IN THE SUPREME COURT OF NEW ZEALAND

SC 27/2005
[2006] NZSC 48

BETWEEN	C Appellant
AND	COMPLAINTS ASSESSMENT COMMITTEE Respondent

Court: Elias CJ, Blanchard, Tipping, McGrath and Henry JJ

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

Judgment: 29 June 2006

JUDGMENT OF THE COURT

A. The appeal is allowed to the extent set out in order C only.

B. The setting aside of the order made in the High Court is affirmed.

C. C's application for disclosure is referred back to the Medical Practitioners Disciplinary Tribunal for re-hearing in the light of the directions given in the reasons of the majority judgment. The directions given by the Court of Appeal are set aside.

D. The appellant must pay the costs of the Complaints Assessment Committee in the Court of Appeal as ordered in that Court. In this Court the respondent must pay the appellant's costs fixed at $10,000 together with disbursements to be fixed if necessary by the Registrar.

REASONS

Para No

Elias CJ, Blanchard, Tipping and Henry JJ [1]
McGrath J [52]

ELIAS CJ, BLANCHARD, TIPPING AND HENRY JJ

(Given by Elias CJ)

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Scope of the appeal

[1] The appeal concerns compulsory disclosure of medical records in disciplinary proceedings under the Medical Practitioners Act 1995.[1] The chairperson of the Medical Practitioners Disciplinary Tribunal made directions for disclosure of the records to C, a medical practitioner facing a charge of disgraceful conduct under the Act. The records concern the complainant in the proceedings. It is beyond controversy that the interlocutory ruling which set in motion this fourth appeal was made by the chairperson of the Medical Practitioners Disciplinary Tribunal without authority. Under cl 7 of the First Schedule to the Medical Practitioners Act, only the Tribunal itself can order disclosure of information to it from "any person"[2] and can require such information to be supplied to any person appearing before the Tribunal "for the purposes of its proceedings".[3] The power cannot be exercised by the chairperson of the Tribunal, acting alone. The Court of Appeal held in the judgment which is the subject of the present appeal that the exercise of the power to compel disclosure must be sent back for the determination of the Tribunal.[4] Although that is

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1 Since repealed by s 175(4) of the Health Practitioners Competence Assurance Act 2003, but applicable to the present case under the transitional provision in s 216(1) of the 2003 Act.

2 Medical Practitioners Act, 1st sch, cl 7(1)

3 Medical Practitioners Act, 1st sch, cl 7(3)

4 *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal and Anor* [2005] 3 NZLR 447 (Glazebrook, Chambers and O'Regan JJ).

the conclusion of this Court, too, the course the appeal has taken in courts below has made it necessary to consider further the law under which that determination must be taken by the Tribunal.

[2] In particular, it is necessary to consider the application of the privilege contained in s 32 of the Evidence Amendment Act (No 2) 1980. Section 32 is contained in Part 3 of the Act, which is headed "Privilege of witnesses". It describes a limited privilege in civil proceedings for confidences made by patients to medical practitioners for the purpose of treatment. As far as is relevant, it provides:

> **32 Disclosure in civil proceedings of communication to medical practitioner or clinical psychologist**
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> (1) Subject to subsection (2), no registered medical practitioner and no clinical psychologist shall disclose in any civil proceeding any protected communication, except with the consent of the patient or, if he is dead, the consent of his personal representative.
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> (2) This section shall not apply-
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> (a) in respect of any proceeding in which the sanity or testamentary capacity or other legal capacity of the patient is the matter in dispute:
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> (b) to the disclosure of any communication made to a registered medical practitioner or a clinical psychologist in or about the effecting by any person of an insurance on the life of himself or any other person:
>
> (c) to any communication made for any criminal purpose.

"Protected communication" is defined in s 32(3) as:

> a communication to a registered medical practitioner or a clinical psychologist by a patient who believes that the communication is necessary to enable the registered medical practitioner or clinical psychologist to examine, treat, or act for the patient.

[3] Section 32 was not referred to by the chairperson of the Tribunal in making the original order. It has however been central to the decisions on appeal. In the

High Court, it was held that s 32 did not apply because it was excluded by the obligation to observe natural justice and the ability of the Tribunal to receive evidence not legally admissible.[5] The Court of Appeal rightly held that neither circumstance affected the application of s 32 to proceedings before the Tribunal. Its conclusion on this matter is not challenged on further appeal to this Court. But whether s 32 protects information in the possession of the Complaints Assessment Committee (which brings the proceedings against C to the Tribunal) and whether it protects information under the control of the patient herself were the subject of consideration which gives rise to live issues on the present appeal. The views expressed by the Court of Appeal as to what constitutes the patient's consent to disclosure, removing the privilege, are also raised on the appeal. In addition, it is necessary to consider whether the Court of Appeal was right in its assumption that s 32 applies to the pre-hearing exercise of the powers of production under cl 7. To the extent that s 32 does not apply, additional questions arise about the application of s 35 of the Evidence Amendment (No 2) Act 1980 (which confers a discretion to exclude production of records and other evidence to protect confidences) and about the considerations which may legitimately bear upon the ultimate exercise of the discretion to order production under cl 7.

[4] Because of the way the initial orders were made and because of the course the subsequent appeals have followed, the matters in issue have necessarily been considered at a level of generality. Few of the background facts are known. The present appeal cannot determine whether the records in issue are relevant to the proceedings, or the extent to which they are within the definition of "protected communications". We cannot determine whether the patient has consented to disclosure under s 32. We cannot determine whether the circumstances in which the Complaints Assessment Committee came into possession of confidential information about the medical treatment of the complainant are such as to permit it to raise the discretionary privilege recognised by s 35. Nor are we able to assess whether the medical records the patient was originally directed to produce are properly regarded as being in her possession or power, if she is unable to assert privilege in them. It is

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[5] *A Complaints Assessement Committee v The Medical Practitioners Disciplinary Tribunal and Anor* HC CHCH CIV 2003 751 03 25 March 2004 (Chisholm J).

unfortunate that the way this interlocutory matter has proceeded leaves a number of loose threads which may yet have to be considered but which cannot be addressed on the present appeal.

History of the appeal

[5] C is charged with disgraceful conduct arising out of claims of improper sexual conduct towards a 16-year-old patient in 1985. He has sought disclosure of medical records relating to the patient. The records concern the patient's treatment by other medical practitioners after the events which give rise to the disciplinary proceedings. They are said by C to be relevant to the credibility and accuracy of the patient's recollection of events. The records are likely to include communications made to the medical practitioners by the patient for the purpose of her treatment for depression and drug use.

[6] The appeal arises out of rulings made in February 2003 by the chairperson of the Medical Practitioners Disciplinary Tribunal purportedly under the powers to compel disclosure contained in cl 7 of the First Schedule to the Medical Practitioners Act. By the rulings, medical records earlier supplied by the patient as complainant to the Complaints Assessment Committee (which had already been made available on a confidential basis to C's counsel so that he could assess their relevance) were required to be disclosed to C. In addition, the chairperson ruled that the patient must disclose to C any other medical records concerning her "which may assist in determining whether or not the complainant's recollection of the events of March/April 1985 has been impaired". The chairperson of the Tribunal recognised that the information "relevant to the patient's psychiatric/psychological condition" was "intensely private and may be very sensitive". He considered however that it was necessary to "balance the complainant's well-founded desire to preserve her privacy with the need to ensure C has a fair and proper opportunity to defend the charge". Although ordering disclosure, the chairperson assured the patient that publication of any intimate and distressing information would be suppressed. In making his ruling, the chairperson gave no consideration to any question of privilege.

[7] The Complaints Assessment Committee appealed to the District Court, claiming that the chairperson of the Tribunal lacked jurisdiction to make the orders. Judge Ryan took the view that, since the argument as to jurisdiction had not been canvassed with the chairperson, it was appropriate to remit the matter for his further consideration.[6] He made observations about issues of law canvassed on the appeal, in particular noting that the question of privilege might have to be considered, but gave no formal directions on that or any other topic for the guidance of the chairperson.

[8] The Complaints Assessment Committee appealed by case stated to the High Court, claiming that the District Court Judge should have determined the merits of the disclosure application on the appeal and challenging a number of the observations made by him as being erroneous in law. Chisholm J agreed that the chairperson lacked jurisdiction to make the directions as to disclosure because the exercise of the powers under cl 7 required a determination of the full Tribunal. He held that the District Court Judge had misdirected himself in law when deciding not to exercise the power to dispose of the application on appeal. In the circumstances, Chisholm J thought there was no alternative but for him to consider the merits of the disclosure application. He acknowledged that course was not ideal, because the case stated procedure followed meant that some matters of fact could not be resolved. He held that s 32 of the Evidence Amendment Act (No 2) 1980 did not apply to the medical records and was not in issue: under cl 5(3) of the First Schedule the Tribunal was obliged to observe the principles of natural justice and under cl 6(1) it was permitted to receive evidence not admissible in a court of law. These two circumstances, he thought, left no room for the application of s 32. Since he considered that no privilege could be asserted, Chisholm J considered that the interests of justice required disclosure of the records, despite their confidential nature. He was of the view that s 35 of the Evidence Amendment Act (No 2) 1980 (which confers upon a court or tribunal a wide discretion to excuse disclosure of confidences) applied only at the hearing and had no application to interlocutory disclosure. On the assumption that the Complaints Assessment Committee had the

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[6] *A Complaints Assessment Committee v The Medical Practitioners Disciplinary Tribunal & Anor* CIV 751/03 4 August 2003 (Judge Ryan).

power to obtain from the patient the records not already in its possession, Chisholm J ordered the Committee to disclose to C:

> records relating to the complainant's counselling, psychiatric and psychological history since the alleged offending by Dr C including records relating to the consultations and treatment alluded to in the complainant's brief or chronology.

Except to the extent that it might be necessary to refer to the records during the hearing and to consult with expert witnesses, Chisholm J ordered that the records remain confidential to C and his counsel.

[9] The Complaints Assessment Committee appealed to the Court of Appeal, with leave. The questions for which leave was granted were wide-ranging and resulted in wide-ranging judgments in the Court of Appeal. Separate concurring judgments were delivered by Glazebrook and O'Regan JJ and by Chambers J. It is necessary to refer only to those aspects of the judgments in contention on the further appeal to this Court.

[10] The Court of Appeal allowed the appeal against the orders made in the High Court. It agreed with the lower courts that the chairperson lacked authority to make the original directions. The order of the High Court requiring the Complaints Assessment Committee to disclose the medical records to C was set aside. The Court held that s 32 of the Evidence Amendment Act (No 2) 1980 applied to proceedings before the Medical Practitioners Disciplinary Tribunal, including for the purposes of pre-hearing disclosure. In this it applied the earlier decisions of *Pallin v Department of Social Welfare*[7] and *M v L*.[8] It considered that the Complaints Assessment Committee could not be ordered to produce material not within its possession or control and that therefore the High Court order that it obtain additional records from the patient was misconceived. The Court considered that privilege could be asserted by the patient for records under her control, and that further records could not therefore be ordered to be disclosed unless the patient consented. The duty to observe natural justice in the proceedings could not override the statutory privilege, although fairness might require a complaint to be stayed or

7 [1983] NZLR 266, 268 per Cooke J.
8 [1999] 1 NZLR 747, 751.

evidence to be excluded at hearing if consent to disclosure of material information was withheld.

