

IN THE SUPREME COURT OF NEW ZEALAND

SC 27/2005

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **DR C**

Appellant

AND **A COMPLAINTS ASSESSMENT
COMMITTEE**

Respondent

Hearing 17 August 2005

Coram Tipping J
McGrath J

Counsel H Waalkens QC and S R Carey for appellant
C J Lange for respondent

APPLICATION FOR LEAVE TO APPEAL

11.46 am

Waalkens Yes if it please Your Honours I appear for the applicant together with Mr Carey.

Tipping J Yes thank you Mr Waalkens, Mr Carey.

Lange May it please the Court, I appear for the respondent.

Tipping J Mr Lange, thank you. We rather think that it would be most convenient if we heard you Mr Lange first in relation to the jurisdictional point because it's a point which your client is raising. And I think, well it's inappropriate to talk in terms of onus, it might be best if you went first. So if you would like to develop that point. Don't go on to the merits, just develop the jurisdictional point to the extent you wish. We understand the point. It's a narrow but reasonably important point.

- Lange I've tried to encapsulate the essence of the submissions on behalf of the respondent in the written material.
- Tipping J Yes.
- Lange And to develop that, it's my submission that s.67 does have application and to hold otherwise would create an odd scenario depending on the route of appeal to the Court of Appeal a party took. If, for example, the appeal was taken by the s.144 route, then there is potentially an argument for appeal to this Court with leave. If, however, it's a s.67 route that's taken to get the matter to the Court of Appeal, then clearly in my submission there is not leave or no ability to appeal that decision to this Court. Accordingly in those circumstances, depending on the procedural provisions relied on to get to the Court of Appeal, a party could control whether or not there potentially could be a further appeal here.
- Tipping J When you say a party could, are not the parties bound if you like by what the legislation provides as to the route?
- Lange They are here and potentially there are two, at least it appears at first blush, inconsistent provisions. The issue then becomes, can those be reconciled in a consistent form. In my submission they can by the wording of s.121 subs (3) of the Medical Practitioners Act and s.7A of the Supreme Court Act.
- Tipping J That's the applicable and with all necessary modifications.
- Lange Yes.
- Tipping J Well why is it a necessary modification? Because otherwise there's an inconsistency?
- Lange In my submission the question is, is it applicable.
- Tipping J Well it's applicable in terms.
- Lange Except what I would submit is that the starting point is under 121 there is a right of appeal from a decision of the District Court to the High Court and the procedural provisions of Part IV of the Summary Proceedings Act can be invoked so far as they are applicable. The nature of that appeal is an appeal from an inferior Court in its civil jurisdiction. Section 67 limits the further rights of appeal only as far as to the Court of Appeal with leave.
- Tipping J But if one said that the Summary Proceedings Act route, if I can call it that for short.
- Lange Yes.

- Tipping J Was not applicable, then that is in direct defiance of what the legislature has said is applicable to this type of situation.
- Lange In my submission what the legislature has done is said the provisions of Part IV apply so far as they are applicable. Now arguably that could mean s.144A.
- Tipping J You carve out the apparent right to go to the Supreme Court on the premise that it's not applicable in inverted commas because of s.67, is that the thing in a nutshell?
- Lange In a nutshell.
- Tipping J I see thank you, yes I understand that.
- McGrath J Mr Lange is the real issue whether the matter falls under s.7 or s.10 of the Supreme Court Act? If you go in through the s.7 you're into the zone of appeals against decisions of the Court of Appeal in civil proceedings.
- Lange Yes.
- McGrath J And if you go through under s.10 you're actually dealing rather with a list of three categories of appeals.
- Lange Of criminal appeals.
- McGrath J Yes, well the heading says criminal proceedings but in fact (a) is clearly a Crimes Act criminal proceeding, (c) I suppose the Courts Martials Appeals Act, you can categorise that as criminal, but (b) happens to include, once you're invoking the Summary Proceedings Act and the case stated procedure, it happens to include some matters that are criminal and some that are not. This procedure's been used for Sale of Liquor Act proceedings as you well know and all sorts of other matters.
- Lange Yes.
- McGrath J And I'm really wondering, even accepting the heading has criminal proceedings, whether the way s.10 is in its text expressed differently to s.7. It doesn't speak of an appeal by a party to a civil proceeding in the Court of Appeal, it just simply says the Supreme Court can hear and determine appeals authorised by, then it lists types of appeal.
- Lange The submission on behalf of the respondent is advanced on the basis that ss.7 through to 10 are an endeavour to distinguish between civil and criminal appeals; 7, 8 and 9 all dealing with civil proceedings and 10 via its head note, from which regard can be had, directed at criminal proceedings. Now if the Court was to take a different view that 10 can also encompass civil proceedings.

