



New Zealand
Health Practitioners
Disciplinary Tribunal

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DECISION NO: 390/Nur10/167P

IN THE MATTER of the Health Practitioners
Competence Assurance Act 2003

AND

IN THE MATTER of disciplinary proceedings against
DARREN GWYNN, of
Invercargill, registered nurse

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING held in Invercargill on 18-20 April 2011 and on the papers thereafter

TRIBUNAL: Mr Bruce A Corkill QC (Chairperson)
Ms Taima Campbell, Ms Susan Matthews, Ms Sandra Matheson
and Mr Quentin Hix (Members)

Ms G Fraser (Executive Officer)

Ms K O'Brien (Stenographer)

APPEARANCES: Mr M F McClelland and Ms C Prendergast, for the Professional
Conduct Committee

Ms A O'Brien and Ms K Rose, for Mr D Gwynn

Introduction:

1. On 19 November 2010, the Professional Conduct Committee (PCC) laid a disciplinary charge against Mr Gwynn. It raised issues as to the quality of care given to a very elderly patient Mrs Y following her discharge from hospital; and as to a listing agreement that patient gave in Mr Gwynn's favour, giving him sole real estate agency rights of sale over her property for a period of two years.
2. The allegations of the charge were disputed by Mr Gwynn, on the basis that either individual allegations were not established, or that discipline was not warranted.
3. Prior to the hearing the following non-publication orders were made:
 - 3.1. On 21 March 2011, the Tribunal made a permanent order by consent preventing the publication and identifying features of the patient and related family members.¹
 - 3.2. On 22 March 2011, by consent, the Tribunal made an interim order preventing the publication and identifying features of Mr Gwynn.² That order was to continue until further order of the Tribunal. It is considered further below. In order to maintain the integrity of this order, the Tribunal also made an interim order of non-publication of name in respect of Mrs Gwynn.
 - 3.3. At the hearing, interim orders of non-publication of name were made in respect of HealthCare NZ and Mr R; and permanent orders were made in respect of Ms D, Ms A, Ms C and Ms N.
 - 3.4. Issues arose with regard to publication of evidence during the hearing; and these were the subject of the Tribunal's decision of 29 April 2011.³

¹ 360/Nur10/167P

² 362/Nur10/167P.

³ 371/Nur10/167P.

Overview:

4. Mrs Y was a spirited but at times difficult lady who lived on her own, and whose health deteriorated, making it increasingly difficult for her to look after herself. Mr Gwynn was a near neighbour, who was involved with her both as a friend and in his role as a support worker for HealthCare NZ, for example, assisting her with regard to wound dressings.
5. Following a fall in early March 2009, Mrs Y's condition deteriorated with her great toe becoming increasingly necrotic, and on 29 March 2009 she was admitted to hospital for amputation of her toe. She acquired pneumonia, and the procedure was not able to go ahead; it had been recorded that she did not want to have contact with her family. Initially, they were unaware that she was in hospital. However, Mr Gwynn then contacted them, and her nephew Mr L travelled from Central Otago to Invercargill so as to be with his aunt initially in hospital, and then when she was discharged to her home. She wanted to die at home.
6. She was discharged on 3 April 2009. The Tribunal is required for the purposes of the charge to consider carefully the care which was given from Friday 3 April 2009 to Saturday 4 April 2009. Because there were difficulties in continuing to support her at home she was admitted to a hospice on the Saturday evening. On 17 April 2009 she died.
7. In the course of these events, Mr Gwynn entered into an exclusive listing agreement with Mrs Y in respect of her property for two years. It will be necessary to consider all aspects of this agreement later in this decision.

The Charge:

8. The charge alleged:

“Particulars of Charge

1.0 That during the period 2 April 2009 to 4 April 2009, Darren Gwynn failed to ensure that Mrs Y was provided with reasonable care following her

discharge from Southland Hospital to her home, and/or informed other staff and the family that he would organize 24-hour care for Mrs Y when he knew or ought to have known that HealthCare NZ would not provide this care and/or that he would not provide 24-hour care. In particular:

- 1.1 *On or about 3 April 2009, Mr L informed Carla Arkless and/or Mr L that he would provide 24-hour care for Mrs Y in her home;*
- 1.2 *Mr Gwynn failed to ensure that Mrs Y's home had the adequate equipment to provide terminal care in that she was nursed on an old bed with a wire wove base and no pressure mattress;*
- 1.3 *Darren Gwynn did not attend to or ensure care was provided to Mrs Y during the six hours between 2300 hours on 3 April 2009 until approximately 0500 hours on 4 April 2009 and/or from 0500 hours until late morning (approximately six hours), when he knew or ought to have known that he had agreed to provide this care and/or that Mr L would not be able to provide care;*
- 1.4 *On or about 3 April 2009, Mr Gwynn informed Mr L that the family would have to find alternate arrangements for Mrs Y on Monday 6 April 2009 as the care was being provided on a voluntary basis, despite having informed Mr L and hospital and hospice staff that he would provide 24-hour care at home to allow Mrs Y to die in her own home;*
- 1.5 *Mr Gwynn failed to ensure that Mrs Y was kept comfortable and pain-free by administering the medication that had been prescribed and/or dispensed for her for this purpose, and/or when informed of Mr L and Mr E's decision to transfer Mrs Y to the hospice, Mr Gwynn attempted to remove this medication from her home;*
- 1.6 *Mr Gwynn arranged for Mrs Y's transfer home when he knew or ought to have known that there was no running water at Mrs Y's home prior to and/or after her discharge and thereby failed to ensure that Mrs Y was being discharged to an environment where she would be provided with reasonable and safe care.*
- 2.0 *On or about 17 March 2009, as a registered nurse providing care for Mrs Y, Mr Gwynn breached professional boundaries by entering into a contract with Mrs Y, giving him sole real estate agency rights over the sale of her property for a period of two years.*
- 3.0 *That during the period 2 April 2009 to 4 April 2009, as a registered nurse providing care to Mrs Y, Mr Gwynn failed to communicate professionally with Mrs Y's family: in particular:*
 - 3.1 *He informed Mrs X that "You won't see her – she'll be dead. She won't last till then. You should come straight away", in a nasty tone when she informed him that she could not visit her aunt on 3 April 2009;*

3.2 *Mr Gwynn behaved unprofessionally with Mr L when he informed Mr Gwynn that he wished to transfer his aunt by yelling this in her ear and/or arguing with Mr L about this decision.*

The conduct alleged in Charges 1.0, 2.0 and 3.0 amounts to professional misconduct pursuant to section 100(1)(a) or (b) of the Act and particulars 1.1 to 1.6, and 3.1 and 3.2, either separately or cumulatively, are particulars of that professional misconduct.”

Legal Principles:

9. The burden of proof was on the PCC.
10. As to standard of proof, the appropriate standard is the civil standard, that is proof to the satisfaction of the Tribunal on the balance of probabilities, rather than the criminal standard. The degree of satisfaction called for will vary according to the gravity of the allegations. The greater the gravity of the allegations the higher the standard of proof.
11. In the decision of *Z v Complaints Assessment Committee* [2009] 1 NZLR 1, a majority of the Supreme Court stated that in civil proceedings in New Zealand (including disciplinary proceedings) there is a civil standard, the balance of probabilities. That standard is to be applied flexibly because it must accommodate serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probability standard.

Professional Misconduct:

12. Section 100 of the HPCA Act defines the grounds on which a health practitioner may be disciplined. The Tribunal has now had ample opportunity to consider the test for professional misconduct under the section, and the approach to it is well settled – examples of the correct approach are found in *Nuttall* (8/Med04/03); *Aladdin* (12/Den05/04 and 13/Den04/02D) and *Dale* (20/Nur05/09D).
13. The section provides that malpractice and/or negligence and/or conduct likely to bring discredit to the profession can constitute professional misconduct.

14. “Malpractice” is defined in the Collins English Dictionary (2nd ed) as:
- “The immoral, illegal or unethical conduct or neglect of professional duties. Any instance of improper professional conduct.”*
15. In the new shorter Oxford English Dictionary (1993 edition) the word is defined as:
- “Law. Improper treatment or culpable neglect of a patient by a physician or of a client by a lawyer ... 2 gen criminal or illegal action: wrongdoing, misconduct.”*
16. Malpractice, although often equated with negligence, is perhaps better considered a broader concept, capable of encompassing neglect, but also of extending to trespassory conduct in the process of caring for patients in relation to consent, breaches of patient confidence and fiduciary obligations, and other forms of conduct reaching the necessary level of gravity, such as assaulting a patient, swearing at or threatening a patient, a deliberate failure to obey an instruction or sexual misconduct. (see para 23.65, “Medical Law in New Zealand”, 2006).
17. Negligence and malpractice were discussed by Gendall J in *Collie v Nursing Council of New Zealand* [2000] NZAR 74. His Honour said:
- “Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, or oversight or for that matter carelessness.”*
18. Similarly, it is for the Tribunal to decide whether the conduct, if established, would be likely to bring discredit on the medical profession. In the same case Gendall J stated:
- “To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard for the question to be asked by the Council whether reasonable members of the public, informed and with the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good standard of the nursing profession was lowered by the behaviour of the nurse concerned.”*
19. In *IRG v Professional Conduct Committee of the Psychologists Board* [2009] NZAR 563, the Court of Appeal emphasised that the intention in enacting section 100 in its current form was to move away from an approach that differentiated between levels of

seriousness in the charge. The differentiation was now likely to be reflected in the penalty, not the charge (at [49]).

20. There are two steps involved in assessing what constitutes professional misconduct:
 - 20.1. The first step involves an objective analysis of whether or not the health practitioner's acts or omissions can be reasonable regarded by the Tribunal as constituting:
 - malpractice; or
 - negligence; or
 - otherwise meets the standard of having brought, or was likely to bring discredit to the practitioner's profession;
 - 20.2. The second step requires the Tribunal to be satisfied that the health practitioner's acts or omissions require a disciplinary sanction for the purposes of protecting the public and/or warrant maintaining professional standards and/or punishing the health practitioner.
21. This approach to the assessment of professional misconduct under the statute is well established under previous decisions of the Tribunal, and in authorities such as *McKenzie v MPDT & Anor* [2004] NZAR 47.
22. Threshold is an important issue in this case. Both Counsel made submissions as to the relevant law. The correct approach is that described in the Court of Appeal in *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774, which endorsed the earlier statement of Elias J in *B v Medical Council* (noted at [2005] 3 NZLR 810). She made the important point that the threshold is “*inevitably one of degree*”. The Court of Appeal expressed the issue in this way:

“In cases of both professional misconduct and conduct unbecoming it will be necessary to decide if there has been a departure from acceptable standards and then to decide whether the departure is significant enough to warrant sanction.”

23. In determining whether the departure is significant enough there must be positive reasons to justify such a conclusion.

Credibility:

24. Some credibility assessments arise in this case.
25. What is involved in any test for “credibility” was articulated by a Canadian Appellate Court (in *Farynia v Chorny* [1952] 2 DLR 354 (BCCA)) to be that the real test of the truth of the story of a witness must be at harmony with the preponderance of the probabilities which are practical, and which an informed person would readily recognise as reasonable in that place and in those conditions.
26. So, the Tribunal, where relevant, must consider such factors as:
- 26.1. The witness’ manner and demeanor when giving evidence.
- 26.2. Issues of potential bias – to what extent was evidence given from a position of self interest.
- 26.3. Internal consistency – in other words was the evidence of the witness consistent throughout, either during the hearing itself, or with regard to previous statements.
- 26.4. External consistency – in other words, was the evidence of the witness consistent with that given by other witnesses.
- 26.5. Whether non advantageous concessions were freely tendered.

Hearing:

27. Evidence was given by 15 witnesses; the detailed evidence of each witness will be outlined and discussed further when considering individual particulars.
28. The PCC called:
- 28.1. Three relatives of Mrs Y; Mr E and Mr L who are nephews of Mrs Y; and Mrs X, a cousin of Mrs Y. They provided background information relating to Mrs Y’s circumstances, focusing particularly on her health and mental state

and their awareness of her circumstances following her discharge from hospital on 3 April 2009.

