

**IN THE SUPREME COURT OF NEW ZEALAND**

SC 27/2005

IN THE MATTER of a Civil Appeal

BETWEEN **DR C**

Appellant

AND **A COMPLAINTS ASSESSMENT  
COMMITTEE**

Respondent

Hearing 15 December 2005

Coram Elias CJ  
Blanchard J  
Tipping J  
McGrath J  
Henry J

Counsel A H Waalkens QC and S R Carey for Appellant  
C J Lange and A M Toohey for Respondent

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**CIVIL APPEAL**

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10.03 am

Waalkens Yes good morning Your Honours, I appear for the appellant together with Mr Carey.

Elias CJ Thank you Mr Waalkens, Mr Carey.

Lange May it please the Court, Counsel's name is Lange, I appear for the respondent and with me Ms Toohey.

Elias CJ Yes thank you Mr Waalkens.

Waalkens Just turning to the first question if I may, the essence of the Court of Appeal judgment is set out from paragraphs [77] through to [79]. And

you will have seen from my written synopsis that the contention of the appellant is that the Court of Appeal were wrong in the way they dealt with consent, essentially saying or in fact saying consent had to be informed and explicit. I note from my learned friend's submission that he asserts that in fact the Court of Appeal had also recognised that a consent by necessary implication was available. And whilst those words are referred to in s.78, it's not the view I take or submit to you as what the Court of Appeal have actually found and considered over those relatively brief paragraphs of the judgment. So in dealing with the first question, with your leave, I would propose taking you through the various points that are in my written analysis as to how the Court of Appeal have in my submission arrived at the consent being wrongly informed and explicit rather than implicit.

Elias CJ        Perhaps you should just check with Mr Lange whether he. He's not as I understand it seeking, Mr Lange, you're not seeking to argue that s.32 precludes implied consent? Is that the case?

Lange            It is the case, where the implied consent arises by necessary implication.

Elias CJ        Yes, yes. Thank you. So Mr Waalkens, the.

Waalkens        That has to be right.

Elias CJ        Yes.

Waalkens        It's quite wrong to say that it has to be explicit or informed consent for that matter.

Elias CJ        Yes.

Waalkens        That's pitching it way too high. But that is how I interpreted my friend's submission but it with respect is not how the Court of Appeal appear to have treated the topic.

Elias CJ        Yes, I understand that, yes.

Tipping J        Well other than in that one very fragile passage.

Waalkens        Yes in the fourth/fifth line in paragraph [78].

Tipping J        Yes.

Waalkens        And frankly there's not a lot more I can say about this part of the argument than what's in my written analysis. But I'm very happy to go through it and elaborate on some of the points. But that fifth line where they use, or sixth line where they use the words, unless the complainant had been informed that the disclosure to Dr C would follow and had consented to that disclosure by necessary implication,

in fact isn't how they've treated it at all. They haven't dealt with it as or looked at it as being an implied consent. And you can pick that up on the phraseology used throughout the rest of the document. In fact in paragraph [79] clearest of all is on the top of the second page dealing with paragraph [79], there has been no explicit consent to disclosure by Dr C, or to Dr C.

Tipping J      Of course the Court of Appeal's by necessary implication was conditioned on the prior, previously having been informed.

Waalkens      Yes indeed, indeed.

Tipping J      So it was a very hedged implication.

Waalkens      Indeed Sir and in my submission can only be phraseology consistent with again consent, explicit or informed consent.

Elias CJ      Advertent consent perhaps.

Waalkens      Yes.

Elias CJ      Is what, that's certainly the sense of the emphasis on informed consent.

Waalkens      Mm. I'm sorry Justice Henry.

Henry J      Is it your argument that implied or whether consent has been implied should be determined according to the same principles as would apply to waiver of other forms of privilege?

Waalkens      Yes it is, yes. I do in my submissions deal with the concept or the Court of Appeal's discussion on waiver in paragraph [77] saying the term waiver is inapt. And I can deal with that now. It's clearly not what the law has said. And there are indeed in my friend's casebook a number of overseas authorities that recognise that waiver is alive and kicking in the area of medical privilege. Cross on Evidence notes it. Waiver is of the essence, one of the essential aspects of.

Henry J      The Law Reform Committee I think referred to waivability too.

Waalkens      Yes indeed.

Henry J      In its report.

Waalkens      Right from the word go the Law Reform Committee have considered the concept of waiver and it's indeed in the new Bill of course.

Tipping J      Mr Waalkens would you accept that apart perhaps from the subtleties inherent in imputed waiver, really waiver is the consequence of consent?

Waalkens I have actually written that down. It's the end product of consent.

Tipping J Yes.

Waalkens Be it implied or express. That's all waiver is, it's just the end result of a consent process. And the clearest steer that the Court of Appeal have gone off on the wrong tangent with respect appears to be in the way they dealt with the **Ophthalmological Society** case (**Ophthalmological Society v Commerce Commission** [2003] 2 NZLR) in saying well waiver is a different concept. And they give two reasons of why that is so. I'm sorry, ophthalmology is different for two reasons. One is that waiver is a different concept and secondly because the complainant is not a party. That's at the end of paragraph [78]. But in dealing with waiver as it does, again the Court of Appeal having earlier said waiver's inapt and it really should be talked about in terms of consent, wrongly in my submission with respect misdirected itself in saying that s.32 consent is a different concept from waiver. It just makes, in my submission, no sense at all.

McGrath J So what you're saying then Mr Waalkens is that you have protection for information but if you conduct yourself in a way which is inconsistent.

Waalkens Yes.

McGrath J With maintaining confidentiality of that information, you must have been taken to have consented to the use of the information or to the loss of confidentiality of the information.

Waalkens Absolutely. And what I submit to you is that there are two points here. One is confidence is at the very heart or the core of privilege. And there are a number of cases that recognise that. The **Ophthalmological Society** case itself, I can take Your Honours to the passage if you give me a moment, recognises that. That's in tab 5. Well it's actually paragraph [20]. The page number is 152 although I see the spiral binding has caught the page numbers. But it's paragraph [20]. And the first complete sentence on page 152, as it is of the essence of privilege that the material to which it attaches is confidential, where a party's use of the material destroys the confidentiality, even if unintentionally or as inconsistent with the party's legitimately continuing to assert it, the privilege is treated as waived. So confidentiality is of the essence of privilege and ultimately it is all about inconsistent use of that confidentiality so that it's treated as having been waived.

And Article 61 or what will be s.61 by the look of it, of the Evidence Act, if brought into law, certainly recognises that. I might just stress if I may that I noticed in the, and I haven't put it in the casebook, that the 1999, the earliest Law Commission discussion on the Evidence Bill, then dealing with that s.61 as it now is under the number 69,

recognised that all the Law Commission said it was doing was codifying what was the common law position. And I say that in again demonstrating why or submitting to you why the Court of Appeal have quite wrongly then evidently treated this concept of waiver, because of s.32, as a different concept.

The second case if you wanted one, that has a pithy acknowledgement of confidence being at the heart of privilege is the case of **Paragon (Paragon Finance plc (formerly known as National Home Loans Corp plc) v Freshfields (a firm)** [1999] 1 WLR 1183). That's the second of the two cases referred to in paragraph [78] of the Court of Appeal's judgment. It's not in either my friend's or my bundle of authorities, but I have an internet copy of it where at page 1189 **Paragon v Freshfields**, the Court has noted at its root lies the obligation of confidence in a discussion of, in that case, legal professional privilege.

Blanchard J Is there a paragraph number?

Waalkens No that doesn't have a paragraph number Your Honour. I'm happy to copy. It's not a very long, it's only 9 pages in fact. But the reported page number is 1189 and it looks like it starts at the very top of that page by the look of the electronic copy. The second sentence on the top of that page Sir.

Elias CJ Where's the citation given?

Waalkens It's the second case Your Honour in paragraph [78] of the Court of Appeal's judgment, **Paragon v Freshfields**.

Elias CJ Yes.

McGrath J At what level is the **Paragon** case?

Waalkens Um, it's Court of Appeal Sir. Now that, if I can just have a moment, I think pretty well summarises what I might stress, what I say in criticising the Court of Appeal in answer to question 1. That is that it has directed itself in my submission clearly that one has to have explicit and informed consent or a combination thereof.

McGrath J I suppose it might be said by the Court of Appeal, if not necessarily Mr Lange, that in this, the difference in this case to legal professional privilege is that the privilege arises from statutory expression.

Waalkens Yes that's fair.

McGrath J And we must interpret the statute, interpret the provisions of the Evidence Amendment Act. Do you have anything to say in relation to how we should approach the exercise of statutory interpretation?

- Waalkens Yes I do. Yes I do Your Honour. It's true that there is a difference in that this is a statute and of course legal privilege is the common law. But one that is sacrosanct and the only reason the statutory protection under s.32 was enshrined was because of the absence of the common law to recognise the equivalent that the legal profession has. And I think somewhere in my submission I made the point that it just makes no sense that legal privilege, which is sacrosanct and so well enshrined and recognised by the common law, which is so capable of being waived and treated in the way that I've commended to you, should nonetheless be run second fiddle to a statutory protection that's been put in place for the medical profession.
- McGrath J Is that equivalent to saying that if the purpose of the statute is to accord a privilege; we can look to other forms of privilege, albeit derived in the common law?
- Waalkens Yes it is.
- McGrath J And how they have been treated by the Courts?
- Waalkens Yes that's correct.
- McGrath J In interpreting what Parliament must have had in mind in enacting the statutory privilege?
- Waalkens Yes I'd agree with that. I'd make the second point, that the statute though, if you look at the statute, s.32, nowhere says it's express or informed or explicit or the sort of terminology that the Court of Appeal have used. All it is is consent. And consent being a process by which one can arrive at a waiver, whilst it's understandable perhaps that the Court of Appeal have not been so assisted by looking only at legal privilege because of the common law genesis of it. Nonetheless if they were to look at the section, s.32, and study it carefully, does not use the, or pitch it as highly as they have.
- Tipping J Is there another way of putting it to the same effect, that there's nothing evident in the section or in any of the parliamentary history that would suggest that it was meant to be otherwise, administered otherwise and in accordance with other privileges like legal?
- Waalkens That's indeed so. And the explanation that the only reason it's come into existence is because of the absence of the common law to recognise the equivalent of the legal privilege has to be so.
- Elias CJ Do we have, have you checked the Hansard debates?
- Waalkens I haven't in the lead up to this hearing Your Honour.
- Elias CJ No, no.

Waalkens But I have, perhaps over the break might have a look and see. I've brought a bundle of the historical stuff along with me.

Elias CJ Yes. It was just that in answer to that question you said that, the question was about anything in the legislative history.

Waalkens Yes.

Elias CJ I just wondered to what extent you have looked.

Waalkens I have definitely looked at Hansard.

Elias CJ Yes.

Waalkens And just to be honest Your Honour, haven't looked at it in the context of preparation for the hearing today.

Elias CJ Yes.

Henry J You'd need to go back to the 1908 Act I think, wouldn't you?

Waalkens Yes 1908 is the starting point.

Elias CJ Yes, that's right.

McGrath J Was there not something in the earlier, the legislation at the end of the 19<sup>th</sup> century?

Henry J 1885?

McGrath J Yes.

Henry J But that was in different terms. It required express consent.

Waalkens I can't respond to that Justice Henry.

Henry J I was curious as to why the amendment in 1908 moved away from express consent to simply consent. And also moved away from a creation of a general privilege to one which was directed only to disclosure by the medical people. The 1885 Act, as I read it, some time ago gave what was equivalent to the legal privilege in broad terms whereas since 1908 the medical privilege has been directed only to non-disclosure by medical personnel.

Waalkens Yes. I'll just have a, I'll just see if I can put my hand quickly on them. It just would be I think a little more efficient if perhaps I look at that over the adjournment, members of the Court, rather than hold you up now. I do have some of the Parliamentary debates and the historical material on this aspect. But I don't know that it goes back as far as Your Honour was just asking me about.

Certainly the statute as it's now presently enshrined, s.32 does not have the high threshold of consent, both being informed and explicit, that the Court of Appeal would commend. And in my submission, as I've said, has to be wrong.

