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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP95-SW01

02/0174

IN THE MATTER of the Privacy Act 1993

BETWEEN L

Appellant

AND L

Respondent

Hearing: 26 April 2002

Counsel: Ailsa Duffy QC and Frances Joychild for Appellant
Harry Waalkens for Respondent
Robert Stevens and Michelle Donovan for Privacy Commissioner

Judgment: 31 May 2002

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**JUDGMENT OF HARRISON J**

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SOLICITORS

Shieff Angland (Auckland) for Appellant
Rainey Collins Wright & Co (Wellington) for Respondent
The Privacy Commissioner (Auckland)

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**Introduction**

[1] The Complaints Review Tribunal is a statutory body constituted pursuant to s 93 Human Rights Act 1993. It is empowered to determine, among other things, proceedings for breach of the Privacy Act 1993. In a decision delivered on 26 July 2001 the Tribunal (S C Bathgate (Chairman), P McDonald and L Whiu) dismissed a claim for damages by a patient against her former surgeon. The patient alleged that the surgeon breached a privacy principle by disclosing health information to the patient's husband. The patient (the appellant) now appeals against that decision.

[2] A number of issues arise on the appeal. First, whether the Tribunal erred in law when deciding to dismiss the proceedings. Second, whether its decision should be set aside either for breach of the principles of natural justice or for predetermination. Third, if the appellant succeeds on either of the previous two issues, whether I should remit the proceedings for rehearing before a differently constituted Tribunal or determine them myself.

[3] In brief summary, on 1 October 1996 the respondent performed a hysterectomy on the appellant. In the hours immediately following this operation the respondent telephoned the appellant's husband on three occasions – first, to confirm completion of the operation; second, to advise that the appellant was then very ill and required emergency surgery, and to invite the husband to come to the hospital; and, third, to advise that the appellant's condition had now stabilised with the assistance of a blood transfusion.

[4] The appellant claimed that the respondent had no authority to disclose any of this information. She claimed also that the respondent's conduct in telephoning her husband was a substantial cause of the breakdown of their marriage ("a huge portion of my reasons to leave . . .") over three years later.

[5] The Tribunal found that the respondent's disclosures were not made in breach of the Health Information Privacy Code ("the Code"). Additionally or

alternatively, even if there was a breach, the Tribunal was not satisfied that it constituted an interference with the appellant's privacy.

[6] The appellant had earlier complained to the Privacy Commissioner, Mr Bruce Slane, about the same conduct. On 30 June 1999 the Commissioner advised her of his final opinion that the respondent's disclosures of information to her husband about her general condition and subsequent emergency situation did not breach the Code. He found, however, that the respondent breached the Code in disclosing information about the blood transfusion (and removal of an ovary, which was later in dispute before the Tribunal). Nevertheless, in accordance with his statutory discretion, the Commissioner decided not to refer the appellant's complaint to the Proceedings Commissioner. He advised the appellant of her statutory right to bring her own proceedings before the Tribunal.

[7] Against this background I shall discuss the statutory principles governing privacy issues before analysing the Tribunal's decision and addressing the principal issues. However, before doing so, I must emphasise one important point. The appellant does not allege that the respondent breached the Code when disclosing information to her husband in the first telephone discussion.. On a number of occasions during the argument on appeal Ms Ailsa Duffy QC, counsel for the appellant, acknowledged that this disclosure was "unobjectionable". As will become apparent later, this concession is material to the outcome of the appeal.

**Legislative Framework**

[8] S6 Privacy Act 1993 enumerates 12 information privacy principles. S46 empowers the Privacy Commissioner to issue a code of practice. To the extent that it modifies any one or more of the specific information privacy principles such a Code takes precedence. S53 provides that, where a code of practice issued under s 46 is in force, a failure to comply shall be deemed to be a breach of an information privacy principle for the purposes of determining a complaint and the other enforcement provisions of Part VIII. In due course the Privacy Commissioner issued the Health Information Privacy Code pursuant to s 46. It came into effect on 30 July 1994.

[9] In helpful oral submissions counsel for the Privacy Commissioner, Mr Robert Stevens, explained the purpose and effect of the Code. R4 defines the Code's application. It proceeds on the premise of a blanket prohibition against disclosure of any information by a health agency, such as a surgeon, about an individual's health including his or her medical history (R4( l)(a)). This prohibition is, however, subject to certain specified exceptions set out in R11.

[10] R1 l(1) materially provides:

> A health agency that holds health information must not disclose the information unless the agency believes, on reasonable grounds:
>
> (a) ...
>
> (b) that the disclosure is authorised by:
>
> (i) the individual concerned; . . .
>
> (e) that the information is information in general terms concerning the presence, location, and condition and progress of the patient in a hospital, on the day on which the information is disclosed, and the disclosure is not contrary to the express request of the individual or his or her representative; . . .

[11] S66 Privacy Act provides:

> For the purposes of this Part of this Act, an action is an interference with the privacy of an individual if, and only if,-
>
> (a) In relation to that individual,-
>
> (i) The action breaches an information privacy principle; and . . .
>
> (b) In the opinion of the . . . Tribunal, the action—
>
> (i) Has caused, or may cause, loss, detriment, damage, or injury to that individual; or . . .
>
> (iii) Has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

[12] Any person may make a complaint to the Privacy Commissioner alleging that any action is or appears to be an interference with his or her privacy (s 67). The

Commissioner's functions are to (a) investigate any action that appears to be an interference with an individual's privacy; (b) to act as conciliator in relation to this action; and (c) to take such further action as is contemplated by the Act. Where after making an investigation the Commissioner is of the opinion that the complaint has substance he may refer it to the Proceedings Commissioner for the purpose of deciding whether proceedings should be instituted against the person who is the subject of the complaint (s 77). In this case, as noted, the Commissioner exercised his discretion against referring the appellant's complaint to the Proceedings Commissioner.

[13] However, notwithstanding the Commissioner's decision not to refer a complaint to the Proceedings Commissioner, a complainant remains entitled to bring proceedings at her own suit before the Complaints Review Tribunal (s 83). The Tribunal, if satisfied on the balance of probabilities that a party has interfered with the privacy of another, has a discretion to grant various remedies including a declaration, a restraining order, damages and costs (s 85). It is no defence to proceedings that the interference was unintentional or without negligence; however, conduct is to be taken into account "in deciding what, if any, remedy to grant" (s 85(4)).

[14] S87 materially provides:

> Where, by any provision . . . of a code of practice . . ., conduct is excepted from conduct that is an interference with the privacy of an individual, the onus of proving the exception in any proceedings under this Part of this Act lies upon the defendant.

[15] The Tribunal's general powers and procedures when hearing and determining complaints are governed by ss 89-92 and Part IV Human Rights Act 1993 (s 89). The Tribunal is bound to act ". . . according to equity, good conscience, and the substantial merits of the case, without regard to technicalities . . ." (s 105). It is also entitled to receive any evidence that may in its opinion ". . . assist it to deal effectively with matters before it . . ." irrespective of whether that evidence would be admissible in a Court of law (s 106(1)). In recognition of its judicial function the Tribunal must give written reasons for its decision (s 116). A party such as the

Privacy Commissioner is entitled to appear and to be heard in proceedings before the Tribunal (s 108).

[16] A party dissatisfied with the Tribunal's decision has a statutory right of appeal to the High Court. On determining an appeal (s 123(6) Human Rights Act):

> ... the Court may-
>
> (a) Confirm, modify, or reverse the order or decision appealed against, or any part of that order or decision:
>
> (b) Exercise any of the powers that could have been exercised by the Tribunal in the proceedings to which the appeal relates.

