

## THE HIGH COURT

RECORD No. 2005 638 Sp

BETWEEN

HELENA O'CONNOR

APPELLANT

and  
THE MEDICAL COUNCIL

RESPONDENT

**Judgment delivered the 17th day of July 2007 by Finnegan J.**

By letter dated 10th August 2005 Dr. Michael McCarthy, now deceased lodged a complaint with the Medical Council. The circumstances underlying the complaint were that on the 10th April 2000 Dr. McCarthy had a lesion removed from his right elbow under general anaesthetic. The surgical specimen was sent to the Base Laboratory in St. Brigid's Hospital on the 12th April 2000 for histological examination. He complained that a written report was not received by him on the same until the 30th June 2000 and that the same was incorrectly dated 29th April 1999 rather than 2000. On the 9th May 2000 Dr. McCarthy requested the histology slides so that he could obtain a second opinion from another pathologist. The slides were not released to him on request. Dr. McCarthy, a member of the Army Medical Corps holding the rank of Lieutenant Colonel then applied through military channels and at that time it was found that the slides were missing and that the original paraffin block was also missing. The appellant is a pathologist in the Army Medical Corps with the rank of Commandant and was responsible for the histological examination.

Arising out of the foregoing the Medical Council applied to the Fitness to Practice Committee for an inquiry into the conduct of the appellant on the grounds of alleged professional misconduct. The Fitness to Practice Committee duly held an inquiry on the 12th September 2005 and found the following facts, set out in the Notice of Intention to Hold an Inquiry, proved –

- "1. That you failed to provide a written histology report either at all or within a reasonable period to Comdt. C. O'Malley, surgeon, on tissue removed from Dr. Michael McCarthy's left elbow on 11th April 2000.
2. Failed to provide Dr. McCarthy the relevant histology slide(s) when you were requested to do so on one or more occasions by Dr. McCarthy.
3. Failed to provide to your superiors the relevant histology slides when you were directed to do so on one or more occasions.
4. Failed to ensure that the relevant slides and/or original paraffin block did not go missing from Base Laboratory.
5. Failed to show and apply the standards of clinical judgment and competence required by a person in your position.
6. Acted in a manner derogatory to the reputation of the medical profession.
7. Failed to act in the best interests of Dr. McCarthy."

The Fitness to Practice Committee further formed the opinion that the facts so found amount to professional misconduct.

The Fitness to Practice Committee recommended to the Medical Council the following sanctions –

- "1. That the appellant be censured in respect of her professional conduct and that conditions be attached to the retention of her name in the Medical Register.
2. That she send out written histology reports within a reasonable time which should not ordinarily exceed one month.
3. That she make her practice available for inspection by members of the Monitoring Group of the Medical Council.
4. That she ensure that she practices within best practice guidelines in pathology in particular to tracking of specimens within and without the laboratory.
5. That she familiarise herself with paragraph 3-7 of the Ethical Guide."

The Medical Council considered the report of the Fitness to Practice Committee and invoked its powers under the Medical Practitioners Act 1978 section 48 and censured the appellant and further invoked its powers under section 47 of the Medical Practitioners Act 1978 and attached the following conditions to the retention of her name in the General Register of Medical Practitioners –

- "1. That you send out written histology reports within a reasonable time which should not ordinarily exceed one month.
2. That you engage in appropriate clinical audits on an ongoing basis.
3. That you make your practice available for inspection including clinical audits by the Medical Council and/or its representatives.
4. That you ensure that you practice within best practice guidelines in pathology in general and in particular to tracking of specimens within and without the laboratory.
5. That you familiarise yourself with paragraph 3.7 of a Guide to Ethical Conduct and Behaviour – 6th edition 2004.
6. That you provide documentary evidence of continuing medical education/continuing practice development to the Medical Council in line with the requirements of the Faculty of Pathology of the Royal College of Physicians of Ireland.
7. That you bear the costs of compliance with these conditions.
8. This to be reviewed in two years."

The reason given for the censure and imposition of conditions was that on the facts found by the Fitness to Practice Committee the Committee formed the opinion that the appellant had been guilty of professional misconduct.

This matter came before the court pursuant to the provisions of the Medical Practitioners Act 1978 section 47(3) which provides as follows –

“47(3) A person to whom a decision under this section relates may, within the period of twenty one days beginning on the date of the decision, apply to the High Court for cancellation of the decision and if he so applies –

- a. the High Court, on the hearing of the application, may either –
  - i. cancel the decision, or
  - ii. declare that it was proper for the Council to make a decision under this section in relation to such person and (as the court may consider proper) direct the Council to attach such conditions as the Council thinks fit to the retention of the name of such person in any register maintained under this Act.”

A number of preliminary matters arose on the hearing as to the powers of the Medical Council, the nature of an application to the High Court under section 47 of the Medical Practitioners Act 1978 and the powers of the High Court on such an application.

The Medical Council's powers of relevance are those under sections 46, 47 and 48 of the Medical Practitioner's Act 1978. Section 46 of the Act empowers the Medical Council to decide, following an inquiry by the Fitness to Practice Committee, that the name of a person should be erased from the register or that during a specified period the registration of that person should not have effect: that power arises where the person concerned has been found guilty of professional misconduct following an inquiry by the Fitness to Practice Committee. Section 47 empowers the Medical Council following an inquiry by the Fitness to Practice Committee to attach such conditions as it thinks fit to the retention of the name of a person in the register. In terms, there is no requirement for a finding by the Fitness to Practice Committee of misconduct against that person. Section 48 is in similar terms to section 47 and empowers the Medical Council to advise, admonish or censure a person whose name is entered in the register: again, in terms, there is no requirement for a finding of professional misconduct.

In the present case the decision pursuant to section 47 is quite clear – the reason for the Council's decision was that the Fitness to Practice Committee had reported to the Council its opinion that the appellant was guilty of professional misconduct. Again it is clear that the conditions were imposed pursuant to the powers conferred upon the Medical Council by section 47 of the Act and the censure applied pursuant to section 48 of the Act. In these circumstances the dicta of Morris P. in *Anachebe v Medical Council*, The High Court (unreported) 12th July 2000 have no application that case being one where the Medical Council exercised its powers under section 48 alone. Morris P. there held that where the Medical Council exercises its power under section 48 alone and not in conjunction with any of the powers conferred on it by section 46, 47 or 49 of the Act no right is given to the medical practitioner to apply to the court to have that decision set aside. Rather, as held by Finlay P. in *M v The Medical Council* [1984] I.R. 485 at 495 on an application under section 46 or 47 of the Act to cancel a decision of the Council the onus is on the Council to establish the correctness of any finding of misconduct or unfitness and the correctness of the decision on the penalty that should be imposed. Further the onus rests on the Council to prove by oral evidence any fact on which it relies and which is contested by the appellant: the court should first make findings as to whether any finding asserted by the Council of misconduct or unfitness to practice was established and in the event of so finding should give a further and separate opportunity to the plaintiff to be heard as to appropriate penalty that should be imposed.

