MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 128/00/61C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **BERIS FORD** Medical Practitioner of Whangarei

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference at 7.30 pm on Monday 21 August 2000

PRESENT: Mrs W N Brandon- Chair

Mrs J Courtney, Dr J C Cullen, Mr R W Jones, Dr U Manu (members)

APPEARANCES: Ms K P McDonald QC for Complaints Assessment Committee

Mr A J Knowsley for respondent

Ms K Davies - Secretary

(for first part of call only)

DECISION ON THE APPLICATION TO LIFT OR VARY NAME SUPPRESSION ORDERS

1.0 THE APPLICATION:

1.1 **BY** Order dated 8 August 2000, the Tribunal granted an application prohibiting the publication of Dr Ford's name or any particulars of his affairs until further order of the Tribunal. Ms McDonald QC, counsel for the CAC, seeks that those orders be varied or set aside on the basis that there is now available sufficient information demonstrating that there is a strong public interest that justifies lifting the present orders.

2.0 BACKGROUND TO THE ORDERS SOUGHT TO BE VARIED OR LIFTED:

2.1 **IN** making the original orders, the Tribunal referred to an indication made to it by Ms K McDonald that there was a *"strong likelihood"* that similar fact evidence would be presented at the hearing of the charge laid against Dr Ford by the CAC. At the time of hearing the application, no factual or evidential basis or background information was provided to the Tribunal in this regard, and the Tribunal therefore made its decision *"on the basis of the evidence and information provided to date"*.

2.2 **THE** Tribunal also advised the parties in its Decision that if the situation as it existed at the time of the hearing was to change, then it would urgently consider any material presented to it, and re-visit the orders made by it up until that time.

3. THE LEGAL AND FACTUAL BACKGROUND:

3.1 **THE** reasons for the Tribunal taking that approach were several and are set out in the Decision. In considering and determining such applications the Tribunal is required to exercise its discretionary powers to make any such orders strictly in accordance with the requirements of its governing statute, and most relevantly, with the requirements of section 106 of the Act.

3.2 **THAT** section provides:

*"**106. Hearings of the Tribunal to be in public** -*

(1) Except as provided in this section and in section 107 of this Act, every hearing of the Tribunal is to be held in public.

(2) Where the Tribunal is satisfied that it is desirable to do so, after having regard to the interests of any person including (without limitation) the privacy of the complainant … and to the public interest, it may make any 1 or more of the following orders …".

3.3 **ACCORDINGLY,** the Tribunal is required to exercise its discretion by having regard to the interests of "*any person*" (in practice the practitioner and any other affected person), the complainant's interests, and the public interest generally. It is a matter of balancing those competing interests as fairly as possible taking into account all relevant facts and circumstances.

3.4 **THE** test contained in section 106(2) in this present context is whether or not it is *"desirable"* to grant the order sought, having regard to all of the competing interests including the public interest and the legitimate privacy interests of the practitioner applicant.

3.5 **IN** undertaking that balancing exercise in the context of the application before it on 31 July 2000, the Tribunal was satisfied that, on balance, *"in the present circumstances, the potential consequences for Dr Ford and his family if his name was prematurely disclosed outweigh the public interest in knowing his identity at this time."*

3.6 **THOSE** circumstances and the reasons for the Tribunal's decision have been set out in its Decision dated 8 August 2000, and this Decision should be read in conjunction with the original decision. Prior to the hearing of the application for name suppression, the Tribunal was provided with an affidavit from Dr Ford, and a very brief medical report in the following terms: *"[Dr Ford] has a long history of depression and hypertension, which has been controlled by medication. His current stress situation caused through patient allegations has aggravated his hypertension and depression. To avoid any deterioration of his medical condition I highly advise that you file for further name suppression with the Medical Council."*

3.7 **IN** his affidavit, Dr Ford denied the allegations which are the subject matter of the charge stating that *"These accusations are totally without foundation and came as a terrible shock to me and my family."* He deposed to his suffering from depression for several years stating that *"at one point I became suicidal"*. He expressed *"very serious fears that my past suicidal thoughts might return if I am shunned by the community as a result of these accusations becoming publicly known. The weight of such in a small community like Whangarei is very large and would be impossible for me to survive. I believe that that would be a cruel and unjust burden to have to endure which could not be balanced out by any later findings by the Tribunal."*

3.8 **THE** Tribunal took all of this into account, together with counsels' submissions, in the context of the charge of disgraceful conduct alleging misconduct involving issues of a sexual nature from a single complainant, and in relation to events alleged to have occurred between 1989 and 1992, with no evidence of any other complaints or misconduct of any description on the part of Dr Ford.