[11] The Court of Appeal held that the patient had not consented to disclosure to C. As indicated below at para [39], we think that was the wrong inquiry and that the correct approach was to consider whether the patient had consented to disclosure *in the proceedings.* The Court of Appeal did not determine whether the patient had consented to disclosure of protected communications except in relation to the material shown to C's counsel, and did not determine whether such communications in the possession of the Complaints Assessment Committee or third parties were relevant. It referred the application for disclosure back for hearing by the Medical Practitioners Disciplinary Tribunal in accordance with the principles discussed in the judgments of the Court. Consent, it considered, was different from waiver. It required an "explicit" and "informed" consent by the patient. This, according to the Court, could not be inferred from the fact of the complaint and the proceedings or from the disclosure made by the patient to the Complaints Assessment Committee. The Court of Appeal expressed doubt about the relevance of medical records relating to the complainant's depression and use of drugs, but thought that medical and counselling records which referred to C were relevant to the proceedings and that others which did not mention him might, in context, also be relevant. In addition, the Court expressed the view that, if confidential records not protected by s 32 were held by third parties, the Tribunal would have to consider the application of s 35 before exercising its powers of compulsory disclosure.

[12] C appeals further to this Court, with leave. Leave was granted on two questions.[9] First, whether the Court of Appeal was right in its approach to the concept of consent under s 32 of the Evidence Amendment Act (No 2) 1980. Secondly, whether contrary to the decision of the Court of Appeal, consent had been given in the circumstances of the case by the complainant. To answer those questions it is necessary also to address the scope of s 32; whether it applies to pre-hearing disclosure; and its application where a record of the protected communication is held by someone other than the medical practitioner.

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9 *Dr C v A Complaints Assessment Committee* [2005] NZSC 56.

Scope of the privilege under s 32

[13] Privilege is an exception to the general rule that relevant and otherwise admissible evidence can be compelled to be given to a court by a witness or a party. Privilege arises in respect of relationships in which the public interest in maintenance of special confidence outweighs the public interest in ensuring that the court has all the information it needs to come to a correct decision.[10] Despite the long-standing professional ethical obligations of medical practitioners to maintain confidence in communications from patients,[11] no privilege from disclosure in court proceedings attached at common law to such communications.[12] At common law a medical practitioner was competent and could be compelled to give evidence of confidential communications made to him by a patient. The court had a discretion to excuse disclosure in breach of ethical values if injustice would not be caused in the particular case.[13]

[14] The common law position was first modified by statute in New Zealand in 1885,[14] when communications from patients necessary for their treatment were made privileged and inadmissible in both criminal and civil proceedings except with the "express consent" of the patient.[15] In 1895 the statutory privilege was confined to civil proceedings and was re-expressed. The new provision simply prohibited a surgeon or physician from divulging communications made by the patient for the purpose of treatment without the consent of the patient, dropping the requirement that the consent be "express".[16]

[15] No wider medical privilege has been recognised in the intervening years in New Zealand by statute or common law. The Torts and General Law Reform Committee in 1974 acknowledged public belief that there was total confidentiality

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10 8 Wigmore, *Evidence* §2285 (McNaughton rev. 1961).

11 In New Zealand today, see the New Zealand Medical Association Code of Ethics, cl 14.

12 *Duchess of Kingston's case* (1776) 20 State Trials 355; *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681.

13 See *Attorney-General v Mulholland and Foster* [1963] 2 QB 477; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 (HL); *Campbell v Tameside Metropolitan Borough Council* [1982] 2 All ER 791 (CA); *R v Secord* [1992] 3 NZLR 570 (CA); *M v L*, 760-762.

14 By s 7 of the Evidence Further Amendment Act 1885 (No 14), patterned generally on a Victorian statute, Evidence Statute 1857 (No 8), s 18.

15 Exceptions were provided for communications for a criminal purpose or in order to take out life insurance.

16 Evidence Further Amendment Act 1895 (No 10), s 9. A further exception was made for proceedings where the sanity of the patient was in issue.

between doctor and patient and lack of understanding that the law conferred only a limited evidentiary privilege.[17] It nevertheless recommended against extending the privilege, proposing only minor amendments to it and proposing a more limited privilege in criminal proceedings for communications made to a medical practitioner by an accused.

[16] The limited privilege in civil proceedings for confidences made to medical practitioners is today found in s 32 of the Evidence Amendment Act (No 2) 1980, located in Part 3 of the Act under the heading "Privilege of witnesses". Section 33 provides a more restricted protection for medical confidences in criminal proceedings. Part 3 provides privilege for communications made within categories of confidential relationship and in s 35 gives the court a discretion to excuse disclosure if it would be a breach of confidence in other relationships which are not categorised. In addition to communications made by patients to medical practitioners and clinical psychologists (which are protected by ss 32 and 33), Part 3 protects communications during marriage,[18] confessions to ministers,[19] and communications to or by patent attorneys.[20]

[17] Under s 32 medical records as such are not privileged.[21] The section applies only to protected communications, themselves narrowly defined by reference to communications the patient believes necessary for the purpose of treatment. Section 32 does not protect information obtained by a medical practitioner during the course of advising or treating a patient unless the information is communicated by the patient and otherwise qualifies.[22] Because of the privilege, patients are assured that confidences imparted for the purpose of medical treatment or advice will not be disclosed in proceedings without their consent. The privilege is a legislative balance

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17 *Professional Privilege in the Law of Evidence* (1978) Appendix 1 "Report on Medical Privilege" (1974) 2.

18 Section 29.

19 Section 31.

20 Section 34.

21 Confidences and interests in privacy may be protected by proceedings brought to restrain disclosure, but common law and equitable rights to protect confidences do not prevent disclosure in court proceedings unless privilege applies.

22 What is discovered on physical examination is not privileged: *Lucena v National Mutual Life Association of Australasia Ltd* (1911) 31 NZLR 481; *Pallin v Department of Social Welfare*, 271 per Cooke J.

between the competing public interests in the administration of justice and the preservation of confidences necessary to obtain proper medical treatment.[23]

[18] The First Schedule to the Medical Practitioners Act makes provision for the operation and procedure of the Medical Practitioners Disciplinary Committee. Under cl 5, the Tribunal may regulate its procedure as it sees fit, but must "observe the rules of natural justice at each hearing". The Tribunal is subject to the Evidence Act 1908, "as if the Tribunal were a court within the meaning of that Act".[24] Although the Tribunal has general power to receive evidence not admissible in a court of law as long as it observes natural justice,[25] such general power does not authorise it to override privilege.[26]

[19] The application of s 32 to the proceedings of the Medical Practitioners Disciplinary Tribunal is not in contention. Medical disciplinary proceedings are not criminal proceedings.[27] The privilege that applies in the present proceedings to communications to medical practitioners is therefore the privilege described in s 32, rather than the more restricted protection provided by s 33 for criminal proceedings.

Privilege applies to the Tribunal's powers to order disclosure before hearing

[20] The power to order disclosure to parties to the proceedings is part of the Tribunal's investigative powers under cl 7:

> **7 Powers of investigation**
>
> (1) For the purposes of dealing with the matters before it, the Tribunal or any person authorised by it in writing to do so may
>
> > (a) Inspect and examine any papers, documents, records, or things:

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23 See, for eg, *Pallin v Department of Social Welfare*, 275 per Somer J; *M v L,* 751.

24 Medical Practitioners Act, First Schedule cl 6(4).

25 Medical Practitioners Act, First Schedule cls 5(3) and 6(1).

26 *Pallin v Department of Social Welfare*, 268 per Cooke J, 278 per Bisson J.

27 *Re A Medical Practitioner* [1959] NZLR 784 (CA); *Re Jones* HC AK A 469/84 14 May 1985 (Davison CJ); *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139 (where, however, the Full Court thought that medical disciplinary proceedings were sufficiently analogous to criminal proceedings for assistance to be derived from criminal procedure when considering what fairness required).

> (b) Require any person to produce for examination any papers, documents, records, or things in that person's possession or under that person's control, and to allow copies of or extracts from any such papers, documents, or records to be made:
>
> (c) Require any person to furnish, in a form approved by or acceptable to the Tribunal, any information or particulars that may be required by it, and any copies or extracts from any such papers, documents, or records.
>
> (2) The Tribunal may, if it thinks fit, require that any written information or particulars or any copies or extracts furnished under this clause shall be verified by statutory declaration or otherwise as the Tribunal may require.
>
> (3) For the purposes of its proceedings, the Tribunal may of its own motion, or on the application of any party to the proceedings, order that any information or particulars, or a copy of the whole or any part of any paper, document, or record, furnished or produced to it be supplied to any person appearing before the Tribunal, and in the order impose such terms and conditions as it thinks fit in respect of such supply and of the use that is to be made of the information, particulars, or copy.

The power to order disclosure to a party under cl 7(3) is derivative upon the power to require production to the Tribunal itself under cl 7(1). It is material produced to the Tribunal which it may order to be supplied to a party "for the purposes of its proceedings".

[21] In *B v Auckland District Law Society*,[28] the Privy Council held that common law legal professional privilege could be invoked in respect of the pre-hearing exercise of a statutory power to require production under s 126(1) of the Law Practitioners Act 1982, a power comparable with that in cl 7(3). Privilege could be claimed both at the hearing and in the investigation which preceded it.

[22] On the basis of the approach applied in *B v Auckland District Law Society*, we think it clear that the statutory privilege in s 32 equally prevents disclosure under cl 7. Clause 11(1) of the First Schedule however puts the matter beyond argument, as the Court of Appeal thought. It treats anyone subject to the compulsory pre-hearing disclosure powers of the Tribunal as if a witness in a court of law for the purpose of a claim of privilege. Clause 11(1) provides:

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[28] [2004] 1 NZLR 326.

> **11 Privileges and immunities**
>
> (1) Every person shall have the same privileges in relation to the giving of information to the Tribunal, the answering of questions put by the Tribunal, and the production of papers, documents, records, and things to the Tribunal as witnesses have in courts of law.
>
> (2) Witnesses and counsel appearing before the Tribunal shall have the same privileges and immunities as witnesses and counsel have in proceedings in a District Court.

[23] Clause 11(2) is a reference to the immunities of witnesses and counsel at hearing. This provision is equivalent to that contained in s 127 of the Law Practitioners Act, of which the Privy Council said:[29]

> A question immediately arises: what immunities and privileges are enjoyed by witnesses *qua* witnesses and counsel *qua* counsel in proceedings in a court of law which they would not enjoy in proceedings before a tribunal? The answer is: absolute privilege in defamation and immunity from suit in respect of anything they may say in the course of the proceedings. Legal professional privilege, on the other hand, is not confined to witnesses and counsel and is not conferred on them *as such*; and even in the absence of statutory provision to that effect it is available in every kind of proceedings whether before a tribunal or a court of law.

In contrast, cl 11(1) is not confined to "witnesses and counsel". It applies to "every person" providing information to the Tribunal. All making such disclosure, whether before the hearing under the compulsion of cl 7 or at the hearing in giving evidence under the compulsion provided by cl 8,[30] have "the same privileges" "as witnesses have in courts of law".

[24] In the present case, the Court of Appeal accepted that s 32 applied to interlocutory disclosure under cl 7 of the First Schedule and counsel have been content to proceed on the same basis.[31] But the Court of Appeal expressed the view that the discretionary power to excuse production contained in s 35 could only be invoked at the hearing. Although that position is consistent with the approach taken in *M v L*,[32] it is contrary to the view expressed by a differently constituted Court of

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29 At [63] (emphasis in original).

30 A witness summons procedure under which production of papers and records can be compelled at hearing.

31 This is consistent with Victorian authorities in which the equivalent section, s 28(2) of the Evidence Act 1958, has been held to apply to interlocutory disclosure: *Hare v Riley & Anor* [1974] VR 577, 581 (Sup. Ct. Vic.) followed in *Elbourne v Troon Pty Ltd* [1978] VR 171, 176 (Sup. Ct. Vic.).

