NOTE: HIGH COURT ORDER SUPPRESSING PUBLICATION OF THE NAME AND IDENTIFYING PARTICULARS OF THE APPELLANT INCLUDING DETAILS OF HIS PRACTICE AND ITS LOCATION REMAINS IN FORCE

IN THE SUPREME COURT OF NEW ZEALAND

SC 22/2007
[2008] NZSC 55

BETWEEN	Z Appellant
AND	DENTAL COMPLAINTS ASSESSMENT COMMITTEE Respondent

Hearing: 13 November 2007

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

Counsel: A H Waalkens QC and A L Credin for Appellant
B M Stanaway and A M Toohey for Respondent

Judgment: 25 July 2008

JUDGMENT OF THE COURT

A The appeal is allowed to the extent that the allegation of professional misconduct in 1987 is not to form part of the charge heard by the Tribunal.

B In all other respects the appeal is dismissed.

C The appellant is to pay costs to the respondent of $10,000, together with reasonable disbursements to be fixed if necessary by the Registrar.

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ELIAS CJ

[1] The appeal concerns the intersection between criminal prosecution and professional disciplinary action taken under statutory authority. It raises the question whether it may amount to an abuse of the statutory disciplinary power to charge a dentist with indecent assault, despite his previous acquittal in criminal proceedings in respect of three incidents which are the subject of the disciplinary charges and despite the fact that the fourth claim has not been the subject of criminal proceedings at all. A related but subsidiary question arises as to the standard of proof to be applied by a disciplinary body. These questions are not adequately addressed simply by labelling proceedings as "civil", a classification which is not accurately applied to statutory disciplinary proceedings and which is not in any event determinative of either abuse of power or the appropriate standard of proof. Nor is it adequate to say that a principal purpose of professional disciplinary processes is maintenance of standards, in protection of the public, rather than the punishment of criminal conduct. Criminal law, too, aims to protect the public through enforcing minimum standards of behaviour.[1]

[2] What constitutes abuse of power requires "a broad, merits-based judgment" in context.[2] I have come to the conclusion that in the present case those charges of professional misconduct which are based entirely on the indecent assaults can fairly be determined only by criminal process. In my view it was an abuse of the power to bring disciplinary charges for the Complaints Assessment Committee constituted under the provisions of the Dental Act 1988 to refer claims of indecent assault for determination by the Dentists Disciplinary Tribunal. I reach that conclusion, for reasons more fully developed at paras [56] to [74], because of four principal and overlapping considerations. They are:

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1 See *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 at para [17] per Lord Steyn.

2 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at p 31 per Lord Bingham, a case about abuse of the processes of the Court, the application of which to the present case is discussed below at para [63].

- determination of culpability for a crime is not in general appropriately undertaken in our legal system "by a method which denies to the offender the protection of the criminal law";[3]

- the Dental Act makes conviction of a criminal offence punishable by imprisonment for not less than three years a ground for discipline when the Disciplinary Tribunal is satisfied that "the circumstances of the offence reflect adversely on the practitioner's fitness to practise"[4] (but adjusts the penalties available where that ground is invoked),[5] suggesting a scheme by which serious criminal conduct is professional misconduct justifying imposition of professional penalty when proof of conviction according to criminal process is offered;

- collateral determination by a statutory tribunal of responsibility for the indecent assaults of which the appellant has been acquitted at trial undermines the status of the jury verdict of acquittal and, while not prohibited by the terms of s 26(2) of the New Zealand Bill of Rights Act 1990, does not sit easily with the policy behind that provision and with general principle;

- professional disciplinary action is not a back-up for criminal prosecution.

[3] I do not suggest that conduct cannot form part of a charge of professional misconduct if it requires determination of facts which are also elements of a crime. But where there is entire coincidence between the professional misconduct charged and the commission of a crime (so that the professional misconduct consists of the commission of the crime), there must be some sufficient reason either to re-run the very issue in respect of which an acquittal has been entered at trial or, where trial has not taken place at all, to proceed to find the facts ahead of their determination in criminal proceedings. In the absence of some sufficient justification, I would treat a disciplinary charge which is coextensive with the commission of a crime but in respect of which a criminal conviction has not been entered as an abuse of the disciplinary power.

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3 *Rookes v Barnard* [1964] AC 1129 at p 1230 per Lord Devlin.
4 Section 54(1)(a).
5 Section 55(3).

[4] On the related question of the standard of proof, I am of the view that the facts justifying serious professional disciplinary charges should be established to the satisfaction of the tribunal to the standard of proof beyond reasonable doubt. These are not civil proceedings in which society can be largely indifferent between the claims of litigants, so that it is acceptable that the risk of error in result be left to a mere balance of probabilities. Moreover, the case law relating to application of the standard of proof on the balance of probabilities where serious allegations are made is unsatisfactory, even in civil proceedings properly so-called. The notion of flexibility in application of the civil standard is confusing and disputed even among judges of high standing.[6] In the case of disciplinary bodies with power to impose heavy penalties (including removal from the profession) and comprised of professional peers and lay members it is in my view unacceptably loose to leave the matter on the basis that sufficient protection is provided by "flexible" application of a balance of probabilities standard of proof. The higher criminal standard of proof should be frankly adopted in such disciplinary proceedings.[7] The effect should not be exaggerated.[8] It simply requires the Tribunal to be sure of the facts which justify imposition of substantial penalties and the reputational and professional damage which results from a finding of serious professional misconduct.

Background

[5] In 2002 the appellant dentist was tried before a Judge and jury in the District Court on charges of indecently assaulting three complainants. The charges were based on the appellant's conduct during the treatment of the patients on dates between 1987 and 2001. Two of the patients had been sedated by the appellant with hypnovel before the incidents. The third was not sedated. At the trial, it was acknowledged that the dosages of the sedatives given to the two complainants were

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6 As is illustrated by the criticisms expressed by Lord Hoffmann in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] 3 WLR 1 (HL).

7 As indicated below at para [48] it may be that there is room for a different approach where the body does not deal with serious professional misconduct, although it is not necessary to decide this point. An example may be the body considered in *Sadler v General Medical Council* [2003] 1 WLR 2259 (PC).

8 A point made in *Re Winship* (1969) US 358 at p 369 per Harlan J.

higher than the recommended levels for the drugs. Expert evidence was also given that a side-effect of the sedatives could be to cause hallucinations and distortion of impressions of time. The issue for the jury in respect of each of the charges of indecent assault was whether deliberate indecent touching occurred. After a two-week trial the appellant was found not guilty.

[6] The three patients, disappointed with the verdict, were assisted by the police to take the matter to the Dental Council.[9] They each complained that the appellant had been guilty of professional misconduct on the basis of the same allegations of indecent assault. The complaints were substantiated by the statements the complainants had made in the criminal investigation and by the dental records obtained by the police. A further complaint against the appellant by a patient who had not been a complainant in the criminal trial was also received. This patient too reported that she had been indecently assaulted while sedated, in her case with valium. The Dental Council referred all complaints for investigation and report as required by s 52 of the Dental Act to the respondent, a Complaints Assessment Committee appointed by the Chairperson of the Dental Council under s 45 of the Act and comprising two dentists and one layperson.

[7] After interviewing the complainants and giving the appellant an opportunity to be heard, the Complaints Assessment Committee reported to the Dentists Disciplinary Tribunal on 26 May 2004. It found that the complaints should be considered by the Dentists Disciplinary Tribunal and settled the charges, which were forwarded to the appellant on 4 October 2004. In its reasons, the Complaints Assessment Committee expressed its concern about the level of sedation and whether it constituted safe practice. It expressed the view that the dosage of the drugs in the cases of the three patients who were sedated, as described by the statements of the patients and in the dental records kept by the appellant, "exceeded by two and possibl[y] three times the average dose administered by other dental practitioners…". The Committee considered that "[t]hese dose rates could have been dangerous to the wellbeing of the patients and allowed the opportunity and time for

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[9] The matter was first referred to the Health and Disability Commissioner who, having no jurisdiction, referred it to the Dental Council.

[the appellant] to manipulate the patient in a sexually abusive manner during a long recovery period if a third party was not present the whole of the time the patient was unconscious". Whether a third party was present at different times was one of the points on which the Committee found a conflict on the accounts given to it. The Committee addressed the effect of the acquittal of the appellant in the District Court:

> The CAC is fully aware, of the not guilty findings by that Court in the cases of the three complainants who were part of that trial and the objection by Counsel to [the appellant] having to respond to what he terms the same issues and same allegations. However the CAC feels these issues are inescapably bound up with issues of levels of sedation which the CAC also feels the Tribunal should consider.
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> On balance the CAC felt the sexual abuse charges should also be part of the consideration by the Tribunal.

[8] As to the "hallucinogenic and amnesic effects of the sedative drugs", the Committee said:

> The CAC finds it strange that each of the complainants who were sedated, mention the same set of circumstances, that is, they allege their right hand was in close contact with [the appellant's] penis at some time during the treatment. It was explained in the District Court as hallucinations and accepted as evidence which the jury obviously considered in arriving at their not guilty verdict.
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> While admitting that hallucinations do take place with the two sedative drugs used, and some of these are of a sexual nature, the CAC does not believe that the hallucinations are always so site or mode specific.
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> The amnesic effects are also well known and much more common. This could explain why a sequence of events was described by a complainant as occurring within a few seconds of each other when in fact the time period may be of far greater length or some events may be forgotten completely.

[9] With respect to the sexual allegations, the Complaints Assessment Committee concluded:

> All four complainants make sexual allegations against [the appellant] which should be investigated.
>
> The Committee regarded these complainants as genuine in their beliefs and their stories as believable.

[10] The form of the charge referred under s 53 to the Tribunal by the Complaints Assessment Committee in respect of each of the complaints was that the Committee "has reason to believe that a ground exists entitling the [Dentists Disciplinary

Tribunal] to exercise its powers under section 54 or section 60 of the Act". Section 60 permits the removal of the name of a dentist from the register of specialists in respect of a particular branch of dentistry. Section 54 appears to be the section principally relied upon in relation to the allegations of indecent assault. It provides the grounds upon which a dentist can be disciplined. There are three bases:

- where the practitioner, before or after registration, has been convicted of any offence punishable by imprisonment of not less than three months where "the circumstances of the offence reflect adversely on the practitioner's fitness to practise as a dentist…";[10]

- where the practitioner has been "guilty of any act or omission in the course of or associated with the practice of dentistry that was or could have been detrimental to the welfare of any patient or other person";[11] or

- where the practitioner "has been guilty of professional misconduct (including, without limiting the generality of the foregoing, professional negligence)".[12]

[11] Where one of these grounds is made out, the Dentists Disciplinary Tribunal can impose one or more of the penalties provided by s 55. The Tribunal may:

> (a) Order that the name of the practitioner be removed from the register:
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> (b) Order that the registration of the practitioner be suspended for a period not exceeding 12 months:
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> (c) Order that the practitioner may, for a period not exceeding 3 years, practise only subject to such conditions as to employment, supervision, or otherwise as the Tribunal may specify in the order:
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> (d) Order the practitioner to pay a fine not exceeding $10,000:
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> (e) Order that the practitioner be censured.

[12] A fine may be imposed in addition to any order made under paragraphs (b), (c), or (e).[13] Under s 55(3) a fine may not, however, be imposed:

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10 Section 54(1)(a).
11 Section 54(1)(b).
12 Section 54(1)(c).
13 Section 55(2).

> [w]here a Tribunal is dealing with any matter that constitutes an offence for which the person has been convicted by a Court…

[13] The particulars given by the Complaints Assessment Committee in respect of the charge are said, separately or cumulatively, to amount "to an act or omission in the course of or associated with the practice of dentistry that was or could have been detrimental to the welfare of the patient and/or amounts to professional misconduct". They therefore invoke the grounds contained in s 54(1)(b) and (c).

[14] The particulars given in respect of the first-named complainant claimed that the appellant:

- administered twice the recommended maximum dose of the sedative hypnovel;

- "in administering the hypnovel", "caused [the complainant] to fall asleep in his waiting room", which was "accessible to the general public", and "in so causing, showed a total lack of respect for [the complainant's] feelings and/or dignity";

- "in administering the hypnovel", "potentially endangered" the complainant's well-being and/or exposed her to "undesirable side-effects or consequences" including:

  > 1.2.2.1 while she was under sedation, inappropriately and with no clinical reason for doing so, on two occasions exposed his penis and then caused her right hand to touch or come into close contact with his penis; and on one occasion touched [the complainant's] right breast; or
  >
  > 1.2.2.2 caused her to believe that while she was under sedation he had inappropriately and with no clinical reason for doing so, on two occasions exposed his penis and then caused her right hand to touch or come into close contact with his penis; and on one occasion touched [the complainant's] right breast.

[15] In respect of the second complainant, the particulars alleged inappropriate contact without clinical justification between the appellant's penis and the complainant's right hand during treatment but without any claim of prior administration of sedative. The conduct is claimed to amount to professional misconduct, rather than endangering well-being, apparently because no sedative was involved.

[16] The particulars of indecency relating to the third complainant (who had not been one of the three complainants in the criminal trial) are similar to those given in respect of the first complainant. In her case the sedative administered, "well in excess of the average or recommended maximum dose", was valium. In addition to the indecent touching, it is said that professional misconduct or conduct detrimental to the welfare of the patient included "carr[ying] out the treatment or operative procedures in a room the door to which was locked and the curtains in which were drawn closed, and with no nurse or other third party present".

[17] With respect to the fourth complainant, the particulars alleged administration of hypnovel "in a dose in excess of the recommended maximum dose". In addition to endangering the complainant through this overdose, the particulars claimed that it also exposed the complainant to "the risk of undesirable side-effects or consequences" including the indecencies (again, entailing contact between the complainant's hand and the appellant's penis) or causing the complainant to believe in the indecencies.