McGrath J You're going to look at some of the more recent Parliamentary materials but is there anything in particular that comes to mind now in relation to the Torts and General Law Reform Committee's report which was really discussing the scope of the privilege needed in relation to medical practitioners, clinical psychologists.

Waalkens Nothing that comes to mind at the moment.

McGrath J No it's just background isn't it? There are no particular indicators in that.

Waalkens No, I'm.

McGrath J That was my own impression on reading it.

Waalkens Yes. I'm sorry I can't be more precise.

McGrath J But I just wondered if you'd, having lived with this case for a lot longer, had noticed anything else.

Waalkens Yes, I'm sorry I can't be more precise about that at the moment. One of the other points worth making is that certainly the Australian, some of the Australian authorities of which my friend has included the **Andasteel** case in tab number 6 (**Andasteel Constructions Pty Limited v Taylor** [1964] VR 112) of his casebook would recognise that in a comparable s.32 type situation in Australia, waiver is recognised as being an appropriate way by which consent can be, consent can essentially be given. And if you have a look at tab number 6, the **Andasteel** case, in the headnote is a reference to the equivalent provision of our s.32, that being s.28 of the Evidence Act which states that no physician or surgeon shall without the consent of his patient divulge in any civil suit, action or proceeding, unless testamentary capacity is an issue, any information acquired in attending the patient and to enable them, prescribe or act for the patient. In other words, much the same as, although not identical to, our s.32. So that's the statutory provision.

Just moving through the judgment, you'll see on page 114, following the numbering on the right hand page, page 115 line 30.

Elias CJ I'm sorry, which tab are we under?

Waalkens Page 114 at line 30 halfway down the page.



Elias CJ Thank you.

Waalkens There's a reference there to implied consent. On the contrary I believe that Parliament was determined to ensure that such secret confidences should not be broken without the express or implied consent of the person confiding. And then in introducing the point on waiver, on the right hand page, page 115 at line 45, a reference in another case, Justice Sholl. In line 44, Sholl J has decided that the privilege may be waived by the personal representatives and there's the concept of waiver in this arena being recognised.

And then the point I was going to, the direct point I was taking you to on this issue is over the page, 116 on line 5. The legislation seems to have deliberately given the power of waiver in this type of action of the person concerned only, namely the patient. I have to say, it seems to rather overstate what the legislation does say. It doesn't appear to have deliberately given in the sense that it's not referred to in the section, but all the same in Victoria the relatively equivalent section has been recognised as one where the protection is capable of being waived.

McGrath J I wonder though whether in relation to what's said at page 115, you talk about waiver by a personal representative.

Waalkens Yes.

McGrath J If you really mean that personal representatives are consenting, the person with the privilege being deceased and unable to consent in person.

Waalkens That doesn't necessarily follow because the personal representative could expressly consent or.

McGrath J Or act in a way which is inconsistent.

Waalkens Or act in a way inconsistent. So that waiver is found by implication, by implied consent to have occurred.

McGrath J Maybe. You'd probably have to go and see the case that they're talking about to.

Waalkens That'd have to be right. I just simply point to that as a recognition in passing that waiver in this arena is recognised in the jurisdiction in Australia.

McGrath J Sure.

Waalkens And my learned friend has referred to the Canadian article by Picard and Robertson at tab 8 ("Legal Liability of Doctors and Hospitals in Canada" (3<sup>rd</sup> ed)) whereas I recognise that whilst there's no statutory protection for medical privilege in Canada, nonetheless waiver is

recognised there. And that's at tab number 8, page 15 of the article. The passage in fact in indent at the end of that page in the text. The physician/patient relationship is clothed with confidentiality. A right which may be waived by the patient. Confidentiality is an important attribute of the physician/patient relationship. Essential in promoting open communications. The patient may expressly waive this right or by his actions be found to have impliedly waived it. So there at common law is a recognition of much the same point.

And last but not least the reference in the materials that my learned friend has provided you with at tab number 12 of the American position ("Privilege in Judicial Or Quasi-Judicial Proceedings, arising from Relationship between Psychiatrist or Psychologist and Patient" J L Herbert (2005) 83 TLR 1452). And from my reading Your Honours I understand that in America it's complex as to how each State has treated this vexed area. But there are many exceptions to privileges that are established in the American jurisdiction. But in that article at page number 59, in the right hand column under the heading, (b) By other actions. Certain actions by or on behalf of a patient have been interpreted by the Courts to indicate a patient's intent to waive a statutory privilege against disclosure, in this case of a psychotherapist/patient communication. And then some examples follow.

And over the page, page number 61 in fact in the left hand column of the two on that page 61, first complete paragraph. A waiver of a patient's privilege against a disclosure of psychotherapist/patient communications may also be affected by his voluntary introduction of testimony by himself or by his witness in regards to such communications according to some Courts. None of this is that earth shattering I might say, but the concept of waiver again being recognised in that jurisdiction. Again highlighting in my submission the error of the Court of Appeal in saying that waiver's something different.

Henry J Does the legislation of that jurisdiction talk about consent? Or does the Code of Ethics talk about consent?

Waalkens In the American jurisdiction?

Henry J Yes.

Waalkens If I could just have a moment Sir. It does, if you go to page 57, the recognition of a statutory waiver provision which I understand to be a formal express consent approach to, they call it their express waiver but I would read waiver as synonymous with consent. And onto page 58 in the first complete paragraph on that left hand column. In brief an express voluntary waiver of a statutory privilege against, and so forth, is usually accepted.

Henry J Thank you.

Tipping J There's this passage lower down 58, an express waiver in some cases may be executed orally in open Court. Meaning that you've presumably got to say I accept.

Waalkens I consent.

Tipping J Or I agree or I consent or I waive or whatever.

Waalkens Yes, yes. Now one of the points that my learned friend makes in his analysis is that the loss of the privilege needs to happen within a proceeding, a legal proceeding. And as I understand it the Complaints Assessment Committee's contention is this, that until such time as a disciplinary charge is issued, there's no proceeding within which the complainant in this case may waive or lose the protection of confidentiality. The Court of Appeal likewise perhaps touched on this when at the end of paragraph [78] Their Honours note, and because the complainant is not a party to the proceedings she's only a witness. And I would just like to develop the point, that that in my submission is too restrictive an approach.

Tipping J This was [78]?

Waalkens Paragraph [78].

Tipping J Yes thank you.

Waalkens And the first point I make is that from the cases and the authorities I've taken you through, it's clear that you can lose the protection of confidentiality, that is the privileged material, by acting inconsistent with a claim for confidentiality. It doesn't need to be within the context of a proceeding. And to take it to its absolute extreme, one could for example in a medical privilege type situation lose the protection of confidentiality in the community or in the pub or whatever by making your medical records available or waiving them or acting in a way inconsistent with a later claim for privilege or confidentiality. And it's clear, as I've indicated, from the Evidence Bill at tab 11, clause 61 sub clause 2 certainly does not restrict the matter in a way to being in a proceeding although clause 61 does recognise that losing it within the context of a Court proceeding is one of the bases on which that can happen. And of course I recognise that's very common on Court proceedings, particularly in legal privilege where part of the legal advice is relied upon, it's of course treated as having been waived. But it doesn't mean that it is only within the context of a proceeding that that can happen.

And the second point I make about that as to why both in my submission the Complaints Assessment Committee and if the Court of Appeal is saying likewise, if this has to be within the proceeding is

wrong in suggesting that this is not, is that if you look at the context within which a disciplinary proceeding for doctors takes place, and this Your Honours as you will have seen, is under the predecessor Medical Practitioners Act, the 1995 Act, the mechanics or the way in which disciplinary proceedings come about is that there is a complaint by the patient. And I have brought the Act along, I'm sorry it's not in the casebook, but under s.8, sorry under s.83, dealing with discipline of the 1995 Medical Practitioners Act, a complaint may be made either orally or in writing against a doctor. Under s.92 the Complaints Assessment Committee has to make a determination as to whether the complaint, oral or written, should be determined by the Disciplinary Tribunal. And then if it does so decide, then under s.93 it frames a charge and prosecutes that charge. And so the context of the proceeding, if one is to split hairs or look at what is the proceeding, in my submission is when the complaint is initiated. It's quite wrong to say well the proceeding only starts when it gets to the stage of the disciplinary charge being issued.

McGrath J But that is an investigatory stage, investigative stage isn't it?

Waalkens Yes the earlier stage is.

McGrath J And can be seen as of a different character than the matter once charges have been brought.

Waalkens Ah, yes. It's different in that one is investigation and then charge. But as far as a proceeding is concerned, the proceeding is under way and the formality of it is under way from the point of the complaint.

McGrath J If we drew an analogy with criminal proceedings, wouldn't we be saying that you wouldn't speak about the proceeding as being the police investigation leading up to the prosecution? You'd think of the criminal proceeding as starting with the prosecution?

Waalkens That could be so, yes. Yes. This is though a statutory, I mean there is an analogy with what Your Honour is saying but in my submission I just simply say it's rather splitting hairs to say that the proceeding in fact starts as late as the actual issue of the charge. Because the complainant buys into the process under the Act as early as making the complaint.

Tipping J I'm having some difficulty following the line of thought that seems to have led the Court of Appeal to this conclusion. It doesn't seem to be based on any particular reasoning that I can follow. I wonder if, and this would seem unlikely, but because s.32(1) refers to disclosure in any civil proceedings, the idea of in any civil proceedings has been sort of translated.

Waalkens Yes.

Tipping J Across to a context with which it's not concerned. I just can't understand where this idea came from.

Waalkens Mm.

Tipping J They don't say that.

Waalkens No.

Tipping J But I just puzzle as to where this idea, which seems contrary to what I would instinctively have thought was the position, where it's come from.

Waalkens Yes. I can't know where it's come from either. I believe, and my friend will confirm if I'm not right about this I'm sure, my recollection is this was not argued. There was no debate about this point and this finding.

Tipping J The embargo is against disclosure by the medical practitioner in civil proceedings.

Waalkens In the proceedings, quite.

Tipping J But the consent which is necessary before the embargo is lifted has got nothing to do with in civil proceedings.

Waalkens No, it's not restricted so at all. It's the same point in terms of lack of explanation as to the earlier part of that same sentence where it is said that consent under s.32 is a different concept from waiver. Again there's no explanation or analyses of why the Court considered that to be so either. So I did read these two points, being lacking in any analysis, as rather signalling the same problem.

Elias CJ I had thought, and I missed what you were referring to before you came back to the second statement about the complainant not being a party to the proceedings, that you had referred to some authority which might have given a glimmer as to the Court of Appeal's reasoning in coming to that view. Have you discovered no authority for that proposition that it's significant that the complainant is a witness rather than a party?

Waalkens There had been an argument about that in the Court of Appeal, about whether the Complaints Assessment Committee could be directed to make available records.

Elias CJ Yes.

Waalkens That were in the hands of a witness rather than the party. That was certainly, there were submissions on that. But not on this point here.

Tipping J I think there could be, and its fragile, a clue to this because in the **Andasteel** case the point turned on, in part anyway, on the fact that the personal representative was not a party to the proceedings. Now I'm not suggesting this is reasoning that supports the proposition at all.

Waalkens No.

Tipping J But it's the only thing I can think of as to where this party to a proceeding as opposed to any other category.

Waalkens Except why that doesn't work as an explanation of the Court of Appeal's analyses is that **Andasteel** wasn't raised or referred to.

Tipping J I'm not suggesting Mr Waalkens it does work.

Waalkens No.

Tipping J I'm just saying it's just, possibly it could have come from there but not logically.

Waalkens The only Australian case that we looked at in the, or discussed in the Court of Appeal debate, was the *Scole* decision, the **X v Y** case that's in tab 1 of my casebook (**X v Y** [1954] VLR 708). And that wasn't a case that concerns personal representatives although it's possible that in its consideration of its reserved judgment the Court of Appeal may have looked further than that and uncovered **Andasteel**.

Tipping J Oh I see what you mean, yes. It doesn't matter I would have thought, what the capacity was of the person from whom the consent is required.

Waalkens That has to be so.

Tipping J The simple question is whether there is consent.