32 At 759.

Appeal in *European Pacific Banking Corporation v TVNZ*[33] where the Court considered that s 35 could be applied to protect breach of confidences both at the interlocutory stage of proceedings and at trial. While it is not yet clear that the application of s 35 will have to be considered by the Tribunal in the present case, it is necessary to indicate disagreement with the view taken by the Court of Appeal in the present case that s 35 cannot apply to pre-hearing disclosure.

[25] The Court of Appeal's view is inconsistent with that taken by the Torts and General Law Reform Committee in its 1978 report, which led to the enactment of Part 3. The Committee made it clear that the right not to give evidence or produce documents in court included the right to resist pre-trial discovery. It described "evidentiary privilege" in these terms:[34]

> Evidentiary privilege is a legal right that a witness should not give certain evidence in court, even though the evidence is relevant to the issues before the court, and is otherwise admissible. Privilege also enables a party or witness to refuse to produce relevant documents or other evidence, and enables a party to refuse in pre-trial procedures to produce certain documents for inspection by the other party, or answer questions submitted to him.

[26] In 1978, third party pre-trial discovery was largely unknown, except through the device of summoning a witness to a notional trial date.[35] It was therefore not surprising that the report referred to pre-trial discovery as applying only to the parties. There is no principled reason however why privilege should not be available to all who can now be compelled to make disclosure pre-trial. In general, the law of privilege establishes substantive rights which may be invoked at any stage of proceedings, including to resist discovery or investigation, as is illustrated in the case of legal professional privilege in issue in *B v Auckland District Law Society*.[36] Although Part 3 is headed "Privilege of witnesses", it cannot have been intended that the general approach be supplanted in the case of the statutory privileges established. The privileges described in Part 3 apply "in any proceeding". They are not in their terms confined to the substantive hearing. Moreover, the power of courts to compel disclosure is backed up by the ability to obtain verification and authentication in

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33 [1994] 3 NZLR 43, 48. The Court in *M v L* considered at 759-760 that the view expressed in *European Pacific Banking Corporation v TVNZ* was obiter and preferred the contrary view.

34 *Professional Privilege in the Law of Evidence* (1978) 2-3.

35 See Jolowicz "Discovery Against Third Parties or Evidence Before Trial?" (1995) CLJ 263.

36 Discussed above at [21].

respect of which it would be artificial to say that the person subject to compulsion is not properly regarded as a witness in the proceedings. In the case of cl 7, the power to compel disclosure to a party is consequential upon the production of the information to the Tribunal. The person making such production to the Tribunal may properly be seen as a witness for the purposes of Part 3.

[27] Privilege is invoked "in any proceeding" whether it is raised at the substantive hearing or at an interlocutory stage. Any other interpretation would leave an unaccountable gap, inconsistent with the policy of Part 3 in the protection of confidential relationships. Disclosure pre-trial is as destructive of the confidence as is production in court. We prefer the approach in *European Pacific Banking Corporation v TVNZ* and take the view that the privileges and discretion provided by Part 3 apply to compulsory disclosure at any stage of the proceedings.

Does s 32 protect protected communications from disclosure only by the medical practitioner to whom they are made?

[28] Section 32 prohibits a medical practitioner from disclosing any protected communication, except with the consent of the patient. The statutory prohibition on disclosure creates an immunity for the medical practitioner, subject to the consent of the patient. But the requirement of the consent of the patient indicates that this immunity is a privilege of the patient, as the Court of Appeal held in the present case and as was earlier held in *Pallin v Department of Social Welfare*[37] and *M v L.*[38] To this extent, we agree with what was said in *M v L.* Similar views have been expressed in Victoria, one of the few jurisdictions with a similar statutory privilege.[39]

[29] There is High Court authority for the view that s 32 does not prevent disclosure of protected communications being compelled from someone other than the medical practitioner to whom it was made. In *Jones v Medical Practitioners*

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37 At 268 per Cooke J.
38 At 767.
39 Evidence Act 1958 (Vic), s 28(2). See *Pacyna v Grima* [1963] VR 42, 424-426 (Sup. Ct. Vic.) per Sholl J.

Disciplinary Committee,[40] Davison CJ considered that records of protected communications were privileged only in the hands of the medical practitioner. Anyone else could be compelled to produce them, even if the records had been improperly obtained.

[30] We are unable to agree with the approach in *Jones*. It is inconsistent with the protection of privilege in equity, which does not end when a privileged communication comes into the possession of a third party. It does not accord with the reasoning of the Court of Appeal in *Frucor Beverages Ltd v Rio Beverages Ltd*[41] and such narrow interpretation of the s 32 protection would substantially undermine the statutory purpose in protection of communications to medical practitioners.

[31] Use of privileged information in the hands of a third party will be restrained by equity in aid of privilege, unless the privilege is waived. That is how Nourse LJ in *Goddard v National Building Society*[42] summarised the effect of the authorities, in a passage approved by the Privy Council in *B v Auckland District Law Society.*[43] It is consistent with that approach that privilege continues until it is waived even though the material has come into the hands of a third party.

[32] A narrow construction of a similar provision to s 32 was rejected by the Court of Appeal in *Frucor Beverages Ltd v Rio Beverages Ltd*, in application of the privilege for communications between patent attorneys and their clients under s 34. Like protected communications under Part 3 to ministers and to medical practitioners, s 34(1) is expressed as a prohibition on the person confided in from disclosing confidences. The majority accepted that the statutory prohibition on disclosure by the patent attorney did not exhaust the privilege provided by the section. The requirement of client consent made it clear that the section provides a privilege for the client, as *Pallin v Department of Social Welfare* and *M v L* had considered to be the case. In *Frucor*, the majority judgment of Thomas and Blanchard JJ rejected the submission that s 34 protected disclosure by the patent

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40 HC AK A 469/84 27 February 1985.
41 [2001] 2 NZLR 604.
42 [1987] 1 QB 670, 685.
43 At [71].

attorney only, not the client. Although nothing in the express terms of the sections covered disclosure by the person making the confidential communication (in the case of *Frucor*, the client of the patent attorney), Thomas and Blanchard JJ considered that reading the section strictly would deprive the statutory privilege of effect and would render it, in practice, "almost meaningless". McGrath J, dissenting, was of the view that the statutory privilege in its terms was a narrow one which prohibited disclosure only by the person confided in and provided no shield from disclosure to anyone else.

[33] *Frucor* did not purport to deal with the other statutory privileges in Part 3 and Thomas and Blanchard JJ grounded their reasoning on the legislative history of the protection for communications between patent attorneys and clients. But the conclusion that interpreting s 34(1) to protect disclosure only from the attorney would make the privilege almost meaningless, applies in our view equally to the other privileges provided for in Part 3 which prohibit disclosure by the person confided in.[44] Although *Frucor* was concerned with whether communications are protected if in the hands of the client, the reasoning on the interpretation of s 34 is equally applicable wherever disclosure of privileged communications is sought to be compelled from someone other than the person prohibited from making disclosure under Part 3.

[34] Where medical records contain protected communications, disclosure of the records is disclosure of what the medical practitioner says was communicated by the patient. Whatever the source, disclosure of such records in substance constitutes disclosure by the practitioner. It effects a breach of the very confidence s 32 is designed to protect. To construe the section narrowly, as providing only a prohibition on disclosure by the medical practitioner, would effectively nullify its purpose. In *Re St Helens Hospital*,[45] Cooper J held that the privilege under s 8 of the Evidence Act 1908[46] for the protected communication was not lost where it had been recorded in a hospital casebook by a matron to whom the medical practitioner had related the communication. The hospital could not be compelled to disclose the

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44 Sections 31, 32, 33, and 34 are in the same form.
45 (1913) 32 NZLR 682 (SC).
46 The predecessor to s 32.

communication. It remained the communication of the patient to the doctor and could not be divulged without the patient's consent. We think that approach was right. We too are of the view that until the patient consents to disclosure, the communication remains a protected communication to the medical practitioner. The privilege applies even if the protected communication been passed to someone else, such as the matron in *St Helens* or the Complaints Assessment Committee here.

[35] The privilege applies equally to a record of the communication which has come into the hands of the patient. On this point we are unable to agree with views expressed in *M v L.* There, the defendant in proceedings for exemplary damages for sexual abuse sought inspection of counselling notes from the plaintiff patient. The notes had been listed for the purposes of discovery, but privilege was claimed in respect of them. Some of the notes were of confidential communications by the plaintiff to registered medical practitioners who were treating her. The Court of Appeal held that s 32 had no direct application since the discovery was sought from the plaintiff rather than from the medical practitioners. It held however that s 32 should be applied by analogy to the discretion to order production under Rule 307 of the High Court Rules, to prevent the privilege under s 32 (which the Court considered belonged both to the doctor and the patient) being circumvented. We think *M v L* was wrong in the conclusion that s 32 does not apply directly to records in the hands of the patient.[47] In our view, the records remain protected communications to the medical practitioner which can be disclosed only with the consent of the patient. The requirement of consent would be illusory if a patient could be compelled to make disclosure of the records.

[36] Nor do we think that the matter is any different if disclosure of what was communicated is sought not through records of the communication made by or on behalf of the medical practitioner, but directly from the patient. The requirement of the consent of the person confiding would be rendered practically ineffective if consent could be compelled by seeking direct disclosure of what was communicated. That is the view expressed of the Victorian legislation by McNicol,[48] in response to a suggestion by the Australian Law Reform Commission that the failure of the

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47 And, for reasons discussed at [46], we also doubt the application of s 35 to overcome the limits of s 32.

48 McNicol *Law of Privilege* (1992) 361-362.

legislation to address the position of the patient as witness made it "theoretically possible" for the patient to be compelled to disclose a communication the doctor could not disclose.[49] We consider the requirement of consent cannot be avoided in that manner. Sections 31, 32, 33 and 34 are all clearly directed to protecting specified communications. There is no sensible purpose in giving a protection which is confined when, as in legal privilege, the whole rationale is to enable persons in these carefully constrained respects to make the communication knowing it will be protected. Disclosure being expressed as under the control of the maker, absent the required consent it is implicit that protection must be given to the communication. As we discuss later, these sections are to be contrasted with s 35 communications, which are not subject to the control of the maker. Unless the patient consents, s 32 prohibits disclosure of a protected communication from any source.

[37] The present appeal is concerned with the records made by the patient's medical practitioners of the confidences made to them. For the reasons given, they remain privileged unless the patient consents to disclosure in the proceedings, even though the records may be in the hands of a third party. Equally, in our view, the patient cannot be compelled to disclose medical records of protected communication if the records have come into her hands. Nor does s 32 allow the patient to be compelled to disclose directly what she communicated.

Consent

[38] Although we agree with the Court of Appeal that the privilege is the privilege of the patient, we are unable to agree with the views expressed in the judgments that consent must be "informed" and the suggestion that it be "explicit".[50] The requirement of express consent was dropped from the statutory privilege in 1895. The privilege for the medical practitioner under s 32 can be waived by the patient either by express consent to disclosure or by conduct from which such consent can be inferred because it is inconsistent with maintenance of the privilege in the

[49] Australian Law Reform Commission *Evidence (Interim)* (ALRC No 26 1985) vol 1 at [456].

[50] At [77].

proceedings. The statute does not make it necessary that consent be "informed". The notion of "informed consent", which may suggest reference to principles developed in relation to consent to treatment,[51] is not helpful in this context. The proper inquiry is whether the patient has consented expressly or by implication to disclosure.[52] We see no practical distinction between the concept of consent under s 32 and that of waiver as it applies to the law of privilege generally.