On behalf of the respondent it was submitted that upon the court making a finding on the issue of professional misconduct it must then proceed to consider whether the imposition of conditions is justified and this regardless of whether or not the finding of professional misconduct is upheld. Section 47 of the Act does not require a finding of professional misconduct as a pre-condition to the attaching of conditions. See *Casey v Medical Council* [1999] 2 I.R. 534. In that case the Fitness to Practice Committee did not make a finding of professional misconduct. The Medical Council, however, in reliance on its powers under sections 48 and 47 of the Act decided to advise the practitioner and to attach conditions to his registration. Accordingly the circumstances differ from those in the present case where conditions were imposed by the Medical Council in the light of a finding of misconduct and in reliance on its powers under section 47 of the Act and also to censure in reliance on its powers under section 48 of the Act. The reason given for so doing is the opinion of the Fitness to Practice Committee that the appellant was guilty of misconduct. In *Millett-Johnston .v. Medical Council*, January 2001, the High Court, Morris P. the facts were similar to the present. The appellant was found guilty of professional misconduct and the Medical Council invoked its powers under section 47 of the Act to attach conditions to the maintenance of her name in the register. In the course of his judgment Morris P. said –

“It has been submitted to me that the decision of Kelly J. in *Casey v Medical Council* [1999] 2 I.R. 534 is clear authority for the proposition that conditions may be imposed by the Medical Council irrespective of whether the Fitness to Practice Committee finds professional misconduct or not and therefore an inquiry into professional misconduct by this court is of no relevance. I accept fully that it is within the competence of the Medical Council to impose such conditions irrespective of the precise findings of the inquiry. However I am satisfied, that where an allegation of professional misconduct is made but not established, it would be improper for the Council to attach conditions to the retention of the name of the practitioner on the register where such conditions would only be justified if the facts which gave rise to the imposition of such conditions were established. If therefore the facts alleged to constitute professional misconduct are the same as those relied upon as justification for the imposition of the conditions and if those facts are not established then the conditions, unless otherwise justified, should be removed.”

I am satisfied that this is a correct statement of the law. The statement applies equally where the Medical Council exercise their powers under section 48 of the Act. In these circumstances on this application the first exercise to be carried out by the court is to determine, on the evidence given before the court, if the facts alleged to constitute professional misconduct are established. If the facts or any of them are established the court will continue to consider the appropriateness of the conditions attached and the censure in the light of its findings on the facts. If professional misconduct is not established having regard to the power to attach conditions and to censure under sections 47 and 48 respectively notwithstanding that there has been no finding of professional misconduct, the court must continue and determine whether the attachment of conditions and the censure are nonetheless justified.

As to the onus of proof I am satisfied that the onus lies upon the Medical Council to prove beyond reasonable doubt every relevant averment of fact not admitted by the appellant and to establish beyond reasonable doubt that such facts, as so proved or admitted, constitute professional misconduct. Further the onus rests on the Medical Council of negating every reasonable hypothesis consistent with the appellant's innocence of the allegations against her. See *O'Laoire v Medical Council* 25th July 1997, Supreme Court, Murphy J.

### **The evidence**

I propose to deal with each witness in turn. I will do so in the logical sequence rather than the sequence in which they gave evidence as some witnesses were taken out of turn for their convenience.

### **The respondent's witnesses**

#### **(1) Lt. Col. Christopher Browne.**

The witness is a medical doctor and a member of the Army Medical Corps and the officer commanding St. Bricin's Hospital. Dr. Michael McCarthy was a Lt. Col. and chief medical officer in the Eastern Brigade and also attached to St. Bricin's Hospital: he died early in 2006 of lung cancer, his death being in no way associated with the complaints with which the court is concerned. Dr. Charles O'Malley is a Commandant in the Army Medical Corps and was Dr. McCarthy's treating doctor. The appellant is a Commandant in the Army Medical Corps and the pathologist in St. Bricin's Hospital. Col. Maurice Collins is the director of the Army Medical Corps and has his office at Army General Headquarters.

Dr. McCarthy was admitted to St. Bricin's Hospital and on 10th April 2000 and in a small operation had some tissue removed from his right elbow. The tissue was sent to the appellant for histological examination on the 12th April 1999. On the 9th May 2000 Dr. McCarthy wrote to the appellant and copied the letter to Col. Collins, Lt. Col. Browne and Lawlor O'Reilly Solicitors who were acting for the appellant in an unrelated matter. The letter reads as follows -

"Four weeks have now elapsed since the laboratory received a surgical specimen on my behalf. To-date there has been no formal written report on the specimen received by the surgeon concerned. To me this is totally unacceptable and bad practice. I have made arrangements for the surgical slides to be reviewed in another hospital and wish these to be released by 09.30 on 11.05.2000. There is no discussion on this situation.

Should there be any delay in this release I have instructed my solicitors to institute proceedings against yourself for the delay in release."

The witness met with the appellant on the 18th May 2000 and suggested to her that she issue the report: she said that she refused to do so because the matter was *sub judice*. Col. Collins wrote to the witness on the 23rd May directing him to instruct the appellant to release the slides to Dr. McCarthy forthwith and to provide a written explanation as to why a report on the specimens had not yet been provided. The witness met with the appellant on the 24th May and issued an order as directed whereupon the appellant requested the order in writing and also an interview with the director of the Medical Corps accompanied by a representative. The order was issued in writing on the 25th May 2000. Col. Collins informed the witness that he would not allow a representative to be present at a meeting with the appellant and in those circumstances the appellant withdrew her request for a meeting. The following day the appellant went on leave. By letter dated 21st June 2000 Col. Collins instructed the witness to issue an instruction to an appropriate member of the laboratory staff to locate the slides relating to Dr. McCarthy and to hand them over to the witness and for the witness immediately to give them to Dr. McCarthy. The witness went to the laboratory the next day. There was no report on file for Dr. McCarthy and there was a gap where his slides should have been. The original blocks from which the slides had been prepared were also missing. The witness did not look at any register or book and did not remember asking any of the laboratory staff as to where the slides or blocks might be. Some days later he received the pathology report in the post from the laboratory dated 29th April 1999. He sent this to Dr. McCarthy as soon as he received it. Dr. McCarthy may already have received that report from Comdt. O'Malley. Some days later he spoke to Dr. O'Malley who thought the report was an old one as it bore a 1999 date and a 1999 serial number but different to the serial number of a 1999 report. The first paragraphs of the same are identical to a 1999 report, the clinical details in the description being word for word the same as the 1999 report. He received a letter dated 2nd August 2000 from the appellant. The letter reads as follows -

"I have no problem with an additional histology report on this specimen. The blocks, however, may be needed at any time in the future. Proper procedure would (be), and again I will check this again if you wish with the IMO and the Medical Protection Society, that the blocks are forwarded to the pathologist of Dr. McCarthy's choice and then returned to myself c/o the Base Laboratory i.e. we maintain some control of the transfer and location of the blocks at all time.

On receipt of the above information I will forward the blocks to the pathologist as speedily as possible. Also should the blocks from the same area in 1999 be required I could forward the same."

The witness wrote to Col. Collins on the 3rd August as follows -

"I have received the attached letter today.

I would request your direction on this matter; I would prefer that the military chain of command be respected, i.e. that the specimens be handed over to me as originally ordered."