3.9 **PRIOR** to making the order for name suppression, the Tribunal had made orders imposing conditions on Dr Ford's practice. Pursuant to those orders, Dr Ford is required to advise patients that they are entitled to have a chaperone present during all consultations; to provide a chaperone if requested; to place a notice in his consulting rooms to that effect; and to verbally offer a chaperone to all female patients who are to undergo any examination of an intimate nature (unless the patient is already chaperoned).

3.10 **THESE** latter orders were sought by the CAC. In response to the CAC's application, counsel for Dr Ford submitted that Dr Ford did not accept that there was any requirement for a chaperone, however if the Tribunal was minded to impose such an order, then it should be limited to requiring him to offer a chaperone when examining patients, and a draft notice to this effect was suggested.

3.11 **THE** Tribunal therefore proceeded to consider the application for name suppression against this background, and bearing in mind that the issue of public safety is a paramount consideration for the Tribunal. In the circumstances, given the seriousness of the potential consequences for Dr Ford if his identity was prematurely disclosed, the Tribunal decided that, on balance, it was satisfied that it was desirable to grant the application.

3.12 **HOWEVER**, the Tribunal did have some residual concerns; namely, the seriousness and nature of the charge; the indication of the *"strong likelihood"* of the availability of similar fact evidence at the hearing; the very cursory medical evidence supplied on behalf of Dr Ford; and the strength of the submissions made on behalf of the CAC regarding the possibility that reporting of the charge in the media, and the identification of Dr Ford, might lead to other complaints, or persuade potential witnesses to come forward.

3.13 **IN** this latter regard, Ms McDonald relied upon a decision of the High Court *"A Defendant" v Police*, (unreported) AP 44/97, 4/3/97. That decision involved an appeal from a decision not to grant a defendant name suppression. The relevant statutory provision in that case, section 140 of the Criminal Justice Act 1985, similarly provides in favour of publication of the name of an accused person unless a Judge is persuaded to exercise the discretion granted under the section to suppress the name and particulars of the accused.

3.14 **IN** the District Court the application for name suppression was declined. The appeal was dismissed, but the issue was determined on a different basis by Doogue J. The facts are not important in the present context, save that the application was made for name suppression prior to the hearing of charges against a District Court Judge; two facts which are relevant in the present context because of the timing of the application (pre-hearing), and to the extent that both the applicant in that case and Dr Ford are professional persons whom the community holds in high regard and accord a certain status and in whom a significant degree of trust reposes.

3.15 **IN** that decision, His Honour refers to the Court of Appeal decisions in *P v R* (CA260/96, 2/8/96) and *R v Liddell* [1995] 1 NZLR 638. In particular, Doogue J referred to the Court of Appeal's statement of principle in *Liddell* that:

"it would be inappropriate for this Court to lay down any fettering code. What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness. Name restrictions as to victims of sexual crimes are automatic (subject to the possibility in a range of cases of orders to the contrary), and they are permissible for accused or convicted persons. But they are never to be imposed lightly. …

In considering whether the powers given by s.140 should be exercised, the starting point must always be the importance in a democracy 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'. These principles have been stressed by this Court in a line of cases … The basic value of freedom to receive and impart information has been re-emphasised by s.14 of the New Zealand Bill of Rights Act 1990."

3.16 **REFERRING** to cases in which High Court Judges had taken the view that the principles to be applied in the application of the discretion under s.140 of the Act were different prior to conviction rather than after conviction, the Court of Appeal made it plain in *R v Russell* (CA133/96, 16/5/96), the precursor to *P v R*, that this was not the case and that the principles in *Liddell* were to be applied in respect of applications made prior to conviction as well as any such applications made post-conviction.

3.17 **THE** presumption of innocence is but one factor to be taken into account when considering or pre-hearing applications:

"We have no doubt that the principles in R v Liddell referred to above apply to the question of name suppression both before and after trial and that those principles remain the starting point in considering any application for name suppression. The key difference is that, whereas the presumption of innocence is not relevant following conviction, it is undoubtedly a factor which must be taken into account when the question arises before trial. What weight the presumption of innocence is then to be given will depend on the particular circumstances of the case. But it becomes a significant factor to be weighed in the balance against the principles which favour open reporting." (5)

3.18 **AT** the hearing of the application, Mr Knowsley submitted that the Tribunal should be cautious about applying cases from the criminal jurisdiction in the context of disciplinary proceedings, and the nature of his objection, and the Tribunal's decision on that point, are set out in the original decision. However, the Tribunal is satisfied that these cases are relevant, and the Tribunal is bound to apply the relevant legal principles as formulated by the Court of Appeal.