Waalkens That has to be so. So in wrapping up this part of the argument, that's on question 1, what I would commend to you is that the proper, the Court of Appeal were wrong in their approach to consent. That the proper approach ought to have been to adopt what the common law has long recognised, being the phraseology used in the **Ophthalmological Society** case, that it's all about act, you can either expressly or on an informed basis consent, or as they say in the **Ophthalmological Society** case, use the material that's the subject of the confidentiality in a way that's inconsistent with maintaining the confidence. And that's the essence of what may be described as imputed waiver or implied consent or however you wish to describe it.

And that's, as I have said, fits neatly or dovetails neatly into what the.

Tipping J That's the only area I think where there is any real difficulty with equating waiver with consent. Because imputed waiver is something really that's imposed on you as a matter of fairness.

Waalkens Yes.

Tipping J But I don't think it's going to matter for this purpose at all.

Waalkens Your Honour's right and I don't believe it does make a difference at the end of the day. The imputed fairness, the discussions on that ironically appear to be more finely balanced in legal privilege.

Elias CJ You're talking about imputed waiver.

Waalkens I'm sorry?

Elias CJ By reason of fairness.

Waalkens Of fairness, yes. The fairness aspect kicks in so **Ophthalmology** says when you, it's a factor to consider apart from merely the inconsistent use of the privileged material, the confidential information, that a question is asked about fairness and natural justice. And I can understand with respect that being a more finely balanced issue in a legal privilege type case where that privilege is so enshrined in the law. Less so I would suggest in a case like this where the very nature of the proceeding is going to involve the requirement to look at medical information that by nature will have that confidential tinge to it. So that I'm really saying, in my submission if fairness is to be looked at as part of the equation and certainly **Ophthalmology** recognises that that's so, s.60 or clause 61 of the new Evidence Bill does not, but if it is, then it's an easier road for Dr C to drive on in that regard than may be the case in others. There's no absolute requirement.

Tipping J But if it was a case of imputed waiver, as opposed to implied consent.

Waalkens Mm.

Tipping J There could be an issue as to whether that is covered by s.32. But the way to handle that if it isn't so covered would be for a request to the Tribunal to deal with the matter in the proceeding in a way that achieved fairness.

Waalkens Yes I'd agree with that.

Tipping J You couldn't, it would be in my view at least prima facie, difficult to treat imputed waiver as consent within the meaning of s.32 but there may well be other ways of doing justice.

Waalkens Mm.

Tipping J Than as it were forcing someone to divulge without either express or implied consent. But that's not before us.

Waalkens No, no. And Your Honour's correct that that could certainly be the case.

McGrath J If imputed waiver really derives from you acting inconsistently with a desire to maintain the confidentiality, although the Courts impose it on you, perhaps it can be seen as an implied consent. You have acted in a way that indicates you no longer wish to maintain the protection for the information the statute gives you.

Waalkens Yes.

McGrath J And you've given if you like a broad-based consent on that basis. And I think that's an arguable proposition.

Waalkens Yes the terms certainly do merge into one another after a point of analysis. Just before I move if I may then onto the second question being whether there was evidence of it being used inconsistently or whatever. Could I just take you back to paragraph [76] of the Court of Appeal judgment? And just highlight the point that the way the Court of Appeal dealt with this fairness conundrum was the first half of that paragraph, noting as they do initially that there's some force to the point that the s.32 problem will inevitably or could arise, would arise in virtually every case before the Tribunal. They discuss it being normally cases for medical treatment rather than inappropriate conduct.

And then say that consent for the disclosure would likely be required to continue with the complaint and in fairness to the practitioner a complainant would not be able to refer to the medical records in evidence without consenting. We do not consider in such a case that a complainant could be forced to consent but if the complainant did not consent, then evidence of the directly related medical records may be able to be excluded. And I just highlight that as just a classic example of the folly that this error gets to in making a completely unworkable circumstance for both the Tribunal and certainly for the doctor. It wouldn't afford or accord the doctor with any sense of fairness to have the complainant being able to benefit from the use of the confidential privileged material and use it in the case and then be just told, well we'll disregard that and drop it out.

Now moving on Your Honours to the second question which is, was there in fact consent in this case. In other words, given what I've taken you through already, had the complainant vis a vis confidential information.

Henry J Mr Waalkens, just before you do that.



Waalkens Yes Sir.

Henry J There seems to be an assumption that s.32 is directly applicable both to the Committee and to the patient. Now that's not really what s.32 says. And I wouldn't have thought that you would be accepting that the section has direct as opposed to indirect application.

Waalkens Yes, this was, we touched on this in earlier hearings. This is the point about the prohibition being on the medical practitioner being able to offer the information. Nothing about what the patient can do with it or whatever. Yes, that is the case Your Honour. It's of indirect application. It's not directly applicable. But I have to say it's not an issue, well I believe it's not an issue that really has been put before you by way of the leave hearing.

Henry J Well it could be if the end result is that there has been no implied consent. Section 32 then becomes a bar if it does directly apply.

Waalkens Mm. Well I certainly accept that it doesn't.

Henry J If it is applicable only indirectly then there could be another route.

Waalkens Yes I most certainly do adopt the point that s.32 doesn't directly apply here because of what we've just identified.

Elias CJ But why has it all proceeded on that basis? I'm not sure. I have that question too, does s.32 apply at all?

Waalkens **M v L**, which is referred to by the Court of Appeal in its decision.

Elias CJ We don't have that.

Waalkens No, and it's not in the bundle. That discusses s.32 and its analogy with, and that's I believe how this unfolded.

Elias CJ How what unfolded?

Waalkens How the point unfolded to where the Court of Appeal have determined that s.32 is the bar.

Elias CJ But that isn't what **M v L** decides is it?

Waalkens No. It does though refer to s.32 by way of analogy. But Your Honour is right.

Elias CJ Yes but that is quite different.

Waalkens Yes.

Elias CJ As Justice Henry has put to you.

Waalkens I accept that it doesn't directly apply.

Tipping J I'm just having a little bit of difficulty here. The statute is couched on the basis of an embargo against the person with possession of the records.

Waalkens Yes.

Tipping J The medical practitioner.

Henry J Could be an oral.

Tipping J Yes, my brother says it could be oral but prima facie.

Waalkens Normally it would be in record but it could be certainly oral.

Tipping J But the capacity for consent shows that it's a privilege really belonging to the person about whom the records or oral communication took place.

Waalkens Correct.

Tipping J Now here we have presumably a qualifying proceeding. Is it not, why is it thought not to be directly related to that qualifying proceeding? I'm probably being, and as the author of the judgment of **M v L**, I probably should be far better up to speed with this point.

Waalkens I think the, well the argument is that s.32 is about no medical practitioner or no clinical psychologist shall disclose. And here.

Tipping J In any civil proceeding.

Waalkens In any civil proceeding, any protected communication.

Elias CJ And the material has been supplied by the complainant.

Waalkens By the complainant.

Elias CJ In this case to the CAC.

Waalkens CAC and then the CAC have provided it with her knowledge to Counsel for the doctor.

Tipping J But you want it to be disclosed in the proceeding don't you?

Waalkens Correct.

Tipping J You want it to be disclosed in the disciplinary proceeding.

Waalkens Correct.

Tipping J The section says it can't be unless the relevant person consents.

Henry J It doesn't say that does it? It says the doctor can't disclose.

Waalkens I just says the doctor can't.

Elias CJ The doctor can't.

Waalkens I think.

Tipping J But it must be, the clear implication must be that if the patient consents, the material can be compelled.

Waalkens And that's the implication that the Court of Appeal adopted. And **M v L**.

Henry J I think **M v L** recognises that s.32 has no direct application.

Waalkens Mm.

Henry J I haven't got a note of the page reference but I think it was about 747 or something like that. But then applied it by analogy.

Waalkens Yes that's right.

Tipping J Yes I remember that. But.

Elias CJ The complainant has consented to the release of the information to CAC. She's obviously directed the medical practitioners to provide the information.

Waalkens And you can see from the bundle that's exactly what's happened.

Elias CJ Mm.

Waalkens It's in the case on appeal. There are two letters from her that recognise this.

Tipping J But assuming for the moment that she had consented.

Waalkens Yes.

Tipping J To production in the proceedings, let's just pretend that for a moment. Is this argument that the doctor can still withhold it and can't be compelled to produce it?

Waalkens Well that couldn't follow because she has already given her consent.

Elias CJ And no-one's seeking to compel the doctors to disclose it.

Waalkens No.

Tipping J What I'm struggling with, and I'm sorry but it's probably just a diversion, but I'm struggling with this direct and indirect application business. But maybe you should move on because I think other members of the Court probably are seeing it more clearly than I.

Elias CJ No, no, I think it's absolutely critical this point.

Henry J If s.32 applies it can be a bar.

Elias CJ Mm.

Henry J If it doesn't, you are in a different area.

Elias CJ Yes.

Tipping J You're under s.35.

Waalkens 35.

Tipping J Yes, but I can't understand for the moment why it doesn't apply directly.

Henry J Because you've said so in **M v L**.

Tipping J Well that's a pretty powerful observation but I still fall to be persuaded that that was right. And maybe we were wrong in **M v L** to say that it applied only by analogy. I mean it's on the table for persuasion one way or the other.

Elias CJ Well if you're adopting it Mr Waalkens, perhaps you had better try to persuade Justice Tipping and the rest of the Court. If you're making that argument.

Waalkens Well I do adopt the argument that s.32 doesn't directly apply in this case.

Tipping J We're still back on the first ground at the moment aren't we?

Elias CJ Yes.

Waalkens Yes.

Tipping J Yes, s.32 doesn't apply directly. See **M v L**.

Waalkens See **M v L** and see also, well the section's set out in s.65 or paragraph [65] or the Court of Appeal judgment.

Elias CJ The section, section 32.

Waalkens Yes.

Elias CJ Yes. Do we have s.35 anywhere, is it referred to?

Waalkens It's in. Oh you don't have **M v L**.

Henry J I see it on page 42 of the case.

Elias CJ Oh yes.

Tipping J Compellable documents can be excused if it's a breach of confidence more serious than the value of the document.

Elias CJ Yes.

Tipping J But you'd rather have an, you say there's no absolute bar. The only possible way to stop this coming in would be under s.35.

Henry J No absolute bar to people other than the medical.

Waalkens Other than the medical practitioner.

Henry J ... s.32. And it is a complete bar so far as they're concerned.

Elias CJ Mm.

Tipping J Mm.

Henry J And you might get some help from the change from 1885 which did bestow a general privilege not restricted to nominated persons, in 1908 restricting it to the medical people.

Waalkens Well I must say members of the Court, I hadn't come here today ready to argue this aspect of it and I'm a bit embarrassed that I can't take that much further other than this has been an issue that's been raised earlier and debated but it still has an aspect that it will, where s. 32 and its direct applicability may arise. And that is in the Order that was the subject of the appeal to the Court of Appeal. The order made was that the CAC had to produce records that weren't just the records that we had received. So for them to get them they had to get them from the medical practitioners concerned. And that's where that aspect.

Elias CJ Can you just take us to the form of the Order?

Waalkens Yes it's in Justice Chisholm's judgment at.

Elias CJ And also, was there a written application that preceded all of this?

Waalkens Yes there was. Justice Chisholm's judgment is at page 85 of the case and it's paragraph 60 (b). And the issue that will arise with regard to further records, and I accept that this isn't part of the leave or the application for which leave has been granted to have this argument in the Court, is that when the complainant, as we say she has, puts or acts inconsistently with regard to privileged material in part, she opens up the Pandora's box for the whole. So that if for example she has asserted reliance on her information provided to her medical people including psychiatrists and psychologists, and does so in part which has happened, then any other disclosures likewise to persons of that nature subsequently are also discoverable. So that's the argument on that.

Tipping J That's the argument that flows from implied consent?

Waalkens Yes.

Tipping J You haven't been given leave to argue the point that s.32 doesn't protect or doesn't bind the CAC.

Waalkens No, no I haven't been.

Tipping J That's where I think I'm, I think I'm now seeing some daylight.

Waalkens Yes. Yes there's no leave for that.

Tipping J You may have to get it, subject to ...

Elias CJ Well the form of the leave is really to enable us to control the hearing so it doesn't become a dog's breakfast. If there is a substantial point, I don't think that that's a significant impediment. Because certainly I.

