Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 31/98/18D

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **E** medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Friday 3 April and Tuesday 7 April 1998

PRESENT: Mr P J Cartwright - Chair
Dr J W Gleisner, Dr R S J Gellatly, Dr B J Trenwith
Mrs H White (members)

APPEARANCES: Ms K G Davenport, Director of Proceedings
Mr H Waalkens for respondent
Ms G J Fraser - Secretary
(for first part of call only)

DECISION:

1.1 **THE** Director of Proceedings under the Health and Disability Commissioner Act 1994 and pursuant to Section 102 of the Medical Practitioners Act 1995 and Section 49 of the Health and Disability Commissioner Act 1994 has determined that a complaint against Dr E shall be considered by the Medical Practitioners Disciplinary Tribunal ("the Tribunal"). The charge has been set down for hearing in xx.

1.2 **COUNSEL** for Dr E, Mr Waalkens, seeks the following orders:

1.2.1 **THAT** the Health and Disability Commissioner and the Director of Proceedings of the Health and Disability Commissioner's office give discovery of documents to the Tribunal and to Dr E of all documents in their possession or power relating to either the investigation of the matter of the complaint concerning Dr E's care of the late Mr Francis Wall and/or this prosecution which has then followed, by filing and serving an affidavit within 14 days listing all such documents. In the event that the Health and Disability Commissioner and/or the Director or Proceedings claims privilege in respect of any documents listed herein, then those particular documents are to be so identified and the basis upon which privileges claimed is to be set out.

1.2.2 **THAT** the Health and Disability Commissioner and the Director of Proceedings of the Health and Disability Commissioner's office do produce to Dr E copies of all documents comprising their investigation and/or prosecution file concerning the complaint regarding Dr E's care of the late Mr A - such documents to be produced within 14 days.

1.2.3 **THAT** the Health and Disability pay to Dr E the costs of and incidental to the application.

1.2.4 **SUCH** further orders as the Tribunal may deem appropriate.

2. GROUNDS OF APPLICATION:

2.1 **THE** documentation requested by Dr E is both reasonable for him to receive and as well, its receipt is required to comply with natural justice.

2.2 **THE** Tribunal is entitled to regulate its own procedures in such manner as it thinks fit (Rule 5 of the First Schedule of the Medical Practitioners Act 1995) ("the Act").

2.3 **THAT** the Tribunal is entitled to order the above parties to produce to Dr E the records - Rule 7 First Schedule.

2.4 **THAT** the rules of criminal procedure should be applied and in such circumstances would require the Health and Disability Commissioner and her Director of Proceedings to produce the above documents - see *Gurusinghe v Medical Council* [1989] 1 NZLR 139, 155-160.

2.5 **THAT** it is reasonable that the Health and Disability Commissioner should pay the costs of and incidental to the application. See also Section 47(3) Health and Disability Commissioner Act 1994.

2.6 **AS** set out in the affidavit of Dr E sworn and filed herein.

3. AFFIDAVIT BY DR E:

3.1 **IN** summary Dr E lists in his affidavit copies of correspondence which have passed between his counsel and the offices of the Health and Disability Commissioner and the Director of Proceedings. Principally the correspondence comprises:

(a) Requests by counsel for a complete copy of the Health and Disability Commissioner's file, including details of advice from *"an independent expert"*.

(b) Responses by the Director of Proceedings declining the requests made under (a) above.

3.2 **IN** completing his affidavit Dr E explains that access to the documents requested by him and his counsel, on his behalf, are important for his ability to respond to the disciplinary charge and that he would be grateful if the Tribunal would direct that the Health and Disability Commissioner and the Director of Proceedings produce them accordingly.

4. SUBMISSIONS:

4.1 **IN** brief summary it was submitted by Mr Waalkens on behalf of Dr E:

4.1.1 **THE** privilege claimed by the Director of Proceedings under Section 65(4) of the Health and Disability Commissioner Act 1994 is not unqualified;

4.1.2 **HAVING** elected to refer this matter to the Director of Proceedings to determine whether or not there should be a prosecution of Dr E and, having decided to prosecute Dr E before the Tribunal, the Health and Disability Commissioner and the Director of Proceedings are bound to comply with the appropriate laws and protections relating to disciplinary matters, natural justice and in particular, the provisions of the Medical Practitioners Act 1995.

4.1.3 **IN** other cases over the years where he has appeared as counsel for a medical practitioner, he has not encountered a case ever where the complainant and/or his/her counsel has declined to make available access to every document comprising the prosecution/investigation file.