On the 21st August 2000 Dr. McCarthy indicated that he did not require the blocks but the slides. At the time of these events the appellant's relationship with Dr. McCarthy had been soured. Dr. McCarthy had a relationship with the appellant's sister and in early 2000 the sister's daughter committed suicide. The witness thought that the appellant in some way held Dr. McCarthy responsible.

On receiving the report with the letter of 2nd August 2000 the witness gave a copy of the same and the report to Dr. McCarthy. Dr. McCarthy said he had already received that report: he had acknowledged receipt of the report in a letter dated 31st July 2000 to Lt. Col. Browne. The witness was unable to say whether this was in fact the case or whether Dr. McCarthy was in error because the date on the same was 1999. Dr. McCarthy may have believed it was a further copy of an earlier report which he had received. The witness prepared a memo which contained the following -

"Discussed with Commandant O'Malley on 3rd July 2000. He had received this report, date not known, but noted the date and serial number and presumed it referred to a previous biopsy. Other reports for 2000 he said were not dated 1999."

By December the slides had not yet been produced. On the 4th December 2000 he wrote to the appellant in the following terms -

"1. As you are no doubt aware, biopsy specimens taken from Lt. Col. McCarthy in April of this year were sent to you for examination.

2. I now instruct you to furnish me with a report of your examination of the specimens in question.

3. The report is to be forwarded to me not later than 8th December 2000."

The appellant sent the report on the 7th December 2000 but in the covering letter said -

"I protest at your instruction and consider your request unethical."

The witness forwarded the report to Dr. McCarthy on the 14th December 2000.

In cross-examination the witness agreed that while the appellant was on sick leave there was a locum in the laboratory, Dr. Laffan. He accepted that the appellant was on sick leave from the 25th May 2000 to the 31st July 2000. However during that period the appellant did attend at the laboratory from time to time. Insofar as delay is concerned this period, in the witness's view, should be discounted. He was aware that Dr. O'Malley was given a verbal report on the biopsy but could not of his own knowledge say that this occurred on the 14th April 2000. The witness qualified from the Royal College of Surgeons but in terms of his practice he was a general practitioner. He agreed that normally a pathologist would not deliver slides or blocks or a report to the patient. However this situation was not normal in that Dr. McCarthy was a colleague who was a doctor. He agreed that the letter from Dr. McCarthy demanding the slides dated 9th May 2000 had been copied to Col. Collins, Lt. Col. Browne and to Lawlor O'Reilly, Solicitors, who were acting for the appellant in an unrelated matter. It was put to the witness that the appellant had authorised the pathology report to be given to Comdt. O'Malley on the 8th May 2000 and that Mr. Brian Delaney a Quarter Master delivered the report to him at that time: he could not say if this was so. The witness agreed that he requested from Mr. Delaney on his visit to the laboratory in June 2000 a copy of the report on the 2000 specimen but did not agree that a copy of the same was printed off the computer and handed to him: he did not see the report until the following August. On the occasion of his visit to the laboratory he had spoken to Dr. Laffan but could not remember whether or not he had requested a copy of the report from him but had asked him for the slides. From the 12th July 2000 onwards Dr. McCarthy's emphasis shifted from the report to the slides. The witness agreed that in his letter of the 12th July 2000 Dr. McCarthy did not express any concern about the report but only on the slides. His manuscript note of speaking to the appellant on the 18th May 2000 might read -

"Asked HO'C to forward slides on report on McC biopsy"

and not

"slides or report".

The report was not required for a second opinion but the slides were. His note of the meeting of the 24th May records that he ordered the appellant to hand over the slides and contains no mention of a report. He agreed that as of the 2nd August 2000 the appellant had agreed to send the slides to a pathologist of Dr. McCarthy's choice but he was frustrated that a military order that they be handed to him was not being obeyed. In a civilian practice, he accepted, the slides would be given to another pathologist but in this case there was a military order that these slides should be given to him. On the 4th December 2000 he wrote instructing the appellant to furnish him with the report and this arose out of a letter received from Dr. McCarthy's solicitors threatening proceedings in relation to the same against the witness and other officers.

In re-examination the witness said that Dr. Laffan was over 90 years of age at the time he was acting as locum. He was a former Director of the Army Medical Corps and had retired about 1982. He was a pathologist.

The witness was re-cross-examined. It was put to him that on the 18th May the appellant told him that she had issued a report and that matters between herself and Dr. McCarthy were now getting personal and were not about the histology and that he required grief counselling: the witness said he did not remember this.

## **(2) Commandant Charles O'Malley.**

Commandant O'Malley is now retired from the Army Medical Corps and is working as an emergency surgeon in St. Columcille's Hospital, Loughlinstown. He left the army in late 2000, his formal retirement being in January 2001. He spent four tours of duty in the Lebanon, the last beginning in August 2000. On the 2nd February 1999 he dissected a small fatty or lymph node-like lesion from Dr. McCarthy and also some fragments of lymph node. He sent samples to the laboratory and received a pathology report dated 17th February 1999. A second opinion on the same was received from Dr. O'Brian in St. James's Hospital, having been obtained by the appellant. The lump in Dr. McCarthy's elbow recurred and the witness determined that a further biopsy should be carried out to obtain a better specimen and did so on the 10th April 1999 and this again was sent to the laboratory for a pathology report on the 12th April 1999 and one was received dated the 29th April 2000. He also received a verbal report from the appellant: this was quite normal and would normally be given within one to four weeks of the sample being received; occasionally it might take a little longer. By letter dated the 7th August 2000 he informed Lt. Col. Browne of the verbal report. He agreed that in this case he may have received the report within two or three days of the sample going to the laboratory. The written report dated the 29th April 2000 (mis-dated 1999) bears a lot of similarity to the 1999 report on the 1999 biopsy and which is dated 17th February 1999. However the printed format is different, it bears the date of the sample the 12th April 1999 and is dated 29th April 1999. The lab number is in manuscript over the original typed lab number. The description of the sample is different but refers to four fragments of tissue whereas the sample was a whole lymph node. The microscopic is different. The diagnosis is the same in both reports. He did not remember when he received the 2000 report. He would most likely have thought the report on the 2000 sample was the 1999 report and when he spoke to Lt. Col. Browne in late June or early July 2000, he would have thought that he had not received the 2000 report: however his memory was very uncertain. In July 2000 he was about to leave for the Lebanon, having been ordered to do so at short notice, and he was busy wrapping up his surgical practice and preparing for his tour of duty. Also he was planning to leave the army and had made arrangements to take up another job. He wrote a letter on the 27th July 2000 to the appellant because he had been asked to do so by Dr. McCarthy or by Lt. Col. Browne. On that date he had on file the report dated the 29th April 1999. He received a reply from the appellant dated 2nd August 2000 identical to a letter of the same date which she sent to Lt. Col. Browne, and attached to his letter was a manuscript note on a post-it. Before leaving for the Lebanon at the request of Lt. Col. Browne he prepared a report dated the 17th August 2000 in which he said that he had not received a written report to that date: that was his understanding at the time. The witness was shown a copy of the pathology report on the second sample but bearing date 8th May 2000. At the foot of the same is a manuscript note-

"Copy sent to Commandant O'Malley on above date 10.10.00 to theatre and overseas."