[17] The Court has jurisdiction to refer the case back to the Tribunal for further consideration instead of determining an appeal (s 123(7)). On an appeal, inter alia, from a decision dismissing proceedings "in which a question of fact is involved" the Judge shall appoint two additional members, selected from the panel of people available for appointment to the Tribunal, to sit with the Judge for the purpose of determining the appeal (s 126(1)).

[18] The appellant appeals against the Tribunal's decision on two independent grounds. First, she submits that the Tribunal's decision was based on an error of law. Second, or alternatively, she submits that the Tribunal committed what she describes as procedural errors in breaching s 27 New Zealand Bill of Rights Act 1990 by failing to conduct the hearing in accordance with the principles of natural justice, in particular by predetermining the issues for decision. I shall deal with each argument in the same order.

**Legal Errors**

[19] Ms Duffy, who appeared as counsel for the appellant in this Court but not before the Tribunal, accepted this narrative of the background facts from the Tribunal's decision as correct:

> 2. The defendant is a specialist obstetrician and gynaecologist. The plaintiff was referred to the defendant in 1988 and the doctor/patient relationship lasted until late 1996. During that

time a number of procedures and operations were required to be performed. The plaintiff estimated that she would have seen the defendant at least a hundred times. The defendant described the plaintiff as a difficult but interesting patient in a letter to the plaintiffs general practitioner in 1993. At that time the issue of whether a hysterectomy should be performed was discussed between the parties and the plaintiffs husband. He was apparently opposed to the idea and talked the plaintiff out of proceeding with the operation shortly before it was due to occur. In September 1996 the plaintiff again decided to proceed with the operation. She did not wish her husband to be involved in the decision making at this time because she did not wish to be talked out of it again. She wrote him a letter about the issue on 14 September 1996. She requested a response from him in writing. She had not received any response from him when she saw the defendant at a consultation on 16 September. They discussed the operation and the plaintiff was booked in for surgery at a private hospital. On or about 23 September the plaintiff left a message with the defendant's nurse confirming that she wished to proceed with the hysterectomy, that her husband still wished to have another baby and that the defendant was not to discuss the matter with him.

3. The surgery was booked to proceed on 1 October 1996. The plaintiff completed the admission form for the hospital at the defendant's rooms and it was forwarded to the hospital. She completed next-of-kin details but omitted to complete that part of the form which requested the details of the person to be contacted after the operation. She says that this omission was deliberate because she did not want her husband contacted with details of the operation. She was admitted to the hospital at 10 a.m. Details of the person to be contacted were completed on the hospital admission forms and post surgery contact list. The plaintiff is adamant that this was not on her instruction. She is equally adamant that she discussed her wish that her husband not be contacted with the defendant at about 1 p.m. prior to the surgery. The defendant disputes this and is certain that the only requirement was that there was to be no discussion about the operation prior to it occurring.

4. The contact details for the plaintiff (her husband and home telephone number) were included in a contact list which is a list of patients having operations on a particular day. That list is taped to the wall next to the telephone in the operating theatre and enables surgeons to telephone those named as contact persons to advise on the condition of a patient once an operation has been completed. The defendant consulted that list and telephoned the plaintiffs husband to confirm that the operation had been completed. This was a message left on an

answer machine. Some time later on the same day it became clear that the plaintiff required further emergency surgery as a result of internal uncontrolled bleeding. Immediately prior to the operation the defendant telephoned the husband to advise of the emergency and to inquire whether he wished to visit the plaintiff because she was very ill. He indicated that he was unable to do so and the defendant asserts that this information was transmitted back to the plaintiff immediately following this telephone call. According to the defendant the plaintiff was devastated by the refusal of her husband to come to her side at this critical time. The emergency procedure was completed and the husband was again contacted by the defendant and advised that blood transfusions had been given. There is dispute about whether the defendant also advised that the plaintiffs right ovary had been removed during the hysterectomy operation.

5. The plaintiff regarded the three telephone calls made by the defendant to her husband as a breach of her express request that he not be contacted. The defendant maintains that no such express requirement was made. The plaintiff laid a complaint with the Privacy Commissioner in February 1997.

[20] When determining proceedings brought by a patient against a doctor, the Tribunal should apply these sequential principles taken from the Privacy Act and the Code:

[a] First, the Tribunal must decide whether health information (i.e. information about the patient's health) was disclosed by the doctor and, if so, the nature of the information (R4 and R11). The patient carries the burden of proving this threshold element on the balance of probabilities;

[b] Second, if the Tribunal is satisfied that health information was disclosed, the burden shifts to the doctor to establish to the same standard that disclosure fell within one of the exemptions provided by R11(1) (s 87). For example, a doctor relying on R1 l(l)(b) must prove:

[i] the existence of a belief that the disclosure was authorised by the patient (a subjective inquiry);

[ii] that the grounds for her belief are reasonable (an objective inquiry);

[c] Third, if the Tribunal is satisfied that the health information was disclosed and that the doctor has not discharged her burden of proving one of the exemptions in R1 1, the Tribunal must then determine whether the disclosure constituted an interference with the patient's privacy (s 66). The burden of proof reverts to the patient at this stage. She must:

[i] prove that the action breached an information privacy principle; and

[ii] satisfy the Tribunal (in its "opinion") that the breach has caused or may cause certain consequences or has resulted in or may result in other consequences;

[d] Fourth, if the Tribunal is satisfied to this stage, then its final task is to determine whether, in its discretion, it should grant any of the statutory remedies (s 85).

[21] The following passages from the decision articulate the legal test which the Tribunal actually applied:

> 7. The plaintiff and a friend in whom she confided after she became aware the disclosures had been made gave evidence for the plaintiff. The defendant gave evidence. Two briefs of evidence of staff at the private hospital responsible for the admission of patients were received and read by us. This evidence was called by the defendant. We indicated to the parties that we did not need to hear further from these witnesses because **we were not satisfied that there were facts sufficient to form the basis of the plaintiff's case that she had expressly requested that her husband not be contacted at all by the defendant.**
>
> 8. **We are required to determine whether there was an express request or direction to the defendant not to disclose any health information at all to the plaintiff's husband. We also have to be satisfied that the information**

**that the plaintiff alleged was disclosed was in fact disclosed.** As we indicated to the parties at the hearing those are findings of fact which must be established in order to found a breach of Rule 11. After we are satisfied that a breach of an information privacy principle has occurred we can consider whether an interference with the plaintiffs privacy occurred and whether there should be any remedies awarded.

9. After hearing the evidence of the plaintiff and the defendant **we were unable to determine the precise nature of the information disclosed (apart from the current condition and progress of the plaintiff following the two procedures)** because the defendant could not remember in precise terms what she told the husband and the husband was not called to give evidence about the information he received.

