

Medical Practitioners Disciplinary Tribunal

*PO Box 5249 Wellington Telephone (04) 499-2044 Facsimile (04) 499-2045
All Correspondence should be addressed to The Secretary*

DECISION NO: 52/98/19D

IN THE MATTER of the Medical Practitioners
Act 1995

-AND-

IN THE MATTER of a charge laid by the
Director of Proceedings
pursuant to Section 93(1)(b)
of the Act against

BELLANAVIDANELAGE

ELMO STANLEY

JAYASINHA medical

practitioner of Shannon

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr P J Cartwright (Chair)

Ms S Cole, Professor B D Evans, Dr A M C McCoy,

Dr J M McKenzie (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Date of hearing: 27 May 1998

Date of reserved Decision: 30 June 1998

APPEARANCES: Ms K G Davenport, for the Director of Proceedings.
Mrs A Lombard for Dr Jayasinha.

SUPPLEMENTARY DECISION:

THIS supplementary decision should be read in conjunction with Decision No. 39/98/19D which issued on 30 June 1998.

- 1.1** **IN** Decision No. 39/98/19D a finding was made by the Tribunal that Dr Jayasinha's overall management and treatment of Mr A was inadequate and was not carried out with reasonable skill and care. Specifically and primarily this finding was made on the basis that when contacted and advised that Mr A's condition was worsening, Dr Jayasinha failed to arrange for a review of his patient and/or his diagnosis.
- 1.2** **THE** Tribunal went on to determine, based on that finding, that the conduct reflected adversely on Dr Jayasinha's fitness to practise medicine. Accordingly it was held that Dr Jayasinha was guilty of conduct unbecoming a medical practitioner such conduct reflecting adversely on his fitness to practise medicine.

1.3 **DECISION** No. 39/98/19D concluded with an invitation to counsel to make submissions as to penalty. Those submissions having now been received and considered, the Tribunal make the following orders pursuant to Section 110(1) of the Act:

2. ORDERS:

2.1 **THAT** Dr Jayasinha be censured (S. 110(1)(d));

2.2 **THAT** Dr Jayasinha be fined \$3,000.00 (S. 110(1)(e));

2.3 **THAT** Dr Jayasinha pay \$5,956.53 which represents 35% of the costs and expenses of and incidental to the investigation made by the Health and Disability Commissioner under the Health and Disability Commissioner Act 1994 in relation to the subject-matter of the charge and the prosecution of the charge by the Director of Proceedings, together with the hearing by the Tribunal (S. 110(1)(f));

2.4 **THAT** the order made by the Tribunal prohibiting publication of Dr Jayasinha's name be vacated.

3. REASONS FOR ORDERS:

3.1 CENSURE:

DR Jayasinha has been found guilty of a charge of conduct unbecoming a medical practitioner, such conduct reflecting adversely on his fitness to practise medicine. Censure is a normal order which usually follows the making of a disciplinary finding by the Tribunal against a medical

practitioner. An official expression of disapproval must be an inevitable outcome of Dr Jayasinha's offending.

3.2 FINE AND COSTS:

3.2.1 MS Davenport, counsel for the Director of Proceedings, explained in her view the level of fine is a difficult area. The maximum fine which can be ordered is \$20,000.

Ms Davenport noted the finding made by the Tribunal is at the lowest end of the disciplinary scale, and that a fine should be commensurate with that. However in her view a fine also must reflect the Tribunal's clear view that there has been a breach of the disciplinary process. Accordingly Ms Davenport submitted that a fine in the vicinity of \$5,000 - \$9,000 would be the appropriate level of a fine at the level of conduct unbecoming.

3.2.2 MS Davenport indicated that the Director of Proceedings seeks recovery of the following costs:

Cost of Investigation	\$1,368.75
Other Costs	166.90
Prosecution Costs	5,484.65

	\$7,020.30

3.2.3 THE costs and expenses of and incidental to the hearing by the Tribunal amount to \$9,998.35.

3.2.4 IN opposing imposition of a fine or censure Mrs Lombard submitted:

- (a) As a result of the disciplinary proceedings Dr Jayasinha is suffering from acute depression which has adversely impacted on his health, resulting in closure of his practice in Shannon. This has been traumatic, as Dr Jayasinha feels he has failed the Shannon residents as there is no longer a doctor available after 5 pm in Shannon;
- (b) Dr Jayasinha is being treated for depression, which is also exacerbated by the fact that his wife has been suffering from the same condition for many years;
- (c) This is Dr Jayasinha's first complaint in all the 24 years he has served the Shannon Community and in his 42 years practising as a doctor. He is devastated;
- (d) As a result of Dr Jayasinha not being able to sell his practice and house in Shannon, his financial situation looks bleak;
- (e) Dr Jayasinha's financial position (affirmed by affidavit) is:
 - (i) Receipt of NZ Superannuation totalling \$7,488.00 per annum.
 - (ii) Receipt of rental for a Johnsonville residence totalling \$16,640.00 per annum, less mortgage expenses of \$21,144.00, leaving a net deficit of \$4,504.00 per annum.
 - (iii) No other form of income.
 - (iv) Capital assets consist of a house in Shannon valued at \$80,000.00. This house has been on the market for sale for many years, but no buyer has yet been found.
 - (v) The Johnsonville house is worth \$252,100.00 but is subject to a mortgage of \$152,000.00, leaving a net equity of \$100,100.00.