McGrath J Well it might be that in terms of 10, because it refers to s.144A of the Summary Proceedings Act, s.10 is if you like creating a statutory fiction and treating certain appeals as in effect of the same kind as summary appeals from the District Court in its criminal jurisdiction. I don't, just for myself though, when I look at, I acknowledge that the term criminal proceedings is used in the heading, but if you come back to 10, one of those categories does bring in a number of appeals which through a procedure incorporated by reference in a number of statutes which seems to be as I see it not to be exclusively criminal. Or if it is criminal, they're deemed to be criminal for the purposes of certain, appeals from tribunals are deemed to be of a criminal kind for the purpose of s.10 if you want to maintain the distinction, but I'm not sure you have to maintain the distinction.

Lange In my submission the incorporation of Part IV as the Medical Practitioners Act, another Act, does, does not then deem the proceedings to be criminal in nature. It is simply providing a simple, in effect fast track ability to have the appeals proceed as they would in the criminal forum as opposed to the civil forum. There's the absence of the strict procedural requirements and so forth which arise in the civil jurisdiction of the Court.

Tipping J Is there any other basis that your client seeks to get out of the apparent prescription of the Supreme Court Act track right through so to speak other than the proposition that it's necessary to read that down on the "so far as applicable" premise.

Lange No.

Tipping J Well I think we understand the point Mr Lange unless you feel there's something that can be more substantially developed. It's a narrow point.

Lange Well it is a narrow point and it was one identified and raised.

Tipping J You've put it I think as well as it could be put. I'll just confer. (Judges confer). No we're against you on that Mr Lange I'm afraid so we'll now invite Mr Waalkens to address us on the merits so to speak.

Waalkens Yes thank you Your Honours. The substantive issue is all about privilege and in particular whether privilege has been waived. There are a number of, I mean the topic is quite broad and there are a number of other subsidiary issues, but you will see from the submissions that have been filed by the applicant that the primary issue is all about waiver.

Tipping J Is it perhaps more accurate to say that the primary issue is whether there has been consent in terms of s.32?

Waalkens Yes.

Tipping J It may amount to the same thing.

- Waalkens Well the structure must be that the first question is, has there been consent. Because if there has, it's the end of the story. If there hasn't, will waiver suffice? It's been discussed in the Court of Appeal judgment as being perhaps analogous to implied consent but in my submission waiver is the preferable way of terming or looking at the issue. But Your Honour's right, the first issue is, was there consent or has there been consent given. If there has, end of story; if there's not, then that's then.
- McGrath J I wondered whether the issue Mr Waalkens might be rather if you focus on consent, you've got s.32 does, and whether the consent had to be express or whether it could be inferred from the conduct of the person who holds the privilege.
- Waalkens Yes.
- McGrath J Now in other words, if we look at it in terms of the statutory language, would that be a way of encompassing a point you've discussed in your submissions as waiver.
- Waalkens Yes it would do because I acknowledge that the Court of Appeal for example has seen that as implied consent rather than waiver. I think they used the phraseology that describing it as waiver is inapt.
- Tipping J Could I put to you Mr Waalkens that the two issues that might arise if leave were granted would be first, and this is expressed quite widely and deliberately so, first, was the Court of Appeal right on the concept of consent and two, if not, was there consent? That encompasses both what you might call the definitional question, what does consent in the statute amount to.
- Waalkens Yes, yes.
- Tipping J In law and secondly, the specific question as to whether the Court of Appeal, if the Court of Appeal were wrong, you would wish to go on and say well there actually was consent here.
- Waalkens Yes.
- Tipping J Within the meaning.
- Waalkens Yes, those two questions would encapsulate the issue.
- Tipping J Yes, I thought so.
- Waalkens I would have approached it differently but it gets to the same position.
- Tipping J Well if you want us to contemplate framing them differently then please don't hesitate to tell us how you would like them framed.

Waalkens No.

Tipping J I mean I was just simply having a shot at it.

Waalkens Yes, I'm quite content with those two questions. They do deal with the issue.

Tipping J I just wanted to get clear in my mind before we discuss the merits if you like as to what the two questions would be or what the questions, that's fine, that's good.

Waalkens Quite, absolutely so. Where the Court of Appeal, or the thrust of the applicant's challenge to the Court of Appeal judgment is the paragraphs that start around paragraph [76], [77], [78] where in fact at paragraph [77] the Court of Appeal say, in the very last sentence, consent in our view must be info medical and explicit consent to the disclosure. And they go on in paragraph [78] and the analysis that follows in there to find that implied waiver, as they describe it under the topic of legal privilege, is not a concept that's applicable to medical privilege. And as I say, whether it's described as implied waiver or implied consent, the Court of Appeal is saying that that's not open, as in ophthalmology, that's a completely different circumstance.