Tipping J No, no I don't want to.

Elias CJ I don't think the members of the Court will want to be parties to some erroneous legal position.

Waalkens Yes, no I think that's fair Your Honour.

Elias CJ If it is, what we're raising with you, maybe you can't take it much further than the language of s.32 and the legislative history which has been referred to by Justice Henry which I think you're not in a position really to give us.

Waalkens No I have brought to, I haven't prepared.

Elias CJ Yes.

Tipping J The question really is whether there's some sort of derivative protection when it's in the hands of someone other than the medical

practitioner to which the section expressly refers. It couldn't have been intended that just by getting it out of the doctor's hands the protection was to be automatically lost. Subject to s.35 of course which is discretionary.

Waalkens Yes, that's the argument for interpreting s.32 broader than the mere words used in there which are confined to the medical.

Elias CJ Well the policy in s.35 must be relevant to the application of s.35, the policy in s.32.

Waalkens 32.

Elias CJ Must be relevant.

Waalkens Correct.

Blanchard J Surely there has been, if the civil proceeding was under way from the point of the complaint, there has been a disclosure by a medical practitioner to the CAC for the purpose of the proceeding and s.32 is engaged at that point.

Elias CJ Well that's been achieved by consent.

Blanchard J Well that's the question. What was that consent?

Tipping J What was the consent?

Blanchard J I mean that, it seems to me, is what the case is really about. Was it a consent or was it something less than a consent, because of, for example, conditions attached to it.

Elias CJ Well nobody is seeking an Order compelling a medical practitioner to disclose. So I'm not sure about whether s.32 is engaged.

Blanchard J Well effectively it's taking advantage of a disclosure by a medical practitioner. It seems to me it's got to be derivative from that.

Tipping J The disclosure cannot go wider than that which was inherent in the consent. Otherwise you drive a cart and horse through the whole section.

Blanchard J Yes, mm.

Waalkens There can be no question about, or the suggestion that the complainant did not consent to this. And I can show you to the two documents that make that.

Elias CJ I think.

Henry J We don't have her consent do we, the form of consent?

Waalkens We don't have the form of the consent for her to make records available but she has herself written letters signalling her consent. And they start at.

Henry J Yes but as I read the record there was a formal document of consent.

Waalkens Correct. 160.

Henry J But it doesn't feature.

Waalkens Page 160. We've actually never had that. I haven't got that myself.

Henry J No, that's why I say we don't know what the terms of her consent were.

Waalkens No except when you look at page 168 of the bundle, that's the second part of the case. where she herself acknowledges that she will access records and forward these records to you when I've received them. That's the.

Henry J That may be pursuant to a written consent she had earlier given. Which had conditions attached to it.

Waalkens Well no that can't work Your Honour because, well it's possible. But page 169 which refers to the written consent is dated in August 2002.

Henry J Page?

Waalkens 169.

Henry J Thank you.

Waalkens There's a letter dated 16 August 2002 where she's writing to the practice, where the Convenor of the CAC is writing.

Henry J Doesn't tell us when that was signed does it?

Waalkens No, precisely, it doesn't.

Blanchard J Why haven't we got that consent form?

Waalkens I don't have it myself Your Honour.

Henry J I would have imagined that that consent form would have been signed prior to the medical practitioners forwarding the records. It's just a matter of practice.



Waalkens Well one would expect that most likely to be so. But she has written the letter at page 168. She's also written at page 125 enclosing documents. So she's attached them herself and you can see it starts with a chronology, which is the document that ends with, well just precedes that particular document. And then some other incidental documents. And then the last squiggle or bullet point, a section of medical records from Sunnyside Hospital. And you can tell by reading her comments about correcting the errors that she's making reference to one and the same of the documents that then follow. So if I can take you through that. There were a few mistakes in these records she says. You will see on the face sheet, and if Your Honours go to page 136.

Tipping J Is this Sunnyside Hospital face sheet?

Waalkens Face sheet, that's correct. And just under the word face in the heading face sheet, you'll see 23 years is about four entries or so down. And she in her letter on page 125 corrects that. My age is listed as 23 instead of 20. And she goes on to say in her later notes there's a reference to me being raped while at journalism school and that is the letter that's at page 130, at the very bottom, the last, um second to last sentence. Anna was raped during her journalism course. And so she is correcting that assertion saying as she does that journalism school was later that year. So she's from this letter clearly herself forwarding copies of records including the Sunnyside records that are in this bundle to the CAC irrespective of what other consents the CAC had obtained from her for it to get records from doctors directly.

Blanchard J It does seem to me slightly odd that we're being asked to decide a question of whether there's been a consent without the consent form being in the material before the Court and presumably not in the material before the Courts below.

Waalkens Yes, two things on that. If there had been some restriction or condition imposed on the consent which gave her some protection, in other words she was maintaining confidentiality or whatever, just drawing the worst inference from the doctor's perspective, I have no doubt that that information would have been produced by the CAC as the basis upon which or the limited basis upon which the consent was given. Now that's never been raised, never suggested. But secondly the consent I don't have.

Blanchard J Have you asked for it?

Waalkens Um, I don't remember Sir.

Tipping J I for myself would be prepared to look at this on the basis that if we deal with it on the tenor of her correspondence that annexes material to the CAC and on the clear inference that she did not reserve her position in any material way in the other documents that were made available so that the CAC could get.

Waalkens Yes that has to be reasonable. And in fact to make it abundantly clear that there was no condition placed on it, at page 151 of that second case book you have the basis of the undertaking given as to when the documents were being provided by the CAC to Counsel for Dr C and at the very bottom is a note from the solicitors for the CAC recording the terms of what they instructed Ms X, the complainant. Reading as it does in the second sentence, Dr C's Counsel however quite properly wants to satisfy himself whether there's anything in the notes that may be of relevance. Mr Waalkens ... Counsel, in recognition of your concerns has agreed not to disclose the medical notes to Dr C and will give a written undertaking to that effect. Should need to discuss any matter with Dr C arise, he will firstly seek your consent to do so and if consent's refused application will be made to the Tribunal. And the point that's made here is that that makes it very clear that it's not the emphatic undertaking that the Court of Appeal talk about. In fact the undertaking recognises the end product of a process by which the records may be made available because they are relevant.

And that point's put beyond doubt when you go over to the next document which is, I'm sorry, the second to next document, page 153. This follows the disclosure of the records. As you can see at page 152 the records are sent. At page 153 is a subsequent letter where on medical notes it starts at page 154, 14A. As set out in the earlier correspondence, the medical notes have been sent to yourself to satisfy you as to their relevance and an undertaking was received that you would not disclose them to your client in the absence of consent. And then over the page, number E.

Tipping J Is that Mr X, should it be Ms X?

Waalkens Ms X Sir, yes.

Tipping J Yes.

Waalkens Number E. While it is a matter for you whether or not your client is qualified to provide expert opinion on this matter, we suggest inquiries as to any relevance can be made without the need for disclosure of the records. And then at the very end of it, number H, before we discuss your further request with Ms X for access to other medical records, please advise what information you believe, what is in those records that you are seeking and the relevance of that information at this point in time in the absence of any basis for the, I think that's supposed to be assertion, assertion of relevance. Ms X does not agree to the notes you currently have being forwarded to Dr C. The point there being again, it's not, look this is confidential, sensitive information that we're not going to hand over. It's, well how can they be relevant? And so the mechanism by which they were made, or provided was with a focus on relevance, not on retaining their confidentiality. And that I say is quite separately an act by the complainant inconsistent with an assertion of

confidentiality of the records. Because if she felt they were confidential that would have been said and would have been clearly enunciated and on no account would it have been able to have been left on the basis, well if relevant we're going to get an Order that they be produced.

Henry J Mr Waalkens, the impression I have is that the records which we have on pages 126 to 140 have already been viewed by Dr Walsh and Dr C.

Waalkens That is correct, they have been.

Henry J And are those the ones which were released to you for assessment as to relevancy?

Waalkens Yes that's right. And then when they weren't, when I considered they were relevant and asked for permission to show them, that permission was not given. An application to the Tribunal was made for them to be made available to witnesses and Dr C. Which was an Order made by the Chair of the Tribunal. And then the case continued from there with the appeal.

Henry J Do we have that on the record?

Waalkens Yes that decision's the one that starts at page 141 I think it is. Oh I beg your pardon, that's the, I'll just give it to you in a moment Sir. It is in here. I'll just find it for Your Honours. Oh, it's at the end of the first volume, volume 1. Starts at page 101. There it is there. It's paragraph 24 on page 108.

Blanchard J Do we know whether the Tribunal had the consent form?

Waalkens No it didn't have the consent form Sir.

Henry J What was the subject of the appeal to the District Court?

Waalkens This order that's made by the Tribunal or the Chair of the Tribunal starting page 101.

Henry J Was the Order implemented before the appeal was heard?

Waalkens Yes it was, yes.

Henry J That explains it then, thank you.

Elias CJ Can I ask you, while we're on this sort of paper chase, the letter at page 169 refers to the earlier request apparently forwarded on 14 August. Do we have a copy of that letter?

Waalkens It's not in the, I don't have it Your Honour, no.

Elias CJ No.

Waalkens And it's not in the bundle.

Elias CJ How many different medical entities were the source of the information supplied to the CAC? Because this is one letter to one practice referring to consent.

Waalkens Can I just have a moment Your Honour? (Counsel confer)

Henry J It looks as though all these records that we've had exhibited came from the medical practice.

Waalkens No that's not correct Sir. Because the R Medical Centre medical practice was the, that's the one at p 126, was a prior medical centre or medical place where Ms X was going to.

Henry J I thought Mr Lange noted that all the records which followed, including those from Sunnyside, were in fact those which had come from the Medical Centre.

Waalkens Yes, he says that but that with respect I don't believe is right. Because of the letter from Ms X that I just took you to that shows that she herself sent to the CAC the documents that are pages 130 onwards, the Sunnyside Hospital records. So it may be perhaps possible.

Henry J No but if you look at 130, that's directed to Dr Stemmer at the practice.

Waalkens And it's the very same document that she refers to, as is the one over at, I accept that Your Honour. It's quite possible they've got them from two sources.

Henry J Yes.

Waalkens Yes.

Henry J What I'm suggesting is that it looks as though the source was the medical practice. I don't think it matters much where they came from.

Waalkens No. No I agree with Your Honour, it doesn't matter what the source is. But it appears that also Ms X herself has sent them in. Because of her letter, makes express reference to those same documents. But just to clarify the letter that.

Elias CJ This really, my question was really directed at the consent. And that seems to be the only reference to a formal consent. And I wondered if there were more, but that may be the answer, that the only one that the CAC sought directly from medical practitioners was the one referred to in that letter.

- Waalkens And that, I believe that will be right Your Honour. And that's a different practice, you can see, from the earlier one. That is the practice I believe where Dr C practices. Because there's reference in the bundle somewhere to Dr C not actually having any, or he said to the CAC he couldn't locate any medical records. So they formally asked the practice. And I believe it's the Z Health Centre practice. My friend I think's agreeing with that. And that helps with respect to the timing of the consents too Your Honours. Because that would explain why that consent would have been in fact signed around August 2002 for them to get it. But I have to say I can't put a date on that because I don't have the consent.
- Tipping J In the end, ultimately this will be a question of fact as to what was the tenor of the consent, whether it extended far enough or not far enough. Is there any, in essence, isn't it to discern the extent of the waiver or consent that's the crucial question now? Subject to the point about to whom s.32 is directed and the subtleties attendant on that?
- Waalkens Yes.
- Tipping J But essentially, if it is capable of being implied, this consent which everyone seems to accept, then the question whether it should be implied and to what extent, I'm not completely sure that we're in a position to determine in the light of.
- Waalkens Well I think you are Your Honours in that the letter from, that I showed you earlier, page 16-
- Elias CJ 9?
- Waalkens No, I'm sorry, no 125 I beg your pardon, from her, makes it very clear that without any restriction at all she is providing the records which she relies on in her letter and chronology, as I say bolstering the complaint, she provides without any conditional consent at all.
- Tipping J But is she impliedly consenting to their being disclosed to Dr C? Because you can have partial waiver.
- Waalkens Well she's not putting any restriction on, she's providing them, she doesn't say in there whether she knows that they're going to be provided to him or not. But it's reasonable to submit surely that providing them to an investigating body like the CAC who the CAC say are a completely separate person and party to her in her capacity as a witness, puts them then out of her control and custody and it's reasonable to.
- Tipping J Well that's the issue isn't it, as to whether or not one could. And is this the high water mark Mr Waalkens of what you say is the what you might call total waiver as opposed to we shouldn't construe it as a

partial waiver in favour of the Complaints Assessment Committee, we should construe it as a total waiver in.

