MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 166/01/78C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against A medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Friday 27 July 2001

PRESENT: Mr G D Pearson - Chair

Ms S Cole, Dr R S J Gellatly, Dr J M McKenzie, Dr B J Trenwith (members)

APPEARANCES: Ms K P McDonald QC for Complaints Assessment Committee

Mr H Waalkens for respondent

Ms G J Fraser - Secretary

(for first part of call only)

DECISION ON APPLICATIONS FOR NAME SUPPRESSION AND THAT THE COMPLAINANT'S EVIDENCE BE GIVEN IN PRIVATE

1. There are two applications, the first by the practitioner for interim name suppression, pending the hearing and decision of the Tribunal in respect of the charges in issue.

2. The second application is by the Complaints Assessment Committee which has applied for orders suppressing the name of the Complainant, and an order that she be permitted to give her evidence in private.

THE PRACTITIONER'S APPLICATION

Grounds for applications and opposition

3. The Practitioner's application was made on the grounds that:

- The charge is denied,
- The alleged offending is at the higher end of the scale of offending,
- Publicity would cause a detrimental effect and damage out of keeping with the offending alleged, and
- Publication would have an unreasonable and detrimental effect upon others including his family and patients.

4. An affidavit of the Practitioner submitted with the application, a judgment in earlier proceedings before the High Court concerning the same subject matter, and Mr Waalkens' submissions during the telephone conference enlarged those grounds.

5. The affidavit explains that the facts that form the principal substance of the charge now before the Tribunal have been the subject of a criminal trial at which the Practitioner was acquitted. Mr Waalkens explained that his understanding is that the principal part of the

charge relies on exactly the same factual allegations as those made in the criminal trial. There are however some elements of the charge before the Tribunal that were not elements of criminal charges, particularly an allegation that the Practitioner was not "sensitive to the distress" of the complainant, and that the Practitioner failed to maintain confidentiality of medical notes.

6. The Practitioner's affidavit describes the earlier criminal proceedings in this way:

"The matters in issue in this case have already been the subject of a criminal trial in the High Court at Auckland where I was charged with indecent assault and sexual violation of the patient. The jury trial for this criminal charge took place in June 1999 and was heard for just under two weeks. Following the hearing, the jury retired for about an hour (may be 1½ hours) and returned not guilty verdicts in respect of both charges of the indictment."

7. The Practitioner's affidavit also described the fact that the courts had granted name suppression to the Practitioner, before, during, and after his trial:

"Prior to the criminal trial, I obtained three orders of interim name suppression. The first was when the matter was first called in the District Court when I was charged. That order was made by a District Court Judge. The second was at the depositions hearing (which I think was in late 1998). Immediately at the conclusion of the depositions hearing, and after hearing argument from my counsel and the Crown prosecutor, the District Court Judge continued the order of name suppression pending further orders of the High Court.

The third name suppression order was made by the High Court on 24 February 1999. That order was made following a defended hearing. I refer to that decision of the court dated 24 February 1999 which I understand my counsel will make available to the Tribunal."

8. The decision of the High Court, is a decision of Smellie J. In fact, contrary to the statement in the affidavit, this decision made on 24 February 1999 was made while the charges were still pending.

9. The decision of Smellie J reviewed the leading authorities on name suppression, and applied the principles to the Practitioner's then current circumstances. The grounds on

which the application was made were similar to the grounds in the application in the present case.

10. The Complaints Assessment Committee opposed the application on the grounds that the starting point must be that there must always be open and unqualified reporting of all cases before the Tribunal. Furthermore, the nature of the charge points to the appropriateness of publication, and that it would be in the public interest to publish the Practitioner's name as publication may bring forward additional complainants.

Reasons for decision

11. The application is to be determined pursuant to s.106(2)(d) of the Medical Practitioners Act 1995. The Tribunal recognises that each application of this kind must be considered on its own merits, considering each factor and the combined weight of the total. There is no presumption that an application of this kind will, or will not, be granted.

12. The Tribunal does however recognise, that a practitioner facing a disciplinary charge must make out grounds for suppression of his or her name. That follows from the legislative scheme in which s.106(1) of the Act provides that hearings of the Tribunal will be public, subject to certain exceptions, relevantly, the power to make orders under s.106(2).