Tipping J There's also something that could be at issue I presume in the statement at the bottom of [78] that consent is a different concept from waiver.

Waalkens Yes.

Tipping J Your client's case essentially I presume is that for present purposes the two are the same.

Waalkens Absolutely, correct.

Tipping J Mm.

Waalkens And waiver has been alive and kicking, if I may put it that way, in the most clear example of privilege in our law of solicitor-client privilege.

Tipping J Why did the Court of Appeal say it's not applicable to medical privilege? Do they develop that, the capacity for?

Waalkens They appear to be saying that because the statute uses the word consent that that has to be then something different from waiver.

Tipping J Mm.

Waalkens And that's an issue or a view with which the applicant disagrees.

Tipping J Mm, yes I thought it probably came back to that.

McGrath J They read the section narrowly, focusing on consent and then it's as you say, from the context they develop this position that it must not only be explicit but it must be informed consent.

Waalkens Yes. And just on that, what they've overlooked is dicta in many cases and many writings. Indeed Wigsmore on this topic notes that it doesn't matter, or it's not determinative that the outcome of waiving the privilege if I may put it that way or consenting by implication was not intended by the patient. The Court of Appeal spends some time seemingly directing themselves that because she didn't intend that.

McGrath J Is that reference to Wigsmore in your submissions?

Waalkens It's not Sir but you'll find it in Ophthalmology.

McGrath J Yes paragraph 20 or so.

Waalkens Yes. Yes paragraph 20 indeed Sir. It makes it very clear that unintentional outcome of the privilege being either impliedly consented to or waived is not the concern and they make a good point that of course no patient would ever intend to in fact waive it or implicitly consent if that were the strict test.

Tipping J Well they might but it's much more likely, well my recollection of this field, and of course I was in the case that went to the Privy Council as was my brother, was that it was implicit in all that discussion that you could waive unintentionally.

Waalkens Yes indeed.

Tipping J It was, the debate in effect was whether the person had but there was no real debate about the fact you could.

Waalkens Mm.

Tipping J But I understand the point, yes thank you.

Waalkens And that's the essence on this legal point of where the applicant differs or respectfully suggests that the Court of Appeal have got this quite wrong and have misdirected themselves in the process.

Tipping J Yes.

Waalkens And the broad point that deals with the point I want to touch on later on but it would be useful to note it now, on the interests of justice, your s.13 criteria, is that this point, if the Court of Appeal are right, will have a dramatic effect on all disciplinary cases in the health arena, certainly medical disciplinary cases, because inevitably this concept is not restricted just to cases where the patient has made a complaint about the

adequacy of the treatment of the doctor concerned. If the Court of Appeal's rationale is correct, which we say it's not, then a patient could make a complaint against a doctor, the doctor may have handed over the records or no longer have his or her records and be required to come to the Tribunal and defend him or herself. In the absence of records the patient would be entitled to say expressly, no I do not consent to these records being made available and the Court of Appeal's suggestion that that might be remedied by a direction that that evidence based on that protected communication would then have to be deleted doesn't meet an adequate cure at all. It's far preferable.

McGrath J Do I understand, this is your argument, that the Court of Appeal's decision will prove problematic in its implementation. Now is that confined to situations which might be described as improper conduct as opposed to inadequate conduct?

Waalkens No, no it's not confined at all in that regard.

Tipping J Any case where the complainant said of the doctor complained of, this is what I'm complaining about, the doctor could not, without the express consent of the complainant, use his medical notes to rebut the complaint.

Waalkens Correct.

Tipping J Yes I wondered whether it went that far. You say it does go that far?

Waalkens Yes it does.

Tipping J Because you couldn't draw an implication from the very fact of the complaint that of necessity there was a waiver of privilege.

Waalkens On the Court of Appeal's analysis, absolutely not.

Tipping J Mm. Well I'm not sure but at least it's open to that view.

Waalkens Mm.

McGrath J As I understood the Court of Appeal decision, the point they made in relation to what you might call negligent conduct, was that if there wasn't a consent, then the complaint simply wouldn't be able to proceed. The Tribunal wouldn't hear it. And that that would be perfectly workable. But that where the matter became complicated was rather if we're dealing with what I would call improper conduct, if you get a complaint on that side.