This report has the correct date and lab number and correctly describes the sample.

He did not recall seeing that document prior to the hearing before the Fitness to Practice Committee and did not remember receiving it in the Lebanon.

In cross-examination it was put to the witness that the appellant received the sample on the 12th April 2000 and telephoned him on the following Friday the 14th April 2000 at the Curragh and gave him a verbal report. He probably communicated that report to Dr. McCarthy. It was put to the witness that Mr. Delaney would say that he delivered the report dated 8th May 2000 to him at the theatre and he agreed that this may well have occurred. When he wrote on the 27th July 2000 he was requesting the appellant to release blocks. He received a letter from her dated the 2nd August indicating that she would give the blocks to whatever pathologist was nominated and this was a reasonable response and he considered this to be an end to the matter.

In re-examination the witness said that he did not recall receiving the report dated the 8th May 2000.

In answer to a question from the Court the witness said that all reports would be kept on Dr. McCarthy's medical file, the back up system is that copies of the reports are kept in the laboratory in case the personal medical file should be lost.

Commandant O'Malley was recalled on the 14th December 2006. He was shown a letter dated the 2nd August 2000 addressed to him from the appellant. He had no recollection of receiving this. He wrote to Lt. Col. Browne on the 7th August 2000 and stated that he had not received a written report. There is another version of the letter of the 2nd August which went to Commandant O'Malley which includes an additional last paragraph-

"I am enclosing the recent report on this patient."

The witness had no recollection of receiving that letter.

In cross-examination he agreed that it was possible that the second version of the letter of 2nd August 2000 had been sent, but he did not believe that he had seen it by the 7th August after which he had no involvement with the case due to his departure to Lebanon.

### **(3) Col. Collins**

The witness is Director of the Army Medical Corps. He confirmed the correspondence which had already been outlined by previous witnesses. He received a copy of Dr. McCarthy's letter of the 9th May 2000: however he was away from his office until the 15th August. He issued the instruction to Lt. Col. Browne on the 23rd May 2000: as a staff officer on the General Staff he has no command function and for this reason he did not write directly to the appellant but rather to her commanding officer Lt. Col. Browne. He again wrote to Lt. Col. Browne in relation to the slides on the 21st June 2000 and directed him to issue an instruction to an appropriate member of the laboratory staff to locate the slides and hand them to Lt. Col. Browne and then for him immediately to give them to Lt. Col. McCarthy. The witness did not recall receiving the memo dated the 3rd August 2000 from Lt. Col. Browne: he had no copy of the memo on his file.

### **(4) Dr. Thomas Crotty**

The witness is a Consultant Histopathologist. In his opinion a verbal report should be given within one week more or less, three to four weeks would not be best practice. If the written report, dated the 29th April 1999 was furnished after the 25th May but before early June 2000, in his opinion that would be an unacceptable delay in an uncomplicated case. The case in question was not complicated. Reports should go out as soon as they are authorised: if the report dated the 8th May 2000 was not in fact delivered to Commandant O'Malley on the 8th May or as soon thereafter, that would be a major breakdown in standards. The best practice in relation to the slides would be that they should be sent from pathology laboratory to pathology laboratory. However he would not be strongly against handing the slides to a patient if the patient is a medical doctor. It was however acceptable for the appellant to question whether she herself should send the slides. It was acceptable practice to send the slides to St. James's Hospital for a second opinion and represents good practice. Ideally, in case the pathologist was absent when the slides were being sought, a system should be in place which would indicate where the slides are. The guide to ethical conduct and behaviour provides as follows-

"Patients are entitled to a second or further medical opinion about their illness. Doctors must either initiate or facilitate a request for this and provide the information necessary for an appropriate referral."

In his opinion the appellant had not facilitated the obtaining of a second opinion. However the conditions imposed by the appellant in relation to the slides were appropriate. The conditions proposed to be attached to the appellant's registration would help a pathologist to ensure that they are operating within best practice guidelines. He himself would find them useful to his own practice. They would not interfere with current best practice. However he would not expect such conditions to be attached to someone who is observing best practice. If the report in this case had been of a significant pathology, a delay beyond late May would represent a serious falling short of acceptable standards. If the delay was due to second opinion being sought from St. James's Hospital this should have been made known to Col. O'Malley.

In cross-examination the witness said that he would have been concerned to receive a letter such as that from Dr. McCarthy dated 9th May 2000, it being copied to a number of persons including solicitors. He would not fault the appellant in contacting her indemnifiers, the Representative Association for Commissioned Officers and the Irish Medical Organisation on receipt of the letter. The appellant was entitled to act on the advice which she received from her indemnifiers and the Representative Association for Commissioned Officers and also to send the slides to St. James's Hospital. The letter dated the 2nd August from the appellant in which she expressed willingness to send the slides to a nominated pathologist represented co-operation and it is best practice to send the slides to another pathologist. The failure of Dr. McCarthy to nominate another pathologist represented professional discourtesy. The second best choice, however, was to furnish the slides in this case to the patient: the reference of correspondence to solicitors was an additional factor but once it became clear that a pathologist was not going to be nominated, the second best course should have been adopted. The practice in most departments is that the slides should be kept in the department and the appellant was correct in this: if slides are given directly to the patient it should be made clear that their return is required. The Faculty of Pathology of the Royal College of Physicians of Ireland guidelines, February 2000, make it clear that it is best practice to ensure that if slides are let out of a pathologist's custody he should require them to be brought back to the laboratory so that they can be objectively analysed in the future if required. The appellant's letter of the 2nd August represented best practice. An alternative, if not releasing the slides, would have been to follow up in obtaining the name of a pathologist to whom the slides could be sent. There was an obligation on Dr. McCarthy to co-operate with the appellant and nominate a pathologist, and this was the simplest way to resolve the matter. Dr. O'Brian did not give a written report on the 2000 specimen but the witness found this acceptable practice on his part.

### **The appellant's witnesses.**

#### **(1) The appellant**

The appellant at all material times was and is a member of the permanent defence forces holding the rank of Commandant and is a

