

IN THE DENTISTS DISCIPLINARY TRIBUNAL

IN THE MATTER of the Dental Act 1988

AND

IN THE MATTER of a complaint by Ms A against **NEVILLE JAMES GIBSON** of Auckland, Dentist

TRIBUNAL Dr D Bambery (Chair)
Dr P A C Coote
Ms W Davis

LEGAL ASSESSOR Mr G D Pearson

TRIBUNALS OFFICER Mrs S D' Ath

COUNSEL Ms K McDonald (for Ms A)
Mr A Woodhouse (for Dr Gibson)

DATE OF HEARING 22 July 2002 to 24 July 2002

DATE OF DECISION 13 August 2002

DECISION OF THE TRIBUNAL

CHARGES

1. These proceedings involve charges against **Neville James Gibson**, Dentist of Auckland. The charges were brought under s.54(1)(b) and (c) of the Dental Act 1988, and Dr Gibson was notified of the following particulars of those charges:

That when treating **Ms A** between 10 January 1995 and 23 March 1998 he:

- (a) Failed to obtain Ms A's informed consent to the nature and extent of the treatment that he carried out, to prepare a treatment plan or to give an estimate of costs of the treatment; and/or
- (b) Failed without proper cause to complete a course of dental treatment, including extensive bridge and crown work; and/or
- (c) Carried out dental treatment which was not in accordance with proper professional standards, including fitting but failing to replace four temporary crowns and defective root filling, causing unnecessary and prolonged pain, suffering and inconvenience; and/or
- (d) Charged a total of \$11,716 for dental treatment which you knew or ought to have known was excessive for the treatment carried out; and/or
- (e) Negotiated and banked two cheques post dated to cover the costs of future or anticipated treatment without undertaking such treatment; and/or
- (f) Failed or refused to deliver up to Ms A his records of her dental treatment.

APPLICATION FOR ADJOURNMENT

2. The Tribunal received a formal application to adjourn the hearing on 18 July 2002. This application followed a letter requesting an adjournment dated 16 July. This application was heard at the commencement of the hearing on 22 July 2002.

3. In considering the request for an adjournment the Tribunal received submissions from Mr Woodhouse (counsel for Dr Gibson), and Ms McDonald QC (counsel for the complainant).

4. The grounds for the application were set out in the notice of application. The grounds may be summarized in this way:

- Dr Gibson only received witness statements for the hearing set down for 22 July 2002 on 17 July 2002.
- Delay in receiving witness statements prejudiced Dr Gibson, as it affected his ability to apply for legal aid, and prevented him preparing properly for the hearing.

5. The grounds in the application were developed in an affidavit of Dr Gibson, an unsworn statement of Dr Gibson, and submissions made by Mr Woodhouse. The affidavit encapsulated the approach advanced for Dr Gibson: "I have always maintained as I still do that I should be entitled to the witness statements in order to then assess my position." The unsworn statement, and Mr Woodhouse's submissions added as a ground for granting an adjournment, the Tribunal's requirement that the application for an adjournment be made formally - which took time for Dr Gibson to prepare. The submissions made by Mr Woodhouse reiterated the matters raised in the application, affidavit, and unsworn statement. In addition, Mr Woodhouse expressed concern about the availability of photographs, radiographs, and a treatment plan. Mr Woodhouse and Dr Gibson informed the Tribunal that Dr Gibson had an oral indication that he had been granted legal aid.

6. In opposition to the application Ms McDonald QC for the CAC submitted:

- The matter had already been adjourned on two previous occasions (previously set down for 1 October 2001 and 25 March 2002) at the request of Dr Gibson.
- No Timetabling orders were sought regarding exchange of briefs of evidence.
- Mr Woodhouse and Dr Gibson had not communicated with counsel for the complainant since 26 March 2002.
- Dr Gibson had refused to provide a postal address.
- Briefs of evidence did not differ in all material respects from the CAC file already provided to Mr Woodhouse and Dr Gibson.
- Ample opportunity had been provided to apply for legal aid.
- Prejudice, inconvenience and distress to the complainant would be caused by yet another delay.