Waalkens Well absolutely so in the improper arena with which this case is concerned, and many cases do concern allegations of impropriety, not of inadequate treatment. This is by no means an isolated case but the facts may be rather unique, but the concept is not. But Your Honour I don't read the Court of Appeal at all restricting the case to be only in that

improper or non-treatment type circumstance. And certainly it creates very real practical problems for the doctor, whether he or she has the records or not. But particularly so in cases where they don't have access to the records because the doctor would have had no opportunity to refresh his or her mind on what actually happened.

McGrath J Yes I take the point of the need to refer to notes. And you say it goes that far.

Waalkens Yes I do Sir. I don't need to take it that far but I say that is as far as this principle takes it. It would be sufficient in my view if it were, just to adversely affect that more narrow category of the improper type case. That in my submission would be sufficient. But it does go further than that.

Tipping J I had some hesitation too Mr Waalkens as to quite where you'd get the proposition from that if you didn't consent, the Tribunal for that reason alone would not be able to or would not embark upon the hearing of the complaint. The two didn't seem necessarily to follow.

Waalkens No.

Tipping J Because you could hardly say it's an abuse of process if you're relying on a statutory protection which the law expressly gives you.

Waalkens Mm.

Tipping J But anyway, that's just another rather interesting.

Waalkens Your Honour's absolutely correct. If the statute is interpreted that the patient has this statutory right, it's a factor that cannot be an abuse of process.

Tipping J No.

Waalkens I can say to you that the Tribunal does apply the law, in particular the criminal law approach, of staying proceedings where, for example, records may be lost and/or the doctor is facing a very historical complaint and unfairness is such that the matter just simply cannot fairly be heard. There has been a case where the Tribunal have stayed a proceeding like that. But they couldn't do so in this case because the answer from the prosecution, be it the CAC or the Health and Disability Commissioner's Director of Proceedings, which is an analogous office to the CAC in prosecuting doctors, would of course say well it can't be an abuse because it's the law.

Tipping J Yes well I think I'm at least provisionally satisfied that there's a pretty serious point here. The only question in my mind is whether after all these steps it's desirable to hear it at this stage. And I'd like to hear you

on that Mr Waalkens. Because that seems to me to be the main thrust of Mr Lange's opposition, without prejudice to the first point.

Waalkens Yes, yes. I perhaps rather obliquely referred to it in my notice of appeal. But the position is that it's wholly unsatisfactory for the disciplinary proceeding to be determined with what I say will be very serious prejudice to him in being unable to challenge the complainant on some of these crucial credibility issues. Because this case Your Honours is inevitably, I don't say exclusively, but inevitably will come down to who's to be believed. And the doctor's own medical notes which the patient has alleged that she was a patient of the doctor, there's a contest about that, there are no medical records going back this far and so there's going to be a factual dispute about that, there will be some credibility issues arising from that of course, different from what we have here, but on these important credibility issues on whether she was abused in this way, her own endeavour to in her complaint letter refer to the fact that she's consulted with counsellors and others, doctors, psychiatrists in circumstances where she's not just suffered for what has allegedly happened but has talked with these people about the allegations against Dr C, must be something that Dr C must cross-examine about.

Tipping J Would your client be in a position if leave were granted to accept a fixture at pretty short notice? Well I don't mean draconian.

Waalkens In this Court Your Honour?

Tipping J Yeah in this Court.

Waalkens Yes.

Tipping J I don't mean draconianly short but.

Waalkens Well provided it's not draconianly short, absolutely Sir, that would be.

Tipping J Because I'm very mindful about the perception that there may be at least from the complainant's point of view, that all these sort of legal things have been dragging it out.

Waalkens Yes.

Tipping J But on the other hand there's also the, is there also the risk that if the Court of Appeal's decision is not appealed, but it later came into question and came up to the Supreme Court, the whole case below might have proceeded on a false premise if this Court were to take a different view from the Court of Appeal.

Waalkens Well that's absolutely so. The other corollary though of the case running its course is that these are the gravest allegations that could be made against a doctor. And although of course if it went very badly for

the doctor I would be saying something different in front of the Tribunal, it's very apparent that his ability to practice his profession is at risk and there is certainly, there can be no assurance that he would for example have a stay of the imposition of for an example an erasure order or striking him from the medical register.

McGrath J But I understand the importance for Dr C but I think that you can also say can't you that it's not only that; that a large number of other cases may well be proceeding on a basis that's misconceived if the point's not addressed by the Court at this stage.

Waalkens Yes, yes thank you Your Honour. And I can tell Your Honour from direct knowledge that there is a case in Auckland of a doctor who was struck off for an alleged sexual offending issue which has been the subject of an appeal and the appeal has raised as a very central part of the appeal this very issue and it was all going very well up until the Court of Appeal of course and then disaster happened so.