4.1.4 **IT** is plain that the Medical Practitioners Act 1995 requires the Tribunal to observe the rules of natural justice. This point is enshrined in common law with many New Zealand judgements recognising the point. In any event see Rules 5 and 7 to the First Schedule of the Medical Practitioners Act.

4.1.5 **WHILE** medical profession disciplinary proceedings are strictly civil rather than criminal, *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139 determined that they are sufficiently analogous in some respects to criminal proceedings for assistance to be derived from the criminal rules of procedure. Applying such rules as to pre-trial disclosure, a prosecutor, in proceedings such as these, must decide whether information in his possession is material to the guilt or innocence of the defendant or may materially assist his case, and therefore whether

it should be disclosed in the interests of justice. Applying *Gurusinghe* a prosecutor would be wise to allow the defence to see information which is of concern to the defence unless there is good reason for not doing so.

4.2 **AGAIN** in brief summary it was submitted by the Director of Proceedings in opposing the orders sought:

4.2.1 **THE** Health and Disability Commissioner Act 1994 created three separate independent roles of the Health and Disability Commissioner, an independent Director of Advocacy and an independent Director of Proceedings. The Director of Proceedings has complete autonomy from the Commissioner save in administrative matters.

4.2.2 **THERE** is a clear distinction between the Commissioner's role as investigator to determine breaches of the Code, and the Director of Proceedings' role to prosecute charges of professional misconduct before Disciplinary Tribunals.

4.2.3 **SECTION** 65 of the Health and Disability Commissioner Act, in providing that proceedings are privileged, provides the Commissioner with litigation privilege, i.e. protection from disclosure/inspection for documents, information or any "thing" produced by any person in the course of any inquiry. It is clear, therefore, that the Commissioner has no obligation to provide copies of the investigation file.

4.2.4 **SIMILARLY** there is no power to compel the Health and Disability Commissioner or the Director of Proceedings to provide any affidavit as to discovering of documents. In particular the provisions of Section 65(2)(b) prevent any person being compelled to give any evidence in respect of "anything coming to his or her knowledge in the exercise of his or her functions".

4.2.5 **THERE** is nothing in *Gurusinghe v Medical Council of New Zealand* (supra) to indicate that the obligation on the prosecution is to provide complete copies of the file.

5. ORDERS:

5.1 **THAT** the Health and Disability Commissioner and the Director of Proceedings of the Health and Disability Commissioner's office do produce to Dr E copies of all documents comprising their investigation and/or prosecution file concerning the complaint regarding Dr E's care of the late Mr A - such documents to be produced within 14 days.

5.2 **COSTS** are reserved.

6. REASONS FOR ORDERS:

6.1 **IT** is noted that the application has been framed in two different ways. First an order is sought that the Health and Disability Commissioner/Director of Proceedings list by affidavit those documents comprising their files. Although Mr Waalkens suggested that it would be useful for the Health and Disability Commissioner/Director of Proceedings to do this prior to the conference hearing on 3 April 1998, with any claims of privilege in respect of particular

documents to be so identified, this did not eventuate. This aspect was discussed briefly at the first hearing. Mr Waalkens agreed that any order made only in terms of the first part of the application would serve to delay the inevitability of seeking a further order in terms of the second part of the application. He clarified that an order in terms of the second part of the application was the preferred option.

6.2 **IT** is apparent from the affidavit of Dr E that from an early stage he has requested access to documentation which has continually been declined. It is noted that different reasons have been given by or on behalf of the Health and Disability Commissioner at different stages. For example:

- In her letter of 5 November 1997 to Mr Waalkens the Director of Proceedings explained:

  "It is not the Commissioner's policy to release this advice. If, after the hearing on 4 December, I form the view that a charge ought to be laid against your client then your client will be entitled to copies of all of the briefs of evidence which are produced by me for the hearing."

- In her letter of 18 November 1997 to Mr Waalkens the Director of Proceedings further explained:

  "..... the basis on which the Commissioner declined to release the expert evidence obtained in formulating her opinion is that her role was to investigate and form an opinion on the complaint made against your client. Your client was given opportunity to comment

  ..... It is the Commissioner's view that to provide copies of expert evidence would discourage peer reviewers from providing free and

frank information to the Commissioner and thus discourage the frank and efficient running of the Commissioner's office."

- In her letter of 11 February 1998 to Mr Waalkens the Director of Proceedings elaborated:

  "The Commissioner's files is not under my control. .... the authority for reaching that opinion and the procedures for doing so are governed by the Health and Disability Commissioner Act 1994, a separate statute with a separate purpose from the Medical Practitioners Act."