[39] Bringing a complaint about the conduct of a medical practitioner of itself could not be a waiver of the s 32 privilege. It is not inconsistent with maintenance of confidences between patient and medical practitioner for the purposes of treatment, which the privilege protects. An implied consent under s 32 must be to disclosure in the proceedings. The inquiry is not, as the Court of Appeal held, whether there was consent to disclosure to a certain person, such as C, but whether there was consent to disclosure in or for the purposes of the particular proceedings. The fact that the patient may have made the information relevant to the proceedings would not necessarily be sufficient to permit an inference of consent to disclosure. It depends upon the context. It is the nature of privilege that it permits relevant evidence to be withheld. Since the privilege exists for the purposes of proceedings, the relevant consent must be a consent to the disclosure of the confidences in the proceedings. That was the view taken in Victoria in *Carusi v Housing Commission*.[53] It gains support from the view expressed by the Privy Council in *B v Auckland District Law Society* that a partial or limited waiver of privilege for a particular purpose does not result in loss of privilege.[54]

[40] In some cases, the refusal of a complainant patient to give consent may make it unfair to proceed without reference to the confidential material. It may be a ground for stay of the proceedings.

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[51] On the topic of consent to treatment, see Manning "Informed Consent to Medical Treatment: The Common Law and New Zealand's Code of Patients' Rights" [2004] 12 Medical Law Review 181.

[52] This approach is consistent with the Victorian authority of *X v Y* [1954] VLR 708 (Sup. Ct. Vic.).

[53] [1973] VR 215 (Sup. Ct. Vic.).

[54] At [68].

[41] The Court was asked to determine that there had been an implied consent by the complainant to disclosure. We are unable to make such a determination. The relevant facts have not at any stage been properly investigated. For example, the circumstances in which the records of the protected communications were sent to the Complaints Assessment Committee are not known. We were told at the hearing that a completed consent form was sent, apparently after the records had been provided to the Committee, to the medical provider who supplied the records. But the terms of the consent were not before us. Nor is it known whether any terms and conditions were imposed on release of the information. The question of consent must therefore be sent back for consideration by the Tribunal.

Section 35

[42] If private or confidential communications are not covered by the scope of s 32, the Tribunal may also need to consider the application of s 35. It provides a statutory discretion to excuse disclosure which is not confined to confidences between medical practitioners and patients. The section was enacted following a recommendation of the Torts and General Law Reform Committee in its 1978 report that the common law discretion of the court to excuse witnesses from breaching confidences where they are obtained in the course of a relationship of confidence should be given statutory force. The availability of a discretion to excuse was one of the reasons given by the Committee for not extending s 32 to other categories of confidential relationships in which confidences are imparted. A statutory discretion to excuse disclosure was, the Committee considered, "a satisfactory and certainly more desirable alternative to the granting of privilege to a wider number of named groups".[55]

[43] Section 35 applies to tribunals and other statutory authorities with power to compel the attendance of witnesses, and any person acting judicially. It permits the court or tribunal, either before commencement of the hearing of a proceeding or at

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[55] *Professional Privilege in the Law of Evidence* (1978) 75-77.

the hearing,[56] to excuse any witness or party "from answering any question or producing any document that he would otherwise be compellable to answer or produce" on the basis of confidence arising out of a special relationship of confidence.[57] In considering whether to exercise its discretion, the court or tribunal is directed by s 35(2) to consider:

> … whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:
>
> (a) the likely significance of the evidence to the resolution of the issues to be decided in the proceeding:
>
> (b) the nature of the confidence and of the special relationship between the confidant and the witness:
>
> (c) the likely effect of the disclosure on the confidant or any other person.

[44] The s 35 excuse may be claimed in respect of confidences made to counsellors and in the course of other relationships not covered by s 32. A claim to excuse production of information under s 35 might also conceivably be made out by the Complaints Assessment Committee in respect of information not covered by s 32 which is held by it, depending on the circumstances in which it came into possession of the information. This point has not been addressed in argument. It would be necessary for the Tribunal to consider whether the relationship between a patient and the Complaints Assessment Committee in the investigation of a complaint is one of confidence in which there is public interest in the preservation of confidentiality. Analogies with other investigative and prosecuting bodies might have to be considered. Whether the disclosure of the information or document would constitute a breach by the person claiming the excuse would also need to be addressed.

[45] The s 35 discretionary protection cannot however be claimed by the patient who makes the communication. The terms of s 35(1) do not allow it. They protect witnesses from breaching confidences communicated to them. Because any protection is discretionary and must be weighed against the public interest in

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[56] Section 35(3).

[57] Section 35(1).

disclosure, there is no right to privilege as under s 32. The "confidant" under s 35 is not subject to control in the matter of disclosure by the person who has confided in him, as the medical practitioner is under s 32. In those circumstances, s 35 cannot be properly described as a privilege of the person making the communication.

[46] Nor does s 35 extend the privilege provided for a patient by s 32. The legislative balance achieved by s 32 would be disturbed if s 35 were used to extend by analogy the s 32 exception to the general rule that all relevant and admissible evidence can be compelled in court proceedings. Similarly, it is not appropriate to use the discretion under cl 7 to extend the protection provided by s 32, in the manner in which the Court of Appeal in *M v L* suggested the discretion under Rule 307 of the High Court Rules could be used.[58]

[47] These views are consistent with *Frucor Beverages Ltd v Rio Beverages Ltd,* in which *M v L* does not appear to have been cited. In *Frucor,* the majority in the Court of Appeal considered that neither s 35 (relied upon by counsel) nor Rule 307 of the High Court Rules (relied upon by the High Court judge) permitted extension by analogy of the privilege in s 34 (the patent attorney equivalent of s 32):[59]

> While acknowledging that the power for the Court to order that a document is to be produced for inspection under R 307 is discretionary, we do not consider that it is a satisfactory vehicle for a determination that, although not privileged, production will not be directed, essentially on the ground that the client's communications should be privileged from production. Where documents are privileged the Court has no power to order their production. Under R 311, where a claim is made that the document for which production is sought is privileged, the Court may inspect the document for the purpose of deciding the validity of the claim. Consequently, if the document is not privileged, the claim would be without validity. It is at least arguable that it would be a misuse of the discretion under R 307 to then refuse to order production on the basis that it should be privileged. The question of privilege is expressly covered. Other grounds for claiming immunity from production might exist, of course, but they are unlikely to assist the client seeking to rely on the confidential nature of his or her relationship with their patent attorney.
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> Nor can we accept that s 35 applies. Section 35(1) provides that in any proceeding the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document on the ground that to supply the information or produce the document "would be a breach by the witness of a confidence" that, having regard to the special

[58] At 765.
[59] At [24]-[25].

> relationship existing between him and the person from whom he obtained the information or document, the witness "should not be compelled to breach". The key words are "would be a breach by the witness of a confidence …" which the witness "should not be compelled to breach". Hence, the section applies to those persons who receive confidences. It cannot apply to clients of patent attorneys who impart or receive confidential information to or from their attorney. The "confidence" is theirs and to give evidence of it could not be a "breach" of that confidence.

[48] On the basis of the legislative history, Thomas and Blanchard JJ were of the view that s 35 was intended "to meet the case of people, such as accountants, bankers, psychologists, counsellors, social workers, teachers, journalists, and others without going so far as to confer a complete statutory privilege".[60]

[49] The application of s 35 to confidences outside the scope of s 32 depends upon the relationship between the confidant and the person confiding. It can only be claimed by the person confided in. The narrow statutory privilege for communications in confidential relationships under Part 3 of the Evidence Amendment (No 2) Act 1980 cannot be extended judicially. The statute is an exception to the general rule, protective of the interests of justice.

Conclusion

[50] The matter of disclosure must be remitted for the consideration of the Medical Practitioners Disciplinary Tribunal. It is not at all clear how much of the material in issue could properly be regarded as protected communications by the patient within the meaning of s 32. It is likely that disclosure of many of the "medical records" cannot properly be resisted under s 32 if relevant to matters in issue. That will be a matter for the Tribunal to assess. The patient cannot be compelled to consent to disclosure of communications protected under s 32. Such communications continue to be privileged until she consents to their disclosure in the proceedings either expressly or impliedly. Her consent cannot be implied simply from the making of the complaint or her acknowledgement (for example, through the supply of the information to the Committee) of the relevance of any of the communications. The discretion to excuse under s 35, if it applies, cannot be used to

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[60] At [26].

extend the privilege under s 32. Nor can the discretion entailed in the power to order disclosure under cl 7.

[51] We are of the view that the appeal must be allowed. While the Court of Appeal's order setting aside the orders made in the High Court should be affirmed, the directions it gave as to consent must be set aside. C's application for disclosure should be referred back to the Medical Practitioners Disciplinary Tribunal for re-hearing in the light of the directions given in this Court. The appellant is entitled to costs in this Court, which we would set at $10,000 to reflect his substantial success. It is appropriate that the order as to costs in the Court of Appeal stand, however, as the Complaints Assessment Committee was successful there in its contention as to the application of s 32, and that determination by the Court of Appeal was not challenged before us.

McGRATH J

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Introduction

[52] This appeal raises issues concerning privilege arising from the investigation of a complaint of improper conduct made against the appellant, who is a medical practitioner, by a woman who had been one of his patients. In 2001 the complainant alleged that during 1985, when she was aged 16 years, the practitioner had on one occasion given her liquor then gone on to have consensual sexual intercourse with

her, on another again had sexual intercourse with her and on a third provided her with illicit drugs. Following an investigation of the complaint, the Complaints Assessment Committee, which is the respondent in this appeal, charged the practitioner with disgraceful conduct in a professional respect under the Medical Practitioners Act 1995. The charges will be heard by the Medical Practitioners Disciplinary Tribunal.

[53] The principal issue in the appeal to this Court is whether the Complaints Assessment Committee or the complainant can claim a privilege that would preclude disclosure to the practitioner, or prevent him from producing at the hearing, certain medical records of professional attendances by her on other health professionals subsequent to the alleged 1985 events. There are two categories of records involved. The first comprises medical records which are already held by the Complaints Assessment Committee, having been submitted to it as part of the original complaint. The second category of medical records are still in the possession of medical practitioners or psychologists consulted by the complainant, or the institutions for which they worked.

Background

[54] In May 2001 the complainant made her initial complaint to the Health and Disability Commissioner. She attached a chronology in which she referred to attendances on other health professionals since the events the subject of her complaint. Because these alleged events had occurred prior to 1 October 1994, the matter was taken up by the Complaints Assessment Committee, to be addressed under the 1995 Act.[61] On 2 August 2001 the complainant confirmed that she wanted her complaint to proceed. On 1 October 2002 the Complaints Assessment Committee brought charges under s 93 of the 1995 Act before the Tribunal.

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[61] The current transitional provision appears in s 216 of the Health Practitioners Competence Assurance Act 2003.

[55] The practitioner is charged with disgraceful conduct in a professional respect under the 1995 Act. The Complaints Assessment Committee alleges that the practitioner had sexual intercourse with the complainant at his home on two occasions, during March and April 1985, at a time when she was one of his patients. She was then aged 16 years, and on each occasion had been baby-sitting earlier during the evening at the practitioner's home. The complainant also told the Complaints Assessment Committee that before sexual activity took place she had consumed wine and on one of the two occasions cannabis, which had been given to her by the practitioner. She also alleged that on another occasion she had inhaled laughing gas and cocaine which he made available to her.

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[56] In June 1985 the complainant moved away from her home town to attend journalism school in another centre. While studying there she visited a counsellor with whom, she says, she discussed the "affair" that she had with the practitioner. She says that the counsellor suggested that she report the practitioner to the authorities but the complainant did not wish to do so. She also says she had a short course of anti-depressants on prescription at this time.

