MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 193/01/83C

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by a Complaints Assessment Committee pursuant to Section 93(1)(b) of the Act against **H** medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chair)

Mrs J Courtney, Dr R W Jones, Dr C P Malpass, Dr F McGrath (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Auckland on Monday 5, Tuesday 6 and Wednesday 7 November 2001

APPEARANCES: Ms K G Davenport for a Complaints Assessment Committee ("the CAC")

Mr A H Waalkens for Dr H.

Supplementary Decision

1. In its Decision 184/01/83C dated 14 December 2001 ("*the Substantive Decision*") the Tribunal found Dr H guilty of conduct unbecoming a medical practitioner, and that conduct reflects adversely on his fitness to practice medicine. This Supplementary Decision should be read in conjunction with the substantive decision.

2. The substantive decision followed a hearing of a charge of professional misconduct laid against Dr H by a Complaints Assessment Committee convened by the Medical Council of New Zealand. The allegations giving rise to that charge were that Dr H's management and treatment of the late A was inadequate in a number of respects.

3. In the Substantive Decision, the Tribunal determined that Particulars 1, 2, 3 and 4 of the Charge were established. Particular 5 of the Charge, related to Dr H's absence from xx Hospital while Mrs A remained under his care and his failure to hand over her care in a proper manner by not adequately alerting the ward registrar and/or his colleagues as to her condition. The Tribunal was satisfied that any shortcomings on Dr H's part in regard to this particular did not warrant the sanction of an adverse disciplinary finding.

4. However, in relation to Particulars 1 to 4 the Tribunal determined that there was simply no evidence of any action taken by Dr H to ensure that Mrs A's condition was appropriately monitored beyond an expectation that his registrar and/or the house surgeon and/or anyone else involved in Mrs A's care would recognise the need to monitor her treatment, particularly the administration of Vancomycin, and to ensure that was done. Perhaps most significantly,

the Tribunal determined that there was no evidence of care given to Mrs A, or any act of oversight or supervision, by Dr H beyond a mere instruction that Mrs A should be transferred to Ward xx at xx Hospital, from Ward xx at xx Hospital, so that he could continue her care there.

5. In the Substantive Decision, and in relation to the determination of what constitutes acceptable standards of care, the Tribunal considered that there is a distinction between the standards which it, objectively, considers are "*acceptable*" and the standards which may be '*accepted*' by some members of the profession. Taking into account the factors it considered relevant, the Tribunal was satisfied that Dr H, as Mrs A's doctor and also as the consultant and team leader, did not exercise sufficient oversight, either in terms of his junior staff or Mrs A's care and treatment generally. This finding was made notwithstanding evidence that some other consultants might conduct their practices in a similar fashion.

6. It was Dr H's failure to adequately carry out his professional obligations, in particular his responsibility to oversee Mrs A's care, that the Tribunal considered fell significantly short of acceptable standards i.e. standards which the Tribunal considered were '*acceptable*' taking into account the evidence given to the Tribunal at the hearing of the Charge by other medical practitioners; the clinical context of Mrs A's care, the principal purpose of the Act pursuant to which the Tribunal is established, and the role of the Tribunal in identifying and, if appropriate, setting standards.

7. The Tribunal was satisfied that Dr H had responsibilities and obligations towards Mrs A over and above his responsibilities as a competent orthopaedic surgeon. It appeared to the Tribunal that Dr H's focus in terms of his overall management of Mrs A's care was relatively narrow and, in terms of her clinical care, was confined to her orthopaedic problems notwithstanding that she had a number of comorbidities and that her condition required careful medical management.

8. The Tribunal was satisfied that Dr H retained responsibility for Mrs A's care at all times and his failure to adequately ensure that she was receiving the care and monitoring her condition required, was conduct that fell significantly below the standards of a reasonably competent consultant practitioner.

Submissions on penalty

Submissions on behalf of the CAC

9. On behalf of the CAC, Ms Davenport noted that because the subject events took place before the coming into force of the current Medical Practitioners Act, the penalties which can be imposed on Dr H are only those which are contained in the 1968 Act. Ms Davenport sought the dismissal of the interim orders prohibiting publication of Dr H's name, together with orders that he pay a fine of approximately $500.00, and 50% of the costs and expenses of the hearing.