- 28.2. Evidence from Mrs N, a close friend of the family and a registered nurse who also gave evidence of Mrs Y's background circumstances, and of her involvement in supporting Mrs Y and family members following Mrs Y's discharge from the hospital.
- 28.3. Ms M C Vincent, a registered nurse employed as a Community Outreach nurse for the rehabilitation unit at AT & R Services, Southland DHB; she gave evidence of her attendances on Mrs Y from July 2005 until 2009.
- 28.4. Mr L J Smith, a solicitor who acted for Mrs Y. He described meeting her on several occasions in 2007 when he arranged Enduring Powers of Attorney (EPOA) in favour of Mr E. He also described his efforts to attempt to have her move into 24 hour care because she could no longer look after herself at home; his attempts to assist her in selling her property in 2008; and his visit to her when she was in hospital in 2009.
- 28.5. Ms A Mawhinney, a registered nurse employed as an outreach nurse working for Mental Health Services for the Older Person. She described her visits to Mrs Y from 2007-2009 where she observed Mrs Y's health issues, and other concerns especially as to whether her house would be sold.
- 28.6. Ms B J Stirling, a registered nurse employed as a district nurse by the Southland DHB, who visited Mrs Y at her home on 4 April 2009, and who arranged for her to be admitted to a Hospice that evening.
- 28.7. Ms D, a support worker for HealthCare NZ, who cared for Mrs Y from time to time from 2007 to 2009; she gave evidence relating to Mrs Y's admission to hospital on 29 March 2009, and of subsequent visits while she was an inpatient.

- 28.8. Ms A, [] of Otago and Southland HealthCare NZ. She described employment arrangements for Mr Gwynn, and confirmed that Mrs Y had been under the care of HealthCare NZ from 2007 to 2009; she described the nature of support care that was given by staff including Mrs Gwynn to Mrs Y.
- 28.9. Ms C N Arkless, a registered nurse employed by Hospice Southland, as a community palliative care nurse. She described the contacts she had with Mrs Y after she was referred for care by the Southland Hospital on 2 April 2009, and her understanding of the arrangements that would be made for her discharge to her home on 3 April 2009.
29. For the practitioner, the following witnesses were called:
- 29.1. Mr Gwynn who gave evidence relating to his professional qualifications and experience; the circumstances in which he came to know Mrs Y as a near neighbour and then as a provider of care for her in his capacity as a district nurse for HealthCare NZ; the signing of the agreement to sell her property on 17 March 2009; the arrangements he made to have her assessed by a GP and then admitted to Southland Hospital on 29 March 2009; his visits to her in hospital including contact with Mrs Y's family members; his attendances on her following her discharge to her home, and then the submitting of the agreement to sell to Mr Smith, at the time of her death on 17 April 2009.
- 29.2. Mr R, a real estate agent and managing director of the firm who employed Mr Gwynn as a real estate salesperson; he described being informed of the listing agreement by Mr Gwynn in mid March 2009, and his understanding as to why that agreement had been entered into. He also described attendances which followed Mrs Y's death when a meeting was held with the solicitors acting for Mrs Y's estate regarding the listing of her property, and the decision then made that the real estate agency would unconditionally relinquish the contract of

agency; he also described the steps taken by the Real Estate Institute of New Zealand in relation to the matter; and their ultimate decision being that there was no case to answer on the part of Mr Gwynn having regard to his obligations as a real estate agent.

29.3. Ms C, [] of HealthCare NZ, who described the care given for Mrs Y, including by Mr Gwynn, from 2007 onwards.

29.4. Mrs V J Gwynn, a registered nurse and wife of Mr Gwynn, in relation to her contact with Mrs Y, both in her role as a support worker employed by HealthCare NZ, and as a near neighbour. She was not called for cross examination.

30. The Tribunal also had various documents placed before it which have been considered carefully. These included Mrs Y's notes from the Southland DHB, her GP, the Hospice and HealthCare NZ; notes of key events made by family members and others; and a copy of the listing agreement.

Chronology:

31. In early July 2005, staff at the rehabilitation unit, AT & R Services, Southland Hospital in Invercargill were made aware that Mrs Y was living in her rural home in poor circumstances. She was noted to be living in very unhygienic conditions and not showering, and there was rubbish lying around. She was, however, very resistant to any care being provided.⁴

32. In February 2007, a Community Outreach nurse and a visiting consultant psycho-geriatrician visited Mrs Y and found her house very poorly maintained. There were large amounts of garbage observed; there was evidence of accumulated rotting matter, and cats roaming outside which looked underfed. The psycho-geriatrician wrote to Mrs Y's GP, stating that it was important she had an enduring power of attorney, and

that the property be cleaned so that supports could be put in place for her, then aged 89. It was stated that at that time she was living in “squalor”.⁵

33. In April 2007, Ms Mawhinney in her role as a Community Outreach nurse visited Mrs Y and found her power had been discontinued due to non payment, and that she was becoming increasingly forgetful.⁶
34. On 1 May 2007, Mrs Y was the subject of a five day notice under the Mental Health legislation.⁷ The admission was to be a “... *compulsory admission for assessment and treatment under section 11(MHA) indicated by poor hygiene and substandard living conditions not conducive to healthy living*”.⁸ There was no evidence that the family precipitated the admission. It was noted at the time she had a niece living in Gore, Mrs X, who provided her with assistance when needed.⁹ Permission was given to the staff to inform Mrs X of the admission.¹⁰
35. By 6 May 2007, it was recorded Mrs Y was angry about the way she had been “*pulled out of the house*”; and that she could have been asked nicely.¹¹
36. On 9 May 2007, she was visited by her nephew Mr E and Mr Smith her solicitor. The notes record that “he” was not in favour of Mrs Y going home, as there was no heating yet available for her.¹²
37. On the same day, EPOAs were signed appointing Mr E as having power in relation to her care and welfare if she became mentally incapable;¹³ and as having power of attorney in relation to her property. The property EPOA was not conditional on her

⁴ Vincent para 3.

⁵ AB333.

⁶ Vincent para 9.

⁷ ABD292.

⁸ ABD295.

⁹ ABD 301.

¹⁰ ABD306.

¹¹ ABD309.

¹² ABD111; it is unclear who the person described as “he” was.

¹³ ABD19.

becoming mentally incapable so that it took effect immediately.¹⁴ Mr Smith stated that he had rung Mrs X to see if she was prepared to accept the appointment as she was preferred by Mrs Y, but she did not want to do so. He therefore drafted the document in favour of Mr E; Mr Smith explained that he knew Mrs Y was unhappy about this appointment.

38. On 16 May 2007 Mrs Y was discharged.¹⁵ By this time, support services from various agencies had been arranged.¹⁶ Power had been reinstated.
39. On the day of discharge, Ms Mawhinney visited Mrs Y at home and recorded the state of the house, which had been tidied and readied for Mrs Y's return. Ms Mawhinney conducted regular house calls thereafter.¹⁷ It appears purchases were made from time to time on her behalf, and invoices sent to Mr E presumably because he could then pay them under his power of attorney.¹⁸
40. HealthCare NZ thereafter provided household management and personal care; nursing care was given as required by district nurses including Mr Gwynn and his wife. Mrs Y required long term wound care throughout 2008 and 2009.¹⁹
41. In April 2008, Mrs Y was admitted to the AT & R Unit with gastroenteritis.²⁰ When in the unit, she stated she had sold her farm for \$3m.²¹
42. In June 2008, she told a social worker that the family was having real estate agents through the house, it being apparent that she did not approve of this happening.²² At the time, her attitude was described as "*wary and distrusting*" of her nephew and other

¹⁴ ABD20.

¹⁵ ABD293 & 318.

¹⁶ As per ABD 312.

¹⁷ ABD255 & following.

¹⁸ ABD256.

¹⁹ Ms A brief para 4.

²⁰ ABD265.

²¹ ABD96.

²² ABD271.

people involved in her life. Specific reference was made to the circumstances of the signing of the EPOAs. The possibility of her seeing her lawyer about this was discussed.²³ On some occasions Mrs Y told the Outreach nurse, Ms Vincent, that she wanted to change the EPOA; and at other times she said she did not.²⁴ A social worker did leave a message with the solicitor to attend, but he was not available until late July 2008.²⁵ There is no evidence that a meeting with the solicitor occurred to review the EPOAs.

43. In respect of this period, Mr Smith explained that he, the accountant, and Mr E agreed after a valuation of Mrs Y's property had been obtained that a local land agent would view it and attempt to obtain consent to sell. This appears to have been in mid 2008.²⁶
44. In February 2009, Mrs Y suffered a burn below her left knee, having gone to sleep in front of a heater at her home.²⁷ From that time onwards, regular wound care was given often by Mr Gwynn. He contacted Mrs Y's GP, noting that there was pitting oedema.²⁸
45. On 11 March 2009, Mrs Y had a fall at 6.00am. She was still on the ground when Mr Gwynn called to see her later.²⁹ The GP was again contacted and informed of the fall.
46. The next day, Ms Vincent, visited Mrs Y, as did the GP. She was reported as being very bright in mood, laughing and joking with visitors. Respite care was declined. She said she just wanted to stay at home.³⁰

²³ ABD272.

²⁴ Vincent brief para 14.

²⁵ ABD269.

²⁶ Smith brief para 4.

²⁷ ABD210.

²⁸ ABD331.

²⁹ ABD350.

³⁰ ABD98.

47. On 17 March 2009, Mr Gwynn signed the exclusive listing agreement with Mrs Y in respect of her property, for a period of two years. Mr Gwynn told Mrs Y that the listing contract meant she could tell any agent who called that she had listed the property with him, and they would have to talk to him. He said he was instructed by Mrs Y not to progress the contract any further; this would ensure the house could stay in her ownership.³¹ Within a couple of days he spoke to the manager of the real estate agency for whom he worked, explaining that he had taken the listing, but that it was not intended to be active.
48. On 18 March 2009, a birthday party was held for Mrs Y with various of her support persons (including staff from HealthCare NZ). Family members did not attend.³²
49. On 22 March 2009, when in the area, Mr E visited Mrs Y. He noticed she was very unwell and could not get to the door. He thought she had deteriorated rapidly from his previous visit.³³
50. On 23 March 2009, the GP discussed Mrs Y's situation with Mr Gwynn. It was noted that her great toe was increasingly necrotic and he recorded that he would refer her to the wound clinic. Mrs Y was reluctant to go to hospital. Her legs were increasingly oedemic. It was recorded that Mr Gwynn would contact the surgery if it was necessary for the GP to visit or if hospital admission was necessary. Mr Gwynn would also look into the possibility of respite care.³⁴
51. On 26 March 2009, Mr E telephoned his aunt to discuss the possibility of her staying with himself and his wife over the winter. Mrs Y did not say very much in response but did say she would consider it.³⁵

³¹ Gwynn paras 25 & 26.

³² Gwynn para 23.

³³ Brief para 6.

³⁴ ABD330.

³⁵ Brief para 10.

52. On 29 March 2009, Ms D and Mr Gwynn agreed to take Mrs Y to the GP. She was showered first at Mr Gwynn's own home because there was a water problem at Mrs Y's house. They then proceeded to the urgent doctor's rooms (since this was on a Sunday) and the GP who attended her made an urgent medical practitioner referral to the surgical department of the hospital.³⁶ Mr Gwynn recorded that she was admitted for amputation of her toe the next day.³⁷ It was noted on admission that she was hard of hearing but clear in mind.³⁸
53. On 30 March 2009, a Community Outreach social worker visited Mrs Y. Mrs Y was described as being very anxious about the forthcoming operation. She was wary of people at times, and was noted as getting "*forgetful frequently*". She stated she would prefer that if family contact was required her cousin from Gore should be contacted as next of kin.³⁹
54. On 31 March 2009, the surgeon visited Mrs Y. The swelling of the gangrenous toe was recorded as having decreased.⁴⁰ However, at 9.35pm, periods of confusion and agitation were noted.
55. At 2.15pm on 1 April 2009, it was recorded that she remained confused. An x-ray showed that she had pneumonia, which was said to be hospital acquired.⁴¹ During a surgical review it was noted that Mrs Y did not want to see her family and that her nephew held an EPOA.⁴²
56. On the same day, the family's friend Mrs N went to visit Mrs Y at her home, finding the house empty. She contacted Mr L to tell him of this.⁴³

³⁶ ABD210.