7. After carefully considering the submissions of all parties the Tribunal's decision was to proceed with the hearing. The Tribunal now records its reasons for deciding to proceed. The Tribunal's approach to the adjournment was that the overall interests of justice must prevail. The Legal Assessor's advice to the Tribunal was that it must be satisfied that Dr Gibson has had a full and fair opportunity to defend the charges against him. The Tribunal would certainly have granted an adjournment unless satisfied that was the case. The Legal Assessor's advice was that if Dr Gibson had chosen not to be prepared for the hearing, that did not necessarily provide adequate grounds for an adjournment. Accordingly the Tribunal considered the way in which events had developed, leading up to the proceeding being set down for 22 July 2002, and the briefs of evidence being served on 17 July 2002.

8. One point of significance is that on 19 March 2002, the Tribunal determined an application for an adjournment. This case had been set for a hearing on 25 March 2002, and the case was adjourned to a date to be arranged with the Tribunals Officer. Reflecting what had occurred in the Telephone Conference dealing with that earlier application for an adjournment, in which Mr Woodhouse represented Dr Gibson, the Tribunals Officer wrote to Mr Woodhouse and recorded "I have been instructed by the Tribunal to advise you that no further adjournments will be granted". The Tribunal does not regard that indication as determining whether a further adjournment will be granted, as unforeseen circumstances can always intervene. This Tribunal is aware that it can, and has on past occasions,

adjourned proceedings in the course of a hearing when circumstances require that to occur. Accordingly, we regard the warning that there would be no further adjournments as simply firm and clear notice to Dr Gibson and his counsel that they should regard the fixture date seriously, and they should not assume a failure to prepare adequately for a hearing would result in a third adjournment being granted.

9. It is to be noted that the adjournment granted on 19 March 2002 was the second adjournment Dr Gibson had obtained from a date set for the hearing. The Tribunal also notes that the Legal Assessor notified Dr Gibson's counsel on 18 July 2002 that he should not assume that the present application for an adjournment would be granted.

10. Accordingly, the Tribunal considered carefully whether the grounds advanced on Dr Gibson's behalf indicated that there was a reasonable basis for considering that events had affected Dr Gibson's ability to prepare for the hearing.

11. The Tribunal is not satisfied that Dr Gibson has presented any reasonable basis for an adjournment being granted. It is a matter of considerable significance that Dr Gibson's counsel was notified of the hearing date on 28 May 2002, and there was no response of any kind until some 7 weeks later on 16 July 2002 (a week prior to the hearing). Dr Gibson's counsel had not notified counsel for the CAC that there was any urgency in relation to briefs of evidence, or notified the Tribunals Officer of any difficulty with the fixture date during that period.

12. The Tribunal considered the fact that briefs of evidence were not supplied until the week prior to the hearing. There is nothing particularly unusual in that, and if counsel require briefs earlier they would either obtain a timetable order from the Tribunal, or make an arrangement with counsel. If counsel required briefs of evidence earlier, it was not a reasonable option to receive a fixture notice, in the face of the Tribunal's earlier notice that there would be no adjournments, and take up the issue in the week before the hearing. The Tribunal is not satisfied that the absence of briefs of evidence, or any other material, in fact prevented preparation for the hearing. Dr Gibson had a considerable amount of material in addition to notice of the charge, which would have enabled a substantial amount of preparation, or the whole of the preparation, to be undertaken; and for an application to be made for legal aid. Dr Gibson has not given a reasonable explanation as to why he and his counsel did not proceed on the basis that the hearing would occur.