3.19 **IN** the disciplinary context, the public interest has been defined in terms of the general principles in favour of openness; freedom of speech and the media's right to report proceedings fairly of interest to the public, and in terms of the nature of the public interest in professional disciplinary proceedings. It has been identified variously in previous cases as residing in the public's expectation of the accountability and transparency of the disciplinary process; the maintenance of the public confidence in the integrity of the disciplinary process; public confidence in the medical profession generally, and in the reputation of the profession, and the public interest embodied in the legislation itself: *W v CAC* MA 122-98, 9/7/98 (DC); *ZX v MPDT* [1997] DCR 638; and *P v MPDT*, AP 2490/97, 18/6/97 (DC)..

3.20 **HOWEVER**, it is perhaps the Court of Appeal's reference to the so-called 'flushing out' principle referred to in *P* that is most relevant in the present context:

> *"… we have indicated our approval of the learned Judge's approach and reasoning in respect of the question whether public identification of Mr P could lead to the discovery of additional offending when we quoted from his judgment at some length above. The point is undoubtedly an important one favouring publication …*
>
> *We therefore consider that the prospect other persons might come forward as complainants with additional allegations of sexual abuse is a most important factor in refusing suppression prior to trial in respect of an accused person charged with offending of this kind."*

3.21 **THE** Judge in court below had said on this point:

"Without in any way commenting on the strength or weakness of the Crown case, one cannot overlook the possibility that if the accused is identified then other potential complainants might be encouraged to come forward. Obviously that is an extra burden upon a potentially innocent man but experience in cases of this kind suggest that it is a far from inconsiderable point. … Public identification of the accused could attract a wholly different source of potential complainants. This is better done pre-trial rather than post-trial having regard to potentially admissible similar fact evidence."

3.22 **THE** possibility that other complainants (or potential witnesses) might come forward as a result of publication of the practitioner's name was a factor in favour of publication in the *Fahey* case (Decision 105/99/55C) in which the Tribunal expressed the view that *"in the professional disciplinary context it is clearly in the public interest that any patients or former patients who feel that they also have grounds for complaint are encouraged to come forward either to corroborate or support other complainants. The Tribunal considers that this is a legitimate public interest ground warranting publication."* The High Court subsequently did not disturb the Tribunal's decision not to grant name suppression in that case.

3.23 **IN** *MacDonald & Anor v CAC,* MA 106/99 (DC), interim name suppression was granted in circumstances where the Court was satisfied that *"this is not a case where there is a possibility of any pattern of conduct raising a question of the influence of pre-hearing publicity on other persons who may legitimately have information to contribute. It is an isolated occurrence and, while it concerns an important issue of informed consent [there being no issues of a sexual nature] there is nothing alleged in relation to the general conduct of the practitioner that exposes the possibility of other instances of misconduct that should be addressed."*

3.24 **THE** Tribunal is satisfied that there is clear authority which is relevant and applicable in the circumstances of this present case, and that continued suppression of Dr Ford's identity cannot be justified.

4.0 THE TRIBUNAL'S DECISION:

4.1 **ACORDINGLY,** the Tribunal has decided that the application to lift the name suppression orders should be granted and the orders prohibiting publication of Dr Ford's name or any particulars of his affairs, are set aside.

5.0 REASONS:

5.1 **IN** support of the application Ms McDonald has provided a Memorandum of Counsel and an affidavit from the Chair of the CAC, Dr Lynn McBain. In her Memorandum, Ms McDonald outlines the difficulties she has experienced obtaining information necessary to prepare her case as a result of the orders made, and the considerable amount of information she has been able to assemble relevant to her earlier indication that she will be seeking to admit similar fact evidence at the hearing of the charge.

5.2 **THERE** has also been correspondence passing between Ms McDonald and Mr Knowsley regarding Ms McDonald's application to vary or lift the suppression orders, and copies of this correspondence have been provided to the Tribunal. It was apparently originally Ms McDonald's intention to seek a variation to the orders only to enable the Medical Council, the Police, various social agencies, and other persons (presumably to be named) to provided relevant information held by them to Ms McDonald, but she came to the view that any variation of the orders made would be impractical and unworkable, and she advised Mr Knowsley accordingly earlier on the day of the hearing of the application.

5.3 **FOR** Dr Ford, Mr Knowsley takes the view that no variation is needed. He considers that the present orders do not stop the prosecutor (Ms McDonald) or anyone else approaching any persons who have expressed a complaint and ascertaining the details of that complaint; persons or social agencies that have information relevant to the complaint can provide it without breaching the suppression order. Alternatively, persons holding such information can contact the individuals concerned, ask them if they want to speak to Ms McDonald and provide her contact details if they do, or simply obtain their consent to provide information to the CAC.