[18] The appellant issued proceedings by way of judicial review in the High Court on 18 February 2005 claiming that the decision of the Complaints Assessment Committee referring the charges to the Dentists Disciplinary Tribunal was unreasonable and the charges themselves as notified by the Dentists Disciplinary Tribunal were "invalid and/or unreasonable". The unreasonableness pleaded included:

> (b) Failing to pay any or proper regard to those parts of the matter which duplicate the allegations of criminal offending made against the plaintiff in the criminal trial at the Christchurch District Court in December 2002 and for which the plaintiff was acquitted. These particulars are those in the disciplinary charge alleging sexual misconduct on the part of the plaintiff…
>
> (c) Determining the second defendant to consider particulars of charge – the wording/meaning of which is unreasonable for the plaintiff to have to defend.

Particulars

> Those aspects of the charge alleging the plaintiff caused the complainant to believe that while under sedation, the plaintiff had inappropriately, and with no clinical reason, touched the complainant…

[19] The appellant was unsuccessful in his principal argument in the High Court before Fogarty J.[14] The Judge rejected the contention that the indecent assault charges were contrary to the common law principle against double jeopardy and in breach of s 26(2) of the New Zealand Bill of Rights Act (which provides that "[n]o one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again"). In this conclusion the Judge relied upon the decisions of the Court of Appeal in *Re a Medical Practitioner*[15] and *Daniels v Thompson*.[16]

[20] The appellant succeeded in having quashed what the Judge described as the "vague charges"[17] of "causing the complainant[s] to believe"[18] that they had been indecently assaulted. Fogarty J considered that the charges and particulars comprised "three categories of charges":[19]

> The first is over-administering sedative drugs, that is administering the drugs above the recommended maximum dose. The second is the complaints of indecent assault. The third is a more vague proposition of causing the complainant to believe that she had been indecently assaulted.

He took the view that the third charge was in breach of natural justice. Such a charge could only fairly be laid if it were based on a factual basis, made explicit, which was different from the allegations of excessive sedation and indecent assault:[20]

> If it cannot be made explicit, then it is a breach of natural justice, to proffer a second charge which upon analysis contains no different assertion of fact. Parliament cannot have intended that practitioners be subjected to such amorphous charges.

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14 *Z v Complaints Assessment Committee* [2006] NZAR 146.
15 [1959] NZLR 784.
16 [1998] 3 NZLR 22.
17 At para [37].
18 At para [20].
19 At para [20].
20 At paras [51] – [52].

> The tribunal can formulate a cause to believe charge if it relies on only some of the facts contended for in the main charges or relies on additional facts. But either way the charge has to be pleaded so that the set of facts upon which the Tribunal relies and asserts, are made explicit. Accordingly, these "caused her to believe" charges, as currently pleaded, are quashed. However, the Tribunal is left free to re-lay "caused her to believe" charges provided that the set of facts relied upon are different from the other charges, and are pleaded. Some of the facts can be in both sets.

[21] The Court of Appeal dismissed the appellant's appeal.[21] The argument in the Court of Appeal focussed on the correct standard of proof and whether the charges based on indecent assault were abuse of process following the appellant's acquittal. Ellen France J, who delivered the reasons of the Court, held that the civil standard of proof was properly applied to proceedings of the Dental Disciplinary Tribunal, in the manner described by Lord Nicholls in *Re H (Minors) (Sexual Abuse: Standard of Proof)* by which, "to whatever extent is appropriate in the particular case", "the more serious the allegation the less likely it is that the event occurred".[22] In this, Ellen France J adopted the approach of Tipping J in *Guy v Medical Council* (where however the issue was not as to the standard of proof),[23] in preference to the view expressed by William Young J in *F v Medical Practitioners Disciplinary Tribunal* that the criminal standard of proof is appropriate for professional disciplinary proceedings.[24] Nor did the Court of Appeal accept that it was abuse of process for charges based on indecent assault to proceed. Counsel for the appellant had taken the position in argument that the question of abuse of process turned on the rejected argument that the criminal standard of proof was applicable. The Court of Appeal considered the question more broadly however. It came to the conclusion that the "distinct" and "protective" purpose of professional discipline and the limited effect of a verdict of acquittal, as recognised in *Daniels v Thompson*, meant that Fogarty J, in coming to the "broad, merits-based judgment" required in considering abuse of process, was not shown to have been wrong in the conclusion that the charges could proceed.[25] He had considered the relevant authorities, noted the protective purpose of these "distinct" types of proceedings, and allowed "room for an expert

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21 *Z v Complaints Assessment Committee* [2008] 1 NZLR 65.
22 [1996] AC 563 at p 586.
23 [1995] NZAR 67 at p 80 (HC).
24 [2005] 3 NZLR 774 (CA).
25 At para [46].

professional disciplinary tribunal to differ from a jury on the same questions".[26] He had accepted that the Complaints Assessment Committee had "rational reasons" to doubt the judgment of the jury of laypersons and put the charges to the Tribunal.[27] He had concluded there was nothing in the Dental Act which affected the consideration and that the principles of double jeopardy did not apply. For its part, the Court of Appeal concluded:[28]

> In this case, the relevant factors have been carefully evaluated by the Judge. This is a discretionary matter and one to which Fogarty J has applied the correct principles. There has been no error in the Judge's approach, and we agree there is no abuse of process in allowing these charges to proceed.

[22] It is convenient to note here that I do not accept the view apparently adopted by the Court of Appeal that the question of abuse of process was a discretionary matter for the High Court Judge and that on appeal the role of the Court of Appeal was confined to supervising for error in approach. The Court of Appeal was obliged to consider whether or not the Judge's view that there was no abuse of process was correct. Nothing turns on this, however, since the Court of Appeal judgment in any event indicates agreement with the reasoning of the High Court Judge.

Unpacking the charges

[23] It is necessary to make some comment about the particulars and the charges of professional misconduct and actions endangering the patients, set out at paras [13] – [17]. Like Fogarty J, I am of the view that there are three separate bases for the charges. He quashed the third basis as being unfairly vague, but has signalled that it may be reinstated if it can be expressed as a stand-alone charge based on distinct facts.

[24] Each particular is said separately to amount to professional misconduct or acts endangering patient welfare. Although, therefore, the indecent assaults are in form expressed to be "undesirable … consequences" of the administration of high dosages of sedatives in relation to three of the complainants, they are themselves the

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[26] At para [46].
[27] As quoted at para [47].
[28] At para [34].

basis of stand alone claims of professional misconduct. It would be surprising if they were not. Such indecent touching is itself conduct in a dentist which requires no causal link to improper sedation to amount to professional misconduct. On the other hand, although the allegation of "caus[ing]" the complainants to believe they had been sexually assaulted was expressed to be an alternative "consequence" to the "consequence" of indecent assault, such linkage strikes me as based on an improper question. They are not alternative consequences at all. Leaving aside the specific allegations of drawing the blinds and shutting the doors (in relation to the third complainant) and failing to treat the first complainant with respect for her dignity by leaving her on view while sedated (either or both of which may or may not amount to professional misconduct either on their own or in combination with the other particulars of complaint and are matters upon which I express no view), the gravamen of the charges relevantly seems to me to rest on three matters. They are stand alone in the sense that each is claimed to amount to professional misconduct. They are:

- exceeding the safe level of sedation, exposing the complainants both to physical risk and to the risk of side-effects such as known hallucinogenic and amnesic consequences;

- indecently assaulting the complainants; and

- failing to provide the complainants with the reassurance and safety of third party supervision during sedation when using drugs known to have hallucinogenic and amnesic side-effects (this last is not currently part of the charges but seems to have been the thinking behind the quashed particular).

In the case of the complainant who was not sedated, the gravamen of the charge is simply the indecent assault alleged.

Standard of proof

[25] In the Court of Appeal, application of the lower civil standard of proof was treated as a reason why investigation of the indecent assaults was not an abuse of

process. It was suggested that there is no risk of unacceptable inconsistency in outcome in such circumstances, because the processes are different. This reasoning is not determinative of the question of abuse of power. If the standard of proof in disciplinary proceedings is the lower civil standard, then inconsistency in outcome may be able to be explained, but at the expense of depriving the respondent in the disciplinary proceedings of protections generally required for determination of responsibility for a crime. But the standard of proof is linked to the questions of abuse of power and is more sensibly dealt with before turning to that topic. Some overlap is unavoidable.

[26] Under s 54 of the Dental Act, the Dentists Disciplinary Tribunal is required to be "satisfied" of professional misconduct. The formula that the court or tribunal must be "satisfied" is common in statutory conferral of judicial and disciplinary jurisdiction. It says nothing about the standard of proof. It simply means that the Tribunal must come to "the required affirmative conclusion".[29] References to the "standard of proof" concern the quality or degree of persuasion of those required to determine facts in order to make conclusions of legal responsibility. Except where a different standard is required by statute, New Zealand law recognises only two standards of proof. The standard that the trier of fact be sure of the facts in issue is applied in criminal cases, but is also used in some non-criminal cases. If the trier of fact is left with a reasonable doubt that cannot be excluded, the standard is not reached. In civil cases, and in most other non-criminal proceedings unless a different standard is prescribed or applied,[30] the trier of fact must be satisfied on the balance of probabilities. In that case, he must be convinced by the evidence that the fact in issue is more likely than not.

[27] The difference between the two standards of proof is, as the High Court of Australia has held, "no mere matter of words":[31]

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29 *Robertson v Police* [1957] NZLR 1193 at p 1195 (SC) per Adams J. See also *Blyth v Blyth* [1966] AC 643 at p 676 per Lord Pearson.

30 McCauliff points out in "Burdens of Proof: Degrees of Belief, Quantum of Evidence, or Constitutional Guarantees?" (1982) 35 Vanderbilt Law Review 1293, p 1294, that the standards of proof in court proceedings are "only a representative selection of a whole series of phrases that express a similar decision-making function for triers of fact other than juries or judges".

31 *Rejfek v McElroy* (1965) 112 CLR 517 at para [11].

> No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.

[28] Whatever the standard used (whether beyond reasonable doubt or on the balance of probabilities) the trier of fact must take account of inherent improbabilities in deciding what evidence is sufficient to satisfy him to the appropriate standard. The point is explained by the judgments of Lord Nicholls in *Re H*[32] and Lord Hoffmann in *Secretary of State for the Home Department v Rehman*.[33] It is often said that more grave allegations are less likely to be true and require more in the way of evidence before the trier of fact will be satisfied.[34] I have some doubts as to the extent to which experience bears out the proposition, but in any event it is clear that its application turns on human experience and the particular context, as Lord Nicholls made clear in *Re H*. Statements such as these have however caused confusion when applied, not to the inherent probabilities which any decision-maker necessarily weighs, but to the standard of proof.[35] The confusion has led to judicial statements which suggest that the standard of proof is itself "flexible", an unfortunate and inaccurate notion. Nor do I think matters are improved by the suggestion that it is not the *standard* but its *application* that is "flexible". "Flexibility" is a term I think best avoided in the context of proof, despite its impressive pedigree.[36] Proof is made out whenever a decision-maker is carried beyond indecision to the point of acceptance either that a fact is more probable than not (if the standard is on the balance of probabilities) or that he has no reasonable doubt about it (if the standard is proof beyond reasonable doubt).[37]

[29] It is well established that in civil proceedings the standard of proof on the balance of probabilities does not change if a fact in dispute would also constitute a criminal offence. The decision-maker must be satisfied of its existence only on the

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32 [1996] AC 563 at p 586.

33 [2003] 1 AC 153 at p 194.

34 *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at p 266 per Lord Morris; *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 at p 425 (CA) per Somers J.

35 As described by Lord Hoffmann in *Re B* at para [12].

36 Lord Bingham in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 at pp 353 – 354 (HL); Lord Scarman in *R v Secretary of State for the Home Department, ex p Khawaja* [1984] 1 AC 74 at p 113; Lord Nicholls in *Re H* at p 586.

37 *Miller v Minister of Pensions* [1947] 2 All ER 372 at pp 373 – 374 (KB) per Denning J; *Rejfek v McElroy* (1965) 112 CLR 517 at para [11].

balance of probabilities.[38] Ready examples may be seen in defamation claims, where the defamation consists in an allegation of criminal conduct, or in cases where fraud or assault is an element of a cause of action.

[30] The choice between the standards of proof is explained by the need to reduce error in fact-finding where the costs of such error are considered by the legal system to be too high. Thus in the US Supreme Court Justice Harlan in *Re Winship* described the standard of proof as representing "an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication":[39]

> Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

[31] Assessment of the social cost of error is behind the value judgment as to the standard of proof to be applied in particular contexts. The difference between the standards in civil and criminal litigation was explained by Justice Harlan in this way:[40]

> When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious and general for there to be an erroneous verdict in the defendant's favour than for there to be an erroneous verdict in the plaintiff's favour. A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly, it simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence".[41]
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> In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. …
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> In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man

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38 *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, applied in New Zealand in *WV Middleditch and Son v Hinds* [1963] NZLR 570 (SC) and *Corbett v New Zealand Society of Accountants Fidelity Fund* [1970] NZLR 952 (SC).

39 (1969) 397 US 358 at p 370.

40 At pp 371 – 372.

41 Referring to James, *Civil Procedure* (1965), pp 250 – 251.

> go free. It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation.