13. This is not a case where some intervening event such as ill health has prevented Dr Gibson preparing for the hearing. Dr Gibson had very clear notice that the hearing would proceed and every opportunity to prepare for it. If choosing not to prepare for a hearing, without reasonable justification, is adequate grounds for an adjournment, the administration of the Tribunal becomes impossible. In addition, the Tribunal accepts the submission of Ms McDonald that the Complainant's interest in this matter should be considered, and that it is distressing for the Complainant to have the matter continually deferred and remain unresolved. The Complainant is entitled to have her complaint determined in a reasonable time frame, provided Dr Gibson has a proper opportunity to prepare.

EVIDENCE

14. The Tribunal received evidence from

- Ms A (the complainant)
- Dr P Worthington (general dental practitioner)
- Mr P Cathro (specialist endodontist)
- Dr Gibson (the practitioner)
- Ms S Cotter (Dr Gibson's nurse at the time in question)
- Mr B Scott (oral surgeon)

BACKGROUND

15. Ms A first went to see Dr Gibson of the Remuera Dental Group on 14 January 1995. Her problem was a broken tooth which she considered required immediate attention.

16. Ms A told Dr Gibson that she had some concerns about the look of her teeth and was told that with treatment she could have a better smile. It was decided to proceed with treatment and it was agreed that payment would be made at each session. Dr Gibson undertook the work and this required numerous attendances during 1995 and 1997. Payments totalling \$11,716.00 were made.

17. In July 1997 treatment with Dr Gibson ceased with some work incomplete (temporary restorations in place with crown and bridgework yet to be fitted). Post-dated cheques had been given to cover the treatment yet to be completed. Two of these cheques were banked on 15 February 1998 (\$1266.00) and 23 March 1998 (\$1268.00) respectively.

18. In July 1999 Ms A went to another dentist, Dr P Worthington, because she had a broken tooth. At this time she was concerned generally about the work that had been previously carried out on her teeth. Dr Worthington referred her to Mr Cathro, an endodontist, who saw her on 2 September 1999. Both Dr Worthington and Mr Cathro were not happy with the work that had been carried out on her teeth. Dr Worthington was particularly concerned about the four temporary crowns and he prepared a treatment plan to remedy her problems.

19. Ms A sought to obtain her records from Dr Gibson. During one visit to the premises of Dr Gibson he offered Ms A a refund of \$950 and asked that a letter be signed indicating settlement of any claims against Dr Gibson's clinic. This meeting became tense and resulted in the police being called.

20. On 20 August 2000 Ms A complained by letter to the Dental Council of New Zealand. She wrote to Dr Gibson on 20 October 2000 requesting her records and a refund. She was told that the whereabouts of her records was unclear.

21. Dr Gibson has not supplied the records to Ms A, the Complaints Assessment Committee, or the Tribunal

FINDINGS

22. After considering the evidence the Tribunal is satisfied Dr Gibson was responsible for all of Ms A dental treatment after she left her previous dentist (“The Dentist”) and before her consultation with Dr Worthington.

23. The Tribunal accepts that Dr Gibson did keep some dental records for Ms A including radiographs. These records were not made available to Ms A at any time. The Tribunal accepts the Dr Gibson could well have recorded proposed treatment on the treatment card. The Tribunal finds, however, that these details were not communicated to Ms A. The Tribunal accepts Dr Gibson’s evidence that these records were very unlikely to have been off the premises during the period up until his surgery was closed and his possessions packed up and moved out. While occupying the property Dr Gibson did not remove them himself and considered it very unlikely they could have been removed by anyone else including being mistakenly thrown out in the rubbish.

24. Dr Gibson made no effort to write out details of Ms A treatment as he remembered it at the time of her request. No other records such as study models were made available. The bridge and crowns that were supposed to be fitted were not made available to Ms A or Dr Worthington.

25. The CAC and the Tribunal were not provided with any patient records prior to their respective hearings. During the Tribunal hearing some records of financial transactions and appointment books were made available.