Waalkens It's not the high water mark because you have to also look at what she said in the letters and chronology that she provided.

Tipping J Okay, thank you.

Waalkens Which predate, well certainly the letter predated the provision of the chronology on 4 June. So when she wrote her letter she said I had this awful thing happen to me.

Tipping J Are you able to just summarise for my benefit what are the documents which she has signed or authenticated that you say read together amounts to a total waiver?

Waalkens Yes page 115 is the four or five paged letter statement from her. And it's quite long but I can highlight to you the relevant portions of it if that would be of assistance to the Court. So you'll see its headed complaint against Dr C. And then she articulates on the first page material about the complaint. And I don't say that's irrelevant but for the purposes of this hearing it's certainly irrelevant. And onto the next page, much the same. And then she goes on to page 117, third paragraph. I completed my journalism course but it was difficult. Struggled with depression. Prescribed anti-depressants. I spoke to the College Counsellor. I told her about the rape and about having an affair with Dr C. I remember her saying it was outrageous and she'd like to report him. I remember telling her not to tell anyone. Got very confused about what happens with telling someone, make things worse. Two paragraphs down she refers, end of 85 moved to N. Spent a year there. Again struggling with depression. Saw a Counsellor. Over the page at the very bottom, 118, the last two paragraphs, in January 2002 I sought psychological help as I was finding the matter stressful. And you'll see that follows reference to, well it follows her account of problems with C.

Tipping J Are you saying the reference to "I sought psychological help" impliedly consents to the records of that psychological help being released from the privilege?

Waalkens Well she's referring to not just the fact, this is the point, she's referring not just to the fact of seeking psychological help, but that it was because of what had happened to her from Dr C. And so she's not just referring to the existence of records.

Tipping J Oh no, no I appreciate that.

Waalkens Yes.

Tipping J But what I'm slightly struggling with is how you can imply a consent to disclosure of records from a simple reference to the fact of her having sought psychological help on account of her problems with Dr C.

Waalkens Because in her chronology, which you will see starts at page 120, she refers to, under the second to last column, supporting documents. And there's various of them as you work through the chronology. Her medical records for example at page 122. So she puts the existence of them, and provides them the medical records for anti-depressants and her referral to Sunnyside as an outpatient. So she's there combined with her letter saying two things. I have suffered badly, I've had psychological consequences directly or indirectly from this. I have records to verify and vouch for that. And here they are.

Tipping J And because of the purpose for which she was sending them to CAC you say that it's an inevitable and necessary implication.

Waalkens Yes.

Tipping J That she was making them generally available for the purpose of the prosecution of Dr C.

Waalkens That has to be so because she's providing them to the CAC for the purposes of identifying that there is a case against this doctor and she's putting it all in as part of her, or to bolster the complaint. She gets the benefit from that of persuading the CAC to initiate the charge. And in all respects that is sufficient. It surely has to be.

Elias CJ I must say I'm not sure that that follows at all. Because it depends what use is put of those documents subsequently. I can see that an investigator may gain some comfort from being able to verify the chronology. But it doesn't necessarily follow that the investigator will use the material provided in the proceedings to follow.

Waalkens Except Your Honour, and I have raised three issues, well factual issues, but as supporting the assertion that there has been consent. But each of them can be looked at in tandem. And one of them is that there was the disclosure to myself as Counsel for Dr C with her agreement only for the purpose of relevance. Not for anything else.

Elias CJ Yes. No I have that on board. It seemed to me though that there was the other matter that, I'm just trying to identify what you're relying on.

Waalkens Yes.

Elias CJ As being consent. And you've indicated this correspondence with the provision of supporting documents.

Waalkens Yes.

Elias CJ        The disclosure to you for the purposes of establishing relevance.

Waalkens        Yes.

Elias CJ        And I would have thought it was also the consent sent in this letter of 169 insofar as those records come into the possession of the CAC.

Waalkens        Well I had those three factors, the complaint letter and chronology, the provision of the medical records to the CAC and the provision in turn to myself.

Elias CJ        Alright, well we'll take the adjournment now for 15 minutes, thank you.

Court adjourns 11.32 am  
Court resumes 11.55 am

Elias CJ        Thank you. Mr Waalkens, I wonder whether you can help us. We're getting a little confused about what is being sought in the Order that you are seeking to have reinstated. It's directed only to the CAC?

Waalkens        Yes.

Elias CJ        But are you in fact seeking only the information that has been disclosed to the CAC?

Waalkens        No. No, it is the reinstatement of the Order made by Justice Chisholm in its entirety which you'll see is beyond just the material already received.

Elias CJ        It's directed isn't it at the CAC?

Waalkens        Yes it is.

Elias CJ        It's paragraph 60 is it?

Waalkens        60 yes.

Blanchard J    What page?

Elias CJ        Page 85 of the case. There will be an Order requiring the CAC to expeditiously disclose.

Waalkens        And the genesis of that Your Honour was that, is that the argument the CAC have acted for and picked up the complaint of the complainant and they have the ability to control the production of the material by saying to the complainant, well if you want this to carry on, you're going to have to produce the material.



Elias CJ Do they have powers to compel disclosure?

Waalkens They don't have, no.

Elias CJ No.

Waalkens They can't compel her by law.

Elias CJ Well in its terms, this seems to be only an Order requiring the CAC to disclose what it has.

Waalkens What it has or what is within its power or possession or within its power.

Elias CJ Well you've just told me they don't have any powers to compel.

Waalkens Well they can't issue a, they can't take any legal, initiate any legal power to. But they can certainly require the complainant and there can be no objection to it being required to.

Elias CJ Do they have powers, statutory powers to compel the complainant?

Waalkens Um, compel her no, other than as a matter of practical enforcement. A CAC would say, and the Court of Appeal acknowledged this in the way that the Tribunal have dealt with failing to disclose material, that if it was not going to be disclosed, then that's going to prejudice the continuation of the charge. So the CAC can say to the complainant, this is the material that we need.

Elias CJ Well that's not a direction that's given by the High Court though.

Waalkens No, no, that's not. If that were required to be, I mean I recognise the CAC don't have these documents, well I understand they don't have, I don't know, but I.

Elias CJ Does the CAC have the documents provided to it by the complainant plus the documents obtained under the authority of the complainant as per that letter of 169?

Waalkens Um, I.

Elias CJ I mean are those the classes of documents that they are holding or are likely to be holding?

Waalkens I believe so but you'd be best to clarify that with my learned friend.

Elias CJ Yes I will clarify that.

Waalkens But I'm sure that I would have been provided. This case has taken so long to get to this stage that the interlocutory discoverability of records

and stuff all has been put on hold for, you know, for when this discovery issue started, I remember it was on Christmas time two or three Christmases ago.

Elias CJ Yes well I'm just trying to get a sense of the scope of what really is in issue here.

Waalkens Well the scope of the records sought is most certainly not just the records that have been made available but the additional records on the basis that when the complainant puts in issue or has partially disclosed records of this category, then the rest should also likewise be disclosed.

Blanchard J By additional records do you mean records which are still with a medical practitioner?

Waalkens Or which she may have. She has the ability herself to get the records.

Henry J Mr Waalkens if you look at page 47 we get the conclusions from the Court of Appeal. Are you challenging conclusion A?

Waalkens I'm not in the sense that that is correct but documents under its control. It has the control of the records by saying to the complainant we need these records. If you want this.

Henry J Well they aren't under its control until it gets them.

Waalkens Well that's one view of it but they would also be able to say, as I've just indicated, a direction, we need them and if you wish this charge to continue to be prosecuted by us, you'll need to produce them. And that's exactly.

Henry J I have some difficulty with that. The CAC can't order a complainant to produce the documents.

Waalkens It has no power to order them, no.

Henry J Well how can the documents be under it's control?

Waalkens Um.

Tipping J It's persuasive only.

Waalkens It's persuasive only in the sense of saying, if you don't produce them it's not going to, the charge will stop.

Henry J Well it may not wish to take that attitude. I don't know.

Elias CJ And isn't the argument effectively you're running one that you would have to run to the Tribunal that there's been imperfect disclosure and that is a reason why the proceedings should be stayed?

Waalkens If the corollary of the Orders made are that we didn't get all the records then that would most certainly happen. There'd be an application for stay to the Tribunal. It hasn't been made because we haven't got to that point in time. But Your Honour's right, if that was the end product of this process and there were records still not made available, there would be an application for a stay.

Tipping J Has the Tribunal got the powers in the nature of ordering production?

Waalkens Yes it does, under the First Schedule of the Act.

McGrath J Rule 7?

Waalkens Rule 7.

Tipping J And would the question of whether documents should be produced not turn on assuming the Tribunal's got an analogous power to s.35 of the Evidence Act?

Waalkens Yes.

Tipping J Would it not depend on the Tribunal's assessment of the balance between confidentiality and importance to them?

Waalkens Yes indeed and I would.

Tipping J Isn't that what this is really all about?

Waalkens I wouldn't have an objection to this part going back to the Tribunal for it to consider this. Because it hasn't been considered.

Tipping J Under 35. Or its analogous.

Waalkens Yes, 35 does apply because the rules of evidence apply. But there are some other provisions, and I don't think we need to spend a lot of time on it. But the first.

Elias CJ Well arguably though s.32 would apply too, depending on what the scope of civil proceedings are.

Waalkens And who had them. But certainly s.32 is bound to arise.

Elias CJ I'm just, sorry.

Tipping J Aren't there two categories for this purpose? The documents that are at the moment in the hands of CAC?

Waalkens Yes.

Tipping J The question whether they should be produced to you or your client should be determined on that balancing exercise under or analogous with s.35. The documents which are in the hands of medical practitioners.

Waalkens Mm.

Tipping J Section 32.

Waalkens 32.

Tipping J Is prima facie at least engaged. And then the question is only whether the consent that you rely on is wide enough to cover those documents.

Waalkens Yes I accept that.

Tipping J And those are the two methods of handling this. 35 for the documents in the power of CAC, the prosecutor so to speak.

Waalkens Yes.

Tipping J And whether you're right, that the present consent covers documents in the hands of other doctors.

Waalkens And the other category Your Honour is documents which are within the power and possession of the patient. Because the patient herself has the right to require the doctors or whoever has records to produce them to her.

Tipping J Well that would be a s.35 matter also wouldn't it?

Waalkens Or a s.7, power of investigation or witness summons procedure which the Tribunal has under the First Schedule to the Act.

Tipping J Yes well that may be the way through.

Blanchard J Well that last question is not before us.

Tipping J No.

Waalkens No it's not before you Sir, no. It was – no it's not before you.

McGrath J Mr Waalkens I think, were you about to tell us the provisions in the Medical Practitioners Act which you say give the Tribunal s.35 powers?

Waalkens No I wasn't, but I can Sir.

McGrath J Yes thank you.

Waalkens They are, it's First Schedule, Clause 6 Subclause 4. Subject to Clauses 1 to 3 the Evidence Act shall apply in the same manner as if the Tribunal were a Court within the meaning of the Act.

McGrath J Thank you.

Waalkens And there's another provision, yes, no there's a number of them but that's the primary one Sir.

Tipping J The only difficulty with s.35, and I think this emerged in **M v L**, was that s.5 is couched on the basis that it's directed to witnesses.

Waalkens That's correct.

Tipping J And I think this is where the general common law power in relation to discovery and production is analogised from s.35 because you're not technically talking about a witness at the time when they are in the hands of a person before if you like. We discussed that if I remember rightly, it's starting to come back to me a little bit in **M v L**, and that might have to be looked at.

Waalkens Yes.

Tipping J But I don't think it would matter whether the Tribunal act directly under s.35 or under the general Court powers if you like.