10. **We were also not satisfied, on the balance of probabilities, that there was an express request or direction to the defendant not to disclose any health information at all to the husband for the reasons which follow.**

[Emphasis added]

[22] These passages from the Tribunal's decision illustrate the nature and extent of its errors when determining the proceedings. It failed to apply the statutory principles which I summarised earlier. In particular:

[a] The Tribunal wrongly identified its threshold statutory duty as a requirement to determine, first, whether the appellant made an express request or direction to the respondent not to disclose any health information at all to her husband and, second, that the information allegedly disclosed was in fact disclosed in order to establish a breach of R1 1. To the contrary, the Tribunal's first duty was to determine whether or not the respondent in fact disclosed health information. The appellant carried the burden of proving the fact of this disclosure. She discharged it once the respondent gave evidence on oath at the hearing of the contents of her three communications;

[b] In this respect it was unnecessary for the Tribunal to "determine the precise nature of the information disclosed". The respondent admitted in her written brief that ". . . I phoned her husband to tell him

that an urgent clinical problem had developed . . ." (second telephone call) and that ". . . I again called to reassure [the husband] that [the appellant's] condition was stable . . . including a four unit blood transfusion . . ." (third telephone call). These statements were sufficient to constitute disclosures of "information about [the appellant's] health . . ." (R4(1)(a)). The Tribunal was not entitled to rely on the appellant's failure to establish "precise details" of the disclosures as a ground for dismissing the proceedings;

[c] To succeed, the appellant did not have to prove that she had expressly requested the respondent not to contact her husband. The existence or otherwise of an express request by the appellant was only relevant to the respondent's affirmative defence under R1 1(1)(e); namely, her belief on reasonable grounds that, inter alia, disclosure was not contrary to the appellant's express request. The appellant bore no burden at all in this respect. The Tribunal misunderstood what s 87 Privacy Act made unequivocally clear – the burden of proving all elements of an exemption provided by R11 rested solely with the surgeon. It reversed the onus;

[d] In this regard the Tribunal failed to make any allowance within the scope of the test formulated in its decision [para 8] for an inquiry into whether the respondent's belief in terms of either the R1 1 exemptions was based on reasonable grounds. This question should have been the focal point of the Tribunal's inquiry. Instead, it does not even feature in the Tribunal's decision.

[23] The Tribunal's subsequent findings reflect the nature and extent of its erroneous approach. For example [para 14]:

> We had the opportunity to see and hear both [parties]. We had no reason to disbelieve the defendant's evidence. It was evidence consistent with the records kept by others. We have no doubt that the plaintiff genuinely believes that she issued an instruction that her husband was not to be contacted. We do not accept, however, that this instruction was communicated in clear and unequivocal terms to

> the defendant. We think the prohibition as understood by the defendant and observed (because there was no contact between the husband and the defendant before the operation) was on discussing whether the operation should proceed. Whether that prohibition has been converted to a much wider prohibition in the plaintiffs mind subsequently or whether there was a simple miscommunication between the parties is a moot point. The plaintiff regards the refusal by the husband to visit her after being asked to do so by the defendant as spelling the end of her marriage (the parties separated in May 2000) and believes that had the defendant not telephoned him he would not have been put in the position of refusing to visit her . . .

[24] Then the Tribunal observed as follows [para 15]:

> **The other reason why we are reluctant to accept the existence of this orally expressed instruction is highlighted by the possibility that there was a miscommunication between the parties.** Oral communication between individuals subject to recall some time later is a shaky basis for **establishing the precise nature of that which was communicated.** There is enough known about the psychology of communication and memory to establish that what one person thought they were transmitting is not necessarily what the other participant received.. .
>
> [Emphasis added]

[25] The Tribunal concluded by summarising its grounds for finding that the appellant failed on the threshold issue as follows [par-a 18]:

> For these reasons **we** regard **the telephone calls** to the plaintiffs husband as coming within the exceptions to Rule 11 **– either because they were authorised by the plaintiff** via the provision of contact details to the defendant by the hospital staff (Rule 1 l(l)(b)(i)) or **because there was no express prohibition on disclosing general information** about the plaintiffs condition and progress and that was the kind of information disclosed during the telephone calls. (Rule 11(1)(e)).
>
> [Emphasis added]

[26] This conclusion was the inevitably flawed result of the Tribunal's erroneous approach. It failed to undertake an inquiry of the type logically mandated by R1 l(l)(b) or (e). It failed to give discrete consideration to each of the two disputed disclosures (second and third telephone calls). **It** failed to make specific findings about whether, in relation to each disclosure, the respondent had discharged her burden by proving, first, her belief that the disclosure was either authorised by the

appellant (R1 1 (l)(b)) or her belief that the information was in general terms and the disclosure was not contrary to the appellant's express request (R1 l(l)(e)) and, second, that her belief was formed on reasonable grounds.

[27] Furthermore:

[a] In terms of R1 l(l)(b)(i), there was no evidence to support the Tribunal's finding that the appellant authorised the respondent to make either disclosure by providing contact details through the hospital staff. Her evidence was unequivocally that she did not provide these details; and

[b] In terms of R1 l(l)(e), at the risk of repetition, the appellant did not have to prove that she expressly prohibited the respondent from disclosing general information about her condition and progress to her husband. Rather, it was for the respondent to prove the existence of her belief to this effect.

[28] Accordingly, I uphold the first or primary ground of the appeal that the Tribunal erred in law in dismissing the proceedings on the ground that the appellant had failed to prove that the respondent breached R1 1.

[29] However, the Tribunal then went on briefly to consider whether, even if it was wrong on the primary issue, the information disclosed by the respondent constituted an interference with the appellant's privacy under s 66 as follows [paras 19 and 20]

> The major difficulty we would have with making that finding lies with the evidence of the plaintiff. She was clear in her evidence that her decision to leave her marriage in May 2000 (some three and a half years afterwards) in large part resulted from the damage done by the telephone calls of 1 October 1996. She said that she left the marriage because her husband still wished to pursue the idea of having more children and because he failed to visit her on the night of 1 October after having been appraised of her condition. She maintains that if he hadn't received the advice about her condition he would not have needed to make the choice about whether to visit her.

> We do not accept that this is damage that can be sheeted home to the defendant. She was not responsible for the husband's decision not to visit. The fact that she gave him the opportunity to make the choice whether to visit does not mean that she should be regarded as in any way responsible for the choice he made.

[30] Ultimately, as will become apparent, I have reached the same conclusion as the Tribunal, namely, that even if the respondent breached R1 1, the disclosures did not constitute an actionable interference with her privacy. However, I have done so for different reasons. It is unnecessary for me to consider the causation issue further at this stage because, if the appellant's alternative argument of breach of s 27 New Zealand Bill of Rights Act 1990 is correct, then the Tribunal's decision must be quashed. I shall deal with that argument next.

**Procedural unfairness**

[31] S27( 1) New Zealand Bill of Rights Act 1990 provides as follows:

> Every person has the right to the observance of the principles of natural justice by any Tribunal . . . which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognised by law.

[32] The Tribunal, by virtue of s 85 Privacy Act, has the power to make determinations in respect of the legal rights, obligations or interests vested in both parties. Accordingly, it is subject to a statutory duty to observe the principles of natural justice or fairness when hearing proceedings. For these purposes, I identify two fundamental and interrelated principles. First, a party to proceedings before the Tribunal has an absolute right to be heard, both in evidence and through supporting submissions. Both parties must be afforded this opportunity. The rationale for the principle is obvious; the interests of each party are or may be affected by the Tribunal's decision, and the law recognises their respective rights to attempt to influence the outcome *(De Smith, Woolf & Jowell: Judicial Review of Administrative Action,* 5th Ed., paras *7-008* and 9-012-9-017; *Philip Joseph: Constitutional and Administrative Law in New Zealand,* para 23.4.7).

[33] Second, as an adjunct of the first principle, the Tribunal must maintain an open mind on the issues for determination until the hearing is concluded; that is, until it has heard all the evidence which the parties wish to call and listened to any submissions which they wish to make through their counsel. The Tribunal must not determine an issue before completion of this process. Otherwise it will be guilty of predetermination, and the parties will be deprived of their rights to be heard; they will not have enjoyed a fair hearing.

[34] The Tribunal's decision [para 7] recorded as follows:

> The plaintiff and a friend in whom she confided after she became aware the disclosures had been made gave evidence for the plaintiff. The defendant gave evidence. Two briefs of evidence of staff at the private hospital responsible for the admission of patients were received and read by us. This evidence was called by the defendant. **We indicated to the parties that we did not need to hear further from these witnesses because we were not satisfied that there were facts sufficient to form the basis of the plaintiff's case that she had expressly requested that her husband not be contacted at all by the defendant.**
>
> [Emphasis added]

[35] The background to this statement is critical. It is appropriate, indeed necessary, for this purpose to refer reasonably extensively to the record of the hearing of the proceedings before the Tribunal.