26. The Tribunal accordingly accepts the evidence that Ms A was not supplied with her records, and finds that it is a professional obligation to create and preserve patient records. They are required to make sound judgments about ongoing treatment, to supply to other health professionals treating the patient (concurrently or later), and the patient is entitled to have a proper record. The Tribunal accordingly finds that the evidence establishes a failure to supply records, and that Dr Gibson has not provided any credible justification. Dr Gibson, claimed that he was disadvantaged by the lack of records, had used his best endeavours to locate the records, and that he had created proper records and maintained a system for preserving the records. Ms McDonald for the Complainant contended that Dr Gibson’s shortcomings would be made further evident by the records, and that he had deliberately withheld them from the time Ms A had requested them. We have considered the evidence closely, and paid regard to both what Dr Gibson said, and his demeanour in giving his evidence. We have also carefully considered the evidence from Ms Cotter (at the material time she was Dr Gibson’s wife, and receptionist, and involved in maintaining the record keeping system), and the evidence from Ms A regarding Dr Gibson’s reaction when she requested her records. We are satisfied on the balance of probabilities that when Dr Gibson was asked by Ms A for her records he deliberately failed to search for them, or withheld them. The evidence satisfies the Tribunal that the records could have been located if a proper search was conducted. Our view is reinforced by the fact that not all of the records were in one form. There would have been paper based records, but in addition there were study models, and physical items that would not have been stored in a paper filing system, and indeed records in the hands of third parties, including dental technicians. Dr Gibson did not attempt to provide Ms A with a description from his own recall of the treatment, or locate any element of the various forms of record that it appears he created.

27. The Tribunal accepts the evidence of Dr Worthington and Mr Cathro in regard to the condition of Ms A teeth that had been treated by Dr Gibson:

- Tooth 17 had been prepared as a bridge abutment. It had a large periapical radiolucent area associated with it which indicated a non-vital infected tooth with periapical infection. It had limited root size and bony support and was tipped mesially. It was of doubtful prognosis and an unsatisfactory bridge abutment.
- Tooth 27 was crowned by Dr Gibson. There was a large radiolucent area associated with it and endodontic treatment was required. It had a poor prognosis and it should not have been crowned because the doubtful future of tooth 26 means 27 may well be required as a bridge abutment.
- Tooth 26 had been prepared for a crown by Dr Gibson. It was not cemented because it did not fit and had been returned to the laboratory for remedial work. This tooth had been root filled in the past (by a dentist previous to Dr Gibson). There are 3 posts in the root system and the root filling in the apical portion of the palatal root is absent, most likely associated with placing the post into the canal. There is very little tooth substance left and a radiolucent area indicating infection exists between the roots. The tooth has a doubtful future and should not have been prepared for a crown.
- Tooth 37 was an abutment for a bridge replacing 36. This bridge was made by Dr Gibson and 37 had a post core system place by him. There is an extensive radiolucent area associated with the root system indicating infection. The distal margin of the bridge is defective. This defect would have been present from the time of placement of the bridge and renders the bridge unacceptable and liable to fail.
- Tooth 47 has a large temporary filling and is of doubtful prognosis
- Tooth 46 was crowned by Dr Gibson. There are periapical areas associated with both roots. A radiolucent area in the area between the roots indicates periodontal infection. This tooth requires both endodontic and periodontal treatment.

28. The Tribunal has no definitive finding on the time that the periapical radiolucencies have been present. Mr Cathro would give no opinion while Dr Scott suggested they were likely to have been there for some years. When considering the evidence of Mr Cathro, Dr Worthington, and Dr Scott, along with the number of teeth with radiolucencies, the Tribunal finds that there was insufficient pre-treatment assessment of the teeth 17, 27, 26, 37 and 46.

29. The presence of radiolucent areas around the roots of teeth (periapical areas) indicates infection. The possible consequences are low grade chronic infection within the jaw, acute exacerbation to acute infection and abscess formation, and/or cyst formation. It is important to have adequate bone support for both crowns and bridges. Tooth 17 is inadequate for a bridge because of the amount of bone support, the size of the root with respect to the loading to be placed on it and the fact that it is tipped mesially. Without adequate and healthy support the crown or bridge would have a limited life expectancy.