[57] At the end of 1985 the complainant moved to another city for work reasons, where, she says, she saw other counsellors for help with depression. In July 1988 she was back in her home town for a period, when she had consultations with a different general practitioner, who referred her to a psychiatric hospital for treatment as an outpatient. She took what she described as a heavy dosage of anti-depressants for around six to eight months at this time.

[58] Between 1989 and 2000 the complainant travelled overseas, where she was married. She made occasional visits back to New Zealand and returned permanently with her husband in September 2000. She subsequently made contact with the practitioner and email messages passed between them, some of which apparently remain available and, the Complaints Assessment Committee says, have evidential significance. Some telephone calls followed. The complainant says that she then broke off all contact with the practitioner in April 2001. She made her complaint on 2 May 2001.

[59] The complainant says that in January 2002 she sought psychological help to deal with stress caused by the complaints process. The complainant also states that she is getting professional help to deal with her realisation that the relationship she had with the practitioner in 1985 was wrong.

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[60] The origin of the appeal to this Court lies in orders made by the chairman of the Medical Practitioners Disciplinary Tribunal on 18 February 2003 directing the Complaints Assessment Committee to provide a list of documents in its possession or over which it has power and that are relevant to the charges, including medical notes relating to the treatment of the complainant for depression during the period since the alleged events. The Tribunal also directed the complainant to disclose any medical records that would be relevant in assessing whether her recollection of events during March and April 1985 was impaired.

[61] The Complaints Assessment Committee appealed first to the District Court, which directed the Tribunal to reconsider the chairman's decision.[62] It next appealed to the High Court, which reversed the District Court's decision and ordered that the Complaints Assessment Committee disclose to the practitioner records relating to the complainant's psychiatric and psychological history since the date of the alleged offending.[63] The Complaints Assessment Committee then further appealed on questions of law, with the leave of the High Court, to the Court of Appeal, which allowed the appeal and referred back the practitioner's application for disclosure to the Tribunal, for fresh consideration, giving directions as to how it should be addressed.[64]

[62] The practitioner then sought and obtained leave from this Court to appeal against the Court of Appeal's judgment.[65] Leave to appeal was given on two points. The first is whether the Court of Appeal took the right approach to the application of s 32 of the Evidence Amendment Act (No 2) 1980. Section 32 prohibits disclosure

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62 *A Complaints Assessment Committee v The Medical Practitioners Disciplinary Tribunal and Anor* DC CHCH CIV751/03 4 August 2003 (Judge Ryan).

63 *A Complaints Assessment Committee v The Medical Practitioners Disciplinary Tribunal and Anor* HC CHCH CIV 2003 751 03 25 March 2004 (Chisholm J).

64 *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 447 (CA).

65 *Dr C v A Complaints Assessment Committee* [2005] NZSC 56.

in civil proceedings by medical practitioners and clinical psychologists of protected communications made to them without their patients' consent. If the Court of Appeal did take the right approach a second question arises which is whether the complainant has consented, in terms of s 32, to disclosure of the records of her communications with the other health professionals concerned.

[63] Although the appeal by leave to this Court is the fourth appeal against a procedural direction of a statutory tribunal, the points that it raises concerning medical privilege are important. In essence they concern whether a person who lodged a complaint with a body responsible for investigating complaints and initiating medical disciplinary proceedings, and who caused that body to be provided with copies of certain records of medical practitioners and counsellors to support her complaint, can subsequently claim the statutory privilege in respect of those and other like communications, thereby preventing the records from being made available to the medical practitioner for use in his defence.

Tribunal's directions

[64] In March 2002, prior to its decision to charge the practitioner, the Complaints Assessment Committee had received from a medical practice in the complainant's home town copies of records and correspondence concerning the consultations and a referral of the complainant to a psychiatric hospital in July 1988. At the hearing of the appeal, the parties seemed to agree that this material was provided with the complainant's consent, although no consent in a written form was produced to the Court. On 4 June 2002 the complainant herself sent to the chairman of the Complaints Assessment Committee copies of psychiatric hospital records of attendances on her during 1988 relating to her depression.

[65] Counsel acting for the practitioner wrote to the Complaints Assessment Committee on 21 October 2002 seeking full disclosure of documents in its possession or power concerning the charges. The request was made under both the Official Information Act 1982 and the general obligation of prosecutors to provide full and complete disclosure. Counsel specifically sought access to the complainant's medical files, including any records relating to consultations with any

medical practitioners concerning the allegations the subject of the charges. He made particular reference to any records relating to counselling, psychological or psychiatric assistance, or other advice she may have received, and to any treatment of the complainant for illicit drug or substance abuse.

[66] On 17 December 2002 counsel for the Complaints Assessment Committee responded, sending briefs of evidence to be given by witnesses including the complainant and her husband. The briefs do not attach or refer to the complainant's medical records. The letter enclosed copies of those portions of the file which counsel considered to be discoverable. These did not, however, include any medical notes concerning the complainant as, counsel said, he did not have the complainant's authority to disclose them. He indicated that the medical notes held by the Complaints Assessment Committee related to a period during 1988. He also observed that substantial information concerning the complainant's counselling and medical treatment had already been provided. If more were required, counsel for the practitioner should make a specific request giving reasons for seeking the information concerned.

[67] The matter was raised at a directions conference with the Tribunal's chairman on 23 December 2002 when counsel for the Complaints Assessment Committee agreed that it would provide copies of the medical records which it held to counsel for the practitioner, so that he could assess their relevance, subject to counsel's undertaking that they would not be shown to the practitioner. The records concerned were then given to the practitioner's counsel.

[68] The matter was raised again at a further directions conference on 18 February 2003 when counsel for the practitioner made plain that he sought access to all of the complainant's medical records relevant to her present psychiatric or psychological situation, and to all medical or counselling records which refer to matters that were the subject of charges. After hearing argument the chairman of the Tribunal ruled that his counsel could now disclose to the practitioner the records which previously had been made available only to his counsel.

[69] The chairman also directed the complainant to disclose any of her medical records which might assist the Tribunal to decide whether her recollection of the crucial events in 1985 was impaired. He said that such an order was necessary to ensure that the Tribunal could evaluate any allegations that her recollection of events was impaired. The chairman also made formal orders for disclosure by the Complaints Assessment Committee of documents in the Committee's possession or power.

Appeals to the District Court and High Court

[70] As indicated, the Complaints Assessment Committee appealed. It is not necessary to discuss the fully considered decision of the District Court in any detail. It directed the Tribunal to reconsider its procedural directions, principally because the chairman of the Tribunal had no jurisdiction to make them on his own.

[71] The matter then came before the High Court on a further appeal by the Complaints Assessment Committee. We confine our discussion of the judgment of the High Court to matters relevant to the questions before this Court.

[72] Chisholm J decided that, by analogy with disclosure obligations of prosecutors in criminal proceedings, as a general rule bodies such as the Complaints Assessment Committee should disclose all relevant information in their possession to those whom they have charged in professional disciplinary proceedings. Where there was good reason not to disclose relevant material it should be clearly stated so that it can be scrutinised. Claims for privilege, in particular, should be expressed in precise terms so that their foundation can be challenged before the Tribunal and, on appeal, the High Court, with inspection of the documents where that was necessary to make a ruling.

[73] In relation to the complainant's medical and counselling records which were already held by the Committee, the Judge decided that by raising her counselling and medical treatment in support of her complaint she had acknowledged the relevance of those records. The relevance might concern either what she had said or what she did not say during consultations concerning the affair she alleged that she had with

the practitioner. Chisholm J held that sufficient was known concerning the records without examining them for the Court to hold that they were relevant and should be disclosed.

[74] The Judge then addressed the issue of privilege under s 32 of the Evidence Amendment (No 2) Act 1980. He held that it did not apply to protect from disclosure obligations a person who had initiated a disciplinary process against a medical practitioner by making a complaint. That was because the Tribunal had an obligation to observe the rules of natural justice which required that it investigate all information that a complainant intended to put before it. As well, by referring to and releasing some of the records in her communications with the Complaints Assessment Committee, the complainant had waived any privilege.

[75] The Judge observed that, to the extent that the Complaints Assessment Committee had not already accessed the records under consideration, the Court expected it to enlist the complainant's co-operation as necessary so that the records could be disclosed.

[76] For these reasons the Judge ordered the Complaints Assessment Committee to disclose records relating to the complainant's counselling, psychiatric and psychological history since the events the subject of charges allegedly took place. He also directed that the records should remain confidential to the practitioner and his counsel.

Appeal to the Court of Appeal

[77] The Complaints Assessment Committee obtained leave from the High Court to appeal to the Court of Appeal on questions of law. The first question addressed whether the complainant had made the counselling and medical records relevant to the matters to be heard by the Tribunal by referring to them when she made her complaint. The complainant had referred to the records concerned in the chronology that she provided to the Complaints Assessment Committee. Other questions in the appeal concerned whether s 32 of the 1980 Act applied to the Tribunal's proceedings at all and, if so, whether the s 32 privilege was overridden by the requirement that

the Tribunal observe natural justice, or could be overridden if circumstances arose which made it unfair to maintain the privilege. Another question concerned whether privilege under s 32 had been waived by the Complaints Assessment Committee's release of the medical records to counsel notwithstanding his undertaking not to disclose the information to his client.

[78] Joint reasons in the Court of Appeal were delivered by Glazebrook and O'Regan JJ. Separate concurring reasons, which elaborated on particular aspects, were delivered by Chambers J.

[79] Glazebrook and O'Regan JJ said that medical disciplinary proceedings were sufficiently analogous to criminal proceedings for the duties of disclosure of prosecutors to provide the Court with assistance in determining the scope of the Complaints Assessment Committee's duty to disclose material relevant to charges before it. These obligations arise from common law duties of prosecutors, and the rights of criminal defendants to access personal information under the Official Information Act 1982. These rights were as outlined in *Commissioner of Police v Ombudsman*.[66]

[80] The joint judgment also noted that the Tribunal had powers to require production and to direct disclosure by a party of papers, documents and records to any person appearing before the Tribunal,[67] indicating that it would expect the disclosure of relevant records to other parties by the Complaints Assessment Committee to be ordered as a matter of course. A witness summons procedure was also available under cl 8 of the First Schedule.

[81] Glazebrook and O'Regan JJ also discussed the relevance of the medical records in this case, that being a question put to the Court in the appeal. It saw medical and counselling records which mentioned the practitioner as being relevant, but medical records which did not mention him could have no more than possible marginal relevance, confined to the extent that they might suggest there had been no complaint at that time. That latter category of records did not have to be disclosed.

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[66] [1988] 1 NZLR 385, 397.
[67] Under cls 7(1) and 7(3) of the First Schedule to the 1995 Act.

As well, the joint judgment doubted that records of consultations concerning the complainant's depression and drugs were of any relevance to the Tribunal's inquiry but it reached no concluded decision on that point.

[82] In addressing s 32 of the 1980 Act, Glazebrook and O'Regan JJ held that it applied to proceedings of the Tribunal, differing on that question from the judgment of the High Court. They saw the Tribunal's proceedings as civil in character so that s 32 rather than s 33 applied. They also noted cl 11 of the First Schedule to the 1995 Act which confers on every person the same privileges as witnesses have in the courts in relation to the production to the Tribunal of documents, papers and records.[68] Neither the Tribunal's ability to receive material of a kind that would be inadmissible as evidence in a court[69], nor its duty to observe natural justice,[70] could, however, override the specific exemption from evidential obligations under s 32.