[36] As the Tribunal noted, the evidence for the appellant was from herself and a friend. Both provided written statements or briefs. The respondent produced her own statement together with statements from Wendy Postlewaight and Tekiri Wera Baker. Both were employed at Rawhiti Trust hospital in Mt Eden where the operation took place; their evidence was related to completion of contact details in the appellant's admission form. The Tribunal had apparently read all briefs in advance of the hearing.

[37] At about 5 p.m. on the first day of the scheduled two day hearing, on completion of the respondent's evidence, the chairman observed [Transcript ("T") 112]:

> We've reached certain conclusions about the facts which we think might have some implications for what should happen next . . .

This observation had a precursor. Immediately after the proceeding opened that morning, before the appellant had even opened her case, the chairman noted [T5]:

> . . . it seems to us that the first determination or finding that we have to make is a factual one and because we have to decide whether we prefer [the appellant's] version of what you might call a prohibition or [the respondent's] version of that. Now, you will be aware from other decisions of this Tribunal that there have been occasions when at the close of the case of the plaintiff we think we've been in a position to be able to indicate our view on factual matters. Is it going to be of any assistance to you if we do that in this case?

[38] To revert to events later that day, the chairman followed her observation with a discursive statement to the effect that, having heard the parties, the Tribunal did not accept ". . . that on the facts a prima facie case has been made out" [T112]; and that the Tribunal was unable to determine what was said both on the issues of consent and on whether information was passed to the appellant's husband. She observed that it was accordingly unnecessary for the Tribunal to hear Ms Baker and Ms Postlewaight.

[39] An exchange with counsel followed. The appellant's counsel, Mr Timothy McBride, noted, with a degree of understatement, that the chairman's observations had put them both "in a rather invidious position" [T114]. The problem was compounded when the chairman suggested that the appellant may incur an order for costs of the two witnesses if she insisted on the respondent calling them [T115]. It should be noted that in the course of a comprehensive cross-examination, Mr Harry Waalkens, counsel for the respondent, had put to the appellant the evidence to be given by Ms Baker and Ms Postlewaight.

[40] As authority for the Tribunal's approach for deciding the proceeding on a finding of no prima facie case, the chairman referred to one of the Tribunal's earlier decisions. She described it as "the funeral director's case" (a passage is recited in the Tribunal's decision [para 16]). Mr McBride then inquired [T116]:

> Well I'm not aware Ma'am, did you hear detailed submissions before you, on the legal issues involved, before you made the ruling in the funeral director's case?

To this the chairman replied:

> Oh yeah we listened, we took that one right to the end.

[41] I assume that it was a source of comfort to the parties in the funeral director's case, if not to the appellant in these proceedings, to know that the Tribunal apparently listened to submissions and allowed the hearing to proceed to its conclusion.

[42] After a brief consultation with his client, Mr McBride advised the Tribunal that she did not insist upon the respondent calling her two additional witnesses. Mr McBride reserved the appellant's right to challenge the Tribunal's approach in the High Court. By then the writing must have been well and truly on the wall that the Tribunal intended to dismiss her claim.

[43] Just before the hearing concluded, the chairman rationalised the Tribunal's stance in these terms [T116]:

> ... There is a conflict about the nature of the information. There is conflict about the issue of consent, that is, the information that passed from the plaintiff to the defendant, and there is conflict about the information that is supposedly disclosed. We can't resolve that conflict. The people are relying on their memories and the reasons for that relate to the lapse of time, they relate to reception of information orally that isn't always the same as the sending of that information. You've got a whole lot of human dynamics that occur and human dynamics in this case are very much a part of the difficulties that have arisen and they get in the way of us being clear and certain about what happened.

[44] This theme later found its expression in the Tribunal's decision [para 15] as follows:

> The other reason why we are reluctant to accept the existence of this orally expressed instruction is highlighted by the possibility that there was a miscommunication between the parties. Oral communication between individuals subject to recall some time later is a shaky basis for establishing the precise nature of that which was communicated.

> There is enough known about the psychology of communication and memory to establish that what one person thought they were transmitting is not necessarily what the other participant received. There are all kinds of explanations for this with which we need not now concern ourselves, but suffice it to say that we are wary of accepting, as the basis of an allegation of a breach of the Privacy Act, something that was said and recorded in no other way than by the speaker's and recipient's memories. Allegations of breaches of the Privacy Act are serious matters. If they are the subject of proceedings such as these they involve the expenditure of a great deal of time, money and stress for the parties. They are not to be undertaken lightly. If there is dispute about the information (or directions/instructions) at issue and it is not in some recorded form we will continue to experience difficulty accepting allegations of what was said without there being some other corroboration of those statements.

[45] I construe this statement, formalising the chairman's observations at the conclusion of the hearing, as the Tribunal's routine justification, albeit legally flawed, for evading performance of its statutory duty to adjudicate on the dispute before it in accordance with the provisions of the Privacy Act and the Code.

[46] Apart from being legally flawed, the Tribunal's approach denied the parties and the Privacy Commissioner the opportunity to make submissions on the various questions at issue in the proceedings. The chairman made very clear that the Tribunal had determined the issue of breach of the Code on the basis of evidence already heard. She made equally clear that the Tribunal was not receptive to a challenge to its approach, which followed its own incorrect precedent. If the chairman had invited submissions, and listened to what was submitted, she might have appreciated the nature and extent of the Tribunal's errors.

[47] No criticism can be made of either counsel for what transpired. Mr Waalkens was not about to look a gift horse in the mouth. As noted, the chairman's statements were made at about 5 p.m. on the first day of the hearing. Her reference to a cost award was an unambiguous threat of adverse financial consequences if the appellant did not accept, then and there, that her case was lost. The appellant was, as Mr McBride observed at the time, in an "invidious position". The case then came to an abrupt end.

[48] Ironically, the respondent suffered as much if not more than the appellant from the Tribunal's approach. The evidence of her two additional witnesses was relevant to the reasonableness of the grounds for her belief that she was authorised by the appellant to make disclosures to her husband. If accepted, this evidence would have strengthened the respondent's defence.

[49] In summary, the Tribunal initiated a peremptory conclusion of the hearing on 28 June 2001. It did so by expressing in finite terms what the chairman described, euphemistically on one occasion, as a "preliminary" conclusion on the issues for determination without hearing all the evidence or any submissions from counsel. It achieved its objective by the threat of an added burden of costs for the appellant. It did not accord either party or the Privacy Commissioner, who was separately represented, an opportunity to exercise their rights to make submissions.

[50] In legal terms the Tribunal, first, failed to afford the parties an opportunity to make submissions on the issues for determination and, second, manifested a concluded view on the issues before hearing from the parties. This was a plain case of breach of the principles of natural justice, and in turn a breach of s 27 New Zealand Bill of Rights Act. The decision cannot stand. It is quashed as a consequence.

[51] I regret this result. The events giving rise to these proceedings occurred on 1 October 1996. Doubtless the litigation has caused great stress and inconvenience to the parties, who were entitled to the benefit of a fair hearing conducted by a specialist body in accordance with statutory principles. The process adopted by the Tribunal was demeaning both to the parties and to the Privacy Commissioner.