30. In relation to whether Ms A gave informed consent for the treatment, we are satisfied that Ms A did not understand the treatment she received. The treatment required was substantial in terms of complexity, and also the financial commitment. The Tribunal's view is that Dr Gibson was obliged to explain fully to Ms A the underlying state of her dental health, including the implications that pre-existing unsoundness in her teeth had for

the durability of crown and bridge work. Having heard Ms A give evidence the Tribunal is satisfied that she is well able to understand the issues, if explained to her properly. We are satisfied that Ms A placed her faith and trust in Dr Gibson as a professional person with expertise, and Dr Gibson failed to explain adequately the treatment she was to receive, the risks involved (for the long-term viability of the treatment), and the full cost of the treatment. It is unlikely that Ms A would have consented to the treatment had she been adequately informed.

31. There was a conflict in the evidence regarding the seeking of further appointments to complete the work. Ms A was adamant that on a number of occasions she sought an appointment to have the work finished. The Tribunal finds Ms A a credible witness in this respect. Dr Gibson maintained that his staff would have attempted to make an appointment if the work had been returned from the laboratory and Ms Cotter, in her evidence, confirmed this. Dr Gibson did not know if the work had been returned. No evidence, such as laboratory invoices, was made available to the Tribunal. The Tribunal's conclusion is that the work was probably never completed by the laboratory.

32. The Tribunal finds that the temporary crowns were completely inadequate in respect of contour, marginal fit and contact point. These temporary crowns were left in place for too long and Dr Gibson had a responsibility to contact Ms A to ensure treatment was completed by himself or another dental practitioner. In relation to this matter, Ms A gave evidence that her dentition has seriously deteriorated, at least partly as a result of crown preparations having been completed and crowns never having been fitted. The Tribunal accepts that result is an inevitable consequence of not fitting crowns promptly. Dr Worthington indicated that temporary crowns were suitable for a period of less than a month. A crown preparation involves removing a layer of tooth tissue and exposing the dentine. Sensitivity, decay, pulp death and breakage of the core of the tooth, are virtually inevitable outcomes of leaving a crown preparation for a long period without fitting a crown or providing a longer term interim restoration. It is possible for a dentist to make more durable temporary crowns than those designed to last for a month; such crowns may last for a year or two. However the evidence is clear, the temporary crowns Ms A had fitted were not of a kind or quality that could be regarded as satisfactory for any extended use, there were problems with the contact points, inadequate margins, inadequate strength and gingival irritation. Ms A gave evidence that it is now some 4 years since the crown preparations were undertaken, and she has not been able to afford further treatment due to having paid a large sum of money to Dr Gibson. We accept Ms A's evidence.

33. Ms A visited Dr Gibson on 4 October 1999 in order to pick up her records, he acknowledged he owed her money for incomplete work and could not provide her with the treatment records. During another visit to Dr Gibson on 16 December 1999 in order to uplift her records Ms A was offered a cheque for a refund for the crown paid for (tooth 26) but not fitted (because it needed remedial work by the laboratory). She was asked to sign a letter acknowledging refund of the payment for proposed crown on 26 and discharging any claim she might have against the Remuera Dental Clinic. There was a conflict of evidence on the details of this encounter but the situation became tense and the police were called. The Tribunal has formed the view that Dr Gibson's behaviour was inappropriate in seeking to have such a letter signed in those circumstances. Such a conclusion is reinforced by the intimidatory, threatening and bullying nature of other correspondence presented in evidence (letter to the chairperson of the CAC, and the Dental Council).