5.4 **AS** noted above, Ms McDonald is now of the view that a variation to the order would be artificial and too difficult in practice. She is not aware of all of the possible sources of information, and in any event, she does not see how any of the Medical Council or any other agency having information could obtain the consent of any person to release information or to contact her without their telling that person or agency the reason why such release or contact is being sought.

5.5 **THE** Tribunal agrees with that submission. It considers that there are only two options; either the original orders are confirmed, or they are lifted.

5.6 **MR** Knowsley objected to that course at the hearing of the application, principally on the basis that he had not prepared to argue an application to lift the name suppression orders. If he had known that such an application was being sought, he said, he would have taken instructions and certainly would have obtained more complete and updated medical evidence regarding Dr Ford's depressive illness and current condition. He asked that his

formal objection to the Tribunal considering such an application be recorded, and the Tribunal accordingly does so.

5.7 **THE** Tribunal proceeded to consider the CAC's application notwithstanding Mr Knowsley's objection and decided that the order lifting the suppression orders should be made. It was the Tribunal's view that the correspondence passing between him and Ms McDonald over the three weeks since the orders were made clearly explained to Mr Knowsley the nature and extent of the practical effects of the name suppression orders. It was clear that, if the Tribunal was to consider any application to vary the orders, then lifting the orders altogether was an option that the Tribunal would have to consider. In any event, it is the Tribunal's view that it can fairly be assumed that all of the evidence which was relevant and necessary to support the application for name suppression had been presented to the Tribunal in the first place, or, if it was not, it should have been.

5.8 **AT** the hearing of the application for name suppression, Mr Knowsley conceded that the medical certificate that was provided in support of the application was "*ambiguous*", and it did not make any reference to any suicidal ideation on the part of Dr Ford, either presently or in the past. In making the orders the Tribunal made it clear that if it was presented with any information, or circumstances changed, it would re-visit all of the orders made. Mr Knowsley was apparently advised around mid-day on the day of the application (scheduled for 7.30pm) that the application would include a request that the name suppression orders be lifted. The Tribunal considers therefore that its preparedness to consider a request to lift the orders was always a possibility given the terms of its original order, provided to the parties on or about 9 August, and it could not fairly and reasonably be said to have taken him by surprise, or to constitute an ambush.

5.9 **THE** Tribunal also records that when copies of the Memorandum and Affidavit were provided to him, Mr Knowsley immediately contacted the Tribunal's secretariat and requested that these documents not be provided to the Tribunal hearing the application on the grounds that the information contained in them was prejudicial. This request (but not the documents) was passed on to the Chair of the Tribunal who declined to withhold the documents from the Tribunal and the material was circulated to the members prior to the telephone conference.

5.10 **MR** Knowsley has also asked that the Tribunal that hears the charge should be differently constituted to that which dealt with this present application, and who have now seen the information provided by the CAC. In fact, at least one of the members who has sat on the Tribunal dealing with this application has not been appointed to hear the charge, and the Tribunal does not consider that such a precaution is either necessary or desirable.

5.11 **THE** Tribunal sits as a five member panel comprising a legally trained Chairperson, a consumer representative or lay member, and three medical practitioners. The Tribunal makes its decision after hearing all of the evidence, and on a consensus basis. The Tribunal considers that any potential for prejudice is very limited by the nature and the composition of the Tribunal; its collective and consensus decision-making process; the collective and individual experience of the members, and its procedures.

5.12 **ALSO,** in the normal course of events, prior to the hearing of a charge the Tribunal members appointed to hear the charge receive a copy of the Tribunal's file, all documents, and written statements of evidence exchanged between the parties, and other relevant information.

5.13 **FURTHER**, the Act provides that, subject to the requirement to observe the principles of natural justice, the Tribunal may regulate its own procedure, and may receive any evidence whether or not it would be admissible in a court of law. It also has extensive powers of investigation.

5.14 **IT** must clearly have been intended by Parliament in enacting such provisions that the Tribunal should be able to receive, obtain and consider all and any information, documentary material and/or evidence that might be relevant to its considerations and deliberations on the matters presented to it.

5.15 **THE** information provided by the CAC is clearly relevant, and the Tribunal does not consider that it is information that is any more likely to be prejudicial to Dr Ford than that provided to the Tribunal in the context of all charges, especially those involving allegations of misconduct of a sexual nature. In any event, the information provided appears to be largely in the public domain, but currently inaccessible because of the orders made by the Tribunal.