[32] In the earlier case of *Speiser v Randall*, Justice Brennan for the Supreme Court had expressed a principle of general application in the view that, where a party has at stake "an interest of transcending value", proof beyond reasonable doubt was the appropriate standard.[42] In *Re Winship*, writing for the majority (in an opinion with which Justice Harlan concurred) he rejected the Court of Appeal's application of a balance of probabilities standard to delinquency proceedings (on the basis that delinquency was not a crime) as "'civil' label-of-convenience".[43] "Civil labels and good intentions" and the informal and flexible procedures in juvenile proceedings did not obviate the need for the safeguard of proof beyond reasonable doubt in circumstances where significant penalties could be imposed and the stigma of the underlying finding "that the accused committed a crime" attached.[44] This reasoning, and the view that "fundamental fairness" requires a higher standard of proof "in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma'", has been subsequently confirmed.[45]

[33] Similar considerations lie behind cases in the United Kingdom where the criminal standard of proof (or what Lord Hoffmann described in *Re B (Children) (Care Proceedings: Standard of Proof)* as "something like it")[46] has been required even though the proceedings for other purposes may be treated as though civil. Lord Hoffmann puts into this category cases such as *R v Secretary of State for the Home Department, ex p Khawaja*[47] and *B v Chief Constable of Avon and Somerset Constabulary*, despite language in the latter case suggesting a "flexible standard" of proof.[48] And he considered that similar considerations were behind the anti-social

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42 (1958) 357 US 513 at pp 525 – 526.
43 At p 365.
44 At p 374.
45 *Santosky v Kramer* (1982) 455 US 745 at p 756 per Blackmun J.
46 [2008] 3 WLR 1 at para [5] (HL).
47 [1984] AC 74.
48 [2001] 1 WLR 340 at para [30] (QB) per Lord Bingham CJ.

behaviour order case, *R (McCann) v Crown Court at Manchester*.[49] Lord Hoffmann expressed the view that clarity would be served by adopting Lord Steyn's suggestion in *McCann* that it would be more straightforward in such cases to rule that the criminal standard must be applied.[50] I agree.

[34] On that basis, in proceedings which are not civil claims between private litigants, it is necessary to consider what standard of proof is appropriate, even if for some purposes the proceedings may be treated as civil. The standard of proof to be applied in professional disciplinary proceedings in New Zealand has not been the subject of extensive appellate consideration. In *Re a Medical Practitioner* the issues on the appeal were autrefois acquit and res judicata, rather than the standard of proof to be applied by the Medical Council. In the High Court, McGregor J had held that the standard of proof was beyond reasonable doubt because the allegation was one of indecent assault.[51] In the Court of Appeal Gresson P simply said that, though the proof "may be different":[52]

> having regard to *Bhandari v Advocates Committee*,[53] this difference is of little importance.

The judgment of North and Cleary JJ similarly indicates that the difference in proof is unlikely to be material, citing *Bhandari*.[54] In *Bhandari*, the Privy Council approved as "an adequate description" of the duty of a professional disciplinary tribunal the view of the Court of Appeal for Eastern Africa that professional misconduct "involving an element of deceit or moral turpitude" called for a "high standard of proof" and was not appropriately resolved by the Tribunal on "a mere balance of probabilities".[55]

[35] In *Ongley v Medical Council of New Zealand* Jeffries J, referring to Australian authorities and to *Bhandari*, considered that the proof was the civil standard, but that "the degree of satisfaction for which the civil standard of proof

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49 [2003] 1 AC 787.
50 At para [13].
51 [1959] NZLR 301 at p 308.
52 At p 808.
53 [1956] 1 WLR 1442 (PC).
54 At p 817.
55 At p 1452.

calls may vary according to the gravity of the fact to be proved".[56] In *Gurusinghe v Medical Council of New Zealand* the Full Court thought that medical disciplinary proceedings were sufficiently analogous to criminal proceedings for assistance to be derived from criminal procedure when considering what fairness required.[57] In *Cullen v Medical Council of New Zealand*, Blanchard J approved the directions given by the assessor to the Medical Council Disciplinary Committee that:[58]

> where there is a serious charge of professional misconduct, you have got to be sure. The degree of certainty or sureness in your mind is higher according to the seriousness of the charge, and I would venture to suggest it is not simply a case of finding a fact to be more probable than not, you have got to be sure in your own mind, satisfied that the evidence establishes the facts.

[36] When the question of the appropriate standard of proof arose in *Guy*, Tipping J considered that there was no authority on the point binding on him.[59] He determined that the appropriate standard of proof was "the civil standard, but with the degree of probability consistent with the gravity of the allegation",[60] while acknowledging that the criminal standard had been approved by the Privy Council in *Lanford v General Medical Council*[61] and *McAllister v General Medical Council*.[62] This, he thought, represented "an appropriate balancing of the interests involved":[63]

> A sliding scale of probability is as good a balancing of these competing interests as can be devised. It also has the advantage of at least conceptual clarity combined with flexibility. A conclusion suggesting that if the conduct alleged is sufficiently bad the criminal standard should apply would lead to endless arguments about what the standards should be. It can hardly differ depending upon the perceived gravity of what is alleged.

[37] I have some problems with this approach. If it is difficult to decide when an allegation amounts to a serious crime requiring application of the criminal standard, it is equally or perhaps even more difficult to assess when an allegation is grave enough to require a higher "degree of probability" and then to what extent the degree

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56 (1984) NZAR 369 at pp 375 – 376 (HC), quoting *Re Evatt, ex p New South Wales Bar Association* 67 SR (NSW) 236 at p 238 (NSWCA) per Herron CJ, Sugarman and McLelland JJA.
57 [1989] 1 NZLR 139 (HC).
58 (High Court, Auckland, HC 68-95, 20 March 1996) at p 3.
59 At pp 76 – 77.
60 At p 77.
61 [1993] 1 AC 13.
62 [1993] All ER 982.
63 At p 77.

of probability should be raised. Nor does it seem that a "sliding scale of probability" has the advantage of "conceptual clarity combined with flexibility". Tipping J's approach in *Guy* seems to me to differ from that proposed by the majority in this Court.[64] It also seems to fall into the category of cases described by Lord Hoffmann in *Re B* where there appears to be confusion between inherent probabilities and the standard of proof.[65] For present purposes, however, what is significant is that it is not the case that the application of a balance of probabilities standard has been long established for professional disciplinary proceedings in New Zealand case law.

[38] Nor in the years since *Guy* was decided has there been much in the way of further New Zealand consideration of the standard of proof in such proceedings,[66] until brief reference to it was made by William Young J in *F*. There, concurring in the result reached by the other members of the Court of Appeal (who did not find it necessary to refer to the standard of proof) William Young J expressed unease about the lack of evidence on a critical point and referred to the standard of proof:[67]

> This is an important issue. The standard of proof required in disciplinary proceedings is high. Indeed, in my view (and I recognise that this is not the practice of the tribunal) proof beyond reasonable doubt is required. In this respect I adopt the approach taken by the Privy Council in *Campbell v Hamlet*.[68]

F was a professional competence case of "conduct unbecoming", rather than a case where serious misconduct or criminal offending was in issue. It seems therefore that William Young J was of the opinion that disputed facts in all medical disciplinary proceedings, whether or not they entail criminal offending or serious misconduct, must be proved beyond reasonable doubt.

[39] The standard of proof in professional disciplinary proceedings has been the subject of more extensive consideration by the Privy Council and in the courts of England and Hong Kong. *Campbell v Hamlet*, relied on by William Young J in *F*, was a decision of the Privy Council on appeal from Trinidad and Tobago. It involved a complaint of professional misconduct against a lawyer. The Privy

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64 At paras [101] and [112].
65 At para [5].
66 See the cases cited by McGrath J in fn 157.
67 At para [94].
68 [2005] 3 All ER 1116 (PC) at paras [15] – [21].

Council, referring to a number of earlier English authorities,[69] held that the standard of proof was the criminal standard:[70]

> That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt. If and in so far as the Privy Council in *Bhandari v Advocates Committee* may be thought to have approved some lesser standard, then that decision ought no longer, nearly 50 years on, to be followed.

[40] A similar approach had earlier been adopted in respect of medical practitioners by the Privy Council in *Lanford*.[71] The passage in the judgment simply records that their Lordships considered that the submission for counsel for the appellant was correct to maintain that the onus and standard of proof in the medical disciplinary proceedings in issue were those applicable to a criminal trial. In the later case of *McAllister* (a case concerning financial misconduct where the issue was one of corroboration rather than standard of proof) Lord Jauncey, for the Board, doubted whether the dictum in *Lanford* could be treated as having "universal application".[72] The Board in *McAllister* considered however that:[73]

> In charges brought against a doctor where the events giving rise to the charges would also found serious criminal charges it may be appropriate that the onus and standards of proof should be those applicable to a criminal trial.

[41] In *Sadler v General Medical Council* the Privy Council considered that at a performance hearing before the Committee on Professional Performance, the standard of proof of primary facts was "in the generality of cases", the ordinary civil standard of proof, although "[t]here might be exceptional cases … in which a heightened civil standard might be appropriate".[74] *Sadler* was concerned with provisions to achieve proper standards of professional performance rather than

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69 *B v Chief Constable of the Avon and Somerset Constabulary*; *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213 and (most relevantly) *Re A Solicitor* [1992] 2 WLR 552 (QB). In that case Lord Lane thought it undesirable to leave the standard somewhere between the civil and the criminal. In settling on the criminal standard he was influenced by the desirability of applying the same standard to both branches of the profession (the bar rules provided for the criminal standard of proof). No such consideration applied in *Campbell v Hamlet*.

70 At para [16].

71 At pp 19 – 20.

72 At p 399.

73 At p 399.

74 [2003] 1 WLR 2259 at p 2281.

serious professional misconduct. In relation to serious misconduct,[75] however, Lord Walker for the Privy Council repeated what had been said in *McAllister*: that where "the charges would also found serious criminal charges it may be appropriate that the onus and standards of proof should be those applicable to a criminal trial".[76]

[42] In *Gopakumar v General Medical Council* Mr Justice Underhill in the Queen's Bench Division was concerned with an appeal by way of rehearing from a determination of the General Medical Council removing the practitioner from the roll for indecent assault.[77] It was common ground in the case that "findings of gross misconduct should only be made if the case is proved to the criminal standard of proof".[78] On that basis the question for the Court was whether the panel had been right to be sure that the medical practitioner had touched the patient indecently.

[43] Similar conclusions have been expressed in Hong Kong. In *Tse Lo Hong v Attorney-General* the Hong Kong Court of Appeal was concerned with the standard of proof to be applied by a police disciplinary tribunal where the gravamen of the complaint against the police officer amounted to criminal conduct.[79] The three Judges of appeal were unanimous in holding that the criminal standard must be applied. In reaching this conclusion they took into account the English medical disciplinary cases of *Lanford* and *McAllister*. Litton VP considered that since the charge was in essence one of indecent assault, to characterise the proceedings as "civil" did not end the matter:[80]

> The standard of proof must be commensurate with the gravity of the charge. Here, the tribunal seems to have required the prosecution to prove the case on a mere "balance of probabilities" which in my judgment is plainly unacceptable.

Bokhary J took from *McAllister* that simply because a serious disciplinary charge is involved the criminal standard of proof is not necessarily applicable:[81]

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75 Which would be dealt with by the Professional Conduct Committee rather than the Committee on Professional Performance.

76 At pp 2281 – 2282, citing Lord Jauncey in *McAllister* at p 399.

77 [2006] EWHC 729.

78 At para [5].

79 (1995) 3 HKC 428.

80 At p 440.

81 At p 442.

> But where the events giving rise to such a disciplinary charge would also found serious criminal charges, then it may be appropriate to apply that standard.

The third member of the court, Godfrey JA, expressed similar conclusions.[82]

[44] The criminal standard of proof was similarly held applicable in a decision of the Hong Kong Court of Appeal in *Wu Hin Ting v Medical Council of Hong Kong*.[83] There, too, the allegations charged amounted to crimes. Ma CJHC held that where disciplinary charges amount to "serious charges of a criminal nature", the criminal standard of proof applies.[84]

[45] Without doubting these earlier cases, the recent decision of the Hong Kong Court of Final Appeal in *A Solicitor v Law Society of Hong Kong* suggests that, following *Re H*, it is unnecessary to import the formula "beyond reasonable doubt" in disciplinary cases.[85] Bokhary J, with whose judgment the other members of the Court concurred, concluded that "the standard of proof for disciplinary proceedings in Hong Kong is a preponderance of probability under the *Re H* approach":[86]

> The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability. If that is properly appreciated and applied in a fair-minded manner, it will provide an appropriate approach to proof in disciplinary proceedings. Such an approach will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time, protecting their members from unjust condemnation.

[46] I do not think matters can be left on this basis. The "nuanced"[87] approach used by Lord Nicholls in *Re H* has proved troublesome in application, as the discussion in the recent decision of the House of Lords in *Re B* demonstrates.[88] The inherent probability that serious offending is less rather than more likely (if

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82 At p 444.
83 [2003] HKCA 331.
84 At para [29].
85 [2008] 2 HKLRD 576.
86 At para [116].
87 As described by Baroness Hale *Re B* at para [64].
88 At paras [62] – [67] per Baroness Hale.

applicable in context) does not address the risk of error in decision-making which is the reason for a higher standard of proof. If it were an answer, a separate criminal standard would not be necessary. The assessment of inherent probabilities is simply common sense in application. There may be little or much scope for such assessment in context, but it says nothing about the degree of conviction required by law of the decision-maker. That is not always easily grasped. And in *Re B* the House of Lords was concerned with the undesirable consequence that muddling inherent probabilities with the standard of proof had resulted in proof being ratcheted up to a higher standard than the law required, with wholly undesirable consequences.[89] Here, it is suggested that flexible *application* of the civil standard (according to the inherent improbabilities of serious professional or criminal behaviour) will "give all due protection to persons who face [professional disciplinary] proceedings".[90] But it does not provide protection against error in result. There is no difference between flexible and inflexible application of the balance of probabilities. Any difference arises only if the flexibility is in the *standard* of proof, the degree of conviction required.

[47] In *Re B*, Lord Hoffmann made it clear that he did not intend to disapprove of the cases where the courts have decided that, "because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied", even though for other purposes the proceedings may be classified as civil.[91] Similarly, Baroness Hale, with whom all other members of the House of Lords in *Re B* expressed their complete agreement, accepted that "there are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof".[92] Lord Hoffmann said, echoing in this respect Lord Steyn in *McCann*, that:[93]

> clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

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89 See paras [63] – [64].
90 See para [116] of the judgment of McGrath J.
91 At paras [5] and [13].
92 At para [69].
93 At para [13].

I think the time has come to say simply that the criminal standard of proof applies. I summarise the reasons why I am of that view, which have already been foreshadowed.