Tipping J Your client would have preferred Justice Chisholm's view to the.

Waalkens Yes, yes he had done so. And that decision came out just after this other disciplinary case decision came out, the appeal was lodged, it was then stayed pending the High Court hearing, the challenge to the High Court hearing so that the District Court has entered a stay of that based on this legal issue. Now if the Supreme Court refuses leave and the matter goes ahead you're going to have another case that that central issue is no longer going to be available.

Tipping J Well it would be rather unfortunate for this complainant also if everything went ahead on a premise which was ultimately found to be erroneous.

Waalkens Yes.

Tipping J Because presumably then either one has to simply set aside what's happened and nothing more or redo it.

Waalkens Well that's the other mess of the situation. Rehearing it's all well and good and fine but.

Tipping J The question really I suppose comes down in the end to whether this is a sufficiently important point both in these proceedings and generally that the delay and problems that the complainant might see in that just has to be endured.

Waalkens Can I say Your Honour just on delay, Your Honour's correct, that the delay is also a matter that doctor C, he in no way is wishing this matter to be delayed either.

Tipping J Understood.

Waalkens Yes.

Tipping J Well it's probably in the interests not only of these people but also the public generally that the case, when it finally goes ahead, goes ahead on a correct legal basis.

Waalkens On a proper basis, absolutely in my submission Sir. And of course under the Health Practitioners Competence Assurance Act, the new Act that deals with not just doctors but it envelops everything, doctors, dentists, I've got the list here, chiropractors, optometrists, pharmacists, podiatrists.

Tipping J Yeah I think you can spare yourself the full list Mr Waalkens.

Waalkens Nurses, the whole lot.

Tipping J You're making me feel slightly uncomfortable. All the things that can go wrong with one.

Waalkens Anyway the short point is that it does have application, that it can traverse quite a number of other professions beyond just this general practitioner doctor.

Tipping J So in a nutshell, high level important public interest point. Delay unfortunate but on balance better to get it completely determined before we go ahead with the substance.

Waalkens And delay, absolutely Sir, and delay also in the context that of course I think it was 20 years before the complaint was made.

Tipping J Yes.

Waalkens So delays are regretted but it needs to be looked at in that context also.

Tipping J Yes, understood.

McGrath J Did you say 20 years?

Tipping J I was about 18 wasn't it?

Waalkens Well I'm just, it happened in 1985, the alleged allegations happened in '85 and the complaint wasn't made until.

Tipping J It's a fair while ago, I don't think it's quite 20.

Waalkens It can't be 20. It must be 18.

Tipping J About 17-18.

Waalkens Yes.

Tipping J But the point's still there.

Waalkens Yes.

Tipping J Yes well I think we understand all that, thank you very much Mr Waalkens. Unless there's something specifically beyond that we'll invite Mr Lange to reply to those points.

Waalkens No thank you Sir.

Tipping J Thank you Mr Lange.

12.17 pm

Lange Firstly in the context of this particular case, in my submission the conclusions reached by the Court were correct. As is apparent from the submissions, this isn't a case of allegations of medical mistreatment or negligence or anything to that effect. It's outside the medical arena and those records have no relevance.

Tipping J The records of interviews with other doctors?

Lange Medical practitioners.

Tipping J Yeah, not the doctor complained about.

Lange Akin to the common issue that arises in criminal proceedings of access to Social Welfare etc reports. Here, as is apparent, there is the reference to receiving counselling in the letter of complaint to the Medical Council. That complaint or letter of complaint does not form any part of the proceedings before the Tribunal. Okay, and as is apparent from the judgment, the brief of the complainant doesn't make any reference to that. As regards implied waiver, in my submission the cases indicate that will arise where in the course of the proceedings the party or potentially the witness that raises an issue relating to legal advice or something along those lines.

Tipping J You say in the course of the proceedings.

Lange Yes.

Tipping J You mean that in the narrow sense of the evidence or you mean it in the sense of all matters pertaining to the proceedings?

Lange The context of this, in respect of the hearing.

Tipping J Hearing.

Lange The complaint is only relevant to the investigation as to whether or not a charge should be laid.

Tipping J Yes.

Lange Then there is a proceeding commences by the filing of the charge before the Tribunal and the proceedings then take place before the Tribunal. Here in this case any reference predates any involvement of the proceeding before the Tribunal and it's not referred to in any evidence proposed to be adduced before the Tribunal.

McGrath J So you say it's not the same as if there's a disclosure of confidential privileged information in the statement of claim for example, you're saying this is prior to.

Lange Prior to that.

McGrath J Yes.

Tipping J It's at the stage when you're deciding whether to charge rather than the outcome of the charge. Yeah I understand that.