³⁷ ABD156.

³⁸ ABD214.

³⁹ ABD216.

⁴⁰ ABD217.

⁴¹ ABD222.

⁴² ABD222.

⁴³ Mr L brief para 11.

57. Mr L then contacted his brother Mr E to advise of this development.⁴⁴ Late that day, he contacted Mrs X in Gore.⁴⁵ She made inquiries, and found that Mrs Y had been admitted to Southland Hospital.⁴⁶
58. That evening, Mr Gwynn and Ms D assisted Mrs Y with an evening meal, then washed her and put her back to bed. The notes record that the registrar was aware of “*patient’s family dynamics and patient’s family notified tonight*”. It was noted that her solicitor would come to the ward the following day, as would Mr Gwynn.⁴⁷
59. At 8.30am on 2 April 2009 there was a ward round. Mr Gwynn was in attendance and was noted as being a “*good friend*” and a “*district nurse*”. It was noted Mrs Y did not want to go into care, wanted to die at home, and did not want to have any contact with her family. Mr Gwynn said he would contact a solicitor regarding the EPOA. It was recorded that nursing cares for her to die at home would be arranged by Mr Gwynn. It was also recorded that she was now not for surgical intervention, since she had a chronic renal failure exacerbated by pneumonia. A referral was made to a local Hospice.⁴⁸
60. At 10.02am, Mr E contacted Mr L and told him that Mrs X had located Mrs Y at Southland Hospital.⁴⁹
61. By 1.05pm, it was recorded that Mrs Y was not oriented, not obeying instructions and difficult to understand as she was mumbling.⁵⁰
62. At 2.00pm, Mrs N visited Mrs Y in hospital, and was shocked to discover her in a “serious non responsive condition”. She learned that Mr Gwynn and Ms D had been with Mrs Y in hospital, had input into her care and were “*taking her back the*

⁴⁴ Mr E brief para 11.

⁴⁵ Mrs X brief para 7.

⁴⁶ Mrs X brief para 7.

⁴⁷ ABD224.

⁴⁸ ABD223.

⁴⁹ Mr L brief para 12.

⁵⁰ ABD225.

following day to die at home".⁵¹ After staying with her for about an hour, she telephoned Mr L and told him of his aunt's condition, and recommended that the family come immediately.

63. That afternoon, following receipt of the referral to the Hospice (which noted the patient wanted to die at home and did not want contact with her family),⁵² Ms Arkless from the Hospice visited Mrs Y and raised the option of her being admitted to the Hospice. She did not react. Ms Arkless noted that IV fluids and antibiotics had been stopped, along with most oral medications. She considered that if there were no symptom concerns, Mrs Y could continue to be cared for on the surgical ward; however, if her symptoms were difficult to manage and/or the family wished her to be in the Hospice a transfer could be arranged the next day if appropriate. She also recorded that Mr Gwynn was a neighbour who had been looking after Mrs Y and wanted to honour her wishes to take her home to die but "... *[Mr E] says he has stated he has no intention of coming to Invercargill and he wants [Mr Gwynn] to take care of her healthcare needs*".⁵³
64. The solicitor Mr Smith visited Mrs Y in the course of the afternoon. He thought this was for the purposes of preparing a will. He stayed for a few minutes but Mrs Y was in no condition to give instructions.
65. Mr L was working in Central Otago and proceeded to Invercargill, arriving at the hospital at 9.00pm staying overnight in his aunt's room. She was completely "unresponsive and not communicating" and he did not think she would make it through the night.⁵⁴

⁵¹ Mrs N's brief para 9.

⁵² ABD436.

⁵³ ABD225-6, 429.

⁵⁴ Brief para 14.

66. Early on Friday, 3 April 2009, there was a “family conference” involving Ms Arkless, Mr Gwynn and Mr L. Ms Arkless recorded that a discharge home for 1.30pm that day was planned. There was discussion as to equipment, and that a hospice bed would be available over the weekend, as would GP assistance. Also discussed was a DN referral.⁵⁵
67. Subsequently, there is a meeting with social workers apparently attended by Mr L and Mr Gwynn. There was no record of the meeting.
68. At 10.00am, there was a discussion between an occupational therapist and Mr Gwynn. There was discussion as to whether a hospital hoist could be provided but Mr Gwynn indicated he was happy to continue over the weekend without this, and to review Mrs Y’s needs on the following Monday.
69. A nursing referral (one copy of which had written on it “*Darren*”) was prepared, confirming that “*carer Darren*” could contact the district nurse over the weekend if necessary and that he would administer medications.⁵⁶
70. An Outreach nurse was notified that palliative cares were in place and that Mr Gwynn “neighbour” had made arrangements for Mrs Y to return home to die.⁵⁷
71. That afternoon Mrs Y was discharged. On her way home the ambulance stopped to enable Mr L, who was accompanying his aunt in the ambulance, to obtain medications from a pharmacy.
72. When the ambulance arrived at Mrs Y’s property, Mr L noticed a water tanker leaving.
73. Mrs N arrived at the property at about 5.30pm, shortly after Mrs Y and Mr L having arrived. She was disappointed and surprised to find there was no special equipment,

⁵⁵ ABD227, 429, 119, 128, 129, 434 & 435, 437 & 99.

⁵⁶ ABD128-129.

⁵⁷ ABD99.

she said.⁵⁸ It was then discovered there was no running water in the house and that the toilet was blocked.⁵⁹ Mrs N remained until 9.00pm.

74. At about teatime, Mr Gwynn telephoned Mrs X and asked if she was coming to visit her aunt.⁶⁰
75. Mr Gwynn was present for a short period early in the evening, when he brought water from his nearby home.⁶¹
76. Mr Gwynn came over to Mrs Y's property at about 10.00pm or 11.00pm, turning Mrs Y.⁶²
77. In the early hours of Saturday, 4 April 2009, Mr Gwynn returned. He said this was about 3.00am; Mr L said it was about 5.00am. Because it was discovered the water tanks were empty there was discussion as to Mr Gwynn possibly bringing his house bus over to facilitate sanitation.⁶³
78. At about 9.00am, Mrs N returned, and stayed for several hours supporting Mr L in his care of his aunt. By that time Mrs Y's sacral area was quite red, and Mrs N thought she was uncomfortable.⁶⁴ Mrs X arrived; she stated her cousin was lying in her bed complaining about being uncomfortable.⁶⁵ She did not seem to know where she was.
79. Late in the morning, Ms D and Mrs Gwynn came over to freshen Mrs Y and change her dressings. Mrs Y was transferred into her lazy-boy chair.⁶⁶

⁵⁸ Mrs N brief para 15.

⁵⁹ Mrs N brief para

⁶⁰ Mrs X brief para 10.

⁶¹ Mrs N brief para 20

⁶² Ms L paras 25 & 27.

⁶³ Gwynn para 29.

⁶⁴ N brief para 21.

⁶⁵ X brief para 11.

⁶⁶ L brief para31.

80. Mr L and Mrs N then left so that Mr L could shower and eat. Their evidence was that this was between 1.00pm and 2.00pm.⁶⁷ Mr L also rang the Hospice seeking equipment.⁶⁸
81. Mr L and Mrs N then attended the district nurse on call at the Hospital; the district nurse was unaware of Mrs Y's discharge.⁶⁹ This referral to the district nurse had not been received. The district nurse recorded "*Family managing so far but [Mrs Y] will probably go to hospice tomorrow or Monday as facilities at house not adequate. Will phone if needing any assistance.*".
82. Mrs N and Mr L were sent to the Despatch Centre by the district nurse on call, and were able to obtain pressure boots and a bed cradle.⁷⁰ Mrs N then dropped Mr L off at the property at about 5.00pm.⁷¹
83. There was then a conversation between Mr Gwynn and Mr L, with Mr Gwynn stating that the care which was being given was voluntary and that those who were caring for Mrs Y had jobs to go to on the following Monday.⁷² Mr L then left.
84. Mr L said that Mrs Y was asking why she was not in hospital, and had complained about her bed and the fact it was very uncomfortable.⁷³
85. Mr L phoned his brother, and they discussed the situation. It was decided she should be admitted to a hospice.⁷⁴
86. There was then a discussion between Mr L and Mr Gwynn by phone, and he was advised of the decision. Mr Gwynn came back to Mrs Y's house and they discussed

⁶⁷ N brief para 27.

⁶⁸ Recorded as being 12.26 – ABD 119.

⁶⁹ L para 33, D para 29.

⁷⁰ N brief para 29.

⁷¹ N brief para 30.

⁷² L brief para 34.

⁷³ L brief para 36.

⁷⁴ L brief para 36.

the matter further. He said he could not support the decision. He wanted to wait until Monday so Mrs Y could be assessed.⁷⁵ It is alleged Mr Gwynn then shouted in Mrs Y's ear and attempted to remove the pain relief medication.⁷⁶ He then left.

87. Mrs N returned and was told of the exchange that had occurred. She advised Mr L to phone the hospice as it had a "24 hour open door". Mr L did so; after discussion with the hospice doctor, it was agreed a district nurse should assess the patient at home.⁷⁷

88. The district nurse Ms Stirling attended. She was surprised at the conditions and what had occurred. After administering medications Mrs Y was transferred to the Hospice at approximately 9.00pm.⁷⁸ Medications were given at the Hospice at 11.15pm that evening.⁷⁹

89. On 17 April 2009, Mrs Y died. On that day, the listing agreement was received by Mr Smith from Mr Gwynn.⁸⁰

90. Mr E says he was told about this via a message left by Mr Gwynn stating that he had "some papers to lodge" with Mrs Y's lawyer.⁸¹

91. Subsequently it was agreed the listing should not take effect, as explained earlier.

Mrs Y:

92. The Tribunal finds:

92.1. Mrs Y was 92 years old at the time of her death, a fiercely independent and spirited person. She had previously been a farm worker, seamstress, caregiver for her mother, and widowed after 35 years of marriage in approximately 1993.⁸²

⁷⁵ L brief para 37.

⁷⁶ Y brief paras 38-40.

⁷⁷ ABD430.

⁷⁸ ABD161.

⁷⁹ ABD479.

⁸⁰ Smith para 8.

⁸¹ E brief para 21.

⁸² ABD296 & 35.

- 92.2. She had lived alone since her husband died,⁸³ and was described as being not “particularly house proud”; family members thought that her health and mental state were deteriorating, and she was finding it increasingly difficult to look after herself properly.⁸⁴
93. In summary, her health history was:
- 93.1. In 2007, she was admitted to hospital on the basis of poor self hygiene and substandard living conditions.⁸⁵
- 93.2. By 2008, it was noted her capacity to recall information and convey it was problematic.⁸⁶
- 93.3. In the course of 2008 Mrs Y was admitted for a gastrointestinal issue.⁸⁷
- 93.4. By 2009, as already mentioned, the family thought her health and mental state were deteriorating. There was also evidence of her becoming increasingly confused and disorientated with short and/or fluctuating memory loss with frequent changes of mind. Examples included her being found at night in her nightdress on the road looking for her husband in September 2008;⁸⁸ claiming she had sold her property for \$3m in April 2008;⁸⁹ and in the same month hanging out her dirty clothes and giving her food to the cat.⁹⁰
- 93.5. There was some evidence of her being hearing impaired, but there was not consistency in the notes on this point.⁹¹

⁸³ L brief para 2.