[48] First, making allowances for the dress of inherent probabilities under which guise much of the discussion has been conducted, the preponderance of authority favours the criminal standard, at least where the charges are serious or entail conduct which is criminal. That is the effect of the decisions of the Privy Council in *Campbell v Hamlet*, *Lanford*, *McAllister*, and *Sadler*. It is also consistent with the decisions in *Bhandari* and *Re a Medical Practitioner*. In both cases, the difference between the criminal standard and the standard required by the context was thought to be a difference "of little importance".[94] In the present case the charges of indecent touching clearly meet the level of seriousness envisaged by cases such as *McAllister* and *Sadler*. I would myself however draw no distinction between charges laid under s 54 of the Dental Act according to whether they are or are not in substance criminal or properly classified as "serious misconduct", on the basis that there should be a single standard of proof under the section. In this, I would apply the approach adopted by the Privy Council in *Campbell v Hamlet* and *Lanford*.

[49] Nor do I think such result is different in substance from the standard attempted in the New Zealand cases through variation of "the degree of satisfaction … according to the gravity of the fact to be proved"[95] or through "a sliding scale of probability".[96] "Flexibility" of application however risks inconsistency and inequality in the treatment of like cases. Frank application of the criminal standard avoids much conceptual confusion and minimises inconsistency in treatment. William Young J in *F* cut through the tangle to recognise the criminal standard as appropriate. In *McCann*, Lord Steyn thought that "pragmatism" dictated that the task of the magistrates in making anti-social orders be made "more straightforward"

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94 *Re a Medical Practitioner* at p 808 per Gresson P.

95 *Ongley* at pp 375 – 376 per Jeffries J. The reference to "degree of satisfaction" (in my view inescapably a reference to the standard of proof), appears to have been taken from *Rejfek v McElroy* (1965) 112 CLR 517.

96 *Guy* at p 77 per Tipping J.

by applying the criminal standard.[97] Although a comparison between professional disciplinary tribunals and lay magistrates is not exact, being straightforward is not a bad rule of thumb in promoting consistency. As I have already mentioned, the effect of recognising the criminal standard should not be exaggerated. It simply requires the decision-maker to be sure of the facts that justify imposition of penalties under the Act and the opprobrium that inevitably accompanies a finding of serious professional or criminal misconduct.

[50] Secondly, it seems to me that the application of a balance of probabilities standard is based on a misunderstanding of the nature of disciplinary processes. They are not civil proceedings, in the sense of claims between litigants similarly situated and in respect of whom the risk of error in outcome can be regarded with relative equanimity, in the manner described by Justice Harlan in the passage I have cited at para [31]. Nor are they criminal proceedings.[98] The outcome is not criminal conviction and the procedures prescribed by the statute are not criminal processes. On the other hand the Dental Act sets up a statutory regime for professional regulation. The Complaints Assessment Committee and the Dentists Disciplinary Tribunal are administrative bodies which conduct inquiries and are empowered by statute to impose heavy sanctions. This may not be exactly "government-initiated process",[99] but it is statutory regulation in which analogy with civil proceedings (which attempt relative justice between litigants) is less convincing than analogy with criminal process, as indeed the Full Court suggested in *Gurusinghe*.

[51] Thirdly, I do not think that application of some of the attributes of civil proceedings or denial of some of the protections of criminal proceedings can be determinative of the standard of proof to be applied. I do not think it matters that the method of admitting evidence is more relaxed before the Dentists Disciplinary Tribunal than in criminal proceedings. I agree with the views expressed by Justice Brennan in *Re Winship* that it is important not to misapply "labels of convenience". For some purposes it may be necessary to classify disciplinary

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97 At para [37].

98 *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal* [2006] 3 NZLR 577 at para [19] (SC) per Elias CJ, Blanchard, Tipping and Henry JJ.

99 *Santosky v Kramer* (1982) 455 US 745 at p 756 per Blackmun J.

proceedings as civil or criminal. It was necessary to do so, for example, in *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal*, for the purpose of deciding whether privilege was according to the provisions applicable to civil or criminal proceedings. (It was unnecessary in that case to consider the question of the standard of proof.) But it should not be assumed that a classification for one purpose is a classification for all purposes. And even where proceedings are properly classified as civil, it does not mean that the standard of proof to be applied is the balance of probabilities. That is illustrated by *McCann*. There, the House of Lords classified the procedure for making anti-social behaviour orders as civil for the purpose of application of the civil rules of evidence, allowing hearsay evidence to be admitted. That classification did not however determine the standard of proof. Lord Steyn held that the magistrates should apply the criminal standard in deciding whether a defendant had acted in an anti-social manner. This approach, he thought, would "facilitate correct decision-making and should ensure consistency and predictability in this corner of law".[100] Lord Hope, in the same case, emphasised that the classification of the proceedings as civil did not determine the standard of proof:[101]

> But it is not an invariable rule that the lower standard of proof must be applied in civil proceedings. I think that there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made.

Lord Hutton, who delivered the other concurring judgment, also endorsed application of the criminal standard of proof.[102]

[52] Lord Hope's view that the standard of proof to be applied is determined by the interests of fairness is the approach adopted in respect of professional disciplinary proceedings by the Privy Council in *McAllister*. What was of "prime importance" was that the charge and conduct of the proceedings should be fair in all respects.[103] Lord Hope's conclusion that fairness requires the criminal standard to be applied when allegations of a criminal or quasi-criminal nature are made accords

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100 At para [37].
101 At para [82].
102 At p 835.
103 At p 399.

with the cases cited in para [33] that the criminal standard, or something indistinguishable from it, applies in professional disciplinary proceedings where serious allegations are made. It should be noted that the consequences of significant penalty and stigma are much more serious in the case of charge found proved by the Dental Disciplinary Tribunal than is the case with the anti-social behaviour orders considered in *McCann*.

[53] Fourthly, I do not think that the standard of proof is affected by the purpose of professional disciplinary proceedings in maintaining professional standards, for the protection of the public. As Justice Brennan put it in *Re Winship*, "civil labels and good intentions" do not overcome considerations of fairness. In a later case, Justice Blackmun expressed the view that, despite the protective intent of delinquency orders, where significant stigma or penalty could result, it offends "fundamental fairness" for less rigorous standards of proof to be applied than in criminal proceedings.[104]

[54] Finally, it seems to me that the scheme of the statutory grounds contained in s 54 provides support for application of the criminal standard of proof. Section 54(1) permits the Dentists Disciplinary Tribunal to impose penalties under s 55 where "the practitioner … [h]as been convicted … of any offence punishable by imprisonment of not less than 3 months" and the Tribunal considers that the circumstances of the offence "reflect adversely on the practitioner's fitness to practise as a dentist …". In most cases of serious criminal conduct in the course of practise it is to be expected that prosecution will follow. In such cases, the Tribunal will act on proof of a conviction that will have been obtained according to criminal procedure and upon proof beyond reasonable doubt. In cases where it will not be an abuse of power for the Complaints Assessment Committee to bring a charge ahead of or instead of allowing the criminal process to be completed (the topic I next address), dissonance between the standard of proof according to the sequence followed in the particular case sets up potential inconsistencies in treatment and could conceivably lead to perverse incentives in choice of forum. It is difficult to think of any adequate reason for difference.

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104 *Santosky v Kramer* (1982) 455 US 745 at p 756.

[55] In conclusion, the standard of proof depends upon what is required for reasons of fairness. The standard of proof beyond reasonable doubt protects against error in decision-making. It promotes consistency. All charges under s 54 are serious. Where serious disciplinary charges are brought under statutory process in circumstances where substantial penalties may be imposed and damage to reputation and livelihood is inevitable if adverse findings are made, fairness requires application of a higher standard of proof than one on the balance of probabilities. The application of such standard is supported by authority and is consistent with the functions and scheme of the Dental Act.

Abuse of the power to refer charges under s 53 Dental Act 1988

[56] For the reasons I now address, I consider that the decision of the Complaints Assessment Committee referring the indecent assault charges to the Dentists Disciplinary Tribunal was, as claimed by the appellant, unreasonable. On the view I take, the result is inconsistent with values which are fundamental to the legal system. The claimed error of unreasonableness might equally have been a claim of unfairness or one of exceeding the scope of the statutory authority. Such error is properly corrected as abuse of power in which latitude in the discretion to lay charges is not appropriate. The abuse of power in relation to the charges of indecent assault does not affect the distinct charges of overuse of sedatives. The determination of the sedation charges turns on professional conduct issues, not criminal ones already resolved by the verdicts in the criminal trial or more properly determined through that process. But my conclusion in relation to the indecencies is that it was an abuse of power for the Complaints Assessment Committee to bring charges which do not extend beyond the elements of criminal offences in respect of which the dentist has been acquitted. I also consider that it was an abuse of power for the Complaints Assessment Committee to lay a charge, not determined by a criminal court, which constitutes a crime. I do not suggest that disciplinary charges in these circumstances will always be an abuse of power. But I think without adequate justification they will usually be so. No adequate justification in my view is put forward here. In most cases, the two offences – the crime and the professional misconduct – will not be identical. In that case, there may be no abuse in the additional disciplinary

charges, particularly if they are directed at conduct which is not sufficient for the crime but is sufficient to establish professional misconduct. In the present case, however, I consider that the criminal and professional charges are indistinguishable in substance. There is no professional misconduct unless the crimes of which the appellant was acquitted and a further crime, not yet considered by a criminal court, are established to the satisfaction of the Tribunal. The position is very different from that envisaged by the statute where a disciplinary tribunal proceeds on the basis of a conviction. There the facts constituting a crime will have been established in a preceding criminal trial.

[57] The values in issue are those discussed in a number of cases where courts act to prevent abuse of their own processes, and the authorities on abuse of process are helpful here. They discourage relitigation of issues already determined, through collateral attack in other forums, and require determination of criminal responsibility according to the system of criminal justice. The first consideration affects the decision to proceed with the charges on which the appellant has been found not guilty. The second suggests that the Dentists Disciplinary Tribunal will not usually be the proper forum in which to determine whether the appellant has committed a crime. The application of these principles in the present case is also in my view consistent with the terms of the Dental Act.

[58] Two purposes are served by discouraging relitigation. The first is protective of the interests of litigants who have obtained final judgment. It is expressed in the maxim nemo debet bis vexari pro una et eadem causa. The second is concerned with the public interests in stilling controversies. It is expressed in the maxim interest reipublicae ut finis sit litium. The relationship between the two is explained by Lord Hoffmann in *Arthur JS Hall & Co v Simons*.[105]

[59] The first purpose gives rise to the rules which prevent relitigation between the same parties. They include res judicata and issue estoppel in civil and criminal proceedings, and autrefois acquit/convict and the rules against double jeopardy in respect of trial and punishment which apply in criminal cases. The rules preventing

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[105] [2002] 1 AC 615 at p 701.

double jeopardy for trial or punishment are recognised as human rights by s 26(2) of the New Zealand Bill of Rights Act, which provides:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

[60] In *Re a Medical Practitioner*, the claims of res judicata and issue estoppel were held by the Court of Appeal not to apply to disciplinary proceedings based on an indecent assault in respect of which the medical practitioner had been acquitted at trial. It was fatal to these claims that the disciplinary proceedings were not between the same parties and that the criminal and disciplinary proceedings served different purposes. In the present case, the claim by the appellant based on the Bill of Rights Act expression of autrefois acquit similarly failed because it was held not to apply to proceedings except where the person acquitted is in jeopardy of conviction of an offence. The appellant no longer seeks to argue this point. It is supported by authority, and is illustrated by the recent decision of the English Court of Appeal in *R (Redgrave) v Commissioner of the Police of the Metropolis*.[106] That case takes the view that, quite apart from the standard of proof, the different processes followed make the rigidity of the double jeopardy rule inappropriate to disciplinary proceedings.[107]

[61] That does not however dispose of the wider inquiry as to whether such proceedings in the particular case will constitute abuse of the disciplinary power, as Simon Brown LJ in *Redgrave* recognised.[108] The principle described by the second maxim is of wider application and is not limited to claims involving the same parties. It is "concerned with the interests of the state":[109]

> There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of issue estoppel to cases in which the parties are not the same but the circumstances are such as to bring the case within the spirit of the rules.

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106 [2003] 1 WLR 1136.
107 At paras [38] – [39].
108 At para [44].
109 *Arthur JS Hall* & *Co v Simons* at p 701 per Lord Hoffmann.

[62] *Hunter v Chief Constable of the West Midlands Police* was based upon this second principle.[110] Lord Diplock there considered that the power to strike out proceedings as an abuse of process was available where the new proceedings would be "manifestly unfair to a party to litigation before [the court], or would otherwise bring the administration of justice into disrepute among right-thinking people".[111] The circumstances in which litigation would be an abuse of process were, he thought, "very varied" and it would be unwise to:[112]

> say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

[63] Whether a proceeding attempts in substance to relitigate a controversy already settled by final determination and amounts to an abuse turns on what Lord Bingham described in the context of court litigation as a:[113]

> broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether in all the circumstances a party is misusing or abusing the process of the court.

Key in that consideration in the present case will be whether the disciplinary charges are the same or substantially the same as the criminal charge in respect of which the dentist was acquitted. That was the principal basis upon which the appellant in *Redgrave* failed to show abuse in the subsequent disciplinary proceedings in issue there. Another important consideration in the present context is the role of the criminal justice system in determining criminal responsibility.

[64] In *Rookes v Barnard* Lord Devlin expressed concern that it is important not to erode the protection of the criminal law.[114] Similar concern not to undermine fundamental fairness in criminal process is seen at work in the English and US cases already considered in the context of the standard of proof. In *Arthur JS Hall v Simons* Lord Hoffmann expressed the view that, although the point should not be pushed too far (and in some circumstances it is right to treat a conviction as a

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110 [1982] AC 529.
111 At p 536.
112 At p 536.
113 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at p 31.
114 [1964] AC 1129 at p 1230.

judgment between the Crown and the accused), criminal proceedings are "special":[115]

> Criminal proceedings are in my opinion in a special category because although they are technically litigation between the Crown and the defendant, the Crown prosecutes on behalf of society as a whole. In the United States, the prosecutor is designated "The People". So a conviction has some of the quality of a judgment in rem, which should be binding in favour of everyone.

