalkens I believe so Sir, yes, in terms of an acquittal.

McGrath J Well if you can imagine a case of which the alleged incidents happened but there was no new factor involving the effect of drugs that had been administered. I mean there seem to be a number of those cases involving health professionals. In other words when it was just the straight, the bare, there were no additional facts that could be the subject of separate charges and the only charges were the criminal charges that there had been an acquittal on, that might be a lot more close to the sort of situation Lord Brown was looking at.

Waalkens Yes although, I was going to come to this point, it's inelegant in my submission to suggest that to look at the matter in the round, the Tribunal must look at a particular of the charge that replicates the criminal offending. It's all well and good to look at the excess, the alleged excess of anaesthetic, I beg your pardon, of sedative, and some of the other clinical issues, but they don't require a particular of

the charge to also be this very same criminal matter and my learned friend made some point about commending to you some of the evidence and this isn't a good forum to go into the evidence let me quickly acknowledge, but the criminal trial that took two weeks called not only expert evidence but also nurses and others who were in the surgery at the time, and the CAC have obviously not looked at that. They've made their own particular comments about site specific and other observations like that, and my learned friend, or the CAC's reliance on for example the point that well the evidence won't be the same because they're going to be calling Ms M, who did not give evidence before the Criminal jury, is correct as far as it goes, but Ms M's evidence, and I would like to just spend a very brief moment if I may just showing you what she had to say on this because it could hardly be evidence that's going to have any effect on a similar fact basis. You will see it, a synopsis of her evidence is on one page of the case, it's at page 68, and this is a complainant who the Police were aware of but they did not charge Dr Z with respect to it and nor did they call her evidence by way of similar fact evidence or otherwise. And the reason's obvious why they didn't do so and the fact that I'm going to show you goes somewhat to the unfairness of suggesting well look let's have the Tribunal look at this whole thing again with her evidence now being introduced. Her synopsis you'll see under the allegation is that while being administered IV Valium she was told to squeeze her hand repeatedly; recalls squeezing something, not sure what it was; recalls him wiping around her hand with a tissue - she thought at the time he may have ejaculated; did not at any stage see his penis and cannot say for certain this is what she had been squeezing; told her ex husband about her suspicions. And a few pages on from that, page 72, this is in her statement, her deposition to the Police. As I say she wasn't called as a witness - second sentence; I was still thinking about this when I became asleep; cannot recall him saying anything other than 'keep squeezing'; I did not at any stage see what was going on; I cannot recall anything that was said or done when I woke up. I did not put my suspicions to him; I don't know how long I was out to it, but thinking back about the bill, it was probably about an hour. He had fixed the tooth problem, he had removed the wisdom tooth; I can't recall whether I phoned him or how it was arranged, however D came and picked me up – that's her ex-husband; I remember being a little bit groggy afterwards but still wondering whether what I have said had happened; one in the care told ex-husband about it; he shrugged it off and said something like 'you've imagined it', and to like effect over the page, page 73, to just exacerbate matters evidence of contamination that she'd spoken to a friend about some other complainant or issue that related to this person, that was a charge that was stayed, and on the fact of it it's just wholly unreliable evidence. Not surprising the Police didn't call it, and the CAC's determination of this complainant's complaint is at page 183. It actually starts at the bottom under the heading of her name, page 182, then on to page 183 having set out what documents were received and reviewed – a few lines down – 'the complaint