10. In support of those submissions, Ms Davenport referred to Dr H's attitude to Mrs A's care, reflected in paragraph 61 and 64 to 69 of the Tribunal's Decision. Ms Davenport submitted that it is significant that Dr H's defence, which was that no orthopaedic surgeon had any further obligation in relation to Mrs A's care than he had met, was specifically rejected by the Tribunal.

11. In support of the CAC's application for dismissal of the interim name suppression orders, Ms Davenport referred at length to a recent case on appeal to the High Court, *Pilkington v MPDT* (AP 21/SW01, Auckland Registry, 5/12/01, Laurenson J). At page 19 of that decision the court held:

> *"In the final analysis the Tribunal, and later the District Court Judge, were faced with a situation where it was not contested on appeal*
>
> *(a) The appellant had made a serious error of judgment;*
>
> *(b) This had resulted in the dreadful condition of the child at birth; and*
>
> *(c) The error of judgement was such that it reflected on the appellant's fitness to practise medicine.*
>
> *In these circumstances the Tribunal found that suppression should be removed because the public had a right to know.*
>
> *If one then asks whether this conclusion can be said to necessarily involve the protection of the public then, I consider, the answer must be "yes". The requirement under the new Act for hearings to be in public is a clear indication*

the Legislature intended the public was to be informed. That change must be seen in the context of the principal purpose of protecting the public. Members of the public are entitled to be able to make an informed choice as to which medical practitioner they wish to engage.

Thus, if a medical practitioner has been found guilty of a serious error of judgment, such that it reflects adversely on his or her fitness to practise medicine, then, in my view, it follows that the public is entitled to know of it to enable an informed choice to be made. The protection sought by the new Act is provided by that knowledge.

In my view it is implicit from the deliberations of the Tribunal that when it came to balance the public interest against that of the appellant, it was addressing precisely the issue of public protection."

12. Ms Davenport also set out a number of the court's other findings in that case and submitted that, applying the various propositions and principles of law contained in the *Pilkington* decision and in the lower court decision in the same case, to this case, the Tribunal must weigh Dr H's interests, the interests of Mrs A's family, and the public interest, as that has been variously defined in the relevant cases. Thus, the Tribunal must balance the need for openness and transparency in the professional disciplinary process, and the interests of the individual practitioner. In carrying out this balancing exercise, Ms Davenport submitted, the Tribunal should take into account the following factors:

"*(i) Reputation:*

It is generally acknowledged that there are no circumstances where the reputation of a professional will not be adversely affected by an allegation and a finding of professional misconduct (in its widest sense) and therefore this matter must be put to one side.

(ii) Issues arising from the hearing:

Mr H has not appeared before a Disciplinary Tribunal before, however, the Tribunal has correctly censured his behaviour in his treatment of Mrs A who was specifically transferred from xx to be in xx Hospital under his care. Mr H showed a distinct lack of care, understanding or acknowledgement of his proper role as a <u>doctor</u> (not orthopaedic surgeon). He essentially did nothing to see that she was properly cared for, properly monitored and that the thoughts and comments of the Infectious Diseases team were appropriately conveyed to the team managing her care in xx. He led that team. Thus, departure of the appropriate standard to be expected from Mr H is significant. He made

no notes. [Refer paragraph 69 of the Tribunal's decision]. This must be put in the balance as a punitive factor in favour of publication.

(iii) Other things which are relevant for the Tribunal to take into account are:

The public right to know about the doctors who have committed errors (see Laurenson J's comments). The stance taken by Mr H that as an orthopaedic surgeon he had no responsibility to do any more than he did is a serious one and the public are entitled to know this.

(iv) Issues of openness to [the] public, accountability and [the] transparency of the disciplinary process. These factors are essentially reflections of s.106 and its emphasis on openness in hearing and reporting.

(v) Mr H's affidavit filed in support of his interim application does not show any compelling reason why publication should not be made.

(vi) The public has an interest in the matter despite the case being over 6 years old.

(vii) The interests and wishes of Mrs A's family. Annexed to these submissions are the family's comments on the impact that this case has had on their lives and their wishes as to publication and penalty."