34. The Tribunal was satisfied that Ms A paid \$11,761 to Dr Gibson. The work done by Dr Gibson that was apparent on the radiographs and study models and photos would be considerably less than this amount. During his evidence Dr Gibson recalled restorative and periodontal treatment which would, according to him, account for significantly more fees. The Tribunal has doubts about the credibility of this aspect of Dr Gibson's evidence and concludes that the amount paid by Ms A was in fact excessive for the work completed. But, would not have been excessive for the course of treatment that had been commenced, and which should have been completed. The two post-dated cheques should not have been presented for work which was not completed. There was no evidence to suggest the bridge and crown work not fitted had ever been completed by the laboratory and the crown on 26 was paid for and not fitted (it had to be returned to the laboratory)

CONCLUSION

35. The Tribunal is satisfied that it had sufficient evidence placed before it to make a determination on all charges.

36. With regard to charge (a) that he *failed to obtain Ms A' informed consent to the nature and extent of the treatment that he carried out, to prepare a treatment plan or to give an estimate of costs of the treatment* the Tribunal finds the charge **established**. The Tribunal is satisfied Ms A did not have the nature of the treatment explained to her adequately. She was not adequately informed, as to whether the treatment was appropriate, the risks as to the durability of the treatment, or the financial implications.

37. With regard to charge (b) that he *failed without proper cause to complete a course of dental treatment, including extensive bridge and crown work* the Tribunal finds the charge **established**. Dr Gibson embarked on a course of treatment, which had to be completed if his patient was not to be left in a seriously compromised position, which is what has occurred. Dr Gibson failed to complete treatment for which he had been paid, despite Ms A attempting to obtain appointments to have work completed.

38. With regard to charge (c) that he *carried out dental treatment which was not in accordance with proper professional standards, including fitting but failing to replace four temporary crowns and defective root filling, causing unnecessary and prolonged pain, suffering and inconvenience* the Tribunal finds the charge **established**. The Tribunal is satisfied that Dr Gibson failed to evaluate adequately whether Ms A teeth were suitable to carryout the work he undertook, failed to take any adequate steps to stabilise existing unsoundness in her teeth, and undertook crown preparations without then protecting the exposed tooth tissue in an adequate way. Ms A has suffered considerably as a result.

39. With regard to charge (d) that he *charged a total of \$11,716 for dental treatment which you knew or ought to have known was excessive for the treatment carried out* the Tribunal finds the charge is **established**. The Tribunal determined this charge on the basis of the evidence before it. That evidence did not include Dr Gibson's records which we have found he withheld from his patient. The Tribunal is satisfied that Ms A' evidence establishes that she paid \$11,716 for treatment and on the basis of what Dr Gibson told her she should have received more treatment than she did for that sum of money, that indicates she was charged excessively. In addition the Tribunal heard Dr Gibson's explanation for the costs (including work he said he would have done, for which there is no other evidence

or record), Dr Gibson's explanation (even if he did the additional work for which there is no record) did not explain him charging Ms A \$11,716.

40. With regard to charge (e) that he *negotiated and banked two cheques post dated to cover the costs of future or anticipated treatment without undertaking such treatment* the Tribunal finds the charge **established**. The Tribunal is satisfied that Dr Gibson obtained post-dated cheques on the basis of his promise to undertake treatment. Dr Gibson then failed to complete the treatment, and caused the cheques to be banked regardless.

41. With regard to charge (f) that he *failed or refused to deliver up to Ms A his records of her dental treatment* the Tribunal finds the charge **established**. The Tribunal is satisfied that Dr Gibson chose not to make any effort to supply Ms A with records when requested, and that there were no proper grounds for doing so.

42. After considering the allegations separately and cumulatively the Tribunal finds the charge established under Section 54 (1) (c) and that Dr Gibson has been guilty of professional misconduct.

PENALTY, COSTS AND NAME SUPPRESSION

43. The Tribunal seeks submissions from counsel on penalty, costs and name suppression according to the following timetable:

- Counsel for the CAC to file and serve submissions within 10 days of receiving this decision;
- Counsel for Dr Gibson to file and serve submissions within 7 days of being served with submissions from counsel for the CAC;
- Legal Assessor to file and serve submissions within 3 days of being served with submissions from counsel for Dr Gibson.

Service of the submissions to be effected by fax sent to the respective counsel.

Dexter Bambery
(Chairperson of the
Dentists Disciplinary Tribunal)