## Rehearing

### *Introduction*

[52] However, that finding does not signal the end of this appeal. As noted, s 123(6) Human Rights Act empowers the Court, in its discretion, to "confirm, modify, or reverse the order or decision appealed against . . . [and] to exercise any of

the powers that could have been exercised by the Tribunal". In her written synopsis Ms Duffy submitted that this section "provides the High Court with a very wide appeal jurisdiction . . . effectively to rehear the complaint".

[53] The proper approach for an appellate Court to adopt on a rehearing (Pratt v *Wanganui Education Board* [1977] 1 NZLR 476 (CA) per Somers J at 490 (cited by Ms Duffy)) is as follows:

> But a direction that an appeal shall be by way of rehearing does not mean that there is to be a complete rehearing as, for example, in the case of a new trial. Under such a direction the appeal is to be determined by the Court whose members consider for themselves the issues which had to be determined at the original hearing and the effect of the evidence then heard as it appears in the record of the proceedings but applying the law as it is when the appeal is heard and not as it was when the trial occurred.

[54] After giving the issue careful consideration, I have decided to exercise the Tribunal's powers by rehearing the proceedings instead of referring them back for a rehearing there in accordance with my discretionary jurisdiction under s 123(7). In my opinion the latter course would be a soft option and unfair to the parties. The factors on which I rely, when exercising my statutory discretion to rehear the proceedings in this Court, are as follows:

[a] The events giving rise to these proceedings occurred on 1 October 1996. The complaint was laid in 1997. The delays leading to determination have been extraordinary. Finality, without yet further delay, is essential for both parties;

[b] Both parties must have incurred substantial cost and suffered considerable stress in prosecuting and defending this proceeding. Another hearing, with the attendant preparation and the contingency of further appeals, will only compound those factors;

[c] All the evidence called by the parties is contained within the record of the hearing of the proceedings. I am now in as good a position as the Tribunal to make a decision. Its errors were solely of a legal nature,

as Ms Duffy submitted. In my view the proceedings can be determined without credibility findings based on contested evidence. It is unnecessary to see and hear the parties or the witnesses. It is simply a matter of applying the correct legal principles to the evidence in the record;

[d] The respondent is the only party who may suffer prejudice from a rehearing in this Court. The briefs of her witnesses, Ms Postlewaight and Ms Baker, are not included within the record. I will have to disregard them. With knowledge of this factor, Mr Waalkens nevertheless urged me to determine the proceeding instead of remitting back to the Tribunal.

[55] I do not consider that I am disqualified from following this course by s 126(1) which materially provides that, on any appeal under s 123(2) "in which a question of fact is involved . . .", there shall be two additional members of the Court appointed from the panel maintained for membership of the Tribunal. Originally after this appeal was filed both counsel requested the Court to appoint two additional members pursuant to this provision. Arrangements were made accordingly. However, just before the hearing counsel advised that the appeal was proceeding on questions of law only. The two additional members were thus released.

[56] I appreciate Mr Stevens' submission that the parties cannot waive compliance with a statutory provision. But it is unnecessary to consider that point because I am satisfied that counsel were correct in confirming that this appeal only involved questions of law. Ms Duffy expressly introduced her submissions by emphasising that the appeal raised only questions of law and of procedure. In the course of oral submissions she never challenged the findings of fact made by the Tribunal. To the contrary, she expressly acknowledged her inability to do so. The appeal did not involve, in the sense of including or containing as a necessary part or spreading to or concerning, questions of fact. Thus, in my opinion, s 126(1) does not apply.

[57] I must record, though, a strange twist in the way this appeal was run. In submissions in reply and in a supplementary synopsis, Ms Duffy seemed to

contradict her original proposition that I had a very wide jurisdiction to determine this appeal by way of rehearing. She also suggested, contrary to the express advice given to the Court before the hearing, that I was limited by s 126. She submitted that if I quashed the decision the proper course was to remit the proceedings to the Tribunal for rehearing. I was left with the distinct impression that this change in emphasis may have been influenced by the appellant's desire to run her case differently if the proceedings were reheard by the Tribunal, differently constituted.

[58] In this context the concession made by Ms Duffy at the hearing on 26 April assumes particular importance. She acknowledged that the respondent's first telephone call to the appellant's husband immediately after surgery on 1 October 1996 was "unobjectionable"; i.e. it did not constitute a breach of the Code. On the appellant's own evidence (by way of memory of the message heard on the family answer phone subsequently to the operation) the disclosure was briefly to the effect that "[the appellant's] surgery has gone well and she's in the recovery room now, and all is well" [T19].

[59] The importance of Ms Duffy's acknowledgement is this. She accepts that the communication does not constitute a breach of the Code. Yet the information was clearly information about the appellant's health within the meaning of R4(1)(a); it was "health information" which was the subject of a prohibition against disclosure in terms of R1 1(1). Ms Duffy's acknowledgement can only be predicated on the basis that the appellant accepted the respondent believed on reasonable grounds either that (a) the disclosure of that information was authorised by the appellant (R1 1(1)(b)) or (b) the information was in general terms about the appellant's condition and progress following the operation (which it clearly was) and, furthermore, the disclosure was not contrary to the appellant's express request. In other words, the appellant accepts that the respondent reasonably believed she was authorised to make this disclosure.

[60] Once this stage is reached, there does not appear to be a logical basis for arguing that the respondent did not reasonably believe she was acting within the scope of the same authority in terms of R1 1(1)(b) when communicating subsequently with the appellant's husband. The appellant's case was that she had expressed an absolute prohibition to the respondent, both directly and through her

receptionist, against any communications with the appellant's husband following the hysterectomy. Her concession about the first telephone call is inconsistent with this stance. An argument may still remain about whether the information actually disclosed in either discussion was ". . . in general terms concerning the presence, location, and condition and progress . . ." of the appellant within the meaning of R1 l(l)(e). But that question becomes academic if the respondent is able to obtain the protection granted by R1 1 (l)(b).

[61] I have read the written statements or briefs tendered by the parties and the appellant's witnesses together with the transcript of all evidence given under cross-examination and re-examination. I record that most of the appellant's evidence was immaterial to the issues for determination by the Tribunal. Her written brief was tendentious and self-serving, and raised numerous collateral issues of no relevance whatsoever to the proceedings. It read like a submission. The thrust of her evidence, both in her statement and viva voce, was to promote her case by using every possible opportunity to denigrate the respondent. Some of her evidence was so far fetched as to defy belief.

[62] I shall deal with the issues raised discretely by both disputed phone calls separately by reference to R1 1 (l)(b) and (e).

***Second telephone call***

[63] The only evidence on the contents of the telephone discussions was given by the respondent. The appellant did not call her husband, although he was available. In the absence of conflicting evidence the respondent's accounts of those discussions must stand unless undermined in cross-examination. Her written evidence about the second telephone call [para 25] is as follows:

> [The appellant's] initial surgery had gone as expected but unfortunately when I was called to see her 4 hours postoperatively it was apparent that she had ongoing intra-abdominal bleeding and needed to be returned to theatre to secure what I suspected was a bleeding vascular pedicle. She had evidence of ongoing haemorrhage but was not shocked and was conscious and alert and able to sign her own consent form. There was some urgency about the situation and I

> quickly organised for her to be returned to the operating room. I was concerned that her condition could become serious, very quickly, and as expected I phoned her husband to tell him that an urgent clinical problem had developed. [The appellant's husband] was very concerned and worried about his wife. It was relatively late in the evening and he was looking after their children and he could not immediately come to the hospital to see her. He asked to be kept informed of her condition.