Submissions on behalf of Dr H

13. On behalf of Dr H, Mr Waalkens urged the Tribunal to consider the case in the context of the time, place and circumstances of the events giving rise to the charge. These include the fact that the events occurred in March 1995, some 7 years ago; they concern events that happened within the public hospital system where Dr H (reasonably) was dependent upon the primary monitoring and management of the patient being conduct by the hospital medical staff including his registrar and house surgeon; that the cause of the demand on orthopaedic services and the lack of resources, the system established for the care and management of orthopaedic patients such as Mrs A was at xx Hospital, as a satellite unit, not xx Hospital, which created logistical and practical difficulties.

14. In summary, Mr Waalkens sought to characterise the deficiencies in Mrs A's care as 'systemic error' rather than being the result of conduct, failure or omission on Dr H's part. On the basis of these submissions, Mr Waalkens submitted that this was a case in which it would be entirely appropriate for the Tribunal to impose no orders as to penalty against Dr H.

15. In support of that latter submission, Mr Waalkens referred to the case of Dr McC, a general surgeon who was held responsible for leaving large forceps in a patients abdomen following surgery. The surgeon had been reliant on other staff and although he was found guilty of "*conduct unbecoming*" before the Tribunal's predecessor, the MPDC, it considered in the circumstances that no penalty was warranted.

16. Mr Waalkens submitted that, on the facts of this case, Dr H was heavily reliant upon the medical staff. This point is emphasised not as a means of shifting blame, but because Dr H expected that his registrar and house surgeon were monitoring and adequately caring for Mrs A. Dr H expected that if any problems or difficulties were encountered then he would be notified of these.

17. Dr H is plainly a highly competent and highly respected orthopaedic surgeon who has done a huge amount to advance the well being of the care of orthopaedic patients in xx and has done a lot in terms of raising the level of competence of orthopaedic surgery (in particular knee and hip joints replacement surgery) within New Zealand.

18. It was also submitted that Dr H is devastated by the Tribunal's finding and the adverse finding is a matter that he regards very seriously.

19. As to costs, Mr Waalkens accepts that the Tribunal must exercise its discretion but contests the CAC submissions on the basis that an order of 35% - 40% for a finding at the lower level of professional disciplinary offences is excessive.

20. Mr Waalkens also seeks permanent name suppression for Dr H. In support, he cites *J v NZ Psychologists Board, (*AP 34/01, High Court, Wellington, 11/7/01) and *S v Wellington District Law Society*, (AP 319/95, Wellington High Court, 22/10/96) in which the Full Court observed (at page 5):

> *"Proceedings before the disciplinary Tribunal are not criminal proceedings. Nor are they punitive. Their purpose is to protect the public, the profession and the Court…*
>
> *We conclude from this approach that the public interest to be considered, when determining whether the Tribunal or an appeal of this court, should make an*

> *order prohibiting the publication of the report of the proceedings, requires consideration of the extent to which publication of the proceedings would provide some degree of protection to the public, the profession or the court. It is the public interest in that sense that must be weighed against the interests of other persons, including the practitioner, when exercising the discretion whether or not to prohibit publication."*

21. Mr Waalkens emphasised that Dr H does not seek prohibition of publication of the Substantive Decision and, to this extent, the public's right to know what is happening in hospitals and so forth can well be met by the facts of the case being discussed. Rather, Dr H seeks an order "*merely prohibiting publication of his name and/or anything that might identify him – a result the same as in S*" and Mr Waalkens commended that case to the Tribunal.

22. Mr Waalkens rejected the CAC's reliance on *Pilkington*. He submitted that it needs to be emphasised that the facts and circumstances applying to that case are quite different from those applying to Dr H. In that case, there were no systemic issues (or reliance upon other practitioners). In this case, the fact remains Dr H relied upon his junior medical staff to monitor Mrs A's drug treatment and to highlight any concerns or worries as to her stability (Dr H himself continuing regular ward rounds/assessments).

23. Mr Waalkens also urged the Tribunal to take into account the length of time that had passed since the events occurred and, in relation to his application for permanent name suppression, that:

(a) Dr H has a young family and to name him, with his unusual surname will inevitably cause distress and upset to his family.

(b) Some of his patients will inevitably become unnecessarily distressed as a consequence of what they read about his conduct.