[65] In *Chamberlains v Lai* this Court took the view that it would generally be an abuse of process for a plaintiff in a civil action to challenge his prior conviction in criminal proceedings.[116] That approach was treated as inapplicable by the Court of Appeal in the present case, adopting the reasoning of Fogarty J, for two reasons. First, because the proceedings are not parallel civil claims but disciplinary proceedings in which penalties imposed are for a purpose which is additional to the purpose of criminal punishment: the maintenance of professional standards. Secondly, because it is suggested that the status of an acquittal is different from that of a conviction and it does not bring the law into disrepute to have a verdict of not guilty contradicted by the decision of a professional disciplinary body. On this view, an acquittal "decides nothing more than that there was a failure upon the part of the prosecution to establish all the necessary ingredients" of a criminal charge.[117] The Court of Appeal agreed with Fogarty J that there was accordingly "room for an expert professional disciplinary tribunal to differ from a jury on the same questions".[118] The Court of Appeal did not address the position in relation to the third complaint, which had not been part of the criminal case, because the appellant did not argue the charge in that matter was an abuse of power. It would be consistent with the view taken of the distinct purpose of disciplinary proceedings however that no abuse would have been found by the Court of Appeal where a claim of criminal offending had not been the subject of criminal investigation and trial.

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115 At p 702.
116 [2007] 2 NZLR 7 at para [66].
117 *Re Medical Practitioner* at p 800 per Gresson P.
118 At para [46].

[66] Lord Devlin's statement in *Rookes v Barnard* was made in the context of claims for exemplary damages where criminal conduct was in issue. New Zealand law has taken a different path on the availability of exemplary damages in civil litigation.[119] Section 319 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 makes it clear that the principle against double punishment does not prevent such claims by private litigants. On wider questions of the place of the criminal justice system in determining guilt, the principles discussed in *Daniels v Thompson* and on its appeal to the Privy Council, in the judgment reported as *W v W*,[120] remain helpful.

[67] Henry J, delivering the judgment of the majority in the Court of Appeal, was influenced by the "primacy of the criminal law in imposing discretionary Court-based sanctions for criminal offending":[121]

> The state has primary responsibility for the control and punishment of criminal conduct. If that responsibility has been undertaken in accordance with the rule of law and established procedures, it would require compelling reasons for not treating it as determinative in the overall interests of justice.

Thomas J dissented in the conclusion of the Court on the basis of the very different role of complainants in criminal and civil proceedings and the view that to deny a civil claim in all cases would impinge on the basic right of access to the Court.[122] The legislation effectively adopted his view. I do not think that outcome, any more than the availability of other civil remedies for civil wrongs which amount to crimes, detracts from the general approach that criminal responsibility is usually to be established in criminal proceedings. The discussion in *Daniels v Thompson* affirms the primary place of criminal proceedings in the justice system. And, on further appeal, the Privy Council too cited Lord Devlin's view of the importance of the protection of criminal law in determining criminal culpability.[123]

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119 *Taylor v Beere* [1982] 1 NZLR 81 (CA).
120 [1999] 2 NZLR 1.
121 At p 51.
122 See especially pp 73 – 77.
123 At p 2.

[68] The general instinct that criminal culpability should be ascertained through the processes of the criminal law is sound. Civil claims by private litigants are not excluded by the principle, for the reasons described by Thomas J in *Daniels v Thompson*. But I think the position is quite different when determination of culpability for a crime and consequential imposition of penalties is undertaken by administrative processes with the authority of the state. In such cases, there must be compelling reason to bypass or second-guess the criminal law processes. The reasons are not only based on the protection of the individual, but on the public interest in the integrity of the criminal justice system as the proper and safe means of authoritatively ascertaining responsibility for crimes. If a parallel system is allowed to develop in disciplinary proceedings, it could undermine the primary process. And once the criminal process has been completed "in accordance with the rule of law and established procedures", I agree with Henry J that it would "require compelling reasons for not treating it as determinative in the overall interests of justice".[124]

[69] I do not agree with the Court of Appeal in the present case that there is any distinction to be drawn where the criminal process results in acquittal. As was made clear in *Daniels v Thompson*,[125] Gresson P in *Re a Medical Practitioner* was not considering the wider question of abuse of power when he held that in disciplinary proceedings breach of a code of conduct can properly bring consequences additional to those imposed by the criminal court.[126] He was there dealing with an additional penalty of the sort specifically available in the case of dental disciplinary proceedings under s 54 of the Act. In *W v W*, when considering a subsequent claim for exemplary damages, the Privy Council disagreed with the argument that, while such a claim following conviction would be an abuse, it was not an abuse following acquittal because there could be no question of double punishment:[127]

> This is of course true, but Their Lordships consider that a need for consistency leads inexorably to the conclusion that an acquittal should also bar the civil remedy for exemplary damages.

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124 At p 51.
125 At pp 50 – 51 per Henry J.
126 At p 801.
127 At p 5 per Lord Hoffmann.

The Privy Council view was that, as a matter of principle, acquittal and conviction should be treated as equivalent for the purpose of abuse of process where the abuse was based on double punishment. In the case where the abuse is based, rather, on the public interest in stilling controversies and in the context of disciplinary proceedings, I would similarly treat acquittal and conviction on the same basis.

[70] Section 54 of the Dental Act, which provides the powers of the Dentists Disciplinary Tribunal, deals specifically with the effect of conviction of an offence punishable by imprisonment of three months or more. In such circumstances additional professional penalty under s 55 can be imposed only if the Tribunal forms the additional judgment that "the circumstances of the offence reflect adversely on the practitioner's fitness to practise".[128] I do not think that the existence of this provision supports the inference that the scheme of the Act envisages reconsideration of the verdict reached in criminal proceedings. The effect of inclusion of the provision is rather the reverse. It is clear that the conviction is not itself able to be questioned and may be relied upon as conclusive for the purposes of disciplinary proceedings. Whether further penalty is properly imposed depends upon an assessment that the circumstances reflect adversely on fitness to practise. Professional standards are properly the focus of the disciplinary inquiry. Where a distinct finding that a conviction reflects adversely on fitness is made, the Tribunal cannot exercise its usual powers to fine the dentist.[129] Again, this seems to me to be recognition that punishment is the responsibility of the criminal justice process. What remains are the professional sanctions for public protection: removal from the register, suspension of registration, the requirement to practise only under supervision, and censure. The overlay of professional discipline in this way meets the purpose explained by Lord Devlin in *Ziderman v General Dental Council*:[130]

> The purpose of disciplinary proceedings against a dentist who has been convicted of a criminal offence by a court of law is not to punish him a second time for the same offence but to protect the public who may come to him as patients and to maintain the high standards and good reputation of an honourable profession. … [I]t would be the duty of the committee, before deciding to inflict the only and draconian penalty which lies within their

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128 Section 54(1)(a).
129 Section 55(3).
130 [1976] 1 WLR 330 at p 333 (PC).

> power, to satisfy themselves that the offence of which the dentist had been convicted was if so grave a character to show that he was unfitted to continue to practice his profession.

[71] There is no clash between this consequential professional inquiry and the integrity of the criminal justice system. The fact of the conviction is sufficient for the disciplinary purposes and makes it unnecessary for the Tribunal to come to its own conclusion on the facts which gave rise to criminal responsibility. Although the Act does not mention what is to happen if the dentist is acquitted of a crime or the crime has not been investigated through the criminal justice process, that does not suggest that it is proper for the Tribunal to determine the facts constituting the offence. For the reasons already given, I think it will be an abuse for it to do so when the misconduct charged amounts to a crime unless there is good reason for departing from the usual approach.

[72] The critical question in determining whether there is abuse of process is the one posed by Moses J and approved by the Court of Appeal in *Redgrave*: is the disciplinary charge "the same or substantially the same" as that faced in the criminal proceedings?[131] Where the two sets of proceedings – criminal and disciplinary – are not identical, there may be no abuse in the disciplinary charges. That is not the case here because the issue in the criminal trial was simply whether the deliberate indecent touching occurred. Determining whether charges are in substance identical may sometimes be difficult. In the present case, however, I consider that the criminal and professional charges are indistinguishable in substance. It would be necessary to re-run the substance of criminal prosecution.

[73] The references in the Complaints Assessment Committee's decision make it clear that they expected the evidence at the criminal trial to be revisited by the Dentists Disciplinary Tribunal. The Complaints Assessment Committee is sceptical of the explanation of hallucination (on the basis that the similarities of the experiences reported were implausible). It is clear that it regards the believability of the accounts given by the complainants as key. It suggests that discrepancies and oddities in the evidence of the complainants are explained by the amnesic quality of the sedatives. Both indications are directed at the reliability of the evidence of the

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131 At p 45.

complainants on what was the key question of fact for the jury in respect of the criminal charges: whether the deliberate indecent touching had occurred. The critical issue on the indecent assault charges is not concerned with appropriate standards of practice, on which an expert tribunal might legitimately take a different view than the jury.[132] Both the hallucinogenic and amnesic qualities of the sedatives used by the practitioner were the subject of expert evidence at the preceding trial and were matters of fact for the jury to assess in considering the reliability of the evidence of the complainants. A conclusion by the Dentists Disciplinary Tribunal that indecent touching had occurred would be a conclusion that the jury verdict was wrong.

[74] Two reasons were put forward by the Complaints Assessment Committee for its decision to proceed with the disciplinary action in respect of the indecent assaults, notwithstanding the acquittals in the previous criminal trial. They were its views that the complainants were believable and that the indecent assault allegations were inescapably linked with the charges concerned with over-sedation. The first consideration was the critical issue for the jury. A different view taken by the Dentists Disciplinary Tribunal would undermine its verdict. Doubt in the verdict is not sufficient reason to overcome the abuse entailed in such undermining. Nor are the charges of indecent assault so inextricably linked with the issues of sedation as to make it impracticable or artificial to proceed with the disciplinary charges on excessive sedation alone. The sedation charges are serious and stand-alone charges in themselves. It is true that a motive of exceeding safe dosages in order to facilitate the indecent assaults would, if established, help in negating any claim of negligent as opposed to deliberate excess and would be relevant to culpability. If the Complaints Assessment Committee is correct, the level of sedatives is such that non-advertent administering is highly improbable, and can be tested (as the Complaints Assessment Committee suggests) against the dosages recorded as having been given to other patients. The suggested motive of intended indecencies overwhelms the question of overuse of the drugs. It seems disingenuous to treat such motive as necessary for the determination of the drug charges: the indecent assaults would be the central issue and indeed were treated as such by the Complaints Assessment Committee. I do not

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132 Compare with the Court of Appeal at paras [46] – [49].

think the subsidiary consideration of motive is sufficient to overcome the concern about undermining the jury verdict and the unfairness of by-passing the proper processes for establishing criminal responsibility. To allow the charges of indecent assault to proceed on that basis would be unacceptably destructive of important values in the criminal justice system. I would quash them as an abuse of the power of the Complaints Assessment Committee.

BLANCHARD, TIPPING AND McGRATH JJ

(Given by McGrath J)

Table of Contents	**Para No**

Background

[75] The appellant is a dentist who was tried by a jury on four charges of indecently assaulting three female patients whom he had sedated for the purpose of treatment. He was acquitted on all charges. After the trial, complaints were made by the patients to the Dental Council. They were referred to the respondent which is a Complaints Assessment Committee set up under the Dental Act 1988, having responsibility for investigating complaints made against dentists. Following its investigation, the respondent decided to refer all the complaints to the Dentists Disciplinary Tribunal for its consideration.

[76] The High Court refused the appellant's application for an order declaring that the respondent's decision to put the matters raised in the complaints before the

Disciplinary Tribunal was invalid.[133] His appeal to the Court of Appeal was dismissed.[134] In this Court the principal issue is whether the respondent's decision to initiate disciplinary proceedings, insofar as they concern allegations that were the subject of acquittal by the jury, amounts to an abuse of process. An important preliminary question concerns the standard of proof that applies to disciplinary proceedings under the Dental Act.

The legislative scheme

[77] Although the Dental Act has been replaced by the Health Practitioners Competence Assurance Act 2003, it is common ground that, because of the time when the alleged events the subject of complaint took place, the Act applies to the proceedings brought against the appellant before the Tribunal.[135]

[78] The Act's long title provides that it is "[a]n Act to make provision for the registration and discipline of dentists … and the control of the practice of dentistry and to consolidate and amend the law relating to dentistry".

[79] Part 3 of the Act deals with suspension and discipline. Complaints against dentists are made to the Secretary of the Dental Council.[136] They are referred to a Complaints Assessment Committee comprising two dentists and a lay person.[137] The Committee must determine whether or not in its opinion the matter should be considered by the Tribunal and shall report its finding to the chairperson of the Tribunal.[138]

[80] The Tribunal must notify the dentist that the Committee has reason to believe that there are grounds for the Tribunal to exercise its disciplinary powers, giving

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133 *Z v Complaints Assessment Committee* [2006] NZAR 146.
134 *Z v Complaints Assessment Committee* [2008] 1 NZLR 65.
135 Under s 216 Health Practitioners Competence Assurance Act 2003.
136 Section 52(1) of the Act.
137 Sections 45(1) and 52(3).
138 Section 53(2)(a) and (b).

"such particulars as will clearly inform the practitioner of the substance of the grounds believed to exist".[139] The Act provides that:[140]

> [I]f a Tribunal, after conducting a hearing in accordance with this Part of this Act, is satisfied in respect of any practitioner that the practitioner —
>
> (a) Has been convicted, whether before or after the practitioner became registered, by any Court in New Zealand or overseas of any offence punishable by imprisonment for not less than 3 months and that the circumstances of the offence reflect adversely on the practitioner's fitness to practise as a dentist …; or
>
> (b) Has been guilty of any act or omission in the course of or associated with the practice of dentistry that was or could have been detrimental to the welfare of any patient or other person; or
>
> (c) Has been guilty of professional misconduct (including, without limiting the generality of the foregoing, professional negligence), —
>
> the Tribunal may …, by way of penalty, do any one of the things authorised by [s 55(1)].