pathologist at the Base Laboratory, St. Bricin's Hospital. She is a fellow of the Faculty of Pathology of the Royal College of Physicians in Ireland. On the 10th April a biopsy was taken from Dr. McCarthy and sent to the laboratory for microscopic examination by the witness. Slides were prepared and were ready for examination within forty eight hours of receipt of the specimen. She examined the specimen and it was immediately apparent that it was similar to a previous sample which she had received in 1999. Her diagnosis was that it was a benign lesion. She immediately contacted the surgeon Comdt. O'Malley and that was within four days of receipt of the specimen and on a Friday. She made contact with him at the Curragh Military Hospital, where Comdt. O'Malley attended every Friday, by telephone. She told Comdt. O'Malley that she would get an informal second opinion prior to releasing her written report. At the time of speaking to Comdt. O'Malley she had handwritten her diagnosis. When she got the second opinion she again telephoned Comdt. O'Malley and on enquiring was told by him that there was no swelling and no clinical problems. She informed him that she had received an informal second opinion. She then issued the report. She was unsure from whom she received the second opinion but it was most likely Dr. Séan O'Brien in St. James's Hospital where she would normally attend once each week. The report issued on the 8th May 2000. The copy of that report on that file has a manuscript note on the same made by Mr Delaney in October 2000. Witness received the letter dated 9th May 2000 from Dr. McCarthy and that was after she had released the report. She was stunned by the letter. She was satisfied that the report had gone out and that she had spoken to the surgeon. It would not be common practice to furnish a report to a patient. Slides and blocks represent primary diagnostic material and it would be extraordinary that a medical colleague would request that they be handed over to him. On the 25th May 2000 she was ordered by Lt. Col. Browne to hand over slides: she was not ordered to furnish a report. She requested the order in writing and requested to see the director of the Army Medical Corps about the order and to have representation at the meeting. She received the order in writing later that day but the meeting did not take place as representation would not be permitted. Immediately after meeting with Lt. Col. Browne she made contact with the Medical Protection Society, then with the Irish Medical Organisation and then with Lt. Col. O'Keeffe, President of the Representative Association for Commissioned Officers. She also telephoned Dr. Séan O'Brien and agreed to meet with him at noon that day at St. James's Hospital. They discussed the tissue and he agreed with her that the tissue was the same as the previous year's tissue but agreed that he would do a repeat work up – a thorough lymphoma type work up. This involved him retaining the blocks and the slides. She then kept an appointment with her cardiologist. He was concerned about her cardiac status and recommended time off work. He certified her for two weeks sick leave. She then attended a meeting with Lt. Col. Browne and Col. Collins unrelated to the matters with which I am concerned. However she received a written order. She was not asked to explain when no written report was yet available. Later that day she had a meeting with Lt. Col. Browne when she advised him, on the advice of the Medical Protection Society, the Irish Medical Organisation and the Representative Association for Commissioned Officers, that she was not in a position to comply with the order. Her medical certificate was extended for a further two weeks and then a further twenty eight days. Her first day back on duty was the 31st July. She did attend St. Bricin's for a medical examination on the 17th July. She received a letter dated 27th July from Comdt. O'Malley requesting the slides. She immediately telephoned Comdt. O'Malley and discussed the matter with him. She wrote to him on the 2nd August 2000 indicating her willingness to forward the slides and blocks to a pathologist nominated by Dr. McCarthy. The letter of 27th July stated that Dr. O'Malley had not on file a typed report and she dealt with that in the post-it attached to the letter of 2nd August 2000 which she sent to Comdt. O'Malley. It was at Comdt. O'Malley's suggestion, as he was going to the Lebanon, that she write also to Lt. Col. Browne. The post-it note followed on from a conversation with Comdt. O'Malley. She sat down with Mr Delaney who was her clerk receptionist to check the position and forward all reports to Comdt. O'Malley. Mr Delaney had told her that he had furnished a copy of the report to Lt. Col. Browne and the second in command while she was absent on leave. She did not change the laboratory number on the report.

The witness spoke to Lt. Col. Browne on the 17th or 18th May following a promotion board of which they were both members. Lt. Col. Browne raised the issue of the slides. The witness told him that the report had gone out, that the lesion was benign and that she had concerns about inter-personal difficulties in the workplace. She meant that the report dated 8th May 2000 had gone out to the appropriate person, namely Comdt. O'Malley. Lt. Col. Browne did not request a report at that meeting. While on sick leave she occasionally visited St. Bricin's usually to attend the pharmacy. She was also in touch with the locum, Dr. Laffan. The meeting on the 17th May related to her cardiac condition only. She did deal with Comdt. O'Malley's statement in his letter that he had not a copy of the typed report on file: as a result she sat down with her clerk and resolved the issues with the report and forwarded a second letter to Comdt. O'Malley indicating that she would forward the report. She would not forward the report to Lt. Col. Browne. Her understanding was that Comdt. O'Malley had received the report but that he was confused by the reference to the histology and the previous sample. She was confused by Lt. Col. Browne's reference to a report as the report had gone out in the normal fashion. The normal procedure is that information is received by her on Army Form AF91. The medical laboratory assistant would prepare the specimens. The witness would write on the back of the Form AF91 and pass it to Mr Delaney who would type up the formal parts of the report on the computer from the Form AF91. He would fill in "date", "lab number", "patient", "report to" and clinical details all from the Form AF91. Thus "description" would be filled in by Mr Delaney from the appellant's handwriting on the back of Form AF91. The section "microscopic" would not be available until the slides had been reviewed under the microscope by the appellant. She would then hand write that section and the diagnosis and hand it to Mr Delaney to complete the report. The original handwritten notes would not be maintained. The form of report would be checked and printed off and signed and then delivered to the area indicated on the Form AF91.

The witness in writing on the post-it that she would compile all the relevant histology reports was due to her confusion caused by Comdt. O'Malley saying he only had the 1999 report on file. When she sat down with Mr Delaney she discovered that a report existed which was a compilation of the 1999 and 2000 reports which had got into the system and been handed over at some point. She immediately removed that and forwarded a copy of the correct report. The correct copy of the 8th May report was, however, on the computer. The witness never saw the letter dated 21st August 2000 to Lt. Col. Browne from Comdt. McCarthy. The appellant received no further correspondence during the period August to December 2000 nor indeed in 2001 to 2002 or 2003. The next she heard was in relation to the complaint to the Medical Council in September 2004.

The finding of professional misconduct is a serious matter for the appellant. It will continue to affect her professionally. It will affect her promotion prospects within the Defence Forces. Notwithstanding the decision of the Medical Council not to publish its findings, they had found their way into the media and the reporting appeared to make a connection between the death of Dr. McCarthy and the matters with which the court is concerned. Dr. McCarthy had drafted a letter of complaint to the Medical Council on the 10th July 2000 and had that been sent the witness would have been in a much better position to deal with his complaints.

The appellant was cross-examined. She held the report until she obtained an informal second opinion. She had already made a diagnosis before obtaining the second opinion. Prior to the 8th May when the report was completed she checked again with her colleague and then released the report. The report released in her absence by Mr Delaney is not on the laboratory file. Original reports are sent to the theatre and a copy sent to the laboratory and it is not in either place. The witness's recollection is that she had signed the correct form and she did not know how this incorrect form containing the erroneous information came into existence. Both the witness and Mr Delaney believed that the correct report went out on 8th May. When she sat down with Mr Delaney at the computer it appeared that some time between the 8th May and the 31st July the erroneous report had emanated from the laboratory. She cannot say whether or not she signed this report. She did sign the correct report dated 8th May 2000. On that date Mr Delaney would automatically deliver reports, once signed, to the place and person who submitted the specimen as appearing on the Form