[83] In discussing the scope of protection of the medical records under s 32, the majority referred to the Court of Appeal's decision in *M v L*,[71] a case concerning an application for orders for discovery by plaintiffs who were claiming damages for alleged sexual abuse, where the defendants were seeking inspection of the plaintiffs' counselling and medical records. The joint judgment concluded that in *M v L* the Court of Appeal had decided that, although s 32 expressed medical privilege as applicable to doctors, by analogy it also applied to the plaintiffs in that case in relation to the medical records in their possession. They said:[72]

> The need for a patient's consent means that the privilege belongs to both the doctor and the patient and the patient cannot be in a worse position simply because it is a discovery and inspection question.

[84] Glazebrook and O'Regan JJ accepted that, in cases involving complaints of inappropriate treatment, the complainant's consent to disclosure of medical records would normally be required before action on the complaint could proceed.[73] They also accepted that there might be cases where fairness would require that a

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68 Clause 11(1) of the First Schedule to the 1995 Act.
69 Clause 6(1) of the First Schedule to the 1995 Act.
70 Clause 5(3) of the First Schedule to the 1995 Act.
71 [1999] 1 NZLR 747.
72 Para [68] of the reasons of Glazebrook and O'Regan JJ.
73 If consent was not forthcoming, the proceeding should be stayed.

complainant should not be permitted to refer to medical records without having consented to their disclosure in Court under s 32. In a situation of that kind the charged medical practitioner could not force the complainant to consent to disclosure of protected communications, although the practitioner might be able to obtain a direction that evidence from any disclosures was to be excluded from the hearing.

[85] In the present case, however, neither the provision of medical records to the practitioner's counsel, nor making medical records available to the Complaints Assessment Committee, amounted to consent to disclosure under s 32. The joint judgment also said that although the complainant was subject to the Complaints Assessment Committee's powers of investigation under cl 7, and also to the witness summons procedure, s 32 would always protect records held by third party medical practitioners, or clinical psychologists, from disclosure without the patient's consent, to the extent that they were protected communications.

[86] Finally, in referring the application for disclosure back to the Tribunal for a fresh decision, the joint judgment directed that the Complaints Assessment Committee could not be ordered to produce documents which were not in its possession or control, and that protected communications to any medical practitioner or clinical psychologist could only be disclosed with the patient's consent.

[87] In a separate judgment Chambers J concurred, emphasising that the Complaints Assessment Committee could not be required to locate or gain access to, or to disclose, documents that were not in its possession or power but were held by third parties. Where the Tribunal considered third parties may have relevant documents it should exercise its powers to require their production, and having obtained and examined them it could decide if there should be disclosure. But where protected communications were involved the Tribunal could not force a complainant to give a consent she did not wish to give to their disclosure to the practitioner facing charges.

Issues in this appeal

[88] The first question in the appeal to this Court is whether the Court of Appeal was right to decide that s 32 of the Act prohibited disclosure by the Complaints Assessment Committee of copies of medical records of the complainant's attendances on doctors and a psychiatrist where they had been provided to the Committee by the complainant, or with her consent, but she did not explicitly consent to disclosure of them to the practitioner.

[89] The second question is whether the Court of Appeal was right to decide that s 32 also protected from disclosure other medical records concerning the complainant, which remained in the exclusive possession of the doctors who made them, but which might be relevant to her credibility. The Tribunal had directed, in effect, that the complainant must co-operate in obtaining such records for the Complaints Assessment Committee and to its disclosure of them, if relevant, to the practitioner.

[90] In this Court the general thrust of the submissions for the practitioner was that the records concerned should not be protected under Part 3 because of their relevance to the serious charges that he faced. The Complaints Assessment Committee disputed the relevance of any of the records and supported the Court of Appeal's decision that they were protected from disclosure under s 32 of the Act.

Tribunal's powers to obtain documents

[91] The powers of the Tribunal to obtain for itself relevant documents and information, and to ensure it is provided to the parties, are given by cl 7 of the First Schedule to the 1995 Act. Similar powers are conferred on the Health Practitioners Disciplinary Tribunal by the generally applicable current legislation.[74]

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[74] Health Practitioners Competence Assurance Act 2003, First Schedule, cl 7.

> **7 Powers Of Investigation**
>
> (1) For the purposes of dealing with the matters before it, the Tribunal or any person authorised by it in writing to do so may—
>
> > (a) Inspect and examine any papers, documents, records, or things:
> >
> > (b) Require any person to produce for examination any papers, documents, records, or things in that person's possession or under that person's control, and to allow copies of or extracts from any such papers, documents, or records to be made:
> >
> > (c) Require any person to furnish, in a form approved by or acceptable to the Tribunal, any information or particulars that may be required by it, and any copies of or extracts from any such papers, documents, or records.
>
> (2) The Tribunal may, if it thinks fit, require that any written information or particulars or any copies or extracts furnished under this clause shall be verified by statutory declaration or otherwise as the Tribunal may require.
>
> (3) For the purposes of its proceedings, the Tribunal may of its own motion, or on the application of any party to the proceedings, order that any information or particulars, or a copy of the whole or any part of any paper, document, or record, furnished or produced to it be supplied to any person appearing before the Tribunal, and in the order impose such terms and conditions as it thinks fit in respect of such supply and of the use that is to be made of the information, particulars, or copy.

[92] As the heading indicates, cl 7 confers investigative powers on the Tribunal. Clause 7(1), in the present context, gives it the power to require persons to produce records for its examination and also to furnish information to the Tribunal. Clause 7(3) empowers the Tribunal to order that copies of such records also be provided to any person appearing before the Tribunal. These powers must be exercised with due regard to the direction in cl 5(3) that the Tribunal "shall observe the rules of natural justice at each hearing".

[93] The powers under cl 7 are facilitated by that under cl 8 which provides a witness summons power. As well, cl 6(1) empowers the Tribunal to:

> receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not it would be admissible in a court of law.

[94] Clause 6 is relevant both to whether and how the Tribunal may receive medical records. Notes taken by medical practitioners or clinical psychologists concerning what is communicated by their patients in the course of consultations will in general record what the patient has relevantly said to the professional person. Where that person does not give direct evidence of what the patient said the records may be hearsay. That raises questions as to their admissibility. Provisions such as cl 6 enable a party to put the medical records before the Tribunal, whether in conjunction with their use in cross-examination by the practitioner's counsel of the complainant, or as evidence of what was or was not said during a consultation. Whether the Tribunal decides to receive any records as evidence, and for what purposes, will turn on the nature of the records, their relevance, other circumstances of the case and of course any other statutory provisions.

[95] Importantly in the present case, cl 11 qualifies the scope of the cl 7 powers in relation to privileged material.[75] It states:

> **11 Privileges And Immunities**
>
> (1) Every person shall have the same privileges in relation to the giving of information to the Tribunal, the answering of questions put by the Tribunal, and the production of papers, documents, records, and things to the Tribunal as witnesses have in courts of law.
>
> (2) Witnesses and counsel appearing before the Tribunal shall have the same privileges and immunities as witnesses and counsel have in proceedings in a District Court.

Medical privilege

[96] Privilege attaches in situations where the public interest is seen to require the preservation of confidence to an extent that should invariably override the need of a Court to have access to all relevant information in order to do justice. The privilege gives protection on an absolute basis against compulsory disclosure to a class of information in circumstances covered by the privilege. In this respect a privilege differs from a discretionary judicial power to excuse a witness from having to answer questions in the course of giving evidence or to produce documents at any

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[75] As Cooke J put it in *Pallin v Department of Social Welfare* [1983] NZLR 266, 268 (CA) "Section 32 … imposes a duty on the doctor … [which] cannot be overcome by a mere power to admit evidence."

stage of the proceedings. Under that process decisions are taken after balancing the conflicting values of protection of the confidences and administration of justice, in the particular case. However, there is no principle by which documents are protected from discovery by reason of confidentiality alone.[76]

[97] The privilege that is said in this case to prevent exercise of the Tribunal's powers in respect of medical records is "medical privilege". I shall refer to it by that term, while recognising that since 1989 it has extended to clinical psychologists.[77] Medical privilege has its origins in the longstanding ethical obligation of medical practitioners to maintain confidentiality in what passes between them and their patients in the course of consultation and treatment.[78] Privilege is rather an evidentiary rule by which the holder has a legal right to have material excluded from evidence in judicial proceedings in the circumstances covered by the privilege.[79]

[98] A privilege may be created by statute or, as in the case of legal professional privilege, the common law. However, the common law has never recognised a privilege arising out of the desirability of maintaining the confidentiality of what is learned by a doctor during professional relationships with patients. Ever since 1776, when Lord Mansfield CJ ruled in the *Duchess of Kingston's Trial* that a physician who was a witness in a bigamy trial had no privilege to withhold from disclosure that he had learned during a professional attendance on the defendant, a married woman, that she had entered into a previous marriage, the common law has taken a consistent position in rejecting arguments for recognition of a common law medical privilege.[80]

[99] Since 1885 there has been a statutory medical privilege in New Zealand, which initially extended to both criminal and civil proceedings but which, after 1895,

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[76] *Science Research Council v Nassé* [1980] AC 1028, 1065 (HL) per Lord Wilberforce.

[77] Under s 4(1) of the Evidence Amendment Act 1989.

[78] The ethical obligation of patient confidentiality forms part of the Hippocratic Oath. See the discussions in McNicol *Law of Privilege* (1992) at 342 and Vaver *Medical Privilege in New Zealand* (1969) 1 AUL Rev 63.

[79] *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, 520 (HC) Jeffries J.

[80] *Duchess of Kingston's Trial* (1776) 20 State Trials, 355; *Wilson v Rastall* (1792) 4 TR 753, 760 per Buller J; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 245 per Lord Edmund-Davies; *Cross on Evidence* (NZ Looseleaf edition) at [10.35].

for many years was confined to civil proceedings.[81] The 1895 provision was repeated without material alteration in the Evidence Acts of 1905 and 1908. As indicated, in 1980, new provisions for medical privilege covering both civil and criminal proceedings were enacted in different forms.

[100] Part 3 of the 1980 Act is headed "*Privilege of Witnesses*". Its provisions give the protection of privilege in legal proceedings to persons to whom communications have been made in the course of specified relationships which regularly involve communication of confidential information. Instances covered in Part 3 are communications made during marriage, communications to doctors and clinical psychologists, communications by and to patent attorneys, and confessions to ministers of religion.[82]

[101] There are two provisions in Part 3 which confer medical privilege. Section 32 prohibits disclosure in any civil proceeding of communications by a patient to a medical practitioner, or a clinical psychologist, which the patient believes to be necessary to enable examination or treatment. Section 33 confers medical privilege in criminal proceedings, but the privilege is confined to communications made by a patient who is a defendant in the proceeding. "Proceeding" is inclusively defined in s 2 of the Evidence Act 1908 in terms of a matter to be determined in a Court. As indicated, medical privilege directly applies to the Tribunal's proceeding under cl 11 of the First Schedule to the 1995 Act.

[102] Although in a number of respects the work of the Tribunal resembles the criminal process of a Court, it has long been established that medical disciplinary proceedings are not criminal in nature. Their purpose is not to punish misbehaviour by medical practitioners or other health professionals but to ensure that appropriate standards of conduct in the medical profession are met.[83] Accordingly it is the medical privilege that applies in civil proceedings under s 32, rather than the more

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81 Cf s 7 Evidence Further Amendment Act 1885 and s 9 Evidence Further Amendment Act 1895 respectively.
82 Each of these privileges is expressed in its own terms.
83 *In re a Medical Practitioner* [1959] NZLR 784.

restrictive privilege for criminal proceedings under s 33, which is in issue in this case.

