Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 32/98/20C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Tuesday 7 April 1998

PRESENT: Mr P J Cartwright - Chair
Dr F E Bennett, Dr A M C McCoy, Dr A F N Sutherland,
Mr G Searancke (members)

APPEARANCES: Mr K W Harborne for Complaints Assessment Committee
Mr H Waalkens for respondent
Ms G J Fraser - Secretary
(for first part of call only)

DECISION ON APPLICATION FOR SUPPRESSION OF NAME AND IDENTIFYING PARTICULARS

1.1 **A** Complaints Assessment Committee ("the CAC") established under Section 88 of the Medical Practitioners Act 1995 ("the Act") has determined in accordance with Section 92(1)(b) of the Act that a complaint against Dr S shall be considered by the Medical Practitioners Disciplinary Tribunal ("the Tribunal"). The charge against Dr S has been set down for hearing in xx.

1.2 **APPLICATION** has been made for the following orders pending the hearing of the disciplinary charge:

1.2.1 **PROHIBITING** the publication of any report or account or any part of any hearing by the Tribunal (Section 106(2)(b)) in any manner in which Dr S is named or identified; and/or

1.2.2 **PROHIBITING** the publication of the name or any particulars of the affairs including the occupation, place of residence/practice of Dr S (Section 106(2)(d)); and/or

1.2.3 **FURTHER** orders as the Tribunal may deem appropriate.

1.3 **IN** advance of the telephone conference hearing submissions in support of the application were filed by Mr Waalkens. Earlier at a Directions Conference held on 6 April 1998 Mr Harborne had indicated, while not consenting to the application, that it was not opposed by the CAC.

2. THE TRIBUNAL (MAJORITY) ORDERS, PENDING THE HEARING OF THE DISCIPLINARY CHARGE:

2.1 **THAT** publication of any report or account or any part of any hearing by the Tribunal in any manner in which Dr S is named or identified, is prohibited.

2.2 **THAT** publication of the name or any particulars of the affairs including the occupation, place of residence/practice of Dr S is prohibited.

3. GROUNDS OF APPLICATION:

3.1 **PUBLICATION** of the name and occupation of Dr S or the nature of the complaint would cause unnecessary and unjustified public concern.

3.2 **PUBLICATION** of the name and occupation of Dr S or the nature of the complaint would result in the risk that he will suffer damage to his professional reputation which would be disproportionate to the nature of the conduct in issue.

3.3 **PUBLICATION** of the name and occupation of Dr S carries a risk of causing stress or worry to his other patients.

4. AFFIDAVIT BY DR S:

4.1 **HE** is a registered medical practitioner and a general surgeon of xx. He has practised as a general surgeon since 1981 (when he obtained his FRACS) and has been a registered medical practitioner since 1971.

4.2 **IN** all those years of practice this is the first disciplinary hearing he has faced.

4.3 **HE** has three children aged xx, xx and xx, two of whom live at home with his wife and himself. Their eldest child is presently at the xx studying for a health science degree. Their two younger children attend a local school in xx.

4.4 **HE** also has an elderly mother who lives in xx and is aged 85. She is in frail health.

4.5 **HE** is concerned that any publication of his name or other details that may identify him may cause unnecessary stress and strain to his family.

4.6 **HE** is also concerned of the damage to his reputation which would likely follow if there were publication of his name or identity. He holds a reasonably high profile at xx Hospital (very much a rural hospital) where there are three surgeons. Publicity of his name/or identity certainly carries with it a real risk of damage to his reputation.

4.7 **HE** is concerned that any publication may unnecessary cause distress, anxiety or worry to his existing patients at the hospital. They might well start worrying about his treatment of their cases if publication occurred.

5. REASONS FOR ORDERS:

5.1 **THERE** may be a risk, when applications of this nature are unopposed, of them being granted without the necessary degree of scrutiny. Recorded is a comment made by Mr Harborne at the Directions Conference, that he perceives the Tribunal may be "soft" on the issue of

suppression of name. Accordingly it will always be important to ensure compliance with the statutory criteria.

5.2 **SECTION** 106 of the Act requires that every hearing of the Tribunal "shall" be held in public, except as provided in the section and in Section 107 of the Act. The latter section offers certain special protections of a privacy nature for complainants. Otherwise Section 106 provides, where the Tribunal is satisfied that it is desirable to do so, having regard to the interests of any person, including the privacy of the complainant, and to the public interest, that it may make one or more of a number of stipulated orders. Those orders include having the whole or any part of a hearing in private, or orders prohibiting publication of documents, or the name or any particulars of the affairs of any person.