AF91. She received the letter of the 9th May 2000 after she had sent out the report and she is certain of this. She was hopeful that Comdt. O'Malley would deal with Dr. McCarthy particularly as the letter was copied to solicitors. Comdt. O'Malley was the surgeon and the report had gone to him. She had spoken to Comdt. O'Malley and her only contact with the patient should be through Comdt. O'Malley and she assumed having sent the report and having talked to Comdt. O'Malley a few days previously that such communication would ensue. She believed Comdt. O'Malley knew that she had taken an informal second opinion. After the promotion board on the 18th May 2000 she specifically told Lt. Col. Browne that she had released the report. She would not normally send the report to Lt. Col. Browne but only to the surgeon as per the Form AF91. The verbal instruction from Lt. Col. Browne related to the handing over of slides and not to the report. It was suggested to the witness that the written instruction from Lt. Col. Browne made it clear that no written report had been received. The witness believes that she told Lt. Col. Browne on the 17th May 2000 that the report had been provided to the person indicated on Form AF91 Comdt. O'Malley. It was not unusual to remove slides from the laboratory and send them to St. James's Hospital. The laboratory staff were aware that this was done. Because of the reference to solicitors she wanted a complete work up on the specimens so that if anything followed on through solicitors she would have available an expert. The witness believed that Dr. Laffan told Lt. Col. Browne that the slides and blocks were with St. James's Hospital and that Dr. Laffan also gave Lt. Col. Browne a report and discussed the report with Lt. Col. Browne who had no problem with it. However it was a report dated 1999 that Mr Delaney printed off for Dr. Laffan and Lt. Col. Browne. The witness denied that she prepared the report of 8th May 2000 many months later. She would not be in a position to do that as she does not type her own reports. She accepted Mr Delaney's explanation of the report bearing the date 1999. The witness did not know when these slides and blocks were returned from St. James's Hospital but they were back by the 27th July and otherwise the witness would not have written to Comdt. O'Malley as she did. The witness wrote to Comdt. O'Malley after receiving the letter of 27th July in the same terms as the letter of 2nd August 2000 and forwarded a copy of that letter to Col. Collins. The letter to Comdt. O'Malley had an additional paragraph saying -

"I attach copies of the recent report from our file"

and referring to the report of 8th May 2000. A copy of that letter is in the book of evidence produced by the respondent. The witness addressed the slides in the letter copied to Lt. Col. Browne but as she deemed appropriate addressed the matter of the report only to Comdt. O'Malley. She required Mr. Delaney to assist her with the computer. She is not an expert with computers. As soon as this was done she sent a copy of the report to Comdt. O'Malley in early August. That report should be on Comdt. O'Malley's file. If Comdt. O'Malley is correct that he did not see the report this may be related to the fact that he was about to travel to the Lebanon at short notice and was under pressure. The witness accepts Mr Delaney's evidence that he sent a further copy of the report to Comdt. O'Malley on 10th October 2000 but the witness has no recollection of a phone call from Comdt. O'Malley seeking the same. It was suggested to the witness that she prepared the report in October and backdated it to 8th May: the witness said that this would require her asking Mr Delaney to falsify the report by altering dates and she absolutely rejected the suggestion.

## **(2) Gerard Lannigan.**

The witness is a medial scientist in the Adelaide and Meath Hospitals incorporating the National Childrens' Hospital. In 2000 he was working in the Mater Private Hospital but was under contract to supply laboratory services for twelve hours each week in St. Bricin's Hospital. He dealt with specimens 81 and 82 of 2000 taken from Lt. Col. McCarthy. On the 10th or 11th April he was notified by telephone that the specimens had arrived and there was a question as to whether there was a recurrence of the previous year's condition or whether there was something more serious. He arranged for the specimen to be processed rapidly overnight and attended at the laboratory on the 12th April. The log book in relation to the samples was written up by Frank Barrington, Senior Medical Scientist in St. Bricin's. The records indicate that the sample was sent to St. James's Hospital. The entry had been tippexed out and was uncovered by the witness by scraping off the tippex. He did not know how the entry came to be tippexed out.

The witness was cross-examined. The entry had not been in Dr. O'Connor's handwriting. He had looked at the register in the lead up to the case as he knew there was an ongoing dispute about the sample. If someone had asked him about missing slides he would have immediately told them to check with St. James's Hospital as all of the pathologists had a preference to send slides there to be reviewed. Dr. Marie Cassidy and Commandant O'Connor always sent their slides to St. James's to be reviewed.

## **(3) Dr. Séan O'Briain.**

The witness is a Consultant Pathologist attached to St. James's Hospital. The appellant brought the slides to him at St. James's Hospital for his opinion. They sat in his office and looked over them and he gave her his opinion which concurred with hers. The slides were received in St. James's Hospital on the 6th June 2000. He believes that the slides were left with him and that the appellant asked him to do some additional special stains called amino stains and he would require the slides and the block for that purpose. He reported orally on the additional stains. While his laboratory entry was made on the 6th June it may well have been, as the appellant believes, that she called to St. James's Hospital on the 25th May 2000. Where stains are done in St. James's Hospital it is normal to retain the slides for some weeks in case there are any queries. It may well be, that having carried out work on the specimens, the slides were being retained. They were assigned a number and entered in the log after the work had been done, and this could be days or one or two weeks later. He considered Dr. McCarthy's letter of the 9th May 2000 a very exceptional letter. It was issued four weeks after the specimen was taken and a delay somewhat longer than that frequently occurs. In the circumstances he would not have released the slides to Dr. McCarthy. A pathologist has a duty to protect the medical record. He would however be happy to send the slides to a nominated pathologist and this is the usual way in which matters proceed. The witness did not remember at this time any mention of litigation threatened in relation to the slides. He did not know when the slides or blocks were returned to St. Bricin's Hospital.

## **(4) Lt. Col. Brian O'Keeffe.**

Lt. Col. O'Keeffe is General Secretary of the Representative Association of Commissioned Officers and held that position in 2000. He was contacted by the appellant about the dispute concerning Dr. McCarthy. He recalled the phone conversation in which she informed him that she had been ordered to produce the slides to the patient and she explained to him that to do so would be a breach of medical ethics. She was seeking advice. On the one hand she had a military order, and on the other it would be a breach of medical ethics to obey as she explained the matter to him. It was to be done on that day. She was not being disobedient but had a serious ethical issue on her mind. The telephone conversation was on the day that she received the order and she was required to comply with the order by four o'clock that evening. At the time he saw the letter dated the 9th May 2000 from Dr. McCarthy. In his view there was a confusion of roles. Dr. McCarthy was a patient and should be treated as a patient. However he wrote the letter using his military rank and it seemed to the witness that he was writing as a superior officer rather than a patient and this could be perceived as abusing his position. Accordingly he took legal advice.

## **(5) Professor E. Sweeney**

The witness is a retired Consultant Pathologist. The permissible time between receipt of a sample and the issuing of a report would be anything from ten days to four weeks. It was appropriate for the appellant to give a verbal report and it is good practice to do so. If the report was issued by the 8th May 2000 that was good practice. The appellant was absent on sick leave from the 25th May until

the 27th July and that period should not be taken into account in assessing delay. As there was a locum in place, if an issue arose, he should have contacted the appellant. The system in St. Bricin's is that numbers are not assigned to patients but to blocks. The 1999 block was 83/99 and the 2000 blocks were 81-82/00 but this was erroneously put down as 81-82/99. This was a clerical error caused by input into the computer. The diagnosis in the 2000 report is correct. It was apparent from the body of the report that the 2000 report referred to the 2000 specimen. The Faculty of Pathology guidelines were issued in 2000 in the context of the organ retention controversy. The guidelines recommend pathologist to pathologist transfer. If a second opinion is being sought again pathologists to pathologist transfer is appropriate. In this case Dr. O'Malley was a Consultant Radiologist and the witness would not have transferred the slides or blocks to him and it would be unwise to do so. The appellant was entitled to follow the advice of the Medical Protection Society and the Representative Association of Commissioned Officers and could not be criticised for so doing. Had the witness received a letter such as that of 9th May 2000 from Dr. McCarthy he would have replied saying that it was not the standard practice and that if a pathologist was nominated he would send the material to him. Dr. McCarthy's conduct represented a professional discourtesy in failing to name a pathologist. There was nothing improper or unprofessional in the appellant leaving the slides and blocks with Dr. O'Briain in St. James's Hospital as she had requested extra work to be done on the same. In his letter of 3rd July 2000 Dr. McCarthy said –

"I still require the slides at some stage as I would like to have them looked at by another pathologist. I do not see any great urgency on this but when Commandant O'Connor comes back, I would like the slides for a second opinion."