concerned her dental care; she was prompted by a friend who had told her of a plan to catch out a dentist; general memories are more vague because of the time lapse, however she does remember having to come for treatment later that day at 5pm; no nurses in attendance; drapes on the windows and members of the Court those drapes on the windows and the adjacent door locked and so forth is particular 3.3 of the charge, so they've him with that as a particular, and then go on to say records 30mg of valium was administered; patient was concerned for her safety as when she felt her hand was messy and being wiped she was frightened to acknowledge that she was awake and so she was not told of any possible side-effects. There's no charge for side-effects. But it's just an example of case-specific and the issue about a broad merits-based judgment that it's in my submission quite wrong for the CAC to say well this Tribunal's going to be in a better position to re-judge all of this stuff by hearing from a witness here, this patient who didn't give evidence before the Criminal trial. And the last point I just wanted to make just on the topic that the CAC do rely somewhat on the CAC's own subjective views, well they're not so certain about it being site-specific. That part of the case would indicate as one would expect it to ordinary Dentists. They don't have experience in this particular drug Hypnovel and had to talk to a specialist anaesthetist who described, and this is on page 190 of the case. This follows the observation about they don't believe hallucinations are always so site or mode-specific. The first complete paragraph, halfway through that you can see the CAC Chair consulted an anaesthetist who described how he would administer Hypnovel in a ward and so forth and there's something in the correspondence that follows it objecting to that because we were never given a chance to comment on that. But the point Your Honours is that the case law on this is the Tribunal are not in a position to form their own opinion. They are there to judge the evidence and of course they can use their expertise but they're there to assess the evidence called and the main case on that in the medical arena is a case called *Lake. Lake v The Medical Council.* It's an unreported judgment of Judge Doogue in the High Court at Auckland and if you needed it I could get that to you, but it is an authority for that proposition. So I don't for this appellant accept at all that it's appropriate to say that keeping this allegation, these serious criminal allegations, which are so identical to the criminal allegations, is appropriate in any sense and that a broad merits-based judgment in terms of abuse ought be determined in this appellant's favour. Now unless Your Honours have any issues that I can help you with.

Elias CJ You mentioned that the trial took two weeks

Waalkens Correct.

Elias CJ And that other witnesses were called in, including nurses. Did the defence call evidence?

Waalkens Yes the defence called the nurses. The Crown called two of the nurses but they were cross-examined at some length and the defence called evidence from the accused. He gave evidence himself and called some other nurses and people who were in the surgery. His wife was in the surgery for one of the consultations also. I haven't taken you to some of the evidence to do with, it's patient *P* in this case. But her evidence if one wanted to see allegations that just reinforced what's an incredible allegation is that her statement of evidence read that she recalls coming out of the sedation and feeling, she doesn't see anything, but felt something; it felt like she was touching his penis; she didn't see it but at the next moment he then was removing her wisdom teeth and the evidence called established that her wisdom teeth were removed and to do that you need people present, and there were people present at all time, so as I acknowledge it's not going to be that persuasive for you to have to get into the evidence but I wanted to give you a very real sense that there was a complete lack of credibility said by the defence in terms of what these allegations were. Albeit one would have to be as the CAC members seem to have been at first blush surprised that you would have two people, several people making an allegation that's site and hallucination rather specific incomparable. Evidence was called about what that was so and it had something to do with the level of the dose. These things are dose dependent, hallucinations, and also in the dental chair there is a whole lot of pipes and things hanging down from the dental chair that attach to drills and things that are of a very soft skin-like feeling when you hold them together.

Elias CJ But your point then is that a two-week trial will have to be gone through again?

Waalkens Oh absolutely Your Honour, yes. It's going to replicate, plus more because there are additional allegations and those allegations will have to be dealt with. I accept that the clinical professional issues will of course have to be dealt with.

Tipping J But what is the principle you're invoking here or is this just a species adding to the unfairness that it's going to take a long time to re-traverse these matters?

Waalkens The primary point is what I said in my submissions this morning which is it is also identical in the allegation to what this man faced in the criminal charge. Quite unlike *Re a Medical Practitioner* and these other cases. That's the primary ground which was looked at over two weeks by a jury at great inconvenience and cost and so forth and then to replicate all of that is an add-on to what are I have to accept proper inquiries by the Tribunal as to clinical matters is in principle wrong.

Tipping J So it really comes down in the end it's unfair because of the exact identity of the factual allegations?

Waalkens And the acquittals on those, yes Sir. Coupled with what I said earlier today about the standard of proof which I haven't had to give you. You've had the benefit of my detailed written argument on it.

Elias CJ Thank you Mr Waalkens.

Waalkens Thank you Your Honours.

Elias CJ Thank you counsel. We will consider our decision in this matter. Thank you very much for your assistance.

2.47pm Court Adjourned