(c) Dr H has an excellent reputation and publication will be "*immensely damaging to him and a penalty of the harshest nature*".

24. Mr Waalkens also submitted that the Tribunal should take into account, in terms of the "*right of the public to know*" his identity, overlooks the fact that he no longer practices in the public system. There is no possibility therefore that there could be a repeat of this case on his part.

Decision

25. The Tribunal has carefully considered all of the submissions made, and reviewed the Substantive Decision. Having taken into account all of the matters referred to in submissions together with its findings made in the Substantive Decision, the Tribunal has determined that the following penalty should be imposed.

(a) Dr H is censured;

(b) He is to pay a fine in the sum of $450.00 (the maximum fine under the 1968 Act being $1,000);

(c) Dr H is to pay 40% of the costs and expenses of an incidental to the inquiry by the Complaints Assessment Committee in relation to the subject matter of this charge and the prosecution of the charge and the Tribunal's hearing of the charge;

(d) Dr H's application for permanent name suppression is declined.

Reasons

26. In relation to Mr Waalken's submissions that the deficiencies in Mrs A's care resulted from 'systemic error' rather than any failure or omission on Dr H's part, the Tribunal rejected submissions to that effect made at the hearing, and it confirms those findings.

27. In this case, there was no evidence that Dr H had actively engaged his Registrar or House Surgeon or any other staff member in Mrs A's care. All of the Tribunal's findings in this regard are contained in the Substantive Decision. Suffice at this point to state that the Tribunal's view is that any system can only function safely if everyone fulfils their own responsibilities – the Tribunal was not satisfied that Dr H adequately fulfilled his. That finding applies in relation to his responsibilities to Mrs A, his junior staff and to the hospital system generally.

28. The Tribunal notes Mr Waalkens' submission that, because Dr H no longer practises in the public health system, "*there is no possibility therefore that there could be a repeat of this case on his part*". This submission appears to rest on the proposition that what occurred in relation to Mrs A's can be blamed on 'the system'.

29. As already stated, the Tribunal does not agree that this case evidences a 'systemic error', but it is satisfied that any concerns it has in relation to this submission are adequately addressed by declining Dr H's application for permanent name suppression.

Censure

30. The Tribunal is satisfied, taking into account all of the relevant facts and circumstances and its findings contained in the Substantive Decision, it is appropriate that Dr H should be censured.

Fine

31. The fine is slightly less than 50% of the maximum fine that may be ordered and, although relatively modest in monetary terms, the Tribunal considers that $450.00 is appropriate and adequately takes into account the relevant facts and circumstances of this case.

Costs

32. In relation to costs, the Tribunal is satisfied that 40% of the costs incurred by the CAC and the Tribunal are fair and appropriate taking into account all of the relevant facts and circumstances, including Dr H's personal financial circumstances to the extent they have been made known to the Tribunal, and also that the hearing of the charge extended over 3 days.

33. The Tribunal is satisfied that an adverse finding on a charge at the lower end of the range of professional disciplinary offences will generally attract a downwards adjustment of the general order of costs awards (50%) as acknowledged by the High Court in the *Cooray* case. It is also satisfied that, as a general rule, a downwards adjustment is fairly warranted in cases where the practitioner is found guilty at a lessor level than that charged.

34. The Tribunal has also taken into account the general principle that the costs awards are not to be used as a means to punish a practitioner, but that the seriousness of the Tribunal's findings ought to be fairly reflected in the penalty.

35. Accordingly, it is satisfied that in all the circumstances, an order that Dr H contribute $30,561.19, being 40% of the total costs incurred by the CAC and the Tribunal, is fair and reasonable.

Conditions on practice

36. The Tribunal considers that, given that Dr H no longer practices in the public health system, and the events at issue occurred some 7 years ago, there seems little purpose in imposing conditions on Dr H's practice. In relation to the issue of whether or not to impose conditions the Tribunal has also taken into account that it has declined the application for permanent name suppression and therefore the public, and patients and potential patients (especially in the private sector where Dr H now practises exclusively) will have a fair opportunity to make an informed decision as to whether or not to consult him.