[81] Under s 55(1) the Tribunal may order removal of the practitioner's name from the register of dentists, suspension of registration for up to 12 months, or that practice be subject to conditions for a period.[141] It may also censure the practitioner.[142] As well as or instead of these penalties, the Tribunal may impose a fine of up to (now) $10,000 (but not if the practitioner's name is removed from the register or if the matter constitutes an offence for which the practitioner has been convicted).[143] Finally the Tribunal may make orders for payment by the practitioner of the costs and expenses of the Tribunal and the Committee's inquiry.[144]

[82] The Tribunal has certain powers of a commission of inquiry. These include powers of investigation, to summon witnesses, and to receive evidence that is not admissible in a court of law.[145]

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139 Section 61(1).
140 Section 54(1).
141 Section 55(1)(a), (b) and (c).
142 Section 55(1)(e).
143 Section 55(1)(d), (2) and (3).
144 Section 56.
145 Section 63 of the Dental Act and ss 4B, 4C and 4D, Commissions of Inquiry Act 1908.

The criminal proceedings

[83] The appellant was tried in 2002. The jury's verdicts acquitting him were in relation to four counts of indecent assault, involving three complainants. One complainant alleged that the appellant had, during treatment in 1987, pressed his penis against her hand. The second complainant alleged that during treatment in 1989 the appellant had placed her hand on his penis. The third complainant made two allegations of assault by the appellant during treatment in January 2001. She said that he had touched her breast over her clothing. On the same occasion he had placed her hand on his penis. The second and third complainants said they had been sedated for the purposes of treatment by the appellant at the time of the alleged indecent assaults.

[84] Complaints were made to the Dental Council by the three complainants, following the acquittal of the appellant on these charges. A fourth person whose complaint to the police did not lead to criminal charges also made a complaint to the Dental Council in respect of an alleged incident in 1984. It seems that the Police facilitated the making of these complaints.

Complaints Assessment Committee report

[85] Following its investigation into these complaints, the respondent reported to the Tribunal in May 2004. The report recorded that the practitioner had been acquitted on the four criminal charges at his trial. Other charges had been stayed by the District Court. It traversed what was said to the Committee by each complainant and the response made on his behalf by counsel for the practitioner. The Committee decided that all complaints should be considered by the Tribunal and under s 53(2) it reported that finding.

[86] In its report the respondent said that it had concerns about the safety of the appellant's manner of practice in relation to the levels of valium and hypnovel used to sedate patients. He appeared to have substantially exceeded average dosages administered by other practitioners. The respondent concluded this could have been

dangerous to the wellbeing of his patients. What happened could also have allowed time for manipulation of them in a sexually abusive manner during the period of recovery. There were, however, conflicts between what the complainants and counsel for the appellant had said concerning these matters.

[87] In relation to the criminal trial the respondent's report said:

> The CAC is fully aware, of the not guilty findings by that Court in the cases of the three complainants who were part of that trial and the objection by Counsel to [the appellant] having to respond to what he terms the same issues and same allegations. *However the CAC feels these issues are inescapably bound up with issues of levels of sedation which the CAC also feels the Tribunal should consider*. On balance the CAC felt the sexual abuse charges should also be part of the consideration by the Tribunal. (Emphasis added).

As will emerge later, the words we have emphasised in this passage are of crucial importance to whether the proceedings are an abuse of process. The report added that the respondent thought it strange that sedated complainants described similar circumstances of alleged assaults. While hallucinations, including those of a sexual nature, can take place on administration of the drugs used, members of the respondent did not consider these would be site or mode specific. On the other hand, there were commonly amnesic effects which might be relevant to apparent inconsistencies in the factual material about the time periods elapsing between particular events mentioned. In all the circumstances it was considered appropriate to refer the matter to the Tribunal in terms of conduct detrimental or potentially detrimental to patient welfare or professional misconduct or professional negligence.[146]

The charge

[88] On 4 October 2004 the Tribunal gave the required notice to the appellant, giving particulars of the grounds for the exercise of the Tribunal's powers.[147] It did so in the form of a charge which, we were advised, had been framed by the respondent.

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146 Section 54(1)(b) and (c).
147 Under s 61(1).

[89] There is a single charge that there is reason to believe that a ground exists entitling the Tribunal to exercise its penal powers. Particulars separately address all aspects of the appellant's alleged conduct during his treatment of each of the four complainants. There are variations in relation to each. The allegation of the first complainant relating to the 1987 incident, of causing her right hand to come into close contact with his penis while she was under local anaesthetic, is said to amount to professional misconduct. The appellant is said to have administered to the second complainant in 1989 a dosage of the sedative hypnovel that was in excess of the recommended maximum. This potentially endangered her wellbeing and exposed her to undesirable risks and consequences while she was under sedation, which included the sexual touching that was the subject of a criminal charge. The elements of this conduct, considered separately or cumulatively, were said to have been detrimental to his patient's welfare or to be professional misconduct.[148]

[90] Similarly, the particulars concerning the third complainant assert that in 2001 he administered twice the recommended dosage of hypnovel with two sets of consequences. The first related to the complainant falling asleep in an area of the surgery to which the public had access. The second alleged that he had potentially endangered her wellbeing and exposed her to the risk of undesirable side effects or consequences while she was under sedation, including the exposure of his penis and the two incidents of sexual touching.

[91] Finally, in respect of the complainant whose allegations concerning an incident in 1984 had not been the subject of a criminal charge, particulars allege an excessive dosage of valium by the appellant, potentially endangering her wellbeing and/or exposing her to the risk of undesirable side effects or consequences. These include the allegation that the appellant caused her right hand to come into close contact with his penis.

[92] Accordingly, it can be seen that the scope of the allegations in the disciplinary proceedings varies in relation to each complaining patient. The 1987

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[148] Under s 54(b) and (c) respectively. Framing of charges so as to require a disciplinary tribunal to consider elements of a practitioner's conduct both separately and cumulatively was approved by the Court of Appeal in *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 at pp 545 – 548.

complaint seems to raise nothing additional to what was alleged in the equivalent criminal charge. But, particulars concerning conduct in respect of other complaining patients address the appellant's sedative dosing practices and, in one instance, the effects of his conduct in terms of his lack of respect for the patient's dignity and feelings.

[93] For completeness we should add that in the High Court Fogarty J decided that further aspects of the charge, alleging that the appellant caused complainants to believe sexual touching had occurred, were too amorphous and should be quashed. That finding is not in issue in this Court.

Standard of proof

[94] The practitioner argues that he should not be required to defend himself against a charge in disciplinary proceedings that is based on factual allegations that are substantially the same as those he faced at his trial. His counsel, Mr Waalkens QC, contends this is the case in respect of the allegations involving the 1989 and 2001 incidents, that he exposed himself, caused touching or close contact between the patient's hand and his penis or that he touched a complainant's breast. Mr Waalkens submits that it is an abuse of the statutory process to subject the appellant to the risk that is inherent in reconsideration of the same issues. No complaint is made about the particulars in relation to the complainant whose allegations were not the subject of criminal charges or in relation to the manner in which the appellant administered sedatives to three of the four complainants. No complaint is made about the 1987 incident on the basis that the jury might have had more than one basis for acquitting the appellant on the criminal charge. The 1987 charge is discussed further below.[149]

[95] In the criminal proceedings the Crown had the onus of proving facts that amounted to indecent assaults as charged to the criminal standard of proof, that is, beyond reasonable doubt. The first step in considering the appellant's argument that he faces reconsideration of the same issues in relation to the disciplinary process is to

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149 At paras [134] – [136].

ascertain whether the same standard of proof would apply, if the disciplinary process proceeds, as at the trial. If a different, lower standard of proof is appropriate, the argument against allowing the second set of proceedings is weaker. In the context of double jeopardy, Professor Friedland has said:[150]

> Can disciplinary action be taken for the same offence after an acquittal in the criminal courts? The answer should depend on the degree of proof required before a disciplinary tribunal. If the degree of proof required is significantly less than that in the criminal courts, then the acquittal should probably have no effect, although it would surely influence the decision whether to commence proceedings. On the other hand, if much the same degree of proof is required in each case, then a further hearing for the same cause should be considered a violation of the rule against double jeopardy.

[96] Before it is able to exercise its powers to impose penalties, the Tribunal must in the present case be "satisfied" that a practitioner is guilty of detrimental acts or omissions, or of professional misconduct.[151] Being "satisfied" in this context simply means that the Tribunal has made up its mind that is the case. The term "satisfied" does not require that the Tribunal should reach its judgment having been satisfied that the underlying facts have been proved to any particular standard.[152] Nor does the Act or any applicable procedural rule stipulate a standard of proof which the Tribunal must apply. That question must accordingly be decided on general principles having regard to the statutory context.

[97] The common law recognises two standards of proof. The lower standard, the balance of probabilities, is that generally applied in civil proceedings. It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.[153]

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150 *Double Jeopardy* (1969), pp 319 – 320.

151 Section 54.

152 *R v Leitch* [1998] 1 NZLR 420 at p 428; *Cross on Evidence* (NZ looseleaf, Evidence Law Outside the Act), para [3.11] (last updated 1 March 2008).

153 *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA); *Complaints Assessment Committee v Medical Practitioners Disciplinary Committee* [2006] 3 NZLR 577 at paras [19] and [102] (SC).

[98] The civil standard of proof generally applies in civil proceedings even if the facts in issue, including the consequences if they are proved, are serious. As Dixon J put it in a classic passage in *Briginshaw v Briginshaw*:[154]

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

[99] As proposed by the Australian Law Reform Commission,[155] this approach has now been given effect in Australian evidence legislation.[156] The approach in *Briginshaw* has also regularly been applied in New Zealand by the High Court as the appropriate standard of proof in cases concerning professional discipline.[157]

[100] A parallel line of cases in England over the last 50 years treated the balance of probabilities test in civil cases as flexible in its application in that jurisdiction. A leading statement of the principles appeared in the majority judgment of Lord Nicholls in *Re H (Minors) (Sexual Abuse: Standard of Proof)*.[158] In the context of an application by a local authority for a care order based on the alleged rape by the respondent of other children in the family, Lord Nicholls said that the

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154 (1938) 60 CLR 336 at pp 361 – 362.

155 Australian Law Reform Commission, *Evidence* (ALRC 38, 1987), para [72], Summary of Recommendations and para [236], Commentary.

156 For example, s 140 Evidence Act 1995 (Cth).

157 *Ongley v Medical Council of New Zealand* (1984) 4 NZAR 369 at p 375 – 376, Jeffries J; *Guy v Medical Council of New Zealand* [1995] NZAR 67, at p 80, Tipping J *Cullen v Medical Council of New Zealand*, (High Court, Auckland, HC 68/95, 20 March 1996, Blanchard J). *Brake v Preliminary Proceedings Committee* [1997] 1 NZLR 71 at p 77, Tompkins, Cartwright and Williams JJ.

158 [1996] AC 563. Lord Goff and Lord Mustill agreed with Lord Nicholls.

"established general principle" was that the balance of probabilities was the standard of proof and continued:[159]

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

Lord Nicholls later added that this approach to applying the civil standard of proof:[160]

> provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.

[101] Without wishing to be pedantic, it is not the position that flexibility is "built into" the civil standard, thereby requiring greater satisfaction in some cases. Rather the quality of the evidence required to meet that fixed standard may differ in cogency, depending on what is at stake.

[102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged.[161] In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil

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159 At p 586.

160 At pp 586 – 587.

161 *Re Dellow's Will Trusts Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 WLR 451, where an allegation of felonious killing was held proved on the balance of probabilities.

standards, for application in certain types of civil case.[162] Balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[103] The House of Lords has recently expressed concern at the flexible application of the civil standard of proof in the context of child protection legislation applications.[163] The Law Lords considered that the application of a test requiring more cogent evidence that a child is likely to suffer significant harm has led lower courts to require proof to a greater degree of probability, equating to the criminal standard, which is inappropriate in cases concerned with child welfare.[164]

[104] Child welfare cases may form an exception because of the complexity of the impacts of judicial decisions on children and those caring for them, who may be alleged to be perpetrators of harm. In most instances, however, the reality is that a finder of fact in a civil case does generally look for stronger evidence of serious allegations before being satisfied that an event was more likely to have occurred than not. Morris LJ once put it this way in a leading case:[165]

> [T]he very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities.

[105] The natural tendency to require stronger evidence is not a legal proposition and should not be elevated into one.[166] It simply reflects the reality of what judges do when considering the nature and quality of the evidence and deciding whether an issue has been proved to "the reasonable satisfaction of the tribunal".[167] A factual assessment has to be made in each case. That assessment has regard to the consequences of the facts to be proved. Proof to a tribunal's reasonable satisfaction

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162 *Managh v Wallington* [1998] 3 NZLR 546 at p 550 (CA).
163 *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] 3 WLR 1.
164 At para [64] per Baroness Hale.
165 *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at p 266 (CA).
166 As is emphasised in *Re B* at paras [63] and [64] per Baroness Hale.
167 *Briginshaw* at p 362, per Dixon J, cited above at para [98].

will, however, never call for that degree of certainty which is necessary to prove a matter in issue beyond reasonable doubt.

[106] We would therefore respectfully differ from Lord Steyn who, in his judgment in *R (McCann) v Crown Court at Manchester*, went so far as to say that "the heightened civil standard and the criminal standard are virtually indistinguishable".[168]

[107] The view that the reason for requiring stronger evidence to prove serious allegations is the relative improbability that they occurred has been criticised by academic writers in recent years.[169] The House of Lords has now joined in that criticism.[170] But the true reason for the flexible application of the civil standard is concerned more with judicial policy as to what the ends of justice require outside of the criminal justice system.[171] In the present context this reflects the different impact on the individual of the consequences of adverse findings in an occupational disciplinary process, compared with those of a conviction for a criminal offence. The latter, of course, may include loss of liberty. As well, it reflects the different nature of the societal interests served by the two processes. Moreover, the principle requiring more cogent evidence generally in serious civil cases is sound and well established in New Zealand.[172]

[108] English decisions have departed from a flexibly applied civil standard approach in certain types of civil proceeding in which the Court has required, largely as a matter of policy, direct application of the criminal standard. An example is *McCann* which concerned applications for antisocial behaviour orders which

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168 [2003] 1 AC 787 at para [37]. The House of Lords has recently distanced itself from this approach in *Re B* at para [13] per Lord Hoffmann and paras [67] – [68] per Baroness Hale.

169 Redmayne, "Standards of Proof in Civil Litigation" (1999) 62 MLR 167, pp 184 – 185; Robertson, "Criminal Allegations in Civil Cases" (1991) 107 LQR 194; Dennis, *The Law of Evidence* (3rd ed 2007), para [11.48].

170 The House of Lords has recently qualified the dicta in *Re H* and said that that inherent probability is no more than a factor to be taken into account to the extent, if at all, it is relevant: *Re B* at paras [72] – [73] per Baroness Hale and per Lord Hoffmann at para [15].

171 In *Hornal v Neuberger Products* at p 266 Morris LJ cited Holmes' aphorism, suggesting that the authorities illustrated that "the life of the law is not logic but experience". See also Lord Nicholl's reference to "instinctive feeling" in *Re H*, at p 587, above at para [100].

172 *Honda New Zealand Ltd v New Zealand Boilermakers' etc, Union* [1991] 1 NZLR 392 at p 395.

prohibit those subject to them from entering certain areas in a city in which they have been causing trouble. Breach of the orders can lead to criminal sanctions. Lord Steyn said that in those cases, which are heard by magistrates, while, ordinarily, the matter being civil, the standard should be the balance of probabilities:[173]

> pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases [of applications for antisocial orders] apply the criminal standard.

It would be sufficient if the magistrates were "sure" that the criteria for an order were made out. Lord Hope also decided that the criminal standard should be applied in antisocial behaviour order applications, his reasoning being based on judicial policy in light of the gravity of the consequences of making any order.[174] The context in *McCann* is unusual as the legislation involved a scheme for regulation which sought to prevent criminal activity through a regime of prior restraint. Lord Steyn's approach in that type of case has recently been endorsed by the House of Lords on the grounds that it would enhance clarity.[175]

[109] Of more relevance to the present case, English courts regard some types of disciplinary proceeding as an area of exception in which the criminal standard of proof applies. In *Re A Solicitor*,[176] Lord Lane CJ said, of proceedings concerning solicitors before the Solicitors' Disciplinary Tribunal, that it was not altogether helpful if the standard of proof is left somewhere undefined between the criminal and the civil standards. He went on to say:[177]

> We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof, that is to say proof to the point where they feel sure that the charges are proved or, put in another way, proof beyond reasonable doubt.

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173 At para [37].
174 At paras [82] – [83].
175 In *Re B* at para [13] per Lord Hoffmann.
176 [1993] 1 QB 69.
177 At p 81.

[110] This conclusion was influenced by the position under the rules governing discipline of members of the English bar, which specifically stated that the criminal standard was to apply. Lord Lane's approach was taken a step further in *Campbell v Hamlet,*[178] where the Privy Council said that the criminal standard should be applied in all disciplinary proceedings affecting the legal profession.[179] The case was an appeal from Trinidad and Tobago but there is no indication that legislation for rules governing discipline of lawyers in that jurisdiction was relevant. The Privy Council approved *Re A Solicitor* and its reasoning may well signal the course the House of Lords will take in future disciplinary proceedings involving all lawyers in England and Wales.

[111] The current position in respect of discipline of health professionals in England is not as clear. There are indications that the criminal standard may be appropriate where allegations may lead to serious criminal charges. In less serious cases the courts have been reluctant to require such a high standard and have indicated that the civil standard as defined in *Re H* is appropriate.[180] Of prime importance, however, is that the charge and the conduct of the proceedings are fair.[181]

[112] Despite these exceptions, the rule that a flexible approach is taken to applying the civil standard of proof where there are grave allegations in civil proceedings remains generally applicable in England.[182] There is accordingly a single civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them. We are

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178 [2005] 3 All ER 1116 (PC).

179 At para [16] per Lord Brown.

180 *Sadler v General Medical Council* [2003] 1 WLR 2259 (PC).

181 *McAllister v General Medical Council* [1993] 1 AC 388 at p 399 (PC).

182 Lord Nicholls's judgment in *Re H* was approved by Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, at p 194. See also *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] 1 QB 468 (CA).

satisfied that the rule is long established,[183] sound in principle, and that in general it should continue to apply to civil proceedings in New Zealand.

An exception for disciplinary proceedings?

[113] The next question is whether there should be an exception in New Zealand under which the criminal standard applies to occupational disciplinary proceedings. An important feature of the flexible application of the civil standard is that it allows the court to take into account the gravity of the particular allegations to be addressed. The range of conduct that can be the subject of disciplinary proceedings is wide, including what is professionally inadequate at one end and what is a serious crime at the other. The universal application of the criminal standard, as determined in *Campbell v Hamlet*, would be a very rigid approach to adopt for all disciplinary proceedings. It would be in tension with the statutory purpose of such proceedings, which is protection of the public. On the other hand, on the flexible approach, serious allegations must always be proved by evidence having sufficient probative force. In disciplinary proceedings this gives proper protection to the person subject to the process who will face penalties and stigma if found guilty of misconduct.

[114] It is sometimes suggested that the law could, at the discretion of the relevant tribunal, require the criminal standard, but only in respect of the most serious of allegations in disciplinary proceedings, being those which would also found serious criminal charges.[184] Little guidance has been given, however, on when it will be appropriate to require the criminal standard. No coherent principles have been suggested. Conversely, the flexible approach avoids the difficulties of having different standards in the same type of proceeding and having to decide where to draw the line.[185] In this respect, the flexibly applied civil standard is not only a more straightforward one to apply to disciplinary proceedings. It is also a standard which has conceptual integrity.

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183 See Dixon J in *Briginshaw*, at pp 360 – 361 where he notes that both *Wigmore on Evidence* (2nd ed, 1923) and *Starkie's Law of Evidence* (1st ed, 1824 and 4th ed, 1853) supported flexibility in the framing and application of the civil requirement.

184 For example, *McAllister v General Medical Council* [1993] 1 AC 388 at p 399 (PC).

185 *Guy v Medical Council* at p 77.

[115] As well, the present statutory context supports retaining the flexible approach. Consistent with its purpose of public protection, the Act does not extend to those subject to its disciplinary processes all of the protections afforded to a defendant at a criminal trial. This emphasises the significant differences in the two types of proceedings. The Tribunal is engaged in an inquiry rather than a trial. It can receive evidence that would not be admissible in a court of law. It must observe the rules of natural justice, but is mandated to take an inquisitorial approach in doing so. The statutory scheme reflects the long established view that proceedings such as those before the Tribunal are not criminal in nature. A flexible application of the civil standard of proof is entirely consistent with these features of the Act, which are typical in governing statutes regulating occupational disciplinary proceedings.

[116] These factors do not support making an exception to the flexible application of the civil standard to cover disciplinary proceedings, such as those under the Act. As indicated, the reasons given in the English cases for the application of a criminal standard in exceptional situations tend to be based on considerations of pragmatism or policy. As to the former, it is true, as Mr Waalkens points out, that the Act does not require the Tribunal to have a legally qualified member. Nevertheless, the record of its proceedings, and those of other such bodies, can be expected to show that they have applied a particular standard of proof in reaching their decisions. No other pragmatic considerations appear to require the direct application of a criminal standard in this type of proceeding. Nor in my view are there any policy considerations favouring an exception for occupational disciplinary proceedings, including those under the Act. We acknowledge the serious impact that adverse disciplinary decisions can have on the right of individuals to work in their occupation and on personal reputations. The flexible application of the civil standard will, however, give all due protection to persons who face such proceedings.

[117] That approach continues at present to be applied by occupational disciplinary bodies in Australia,[186] Canada[187] and Hong Kong.[188] It has long been applied, without giving rise to difficulties, in New Zealand. The Australian pattern is of particular relevance in the Trans-Tasman context because of the reciprocal recognition of regulatory standards for occupations in the two jurisdictions.[189]

[118] Accordingly, we are of the view that in this country there is no good reason for creating an exception covering disciplinary tribunals. A flexibly applied civil standard of proof should be adopted in proceedings under the Act and other similarly constituted disciplinary proceedings in New Zealand unless there is a governing statute or other rule requiring a different standard.

Abuse of process?

[119] An allegation of abuse of process in the public law context is in essence a complaint that discretionary power has been exercised in a way which falls outside the scope of the authority conferred by Parliament, or for a purpose for which the power was not conferred.

[120] The submission for the appellant is that it was an abuse of process for the respondent to include, in the subject of its report and the disciplinary inquiry, acts of alleged misconduct which directly correspond with those for which the appellant was tried. Mr Waalkens argued that this amounts to a collateral attack on the verdicts of not guilty in the District Court, which Parliament cannot have intended to authorise, and which falls outside of its purpose.

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186 Forbes, *Justice in Tribunals* (2nd ed, 2006), paras [12.21] – [12.23]. The test to be applied is found in *Briginshaw* and *Rejfek v McElroy* (1965) 112 CLR 517 at pp 521 – 522.

187 *Stetler v Ontario Flue-Cured Tobacco Growers' Marketing Board* (2005) 76 OR (3d) 321 (OCA).

188 *A Solicitor v The Law Society of Hong Kong* [2008] 2 HKLRD 576 per Bokhary PJ (HKCFA).

189 The arrangements between the two countries are given legislative effect in New Zealand by the Trans-Tasman Mutual Recognition Act 1997.

[121] If the Tribunal investigates the full scope of the appellant's conduct set out in the notified particulars the inquiry will address the same alleged incidents of misconduct as those for which he was tried.

[122] The appellant does not, however, allege that the rule against double jeopardy applies to the Tribunal's proceeding. He accepts, correctly, that it is confined to barring further proceedings in a court of competent jurisdiction. In law, the rule against double jeopardy does not inhibit institution of proceedings before a disciplinary body.[190]

[123] When addressing whether the respondent Committee has acted within the scope of its powers, it is appropriate to consider cases involving the use of the court process collaterally to attack an earlier court's decision. The concerns in relation to abuse of process which underlie these cases are relevant to ascertaining Parliament's intent and the scope of the Complaints Assessment Committee's power.

[124] Mr Waalkens invited us to consider the basis of the appellant's defence of the criminal charges concerning the 1989 and 2001 incidents which, he said, was a denial that there had been any indecent contact or touching at all. He argued that we should proceed on the basis that the jury had rejected those allegations. Mr Stanaway argued for the respondent that there was no sound basis for ascertaining the basis of the jury's verdicts. We consider that it would be a fruitless, as well as an inappropriate, exercise for the Court to try to do so. Instead we turn to general principles.

[125] It is true that there is a rule of policy that the use of a civil action collaterally to attack a subsisting conviction of the plaintiff is usually an abuse of process.[191] But this rule does not extend to the questioning of acquittals. The reason for this is that:[192]

> The general verdict of not guilty decides nothing more than that there was a failure upon the part of the prosecution to establish all the necessary

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190 *In re A Medical Practitioner* at p 801.

191 *Lai v Chamberlains* [2007] 1 NZLR 7 at para [66] (SC).

192 *In re A Medical Practitioner* at p 800 per Gresson P; see also *Daniels v Thompson* [1998] 3 NZLR 22 at p 50 (CA).

> ingredients. It negatives every offence of which the accused could properly be found guilty on that particular indictment. … In *R v Salvi* (1857) 10 Cox CC 481n, Sir Frederick Pollock CJ said: "Acquittal of the whole offence is not acquittal of every part of it; it is only an acquittal of the whole" (*ibid* 483n).

[126] There is no rule of law that prevents inquiry into some of the essential facts in issue in a criminal trial where they are relevant to an accusation of a different character. Where an element of a criminal charge was not necessarily resolved in the criminal process, and could found a finding of unprofessional conduct, it is not in principle an abuse of process for a later disciplinary inquiry to examine that element.

[127] As the Court of Appeal points out, the abuse of process doctrine is a broad one applicable in varied circumstances. Unlike res judicata and issue estoppel, it is not limited in its application to litigation between the same parties. Lord Bingham has said, in a case where a plaintiff sought to raise an issue that could have been dealt with in earlier litigation, that in deciding whether further proceedings are abusive a court makes:[193]

> a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether in all the circumstances a party is misusing or abusing the process of the court.

This approach is applicable in the present context. Without derogating from its generality, however, an important consideration in the present case is that it is the function of the criminal justice system to ascertain if a defendant has committed a crime and if so to impose due punishment. If further proceedings in a different forum were of the same nature, to permit them to continue would offend the integrity of the criminal process or the Court's sense of justice or propriety. If that were so, it would bring the case into a category where there was abuse of power.[194]

[128] It is accordingly appropriate to consider further the nature of, and public interest involved in, the disciplinary process, including the framework within which

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193 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at p 31.

194 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA); *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA).

the Act provides for that process. The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.[195] Protection is a less prominent factor in the criminal process. One consequence of this difference is that the disciplinary process may cover much wider ground than that litigated at the criminal trial.

[129] This breadth is reflected in what the Act provides in relation to the Tribunal's proceedings, already discussed in our consideration of whether disciplinary proceedings should form an exception to general principles of the standard of proof. The inquisitorial nature of the inquiry, coupled with the Tribunal's own power to summon witnesses and generally to admit evidence which is not admissible in criminal proceedings, are all in point. Also, the inclusion of dentists in the membership of the Tribunal brings expertise in the occupational field concerned which is clearly relevant to its capacity to make judgments on appropriate standards of practice. The same point can be made in respect of bodies such as the respondent which exercise judgment in deciding whether to initiate disciplinary proceedings.

[130] In addition to these differences in purpose, scope of inquiry, and process, there is an important difference between the determinations that the Tribunal must make and those made in the criminal context. While the District Court jury was required to decide if all elements of the criminal charges were proved beyond reasonable doubt, the Tribunal must simply determine if it is satisfied that the practitioner is guilty of conduct detrimental to patient welfare or professional misconduct. The combined effect of all these factors makes it likely that in many cases different evidence will come before the Tribunal, which is addressed to wider aspects of a practitioner's conduct than the strict regime of a criminal trial would allow.