Lange The hearing or conduct.

Tipping J Yeah conduct.

Lange Of the charge. So in my submission when looking at the facts of this particular case it is not a case which requires the appeal to be determined at this stage, in particular where there still hasn't been a hearing before the Tribunal to ascertain whether there is any information, whether it is relevant, whether it's covered by s.32.

McGrath J Court of Appeal's decision of course wasn't concerned with such subtleties as the stage.

Lange No.

McGrath J At which the matter was raised was it?

Lange No, or the issues over s.35 and in the context of this particular case. It would be my submission that the appropriate course should be that the matter should take place in the, the hearing should take place before the Tribunal first so this Court has a factual basis to work from so far as any decision has implications here.

McGrath J Why is that so important when the issue largely seems to be one of statutory interpretation?

Lange It does but it would be my submission that in the context of this case, even if we look at an implied waiver or implied consent, and adopt the

principles from the legal privilege setting, we're not at a stage where there would be the implied waiver or implied consent would arise for the reasons I've already advanced.

McGrath J Perhaps you could help me with this. What is it about the present circumstances as we have them at this stage that is so skeletal that it might create problems for this Court in deciding whether the Court of Appeal was right? Now, what is it that would improve the situation in relation to the questions of the concept of consent, whether or not there was consent? What is it about those matters that might mean we get into trouble and we end up feeling, my gosh we've got to decide this question on far too inadequate a factual basis?

Lange If the focus is solely on whether consent means express consent or consent by necessary application or whether it can mean implied consent, probably nothing because that is truly a legal argument and I accept that.

Tipping J But doesn't that have to be addressed? Let us assume for the moment Mr Lange, and your case is obviously that the Court of Appeal were not wrong, but let us assume they were wrong. Are they not giving the wrong message to the Tribunal when it comes to consider what, if anything, should be admitted? My worry is in part that the Tribunal, if it guides itself by the Court of Appeal, and I think it has to be said frankly that the issue here is serious and it's arguable, if it guides itself by the Court of Appeal, may get it wrong. And then we're going to have a case which goes off half cocked and with all the problems that that might engage. That's just me thinking aloud in the way I sometimes do Mr Lange as you know.

Lange I accept Sir that in the context of other cases, it clearly does have implications.

Tipping J Yes.

Lange And in particular the examples referred to, the negligent medical treatment issues. And I can't move away from that. I mean that is the reality. Whether or not the concerns raised in fact bear any fruit down the track will remain to be seen and it may well be that that does not occur. And it may not occur for a number of reasons. If somebody makes a complaint but says, look I'm complaining about doctor X, this is what happened, here are my medical records, but you can't disclose them. The first issue is, would a charge be laid by the Complaints Assessment Committee? The second issue is, if a charge was laid, to what extent would the Tribunal proceed to hear it? If there was clear unfairness or improper conduct by one party, they can intervene in my submission. Now whether those facts arise in another case will remain to be seen.

Tipping J But my focus was on this case.

Lange But in this case.

Tipping J And it was wondering aloud whether, if the Court of Appeal's view is wrong, if, big if, the Tribunal are going to get the wrong steer in relation to this case which could cause difficulties later when it is found that the law is different from what the Court of Appeal. Material will be excluded, or could be excluded against the doctor which he should have had the ability to examine. And maybe, I take your point that one doesn't know at this stage, but I don't think it could be regarded as hypothetical in the disqualifying sense. Maybe, if he had had access to the material, he could have defended himself successfully whereas he gets done. That's the problem that I'm toying with.

Lange But to bring that back to the question, the issue is if implied consent or implied waiver applies, may it assist the doctor in this case?

Tipping J Yes.

Lange My submission is no for the reasons already advanced. That is, there has been no use or attempted use of privileged information in the proceedings and it has not been raised in the proceedings.

Tipping J Your point in a nutshell is that the fullest of implied waivers that we might construe out of s.32 cannot avail the doctor here.

Lange No.

Tipping J Therefore in no circumstances can the Court of Appeal's decision actually prejudice him.

Lange Yes.

Tipping J Yep I understand that. I'm not saying whether I agree with it.

Lange No.

Tipping J But I understand it.

Lange But I also recognise the potential flow-on effects and I've addressed those.

Tipping J Yep. Alright, well that's probably your best point Mr Lange isn't it?

Lange That's really putting it in a nutshell as regards this case.

Tipping J Yes.

Lange Accepting as I do the potential wider implications, the issue for this Court, should it be resolved at this time.

Tipping J Right.

Lange Or should the base facts be ascertained whether or not any issues will arise.

Tipping J Yep.