[103] Section 32 provides:

> **32. Disclosure in civil proceeding of communication to medical practitioner or clinical psychologist**
>
> (1) Subject to subsection (2) of this section, no medical practitioner and no clinical psychologist shall disclose in any civil proceeding any protected communication, except with the consent of the patient or; if he is dead, the consent of his personal representative.
>
> (2) This section shall not apply-
>
> > (a) In respect of any proceeding in which the sanity or testamentary capacity or other legal capacity of the patient is the matter in dispute:
> >
> > (b) To the disclosure of any communication made to a medical practitioner or a clinical psychologist in or about the effecting by any person of an insurance on the life of himself or any other person:
> >
> > (c) To any communication made for any criminal purpose.
>
> (3) In this section
>
> "clinical psychologist"
>
> > (a) means a psychologist who is, by his or her scope of practice, permitted to diagnose and treat persons suffering from mental and emotional problems; and
> >
> > (b) includes any person acting in a professional character on behalf of the clinical psychologist in the course of the treatment of any patient by that psychologist
>
> "medical practitioner" includes any person acting in his or her professional character on behalf of a medical practitioner in the course of the treatment of any patient by that medical practitioner
>
> "protected communication" means a communication to a medical practitioner or a clinical psychologist by a patient who believes that the communication is necessary to enable the medical practitioner or clinical psychologist to examine, treat, or act for the patient.

[104] There is no dispute that the medical records which are presently held by the Complaints Assessment Committee include notes concerning what the complainant told the doctors and psychologist who made them. Nor is it disputed that what she

told them included "protected communications" under s 32, although that matter was not raised at the hearing. The main question in this part of the appeal is whether the prohibition on disclosure of the protected communications under s 32 applies to the Complaints Assessment Committee, as well as to the specified health professionals to whom the communications were made. That turns on the meaning of s 32, read in its context, and having regard to its purpose.

Legislative history

[105] In considering the context it is helpful first to consider the legislative history of medical privilege in New Zealand. Prior to 1885 there was a statutory provision for medical privilege in the Australian State of Victoria, but not in New Zealand. The provision that was first enacted in New Zealand in 1885 was expressed in these terms:[84]

> 7. The following confessions and communications shall be privileged, and shall not be admissible in evidence in any civil or criminal proceedings, except with the express consent of the person alleged to have made such confession or communication:-
>
> (a) … [confessions made to a minister of any religion] …
>
> (b) All communications made to a physician or surgeon in his professional character by any of his patients; and the word "communication" herein shall include all information acquired necessary to enable such physician to prescribe or such surgeon to do any act for such patient:
>
> Provided that nothing in this section shall protect any communication made for a criminal purpose, or to prejudice the right to give in evidence or use any statements or representations already made or which hereafter may be made by any such physician or surgeon in or about the effecting by any person of an insurance on the life of himself or the life of any other person.

[106] In 1895 the terms of the privilege were changed to read:[85]

> 9. (1) No minister shall …
>
> (2) No physician or surgeon shall, without the consent of his patient, divulge in any civil proceeding (unless the sanity of the patient be the matter in dispute,) any communication which was

[84] Section 7 of the Evidence Further Amendment Act 1885.

[85] Section 9 of the Evidence Further Amendment Act 1895.

> made to him in his professional character by such patient, and which was necessary to enable him to prescribe or act for such patient:
>
> Provided that nothing in this section contained shall protect any communication made for a criminal purpose, or prejudice the right to give in evidence or use any statement or representation at any time made to or by any physician or surgeon in or about the effecting by any person of an insurance on the life of himself or of any other person.

[107] Under both the 1885 and 1895 provisions the privilege covered all communications by a patient to a doctor in the doctor's professional capacity which were necessary to enable the doctor to prescribe or act for the patient. There were, however, significant differences between the two provisions. First, the 1885 Act simply stipulated that the communications themselves were privileged and not admissible except with consent. The 1895 provisions instead structured the privilege as a prohibition on disclosure by the doctor in civil proceedings of such communications made to him. Linguistically this change narrowed the scope of the privilege by defining it by reference to *who* was precluded from disclosure as well as to what is privileged material. If the person called on to give evidence of the protected communication was not one of those prohibited from doing so, the privilege did not apply. As well, in 1895 the privilege became confined to civil proceedings, which had not been the case under the 1885 provision. Both these changes, which were restrictive of the scope of medical privilege, brought the New Zealand legislation closer into line with that of Victoria.

[108] The New Zealand medical privilege provision was re-enacted in 1905, without significant change.[86] The 1905 provision was re-enacted in 1908, again without significant change.[87] The key feature of the legislative history at this point is that the expression of medical privilege as a prohibition remained.

[109] The more immediate legislative history of s 32 supports the application of this approach to ascertain the meaning and scope of privileges under the 1980 Act.

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[86] Section 8 of the Evidence Act 1905.

[87] Section 8 of the Evidence Act 1908.

In 1977 the Report of the Torts and General Law Reform Committee[88] considered and rejected arguments for extension of the scope of medical privilege to widen the range of what was protected from disclosure to include all information derived from a medical examination of a patient. The Committee decided that the competing interests of medical frankness and administration of justice were correctly balanced in the existing law. It was satisfied that the availability of privilege rarely made a difference to decisions to seek medical assistance.[89] The only significant change it proposed to the scope of medical privilege, which was implemented in the 1980 Act, was to confer the privilege in criminal proceedings.

[110] Accordingly the legislative history does not point to an expansive reading of ss 32 and 33 of the 1980 Act.

Statutory interpretation

[111] In 1911 the Court of Appeal had to consider the scope of material covered by medical privilege under the 1908 Act. In *Lucena v National Mutual Life Association*[90] the Court compared the material covered by the privilege under the 1908 Act with what was privileged under the Victorian legislation. The 1908 New Zealand statute had conferred the privilege on any *"communication"* that met the statutory requirements, whereas the Victorian provision covered any *"information"* acquired by the doctor in attending the patient. The Court of Appeal decided that the New Zealand term was narrower and confined the privilege to what had been communicated to the doctor by the patient, by means of writing, words or signs. It held that the statutory protection of privilege accordingly did not extend, as did that of Victoria, to all information that was derived when a doctor examined a patient.

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88 Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (1977) Appendix I, 9-10.

89 At 3, 9-10.

90 (1911) 31 NZLR 481 (CA).

[112] The Court of Appeal also recognised a principle of interpretation that was applicable to all statutory privileges which protect a class of material including medical privilege.[91] The principle was stated in a passage that the Court applied which it took from the judgment of O'Connor J in *National Mutual Life Association of Australia Ltd v Godrich*:[92]

> *Prima facie*, every litigant is entitled to bring before the Court all evidence material to the proof of his case. In respect of a doctor's evidence, where a Statute under certain circumstances abridges that right, it should be so interpreted as not to extend the exception or privilege beyond the limits which its language, fairly interpreted, has expressly marked out. The Courts have always been careful to keep such privileges within their limits.

[113] Strict construction of a statutory privilege recognises that a successful claim of privilege will generally have the effect of withholding relevant evidence from a judicial tribunal, thereby compromising the Tribunal in the discharge of its responsibility to administer justice.[93] The risk of judicial error and consequent injustice is particularly serious in a context such as the present where the Tribunal's functions are concerned with the fitness of a person to continue to practice a profession. The principle ensures that there will be no intrusion from privilege on the tribunal's capacity to access all relevant evidence on the questions before it beyond the extent to which Parliament has taken responsibility.

[114] The purpose of s 32 is to prevent procedural rules governing civil proceedings, which compel disclosure of relevant facts and documents to judicial and quasi-judicial bodies, from requiring the recipients of such medical confidences to disclose such confidential communications made to them, by prohibiting them from doing so in the absence of the patient's consent. A privilege upholding the ethical duty of medical confidence to that limited extent was seen as serving the social purpose of facilitating frankness and social confidence in the doctor/patient relationship, without unduly intruding on the administration of justice.

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[91] At 489.

[92] (1909) 10 CLR 1, 28-29.

[93] McNicol *Law of Privilege* (1992), 344.

[115] Turning to the section itself, where it applies s 32 expresses an absolute prohibition on disclosure of what a doctor or clinical psychologist says that the patient told him or her in confidence and in the subjective belief that such communication was necessary for the professional person to treat the patient. The prohibition is expressed to apply to the professional person in whom the patient has confided.[94] It is also expressed to apply at all stages of a proceeding and not just at the hearing stage. It has not, however, been expressed to confer a general privileged status on such material. The use of the word "communication" in a closely similar way to that in the 1908 Act indicates that the term continues to have the same restricted meaning.[95] Section 32 accordingly does not protect information gleaned from the doctor's observations of the patient or diagnoses based on those observations.

Records held by Complaints Assessment Committee

[116] In the present case the medical records containing protected communications have come into the hands of the Complaints Assessment Committee. The question is whether s 32 prohibits it from disclosure of the material to the Tribunal and practitioner facing charges. In one instance they have been provided by the complainant, and in the other sent to the Committee at her request; in both cases so that the Committee can have regard to them in its investigation of her complaint. This accordingly is not a case where the protected communications have reached a third party through the unilateral action of a doctor or any person associated with the doctor's practice.

[117] In my view s 32 does not apply to prohibit disclosure of protected communications by a third party such as the Complaints Assessment Committee which has properly come into their possession. To read s 32 in that way is to treat the privilege as extending to protected communications in all circumstances, an

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[94] Although this will extend to other medical practitioners, and to their staff, to whom the communication is related for the purposes of treatment within the doctor's practice or institution – *In re St Helens Hospital* (1913) 32 NZLR 682.

[95] Garrow and McGechan *Principles of the Law of Evidence* (7ed 1984) 261.

approach which Parliament has eschewed since 1895 when it first expressed it as a prohibition on disclosure by medical practitioners in whom the patient had confided. The plain language as well as the legislative history are both against such a meaning and this is why I feel unable to agree with the analysis of the majority. Furthermore, in the present case, it cannot be said that the purpose of encouraging frankness and social confidence in the doctor patient relationship will be served by extending the absolute protection of privilege to material that a patient has sent to a body responsible for preliminary investigations of complaints of professional misconduct by doctors.[96]

[118] In my view the scheme of the 1980 Act is that such material should only have protection from disclosure in judicial proceedings in circumstances covered by s 35, involving the exercise of the Court's discretion.

[119] For these reasons, I would hold that s 32 does not apply to medical records in the possession of the Complaints Assessment Committee.

Excusing witnesses from disclosing confidences

[120] It is accordingly necessary for me to consider whether s 35 applies to the medical records of protected communications while they are held by the Complaints Assessment Committee so that the Tribunal is able in its discretion to excuse that body from producing the records to the Tribunal. The place in Part 3 of the 1980 Act of s 35 is to supplement the narrowly framed privilege provisions by giving a general discretion to a court or tribunal to excuse a witness from giving particular evidence or producing documents in certain circumstances. As previously indicated, in 1977 the Torts and General Law Reform Committee recommended against the expansion of medical privilege in civil proceedings and against the creation of further privileges to cover other witnesses who receive confidences in the course of professional relationships. The Law Reform Committee did see value, however, in giving the

[96] As s 32 does not apply to prohibit disclosure of medical records by the Complaints Assessment Committee those records cannot be said to be privileged. It follows in my view that equity cannot protect against their disclosure in proceedings: *Goddard v Nationwide Building Society* [1987] 1 QB 670, 685.

Courts a power to excuse a witness from giving evidence, in breach of an ethical or social value, provided that it was unlikely that serious injustice would result in the particular case. The English Courts had recognised a common law discretion of this kind but the Law Reform Committee thought it desirable that the practice be put on a statutory basis in New Zealand, with some guidelines, in order to ensure a reasonably consistent and predictable approach to the exercise of the discretion. It recommended a provision be enacted in the form of what is now s 35 of the 1980 Act.[97]

[121] Section 35 reads:

> **35. Discretion of Court to excuse witness from giving any particular evidence**
>
> (1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.
>
> (2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:
>
> > (a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding:
> >
> > (b) The nature of the confidence and of the special relationship between the confidant and the witness:
> >
> > (c) The likely effect of the disclosure on the confidant or any other person.
>
> (3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.