Name suppression

37. The Tribunal has carefully considered all of the submissions made to it in this regard, and the cases referred to by Counsel, particularly the *Pilkington* decision, the most recent decision issued by this Tribunal's appellant courts. The Tribunal has also reviewed the District Court's decision upholding Dr H's appeal against the Tribunal's decision not to grant interim suppression. The Tribunal records that, at the time the application for name suppression was made, Counsel emphasised that the application was for interim name suppression only, accepting that the matter would be reconsidered once the outcome of the charge was known.

38. Whilst the decision whether or not to grant or maintain name suppression is entirely discretionary, the Tribunal is bound to apply the relevant provisions of the Act, and to have regard to relevant decisions determined on appeal from the Tribunal.

39. In coming to its unanimous view that the application for permanent name suppression should be declined, the Tribunal has endeavoured to balance Dr H's interests with the public interest

generally, and the interests of the medical profession as a whole, and to carry out this exercise bearing in mind the principle purpose of the Act, contained in s.3- "*to protect the health and safety of members of the public by prescribing or providing for mechanisms to ensure that medical practitioners are competent to practice medicine*".

40. One of the features of this case was the Tribunal's discussion of the distinction between '*accepted*' standards and standards that are '*acceptable*'. In the context the Tribunal referred to Elias J's statement in *B v The Medical Council of New Zealand* (High Court, Auckland Registry, HC 11/96, 8/7/96) that:

> *"In relation to this issue, the Tribunal refers to Elias J's statement in B v The Medical Council of New Zealand (supra) that "the inclusion of lay representatitves in the disciplinary process and the right of appeal to this Court indicates that usual professional practice, while significant, may not always be determinative; the reasonableness of the standard supplied must ultimately be for the Court to determine, taking into account all of the circumstances including not only practice but also patient interest and community expectations, including the expectation that professional standards are not to be permitted to lag. The disciplinary process is in part one of setting standards."*

41. On other, similar occasions, the Tribunal has referred to the educative value of its decisions, and it is consistent also in this context that the application for permanent name suppression should be declined.

42. In declining the application for interim name suppression (Decision No. 172/01/83C) the Tribunal referred to its consistent approach that, while technically the interests of a respondent medical practitioner (for example, in terms of his or her reputation and/or commercial interests) in non-disclosure is a matter to which the Tribunal can have regard under s.106, if that were to be a determining factor, then no proceedings could be held in public because there is unlikely ever to be an instance when the reputation of the respondent medical practitioner is not an issue. If the doctor's circumstances were the determining factor, or were otherwise given undue weight, then the clear intention of Parliament contained in section 106 would easily be negated to such an extent that it had little effect.

43. In the present case, the Tribunal remains satisfied that the likely effects of publicity on Dr H, his patients, his family and his practice are not unusual or exceptional and the Tribunal is

satisfied that none of those factors, either individual or cumulatively, warrant an order permanently suppression Dr H's name and any identifying particulars.

44. A further consideration is that, as on previous occasions, the Tribunal has no doubt that maintaining name suppression orders causes suspicion to fall on all practitioners, especially those practising in the same geographic area, and who have similar status to, Dr H. In circumstances where the charge has been upheld and the Tribunal has made findings in the nature that it has, it is even more difficult to justify a continuation of any suspicion falling on other practitioners, and, in this case, on other staff at xx Hospital or xx Hospitals (or those institutions themselves) and/or for patients to be caused any undue concern.

45. The Tribunal is therefore satisfied that it has undertaken a careful and considered review of all of the relevant facts and circumstances, the relevant cases and legal principles and its findings contained in the Substantive Decision and it is satisfied that Dr H's interests are fairly outweighed by the interests of the profession and the public generally.

46. The Tribunal's decision is unanimous.

Orders

47. The Tribunal orders:

(i) that Dr H be censured;

(ii) that Dr H is to pay a fine in the sum of $450.00;

(iii) that Dr H is to pay 40% of the costs and expenses of an incidental to the CAC's inquiry in relation to the subject matter of the charge and the prosecution of the charge and the Tribunal's hearing;

(iv) the application for permanent orders prohibiting the publication of Dr H's name and any identifying details is declined.

(v) A notice under section 138(2) of the Act be published in the New Zealand Medical Journal.

DATED at Wellington this 19th day of March 2002

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W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal