Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 118/00/58D

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

BETWEEN The Director of Proceedings designated under the Health and Disability Commissioner Act 1994

AND

IN THE MATTER of disciplinary proceedings against H a medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference at 8.00 am on Thursday 4 May 2000

PRESENT: Mrs W N Brandon - Chair

Mrs J Courtney, Dr R S J Gellatly, Mr M G Laney

Dr B J Trenwith (members)

APPEARANCES: Mr A H Waalkens, Counsel for the applicant, Dr H

Ms D A T Hollings, Counsel for the Director of Proceedings

Ms Kim Davies - Hearings Officer

(for first part of call only)

DECISION ON THE APPLICATION FOR INTERIM NAME SUPPRESSION

1.1 **PURSUANT** to sections 102 and 109 of the Medical Practitioners Act 1995, the Director of Proceedings has reason to believe that a ground exists entitling the Tribunal to exercise its powers against Dr H of xx as a result of a complaint by Mrs Teresa Proctor. The charge against Dr H is one of professional misconduct and alleges breaches of Right 5 and/or Right 6(1)(b) and/or Right 7(1) and/or Right 7(7) of the Code of Health & Disability Services Consumers' Rights.

1.2 **BY** application dated 26 April 2000, counsel for Dr H has applied for an interim order prohibiting the publication of Dr H's name or any fact identifying him, and/or the Clinics he is associated with, pending the Tribunal's determination of the charge laid against him.

1.3 **THE** hearing of the application was by telephone conference commencing at 8.00 am on Thursday 4 May 2000. In advance of the hearing submissions in support of the application were filed by Mr A H Waalkens, counsel for the applicant, and in opposition by Ms D A T Hollings, counsel for the Director of Proceedings.

2. GROUNDS OF THE APPLICATION:

2.1 **THE** grounds of the application were as follows:

2.1.1 Dr H denies the charge;

2.1.2 He has established and built up a substantial medical practice specialising in xx and his name is synonymous with that practice, which is operated from two Clinics in xx.

2.1.3 Any publicity of his name will result in a risk of substantial damage being caused to his own reputation and, separately, to that of the Clinics he is associated with.

2.1.4 Publicity may cause damage and upset to patients, both past and present.

2.1.5 Upon the further grounds set out in Dr H's affidavit filed in support of the application. Those grounds included concerns expressed regarding the impact of publicity about the charge on his family; the possibility of irreparable harm being caused to his commercial interests, and in this regard, to the commercial interests of the Clinics; the potential adverse impact of publicity on other work carried on by him and the Clinics, including not-for-profit activities; possible damage to his reputation; and the risk of distress and anxiety being caused to patients.

3. SUBMISSIONS FOR APPLICANT:

3.1 **MR** Waalkens filed written submissions in advance of the hearing. He emphasised that the application seeks interim suppression only. Mr Waalkens submitted that it is trite that although disciplinary proceedings are civil in their nature, the rules of criminal procedure are relevant and may be applied in this present context. On that basis, it is not uncommon for the criminal courts to grant name suppression to doctors, on an interim basis and pre-

hearing, where the allegations are rigorously defended and where there is no suggestion that there has been a pattern of similar offending, particularly of a serious nature.

3.2 **THERE** is no suggestion of any pattern of offending in this case. The circumstances of the complaint are confined to particular consultations and subsequent surgery.

3.3 **MR** Waalkens relied upon the case of *R v KA*, HC Auckland, T990076, 24/2/99, Smellie J, in which the Court suppressed the name of a medical practitioner on an interim basis pending the hearing of very serious criminal charges. Smellie J concluded that the presumption of innocence coupled with the damage which could be caused to the applicant's reputation, and to his family, sufficiently outweighed the interests of the public in having the identity of the doctor published.