The appellant returned from leave on the 27th July and on that date Dr. McCarthy requested delivery of the slides to him. This was not good practice. It was good practice for the appellant to seek the name of a pathologist to whom the slides could be transferred. Dr. McCarthy's letter of 21st August 2000 displays a degree of ignorance with regard to what is assessed by a pathologist in that he seeks blocks whereas he should have sought slides.

In cross-examination the witness said that while the Faculty of Pathology guidelines addressed samples taken at postmortem they equally applied to samples from living patients and later guidelines dealt with living patients. The later guidelines provide that tissue may be retained by the institution. If the giving of the oral report had been delayed for two or three weeks the witness would consider that unacceptable. He agreed with Dr. Crotty that the mistaken date on the 29th April report was a bad mistake. He would not have expected the appellant to inform anyone that she had sought a second opinion as frequently a second opinion is sought to confirm one's own view and would not necessarily be advised to someone else. He accepted that if, as Dr. O'Malley had said in his letter dated 27th July, he had not by then received a report that would be unacceptable. As he understood the position Dr. O'Malley was mistaken in that he was certainly in receipt of the report with the 1999 date erroneously inserted.

The witness was re-examined. If the appellant having gone on sick leave from the 25th May to the 27th July 2000 and did not receive Lt. Col. Browne's letter of 25th May 2000 she would not be responsible for any delay which resulted.

#### **(6) Mr Brian Delaney**

The witness in April 2000 was a member of the permanent defence forces and was a clerk in the pathology laboratory in St. Bricin's Hospital. He recalled the appellant working on Dr. McCarthy's 2000 biopsy. He printed off the report which is 81/82 of the computer. Comdt. Brennan came to the laboratory while the appellant was on sick leave and Col. Laffan was locum pathologist. He printed off a report from the computer and gave it to Comdt. Brennan who in turn brought it to Col. Laffan. It was the wrong report. This was in June 2000. It is possible that some part of the 1999 report went into the 2000 report on the system. The log number is correct. The microscopic section of the report is correct. The report which he gave to Commandant Brennan had the correct lab number and microscopic section. It is dated 29th April 1999. The witness has the correct perfected version of the report dated 8th May 2000 signed by the appellant. The standard practice was that when the appellant signed off on a report the witness would deliver it to theatre or to the surgeon dealing with the patient. As Comdt. O'Malley was in theatre all his reports went to theatre. This would be done as soon as it was signed. In this case the report would have been delivered to the theatre on the 8th May 2000 by the witness. The reason there are two versions of the report bearing the 1999 date is that the witness printed one of these off the computer when requested by Comdt. Brennan. One copy of the correct report has a manuscript note at the bottom in the witness's writing. He made this writing because when Comdt. O'Malley was overseas he requested a copy and the appellant instructed him to send him a copy. Comdt. Brennan never asked him for slides or blocks. In June 2000 Col Laffan was on duty. A technician's histology book is maintained in the laboratory and this contains an entry in relation to lab nos. 81/82. The note reads "No. 2 SJH." This records that the blocks and slides had gone to St. James's Hospital. The witness could not explain how this had been obliterated. The book was available in the laboratory at the time of Comdt. Brennan's visit.

In cross-examination the witness said that at the time of Comdt. Brennan's visit Lt. Col. Browne was present as well. He was asked for a copy of the report but could not give the original because that was their only copy and had to be kept on file: this was the correct report. There was no photocopier in the laboratory at the time and it was for this reason that he printed off a copy from the computer. He believed he was printing off the May 2000 report which was on the computer. The error occurred because he would print off by reference to Lt. Col. McCarthy's army number which is unique. The first histology report would be given that number, in this case 9060. The second and subsequent reports would be denominated 9060/1, 9060/2 and so on. He believed he went to the computer, saw the army number and printed off the wrong report. The probability is that he did not check the date on the report. The 2000 report was on the computer at the time. The practice was that the appellant would check the report on the computer, print it off and sign it. He could not remember this specific report. The 2000 report had to be on the computer because the hard copy was on the file. He was quite sure of the date on which the document was prepared, the 8th May 2000 as he was the typist. As of 10th October 2000 the report had already gone to theatre but his instructions were that a copy of the report should go to the theatre and the other to the surgeon and for that reason he sent a copy to the theatre on 10th October 2000.

In answer to a question from the court the witness said that he had no dealings with the technicians' histology log book which is maintained by the technicians in the laboratory. None of the writing in that book is his.

#### **Findings on the evidence**

I propose to deal with each of the findings of fact made by the Fitness to Practice Committee and to determine if on the evidence before me the respondent has discharged the burden of proof in relation to each of the same.

1. That you failed to provide biology report either at all or within a reasonable period to Comdt. C. O'Malley, surgeon, on tissue removed from Dr. Michael McCarthy's left elbow on the 11th April 2000.

I accept the evidence of Mr Delaney. The basic format for the report, in accordance with the usual practice within the laboratory, was drafted by Mr Delaney on the computer. When available the portions headed description, microscopic and diagnosis were drafted in manuscript by the appellant and given to Mr Delaney for him to complete the report. The report was printed off on the 8th May 2000, signed by the appellant on that date and the original placed on the laboratory file. There was no photocopier available at that



time and so further copies would have to be run off on the computer. Later when Mr Delaney printed off a copy of the report at the request of Comdt. Brennan there were two reports on the computer, one dated 29th April 1999 and one dated 8th May 2000. I think it possible that Mr Delaney made an error, which error was repeated in June 2000, and printed off the report dated 29th April 1999 and that this was the report delivered to theatre for Comdt. O'Malley. As Comdt. O'Malley had already received a verbal report it would be understandable that after a cursory examination he forwarded this report to Dr. McCarthy and this is how the report dated 29th April 1999 came to be in Dr. McCarthy's possession. Thus the report was completed and prepared on time and the appellant adopting the practice within the laboratory was entitled to expect that Comdt. O'Malley would receive a copy of the same. An examination of the report dated 29th April 1999 shows that it contains errors: the date the sample was received is given as 12th April 1999 rather than 2000 and the report is dated 29th April 1999 rather than 2000. It refers to one sample only whereas there were in fact two samples designated Lab. No. 82 and 83 1999. If these errors occurred due to negligence on the part of the appellant or indeed if she were to be vicariously responsible for the error of Mr Delaney in sending out what I consider is a working draft of the report I would remark that errors occur. The Fitness to Practice Committee were in error in describing the elbow as the left elbow where it is in fact the right, and the date upon which the sample was taken as 11th April whereas in fact it was the 10th April. Dr. Crotty's report also contains errors of date which he subsequently corrected. Generally a simple mistake would not amount to misconduct. Apart from the errors which, it would appear, caused Dr. McCarthy to think the report related to the 1999 sample, the report in its substance is completely different to the 1999 report. The sample date and the report date are different. The lab.no. is different. The patient description is different. The clinical details are different. The description is different although it contains an error in referring to four fragments rather than one: however the aggregate measurements differ, the labelling recorded differs. The section headed "microscopic" is completely different as is the diagnosis. The report discloses that a second opinion was obtained from Dr. O'Briain. In the papers before me is a report from Dr. O'Briain but I am uncertain if this is indeed his report intended to be referred to. Having regard to the manner in which the papers were presented to me it would be wrong to assume that it is.