5.16 **HAVING** come to the view that it is not necessary to appoint a freshly constituted Tribunal for the hearing, the Tribunal has decided that, as an additional assurance to Dr Ford should any be needed, it will appoint a legal assessor to provide independent legal advice to the Tribunal at the hearing.

5.17 **THE** affidavit from Dr McBain detailed the nature of the information which is now, or may become, available to the CAC. It is likely that that information, and any other complaints

which might be provided, will be sought to be presented at the hearing either by way of similar fact evidence, or as further complaints or charges. That evidence includes evidence of previous complaints of inappropriate behaviour of a sexual nature by Dr Ford by female patients; [**deleted by order of the Tribunal**]; allegations of complaints by other women patients to another Whangarei GP; and similar allegations of sexual impropriety against Dr Ford being made to the Police.

5.18 **WHEN** considering this application, the Tribunal took the approach that it should put the evidence of [**deleted by order of the Tribunal**], and the complaints made to the Medical Council's Preliminary Proceedings Committee approximately four years ago which did not proceed any further, to one side on the basis that those complaints were, in effect, spent. To consider that information now as a basis for not granting name suppression would be akin to 'double jeopardy' for Dr Ford.

5.19 **HOWEVER**, it does seem to be the case that there is a substantial amount of other information and allegations which have not been 'tested'; and there is of course the possibility that other complainants, and potential witnesses, will come forward if they learn of this present complaint and disciplinary proceedings.

5.20 **IN** considering the health and safety of the public generally, in the context of the paramount purpose of the Act and thus this Tribunal, it considers that it should not overlook the possibility that there may be some women who are patients or former patients who have been unwilling to report any untoward or inappropriate conduct by a practitioner because they might be reluctant to become involved in criminal proceedings, or they may have maintained their silence because they believed it to be an isolated incident or they were

embarrassed to report such an incident, or for any number of reasons. Such women may only feel safe about coming forward if they become aware of others who have similar complaints, or an inquiry by his professional body.

5.21 **AS** Dr McBain has stated in her affidavit, *"It is also important that [women in the Whangarei area] have the confidence to be able to come forward if there are indeed matters of impropriety affecting them."*

5.22 **A** final matter which has been raised in Dr McBain's affidavit is a newspaper article which reports the allegations made against Dr Ford, without of course identifying him. The nature of this report, which includes details of the allegations, must inevitably cause some alarm for women in the Whangarei area, and cause suspicion to fall on all *"Northland"* GPs.

5.23 **TAKING** into account all of these factors, the Tribunal has reconsidered the submissions made to it in the context of the original application for name suppression and it is persuaded that the balance of the respective interests which the Tribunal is required by s.106 to take into account has shifted since it considered that application. On that basis, it is satisfied that it is now desirable that the name suppression orders be lifted.

5.24 **IN** making the order to set aside the name suppression orders previously made the Tribunal wishes to make it clear that it has not treated lightly or ignored the possibility that its decision may place Dr Ford at risk of self-harm. It regards such a risk very seriously, it would simply be irresponsible of it to do otherwise. However, that such a risk might exist is known, and Dr Ford is continuing to receive appropriate professional care and support, including medication.

5.25 **HOWEVER**, as past experience in cases of this sort has demonstrated, maintaining secrecy about such allegations and charges is not in the public interest, and it is potentially extremely damaging for the practitioner, his colleagues, and the medical profession generally. The Tribunal considers that these are relevant concerns for it to take into account in circumstances where the allegations all arise in the context of the practitioner's professional practice.

5.26 **AS** the Tribunal has stated on similar occasions, Parliament clearly intended that proceedings of the Tribunal should be conducted in the public domain. The Tribunal considers that it is even more important that the "*healthy winds of publicity should blow through the workings of the Court*" (*M v Police*, (1991) 8 CRNZ 14, per Fisher J) in a case such as this involving as it does the most serious issues that can arise in the context of the doctor-patient relationship.

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

6.0 **ORDERS:**

6.1 **THE** Tribunal makes the following orders:

6.1.1 That the order prohibiting the publication of Dr Ford's name or any particulars of his affairs is set aside;

6.1.2 That this order is not to take effect for 3 days from the date of receipt of this written Decision by Dr Ford's counsel or other legal adviser to allow time for him to receive advice regarding his rights to appeal this Decision.

6.2 **THE** Tribunal records that its Decision was advised to the parties in writing by facsimile on 22 August 2000 with these reasons to follow.

DATED at Auckland this 28th day of August 2000.

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W N Brandon

CHAIR