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97 Torts and General Law Reform Committee Report, 7-10 and 75-77.

> (4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.
>
> (5) In this section "Court" includes-
>
> > (a) Any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses; and
> >
> > (b) Any other person acting judicially.

[122] The purpose of s 35 is accordingly to ameliorate the strict definition of the provisions for privilege, but only to the extent that the intrusion on the need for judicial bodies to be fully informed of all relevant facts is outweighed by the importance of maintaining confidences in a relationship of that nature and in the particular instance.

[123] Section 35(1) requires that a person has confided in another person who is a witness, in the course of a special relationship between them, in such a manner that it would be a breach of confidence for the witness to reveal information or produce documents to persons who are outside the relationship. In such a case the court has a discretion to excuse the witness from giving evidence that would breach the confidence, after balancing the public interest in disclosure to the court against that in preserving confidences and encouraging free communication between persons in that relationship.

[124] There is no definition of a 'special relationship' but it is implicit that it must be one which encourages the imparting of confidences, and which has a public interest value which would be intruded on if the witness were to supply the confidential information in the particular proceeding.[98] The Law Reform Committee report discussed a number of relationships which it had in mind would be covered.[99] That list is not of course an exclusive one. In the present case I would hold that the relationship between a complainant and a body with the responsibility of investigating complaints of professional misconduct with a view to bring charges

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[98] In *R v Secord* [1992] 3 NZLR 570, 574-575 the Court of Appeal held that the relationship between a probation officer and the person who is to be the subject of a report or supervision is a special one in which confidences are communicated.

[99] The Law Reform Committee report discusses, in separate chapters, relationships involving barristers and solicitors, Citizens Advice Bureau staff, patent attorneys, accountants, bankers, medical practitioners, psychologists, clergymen, counsellors, social workers, teachers and journalists.

clearly had these features and was accordingly a special relationship for the purpose of s 35.

[125] Consistently with its ameliorating purpose, the language of s 35 should be read broadly. It is not confined by the restrictive concept of a "protected communication" and is expressed to apply to confidences which arise in special relationships generally. The considerations that require a narrow reading of the privilege provisions in the 1980 Act do not apply as decisions under s 35 are made by a Court having regard to the overall public interest in the circumstances of each case. It is clear that the power to excuse a witness is given to quasi-judicial bodies such as the Tribunal.[100] And, although the section uses the term "witness" and "hearing" in subs (1), (2) and (3), on a broad reading it applies equally to the interlocutory as to the hearing stage of proceedings.[101]

[126] For these reasons, I would find that in this case s 35 applied to records held by the Complaints Assessment Committee and that the question of their disclosure should be referred to the Tribunal for determination under s 35. The Tribunal would be able to, and in such cases expected to, inspect the records to assist it to determine whether to excuse their production. I would also have emphasised the importance of the relevance of the confidential information to the issues before the Tribunal in deciding whether to excuse production. The Court of Appeal has given guidance on that point. In this case, its decision in that respect has not been the subject of appeal.[102] Beyond that I would have left the application of s 35 for the Tribunal to decide.

[127] Overall the more important the confidential information is to determination of the issues in the proceeding, and the greater the importance of the proceeding to the parties to or the public interest, the greater the weight that will attach to the desirability of disclosure of the confidence in the proceeding. Similarly the greater the importance of confidence in the particular type of specific relationship, and of the

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[100] Under s 35(5).

[101] This was the conclusion reached by the Court of Appeal in *European Pacific Banking Corporation v Television New Zealand Limited* [1994] 3 NZLR 43, 48 but not in *M v L* [1999] 1 NZLR 747, 759.

[102] See para [81] above.

importance of the particular confidence to the confiding party in the case, the greater the weight in favour of excusing the witness from giving evidence.

Other medical records

[128] The chairman of the Tribunal also directed the complainant to disclose any other of her medical records which might assist the Tribunal to decide whether her recollection of events was impaired. This direction seems to be aimed at records of what the patient said during consultations since 1985 for the purpose of seeking medical or psychological assistance for her depressive condition, whether in New Zealand or overseas. The chairman also appeared to envisage that the Complaints Assessment Committee would undertake the task of seeking out the records but would have the co-operation of the complainant against whom the order was directly made. It is common ground that the chairman did not have power to act on behalf of the Tribunal in exercising its powers of investigation. The question in the appeal is whether the direction could not have been given in any event because the material was privileged under s 32.

[129] The direction was aimed at obtaining for the Tribunal, and the practitioner facing charges, medical records concerning the patient of a kind which are protected communications under s 32. I have, however, concluded that section only prohibits disclosures of protected communications by medical practitioners and clinical psychologists in whom a patient confided. It follows that I do not accept that the medical privilege prevents a party from asking a patient who is a witness in a proceeding what he or she said to the doctor. It would, however, subvert the purpose of the statutory privilege for the Tribunal to make a direction of the kind made by the chairman in this case. That is because its practical effect would be to use its procedural powers to compel the doctors to disclose protected communications via their patient by compelling the patient to acquire them from the doctor. The purpose of s 32 is to prohibit recipients of such confidences from being required to disclose them, without the patient's consent. Consent in s 32 means a voluntary and deliberate act of agreement to disclose, or conduct amounting to waiver of the privilege. Such a direction would frustrate the statutory purpose by compelling the

complainant to acquire and disclose the records without her consent. The exercise of the Tribunal's investigative powers to make such a direction would accordingly be an abuse of its processes and unlawful on that account.

Concluding comments

[130] It will be apparent that I do not regard either s 32 or s 35 of the 1980 Act as covering situations in Court or tribunal proceedings where a complainant is asked about what he or she said in confidence to a doctor. To my mind the structure, language and purpose of each of these provisions is not concerned with protecting medical confidences from disclosure in proceedings generally. Rather they are concerned solely with prohibiting such disclosures by those who have been entrusted with the confidences in the course of a relationship covered by those sections.

[131] The 1977 Law Reform Committee accepted that the general public is of the view that there is and ought to be total confidentiality in the doctor/patient relationship. It did not accept that the law of privilege should enforce total confidentiality in respect of that relationship.[103] The limited scope of medical privilege in the end reflects a legislative judgment in 1980 that the ethical duty of doctors and psychologists not to reveal professional confidences should be supported by the law of privilege to a limited extent, but that privilege should not extend to protect medical confidences generally as a class of information.

[132] Medical confidentiality covers a wide field which both Parliament and the Courts have seen as primarily an ethical issue rather than one that should be entirely regulated by the law. The fields covered by the ethical rule of medical confidence and the legal rule of privilege are accordingly distinct, as the Courts have long recognised.[104] In drawing the line between these fields Parliament has recognised that privilege is a blunt instrument for protection of confidentiality which cannot

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[103] Report on the Torts and General Law Reform Committee, 1977, Appendix 1, 2. This does not, of course, prevent disclosure of a patient's information from being actionable by the patient concerned in other areas of the law.

[104] For example in *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, 520 (HC) Jeffries J. Ethical duties and professional codes of conduct frequently impose higher standards of conduct on professional persons than does the law – *Supasave Retail Ltd v Coward Chance* [1991] 1 All ER 668, 672 per Browne-Wilkinson V-C.

address the degree of sensitivity of particular information and which has the constant potential to damage the interests of justice in judicial proceedings, including the professional disciplinary process. It is for this reason that neither medical privilege under ss 32 and 33, nor the judicial discretion to excuse a witness from giving evidence under s 35, cover all aspects of medical confidentiality, or all situations in which evidence of what a patient has said to a doctor in the course of their professional relationship might be relevant and necessary to the fair disposition of proceedings.[105]

[133] The common law has recognised a discretion in the Courts to permit a witness not to give particular evidence having regard to its confidential nature (which s 35(4) arguably preserves), but in New Zealand Parliament covered the ground in the 1980 Act in a way that has left little scope for the development in New Zealand of a common law rule. Similarly the discretionary powers of investigation of the Tribunal must be exercised having regard to the legislative process.

[134] This is not to say that the current law satisfactorily balances the social interests respectively served by the privilege against the consequences of its application. Public appreciation of the importance of the value of personal privacy has grown extensively since 1980 and arguably now provides a more convincing public interest basis for a medical privilege than the traditional argument that public health will suffer if doctors have to testify about what transpired during the doctor patient relationship.[106]

[135] It is significant, however, that under the Privacy Act 1993 patient privacy gave way to the need for the Courts, and parties to litigation, to have access to confidential information if that is necessary in the interests of justice.[107] In the criminal jurisdiction the Court of Appeal recognised in 2004 that information

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105 Compare *Science Research Council v Nassé* [1980] AC 1028, 1071 per Lord Salmon.

106 This was the view of medical privilege that the Law Commission expressed in its 1994 discussion paper: New Zealand Law Commission *Evidence Law Privilege* (NZLC PP23 1994) at [290]-[295].

107 Relevantly, Privacy Principle 11, contained in s 6 of the Privacy Act 1993, provides that an agency shall not disclose personal information unless it believes on reasonable grounds that such disclosure is necessary for the conduct of proceedings before any court or tribunal. In addition, s 7 of the Act provides that it is not a breach of the Act to perform an action that is "authorised or required by or under law".

privacy principles under the 1993 Act required the police not to disclose to the accused medical records in their possession of an examination of the victim of an alleged sexual assault unless that were necessary for the conduct of the trial.[108] The developing area of privacy law provides one avenue for setting principles for the appropriate contemporary balance between medical confidentiality and the needs of the system for administration of justice.

[136] Another vehicle which is more immediately available, however, is the Evidence Bill currently before Parliament. The Bill implements recommendations of the Law Commission in its 1999 Report on Evidence.[109] If it is enacted in its present form there would no longer be a specific privilege covering medical confidences in civil proceedings. Rather the general judicial discretion to direct that confidential communications not be disclosed in a proceeding would apply. Under that provision a judge may direct that a confidential communication not be disclosed if the public interest in disclosure is outweighed by countervailing public interest considerations, involving prevention of harm to individuals or relationships and maintaining activities which rely on the free flow of information.

[137] The Bill reflects the Law Commission's view that the present medical privilege in civil proceedings should be assimilated into the procedures for exclusion of confidential information by exercise of a judicial discretion according to statutory guidelines. The Bill's provisions will no doubt be closely scrutinised by Parliamentary processes and may of course be changed before any reform legislation is enacted.

[138] The Law Commission's discussion paper and Report provide support for my conclusion that the provision for medical privilege in civil proceedings under the 1980 Act has always been restrictively interpreted. If privacy values are now to be further protected by an extension of the law of privilege beyond the limits that it has generally been understood were set in 1980, it is appropriate in my view that Parliament take the responsibility for that step, in light of the further correlative

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[108] In *R v Marshall* [2004] 1 NZLR 793 at [33] to [47] the Court of Appeal decided that medical notes held by the police should have been disclosed under this test. The Court quashed the appellant's conviction and ordered a new trial.

[109] New Zealand Law Commission *Evidence* (NZLC R55 Vol 1 [268] to [274] and Vol 2 C273 1999).

intrusion on access by the Courts to all relevant evidence that would result. That is all the more desirable when considered proposals for reform are currently before Parliament.

Solicitors:
Fisher Lamberg, Auckland for Appellant
Raymond Donnelly & Co, Christchurch for Respondent