3.4 **IT** is also relevant that in *KA* the criminal charges all arose in the context of the doctor's professional practice. In *KA***,** the Court referred to *M v Police* [1991] 8 CRNZ 14, also a case involving criminal charges brought against a medical practitioner and in which name suppression was granted. In this case Fisher J stated that:

"When these competing considerations [freedom of speech, open judicial proceedings, fair reporting] *have all been identified in any given case they must be weighed against each other. It seems to me that at this point one must recognise a crucial difference between the approach which is appropriate where the defendant is merely charged with an offence and the approach where he or she has been convicted. Publication of name is frequently a major and appropriate element of an offender's punishment once it is established that he or she is guilty. But punitive considerations are obviously irrelevant before conviction. At this stage the defendant is entitled to the presumption of innocence. Yet the stigma associated with the serious allegation will rarely be erased by a subsequent acquittal. Consequently when a Court allows publicity which will have serious adverse consequences for an unconvicted defendant, it must do so in the knowledge that it is penalising a potentially innocent person. That is far from saying that suppression should always be granted before guilt is established. But in my view the presumption of innocence and the risk of*

substantial harm to an innocent person should always be expressly articulated in these cases to avoid the danger that they will be overlooked."

3.5 **AS** to suppression of the identity of the doctor's employer (or third party), Mr Waalkens noted the approach taken in *KA* that the Clinic's (in that case) position was "*of course stronger than that of the accused. Innocence is not just a rebuttable presumption but for all practical purposes an established position*." Mr Waalkens suggested that, considering the work undertaken by the Clinics for the benefit of the community generally, there was a greater risk of harm to the public interest from publication, than from non-publication of Dr H's name at this stage.

3.6 **BECAUSE** the application is for interim suppression only there can be no real disadvantage to the "public interest" prior to the hearing and determination of the charge.

3.7 **THE** news media will not be prevented from reporting the circumstances of the case and the evidence - only the name or identity of the doctor involved.

3.8 **IT** matters not that the complainant has no wish to have her name suppressed.

3.9 **IN** oral submissions, Mr Waalkens referred to the reference to the case of *S v Wellington District Law Society* (AP 319/95 High Court, Wellington 11 October 1996, Tompkins J, a case on appeal from the Law Practitioners Disciplinary Tribunal referred to in the Memorandum filed by Ms Hollings in opposition to the application. Mr Waalkens submitted that the Tribunal should bear in mind that that case involved a consideration of

the issues 'post-conviction', whereas only interim pre-hearing name suppression was sought by the present applicant.

3.10 **IN** relation to the application to prohibit publication of the name of the Clinics, Mr Waalkens suggested that the case for the granting of that part of the application was even stronger than existed in the *KA* case, and that any prejudice that might be caused to other third parties by way of causing suspicion to fall on all members of the same specialist class as Dr H if his name was suppressed, could be dealt with by ordering non-publication of his professional status.

4. SUBMISSIONS FOR THE DIRECTOR OF PROCEEDINGS:

4.1 **MS** Hollings also provided very helpful written submissions in advance of the telephone conference. In oral submissions, Ms Hollings emphasised the general trend against ordering name suppression, on the part of the Courts. Although the *Liddell* case (*R v Liddell* [1995] 1 NZLR 538) was a post-conviction case, in that case the Court of Appeal referred to the 'starting point' for the consideration of such applications as being "*… the importance of freedom of speech, open judicial proceedings and the right of the media to report the latter fairly and accurately as "surrogates" of the public"*.

4.2 **THIS**, said Ms Hollings, reflected the trend by the Courts in favour of openness, and of granting applications for name suppression 'far less often'. Section 106 of the Act reflects that trend by stating that "*except as provided for …*" hearings of the Tribunal shall be in public. The intent of s.106 is that hearings shall be heard in public and the publication of names would normally occur.

4.3 **THERE** is nothing sufficiently compelling to distinguish Dr H's case from many others in which respondent practitioners "*have had to endure publication of their name prior to the Tribunal's decision being arrived at*". Ms Hollings submitted that if the Tribunal were to grant this application it would find it difficult to resist future applications for interim name suppression pending determination of the charge, and that was not consistent with the intent of the Act.

4.4 **THERE** is nothing exceptional about the circumstances disclosed on behalf of Dr H. Dr H's commercial interests are no different from other practitioners. It is increasingly the case that doctors have commercial interests to protect, and most practise under their own name. In Dr H's case, he practises under the name of his clinics, and consumers would not necessarily connect him with the clinics. The Tribunal should not put too much emphasis on that aspect.

4.5 **MS** Hollings referred to previous decisions of the Tribunal in *F*, 58/98/33C, 1/12/98, and *Stubbs*, 110/99/54C, 11/2/00.

5. DECISION:

5.1 **HAVING** considered all of the matters raised in both of the oral and written submissions by both Counsel at length, the Tribunal is satisfied that, in the circumstances of this case, it is satisfied that it is desirable to grant the application sought and an order for interim suppression of Dr H's name and any details which might identify him will be made.