6.3 **THE** Tribunal does not need to examine the three different reasons given, namely the Commissioner's policy, discouragement of peer reviewers and separation of the functions of the Commissioner and the Director of Proceedings. Apart from commenting on an apparent inconsistency as to the reasons given for declining Dr E access to their files, the Tribunal considers there may potentially be more substance in the Director's reliance on Section 65(4) of the Health and Disability Commissioner Act 1994. It states:

"65. Proceedings privileged -

(4) Anything said or any information supplied or any document or thing produced by any person in the course of any inquiry by or proceedings before the Commissioner or an advocate under this Act shall be privileged in the same manner as if the inquiry or proceedings are proceedings in a Court."

6.4 **SUBSECTION** (4) of Section 65 cannot be considered in isolation of the others. Subsection (1) states that the section applies to the Commissioner, every advocate, and every person engaged or employed in connection with the work of the Commissioner. So obviously the section applies to the Director of Proceedings. Subsection (2)(a) provides an immunity from proceedings, civil or criminal, in favour of any person to whom the section applies for everything he or she may do, or report, or say in the course of the exercise or intended exercise of his or her duties, unless it is shown that he or she acted in bad faith. Subsection (2)(b) provides that no person to whom the section applies shall be required to give evidence in any Court, or in any proceedings of a judicial nature, in respect of anything coming to his or her knowledge in the exercise of his or her functions.

6.5 **IN** summary, then, Section 65 is an umbrella provision which provides certain protections to those persons who are engaged or employed in connection with the work of the Commissioner, including the Director of Proceedings, and subsection (4) needs to be interpreted in that context. Therefore Ms Davenport's submission, that subsection (4) confers upon the Commissioner litigation privilege, requires careful examination. Especially this is the case given Mr Waalkens' counter submission, that in a Court of law a privilege would not be extended in respect of documentation to which the defendant/accused (in this case respondent doctor) is entitled to receive as part of the rules of natural justice.

6.6 *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139 was cited by both counsel in support of their respective positions. Certainly the judgement of the Court of Appeal in that case is very helpful. The Preliminary Proceedings Committee had failed to give

counsel for Dr Gurusinghe copies of their letters of complaint and statutory declarations received during investigations.

6.7 **THE** Court found that while the proceedings of the Medical Council were civil proceedings *"they are sufficiently analogous in some respects to criminal proceedings for assistance to be derived from the criminal Rules of Procedure"* (lines 48-50 p155).

6.8 **THE** Court then went on to review the disclosure requirements of the prosecution in criminal cases. The Court divided these into two categories:

"(a) Statements made by persons whom the prosecution does not intend to call."

6.9 **UNDER** this heading the Court noted, applying *R v Mason* [1975] 2 NZLR 289, that where the prosecution has taken a statement from a person whom it knows can give material evidence but decides not to call him as a witness, it is under a duty to make that person available as a witness for the defence and should supply the defence with the witness' name and address.

6.10 **THE** Court also noted that a flexible approach by prosecutors was advocated in Archibald, *"allowing the defence to see such statements unless there is a good reason for withholding them"*.

6.11 **THE** second category reviewed by the Court was:

"(b) Previous inconsistent statements of persons called as prosecution witnesses."

6.12 **THE** Court indicated that previous inconsistent statements of persons called as prosecution witnesses ought to be provided to the defence.

6.13 **MS** Davenport argued that there is nothing in *Gurusinghe v Medical Council of New Zealand* to indicate that the obligation on the prosecution is to provide complete copies of the file. Therefore, in the event the Tribunal finds that the prosecution is obliged to provide copies of any witness statements (which is denied), Ms Davenport argued it can only be a statement from a person who the prosecution are not calling as a witness. In this case, because the expert used by the Health and Disability Commissioner is to be called as an expert by the Director of Proceedings, the witness' statement will therefore be made available and if there is any previous inconsistent statement, Ms Davenport said that will also be made available. Ms Davenport added that there is no objection to Dr E having all of the hospital notes and other records, and that she has asked the Commissioner's staff to copy these documents and forward them to Mr Waalkens.