Lange And as regards the other cases, is it appropriate to consider those matters now or should they wait for the opportunity 'til an appropriate case where the requisite factual basis arises.

McGrath J Just on that, and this is going back to the question I asked earlier, but I take it you see no difficulty if this Court grants leave in determining the question of whether the Court of Appeal was right about the concept of consent. But as to whether there was consent in this case, do you see any difficulty with that?

Tipping J No he can't do because he says it's so clear that there wasn't.

Lange Well if this Court was to find the Court of Appeal was wrong.

McGrath J Yes.

Lange Then the factual decision they've reached has to be considered in effect.

Tipping J I'm being very unfair to you in that observation perhaps Mr Lange.

Lange No, but the reality is.

Tipping J But it strikes me that you can't say there's any difficulty on your premise, your client's premise, the answer is obvious. We answer the first question at best for Mr Waalkens, they got it wrong. Very wide implied what-not, but nowhere near it here.

Lange Yes.

Tipping J But the real point is that it's not necessary to come to the Supreme Court because at best for Dr C any favourable answer to him can't make any difference. Sorry to jump in but that really is it isn't it?

Lange And relying on the various cases referred to in the Ophthalmology decision where they all relate to the use of privileged material in the course of a proceeding either by way of affidavit for interlocutories or whatever.

Tipping J Yeah that I think has to be the key point from your side because if this is just a gratuitous exercise for the benefit of doctors generally but can't

possibly avail Dr C on any reasonable view of it then that would be quite a strong point. Have I got you sort of in the bulls eye Mr Lange?

Lange It has and the situation here factually is not different than perhaps arises in a criminal trial where a complainant makes a statement and perhaps in the course of that statement they refer to seeing a counsellor or social worker or something, that isn't taken as an implied waiver that that information can be disclosed.

Tipping J Yep. Mr Lange, if we were to give leave would your client be able to be ready by October?

Lange Certainly Sir.

Tipping J Yes, thank you.

12.31 pm

Tipping J Now Mr Waalkens I think, I'll just confer with my brother (Judges confer). The only point on which we would like you to assist us in reply Mr Waalkens is that last exchange which I summarised, you'll know what it is, that it can't really do your client any good anyway.

Waalkens Any favourable decision won't help him?

Tipping J Yeah.

Waalkens Where that's wrong is we've actually seen part of the records. We have the medical records that were disclosed to myself on that undertaking issue which I haven't addressed you on today in any detail.

Tipping J No.

Waalkens But the Court of Appeal have actually completely misdescribed what that was. They've said emphatically no consent was given. It was all about whether in fact it was relevant. Because it was not apparent whether it was relevant or not, no consent could be given. But to come back to your point, we've seen the records, there is a wealth of cross-examination material in that. In particular there's records from Sunnyside Hospital, an institution where the complainant attended, that make reference to allegations of sexual problems that she has had in her lifetime. Not a hint of any, and this post-dates the alleged offending, and yet no hint of anything about the matter that she's now complained about. And so it would be a very fruitful area for cross-examination. And you may not have picked up on it, or perhaps you did, but the Court of Appeal judgment notes that a Doctor Walsh, a psychiatrist, gave evidence that in psychiatry, psychiatrists don't have these five-ten minute consultations, they spend hours with their patients writing up copious notes and getting into the history and what the problems are.

And he said emphatically he would expect that it would, that a consultation would tease out that sort of information when it's dealing with subject matter of the type in the medical records that we've seen. So he says it's just inconceivable that.

Tipping J But are we not on a slightly different issue? You're saying that if disclosed, the material will be beneficial to your client. I rather thought that the issue was that there could never be any tenable suggestion that if implied waiver is open that there had been implied waiver.

Waalkens Well the answer to that is that there.

Tipping J I think I'm right Mr Lange, that's the point rather than the benefit that might be gained out of the material. Am I right? Yes.

Waalkens Well on the facts, there is very clear implied waiver, just on what we know. She has provided the material firstly in her letter of complaint that starts the whole process running and I don't accept at all that the concept of waiver or implied consent is restricted only to when a formal proceeding actually takes its course, like for example the filing of a statement of claim. It would be my submission that there is a very formal process adopted. When a complaint is lodged it then triggers off the mechanism of the Medical Practitioners Act and the investigation powers of the CAC. And so it's provided in the complaint letter, it's provided in a way that bolsters the truthfulness of the allegation that there has been sexual misconduct and so it's not just a situation where there has been a reference to the privilege but it's actually been put to use in a way that assists.

McGrath J Mr Waalkens, if you get leave and you persuade the Court that the Court of Appeal was wrong in its understanding of the concept of consent.

Waalkens Yes.