[64] Mr McBride subjected the respondent to probing cross-examination. But very little was directed to challenging her evidence about her telephone calls to the appellant's husband. Remarkably, the burden of cross-examination on this point was apparently borne by Mr Stevens in his capacity as counsel for the Privacy Commissioner. He might have been expected to play a neutral role. At one point Mr Waalkens objected to Mr Stevens' cross-examination on the ground that he was following a partisan approach. Equally remarkably, the chairman dismissed Mr Waalkens' objection with this observation made in the respondent's presence [T103]:

> Would it be of any assistance if I indicated that the line of questioning is of enormous assistance to [the respondent].

[65] Before considering the second telephone discussion in any detail, I should record what is common ground between the parties. Some time between 15 September 1996 and 1 October 1996, the day of surgery, the appellant instructed the respondent's receptionist to convey to the respondent that she was not to speak with the husband if he telephoned before the operation. The appellant was concerned that he may attempt to dissuade the respondent from performing the surgery.

[66] However, the appellant admitted at the hearing that she had advised her husband that she would be going to hospital. Moreover, she admitted that he knew she was planning to have a hysterectomy. In fact he personally delivered her flowers in the hospital just prior to the operation. Under cross-examination, the respondent denied that they discussed the purpose of her hospitalisation. She asserted "we talked about the weather and then he left" [T49]. However, the inference is irresistible that before the operation on 1 October 1996 the appellant's husband knew she was about to have a hysterectomy that day.

[67] As I have already noted, the respondent carried the burden of proving either of the exceptions provided by R1 l(1) applied. I shall deal with the elements of each, and the relevant evidence.

**(a) R11(1)(b)**

[68] First, did the respondent satisfy the requirements of R1 l(l)(b)? In her brief the respondent said this [para 22]:

> I saw [the appellant] prior to her going into the operating theatre. She did not give me any instruction that I was not to contact her husband, as usual, following her surgery. She has had several previous operations under my care. She is aware of my practice of always phoning her husband if he is nominated as a contact person and providing him with details of her surgery. [The appellant] has never hesitated to give me specific instructions of an unusual nature if she wishes me to deviate from my usual practice. She is emphatic and definite about her wishes and desires at every occasion. It is my common practice to carefully document anything unusual that she has instructed me to do or not to do as I have always been particularly careful in her case.

[69] Furthermore, the respondent deposed [para 23]:

> [The appellant] was my only surgical patient that day. If she had instructed me not to phone her husband there would have been no possibility of me having forgotten it. Nor would I overlook or disregard it. The interval between me seeing her for a last pre-operative talk and my first call to [the husband] was in the order of two hours. I have no reason to think that she wished me to depart from my usual practice of informing her husband of her condition and progress.

[70] These statements were the evidential foundation, within R1 l(l)(b), for the respondent's defence that (a) she believed the disclosure later identified was authorised by the appellant and (b) the belief was based on reasonable grounds. In her statement [paras 12-16] the appellant deposed:

> As I knew I would be leaving a message for [the respondent] (with her receptionist), of necessity my message to her nurse was concise yet explicit. I can recall that the message was:
>
> (a) 'I have decided to proceed with the hysterectomy';

(b) 'My husband still wants to have another baby';

(c) '[The respondent] is not to discuss my case with him'.

[71] The appellant also said about events immediately preceding the hysterectomy on 1 October 1996 [para 22]:

> At around 1300 [the respondent] came to visit. We discussed briefly the plan for the day. I took particular care to confirm with [the respondent] that she had received the message I had left with her nurse. [The respondent] stated that she had received this message and that she 'understood why'. I then said to her '[my husband] is having nothing to do with this, he is not to be involved'. I did not see [the respondent] again until later that evening.

[72] Later she said this [para 27]:

> Because of my lengthy association with [the respondent], I was aware that she routinely telephones her patient's contact person after surgery, advising them of the patient's condition, how the surgery went etc. That is why I had taken the steps outlined above to ensure that this did not occur in my case. I certainly did not expect that she would make a call . . .

[73] Under cross-examination by Mr McBride [T92-94] the respondent confirmed her evidence-in-chief in these words:

> I have always stated that [the appellant] did not give me any instruction that I was not to phone her husband following her surgery to inform him of her condition and progress.

[74] Mr Stevens cross-examined the respondent at length about the second phone call [T101-106]. But on analysis most of his questions were directed towards the respondent's philosophy and practice about communicating a patient's health information to a third party. He did not challenge her credibility. The respondent's evidence given in answer to Mr Stevens' questions does not materially advance resolution of this question.

[75] The Tribunal clearly accepted the respondent's evidence where it was in conflict with the appellant. This finding was not tainted by any suggestion of pre-determination. I am entitled to give it weight, particularly as the Tribunal members had the benefit of seeing and hearing the parties give evidence. Also, on three

occasions during submissions on appeal Ms Duffy acknowledged that she could not challenge the Tribunal's credibility finding.

[76] However, I am able to determine the respondent's defence independently of any findings made by the Tribunal. There was no challenge before the Tribunal or in this Court to the fact that of the respondent's subjective belief that she was authorised by the appellant to advise her husband that "an urgent clinical problem had developed". The only live issue was whether or not the grounds for her belief were reasonable. This is an objective test. Bearing in mind that the respondent has the burden of proof under R1 l(l)(b), I am satisfied that she discharged it on these grounds:

[a] The respondent had performed a number of previous operations on the appellant. Her invariable practice was to telephone the appellant's husband following the operation if he was nominated as contact person. Her purpose was to provide him with details – i.e. condition and progress – of the surgery. The appellant knew of this practice. She did not suggest in evidence that she had ever protested about it. It must have had her approval. The appellant's acquiescence in this practice is illustrated by her acceptance of the propriety of the respondent's first telephone call;

[b] Prior to the operation on 1 October 1996 the appellant gave instructions to the respondent's nurse. The clear tenor of the words used in her brief was that the appellant did not want the respondent to discuss the surgery with her husband before the operation. The appellant wanted to have a hysterectomy whereas her husband wanted another baby. The rationale for this instruction, as the appellant said herself, was that she did not want her husband to talk the surgeon out of it. However, once the operation was completed this rationale was spent. It did not apply to post-operative communications of the type conducted by the surgeon with the appellant's husband previously;

[c] The only occasion when the appellant communicated directly with the respondent on this subject, according to her own brief [para 22], was early in the afternoon of the day of the operation. She advised the respondent that her husband was "having nothing to do with this, he is not to be involved". The respondent denied this communication. The Tribunal accepted her evidence. But even if the issue is considered on the basis of acceptance of the appellant's account, her statement is at best equivocal in communicating an absolute prohibition on future disclosures. Considered in the context of the appellant's earlier three part message to the respondent's nurse, her direct communication to the respondent some time later is open to construction as restricted to and confirmatory of her determination not to allow her husband to intervene before the operation. In a letter written to the Privacy Commissioner on 5 May 1997 the respondent had noted:

> I cannot recall the specific conversation but it was very clearly my interpretation that she did not wish me to discuss with [her husband] the reasons for her having her hysterectomy or any of the circumstances surrounding her decision to proceed with the operation. [The appellant] has been a longstanding patient of mine and I was aware of the conflict between her and her husband regarding her wishes to have her hysterectomy performed and that she wished to make this decision herself, solely, and that her husband may have, in fact, been in opposition to her desire to proceed with the surgery. At no stage did she specifically request to me that he not be informed of her condition as her next of kin post-operatively or if any serious complications arose.

[d] The admission form signed by the appellant contained two adjacent boxes for completion by the patient. In one she identified her husband as her next of kin. The other, allowing for details of a contact person, was left blank. However, at one stage an arrow was drawn from the next of kin to the contact box. A good deal of the Tribunal's time was wasted on attempting to identify responsibility for this insertion and on the appellant's reasons for failing to give details of her next of kin. What matters for these purposes is that the

respondent did not see the admission form. She simply saw a contact list completed by hospital staff. It was taped to the wall by the telephone. The contact list nominated the appellant's husband. In other words, when the respondent saw this document after the operation, the appellant's husband was nominated as contact person, just as he had been on earlier occasions.