In summary then I am satisfied that the appellant did prepare a report and that that report at all material times from the 8th May 2000 was on the laboratory file. While the report furnished to Comdt. O'Malley contained errors it was in all its most relevant parts an appropriate report on the 2000 samples. I did not have the benefit of the evidence of Dr. McCarthy as to his reaction to the report. However having regard to his letter of 3rd July 2000 to Lt. Col. Browne after he received a further copy of the report dated 29th April 1999 it is quite likely that he was at that date well aware that the report related to the April 2000 samples and indeed his complaint thereafter related to slides.

This being my finding on the evidence the first of the facts found by the Fitness to Practice Committee has not been established in evidence beyond a reasonable doubt before me.

2. Failed to provide to Dr. McCarthy the relevant histology slide(s) when requested to do so on one or more occasions by Dr. McCarthy.

I am satisfied that it is best practice that slides should pass from pathologist to pathologist where a second opinion is required. Further every care should be taken to ensure the slides should be returned to the laboratory and retained there. This is the evidence of Dr. Crotty and Dr. O'Briain. It is also the view of the appellant and upon which view she acted. It was inappropriate for Dr. McCarthy to demand delivery of the slides to him. I am satisfied that Dr. McCarthy was innocent of the correct practice. It was inappropriate of him to seek to enforce his demand through the military chain of command. Since Nuremburg at least military orders must give way to ethics. In short I am satisfied that the appellant acted properly in seeking to have Dr. McCarthy nominate a pathologist to receive the slides from whom she could receive appropriate assurances as to their return. No pathologist was ever nominated. In addition the appellant was correct in seeking to ensure that proper procedures were observed within her laboratory. While it was true that the slides were not furnished to Dr. McCarthy, the conduct complained of did not amount to misconduct. The thinly veiled threat of litigation made by Dr. McCarthy made it all the more important that the slides should be preserved.

3. Failed to provide to your superiors the relevant histology slides when you were directed to do so on one or more occasions.

This finding exemplifies the confusion created by Dr. McCarthy in seeking to avail of the military chain of command to enforce his inappropriate demand for delivery to him of the histology slides. I am satisfied for the reasons set out in relation to the second finding of fact that in delaying delivery of the slides the appellant was acting in accordance with best practice in pathology and in accordance with best practice in relation to an histology laboratory. The approach which she adopted was endorsed both by Dr. Crotty and Dr. O'Briain. While each of those witnesses might ultimately have given Dr. McCarthy the slides they did not satisfy me that this would be appropriate given the threat of proceedings and the advice to the appellant of her indemnifiers and the Irish Medical Association. I am satisfied that the appellant was fully justified in refusing. The first letter of demand received from Dr. McCarthy dated 9th July 2000 contained a very thinly veiled threat of proceedings by being copied to the appellant's solicitors. In these circumstances it was all the more important for her that the slides and blocks should be carefully preserved. The problem being experienced by Dr. McCarthy was created by him and easily resolvable by him by nominating a pathologist. The appellant was justified in holding out on the basis of ethics, best pathological practice and indeed good sense before ultimately delivering the slides to Lt. Col. Browne. I am not satisfied on the evidence before me that her conduct amounted to professional misconduct.

4. Failing to ensure that the relevant slides and/or original paraffin block did not go missing from the Base Laboratory.

In short neither the slides nor blocks went missing. They had, wisely and in accordance with good practice, been sent to St. James's Hospital for a more detailed workup. In accordance with the laboratory practice, which has not been criticised in evidence before me, this was logged in the appropriate record book, the histology log book. Had any one bothered to check or indeed had they enquired of Mr Delaney or the appellant or, I am sure, with Dr. Laffan or a technician this would have been discovered. When these items were sought Dr. Laffan was in the laboratory and it seems most unlikely that he would have been aware of the technicians' histology book. Mr Delaney was aware of the book and had he been asked there can be little doubt but that he would have checked and found that the items had been sent to St. James's Hospital. On the evidence of Dr. O'Briain they were retained in St. James's Hospital for an appropriate period and for an appropriate reason and duly returned to the laboratory. The slides and the paraffin blocks on the evidence before me did not go missing.

5. Failed to show and apply the standards of clinical judgment and competence required by a person in your position.

6. Acted in a manner derogatory to the reputation of the medical profession.

Had any of the facts found by the Fitness to Practice Committee set out by them at 1 to 4 been established in evidence before me then these findings might well be justified. However as these findings of fact have not been established in evidence before me neither of these findings can be supported on the evidence.

7. Failed to act in the best interests of Dr. McCarthy.

This finding is not established by the evidence before me. The oral report was delivered with commendable promptness. A written report was duly furnished to the treating doctor within an appropriate time: it contained errors as to date but it in substance was correct. In relation to the slides and blocks they were not delivered to Dr. McCarthy for very good reason. They were available for the asking had he complied with best practice. The situation was not helped by his combative approach in his letter of 9th July 2000 and his decision to resort to the military chain of command. The tissue was in any event benign. On the evidence the report was not required by Dr. McCarthy for the purposes of obtaining a second opinion. Any delay in obtaining a second opinion was occasioned by his own conduct. In any event Dr. McCarthy saw no urgency in that he was prepared to await the return of the appellant from sick leave before pursuing his demand for the slides and blocks through military channels. The appellant's concerns for Dr. McCarthy are exemplified by obtaining on two occasions a second opinion for Dr. O'Brien on the tissue. On the evidence before me this finding of fact by the Fitness to Practice Committee has not been established.

**The attachment of conditions pursuant to section 47 of the Act and the censure pursuant to section 48 of the Act**

The conditions were attached by the Medical Council expressly on the basis of the findings of fact by and the opinion as to professional misconduct of the Fitness to Practice Committee. The facts have not been established before me. Accordingly the finding of misconduct cannot stand. The basis upon which the conditions were attached does not exist in fact. In these circumstances the conditions cannot stand. For completeness I should say that on the evidence before me there is nothing which would justify the attachment of the conditions absent a finding of professional misconduct. Likewise the censure.

**Disposition**

Having regard to the foregoing it is appropriate that the decision of the Medical Council be cancelled.