Waalkens I think that's got to be right.

Tipping J Of supervising inspection and production and so forth. But that would be the only caveat I would enter in relation to any proposition that it applied under s.35 directly as to whether we're actually talking. I think I'm right aren't I, it's directed only to witnesses?

Waalkens Um.

Tipping J It's set out somewhere in the Court of Appeal's.

Waalkens It's in the Court of Appeal's judgment.

Henry J It's on page 42.

Tipping J Thank you.

Waalkens 42.

Tipping J Excuse any witness.

Waalkens Witness, yes.

Tipping J It implies that it's during the course of the trial. But I think we said in **M v L** that it can be applied back to the production and inspection stage by analogising the principles in s.35 to that earlier stage.

Waalkens That's correct and you did that by virtue of Rule 307 of the High Court Rules.

Tipping J Is that how we did it?

Waalkens Yes.

Tipping J Yes. But whether Rule 307 of the High Court rules is a power that's possessed by the Tribunal would then be the next question.

Waalkens Well it.

Tipping J And just simply reading in the Evidence Act wouldn't necessarily give it that power.

Waalkens No. It does because there is this power under Rule 7 of the, it's got power of investigation for the purpose of dealing with matters before the Tribunal or any, or it or any person authorised by it in writing to do so may inspect or examine or call for production and so forth and so on.

Tipping J Right so call for production would probably, there'd be an ability to.

Waalkens Require any person to produce for examination any papers, documents, records, so forth.

Elias CJ So there's no right of discovery as such.

Waalkens No, there's no, they have the ability to make orders to control their own procedure.

Elias CJ Yes.

Waalkens And by implication that may cover requiring a party to give a list of documents. But there's no express power Your Honour in the First Schedule.

Elias CJ And no case law?

Waalkens The only time this issue about the Tribunal requiring a list of documents to be produced is in this litigation.

Elias CJ Right.

Waalkens And that was a burning issue in the District Court and I think it was dropped at the High Court level. I've just not looked at that issue.

Elias CJ           Where did it end up?

Waalkens           Well it ended up, we, it just wasn't pursued any further.

Elias CJ           Well you got a list of documents or you didn't.

Waalkens           We got a list but it was an informal list. I think we dealt with an unsigned list of documents.

Elias CJ           I see.

Henry J            Mr Waalkens, can we look at page 61 which I think records the Tribunal's decision which was the subject of the first appeal before the second appeal before the third appeal.

Waalkens           Page 61 Your Honour?

Henry J            Yes. Is that it?

Waalkens           Yes at the top, that's correct.

Henry J            Yes.

Waalkens           It's also in the Tribunal's decision itself.

Henry J            Oh I see. Where do we find that?

Waalkens           That's that one at page 106, I'll just find that for Your Honour. There it is there, paragraph 32 page 109.

Henry J            Thank you.

Tipping J           Could we find ourselves or could the Tribunal find itself in the position of having to resolve this issue that whereas the complainant may have consented, it can't be compelled to discover. That lack of discovery may be relevant only to the appropriateness of prosecuting the charge.

Waalkens           I'm sorry Sir, could you just?

Tipping J           Sorry. Whereas there has been consent.

Waalkens           Yes.

Tipping J           The CAC is not obliged in law to discover, to let you look at it, your client look at it.

Waalkens           Yes. I think that's.

Tipping J But the only way you can control a situation like that is in relation to stay or something similar. Because at the moment I'm not entirely clear how the Act gives your client a power, a right if you like, to obtain discovery and thus inspection subject to any discretion from the CAC.

Waalkens I think that's right. There's certainly no express power as I discussed before with your brother Henry. That's just not in the Act. There is that power of investigation but again a person who may refuse to provide to the Tribunal as directed documents, then leaves the affected ... that right to seek a stay or whatever other.

Tipping J Because at the heart of this lies your client's wish to inspect isn't it? To have discovery of, to use the classic civil terminology.

Waalkens Correct.

Tipping J To have discovery made and then to inspect.

Waalkens That's correct.

Tipping J But you can't point to anything that gives you a right to inspect.

Waalkens Other than if the Tribunal make an Order for example under this seventh clause in the First Schedule that the complainant shall produce to so and so for, like Dr C or to a third person, be it the CAC or whoever.

Tipping J So you'd have to.

Waalkens So there can be an Order made by the Tribunal requiring her to produce for examination documents.

Tipping J Right but is there any power in any Court? Is that a power vested at least in the first instance in the Tribunal?

Waalkens It is in the Tribunal. But under the Act, the Medical Practitioners Act recognises that Courts on appeals have the same rights that the Tribunal has had. There it is, it's in, it's s.118 subs (2) of the Medical Practitioners Act 1995. May make any order that the Tribunal could have made.

Tipping J So you're wanting us to order in effect as if we were the Tribunal?

Waalkens Yes.

Tipping J That the complainant or the CAC produce these ... documents to Dr C.

Waalkens Yes.



Tipping J For his inspection?

Waalkens Yes.

Tipping J Is that what it finally boils down to?

Waalkens That is correct.

Elias CJ Well then you'll have to point us to some authority by which we could exercise such a power.

Waalkens The statutory authority is the First Schedule Rule 7, power of it's called investigation but it reads, for the purpose of dealing with matters before it the Tribunal or any person authorised in writing by it may inspect and examine documents or require any person to produce for examination any papers, documents or things to allow copies and extracts to be made.

Elias CJ But that's a power that hasn't been exercised by the Tribunal.

Waalkens No it hasn't been exercised by it. But it has the ability to and correspondingly under s.118 so do you, exercising your appeal.

Elias CJ I don't think we would exercise it if we had it. I don't think without the opinion of the Tribunal on this.

Waalkens I can recognise the efficacy of that Your Honour.

Elias CJ Yes.

Waalkens And look, as much as we want this to be dealt with, I don't strongly oppose at all this aspect being referred back to the Tribunal for it to grapple with and deal with under these powers. The sticking point has been s.32.

McGrath J But apart from that, the fact is that the Tribunal does have investigative powers.

Waalkens Yes it does.

McGrath J They're classified as that. They're somewhat akin to the powers you see the Inland Revenue Commissioner has.

Waalkens They're exactly the same.

McGrath J Where he's dealing with people who aren't providing enough information.

Waalkens Yes.

McGrath J They certainly look fairly effective, powers that can be effectively used, just from what you've read out.

Waalkens They're very wide powers and they also have the ordinary power that Courts have of issuing witness summons to require attendance as well as records and so forth. The investigatory powers are even more extensive than that. So you do have the power. But I, Justice Elias, do accept that if that isn't attractive, and I can understand for an appeal Court particularly as a fifth appeal or whatever you are now, it mightn't meet with much attraction. It might be more.

Elias CJ Absolutely none actually.

Tipping J Well the appropriateness of making, even if we have the power, the appropriateness is really.

Waalkens Yes, yes.

Elias CJ That's the thing.

Tipping J So where does that leave us? That's in relation to?

Waalkens Additional records.

Tipping J Additional documents.

Waalkens In relation to the records thus far, you need to, as I say, there are three aspects singularly and collectively that the complainant has used inconsistently to a continued claim of privilege and that's the test.

Henry J I'm sorry, you've lost me in respect of those because they've been disclosed.

Waalkens Well that's my point. They have been disclosed and in so doing she has acted inconsistently with any continued claim of privilege.

Henry J But you're wanting those to be inspected by Dr W and Dr C, both of whom have inspected them.

Waalkens Yes. And used them in the proceedings. But we can't because of the Order that's been made by the Court of Appeal.

Tipping J Whether you can use them in the proceeding when people become witnesses is s.35. The question which we have to do prior to the hearing is access to the pre-hearing. But if they've already had access to them pre-hearing, is there any continuing problem?

Waalkens Other than records that the CAC may have which we haven't seen fall within the, that is medical and other records other than what the complainant has got. We have seen them.

Henry J At the moment we're not talking about use of any documents in the proceedings.

Waalkens Yes, I hear what you're, yes Sir.

Henry J We're talking about disclosure of them preliminary to a hearing aren't we?

Waalkens Yes. And that all happened before the first, well that happened certainly well before the Court of Appeal hearing.

Henry J Well what are we concerned with then in respect of the Court of Appeal judgment which starts at page 47? It seems to me that items A and B look to be perfectly proper. C is the subject of our debate over the effect of s.32. And on the face of it, D may apply also.

Waalkens To the extent that there's still some documents in category C.

Henry J Don't you have to go back to the Tribunal for those?

Waalkens No because an Order has been made that the records would be produced.

Blanchard J Well now what documents are you talking about now? Are you talking about documents that are already in the hands of the CAC?

Waalkens Of the CAC.

Blanchard J And they're documents which would have come via the complainant or pursuant to an Order that, or consent that she's given?

Waalkens Consent. That's correct.

Tipping J And you want to see any more that they've got that haven't already been shown to you. And you want the embargo that they can be shown only to you as Counsel overridden so to speak on the basis that they should be disclosed to your client?

Waalkens Yes. That's correct.

Tipping J Isn't that a matter that whether that should be so may depend upon an examination of the documents and what force it is seen by the Tribunal they have on an analogous balancing with s.35? Because they're not going to be disclosed, ordered to be disclosed if on the, well I think as we said in **M v L**, it's unlikely that you'd order disclosure if on the section 35 witness balance that was to go against disclosure.

Waalkens Yes. That's fair. Coming back, yes, coming back to the point of, well the documents have already been made available, the importance of this case has been more than just for Dr C. It involves the whole continuation of medical disciplinary cases. And the s.32 determination of the Court of Appeal is something that's had to be addressed. But I do accept the points the Court's making about the documents that we are, that we know that are in existence, by the CAC have already been seen and inspected by witnesses or the expert witness and Dr C.

Tipping J But in principle, forget the fact that in this case some of them have already been disclosed in advance.

Waalkens Yes.

Tipping J In principle the question of disclosure pre-trial should be dealt with, should it not, by the Tribunal exercising its powers to order disclosure analogously with s.35? I mean because, if you're going to withhold them from production as a witness, by a witness, it would be very unusual if you ordered them to be produced, unless you thought that there was some investigatory use that they could properly be made to, in spite of the fact that you were going to excuse them from production. But that's for the Tribunal properly directing itself in law as to whether it orders discovery or not, production or not.

Waalkens That's correct. It's more though than just s.35.

Tipping J Well it may be. But from the point of view of setting the appropriate precedent or legal test.

Waalkens Yes.

Tipping J Should not the Tribunal be told or if it does that it has the power to order discovery, disclosure, in advance.

Waalkens Mm.

Tipping J To whomsoever it thinks appropriate and under whatever conditions that seems appropriate, bearing in mind the analogy with s.35 and what it might do in that respect as to ultimate production at the trial.

Waalkens That's correct. That's fair.

Tipping J But we would have to send it back to the Tribunal, any documents that it still has that are relevant in this respect.

Waalkens Additional. Yes I accept that's correct.

Tipping J To decide according to that general format.

Waalkens Yes I accept that. And that has to be.

Elias CJ How does what we're being invited to do now, how does it differ from the Orders made by the Court of Appeal? If you look at the Orders. I mean it may well be that in D there should be clarification that that refers to production or disclosure by medical practitioners.

Waalkens Yes.

Elias CJ But apart from that, is there really anything wrong with the Orders made?

Henry J No, we'd need to make it clear if we come to the view that consent is implied consent and not express.

Waalkens Yes, that's the important, that's the important part of the appeal.

Elias CJ Yes.

Waalkens For future cases, not for this one.

Elias CJ Yes, yes.

Waalkens In practical terms, Your Honour's right, other than with that point about Subclause D.

Elias CJ Yes thank you.

Waalkens There's not much wrong with what the Court of Appeal have in fact directed. Except the obstacle that would have been created for all future cases.

Elias CJ On the implied.

Waalkens On the implied consent argument.

Elias CJ Consent, yes. Yes, thank you, well is there anything more you want to add?

Waalkens No thank you Your Honour.

Elias CJ Thank you. Any other questions? Thank you.

12.25 pm

Elias CJ Yes Mr Lange.