13. In the present case the fact that there has been a criminal trial in which the Practitioner has had his name suppressed throughout those proceedings and been acquitted of the charges he faced is determinative. The Tribunal is well aware that it is governed by a statutory framework that is different from the High Court's jurisdiction in criminal cases. Furthermore, the standard of proof before this Tribunal is different from criminal proceedings, and the evidence in support of the charges before the Tribunal may be different from that supporting the criminal charges. It is accordingly quite possible for the charges before the Tribunal to have a different outcome to the criminal charges, and that would not be inconsistent. However, that does not mean that the prior criminal proceedings are irrelevant or insignificant.

14. If the Tribunal were to allow publication of the Practitioner's name that would in practical terms negate the effect of the suppression order made in the High Court. There is none-the-less no fundamental principle that prohibits that course, as the publication would be of proceedings before this Tribunal. However, if that were to be done it would in ordinary circumstances have to be on the basis that either the different statutory framework for this Tribunal, or different circumstances, or new evidence required a different result. There is no such difference at this point in time.

15. Smellie J's decision of 24 February 1999 proceeded on the basis that the application had to be assessed against the principle that 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*", and that suppression orders are *"never to be imposed lightly"* (quoting ***R v Liddell*** [1995] 1 NZLR 538, Court of Appeal). Those principles are equally applicable to the Tribunal's statutory jurisdiction, where s.106(1) contemplates open hearings, though s.106(2) provides for various limitations on that in appropriate cases.

16. Smellie J's decision also discussed the principle that publicity may cause other complainants to come forward. That principle too is applicable to the Tribunal. After discussing the ***Liddell*** case, Smellie J said:

> *"That case was followed by **Proctor v R** [1997] 295 in the Court of Appeal where the circumstances were that the accused was charged with 22 counts (many of them of a representative nature) alleging various forms of sexual abuse against six different youths over a period of 18 years. It was a case in which the applicant still had in his favour the presumption of innocence. Nonetheless it was one also in which, because of the large number of allegations, the multiple victims and the lengthy period of alleged offending, there was a high probability that publication before the trial might result in further victims coming forward. This aspect of the matter was expressed by the Court at page 300, line 25 and following:*
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> > *'Fourthly, we have indicated our approval of the learned Judge's approach and reasoning in respect of the question whether public identification of Mr Proctor could lead to discovery of additional offending when we quoted from his judgment at some length above. This point is undoubtedly an important one favouring publication. Moreover, when the circumstances are such to make this factor a*

> *pertinent consideration it is preferable that the question of suppression be resolved as early as possible. If a suppression order is to be refused, the prospect of other potential complaints coming forward is obviously increased the sooner publication takes place.'*

I was not referred to any Court of Appeal decisions dealing with circumstances such as apply in this case. To state the obvious, here the applicant has the presumption of innocence in his favour and there are none of the indications which presented themselves in ***Proctor*** *to suggest that there may be other victims who would come forward if pre-trial publication occurred. On the contrary, on the information before the Court offending is alleged on one occasion only in respect of one complainant …"*

17. Smellie J concluded:

"In the exercise of my discretion in this matter I have, on the one hand taken into account the apparently isolated nature of the alleged offending, the level of seriousness if established, and the absence of circumstances where repeat offending is at all likely. On the other hand, I have placed in the balance the presumption of innocence and the damage that pre-trial publicity could do.

Given the particular circumstances of this case I have reached the conclusion that interim suppression of the applicant's name and other details that might identify him or members of his family should continue."

18. Since that decision was made, the only significant development has been that the Practitioner has been acquitted of the charges he faced. The Tribunal has the charge, and has been informed that the facts are essentially the same as those for the criminal charges. The Tribunal has no evidence in support of the charges at this point in its process, and nothing to suggest that there is either new evidence or something that points to other potential complainants. Accordingly, the Tribunal is in the position where essentially the same principles apply as those that applied to the High Court. The Tribunal is also in a position where it knows a great deal less than the High Court about the circumstances. While the Tribunal at this preliminary stage simply has a charge, and no evidence; the High Court had the advantage of hearing evidence over some two weeks when the final suppression order was made. At the time Smellie J made his decision he had the advantage of the evidence from the preliminary hearing in the District Court.