[77] Taken together, these grounds provide a reasonable basis for the respondent's belief that she was authorised to telephone the appellant's husband after the operation and inform him that "an urgent clinical problem had developed". I am satisfied that the respondent has discharged her burden of proving that the exception provided by R1 1 (l)(b) applies.

**(b) R11(1)(e)**

[78] Second, even if I am wrong on the first finding, does R1 l(l)(e) apply in the alternative? The same evidence is relevant. The existence of the respondent's belief has not been challenged. The issue is whether the respondent had reasonable grounds for believing that the information was "in general terms concerning the presence, location, and condition and progress . . ." of the appellant in a hospital, on the day on which the information was disclosed, and the disclosure was not contrary to an express request from the appellant.

[79] The information communicated that "an urgent clinical problem had developed" was general and concerned the appellant's "condition and progress"" on that day, 1 October 1996. For the reasons applying to her defence under R1 l(l)(b), the respondent had reasonable grounds for believing that the appellant's communications with the respondent's nurse and later with the respondent, which I have already recited, did not constitute an express request to her not to disclose this information. I am satisfied that the respondent has independently discharged her burden of proving that the exception provided by R1 l(l)(e) also applies.

*Third telephone call*

[80] I propose to go through the same exercise for the third call. I must record, though, at the outset that during argument on appeal Ms Duffy acknowledged there was nothing objectionable about the respondent informing the appellant's husband that her condition was stable, although emergency surgery and treatment were necessary to ensure that condition. I can only assume that this acknowledgement was an acceptance that the respondent had reasonable grounds for believing disclosure of this information was either authorised by the appellant in terms of R1 l(l)(b) or was in general terms within the scope of R1 l(l)(e). Ms Duffy's challenge was limited to the respondent's specific disclosure that a "four unit blood transfusion" had been necessary to stabilise the appellant.

**(a) R11(1)(b)**

[81] First, did the respondent satisfy the requirements of Rl l(l)(b)? I have already traversed all the relevant evidence relating to the reasonableness of the grounds for her belief that she was authorised to communicate information in this third call when discussing the second call. Again, Mr Stevens cross-examined her at length on this discussion [T106-111]. Again, much of it was related to practice, philosophy and purpose, with a fair measure of debate. The respondent's answers do not contradict the essence of the evidence in her brief.

[82] In my opinion the respondent's disclosure of the fact that the appellant had received a four unit blood transfusion fell within 'details of [the appellant's] surgery' and was consistent with the respondent's 'usual practice of informing [the appellant's] husband of her condition and progress'. I am satisfied that the respondent's grounds for believing she was authorised to impart this information were the same as applied to the second call, and were thus reasonable. Accordingly, the respondent has discharged her burden of proving that the exception provided by R1 1 (l)(b) applied.

**(b) R11(1)(e)**

[83] Second, if I am wrong on this finding, does R1 l(l)(e) apply? Again, the same evidence is relevant. The only real question is whether or not disclosure of the necessity for a four unit blood transfusion fell within the realm of information "in general terms" about the appellant's "condition and progress". It is all a question of fact and degree, considered in context. I have recorded Ms Duffy's concession that the balance of the information disclosed was not objectionable.

[84] In supplementary written submissions Ms Duffy raised the question of whether in one of the discussions the respondent advised the appellant's husband that one of her ovaries had been removed. Again the husband was not called to give this evidence. In cross-examination the respondent said that she could not remember whether she had advised the husband that the ovary had been removed [T106]. Earlier she acknowledged that information about the ovary would fall within the type of information she would disclose to a contact person.

[85] The appellant bore the burden of proving what the respondent disclosed. As I have already noted, she discharged this burden through the respondent's evidence about the disclosures made in the three telephone calls. However, she did not discharge it by failing to prove what she alleged in addition but the respondent did not accept. She should have called her husband, the other party to the discussions, if she wished to prove this wider disclosure.

[86] In my opinion, a brief reference to the means used to stabilise the appellant's condition falls within the meaning of "general terms" about it, especially where the discussion was with the patient's husband who had already expressed his concern about her condition and where the respondent's usual practice, of which the appellant was aware, was to inform her husband of her 'condition and progress'. To exclude from the realm of lawful disclosure a brief reference to the means achieved to secure the result of stability seems artificial in this context. I do not read R1 l(l)(e) in a literal or legalistic sense, but as designed to impose general and workable principles applicable to the circumstances of each case. Accordingly, I am satisfied that in the alternative the respondent has discharged her burden of proving the exception provided by R1 l(l)(e) applies.

**Causation**

[87] If, however, my findings on breach are wrong, it is necessary to consider the question of causation or, more correctly, interference with the appellant's privacy. A disclosure is only an interference with privacy if it both breaches an information privacy principle or, in the Tribunal's opinion, has caused loss, detriment, damage or injury to the appellant (s 66(b)(i)) or has resulted in significant humiliation, significant loss of dignity, or significant injury to the appellant's feelings (s 66(b)(iii)).

[88] The appellant's evidence in her written statement was as follows:

> 109 I believed that the only way to solve the gynaecological problem was to have a hysterectomy and not tell my husband the specifics of the surgery. This may seem unusual, but it was an unusual situation and I had thought it through very carefully. I took quite extreme measures to ensure that my husband would not know about the details of my surgery. The disclosure of this information unravelled that plan.
>
> 110 After the saga outlined above, I had initially thought I could persevere in my marriage, both for the benefit of our children and because I was afraid of the future on my own and if my illness should worsen further. But as time went on and the full impact of [the respondent's] disclosures became obvious, I realised that I could no longer continue in that relationship – whatever the cost. I therefore left my husband and family and have been living on my own since May 2000.
>
> 111 I cannot lay the whole responsibility for this marriage breakdown on [the respondent] but the results of her action were a huge portion of my reasons to leave. [In cross-examination she quantified this at over 50%]. If [the respondent] had not made these disclosures, I believe that I would still be living in the marital home with my family and enjoying all the benefits and advantages of that situation.
>
> 112 It was very hard to leave my home, my children and my marriage. Together my husband and I had faced many vicissitudes of life, **but the issues of his not coming to the hospital and wanting a new baby** eroded the very foundations of the marriage so much that eventually there was no way I could continue in it . . .

[Emphasis added]

[89] Earlier the appellant had said about her husband's refusal to come to the hospital in response to the respondent's second telephone call:

> 59 ... I felt absolutely devastated that he would not visit or send a message when things were going so badly wrong. I know that my husband was angry that I was proceeding with this surgery. **But his refusal to come to the hospital – when [the respondent] told me she had spelled out to him the seriousness of the situation – sounded the death knell of our relationship.** For me, 'being there', one's life partner is one of the fundamentals of the marriage relationship.
>
> **60** I do accept that the decision not to come to the hospital was my husband's, not [the respondent's]. However, if he had not been provided with the information in the first place this issue would not have arisen . . .
>
> [Emphasis added]

[90] Finally, on this aspect of the case:

> 95 In 1983, whilst living in the Middle East, I received three units of blood following a very prolonged miscarriage. In 1984 our first daughter was born, and it was an incredibly traumatic time for our family some months later when the discovery was made that Aids was transmittable through blood transfusions ...
>
> 96 Due to [the respondent] informing my husband of the 1996 blood transfusions, we have had significant issues between us relating to whether I again run the risk of carrying some unknown transmittable disease – something which even the Department of Transfusion Medicine is unable to clarify. Blood donations in New Zealand are tested for known risk factors. But, as with Aids in 1983, it is the risk factors which are unknown which are the worry.