- (vi) \$48,000.00 invested in a superannuation fund, offset by a Bank overdraft of \$16,000.00.
- (vii) Has been trying to sell the goodwill of his practice for many years. As was never able to do so, the practice was closed down on 19 June 1998.
Estimate the practice has nil goodwill value now.
- (f) Dr Jayasinha has no indemnity insurance and is therefore responsible for his own legal costs.
- (g) As a result of his practice closing, his wife is also without an income.
- (h) Dr Jayasinha would like to retire permanently. He may, however, be forced to obtain employment should his financial situation prove to be unbearable. He would have no choice but to obtain employment should he be fined.
- (i) Dr Jayasinha intends moving to Wellington, in which case he would then, if necessary, obtain employment in a structured environment with controlled (part-time) hours. He will no longer make himself available for after-hours duties.

3.2.5 THE maximum fine payable is \$20,000.00.

3.2.6 PURSUANT to Section 110 of the 1995 Act the Tribunal has the power to order Dr Jayasinha to pay part or all of the costs and expenses of and incidental to the investigation, the prosecution of the charge and the hearing by the Tribunal.

- 3.2.7** **THE** principles which apply to the exercise of the Medical Council's powers to make orders as to costs pursuant to the 1968 Act, are equally applicable to the Tribunal's powers under the 1995 Act.
- 3.2.8** **IN** imposing a comparatively modest fine of \$3,000.00, and in making an equally modest order that 35% of costs incurred be reimbursed, we have taken into account both the personal circumstances of Dr Jayasinha, and his record of service to the community of Shannon.
- 3.2.9** **THE** financial position of Dr Jayasinha is not strong. His ability to pay a fine and reimburse a portion of costs incurred, has been tailored to his financial position as outlined earlier in this Decision. Although acknowledging that the level of fine and reimbursement of costs in this case will cause some hardship, it is not possible for the Tribunal to waive all liability in this regard. A costs award is not intended to be punitive. It is not to form part of the penalty as such. It is a facility to enable recovery of part of the costs and expenses of the hearing.
- 3.2.10** **IT** was the evidence of Dr Hull that Dr Jayasinha has been the only GP available in Shannon every night of the week and weekends, on call for 24-hours out of 24-hours, for the last 25 years. In our view this is an outstanding record of service to the community of Shannon. Dr Jayasinha engaged locums only when he was away on leave. Serving the community of Shannon over such a long period has been a challenging commitment, and the Tribunal is entitled to regard Dr Jayasinha's period

of selfless service as an extenuating circumstance when considering imposition of penalties arising out of the Tribunal's finding.

3.3 CONDITIONS ON PRACTICE:

WE do not consider it is feasible to put any conditions on Dr Jayasinha's right of future practice, especially given that he has now retired from his practice in Shannon. It is noted that Dr Jayasinha would like to retire permanently. However it is also noted that he intends moving to Wellington where he may obtain employment in a structured environment with controlled part-time hours. This being the case we do not consider that it is appropriate to impose any conditions on Dr Jayasinha's right of future practice.

3.4 PUBLICATION:

3.4.1 IN Decision No. 33/98/19D it was the order of the Tribunal, pending its finding into the charge, that publication of the name of Dr Jayasinha be prohibited. Mrs Lombard has requested that the name suppression order be extended to cover these final proceedings. She submitted that although this would not be a media-attracting case, it must be borne in mind that apart from Dr and Mrs Jayasinha, the only other two people bearing this surname in New Zealand are their two children, who are successful in their own right in Wellington. Mrs Lombard explained they are a close-knit family, and that Dr Jayasinha's children have been deeply affected by these proceedings.

3.4.2 SINCE Dr Jayasinha is no longer practising, Mrs Lombard submitted it would serve no purpose for the only complaint that has ever been made against him, to be published.

3.4.3 AS was noted by the Tribunal in Decision 14/97/3C involving a charge laid by a CAC against *Dr Sami*, S. 106 of the Act contains factors which require the Tribunal to exercise a cautious approach when granting exemptions to the basic proposition that hearings be held in public. The *Sami* case concerned a re-visiting of orders made under S. 106 and the mandatory nature of reporting in S. 138 of the Act. Nonetheless, the Tribunal's observations about the significance of S. 106 are of relevance in the present case (at p. 17):

".... while refusal to prohibit publication is not intended to be part of the penalty which the Tribunal may impose, it is acknowledged that the effect of publication may be punitive. However, the Tribunal emphasises that the transparency of the disciplinary process and its outcome is an important protection both for the profession and for the public. More generally publication readily identifies for the public what measures are in place to protect it and to facilitate informed choice of professional medical services."

3.4.4 THAT publication of the name of Dr Jayasinha in this case may have some impact on his reputation, cannot be denied. Equally, it may cause some distress. However, such impact will be apparent in every case where a medical practitioner faces a charge under the Act. The issue arises only after a practitioner has been charged. Parliament would have been aware of this when drafting Section 106(1), so that should not form the basis for the making of an order under Section 106(2) of the Act.

DATED at Auckland this 12th day of October 1998

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P J Cartwright

Chair

Medical Practitioners Disciplinary Tribunal