6. REASONS FOR DECISION:

6.1 **THE** submissions made by both Counsel were cogent and persuasive and the issues are very finely balanced. The Tribunal agrees that it is fair to say that the grounds advanced in support of this application do not appear to raise issues which are not present in all such proceedings. However, as has been said on many previous occasions, every application requiring the exercise of a discretion on the part of the Tribunal is considered on its own merits.

6.2 **IN** balancing the competing interests of the complainant, the practitioner and the public interest generally, the Tribunal must take into account all relevant factors. Equally, by virtue of Clause 5 of the First Schedule, the Tribunal must observe the principles of natural justice; it must not take into account any irrelevant considerations.

6.3 **IT** is not persuaded that the possibility that if this application is granted it will be difficult for the Tribunal to resist such applications in the future, is a relevant consideration. It appears to this Tribunal that it is unfair to require applicants to bear the burden of precedent, especially in the context of the exercise of a discretion on the part of the Tribunal, which, by definition, requires that the Tribunal consider every such application afresh, and on it's own merits.

6.4 **THIS** approach is in accordance with the decision of the District Court in *E v MPDT*, AP2154/97, 20/5/97, the very first decision on appeal from a decision of the Tribunal made on an application brought under s.106 of the Act. In that decision the District Court

noted that the consideration of the competing issues at the pre-hearing stage would be different from that undertaken once the determination of the charge is made:

"Plainly enough, different considerations will arise as regards publication of an outcome as compared with, as here, access to the hearing of a charge. There may often be more powerful reasons for a decision to publish a determination reached than for a refusal of a private hearing. Although, of course, and within proper confines, each case will require consideration on its particular merits or the lack of them. All I am really getting at here is that when a practitioner of any kind has been found guilty of mis-conduct the questions of public and professional interest then do loom particularly large." (at p.7)

6.5 **THERE** was no apparent warrant for not accepting the injunction of the Full Court in *S* that,

"The exercise of the discretion should not be fettered by laying down any code or criteria other than the general approach directed by s111(2). Thus we do not agree with the approach of the Tribunal that the matters put forward by the Practitioner must "justify the exceptional step" of prohibiting publication of the report."

6.6 **WHEN** considering applications made under s.106, the correct approach was simply to abide and apply the statutory language; it requires no reconstruction or additional criteria: "*Thus it simply becomes a question, always allowing of course for the presumption, of whether, after regard has been had to the mentioned interests, the Tribunal is or is not satisfied that it is desirable that [the application be allowed]."*

6.7 **THUS** it is necessary only for the Tribunal to balance the competing interests which are relevant to the case at hand. The relevant public interest generally comprising the principles referred to by the Court of Appeal in *Liddell* as the 'starting point', i.e. the principle of open justice, the importance of freedom of speech and the media's right to report court proceedings fairly of interest to the public; the public's expectation of the

accountability and transparency of the disciplinary process, the public interest in the integrity of the profession's self-regulation; and the interests of any other person.

6.8 **ALLIED** to these general factors is the overriding purpose of the professional disciplinary process, to protect the public and to ensure public safety. Against these, the Tribunal must balance the more specific factors relevant to the particular circumstances of the application; the practitioner, his family and related interests (including the interests of his or her patients and commercial interests); the complainant, and the profession, it's Colleges and institutions.

6.9 **IN** undertaking this balancing exercise, the discretion of the Tribunal must not be fettered in any way. On that basis, the Tribunal has carefully considered what would be the effect of publication, or non-publication, in the present circumstances. In particular, is there likely to be any risk to public safety, or any undue restriction on the fair reporting of this case in the public interest if the application is granted?

6.10 **THE** Tribunal accepts that there is a not only a trend towards openness evident on the part of the Courts of New Zealand, but that s.106 of the Act, and indeed the tenor of the Act generally, demonstrates a clear intention on the part of the legislators that the regulation of the profession, and in particular, the professional disciplinary process, should be open to public scrutiny and be functionally transparent. As has been said in other cases involving such applications, there is a public interest in maintaining public confidence in the integrity of the professional disciplinary process. The days of closed ranks and private hearings as

a matter of course are over, and permitting the fair reporting of disciplinary hearings is a crucial component in ensuring that the public is kept properly informed and advised.