McGrath J Would you be asking this Court to go on to hold there had been consent? Do you have that sort of factual material available?

Waalkens Already in the papers before the Court of Appeal, yes, on the case on appeal, yes you have.

McGrath J Would you be asking this Court to hold that there was consent in terms of s.32?

Waalkens Yes I would be.

McGrath J And you would have the, would you just give me an indication of the basis in the material on which you would be inviting this Court to hold that?

Waalkens In the Court of Appeal already in the case on appeal is the complaint letter, the chronology that she prepared with corroborative evidence referring to the medical records.

McGrath J Yes.

Waalkens I say that's the first one. There's also the evidence of her providing or enabling the Complaints Assessment Committee to actually receive the documents or part of the medical records. I would say to use the phraseology that the Privy Council did in that **B** case, the cat is out of the bag and she's let the cat out of the bag. The CAC have those records. They've then been provided to Dr C's Counsel on this relevance issue and I started to address you on it before. So they're all three quite separate, but in combination very compelling, aspects of evidence of how this Court I consider would emphatically find that there had been.

McGrath J There's enough material for this Court to go all the way?

Waalkens Yes.

McGrath J If you win on the first issue to answer the second issue in your favour?

Waalkens Correct.

Tipping J Or not go all the way without your client saying, oh well, there was some more stuff that they should have taken into account. You see it cuts both ways.

Waalkens Yes, that's correct, there are, there are some records which have not yet been disclosed.

Tipping J Well it's not so much the records, oh you mean, it's not so much the actual documents for which privilege is claimed, it's the steps which she has taken and associated matters that she or you for the doctor say, taken together amounts to implied consent.

Waalkens Correct.

Tipping J But if we're lacking anything that you would wish to rely on in that respect then we're in potential difficulties aren't we? You'll have to confine it to what's in the record.

Waalkens I accept that.

Tipping J And we don't want her saying, oh well, you know, if the thing had been more fully gone into they would have taken a different view.

Waalkens Yes, no, no I accept that.

Tipping J You accept that?

Waalkens Yes I do. Yeah, there's enough in the record.

Tipping J Yep. Right. Okay. October would be possible for you Mr Waalkens?

Waalkens Um.

Tipping J I'm not able to specify the precise date.

Waalkens No.

Tipping J But obviously the Registrar would wish to negotiate with.

Waalkens That would be by the end of October Sir, or by the beginning of Oct?

Tipping J Well I think one would have to say towards the beginning just to be safe.

Waalkens I, yes.

McGrath J Not the first week I think. That's I think pretty well.

Tipping J That's pretty well full.

Waalkens But the second week or something?

Tipping J Well I think it wouldn't be before the second week. And I'm not promising a fixture in October.

Waalkens No.

Tipping J I'm just saying that that would be the soonest it could be.

Waalkens Without being evasive on this Your Honour, could I just on that, make a phone call to my office to check on my time. I haven't brought my diary.

Tipping J I don't think it's going to be that critical Mr Waalkens.

McGrath J I don't think we need to get specific. If you were saying, look sorry, I've got two months out and you can forget about it.

Waalkens I can definitely accommodate. No, no that's not the case. I'm not full up for two months. I have a reasonably horrible diary but I have time in it.

Tipping J Well happily this Court's diary isn't quite as horrible as other Courts' diaries. But still getting quite full in October interestingly.

Waalkens Yes.

Tipping J Alright. We think we would just like to think about this before we announce a decision. We won't detain Counsel, a written judgment will be issued within the next day or two.

Waalkens As Your Honours please.

Lange As Your Honours please.

Tipping J But if leave is granted, without tying the Court to the precise words, I'd just like to double check with you that it would be something along, the grounds would be something along the lines, was the Court of Appeal right in its approach to the concept of consent. If not, was there consent in fact. Justice McGrath has just reminded me that we have commitments later in the week. I think what we'll do is we'll retire briefly if Counsel would just wait. And then we may well be able to come back pretty promptly with an indication.

Waalkens Thank you Sir.

Court adjourns 12.39 pm

Court resumes 12.43 pm

Tipping J Yes thank you gentlemen. We've conferred and reached a decision. This will be written up in a suitable form for Counsel and the record. We're of the view that there is jurisdiction. We are of the view that leave should be granted on the two questions which we have been focusing on, namely (1) was the Court of Appeal right in its approach to the concept of consent; and (2) if not, was there consent in the circumstances of this case. We will also direct that the Registrar give as early a fixture in the month of October or thereafter as is possible after considering the position of Counsel.

Waalkens As Your Honours please.

Tipping J I think that covers everything thank you.

Waalkens Thank you Your Honours.

Court adjourns 12.44 pm