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[195] This feature also distinguishes the purpose of disciplinary proceedings from that of claiming an award of exemplary damages. The purpose of those proceedings is to punish and deter: *Daniels v Thompson* [1998] 3 NZLR 22 at p 51 (CA).

[131] The Act itself recognises that disciplinary proceedings may follow criminal proceedings, which have resulted in a conviction in relation to the same conduct, if the conviction reflects adversely on fitness to practice.[196] The statutory scheme does, however, place restrictions on what punishment may be imposed in such cases. In particular, the Tribunal may not impose a fine.[197] The Act does not address the laying of disciplinary charges where the conduct results in an acquittal because an acquittal in itself will not reflect adversely on fitness to practice. The Act, therefore, provides no explicit guidance on whether it is an abuse of process to lay disciplinary charges following an acquittal in relation to the same conduct.

[132] Taken together, these considerations do, however, signal the importance of the public interest served by the disciplinary process and the difference in nature of that process from criminal justice. These are clearly important policy factors in addressing the abuse of process issue in this case. They tell strongly against the proposition that the initiation of disciplinary proceedings, for the intended statutory purpose, is an abuse of process even if they include the same allegations as those in earlier criminal proceedings which resulted in an acquittal.

[133] Nevertheless, there will be some situations in which it would be an abuse of a Complaints Assessment Committee's discretionary power to refer allegations of aberrant conduct by a practitioner to the Tribunal because the scope of a disciplinary inquiry would simply replicate the exercise that a criminal court has undertaken, where that process has resulted in an acquittal. Bodies such as the respondent must be careful not to permit their processes to be used simply as a reserve means of punishing conduct of a criminal nature after criminal proceedings have been unsuccessful.[198] Subject to one qualification, that is not, however, the present case.

[134] The qualification concerns the complaint about the 1987 incident of alleged indecent touching. The only issue that is raised by including this allegation in the respondent's report to the Tribunal is whether conduct in the nature of an indecent assault took place on that occasion. We have already set out the passage in the

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196 Section 54(1)(a) and s 55(2) and (3).

197 Section 55(3).

198 This was recognised in *R (Redgrave) v Commissioner of the Police of the Metropolis* [2003] 1 WLR 1136, at para [46] (CA).

respondent's report which makes plain that it was of the view that the allegations concerning indecent assaults were inescapably bound up with the issues concerning sedation which the Committee considered should be put before the Tribunal.[199] While that view is open in respect of other incidents, the issue raised by the 1987 allegations is in all respects identical to that raised by the equivalent criminal charge which resulted in an acquittal. No other passage in the respondent's report indicates any concern other than that indecent conduct may have taken place during the 1987 attendance. In that context it would be outside of the authority, and inconsistent with the powers conferred by the legislation, for the respondent to put the 1987 matter before the Tribunal as a disciplinary question.

[135] We have reached this conclusion even though Mr Waalkens (whose argument followed a different course on this point) did not argue it was an abuse of process for the respondent to pursue the 1987 incident.

[136] We recognise of course that a different standard of proof would apply to the 1987 alleged conduct if it forms part of what the Tribunal considers, but of course cogent evidence would be required to meet the civil standard. We also recognise that what happened in 1987 would have potential relevance to other allegations as similar fact evidence. Nevertheless, to allow the 1987 events to form part of the disciplinary inquiry would fall outside the proper exercise of the Tribunal's powers. They go no wider in their significance than did the criminal allegations decided in the appellant's favour and they have insufficient evidentiary relevance to the other alleged events to justify their inclusion in the inquiry. In these circumstances the references in the charge particulars to the 1987 events should be deleted.

[137] In relation to all other particulars the appellant correctly accepts that it is not an abuse for the respondent to pursue concerns over his allegedly excessive sedative dosing practices. The scope of the intended disciplinary inquiry is thus wider than that of the criminal proceeding. It will be a different inquiry which will examine sedative dosing practices and not one in the same cause as the criminal proceeding, even though it will traverse some of the same ground.

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199 At para [87] above.

[138] Mr Waalkens' main argument on this part of the appeal is that the allegations, of giving excessive doses of sedatives in the course of practice, should be considered without any reference to the allegations of indecent assaults on the two complainants who gave evidence to that effect at the trial. The respondent's report to the Tribunal concluded, however, that the allegations of indecent assault were "inescapably bound up with issues of levels of sedation" which, in its judgment, the Tribunal should consider. Clearly the respondent decided it would be artificial for the Tribunal to look at the wider aspects of the appellant's conduct without including the allegations of indecent assaults in its inquiry. There is force in this view. It would be unsatisfactory if allegations of over-sedation had to be considered in isolation from possible motives. The alleged conduct could also be relevant to whether any over-sedation established was negligent or deliberate. These points support the respondent's conclusion that what it should refer to the Tribunal should include the allegations concerned.

[139] In reaching this decision the respondent drew on members' expertise in relation to coincidences in the nature of the various assaults complained of and their knowledge of effects on patients of the drugs concerned. The courts have traditionally accorded great weight to the opinions of professional disciplinary bodies in the area of their expertise.[200] Where the lawfulness of the exercise of a statutory power turns on expert judgment, and there is no question of breach of natural justice, bad faith, material error in the application of the law, or exercise of the power in a way which cannot rationally be regarded as coming within the statutory purpose, the courts are unlikely to intervene.[201] In this area practitioners have the safeguard of rights of appeal from adverse findings and penal orders. The courts will not grant interim relief, which would have the effect of suspending the functioning of the disciplinary process, unless the general principles for granting interim relief under the Judicature Amendment Act 1972 are made out in the particular case.

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200 *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 at p 548, per Cooke P (CA).

201 *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 at para [55] (SC).

Conclusion

[140] For these reasons, which in substance are the same as those of the Court of Appeal, we are satisfied that, other than in respect of the 1987 events, the referral of the matters to the Tribunal and the inclusion of the alleged indecent assaults in the statement of particulars to be the subject of inquiry does not involve any abuse of process or misuse of public power by the respondent or the Tribunal. The respondent addressed wider aspects of the appellant's conduct than did the District Court. The alleged indecent conduct was included in what was referred to the Tribunal because in its judgment, drawing on the expertise of members, the respondent concluded that alleged conduct was relevant to what was properly to be considered.

[141] The appeal is allowed in respect of the 1987 allegations but is otherwise dismissed. The appellant has been successful on one aspect only of the appeal and must pay costs to the respondent of $10,000 plus disbursements to be fixed if necessary by the Registrar.

ANDERSON J

[142] As the Chief Justice points out, there is authority for applying the criminal standard of proof in a case such as the present. However, on this contentious issue where opinion is divided, the cogency of reasoning rather than its preponderance is the important thing.

[143] I have difficulty with the Chief Justice's proposition that consistency is promoted by applying the criminal standard. It is not the choice of standard which promotes consistency but the consistent application of the same standard, whatever it might be.

[144] To my mind, the seriousness of consequences is not a persuasive argument either. Proof beyond reasonable doubt applies generally across the spectrum of criminal charges, from traffic infringements to murder; and the consequences of losing a civil case can be utter financial ruin or blasted reputations yet the standard

of proof remains the balance of probabilities. The "fundamental value determination" identified by Justice Harlan in *Re Winship*[202] needs to be understood in light of the historical context of the criminal standard, when the risk of error was exacerbated by the illiterate, uneducated and hapless condition of unrepresented defendants.

[145] The choice of standard affects relevant risk. If the only relevant risk in a case such as the present were the risk of an erroneous finding *against* a practitioner then the Chief Justice's conclusion that the standard of proof beyond reasonable doubt protects against error in decision making would be a compelling consideration. But I do not think that is the only relevant risk. Disciplinary tribunals, particularly statutory ones relating to the professions, are concerned with the maintenance of standards of competence and conduct for the protection of members of the public who are relevant consumers, and for the maintenance of the integrity of the relevant profession. Accordingly, one of the relevant risks is that an error *in favour* of a practitioner will or may adversely affect the health of members of the public or the integrity of the profession. That, in my opinion, justifies the application of the same standard as in civil cases.

[146] Thus, I am largely in agreement with the majority but not on one issue. That is whether the Assessment Committee or the Disciplinary Tribunal can be prevented from dealing, as a disciplinary matter, with conduct which is in all material respects the same as that relating to the charge of which the appellant was acquitted on his criminal trial.

[147] The Court of Appeal in *Re A Medical Practitioner*[203] had no difficulty in concluding that the acquittal at trial of a doctor on a charge of indecent assault was no barrier to subsequent disciplinary proceedings in respect of the same alleged conduct. The pedigree of that legal principle extends over centuries. Recent applications of it are *R (on the Application of Phillips) v General Medical*

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202 397 US 358 (1970) at p 372.
203 [1959] NZLR 784.

Council,[204] where Dr Phillips failed in his challenge to the consideration by the Professional Conduct Committee of the General Medical Council of allegations which had founded criminal charges on which he had been acquitted at trial; and *R (Redgrave) v Commissioner of Police of the Metropolis*,[205] where the discharge for want of evidence of a police officer on a charge of conspiring to pervert the course of justice was no bar to disciplinary proceedings for the same alleged conduct.

[148] The appellant's argument is that continuation of the disciplinary process would be an abuse of process. There can be no suggestion of abuse of the process of the Court because the Court proceedings are spent. However, the appellant also argued that the disciplinary process amounted to a collateral attack on the Court verdict and that this must fall outside the legislative purpose and thus constitute an abuse of process. As the judgment of the majority points out,[206] an allegation of abuse of process in the present context is essentially a complaint that a power has been exercised in a way which falls outside the scope of authority conferred by Parliament, or for a purpose for which the power was not conferred. Whether or not that might amount to an abuse of process or, more generally, an abuse of a power, will depend on the law and facts of a particular case. When it is alleged that there is an abuse of the process of a tribunal it is as well to bear in mind the admonition of Newman J[207] that the jurisdiction to pre-emptively restrain process elsewhere on grounds of abuse will be sparingly exercised.

[149] The majority judgment states that it would be an abuse of power for the respondent to refer allegations of aberrant conduct by a practitioner to the Tribunal because the scope of a disciplinary inquiry would do no more than replicate the exercise that a criminal Court has already undertaken – an exercise which has resulted in an acquittal. This statement is unsupported by authority and overlooks the different functions of the criminal law and the disciplinary procedures. The function of the criminal law is to ascertain if the defendant has committed a crime, and if so, to impose criminal consequences. The essential function and purpose of

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204 82 BMLR 135 (QB).
205 [2003] 1 WLR 1136 (CA).
206 At para [119].
207 In *R (on the Application of Dr Brian Phillips) v General Medical Council* at para [34].

professional disciplinary bodies are different. As Gresson P pointed out in *Re A Medical Practitioner*:[208]

> [T]he exercise by the Medical Council of its powers is not by way of punishment, but rather to enforce a high standard of propriety and professional conduct.

[150] In the same case Cleary J, writing for himself and North J, stated:[209]

> [W]hen [the Medical Council] becomes concerned with conduct which constitutes an offence, it is not for the purpose of punishing that conduct as an offence against the public, which is the purpose of the criminal law, but because it is conduct which may show that the practitioner concerned is no longer fit to continue to practise the profession.

[151] Lord Diplock pointed out in *Ziderman v General Dental Council*[210] that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[152] I see no reason why the completion of an inquiry in a particular forum for one purpose should preclude an inquiry in a different forum for another purpose.

[153] The majority of this Court[211] states that bodies such as the respondent must be careful not to permit their processes to be used simply as a reserve means of punishing conduct of a criminal nature after criminal proceedings have been unsuccessful. *Redgrave* is cited in support of that proposition. I do not entirely agree that *Redgrave* endorses that proposition, although I am prepared to accept in principle that to seek to punish for punishment's sake might be an abuse of a power. On the other hand there may well be occasions where the specialist tribunal, with its own expertise and/or the benefit of additional evidence, considers itself justified in exercising its powers – for its own statutory purposes. It should be noted, for example, that disciplinary bodies are usually entitled to have regard to evidence which might not be admissible in a court.

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208 At p 800.
209 At p 814.
210 [1976] 1 WLR 330 at p 333 (PC).
211 At para [133].

[154] On the present case the majority finds that in one respect the respondent has permitted its process to be used simply as a reserve means of punishing conduct of a criminal nature after criminal proceedings. But there is just no evidence to support that finding. Improper exercise of power cannot logically be inferred from the fact that the alleged conduct to be investigated was the foundation of a criminal charge of which the appellant was acquitted. The majority's view that the particular allegation cannot be examined in a disciplinary proceeding is founded on the fact that "the issue raised by the 1987 allegations is in all respects identical to that raised by the equivalent criminal charge which resulted in an acquittal".[212] That is a finding of fact with which I do not take issue. But there is no legal reason why that congruence prohibits the respondent from proceeding, as the conventional jurisprudence makes plain.

[155] The sexual safety of patients in relation to practitioners is a proper matter for the respondent to be concerned with. As I have mentioned, a disciplinary body may have access to specialist knowledge and perhaps evidence which may not be admissible in criminal proceedings. Or there may be a case where compelling evidence of misconduct comes to light after an acquittal at trial. I do not accept that an inquiry in such cases, or even where there is no new feature, would be unlawful.

[156] For reasons concerned with the desirability of finality and the integrity of the courts some issues may not be litigated or relitigated, directly or collaterally. But that does not mean that issues which have been determined by a court process may not be examined, criticised, contradicted or not followed in a different context, in which the court is not itself engaged. Authorities such as *Fox v Attorney-General*[213] and *Moevao v Department of Labour*[214] cited in the majority judgment do not suggest otherwise. They were concerned with whether the continuation in the Court of criminal proceedings was an abuse of that Court's process.

[157] I would dismiss the appeal in its entirety.

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212 See para [134].
213 [2002] 3 NZLR 62 (CA).
214 [1980] 1 NZLR 464 (CA).

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