⁸⁴ Mr E para 2 & Mr L para 3.

⁸⁵ She was admitted under the provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992; it was a little surprising that the provisions of section 126 of the Health Act 1956, which relates to steps that can be taken in respect of infirm and neglected persons, was not considered.

⁸⁶ ABD261, & ABD 144, entry for 13 October 2007.

⁸⁷ ABD277.

⁸⁸ ABD96.

⁸⁹ ABD96.

⁹⁰ ABD353; Mrs N para 4, Mr E paras 6-9.

⁹¹ ABD144, 166, 251, 286; and cross examination of Mr Gwynn.

- 93.6. As regards the wound she suffered in February 2009, the pitting oedema became worse, as did an ulcer which had been a persistent problem. Her great toe became increasingly necrotic.⁹²
94. She had expressed concern as to the EPOAs she signed; she was suspicious “*the family*” would take steps in relation to her property and/or attempt to curtail her independence.
95. By the time of admission in late March 2009, Mrs Y was saying she did not want to be put into care and wanted to die at home.⁹³
96. There was evidence of a good relationship between Mrs Y and Mr Gwynn and his wife as neighbours.⁹⁴ Thus, Mr and Mrs Gwynn had invited Mrs Y for Christmas dinner in 2007 and 2008; Mr Gwynn called in regularly when going home; Mrs Y had great faith in him.⁹⁵
97. Mrs Y often changed her mind, and could take a dislike for no apparent reason.⁹⁶

The Family:

98. Relevant contextual information as regards Mrs Y’s family is:
- 98.1. Mrs Y was a maiden aunt.
- 98.2. Family members lived at a distance – Mr L in Central Otago where he worked in IT; Mr E lived in Palmerston where he was a farmer; and Mrs X lived in Gore, where she had a husband who was ill and she was unable to drive.
- 98.3. They had their own family and/or work responsibilities; however they would ring Mrs Y to keep in touch with her, and visit. Mr L appeared to have had the most contact as he was often in Invercargill.⁹⁷

⁹² ABD330 & 211.

⁹³ ABD211.

⁹⁴ Gwynn brief paras 16 & 17.

⁹⁵ Vincent paras 22 & 25.

⁹⁶ Vincent paras 14 & 25.

⁹⁷ Mr L brief para 5; and T67.

- 98.4. He offered to have her stay with him and his family over the winter of 2009, although this was not accepted. But it does indicate the attitude of the family towards her, namely that they were there to help if they could.
- 98.5. Mr E seemed to be the decision maker of the family members who had contact with Mrs Y. He held the power of attorney. Mr L tended, however, to be the family member who interfaced most with Mrs Y. There was a sense in which Mr L deferred to his elder brother; and at times he was in a difficult situation with different suggestions being given to him by family members and Mr Gwynn.
- 98.6. Mrs N should be mentioned, although not a relative. She called Mrs Y “Aunt”. She is a registered nurse, and was very supportive of family members especially Mr L.

Mr Gwynn:

99. The Tribunal finds in relation to Mr Gwynn:
- 99.1. He was a near neighbour of Mrs Y, with whom he had a fond and close relationship.⁹⁸
- 99.2. He had a wide range of qualifications and work experience; and had the challenges of both running a business and providing healthcare. He was not unused to fulfilling concurrent work roles.
- 99.3. As at 2009 Mr Gwynn was working:
- 99.3.1. for Department of Corrections, 16 hours per week.⁹⁹
- 99.3.2. for HealthCare NZ as required, on a part time basis.
- 99.3.3. as a licensed real estate agent, as required.

⁹⁸ T311; 357/14-21.

⁹⁹ Brief para 5 & T288.

99.4. With regard to work at HealthCare NZ, performance reviews were conducted, and Mr Gwynn attended courses and staff meetings from time to time. He thus had collegial relationships.

Particular 1.1: informed Carla Arkless/Mr L he would provide 24 hour care:

100. With regard to this particular, the PCC submitted:

100.1. contemporaneous records and Mr E's understanding clearly showed that Mr Gwynn did inform Ms Arkless, Mr E and others that he would provide 24 hour care for Mrs Y.

100.2. Mr Gwynn assumed responsibility for providing such care when he knew that he would not be able to do so.

101. For Mr Gwynn it was submitted:

101.1. There can have been no professional obligation on Mr Gwynn to provide care to Mrs Y on any basis, let alone a 24 hour basis unless she was his patient. She was not.

101.2. There was no evidence that supported the allegation that Mr Gwynn agreed to take charge of Mrs Y's care when she was discharged from hospital.

101.3. Mrs Y wanted to die at home and Mr Gwynn simply offered her family any assistance he could provide as a friend and neighbour who was also a nurse.

101.4. It also appeared that the family – at least Mr E and Mr L – wanted to honour her wish but did not want to assume full responsibility for her care.

101.5. There was an incorrect assumption that because Mr Gwynn was a nurse, it was assumed he would organise everything that needed to be done to facilitate her wish being honoured. In terms of professional responsibility, that was a far cry from accepting her as a patient.

102. The subparticular must be read in the context of the preamble to the charge, which was an assertion that Mr Gwynn would "... *organise 24 hour care for Mrs Y when he*

knew or ought to have known that HealthCare NZ would not provide this care and/or that he would not provide 24 hour care”.

103. The notes made by Ms Arkless on whose evidence this assertion is at least partly based, do state that the care would be provided via HealthCare NZ and the family.¹⁰⁰ However, Ms Arkless in her oral evidence¹⁰¹ made it clear she was not expecting 24 hour care via HealthCare or via any other person.¹⁰²
104. Whilst there were undoubtedly references in the notes which appear to support the idea that certain assistance would be either arranged for or given by Mr Gwynn¹⁰³ in the end it is significant that Ms Arkless who was a significant party in the organising the arrangements to follow the discharge did not take the assurances given by Mr Gwynn as being a guarantee that he would personally be providing 24 hour care. She understood the position to be that he was a friend and neighbour with nursing experience who would be supporting the family.¹⁰⁴
105. The notes suggest she thought Mr Gwynn and Mr L would be jointly providing the care, although she recognised in her oral evidence that Mr E alone could not give it. She also said that although she knew Mr Gwynn was a registered nurse, she would not have assumed that he knew about medications at the end of life; thus it would be her normal practice to talk these issues through with the parties.¹⁰⁵ She also thought backup would need to be available, a referral to a district nurse at the DHB, the availability of a hospital bed, and a GP referral. These were matters for the

¹⁰⁰ ABD429.

¹⁰¹ T272.

¹⁰² Also her brief at para 11.

¹⁰³ Eg ABD223, 227, 238, 429, 434, 435 & 437.

¹⁰⁴ T268 & 274.

¹⁰⁵ T273.

106. discharging hospital to put in place – which largely occurred, although for some unexplained reason there is no record of the district nurse referral having been effected.

107. Some reliance was placed on the “nursing referral” as having the name “Darren” on it,¹⁰⁶ but the Tribunal considers the referral was intended to be one to the district nurse at the DHB. This conclusion is supported by these words in the document:

“Reason for referral to district nursing. For carer Darren to contact DN over weekend if necessary.” (emphasis added)

108. Although there is some evidence in the notes that Mr Gwynn was thought to be a “district nurse” (which was nomenclature which HealthCare NZ used to describe Mr Gwynn), the referral that was made, was not to Mr Gwynn.

109. The Tribunal is satisfied that staff at the DHB did not consider they were making a formal referral to HealthCare NZ, or to Mr Gwynn.

110. It is reasonably clear that Ms Arkless understood all of the above; but Mr L did not. This was a communication issue, and it is not one for which Mr Gwynn can be held professionally responsible. It also has to be noted that Mr L was in a very difficult situation. He was extremely tired by the time of the referral; he was in a stressful situation, and unfortunately the correct position was not properly conveyed to him, so that he obtained an incorrect understanding of the position.

111. For these reasons subparticular 1.1 is not established.

Subparticular 1.2: Mr Gwynn failed to ensure Mrs Y’s home had adequate equipment to provide terminal care and that she was nursed on an old bed with a wire woven base and no pressure mattress:

112. The PCC submitted:

¹⁰⁶ ABD128.

- 112.1. Mr Gwynn was aware from his visits to Mrs Y's home of the state of her lazy-boy, bed and mattress, and that they fell well short of what would be appropriate for providing end of life care.
- 112.2. That is why on 3 April 2009 he advised Ms Arkless that a hospital bed, air mattress and (possibly) a lazy-boy would be required; and that a hoist was also needed.
- 112.3. Reference was made to Mr Gwynn's statement that if the equipment was not available, he would have expected the hospital not to discharge her until they were.¹⁰⁷
- 112.4. The PCC also referred to his surprise that the hospital had not delivered any of the things that had been discussed with the hospital.¹⁰⁸
- 112.5. Despite this evidence Mr Gwynn was prepared to allow Mrs Y to stay at her home from Friday to Monday (for assessment) on a bed and mattress that were not consistent with what would be expected for end of life care.
- 112.6. Reference was also made to the evidence of Ms Stirling, an experienced district nurse, who said she was "*blown away*" by what she found; her evidence was that Mrs Y was being nursed on a single bed with no pressure mattress, and was restless and appeared to be uncomfortable.¹⁰⁹
113. For Mr Gwynn it was submitted:
- 113.1. It was not his responsibility to ensure that adequate equipment was available to care for Mrs Y at home. That was the responsibility of the hospital, particularly those responsible for discharging her. Mr Gwynn was not present when this happened, and did not sign the discharge form.

¹⁰⁷ Brief para 42.

¹⁰⁸ Gwynn brief para 45.

¹⁰⁹ Stirling para 3.

- 113.2. Mr L was also aware of the facilities at Mrs Y's home, but did not raise any objections at the time of discharge.
- 113.3. A request for items of equipment sufficient for terminal care was made, when Mrs Y was still in hospital.¹¹⁰ It is correct that he had asked for a bed, a mattress, and perhaps a lazy-boy. He expected these items to be at the home, following discharge.¹¹¹
- 113.4. However, and significantly, he was not present at the time of discharge. He first learned that these items were not present when he attended Mrs Y's home after she had been taken there by ambulance. At that stage, he was presented with a *fait accompli* in respect of a person whom a number of family and other members thought did not have long to live.¹¹² She herself was also saying that she wanted to "*return home to die*".
- 113.5. Further, Ms Arkless had not thought these items could be arranged for that day,¹¹³ and it was apparently unrealistic to expect that they would be. Notwithstanding the requests, the Hospital staff discharged Mrs Y.
114. The subparticular asserts a professional failing on the part of Mr Gwynn to ensure that these items were not present following discharge; but given the finding the Tribunal has made as to his role in the matter, given that he was not present at the time of discharge, and given that it was the DHB staff who discharged Mrs Y, the Tribunal cannot conclude that Mr Gwynn breached professional responsibilities. The subparticular is not established.

¹¹⁰ ABD227.

¹¹¹ Brief para 42.

¹¹² Mr L para 18, Mrs N para 9, & Ms Arkless para 10.

¹¹³ T269.

Subparticular 1.3: Mr Gwynn did not attend to or ensure care provided to Mrs Y during the six hours between 2300 on 3 April 2009 until approximately 0500 hours on 4 April 2009 and/or from 0500 hours until late morning (approximately six hours) when he knew or ought to have know he had agreed to provide care and/or that Mr L would not be able to provide it:

115. The PCC submitted:

115.1. Mr L had stated that between 11.00pm on 3 April and 5.00am on 4 April Mr Gwynn did not provide any care to Mrs Y. Mr L did not have experience or expertise sufficient to enable him to determine what, if any care, Mrs Y might require over that period.

115.2. Mr Gwynn explained he had received a call from Mr L at 3.00am saying Mrs Y was uncomfortable, and that he went to see her shortly thereafter leaving about 4.00am or 4.30am.