[91] All this is said to be the consequence of the respondent's disclosures to the appellant's husband that, first, an urgent clinical problem had developed – after an operation of which he had prior notice – and, second and subsequently, that the appellant's condition had stabilised although emergency surgery and treatment, including a four unit blood transfusion, had been necessary to achieve that result.

[92] Balance was not a feature of the appellant's evidence. She placed the blame on the respondent for the breakdown in her marriage. Yet at the same time she

acknowledged the existence of the two factors which "eroded [the marriage's] very foundations . . ." Both were entirely outside the respondent's control. One was that her husband wanted a new baby – to burden the respondent with responsibility for the consequences of this factor, when the appellant alone had decided to have an operation for the purpose of ensuring that she did not have another child, defies belief. The other was her husband's failure to visit her in hospital immediately after the second telephone call – this response was not as a consequence of the respondent's disclosures in the second call but, on the respondent's own evidence (the appellant did not call her husband), due to the time and his child care commitments. Moreover, the whole tenor of the appellant's evidence was that she wanted her husband to visit, carrying an implicit endorsement of the respondent's conduct in advising her husband of the emergency.

[93] The appellant's evidence reflected a facility for identifying, wherever it may possibly exist, an adverse consequence from any act or omission by the respondent. The alleged consequences of the latter's disclosure of a blood transfusion is a telling example. Significantly the appellant did not call her husband to corroborate this allegation. While I am not bound by the rules of evidence for the purpose of exercising the Tribunal's powers on a rehearing, I would give little weight to the appellant's allegation that there were "significant issues between us . . . [about] . . . carrying some unknown transmittable disease . . ." in the absence of evidence from the husband.

[94] The appellant's allegation that information disclosed by the respondent caused or contributed to the breakdown of her marriage cannot be sustained. It is factually contradictory. However, Ms Duffy submits that the appellant's brief and the transcript contain ample reference to other injury, damage, loss or detriment. In this category she includes injury as a consequence of the betrayal of trust by her specialist, and her consequent loss of faith in her; the distress caused by the loss of choice over what and when to tell whom; and humiliation as a result of the nature of the disclosures. Extensive references to these reactions are found in the appellant's evidence. But, too, they suffer from the blight of exaggeration. The communications were, after all, no more than information that the appellant was under emergency surgery and, later, that she had been given a blood transfusion of a

certain quantity to stabilise her condition. To characterise these disclosures as betrayals of trust or causes of humiliation reflects the appellant's abject lack of perspective.

[95] The question then is whether the disclosures constituted an interference with the appellant's privacy. I do not accept that disclosures of the existence of emergency surgery and a blood transfusion for the purpose of stabilising the appellant's condition, following an unobjectionable telephone call to the appellant's husband confirming completion of an operation which he knew was about to be performed, resulted in any humiliation, loss of dignity or injury to the appellant's feelings, let alone something significant in terms of s 66(b)(iii).

[96] Ms Duffy argued in the alternative that the disclosures caused a detriment within s 66(b)(i) in the sense that the respondent disclosed confidential information to a person whom the appellant would prefer not to know of it, even though the disclosures would not be harmful to her in any positive way (*Attorney-General* v *Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109 per Lord Keith at 256). She emphasised the special relationship between a doctor and patient and the latter's private interest in determining who shall have access to her private health information; and that the trust underlying this relationship will be damaged by a wrongful release of information. However, I record that in the course of oral argument Ms Duffy twice acknowledged that a doctor's breach of a privacy principle does not ipso facto constitute an interference with the patient's privacy; something more is required.

[97] I do not accept that the respondent disclosed confidential information to a person whom the appellant would prefer not to know of it. At the risk of repetition, she had already told her husband that she was going to hospital for an operation. The appellant did not complain that the respondent communicated to her husband the fact that the operation had been completed successfully. The appellant's complaint about the respondent's disclosure to her husband that she was undergoing emergency surgery was not that she would have preferred him not to know of it but more that he should have reacted positively to it by visiting her immediately in hospital. Additionally, I cannot accept that she would have preferred that her husband should

not know about the blood transfusion within the context of a disclosure about which she does not complain that her condition had stabilised.

[98] Accordingly, for these reasons, I am of the opinion that the appellant has not established an interference with her privacy as a consequence of the respondent's disclosures to her husband.

**Remedy**

[99] Even if I was wrong in concluding that the respondent's disclosures were not breaches of the Code and did not interfere with the appellant's privacy, I would exercise my discretion under s 85 against granting any of the remedies available to the appellant. I have already recorded that the respondent cannot raise as a defence the fact that "the interference was unintentional or without negligence" (s 85(4)). However, I am entitled to take into account the respondent's conduct when deciding what, if any, remedy to grant. In other words, the respondent is strictly liable for any proven breaches but her conduct is directly relevant to the question of remedy.

[100] In exercising my discretion here I would take into account all of the evidence I have already traversed in some detail. The duty of confidentiality imposed on a doctor towards a patient is sacrosanct. I accept Mr Stevens' submission to the effect that the Code is premised on this absolute duty of confidentiality. For this reason the burden is cast on a doctor to establish that information disclosed by her about a patient's health falls within any of the statutory exceptions.

[101] However, while recognising these principles, the Act provides the Tribunal with a measure of discretion in the event of a proven breach. In this case the disclosures, if they constituted breaches, were to the patient's husband. The doctor had frequently disclosed information to him about the appellant following earlier operations. This practice had the appellant's apparent concurrence. Moreover, as I have noted, the appellant did not object to either the first of the three disclosures or that part of the third disclosure confirming that her condition had stabilised following the emergency surgery. Most unusually, this is not a case where all

disclosures could constitute breaches of a privacy principle but where only a part of them might fall into that category.

[102] There is no suggestion that the respondent acted in bad faith or with any intention to harm the appellant. All the evidence suggests that she went out of her way to accommodate, to the best of her professional and ethical ability, the demands of a patient whom she described, perhaps with a degree of understatement, as presenting many challenges. In my opinion any breaches by the respondent do not warrant granting any of the prescribed remedies to the appellant.

**Result**

[103] Accordingly, I confirm that:

[a] The decision of the Complaints Review Tribunal dated 26 July 2001 dismissing the appellant's proceeding is quashed on the alternative grounds that the Tribunal erred in law or predetermined the proceeding or breached its duty under s 27 New Zealand Bill of Rights Act 1990 to accord the appellant a hearing in accordance with the principles of natural justice;

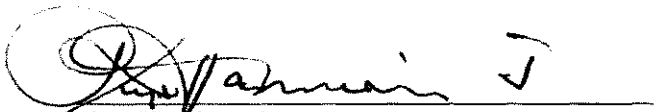
[b] On rehearing this appeal, and exercising the same powers as were available to the Tribunal, I find:

[i] The respondent has established, on the balance of probabilities, that her disclosures to the appellant's husband in the second and third telephone discussions on 1 October 1996 are excepted by either R1 l(l)(b) or 1 l(l)(e) from constituting breaches of the Code;

[ii] However, if either or both disclosures, were in breach of the Code, then they did not constitute an interference with the appellant's privacy within the meaning of s 66;

[iii] Even if either or both disclosures breached the Code, and constituted an interference with the appellant's privacy, I would not exercise my discretion to grant a remedy against the respondent under s 85.

[ 104] Accordingly, the appeal is dismissed. However, in view of the unusual circumstances which have led to that result, there will be no award of costs.



Rhys Harrison J

Signed at 2.30 ~~a.m.~~/p.m. on the 31st day of May 2002