6.14 **THE** Tribunal considers that Ms Davenport's interpretation of *Gurusinghe v Medical Council of New Zealand* is unduly restrictive. First it fails to mention what the Court described as *"the general approach in this field [which] was summarised by Bisson J delivering the judgment of the Court of Appeal in R v Hall [1987] 1 NZLR 616, 628:*

> *"However, should the defence wish to pursue a particular inquiry which is made known to the Crown, then in the interests of justice the Crown should assist by supplying any information it has available relevant to that inquiry. The more co-operative the Crown is with reasonable and specific requests from the defence before the trial the*

less likely will there be problems after the trial when police jobsheets are inspected. If any difficulty arises, the circumstances may warrant the Court making an order for the information to be supplied."

6.15 **AND** secondly Ms Davenport's argument does not include reference to the Court's statement at 160 that:

"At the time when disclosure should be made it must be for the prosecutor to decide whether the interests of justice require disclosure, ie whether the information is material to the guilt or innocence of the defendant or may materially assist his case. Any prosecutor, however, would be wise to allow the defence to see information which is of concern to the defence unless there is a good reason for not doing so, in order to let counsel for the defendant decide whether the information might assist in showing that the defendant may not be guilty of the charges against him. .... it is not a subjective test when the Court comes to determine whether a decision by a prosecutor to withhold disclosure (whether in response to a specific request or not, and whether withheld deliberately or inadvertently) resulted in a miscarriage of justice."

6.16 **IN** the Tribunal's view these statements by the Court go further and beyond a simple review of the law as at the time relating to the disclosure requirements of the prosecution in criminal cases. They impose on the prosecution an obligation *"to allow the defence to see information which is of concern to the defence unless there is a good reason for not*

doing so .....". In cases involving prosecution of doctors before Disciplinary Tribunals, professional livelihoods can be at stake. In the Tribunal's assessment the reasons given in this case for non-disclosure, namely, policy considerations, discouragement of peer reviewers and the separate role of the Health and Disability Commissioner, are not sufficiently compelling as to displace the obligation of the Director of Proceedings to make disclosure. Furthermore the Tribunal is of the view that the privilege claimed by the Director of Proceedings under Section 65(4) of the Health and Disability Commissioner Act, does not, on the principles articulated by the Court in *Gurusinghe v Medical Council of New Zealand*, entitle her to withhold the information sought on behalf of the respondent doctor in this case.

6.17 **A** further aspect of the matter is the legal status of the Health and Disability Commissioner's file. Another case cited by Mr Waalkens, *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596, is authority for the proposition (refer headnote) that when litigation is in progress or reasonably apprehended, a report or other document obtained by a party or his legal advisor should be privileged from inspection or production in evidence if the dominant purpose of its preparation is to enable the legal advisor to advise or conduct regarding the litigation.

6.18 **IT** seems to the Tribunal that the materials comprising the Commissioner's file came into existence for the purpose of reaching an opinion as to whether there had been a breach of the Code of Health and Disability Services Consumers' Rights. Section 45 of the Health and Disability Commissioner Act regulates the procedure of the Commissioner where she is of the opinion that there has been a breach of the Code. Her options include:

- Reporting with recommendations.

- Making a complaint to any health professional body.
- Reference to the Director of Proceedings for the purpose of deciding on further action including the institution of disciplinary proceedings.

6.19 **APPLYING** the test adopted by the Court in *Guardian Royal Assurance v Stuart*, we do not think that the Commissioner's file should be characterised as having been brought into existence for the dominant purpose of submission to the Director of Proceedings in connection with litigation. Reference of the Commissioner's file to the Director of Proceedings is but one option open to her and that option does not crystallise until the Commissioner has completed her investigation and formed her opinion.

6.20 **THE** Tribunal thinks the following extract from *Guardian Royal Assurance v Stuart* (40-44 at 601) has particular relevance in this case:

> *"... any attempt to withhold relevant evidence should be jealously scrutinised. The second concept has gained strength in recent times, partly because of increasing emphasis on openness of information. There is also an increasing awareness in the common law world that the tactics of the adversary system are not the be all and end all of the route to justice."*

6.21 **IN** making the second of the two orders sought by Mr Waalkens the Tribunal reminds the parties, that under Clause 5 of the First Schedule of the Act, it may regulate its procedure in such manner as it thinks fit. Furthermore, having endeavoured to apply legal principles which

have been explained in the reasons for the order, the Tribunal considers that Clause 7 of the First Schedule of the Act reinforces the position it has taken. Clause 7(1)(a) provides, for the purposes of dealing with the matters before it, the Tribunal may:

"(a)

(b) Require any person to produce for examination any papers documents, records or things in that person's possession or under that person's control and to allow copies of or extracts from any such papers, documents or records to be made:"

DATED at Auckland this 24th day of April 1998.

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P J Cartwright

CHAIR