115.3. The evidence was also that Mr Gwynn did not come back to the house until 11.00am on 4 April; Mr Gwynn's evidence was that he got there at about 10.00am. He agreed that in between those visits Mrs Y was not being turned - at least by him.

115.4. Thus there were two significant periods when Mr Gwynn did not attend or otherwise ensure care was provided to Mrs Y, despite having agreed to provide 24 hour care.

116. For Mr Gwynn it was submitted:

116.1. It had not been established Mr Gwynn had any professional obligation to attend or ensure care during the times in question.

116.2. He did visit her twice in the early evening of Friday and again later at about 11.00pm.

116.3. He gave Mr L his cellphone number and made it clear that he was only 100 meters and a phone call away.

- 116.4. When Mr Gwynn was phoned, he says at about 3.00am, he came over to assist.
117. There is a factual issue as to whether, with regard to the first period under review, Mr Gwynn came at about 3.00am, or at about 5.00am. Mrs N recorded in her notes of 24 April 2009 that the time was 3.00am.¹¹⁴ Mr Gwynn said this as well, although he postulated a later time in oral evidence. Mr L said it was “more like” 5.00am.¹¹⁵ The Tribunal, on the combined evidence of Mrs N and Mr Gwynn, conclude that it was likely to have been earlier than 5.00am.
118. It was not unreasonable for Mr Gwynn to seek rest overnight given the finding the Tribunal has made as to his role.
119. A key point is that Mr Gwynn had told Mr L he simply needed to make a phone call to summon him, and this happened.¹¹⁶ That is, Mr Gwynn would come when called for. The Tribunal did not think Mr L was left abandoned, without the ability to summon help promptly if he needed it. Later on during Saturday 4 April, Mr L and Mrs N told the district nurse that they would request help if needed, which underscored the fact that there was an awareness of how to summon help.
120. It seems this subparticular is based on the premise of an agreement to provide 24 hour care, which for the reasons already discussed above was not the position.
121. The Tribunal is not satisfied that the circumstances it has been required to review establishes a professional breach.

Subparticular 1.5: Mr Gwynn failed to ensure Mrs Y was kept comfortable and pain free by administering medication that had been prescribed and/or dispensed; when informed of the family’s decision to transfer Mrs Y to the hospice, he attempted to remove medication from her home:

122. The PCC submitted:

¹¹⁴ ABD67.

¹¹⁵ ABD40.

¹¹⁶ Brief para 28.

122.1. Mr Gwynn was cross examined in respect of his failure over the 33 hour period that Mrs Y was in his care to administer any medication to her. The unchallenged evidence was:

122.1.1. On 2 April 2009, she had been charted subcut morphine, haloperidol and clonazepam; at 10.45am on 3 April she received 2.5mg of morphine.

122.1.2. On discharge she was prescribed morphine, haloperidol and clonazepam, and these were obtained from a pharmacy on the way home.

122.1.3. Her next pain relief was provided by Ms Stirling at 2020 hours on 4 April – 2.5mg subcut morphine; and two drops of rivotril for comfort.¹¹⁷

122.2. On admission to the Hospice, she was charted a syringe driver of morphine, midazolam and fentanyl, with the doctor on admission to the hospice noting that she had pain, some confusion, and had complained of discomfort.¹¹⁸

122.3. References were also made to other statements of concern (particularly from family members) that Mrs Y was uncomfortable and in pain; particular reference was made to the evidence of Ms Stirling, who, when she attended in the mid evening of the Saturday, was very concerned as to the patient's awareness of where she was.

122.4. It was submitted that there was a clear responsibility on Mr Gwynn to administer the subcut morphine and haloperidol, as directed in the nursing referral.¹¹⁹

¹¹⁷ ABD132.

¹¹⁸ ABD477.

¹¹⁹ ABD239.

122.5. Also of concern was that when the decision was made by the family to transfer Mrs Y to the hospice, Mr Gwynn attempted to remove the morphine medication. The reason he had given in evidence was that the morphine was not in a syringe driver and could be easily administered by anyone. He did not want to be accused of misappropriation of any medication.¹²⁰ It was submitted the reasoning was nonsensical. The medication had been prescribed and dispensed to Mrs Y, and it was not his to remove. It was submitted he put his own personal interests above those of the patient, and demonstrated a serious lapse in professional judgment.

123. For Mr Gwynn it was submitted:

123.1. He had given evidence that during the times he was with Mrs Y, he did not believe she was in pain such as to justify the administration of the “as required” medication prescribed and dispensed.¹²¹ Rather he saw her as anxious and requiring reassurance at times.

123.2. If Mrs N had been concerned as she said in evidence she was, she could have administered the medication, but she did not. Even when she and Mr L spoke to the district nurse on the Saturday afternoon they did not raise the issue – rather the district nurse had recorded the family as “*managing so far but [Mrs Y] will probably go to the hospice tomorrow or Mon as facilities at the house not adequate. Will phone if needing any assistance.*”¹²² Ms Stirling had described the amount of medication prescribed as a “*tiny little dose*” and that “*I don’t think it really did a whole lot if anything*”.¹²³

¹²⁰ Brief para 59.

¹²¹ T345.

¹²² T244.

¹²³ T203.

- 123.3. As to the reliance that was placed on the district nurse referral, the point was made that this was not a referral to Mr Gwynn himself and that he should not be held accountable for the failure of hospital staff to ensure that the referral was sent to district nursing as it should have been.
- 123.4. Mr Gwynn did not in fact remove the medications, once he knew it would be administered by someone else if needed.
124. It is clear from the evidence that when Ms Stirling attended on the Saturday evening Mrs Y was restless. But it cannot confidently be concluded this was due to pain. As Ms Stirling herself said it was difficult to tell whether the restlessness was due to the fact the disease had progressed, or to some other factor.
125. Mrs Y was in renal failure, thus irritability and distress would be evident. Other factors contributing to restlessness at that time could have included the facts that Mrs Y had been told she was going to the hospice, and that a district nurse had suddenly arrived. The Tribunal is therefore unable to read into Ms Stirling's reaction, a conclusion that from Mrs Y's then condition she should have been given medication earlier.
126. Earlier, on the Friday night, Mrs N thought there was a need for medication; but she only told Mr L; she did not administer medications herself, or raise the issue with Mr Gwynn. With regard to what she saw when she attended late on the Saturday morning, she stated that there was "*no subcutaneous line in place*".¹²⁴ In fact the medications were PRN; and again no proactive steps were taken. No issue as to

¹²⁴ Brief para 22.

medications was raised with the district nurse in the Saturday afternoon. Following the argument between Mr L and Mr Gwynn, Mrs N was phoned by Mr L and she then attended. Upon attending, she recommended the phoning of the district nurse, but she did not consider it was necessary to administer any medications prior to the district nurse arriving.

127. Mr Gwynn stated that during the Saturday he had observed Mrs Y's discomfort and that she was sore at times, but said she was often like this. He also said she was upset rather than in pain, which might well have been the case.
128. It is correct that a low therapeutic amount given consistently could well have been desirable, but the medications given had only been charted for giving as required.
129. The Tribunal accepts that in the late afternoon/early evening of Saturday, Mr L did ask Mr Gwynn to give pain relief. He refused to do so.¹²⁵ He considered that pain relief should not be given because he could not see a reason for doing so.¹²⁶
130. Mr L's request that medication be given in the late Saturday afternoon was understandable from his perspective; it appears there was not a proper explanation as to why it was not being given. However, by then, it appears communication issues between Mr L and Mr Gwynn were not ideal.
131. In summary, the Tribunal is not satisfied the first limb of the subparticular is established as a professional breach given:
- 131.1. The nature of Mr Gwynn's role.
- 131.2. The fact that another nurse, Mrs N, did not consider she should administer the medications herself.
- 131.3. The possibility that Mrs Y was not in fact in pain, but may have been distressed.

¹²⁵ T353.

¹²⁶ T349.

131.4. The giving of medications had to be based on Mrs Y's clinical needs and not simply on a need to appease a family request.

132. On the second limb, which related to the "attempt to remove" the medication, the Tribunal finds:

132.1. There was no controversy that Mr Gwynn wanted to take the morphine with him after the argument as to whether she should be admitted to the hospice.

132.2. Mr Gwynn would have known that an ambulance would have been coming and that medications would have been available in it.

132.3. The removal of medication was not therefore going to amount to a possibility of Mrs Y being without medications.

132.4. There were heightened tensions as a result of the argument. Mr Gwynn should not have reacted in the way that he did by attempting to take the medication, but he did leave them when asked.

132.5. The attempted removal should not have happened; but it is not a matter in all the circumstances that warrants discipline.

133. This subparticular is not established.

Subparticular 1.6: Mr Gwynn arranged for Mrs Y's transfer home when he knew or ought to have known there was no running water at the home prior to and/or after her discharge and thereby failed to ensure she was being discharged to an environment where she would be provided with reasonable and safe care:

134. The PCC submitted:

134.1. As early as 29 March 2009 there had been difficulties with the water supply to Mrs Y's home, and Mr Gwynn was aware of this; that is why she had had to shower at his place prior to visiting the doctor.

134.2. On 2 April 2009, Mr Gwynn had advised Mr E when he rang him that he had switched off the water pump.

- 134.3. Mr Gwynn did not notify those involved in Mrs Y's care at the hospital that there was no water at her home, or at the very least there had been problems with the water supply. She would hardly have been discharged home if water supply was not guaranteed.
- 134.4. After the discharge, Mr Gwynn was obviously aware of the problem, and provided water in a chilly bin and bottles on the day/evening of her discharge and the following day. Whilst he asserted the water issues were being addressed, it was submitted that it was not addressed adequately.
- 134.5. It was unbelievable that a registered nurse would be prepared to care for a terminally ill elderly person at a home where there was no running water; Ms Stirling had identified this as a significant issue when she attended.
135. For Mr Gwynn it was submitted:
- 135.1. The subparticular referred to Mr Gwynn arranging for Mrs Y's transfer home; but he did not make that arrangement; that was undertaken by the surgical ward team in consultation with Ms Arkless and Mr L.
- 135.2. Mr Gwynn did not know there was no water at Mrs Y's house. As far as he knew, arrangements had been made for the delivery of a full tank load of water on 3 April 2009. Indeed Mr L confirmed he saw the tanker leaving the property when Mrs Y arrived by ambulance.
- 135.3. Mr Gwynn was unaware there was a problem with water until told of this by Mr L. He immediately fetched water from his house and offered the use of his house and house bus with its own self contained water supply and toilet; this was declined.¹²⁷

¹²⁷ T366-367.

136. The wording of the subparticular is specific in stating that Mr Gwynn had “... **failed to ensure Mrs Y was being discharged** to an environment where she would be provided with reasonable and safe care”. The Tribunal must proceed therefore on the basis of what the position was at the time of discharge.
137. At the time of discharge, Mr Gwynn believed that a tanker was being arranged for a second time to refill the tanks. This occurred on Friday: the tanker was seen leaving when the ambulance arrived.¹²⁸
138. Since the assessment has to be made at the time of discharge, and Mr Gwynn reasonably believed the issue was being addressed at that time, the Tribunal is not satisfied that this subparticular is made out.

Particular 2: on 17 March 2009 as an RN providing care for Mrs Y, Mr Gwynn breached professional boundaries by entering into a contract giving him sole real estate agency rights over the sale of her property for a period of two years:

139. Mr Gwynn stated that the circumstances of the signing of the contract were as follows:

“On 17 March 2009 I visited Mrs Y first thing in the morning to check up on her and to redress her ankle. Mrs Y reiterated that she was receiving calls from real estate salespersons and said that she wanted me to “tie things up” so she wouldn’t be bothered by them. She talked again about her anxiety about losing her home. It was at this time that I suggested we complete a contract between the two of us, adding a clause stating that she could review the contract at any time or at an interval of two years, as we were both of the opinion that Mrs Y had many years of life ahead in her in her own home with ongoing support. I told her the listing contract would mean she could tell any agent who called that she had listed the property with Darren Gwynn and they would have to talk to me. Mrs Y said “right, let’s do it”. I had my real estate paperwork in my car, as I usually do, so I went and got a listing contract which I explained to Mrs Y and she signed.

I was instructed by Mrs Y not to progress the contract any further than stated as this was done to keep her house in her ownership. It was agreed at Mrs Y’s instruction, that in future we could void the contract or if she instructed activate it. I told her she should discuss the contract with her lawyer. If it any time she changed her mind I could simply tear up the contract.

¹²⁸ Gwynn para 45.

*I realised, with hindsight, that it was not wise of me to do this. I think my friendship with Mrs Y got in the way and I simply wanted to protect her ...”*¹²⁹

140. For the PCC it was submitted:

140.1. As is evident from the HealthCare NZ records, Mr Gwynn was providing nursing cares to Mrs Y over the period leading up to 17 March 2009.¹³⁰ He also gave care on the day the contract was signed by Mr Gwynn.¹³¹ He continued to provide nursing care to Mrs Y on 20, 23 and 29 March.

140.2. Mr Gwynn confirmed in cross examination that the evidence summarised above is essentially what he explained to Mrs Y prior to her signing the contract. It was submitted that the contract did not however reflect her wishes, because:

140.2.1. There was no clause stating she could review the contract at any time.¹³²

140.2.2. There was no provision that the contract could be voided in the future.¹³³

140.2.3. It was not recorded that Mrs Y instructed Mr Gwynn not to progress the contract any further and/or that the contract was only entered into to keep her house in her ownership.¹³⁴

140.2.4. The contract did not record that if Mrs Y changed her mind at any time he would simply tear it up.¹³⁵

¹²⁹ Brief paras 25 & 26.

¹³⁰ 14 & 17 February, 2, 11, 13 & 14 March 2009, ABD349-350.

¹³¹ 349: “36/40 redress ankle”.

¹³² T309.

¹³³ T310.

¹³⁴ T310.

¹³⁵ T310.

140.3. It was submitted that the contract did not therefore reflect what Mrs Y had instructed.

140.4. Any assertion that Mr Gwynn was acting as a real estate agent rather than a nurse was incorrect. It was not possible in the circumstances to move from one role to another. The vulnerability and power imbalance dependence remained – particularly when her health was deteriorating.

140.5. This was a clear breach of professional boundaries and as an experienced nurse Mr Gwynn should have been aware of this. It constituted a clear breach of the Code of Conduct of the Nursing Council of New Zealand.

140.6. The assertion that the contract was entered into to help protect Mrs Y was incorrect. Once she had died she no longer needed such help. But rather than rip the contract up an attempt was made to activate it. And Mr Gwynn said in evidence:

*“I would have liked to have listed that property, yes.”*¹³⁶

140.7. It was also submitted that an ulterior motive was apparent by reason of the fact that the contract was not forwarded to Mrs Y’s lawyer once it had been signed. The explanation given that this was “*due to her rapid deterioration*”¹³⁷ could not be right, because the deterioration occurred 12 days after the contract was signed, on 29 March.

141. For Mr Gwynn it was submitted:

141.1. To his credit, he accepted that signing the contract was unwise. Mr Gwynn had let his fondness for Mrs Y and his desire to protect her from unsolicited visits by real estate agents cloud his judgment.

141.2. He had not attempted to hide the contract:

¹³⁶ T312.

¹³⁷ Brief para 35.

141.2.1. He told his manager about it within days and gave him a copy.

141.2.2. He informed Mr E that he had the contract when he first phoned him to tell him Mrs Y was in hospital.

141.2.3. Mr E accepted that Mr Gwynn said he was a real estate agent in that call, and that Mrs Y wanted to see her lawyer.

141.2.4. He posted a copy of the contract to Mrs Y's lawyer, which records show was received on 17 April 2009.

141.3. The Real Estate Institute had conducted a thorough investigation, and confirmed there was no case to answer.

141.4. Mr Gwynn had made it clear to the Tribunal he was primarily motivated by his concern to protect Mrs Y rather than from a desire to profit. The facts were not sufficiently serious as to warrant disciplinary action.

142. It is apparent that in the course of 2008 Mrs Y was becoming increasingly concerned as to the suggestion that she should sell her house. She was concerned that family members might be taking advantage of her vulnerability.¹³⁸ Mrs Y told one of her caregivers that she was being harassed by real estate agents; that caregiver saw some of their calling cards that they had left for her. Mrs Y also told that caregiver that she would list her property with Mr Gwynn.¹³⁹

143. The Tribunal is concerned that the document did not accurately record Mrs Y's wishes, particularly the fact the agreement could be "voided" at any time; and that Mr Gwynn had been instructed not to progress the contract because it was only entered into to keep her house in her ownership.

¹³⁸ ABD271 & 273.

¹³⁹ ABD136, para 19; also Vincent para 25 and Mawhinney para 24.

144. The main point, however, relates to the significant power imbalance. Mr Gwynn was not just a real estate agent when he arranged for Mrs Y to sign the listing agreement; he was a caregiver providing her with regular and significant care.
145. Furthermore, it appears Mr Gwynn put his interests first, as is apparent by his admission that he would like to have had the contract and that it was presented to Mrs Y's lawyer on the very day she died.
146. If the intention was to discourage other agents from calling, this could have been dealt with in other ways. Such agents were only ever going to call if asked to do so by Mrs Y's lawyer, or perhaps under the power of attorney. Those persons could have been told that she did not want this to happen and/or further legal advice obtained. Agents were not going to call otherwise – there was no evidence before the Tribunal that there was a real estate agent's sign on the house, or advertisements in the paper.
147. As a matter of law once Mrs Y died the contract took effect, meaning that there would have been an exclusive listing in place for two years; that could well have created problems for the executor if he wanted to use another agent or not have an exclusive listing.
148. The submission that was made for Mr Gwynn that the contract was simply put in a draw and not utilised did not fully deal with the issue of self interest which put Mr Gwynn in the position of being able to maintain the listing for two years following Mrs Y's death.
149. The fact that others were told about the listing agreement after it had been signed (Mr Gwynn's manager, and then Mr E) did not improve the situation, because by then there was apparently a binding contract in place from which Mr Gwynn could potentially profit.

150. In short, the Tribunal considers that in encouraging Mrs Y to sign the exclusive listing agreement, there was a significant breach of professional boundaries. This involved breaches of the following provisions of the Code of Conduct for Nurses:

150.1. Principle 2, which provides that a nurse must act ethically and maintain standards of practice (especially paragraphs 2.2 and 2.3).

150.2. Principle 3, which provides that a nurse must respect the rights of patients (especially paragraph 3.3).

150.3. Principle 4, which provides that a nurse must justify public trust and competence (especially paragraphs 4.7 and 4.9).

151. The breach demonstrated a lack of professional judgment, a failure to comply with ethical principles, and the obtaining of undue preferential consideration.

152. This particular is established.

Particular 3: in the period 2-4 April 2009 as a registered nurse providing care, failed to communicate professionally with Mrs Y's family in two respects:

153. This particular pleaded that Mr Gwynn was providing care to Mrs Y as a registered nurse. The Tribunal has already found that in fact he was providing care and support as a friend and neighbour, albeit one having nursing experience.

154. The first assertion related to the manner in which Mr Gwynn spoke to Mrs X; this was on the evening of Friday, 2 April 2009, when the conversation was said to have occurred "*in a nasty tone*".

155. Mrs X described the conversation. She recalled saying she would have difficulty getting to Invercargill that night. She asserted that Mr Gwynn then said "*You won't see her – she'll be dead. She won't last till then. You should come straight away.*".

156. Mr Gwynn said that:

"I simply stated that I believed Mrs Y was unwell and in the final stages of life and suggested that she visit over the weekend. Mrs X thanked me for calling and said she would be down the next day. Mrs X made no mention at this time that she did not drive. I certainly did not say to Mrs X then or at any other

time “You won’t see her – she’ll be dead. She won’t last until then. You should come straight away.”. This is not the way I would ever speak to people ...”

157. The PCC submitted:

157.1. The Tribunal had an opportunity to observe and hear Mrs X give her evidence; she was plainly an honest witness and there was no reason for her evidence not to be accepted.

157.2. This was a conflict which the Tribunal had to resolve.

158. For Mr Gwynn it was submitted:

158.1. Despite extensive cross examination, he did not accept he had used the words complained of.¹⁴⁰

158.2. Mr Gwynn’s evidence was consistent with the manner in which he gave his evidence generally, and in which he answered questions during the hearing.

158.3. Accordingly his evidence should be preferred.

158.4. Mrs X had not made a note of the exact words or tone used at the time and looking back, she may have been influenced by the general feeling of dissatisfaction with Mr Gwynn as expressed by the family in making the complaint.

159. The Tribunal is not satisfied to the necessary level of persuasion that Mr Gwynn did speak to Mrs X in a nasty way. No doubt it was a distressing situation. He was trying to stress urgency. It may be that the communication was not optimal, but the Tribunal is not satisfied that this is a matter that should result in a disciplinary finding.

160. The second allegation of unprofessional communication relates to Mr Gwynn’s exchange with Mr E, when Mr E said he wanted to transfer his aunt; and it is asserted that Mr Gwynn yelled into Mrs Y’s ear: *“they are taking you back to hospital”*.

¹⁴⁰ T355, 6.

161. Mr E described how stunned he was at this.¹⁴¹
162. In his evidence Mr Gwynn denied yelling at Mrs Y; he said he needed to speak to her clearly and loudly, so she could be reassured about what was happening.¹⁴² There was some evidence that she was hearing impaired.
163. Although Mr Gwynn said in evidence that he did not feel he was angry at the time, the Tribunal considers from the totality of the events relating to what happened when he called at the house in the early evening of the Saturday that he was upset. Certainly, he reported to another caregiver soon after that he was distressed.¹⁴³
164. In all the circumstances the Tribunal has concluded that he did speak loudly and in a preemptory way to Mrs Y, when he did not need to. He was upset, and did not need to speak in this fashion to her.
165. This was not optional from Mrs Y's point view; and interfered with the family's rights and choices – which Mr Gwynn accepted in evidence.¹⁴⁴ In this respect, then, the family made a legitimate complaint.
166. However, the Tribunal does not consider, in the particular circumstances, that this interaction is one which is so serious as to warrant discipline.
167. Accordingly, particular 3 is not established.

Conclusion:

168. Particulars 1 and 3 are not established; and particular 2 is.
169. In respect of particular 2, the Tribunal is satisfied that there were significant breaches of professional boundaries, which were sufficiently serious as to warrant discipline. As already indicated, Mrs Y was vulnerable and in declining health, and there was a

¹⁴¹ Brief para 39.

¹⁴² T354-355.

¹⁴³ T232.

¹⁴⁴ T310.

significant element of self interest in entering into the contract and then conveying it to her solicitor at the time she died.

170. The Tribunal is satisfied that such conduct amounts to malpractice, and the bringing of discredit to the nursing profession.
171. The charge requires the Tribunal to consider the particulars separately and cumulatively.
172. As just indicated, particular 2 considered separately is sufficiently serious as to warrant discipline.
173. Although suboptimal conduct has occurred in some respects in relation to particulars 1 and 3, the Tribunal is not satisfied that considered cumulatively those matters should be considered as part of the established charge. Subparticular 1.5 comes close to being included when all matters are considered cumulatively, but in the end the Tribunal is persuaded that the sole matter warranting discipline relates to the signing of the exclusive listing agreement.
174. Accordingly, on that basis, the charge is made out as one of professional misconduct.

Penalty:

175. The above conclusions were given in the Tribunal's Minute of 13 May 2011, and submissions were then filed by the parties.
176. For the PCC it was submitted:
 - 176.1. The main legal principles were referred to (as discussed below); it was then submitted that the finding against Mr Gwynn was very serious.
 - 176.2. There had been a blatant departure from Mrs Y's instructions, and this could only have been intentional. The overwhelming inference was that Mrs Y had little or no idea about what she was signing.

- 176.3. Reference was made to Mr Gwynn's somewhat surprising evidence that there was no power imbalance, and that Mrs Y was not dependent or vulnerable.¹⁴⁵
- 176.4. Another aspect of concern was that Mr Gwynn had not disclosed the existence of the document in a timely way to family members or to Mrs Y's lawyer.
- 176.5. There was a serious breach of professional boundaries which were not properly understood; accordingly Mr Gwynn's registration should be cancelled as that was the only way in which the public could be properly protected.
- 176.6. It was also submitted that there should be a censure and fine, along with an order as to costs, subject to a consideration of financial circumstances.
177. For Mr Gwynn it was submitted:
- 177.1. After considering the relevant legal principles, it was submitted that whilst Mr Gwynn's conduct could not be condoned and fell well short of the behaviour expected of a practitioner, it was not at the most serious end of the scale of offending. Reference was made to a number of earlier decisions of the Tribunal where there had been boundary breaches and other outcomes had been considered appropriate.¹⁴⁶
- 177.2. The cases demonstrated that cancellation or suspension was not an inevitable outcome of a finding of professional misconduct where professional boundaries were breached. Each case would turn on its own facts, and the Tribunal had to carefully consider all alternatives available to it.

¹⁴⁵ T311, T302.

¹⁴⁶ *L*, 151/Nur07/71D, considered on appeal by Woodhouse J, 25 March 2009, CIV-2008-404-2268; *N*, 213/Mid08/106B; *Jury*, 218/Psy09/130D; *Casey*, 335/Mid10/144P and *Scull*, 326/Nur10/147P.

- 177.3. Mr Gwynn had accepted that his decision to enter into the contract was unwise. The complaint to the Real Estate Institute had been investigated, but there was no case to answer in that respect.
- 177.4. Mr Gwynn had been primarily motivated by a concern to protect Mrs Y rather than profit.
- 177.5. He was a man of honesty and integrity, and had given a sincere apology to the family at the hearing.
- 177.6. He had learned from what had occurred, and had undertaken professional boundaries training with his then employer.
- 177.7. There was no doubt on the evidence that he was a competent and well regarded nurse, albeit one who had made an error of judgment.
- 177.8. Accordingly, the appropriate penalty would be censure, the imposition of conditions on practice for a period of up to three years; a fine would cause difficulties having regard to his financial circumstances, which were described including that he and his wife had recently purchased a rest home and respite care facility.
- 177.9. With regard to costs, consideration had to be taken of the fact that two of the particulars were not established; and Mr Gwynn had to bear the costs of an unsuccessful application by the Southland Times to revoke the Tribunal's interim order of 20 April 2011. In all those circumstances he should bear no more than 10% of the costs of the Tribunal and the PCC in relation to the charge.
178. The PCC made submissions in reply; the principal point which was that Mr Gwynn was now working with the elderly in a rest home. The Tribunal would need to consider this issue if it was to adopt a course short of cancellation of registration. The PCC remained of the view that cancellation was the appropriate outcome.

Legal principles:

179. In determining the appropriate penalties, the Tribunal recognised the following functions of disciplinary proceedings:

179.1. Protecting the public – this object is reinforced by section 3 of the HPCA Act;

179.2. to maintain professional standards – this object is emphasised in *Taylor v General Medical Council* [1990] 2 All ER 263; *Ziderman v General Dental Council* [1976] 2 All ER 344 and *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720;

179.3. to punish the practitioner in question, as referred to in *Dentice v The Valuers Registration Board* and *Patel v Complaints Assessment Committee* (CIV-2007-404-1818, 13 August 2007, Lang J);

179.4. where appropriate, to rehabilitate the practitioner, as referred to in *J v Director of Proceedings* (CIV-2006-404-2188, 17 October 2006, Baragwanath J), and *Patel* (supra).

180. The Tribunal is required to balance relevant aggravating and mitigating factors, in fixing a reasonable and proportionate penalty.

181. In *A v PCC* (5 September 2008, Keane J, CIV-2008-404-2927), the Court discussed carefully the range of sanctions available to the Tribunal, particularly cancellation and suspension.¹⁴⁷ The Court stated that four points could expressly be derived from the authorities, and implicitly a fifth:

“[81] *First, the primary purpose of cancelling or suspending registration is to protect the public, but that “inevitably imports some punitive element”. Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is “some condition affecting the practitioner’s fitness to practise which may or may not be amenable to cure”. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.*

¹⁴⁷ Paras 77-82.

[82] Finally, the Tribunal cannot ignore the rehabilitation of the practitioner: *B v B* (HC Auckland, HC4/92, 6 April 1993) Blanchard J. Moreover, as was said in *Giele the General Medical Council* [2005] EWHC 2143, though "... the maintenance of public confidence ... must outweigh the interest of the individual doctor", that is not absolute – "the existence of the public interest in not ending the career of a competent doctor will play a part".

182. In numerous cases, the need to consider and explain why lesser options have not been adopted is emphasised. But the Tribunal has to proceed on the basis of what is appropriate having regard to the public interest, and the need to maintain public confidence in the profession.¹⁴⁸ Randerson J put the matter in this way:

"[30] The consequences of removal from a professional register are ordinarily severe and the task of the Tribunal is to balance the nature and gravity of the offences and their bearing on the dentist's fitness to practise against the need for removal and its consequences to the individual: *Dad v General Dental Council* [2002] 1 WLR 1538. As the Privy Council further observed at 1543:

Such consequences can properly be regarded as inevitable where the nature or gravity of the offence indicates that a dentist is unfit to practise, that rehabilitation is unlikely and that he must be suspended or have his name erased from the register. In cases of that kind greater weight must be given to the public interest and to the need to maintain public confidence in the profession than to the consequences of the imposition of the penalty to the individual.

[31] I respectfully adopt the observations of the Privy Council and would add that it is incumbent on the Tribunal to consider carefully the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case. As well, while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large."¹⁴⁹

Discussion:

183. In determining a proportionate response, the Tribunal considers there are the following aggravating factors:

¹⁴⁸ *Patel*, supra, para 30 per Lang J; *L v The Director of Proceedings*, Woodhouse J, 25 March 2009, CIV-2008-404-2268 [47-48].

¹⁴⁹ *Patel v The Dentists Disciplinary Tribunal* HC AK AP77/02, 8 October 2002.

- 183.1. There were serious breaches of professional boundaries, as discussed earlier.
- 183.2. This was not an isolated error of judgment, but one which carried on and resulted ultimately in the presentation of the contract to the trustee and executor's solicitor.
- 183.3. Mrs Y was elderly and vulnerable; but Mr Gwynn did not recognise this at the hearing. Of particular concern was his assertion that he did not think there was a power imbalance, nor that Mrs Y was dependent or vulnerable.¹⁵⁰
- 183.4. Although Mr Gwynn is entitled to credit for expressing an apology at the hearing, it is of concern that this only occurred in the closing stages of the hearing.
- 183.5. Mr Gwynn had undertaken a course with regard to professional boundaries, yet still maintained at the hearing when giving his evidence that his actions were satisfactory.
184. Mitigating factors included:
- 184.1. The fact that Mrs Y was reputedly a difficult person to get along with, and Mr Gwynn went to considerable lengths to help her; the problem was that he went too far. As he accepted, he let his fondness for Mrs Y get in the way.
- 184.2. Although he took advantage of a situation which was presented to him, he did not deliberately set out to take advantage of Mrs Y
- 184.3. In a general sense it has to be recognised that Mr Gwynn did care for Mrs Y and wanted to help her.
185. The net effect of all these factors is that the boundaries became seriously blurred; and it appears Mr Gwynn has some way to go in terms of insight and in acknowledging the inappropriate behavior which occurred. There needs to be a change of behaviour.

¹⁵⁰ T311.

186. The Tribunal notes that Mr Gwynn and his wife have recently acquired an interest in a rest home and respite care facility; Mrs Gwynn is the registered nurse/manager for the facility, and Mr Gwynn is the manager. The outcome of the charge needs to take account of these changed circumstances.
187. The Tribunal has considered carefully the numerous statements from the Courts that the Tribunal is required to consider carefully all alternatives available to it short of cancellation and/or suspension.
188. Balancing the aggravating factors and the mitigating factors identified above, and taking into account the various sentencing options that it has open to it the Tribunal is satisfied that on this occasion it should adopt an outcome that has both a deterrent aspect and a rehabilitative aspect.
189. In considering the deterrent aspect – a fine – the Tribunal has considered carefully the financial information that has been provided to it. That information indicates that Mr and Mrs Gwynn are carrying significant debt with relatively modest equity; income is perhaps vulnerable given the early stages of a new business enterprise, although the Tribunal considers that Mr Gwynn is a person who has been able to turn his hand to various income earning initiatives if need be. But his financial situation is, as submitted, finely balanced.
190. Also relevant in this respect is the point which will be considered below, to the effect that the lifting of the interim non-publication order may affect Mr Gwynn's income earning ability.
191. However, the Tribunal also considers that a strong deterrent message needs to be sent to Mr Gwynn and to other members of the profession, if it is going to adopt a range of penalty outcomes short of cancellation of registration or suspension. The maximum amount of any fine which can be imposed by the Tribunal is \$30,000.00. The

Tribunal considers the appropriate amount in the present case to be half of the maximum, that is, \$15,000.00.

192. It is also appropriate to formalise the Tribunal's disapproval of the conduct which occurred on this occasion by an order of censure.

193. Turning to rehabilitative aspects, conditions on practice are imposed as follows:

193.1. Mr Gwynn is to be supervised for a period 18 months.

193.2. The Nursing Council is to appoint the supervisor, and the costs of supervision are to be met by Mr Gwynn.

193.3. The supervisor is to focus on all aspects of Mr Gwynn's practice as a registered nurse, but with particular emphasis on communication issues, reflective practice, and the maintenance of professional boundaries of patients and their family members; and such other topics as the Nursing Council may direct.

193.4. The supervisor is to meet with Mr Gwynn each six weeks, and to file a report as regards the supervisor's assessment on the above issues following each meeting with Mr Gwynn, with the Nursing Council.

194. As a further condition on practice, Mr Gwynn is to undertake such short courses on communication issues, reflective practice and the maintenance of professional boundaries with patients and their family members, as the Nursing Council may direct, in light of the matters which have been considered in the course of this decision.

Costs:

195. The Tribunal was advised that the approximate costs of the PCC are \$45,300.00 (exclusive of GST) and the approximate costs of the Tribunal were \$42,300.00 (exclusive of GST).

196. These amounts include the costs of both the PCC and the Tribunal in having to deal with the application made by the Southland Times for revocation of one of the Tribunal's non-publication orders.
197. The general principles which need to be taken into account when considering applications for costs in disciplinary proceedings include:
- 197.1. The fact that professional groups ought not to be expected to fund all the costs of a disciplinary regime; and members of the profession who come before disciplinary bodies must be expected to make a proper contribution towards the costs of the inquiry and hearing: *G v New Zealand Psychologists Board*¹⁵¹ and *Vasan v Medical Council of New Zealand*.¹⁵²
- 197.2. Costs are not in the nature of a penalty, or to punish: *Gurusinghe v Medical Council of New Zealand*.¹⁵³
- 197.3. Means, if known, are to be taken into account: *Kaye v Auckland District Law Society*.¹⁵⁴
- 197.4. A practitioner has a right to defend himself: *Vasan v Medical Council of New Zealand*.¹⁵⁵
- 197.5. The level of costs should not deter other practitioners from defending a charge: *Gurusinghe v Medical Council of New Zealand*.
- 197.6. It is appropriate in a general way to take 50% of total reasonable costs as a guide to a reasonable order for costs; where in an individual case it is reasonable to impose a higher percentage, it may do so; in other cases, where such an order is not justified because of the circumstances of the case, a

¹⁵¹ Gendall J, 5 April 2004, HC Wellington, CIV-2003-485-2175.

¹⁵² Eichelbaum CJ, Jeffries J and Greig J, 18 December 1991, AP43/91, at p15.

¹⁵³ [1989] 1 NZLR 139, at 195.

¹⁵⁴ [1988] 1 NZLR 151.

¹⁵⁵ Eichelbaum CJ, Jeffries J and Greig J, 18 December 1991, AP43/91, at p15.

downward adjustment may be made: *Cooray v Preliminary Proceedings Committee*.¹⁵⁶

198. For Mr Gwynn, it was submitted that costs in the sum of \$10,000.00 would be an appropriate contribution to the costs of the inquiry and the hearing.
199. The starting point on the authorities is 50% - approximately \$43,800.00 in total.
200. The factors which the Tribunal must then take into account, in considering quantum are:
- 200.1. The fact that one of three particulars only was established – although the Tribunal does consider that the three particulars were properly laid.
- 200.2. The fact that additional costs were incurred as a result of the application of the Southland Times, which is not the fault of Mr Gwynn.
201. Balancing the various factors the Tribunal is required to consider as described in paragraph 198 above, the Tribunal considers that a fair figure is 30% of costs, namely \$25,000.00.

Application for non-publication of name:

202. Mr Gwynn has applied for a permanent order of non-publication of name. As earlier mentioned, an interim order was made on 22 March 2011 by consent.¹⁵⁷
203. For Mr Gwynn, it was submitted:
- 203.1. The relevant legal principles were outlined, and are considered below.
- 203.2. It was submitted publication of Mr Gwynn's name would identify Mrs Y, having regard to geographical factors.
- 203.3. It was submitted that sensational headlines had occurred. This was a factor which the Tribunal should take into account in determining whether it was desirable to make the orders sought.

¹⁵⁶ Doogue J, 14 September 1995, Ap23/94, Wellington Registry.

¹⁵⁷ 362/Nur10/167P.

203.4. The effect of publication on Mr Gwynn and Mrs Gwynn's ability to earn a living was also submitted to be relevant. Publication would have a disproportionate effect, particularly having regard to the rest home responsibilities they now have.

204. For the PCC it was submitted:

204.1. The legal principles were referred to, as outlined below.

204.2. It was not submitted that the identification of Mr Gwynn would result in the identification of Mrs Y and family members; such a submission had not been accepted in *Anderson v PCC* (Gendall J, 14 November 2008, CIV-2008-485-1646, at [54]).

204.3. Publication might have a financial impact, but that would be secondary to the overwhelming principle of protecting the public; reliance was placed on dicta of Laurenson J in *F v Medical Practitioners Disciplinary Tribunal* (5 December 2001, AP21 SW01 High Court Auckland), where the Court emphasised that in order for the public to be protected, knowledge of this fact was required to enable the public thereafter to make an informed choice.

Non-publication of name – legal principles:

205. Section 95(1) of the Act contains a presumption that the Tribunal's hearings shall be held in public.

206. Section 95(2) of the Act requires the Tribunal, when considering an application to suppress the name of any person appearing before it, or to hold part of its hearing in private, to consider whether it is "desirable" to prohibit publication of the name of the applicant or hold part of the hearing in private, after considering:

206.1. The interest of any person (including the unlimited right of a complainant to privacy); and

206.2. The public interest.

207. In many previous decisions,¹⁵⁸ the Tribunal has evaluated the following public interest factors:

207.1. Openness and transparency of disciplinary proceedings.¹⁵⁹

207.2. Accountability of the disciplinary process.¹⁶⁰

207.3. Public interest in knowing the identity of a health practitioner charged with a disciplinary offence.¹⁶¹

207.4. Importance of freedom of speech and the right enshrined in section 14, New Zealand Bill of Rights Act 1990.¹⁶²

207.5. Unfairly impugning other practitioners.¹⁶³

208. Also relevant is the statement made by Pankhurst J in *A v Director of Proceedings*:

*“[F]ollowing an adverse disciplinary finding more weighty factors are necessary before permanent suppression will be desirable. This, I think, follows from the protective nature of the jurisdiction. Once an adverse finding has been made, the probability must be that public interest considerations will require that the name of the practitioner be published in a preponderance of cases. Thus, the statutory test of what is “desirable” is necessarily flexible. Prior to the substantive hearing of the charges the balance in terms of what is desirable may incline in favour of the private interest of the practitioner. After the hearing, by which time the evidence is out and findings have been made, what is desirable may well be different, the more so where professional misconduct has been established.”*¹⁶⁴

209. In *B v B Blanchard J*,¹⁶⁵ the Court stated, in a case which concerned a dentist:

“In normal course where a professional person appears before a disciplinary tribunal and is found guilty of offence, that person should expect that an order preventing publication of his or her name will not be made. That will especially be so where the offence is proved, or admitted, is sufficiently serious to justify striking off or suspension from practice. But where the order is made by a disciplinary tribunal in relation to future practice of the defendant directed towards that person’s rehabilitation and there is no striking off or

¹⁵⁸ eg, 51/Nur06/35P, and 65/Nur06/40P

¹⁵⁹ *M v Police* (1991) CRNZ 14; *R v Liddell* [1995] 1 NZLR 538; *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546; *Director of Proceedings v I* [2004] NZAR 635

¹⁶⁰ *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360

¹⁶¹ *Director Proceedings v Nursing Council*, supra; *F v Medical Practitioners Disciplinary Tribunal* (Laurenson J, 5 December 2001, HC Auckland AP21-SW01)

¹⁶² *R v Liddell*, supra and *Lewis v Wilson & Horton Ltd*, supra

¹⁶³ This point has been emphasised on numerous occasions in the criminal Courts where Judges have declined name suppression to avoid suspicion falling on other members of a profession.

¹⁶⁴ Para 42, 21 February 2006, CIV-2005-409-002244.

¹⁶⁵ HC Auckland (HC4/92, 6 April 1993) p99.

suspension but rather, as here, the practice may continue, there is much to be said for the view that publication of the defendant's name is contrary to the spirit of the decision and counter productive. It may simply cause damage which makes rehabilitation impossible or very much harder to achieve."

210. It is also necessary to have regard to the proportionality principle referred to by Baragwanath J in *J v Director of Proceedings* (17 October 2006, CIV-2006-404-2188, paragraph [71]).

Name suppression – discussion:

211. The following factors point to publication of name:
- 211.1. The well established principles of open justice, as alluded to above.
- 211.2. The importance of the principle referred to by Laurenson J in *F* (supra) that for the public to be protected, knowledge of members of the public who may interact with the practitioner is required, so that an informed choice can then be made.
- 211.3. The fact that other nurses in and around Invercargill should not be unfairly impugned.
212. The factors pointing to non-publication of name, as raised by Counsel for Mr Gwynn are:
- 212.1. To protect the identity of Mrs Y and members of her family. In the Tribunal's view, there is a low risk of this happening; it is significant that the PCC, who have advocated for the interests of Mrs Y and members of her family, do not accept this issue as being a significant one. As it was put by Gendall J in *Anderson v PCC*:

"It will always be the case that association of a family to a named transgressor will arise in the minds of those who know him/her and the

*family. It does not usually arise from the publication of the practitioner's name in the collective mind of the general public.”*¹⁶⁶

Accordingly, the Tribunal does not regard this factor as carrying weight.

212.2. That “sensational” publicity has occurred. In this regard, reliance was placed on a discussion of a similar problem in *L v Director of Proceedings* (Woodhouse J, 25 March 2009, High Court Auckland, CIV-2008-404-2268).

There, the Court stated:

“Nevertheless whether name suppression is desirable is something to be weighed in the context of a proceeding which does have as its primary objective the protection of the public by maintaining professional standards. If the available evidence in respect of publication in public media that has already occurred indicates that further publication is unlikely to promote the primary objectives of the Act, but at the same time is likely to cause harm to the practitioner or the practitioner's family unrelated to what would flow from publicity in respect of the charges actually proved, then that would seem to make desirable an order preventing publication of the practitioner's name.”

The Tribunal has considered that principle very carefully. The facts in the *L* decision involved a substantially greater level of sensationalism than that which is alleged in the present case. Whilst the Tribunal does understand the concerns raised for Mr Gwynn relating to the reporting which has occurred, it is not persuaded that this factor is so persuasive that the principle set out in the *L* case would come into play as a factor which should persuade the Tribunal that it is desirable to make the order sought. In summary, this is a factor entitled to some weight, but it is not dispositive of the application.

212.3. Adverse consequences, causing harm to Mr Gwynn and Mrs Gwynn's reputation. There is force in this concern. It is well established that distress and embarrassment for family members inevitably falls upon the family members of persons convicted of a crime or professional misconduct.¹⁶⁷ But

¹⁶⁶ At [54].

¹⁶⁷ *Anderson v PCC*, at [53].

something more is required; as it was put by the Court of Appeal in *Lewis v Wilson & Horton Ltd* ([2000] 3 NZLR 546 at 559) some damage out of the ordinary and proportionate to the public interest in open justice in the particular case is required.

Similarly, with regard to reputational harm in respect of Mr Gwynn himself; unfortunately that is a natural consequence of a charge being upheld; there are no particular factors with regard to reputation which would allow significant weight to be attributed to it.

213. In the end, the Tribunal is mindful that although publication of name is often seen as being punitive, its primary purpose is to protect and advance the public interest by ensuring that the public is informed where a case of professional misconduct is established. Openness and transparency of a proceeding of this kind is crucially important.
214. Taking all factors it has been required to consider carefully into account, the Tribunal is not satisfied that it is desirable to make the order sought. Accordingly, as below, the application is dismissed, and the interim order is discharged.

Conclusion:

215. The charge of professional misconduct is established, based on particular 2 being made out.
216. The following penalties are imposed:
- 216.1. Mr Gwynn is ordered pay a fine of \$15,000.00.
- 216.2. Conditions on practice are imposed as follows:
- 216.2.1. Mr Gwynn is to be supervised for a period of 12 months.
- 216.2.2. The Nursing Council is to appoint the supervisor and the costs of supervision are to be met by Mr Gwynn.

- 216.2.3. The supervisor is to focus on all aspect of Mr Gwynn's practice as a registered nurse, but with particular emphasis on communication issues, reflective practice, and the maintenance of professional boundaries of patients and their family members; and such other topics as the Nursing Council may direct.
- 216.2.4. The supervisor is to meet with Mr Gwynn each six weeks and to file a report as regards the supervisor's assessment of the issues following each meeting with Mr Gwynn, with the Nursing Council.
- 216.3. As a further condition on practice, Mr Gwynn is to undertake such short courses on communication issues, reflective practice and the maintenance of professional boundaries with patients and their family members, as the Nursing Council may direct in light of the matters which have been considered in the course of this decision.
- 216.4. Mr Gwynn is to pay costs as follows:
- 216.4.1. \$12,500.00 in respect of the costs and disbursements of the PCC.
- 216.4.2. \$12,500.00 in respect of the costs and disbursements of the Tribunal.
- 216.4.3. GST is not payable in respect of either such sum.
- 216.5. There is an order of censure: the Tribunal must express its strong disapproval of the established misconduct.
217. The interim order of non-publication of name made on 22 March 2011 to be discharged, and in respect of Mrs Gwynn (made at the hearing) is also discharged. The discharge orders are to take effect 14 days after the date of service of this decision on Mr Gwynn.

218. The Tribunal directs that a copy of this decision, and a summary thereof, be placed on its website. It further directs that a notice stating the effect of its decision be placed in Kai Tiaki: Nursing New Zealand, the Nursing Council's Newsletter, and Nursing Review.

DATED at Wellington this 29th day of June 2011

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B A Corkill QC
Chairperson
Health Practitioners Disciplinary Tribunal