Lange May it please the Court, in my submission the starting point here in looking at the procedure is we, just to go back a step, as the judgment of the, the decision of the Tribunal and the correspondence in volume 2

indicates, the CAC had possession of the limited medical notes which I refer to as the R medical notes which were disclosed under the undertaking. The CAC is not in possession of any other medical notes in relation to the complainant.

Elias CJ Does that mean that the material she supplied directly was also included in the R medical notes, yes I see.

Lange They are, that bundle are the only notes of any medical relevance.

Tipping J You're saying you've got nothing else other than what you disclosed under the undertaking that could be of any possible relevance to the.

Lange No other medical notes at all.

Tipping J No other medical notes at all, right.

Elias CJ And are those all the ones that are in the bundle?

Lange Yes.

Elias CJ Yes, I see.

Henry J And the 11-25. Numbers 11 to 25.

Lange Yes.

Henry J Referred to by Dr W.

Lange We move on from there in my submission and there seems to be agreement that the provisions of the Evidence Act s.32 and 35 apply to proceedings before the Tribunal. And as regards obtaining documents, as the Court of Appeal judgment identified, there are two means, the witness summons means which is utilised in the criminal jurisdiction or the specific Clause 7 powers. Now the Clause 7 powers can be found at page 69 of the case on appeal.

Elias CJ Sorry, when you say the witness summons in criminal proceedings.

Lange The Dobson procedure where a witness is summonsed to come to Court, bring the documents and then there may be an argument over relevance, content and so forth.

Tipping J Subpoena. ...

Elias CJ Yes.

Lange Yes.

Elias CJ No, it was just the reference to criminal proceedings. Because I had assumed that these were all classified as civil proceedings or is that not right?

Lange Well I've taken it that you could utilise the same procedure before the Tribunal, you could summons a witness, ask them to come along and bring their documents and then debate the issue about whether or not they should be produced.

Elias CJ Oh sorry, you're saying a witness summons, just a general witness summons, yes.

Lange Yes. My apologies. There's specific provision in Clause 7 providing the investigative powers.

Tipping J What page? I'm awfully sorry Mr Lange.

Lange Sorry, page 69 Sir.

Tipping J 69, thank you.

Lange That enables the Tribunal to obtain, inspect and copy documents. It can require it to be verified by statutory declaration in Subclause 2. And in Subclause 3 the Tribunal then may order the information be supplied to a party in effect.

That's the procedure that can be utilised and that was the procedure which the Court of Appeal in my submission could be used in this case.

Tipping J So that's effectively an order for inspection. Effectively.

Lange In effect, the end result's the same, yes Sir.

Tipping J Yes.

Elias CJ I'm sorry to be tedious but I'm still trying to work out, the witness summons, what authority does the Tribunal have to use that procedure?

Lange This is certainly discussed.

Elias CJ Is it in the Schedule?

Lange No, no, no.

Elias CJ Oh.

Lange It's that they have the power to summons witnesses and people have the power to summons witnesses to come before the Court, Clause 8's the specific provision which deals with witness summonses.

Elias CJ      Clause 8 of the Schedule?

Lange          Schedule to the Act, yes.

Elias CJ      And can you just tell me quickly what does that provide?

Lange          The Tribunal may of its own motion or on the application of either party to the proceedings issue a witness summons requiring the person to attend and give evidence. And it includes provision, there's the papers, documents and records.

Elias CJ      Yes, yes thank you.

Lange          Now what has to be considered on top of Clause 7 is Clause 11 of the First Schedule and that was referred to by the Court of Appeal at paragraph [74] of the judgment, page 38 of the case. And Clause 11 provides that persons appearing and required to produce documents have the same privileges as in a Court of law. And accordingly that brings in an overlay of s.32 and s.35 to the production of documents issued via that procedure. In my submission, there can be no real dispute about those principles and the real issue for the Court is when considering 32, s.32, if it applies, what does consent mean.

And as I've set out in my submissions, it means an express consent or an implied consent and in that context of implied consent, where it arises by necessary implication. But on behalf of the respondent in my submission it does not equate with imputed waiver. The two concepts overlap and there can be waiver where consent is express or implied. But where you're imputing waiver there is in fact no consent. It is often being resisted. But what the Court is simply saying is balanced on fairness considerations, it's appropriate that the privilege cannot be maintained. And it's waived.

It's not an implied consent or where you can imply someone is making a conscious decision to waive the privilege. It is purely a concept imputed on fairness principles.

Elias CJ      Well it could be said that by setting all of this in motion, and I think this is partly Mr Waalkens' argument, there is an implied consent. Putting these matters in issue.

Lange          If the matters had been put in issue in the proceeding, I accept there is the issue of implied consent there. But a simple reference in a letter of complaint or something of that nature which doesn't form part of the proceedings doesn't qualify as putting the matter in issue in the proceeding.

And as I've set out in my submissions, there perhaps does need to be a distinction drawn between where the consent or waiver has been given by a party to a proceeding verses a witness. Normally the party to the



proceeding will have legal advice. It will be explained the consequences of putting the matter in issue and that it may amount to waiver. A witness is in an entirely different position. They're not represented by Counsel, as the complainant is not represented here. They have no appreciation of the implications of referring to something, what it may mean. What is required for consent and so forth.

Henry J I have trouble in seeing the distinction Mr Lange I'm afraid.

Lange Well.

Henry J Does that apply in legal privilege?

Lange Sir most of the cases, and generally the cases that have been referred to, it's been where the privilege has been, privileged information has been raised by a party. I haven't seen a case where it's been raised by a non-party and only a witness. But of course there may also be a conflict between the party, for example here the CAC, and the witness, the complainant. You may wish the complainant to waive privilege. That may be in the interests of your proposition.

Henry J I don't see any difference in principle as to whether the person claiming the privilege happens to be a witness or a party. Either there is waiver or implied consent to the disclosure of the information or there isn't. What would be the logic in the distinction?

Lange The only distinction can be drawn between the difference of their status and representation in Court. That a witness may be inadvertently tricked into waiving privilege by adducing or making a reference to a privileged communication during the course of evidence.

Henry J Well if the information is thereby disclosed, it's disclosed. The Court would then have a discretion whether or not to use it.

Lange I'm perhaps looking at it more in the concept of an actual hearing where you're leading evidence from a witness, a non-party witness. You may wish them to disclose a confidential privileged communication and get them to refer to it. And then argue privilege has been waived.

Elias CJ Well usually the Tribunal is astute to remind the witness that they have privilege.

Lange Mm.

Tipping J The only distinction you've made so far seems to be that the parties will normally be represented and the witnesses won't. Therefore the point is that they're more susceptible of inadvertence being construed as implied consent.

Lange Yes.

Tipping J I wonder whether the answer isn't that you just.

Henry J The litigant in person.

Tipping J You just deal with that in a common sense, robust way as to whether it's in fact appropriate to infer consent from the, if you like, what's gone on. Rather than drawing some sort of sharp line between parties and witnesses.

Lange Perhaps that is the better way to deal with the matter.

Elias CJ And anywhere, we're a mile away from that situation here.

Lange We are but I was just looking at the broader issue.

Elias CJ Yes.

Lange Because here we in fact have the witness saying, I do not consent to disclosure of my records.

McGrath J Haven't the Courts really Mr Lange, and I'm thinking of the Australian cases in **Mann** and **Carnel**, haven't the Courts really dealt with this by recognising that a mere slip generally won't be a true indication that the witness has acted in a way that's inconsistent with the desire to keep the protection? I mean isn't that really the rubric in which anyone being tricked out of keeping a protection because they don't have a lawyer alongside them can be dealt with by a judge?

Lange And in my submission that isn't an appropriate approach. And particularly where we have a.

McGrath J But doesn't it actually remove your concern?

Lange No. And you do have to rely on the Courts that they will guard against those sorts of things and intervene at the appropriate time. And in my submission that reinforces here that where Parliament has expressly used the word consent is required, that it does require some conscious decision-making on the part of the person who can claim privilege.

McGrath J But that is a rather literal approach though. I mean this group of sections that cover various people who are commonly in a relationship to which confidentiality attaches, are really all under the rubric of privilege sections aren't they? Which rather indicates that although Parliament thought consent was the right word to use, it was wanting to set up privilege relationships in the sense that those were generally understood. I mean the context is really privilege at common law as is instanced by the very strong legal privileges.

Lange I agree but I still, in my submission there is a distinction to be drawn between a consent to a disclosure or the consent to the waiver of privilege, express or implied, and imputing it. Because where you are imputing, in my submission it cannot really be said that the person is consenting. Where I think some of the cases refer, in fact they are often resisting the disclosure.

McGrath J That's the meaning of the word imputed. But hasn't the law really in this area got to the stage where what's called an imputed consent is really an inference drawn from the conduct of a person that effectively they no longer wish to have the protection of the privilege. Which is as I see it no different to a truly implied consent.

Lange That's going to depend on the facts of each individual case just how far it goes and I accept that.

Elias CJ But in any event Mr Lange, I wonder really whether it's necessary for us to get into this distinction because what is, if it is a matter of imputed consent for reasons of fairness, then those considerations haven't yet been waived by the appropriate Tribunal. I'd like to hear what you have to say on the application of s.32 to the material that's being held by the CAC. Do you accept that s.32 is spent?

Lange For the material that's been disclosed?

Elias CJ Yes.

Tipping J No, for the material that's in your hands.

Elias CJ Yes, sorry, well that's what I meant, disclosed to the CAC, sorry.

Tipping J Yes, yes.

Lange And the only material is the R medical material.

Elias CJ Yes.

Lange In respect of that, yes s.32 does apply, in my submission clearly, as does s.35. Because all of it is not covered by s.32 because of the limited nature of that disclosure only relating to communications by the patient to the doctor to enable treatment. Clearly it goes beyond that.

Tipping J But once it's left the doctor's hands, how can 32 apply.

Blanchard J Unless the doctor's delivered the material to CAC without any form of consent. But as I understand it that's not the case.

Lange There must have been a consent in this case. And in the normal course they do get a written consent for disclosure.

Blanchard J Yes. Well how can s.32 apply then?

Lange In my submission the distinction can be drawn between the CAC investigative procedures and the proceedings before the Tribunal. Section 32 only applies to disclosure in the proceedings, i.e. the hearing of the charge before the Tribunal.

Elias CJ Well does that mean to say that s.32 has been irrelevant to this application throughout?

Henry J How can you invoke it if it doesn't apply?

Lange My submission is s.32 requires the patient's consent to disclosure in the proceedings, i.e. before the Tribunal.

Henry J Section 32 only prohibits disclosure in the proceeding?

Lange Yes.

Henry J If we have no proceeding, then that has no application?

Lange In my submission the proceedings before the Tribunal have commenced with the laying of the charge. As opposed to the substantive oral hearing, it would be my submission that the proceeding covers the entire process.

Tipping J But that still leaves the issue as to the fact that if the documents have left the doctor's hands with the consent of the patient, there doesn't seem to be anything for s.32 to bite on. Because it talks about, it says no medical practitioner, shall disclose. They've already disclosed with the consent of their patient. What use or discovery is then made of material is surely for some other statutory provision or common law analogy to deal with.

Lange There may well be issues down the track as to to what extent those records can be adduced in the final hearing. Or in the course of any further interlocutories. But the ambit of the argument that was considered goes beyond simply those records. It also includes seeking access to the other psychiatry and psychologists' records.

Tipping J Well they're in a different category. Because they're still in the hands of a doctor. And the issue of consent is the one that Mr Waalkens says should be taken as having been given. But for the, just focusing for the moment on the ones that are.

Lange Those records.

Tipping J That have left the doctor's hands, have been disclosed in the proceedings, because you say it's already commenced.

Lange Mm.

Tipping J With the consent. As the Chief Justice said, I would have thought that means s.32 is spent. It's got nothing more to do with things. What it's designed to guard against has already been fulfilled. There has been consent by the patient to the disclosure in the proceeding. Now what use is then made of the document in the proceeding, whether it can be put in evidence, whether it should be made available in advance etc surely doesn't, s.32 doesn't tell us anything about that.

Lange I perhaps accept that point but it is a matter that's going to perhaps be considered in the mix with 35.

Tipping J Indeed.

Lange In due course at the substantive hearing.