19. In these circumstances the Tribunal considers that the Practitioner's name should be suppressed. The Tribunal does however recognise that the process before the Tribunal is at an early stage, and it does not close off the possibility of further information becoming available. Accordingly, there will be an order for name suppression, with leave to make any further applications that may be necessary. The Tribunal draws attention to the fact that this is an interim order, and the issue will be further considered after the charge has been determined and that decision will involve different considerations to those applying at this point.

THE COMPLAINTS ASSESSMENT COMMITTEE'S APPLICATION

Grounds for applications

20. Counsel for the Practitioner opposed this application, on the limited basis that there ought to be reciprocal treatment of the Practitioner and the Complainant. Accordingly, the Tribunal has considered the application on its merits.

21. The Complaints Assessment Committee applied for name suppression for the Complainant, and an order that she be permitted to give her evidence in private. The application referred to s.107 of the Act as the basis for the application. The Tribunal has dealt with the order on that basis, but reserved the right for the parties to make other applications such as an application under s.106(2)(a) should that be appropriate, or apply to vary the order.

Reasons for decision

22. Section 106(2) of the Act directs the Tribunal to have regard to the privacy of the Complainant, and to the public interest. There is no principle of reciprocity, and the privacy of a practitioner facing charges involves quite different principles to that of a Complainant.

23. The Act clearly proceeds on the basis that there is a public interest in a professional discipline process being open and subject to public scrutiny, and that persons subject to

the disciplinary process should usually be identifiable. The scheme in the Act points to no such interest in the identity of complainants, who do not provide services to the public. There is accordingly a lower threshold for a complainant to obtain an order that their identity remain confidential. In fact, there is a clear public interest in preserving the confidentiality of complainants giving personal, or embarrassing evidence, or other evidence that they do not want to be disclosed. Otherwise complainants will be reluctant to give evidence, and that would inhibit the disciplinary process being effective in maintaining standards. This policy consideration is clearly evident in right conferred on complainants by s.107 in respect of evidence that is "of a sexual nature; or … evidence of matters of an intimate or distressing nature."

24. It is clear that the subject matter of the charge before the Tribunal involves allegations of sexual misconduct. The Complainant's name should be suppressed. There is nothing to displace the usual principle that such a complainant is entitled to preserve their privacy. The Complainant is entitled to give her evidence in private pursuant to s.107, the Complainant may seek more restrictive orders under s.106(2)(a) but has not done so at this point.

25. The Tribunal recognises that it may be necessary to revisit the question of exactly what form the taking of the Complainant's evidence should have, and has accordingly reserved leave to deal with that when the hearing takes place.

ORDERS

26. The Practitioner's application is granted in these terms:

There will be no publication of the name of the practitioner, or any information that may identify him, pending further order of the Tribunal. Leave is reserved to the Practitioner and the Complaints Assessment Committee to apply to rescind or vary this order.

27. The Complaints Assessment Committee's application is granted in these terms:

There will be no publication of the name of the complainant, or any information that may identify her; and while the complainant is giving oral evidence at the hearing of the charge in these proceedings no person shall be present in the room in which the hearing is being held except the following:

(i) The members of the Tribunal,

(ii) The Practitioner,

(iii) The person who is prosecuting the charge:

(iv) Any barrister or solicitor engaged in the proceedings:

(v) Any officer of the Tribunal:

(vi) Any person who is for the time being responsible for recording the proceedings:

(vii) Any accredited news media reporter:

(viii) Any person whose presence is requested by the complainant:

(ix) Any person whose presence is requested by the medical practitioner to whom the charge being heard relates, unless the complainant objects to that person being present:

(x) Any person expressly permitted by the Tribunal to be present.

This order is made pending further order of the Tribunal, and leave is reserved to the Practitioner and the Complaints Assessment Committee to apply for further or alternative orders concerning the privacy of the Complainant, and the identification of persons who may be permitted to be present while the Complainant is giving her evidence.

DATED at Wellington this 2nd day of August 2001.

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G D Pearson

DEPUTY CHAIR