6.11 **HOWEVER,** s.106 of the Act also permits practitioners, and any other person, to seek restrictions on the publication of certain information relating to the hearing of charges, and every such applicant is entitled to expect that their application will be dealt with on its own merits. Inevitably, every application has its own combination of facts and circumstances requiring due consideration by the Tribunal.

6.12 **IN** deciding to grant the application, the Tribunal considers that it is not unduly restricting fair reporting of the charge or the circumstances in which it arises. The application seeks only interim orders to the determination of the charge. In the event name suppression is sought past that point in time, or any more extensive restriction on publication is sought, then a further application would need to be made and the matter considered again. In contrast, if publication was permitted, Dr H's opportunity to renew the application if his concerns were realised would, for all practical purposes, be lost.

6.13 **THE** Tribunal accepts that suppression orders are "*never to be imposed lightly*", and it has consistently followed that approach. A central issue for the Tribunal in balancing all of the relevant factors already referred to was to consider what aspect or public interest, or general principle, would be served if Dr H's name was to be disclosed in the period prior to the determination of the charge.

6.14 **IN** this regard, the Tribunal notes that the events at issue in the charge occurred in October 1997, some 2 ½ years ago. There is no suggestion that the public has been at risk in any way, or the wider public interest unduly restricted, as a result of the non-disclosure of Dr H's name during that time, and, given the very narrow ambit of the allegations, there does not seem to be any reason why the public should now be at risk in any way if publication of Dr H's name was postponed for another 2 or 3 months.

6.15 **NEITHER** does it appear to the Tribunal that the various public interest principles such as the principle of open justice, the importance of freedom of speech, and the media's right to report court proceedings fairly of interest to the public or any other person, would be unduly compromised by prohibiting publication of Dr H's name until the charge is determined.

6.16 **ACCORDINGLY,** when weighed against Dr H's interests, it is by no means certain that any good 'public interest' purpose would be served if publication were ordered. Nor would the dissemination of any information fairly of public interest be unduly restricted if non-publication is ordered.

6.17 **CONVERSELY**, it cannot be said with any degree of certainty that the interests of Dr H, his family, the Clinics he is associated with, the other undertakings and community work he is involved in, and/or his patients, will not be detrimentally affected if his name is disclosed in connection with disciplinary charges.

6.18 **IN** undertaking that balancing exercise in the present context, the Tribunal has also taken into account the following:

6.18.1 The circumstances of the complaint are confined to a single episode of care and there is nothing to suggest that any other member of the public is at risk in a similar way - *A v Medical Council of New Zealand & Anor,* HC Auckland, HC163/98, 15/6/99.

6.18.2 This present application differs from those under consideration in both of the decisions referred to by Ms Hollings. In the *Stubbs* case, no affidavit in support of the application was filed and the Tribunal apparently did not consider that the bare grounds disclosed in the application were sufficient to justify name suppression in that case. In *F*, the applicant was seeking much more extensive orders including a private hearing and non-publication of any account or report of the hearing.

6.18.3 As has occurred on other occasions, the Tribunal is also satisfied that it is appropriate for it to take into account the possibility that reporting the names of third parties, in this case of Dr H's Clinics, may adversely affect their reputation in circumstances in which they have no involvement or relevance.

6.18.4 For the same reasons, any reporting of Dr H's status should be limited to describing him either as a medical practitioner, or a surgeon.

6.18.5 The charge is a single charge in the middle of the hierarchy of charges contained in Section 109 of the Act;

6.18.6 The orders made are interim only and will not prevent either the events giving rise to the charge or Dr H's name ultimately being disclosed.

6.19 **THE** Tribunal reiterates that it has taken all of the submissions made to it into account, not only those expressly referred to in paragraph 6.18 herein, and, on balance, it is satisfied that it is desirable that the application be granted.

6.20 **THE** Tribunal's decision is unanimous.

7. ORDERS:

7.1 **THE** application is granted and the Tribunal orders as follows:

7.1.1 **THAT** the publication of the practitioner respondent's name or of any fact identifying him, including the names of:

(i) xx Clinic; and

(ii) xx

is prohibited until the determination of the charge laid against him by the Director of Proceedings, or until further order of the Tribunal.

DATED at Auckland this 11th day of May 2000

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W N Brandon

CHAIR