5.3 **IT** is understood that the complainant is happy for the hearing to be held in public and Dr S has not applied for it to be heard in private. Accordingly the issue is simply whether it will offend against the public interest if publication of any report in which Dr S is named or identified, or publication of the name or particulars of the affairs of Dr S, is prohibited pending determination of the charge against him.

5.4 **IN** having regard to the interests of Dr S which have been explained in his affidavit, the Tribunal considers some of them are less than compelling. Most doctors have families, and understandably would wish to shield them from a matter of this nature. There is never likely going to be a case where reputation is not in issue. And for many doctors, often in practice for several years without a blemish on their record, in times of heightened accountability and a sharper focus on consumerism, there will be a first time experience of the professional

disciplinary process. The only factor identified in Dr S's affidavit which the Tribunal considers may have some application in the circumstances, is the risk of causing stress or worry to other patients. Nevertheless all the factors adverted to by Dr S in his affidavit are available to be weighed in the balance when considering an application of this nature.

5.5 **THE** public interest is the remaining aspect of the statutory criteria which requires careful consideration.

5.6 **IN** *S v Wellington District Law Society*, High Court, Auckland, AP 319/95, Wellington, Judgement 22.10.96, a full bench issued a reminder, that proceedings before the Society's Disciplinary Tribunal are not criminal proceedings in which there is a very plain and pervading presumption in favour of openness rooted in the importance of freedom of speech and the media right to report to the public. Nor are such proceedings punitive in the ordinary sense.

5.7 **IN** *S* the Court concluded that the public interest to be considered, when determining whether the Tribunal, or on appeal the 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. As was said in that case:

> *"It is the public interest in that sense which must be weighed against the interests of other persons including the practitioner, when exercising the discretion of whether or not to prohibit publication."*

5.8 **THE** Tribunal has concluded in this case that publication to the extent of naming or identifying Dr S, his place of residence and practice, is not necessary to provide some degree of protection to the public or the medical profession, pending determination of the charge against him. The Tribunal makes the comment that it has found it very difficult to assess the seriousness of the charge from the way in which it has been formulated. The hearing is scheduled for 19 May next. A long period of waiting for an outcome to the charge is not expected.

5.9 **THE** factor which tipped the balance in favour of granting this application is the presumption of innocence of Dr S. The Tribunal acknowledges that the starting point in considering an application for suppression of an accused's name in the criminal jurisdiction, is application of the principles articulated in *R v Liddell* [1995] 1 NZLR 538. But as was stated by the Court of Appeal in *Prockter v R* [1997] 1 NZLR 295 at 298:

> *"..... the presumption of innocence ..... 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."*

5.10 **THE** Act has expressly recognised that in medical disciplinary proceedings, there will be occasions when privacy orders are appropriate. The Act attempts to balance the general principles in favour of the open administration of justice with the particular issues raised by the medical disciplinary process.

5.11 **FOR** the reasons given the majority has determined that the application be granted. However Mr Searancke has asked that his dissenting opinion be recorded and it follows.

6. DISSENTING OPINION:

6.1 **THIS** is purported to be at the lower end of the scale being conduct unbecoming. My fellow members' view is this is not serious and not warranting publicity however, if the charge is proven then publicity would apply. My argument is that if it is minor it cannot hurt the doctor to have his name publicised. If found innocent the subsequent publicity would announce that he is innocent.

6.2 **MY** major concern is for the Tribunal to be seen not to be hiding behind secrecy that is why the Act was changed. My fellow members consider that if this was a major charge then the public should know that it is a serious charge. However, this is an application only for interim suppression and not a private hearing.

6.3 **I** believe that even if this was a serious charge the factors that could be put forward cannot be for privacy because it would be detrimental to other patients. During our telephone conference it was considered that if a more serious charge applied there should not be any privacy attached, however I believe otherwise. My conclusion is that while this appears to be a minor case, if the result of the doctor's actions, which we will not know about until the hearing, were bad and the patient suffered then I believe the people should know and the people be informed.

6.4 **I** firmly believe that the Tribunal should be seen not to be covering up.

DATED at Auckland this 24th day of April 1998.

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P J Cartwright

CHAIR