Tipping J And the fact that there's been consent and what sort of consent may be relevant in the 35 balancing.

Lange And 32 may have some application by analogy as the Court did in **M v L**, but principally you will be looking on the 35-type basis, yes.

Tipping J Yeah, I agree with that.

Lange Mm.

McGrath J Mr Lange are you saying that the purpose of s.32 is that a patient is entitled to the protection of a prohibition on, in this case, a medical practitioner from going to Court and disclosing in that public forum any communication and that the mere, that you can't think of the fact that the communication has left the practitioners hands with consent to an investigatory body is in any sense altering the broad scope of the prohibition which is addressed to avoiding the privacy of the patient being.

Lange Publicly.

McGrath J Being destroyed in a public forum.

Lange Yes.

McGrath J Is that?

Lange Yes.

McGrath J Yes I think I see that point.

Lange For the reasons I've set out in my submission, the ambit of consent and the purpose behind it leads to an interpretation where consent may be express or implied in the limited sense. And I really probably can't advance that much further.

A question was raised by one of the members of the Court in relation to the American provisions or in the article that I referred to. And I do note at page 72 and it's tab 12, there again the Court was considering a similar provision, a Californian provision using the term without the consent of his patient. And again a narrow interpretation to the term consent was given, not equating it to the broader waiver type issues.

McGrath J What page was that?

Lange It was page 72 of that article Sir.

McGrath J Thank you.

Elias CJ I'm sorry, what's the point you?

Lange It's the **Newell v Newell** decision. And it's about the fourth line down they set out the passage, a licensed physician or surgeon cannot without the consent of his patient be examined in a civil action in relation to information acquired. And later on, just about half way down, the last sentence before the new paragraph referring to **Nelson v Grisson**, the Court stated that although such a privilege may be waived by the patient, his intention to waive must be clear since the Court will not run to such a conclusion. It's a similar line to that which in my submission has been adopted in the Australian Courts.

Tipping J So in other words, don't find implied consent too readily.

Lange Unless there's any other matter, perhaps it's appropriate to turn to really the second question, was it given in this case. Again, for the reasons I've set out in my submissions, consent hasn't been given in this case. And simply a mere reference in a letter of complaint or the suchlike cannot give rise to an express or implied consent. My learned friend took you through the passages in the statement of complaint. And while the submission is made on behalf of the appellant that it's done to bolster her claim, it can also be written in the context that it's there to explain the delays about why she hasn't come forward earlier.

And in my submission the Court as a matter of policy needs to be careful about having mere reference amounting to a waiver. For example a.

Elias CJ Just pause a moment. To the extent that s.32 is not engaged, why are we looking at this? What's the source of the privilege that is being waived? It's not sourced in s.32 on that view.

Lange It's looking at the argument in respect of the request for the other medical notes.

Elias CJ Yes, alright, thank you.

Blanchard J The ones that are still with the doctors.

Lange Still with the doctors.

Elias CJ Yes.

Lange Really coming back to the policy considerations. Often people in a statement, complaint to the police in the case of witnesses and suchlike, will make references to speaking to a lawyer or having had counselling and such like. And in my submission that in itself could not, and as a matter of policy should not, amount to a finding of implied waiver. And the example's probably relatively straightforward. A defendant who goes to the police station after speaking to his lawyer, makes a statement and that refers to, I've told my lawyer about this. I've discussed it with him and this is what I say. Is he implying waiver. Well the answer to that must simply be no. Equally a complainant who goes to the police and says, look I didn't come forward for five years, I've had difficulty dealing with it, I've had some counselling, now I can. Can that be taken as an implied waiver? And in my submission it cannot.

Tipping J Well one thing that might be relevant to this argument I would have thought was that you may well be saying, I consent to disclosure of notes A and B because you don't think there's very much problem. But the idea that you are thereby consenting to notes E and F for example, which you may see as vastly more confidential or prejudicial to your interests, strikes me as being a rather awkward proposition. The idea that just by consenting to A and B specifically, you're thereby consenting to everything there possibly might be, would not prima facie to my mind be persuasive.

Lange I agree Sir.

Tipping J I mean it just sort of tends to go against common sense.

Lange Yes.

Tipping J I might say I'm very happy for you to look at this piece of paper on my desk but that doesn't mean I'm happy for you to look at every piece of paper on my desk.

Lange And there may be some parts of a counselling interview that a witness is happy for a defendant or party on the other side to see. Other parts of an intensely private nature which they don't wish to be seen.

Elias CJ And I suppose there's an issue as to whether the communications which are protected have in fact been put in issue as opposed to the fact of the appointments and so on.

Lange And again, as I set out in my submissions, the cases indicate that it really does have to be put in as a live issue, put forward positively in the course of the proceedings for implied waiver to arise in those circumstances. And the law seems relatively settled in that area about for the need for it to be clearly put in issue.

Tipping J Well this is consistent too with the doctrine of partial waiver. You can have partial waiver in the sense of disclosure for some purposes and not others. You can have partial waiver in the sense I'm willing to have this much disclosed but not the rest.

Lange And the House of Lords recognised in **B v Auckland District Law Society** case ([2004] 1 NZLR 326). Given for a limited purpose; it shouldn't be used for another.

Elias CJ It's slightly different though than avoiding the rind but taking the fruit. Or blowing hot and cold.

Lange Yes.

Elias CJ Yes. Picking and choosing.

Tipping J Yes you can't say.

Elias CJ You can have the good bits.

Tipping J You can have the innocuous bits but I'm going to withhold the bad bits from my point of view. But that's quite different from wholly separate pieces of material.

Lange In my submission in answering as regards the outcome of the appeal, it can be kept as narrow as the questions have been framed in the leave application. Because it's the wider implications to this and other cases. And the Tribunal can be guided when considering issues of consent s.32. What is it required to look at? A narrow approach, a wide or what. And in respect of the second question, in my submission regardless of how the first is answered and to what extent the Court of Appeal decision may be modified, the answer to the second question in this case must be no, she has not given implied consent to disclosure of all her medical, psychiatric and psychological records.

Tipping J Of whatever nature and with whomsoever they may be found.

Lange Yes. Those are my submissions, unless there's any other matter.



Elias CJ Well just summarising, you agree that the Court of Appeal was wrong on the implied consent issue effectively, is that right?

Lange My reading is that they acknowledged that implied consent could arise.

Elias CJ Yes, yes. Alright.

Lange By necessary implication.

Elias CJ Yes.

Lange In that particular paragraph of the judgment.

Elias CJ Right.

Lange If it was read that they've only allowed express consent, yes I agree that's wrong.

Elias CJ If we take the view that they really haven't recognised the existence of implied consent, you'd accept that they are wrong in that.

Lange Yes and that must be reinforced. And Justice Henry, you raised the issue over the 1885 legislation that referred to express consent. It was deleted in the 1895 amendment as was the reference to it applying in criminal proceedings.

Elias CJ And in terms of the Orders made by the Court of Appeal, do you have any comment on those?

Lange ... with the specific way it's worded. It really has to be read in the light of the judgment. Paragraph A clearly should not be altered in my submission. Nor paragraph B because they did acknowledge that Clause 7 powers could be used.

Elias CJ Well you're not appealing against this.

Lange No I'm not.

Elias CJ So presumably you're.

Lange I was looking at paragraph C, it really simply relates to the disclosure of the records in the proceedings. If they're protected, s.32 applies and that must be correct. And for other cases when they're not covered by 32 it's a 35 consideration. So it really just comes down to in paragraph C, what is meant by except with the consent of the complainant.

McGrath J Can you help us, given you accept that there can be an implied consent. Can you help us as to the type of conduct by a complainant in relation to making reference to the notes of clinical psychologists and doctors would amount to implied consent in the sense that it would be a clear

indication that the patient was happy that matters would be used in the medical disciplinary or professional disciplinary process.

Lange There may be express reference to them in the course of a brief of evidence or in the course of giving evidence. I went to see the doctor, I told him it was my right hand that was sore, he chopped off my left hand.

McGrath J Are you saying it should turn on when it's used and who is using it? In other words, if the use is at a later stage once it enters the charge area, that it can't really be the subject of implied consent before the decision to lay charges has been made.

Lange The reality is, is where there is a medical misadventure scenario, the consent of the patient will be obtained because the CAC can't consider it until they've obtained the records and such like. Certainly in the hearing, it's difficult to envisage a case where a patient will not be disclosing the communications if they're alleging the doctor's done something wrong. And in those circumstances where they sit in the witness box and give their evidence, this is what I told the doctor, privilege must be waived by necessary implication in those circumstances.

McGrath J At that stage yes, but do you envisage any facts by which a patient can in the initial communications with the complaints body, effectively impliedly give consent to the subsequent use of that material throughout the disciplinary process.

Lange In medical misadventure cases, it has to happen as a matter of course.

McGrath J Yes. But in terms of improper conduct?

Lange Improper conduct. Looking at some of the American approaches, what they've tended to adopt is where they've put the mental consequences, emotional harm in issue, that can amount to implied waiver.

Elias CJ Is that the case here, is there a claim through this process for compensation, that would have to be.

Lange No, there's not.

Elias CJ Yes.

Lange And the brief which is attached doesn't refer to any of the counselling, the actual brief of evidence which will be used in the hearing doesn't refer to any of the counselling or any of those matters. So yes, you can perhaps envisage a situation if you adopt the perhaps American line where you put mental matters, or mental considerations, emotional harm matters directly in issue, you may be taken to impliedly waive privilege.

McGrath J Thank you.

Tipping J In relation to the notes of the doctor against whom you're making the complaint, you're then, the question is whether you're impliedly consenting to other notes that may be in the possession of some doctor other than the one you've made the complaint about but are relevant to the complaint. We could have various degrees, I think one just has to just let this evolve as to how the principle, the concept's there. It's difficult to forecast circumstances where it may or may not be appropriate to draw the inference of consent.

Lange Certainly and my submissions definitely make it clear that any waiver is extremely limited. It doesn't become a broad waiver. Just as in the solicitor client cases, you sue your lawyer, you don't get access to all the files, only to the relevant files. If the patient had been to Dr A and Dr B, that's going to have to be considered when those facts come to light and what the circumstances are in my submission.

Is there anything further?

Elias CJ No thank you.

1.06 pm

Elias CJ Mr Waalkens, do you want to be heard in reply and if so, how long do you think you might require?

Waalkens Look I don't really Your Honour. The only one topic I was going to touch on is the point raised by Justice Tipping about the partial disclosure and the Pandora's box in other words of opening all the other records. I would recognise this as being an area that will evolve no doubt on a case by case basis too. There is some discussion of the topic in the extract in Cross at tab 3 of my casebook at paragraph 10.29. And the case of, it's half way down that second page in tab 3, 10.19. However a waiver of privilege cannot be limited to parts of documents or some documents in a category of documents.

And the only other point allied to that is the **Paragon v Freshfields** case that the Court of Appeal referred to when it also referred to **Ophthalmology** and I spoke of that earlier this morning. Yet in its judgment notes the practical difficulties that arise in these cases of where there's partial discovery. And I don't know that you'll want to get into that. But if you did, I'd be quite happy to leave you with a copy of the **Paragon** case that isn't in the casebook. But at page 5 of the case that I have the judgment records the conundrum that the Courts have faced and dealt with on that issue.

Tipping J And my judgment in the Court of Appeal in **B v Auckland District Law Society** went into this issue in some detail.

Waalkens Yes it did, yes.

Tipping J I'm not saying it's necessarily right but at least it refers to the main cases.

Waalkens Yes. Yes. Oh well, as I say, I don't see this is a one size fits all type. And I was just a bit concerned that Your Honour might be signalling in this case that just because there's been reference to psychological, psychiatric records, that that is not going to enable the other records in that category to be called for. Because I.

Tipping J Well all I was signalling Mr Waalkens, that the whole concept of partial waiver both for purposes purposes and for content purposes is quite tricky.

Waalkens Oh yes, and that's the point I accept Sir, yes.

Tipping J Yes.

Waalkens Well that was all I wanted to say in reply, thank you Your Honours.

Elias CJ Thank you. Well thank you Counsel. We'll reserve our decision in this matter. Thank you for your submissions.

Waalkens As Your Honours please.

Court adjourns 1.09 pm