Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 51/98/30C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **GALE MERVYN CURTIS** medical practitioner of Hastings

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Friday 18 September 1998

PRESENT: P J Cartwright - Chair
Dr I D S Civil, Dr R S J Gellatly, Dr J W Gleisner,
Mr G Searancke (members)

APPEARANCES: Mr M F McClelland for Complaints Assessment Committee
Ms J Gibson for respondent
Ms G J Fraser - Secretary
(for first part of call only)

DECISION ON APPLICATION FOR ORDER PROHIBITING PUBLICATION OF NAME:

1.1 **A** Complaints Assessment Committee established under Section 88 of the Medical Practitioners Act 1995 ("the Act") has determined that a complaint by Mr A should be considered by the Medical Practitioners Disciplinary Tribunal ("the Tribunal"). A charge of conduct unbecoming a medical practitioner which reflects adversely on the practitioner's fitness to practise medicine against Mr Curtis has been set down for hearing in Hastings on 2 November 1998.

1.2 **AN** application has been made for an order prohibiting publication of the name of Mr Curtis under Section 106(2)(d) of the Act. The application does not make it clear whether an interim order only is sought, pending the finding of the Tribunal. We tend to think that a final order has been sought because one of the grounds of the application states that the public interest in such a proceeding, if indeed there is any, "can be adequately satisfied by the release of the Decision of the Tribunal with deletion of names, location and any details that the Tribunal thinks fit". The application will be dealt with on this basis.

1.3 **THE** grounds of the application are:

1.3.1 **THE** charge of "conduct unbecoming in a professional respect" must equate to the least serious of all the charges and to a charge at the lowest end of the scale.

1.3.2 **PUBLICATION** of the proceedings, given the nature of the complaint, would disproportionately punish the medical practitioner.

1.3.3 **PUBLICATION** of the practitioner's name, given the small centre that the practitioner lives and works in, would have an adverse and disproportionate effect on his private medical practice and hospital practice.

1.3.4 **THE** Tribunal's role pursuant to the Medical Practitioners Act 1995 is to protect the public and medical profession and not primarily for the purpose of exercising a punitive function.

1.4 **IN** advance of the telephone conference hearing, Mr Curtis swore an affidavit which contains the following details in support of the application:

1.4.1 **HE** practices on his own as a vocationally registered orthopaedic surgeon from his surgery at 409 King Street South, Hastings and at Napier and Hastings Hospitals. He has a busy private and public practice. He works approximately 5/10ths in public practice at Memorial Hospital in Hastings and 5/10ths in private. He has a very busy clinic seeing approximately 50-60 people in the public hospital system per week and would see an equivalent number in his private rooms. He conducts operations in both public and private hospitals.

1.4.2 **THE** complaint by Mr A arises out of treatment that he provided to him in September and October 1993, which is nearly five years ago. In terms of the delay in making this complaint, he believes that he will be unfairly penalised if his name is not suppressed.

1.4.3 **HASTINGS**, while a city, is a relatively small centre. He has been advised by his counsel that the Tribunal will be advertising the hearing in the public notice section of the local newspaper in advance. This is likely to lead to the attendance of local people at the hearing. He believes if his name is not suppressed, it will have a detrimental effect on his practice, in respect of what he understands to be a charge at the very lowest end of the scale.

2. ORDER:

2.1 **IT** is the order of the Tribunal that the application for suppression of name under Section 106(2)(d) of the Act be refused.

3. REASONS FOR ORDER:

3.1 **IN** support of the application Ms Gibson emphasised her perception of the charge as being at the lowest end of the scale, and the delay in making the complaint, as being of critical importance. We will examine these two factors.

The Seriousness of the Charge:

3.2 **AN** important decision which addressed the question of conduct unbecoming under the 1968 Medical Practitioners Act is that of Elias J in *B v The Medical Council* (HC 11/96 Auckland Registry, Judgment 8 July 1996). She explained at page 14 of her Judgment:

"The scheme of the Medical Practitioners' Act 1968 establishes a hierarchy of conduct for disciplinary purposes. In ascending order of gravity the categories are unbecoming conduct (a category introduced by amendment to the Act in 1979), professional misconduct, and disgraceful conduct. Disgraceful conduct must be dealt with by the Medical Council. The lesser charges are dealt with by the Disciplinary Committee with a right of appeal to the Medical Council."

3.3 **IT** would appear that the Court had not been referred to McGechan J's decision in *Cullen v The Preliminary Proceedings Committee* (Wellington Registry AP225/92) which at p 16 discussed the *"trilogy of disciplinary offences"* in this way:

"The popular perception, carried forward into submissions in this case, is of a trilogy of disciplinary offences in an ascending order of gravity and penalty : "conduct unbecoming a practitioner"; "professional misconduct"; and "disgraceful conduct in a professional respect". A "rising scale" of that character was, indeed, accepted and recognised as context by Jeffries J in ***Ongley v Medical Council of New Zealand*** *(1984) 4 NZAR 369, 374. With respect, as a matter of statute law that is only partially correct. True, if a matter of conduct unbecoming a practitioner is before a District Disciplinary Tribunal penalties do not extend beyond censure and costs (ss42B(2), 47(1)(a), 48). However, if*

the matter of "conduct unbecoming a practitioner" is before the Disciplinary Tribunal, the penalty for conduct unbecoming a practitioner and professional misconduct are exactly the same. That is not to say at ultimate extremes "professional misconduct" and "conduct unbecoming" necessarily must be seen as of precisely equal gravity. After all, the same penalty of life imprisonment exists for both murder and manslaughter. The difference, however, becomes a fine one. Clearly, Parliament may have seen the general run of "conduct unbecoming a practitioner" offences as being at the lesser end of gravity. The cursory Parliamentary debates upon the amendment introducing the latter category in 1979 tend to so indicate (426 NZPD 3524, 12 October 1979, 3773, 24 October 1979). With equal clarity, however, Parliament by the terms of the statute it passed envisaged the possibility of cases of "conduct unbecoming a practitioner" so grave that penalty imposed could equal the most severe available for professional misconduct. The term "professional" within "professional misconduct" is not to be interpreted as within a simple rising scale in which it necessarily starts above "conduct unbecoming a practitioner" in gravity. In law, the "professional misconduct" offence could be of equal or even lesser gravity."

3.4 **WE** respectfully agree with and adopt this statement of opinion, particularly in light of the requirement under the 1995 Act that the unbecoming conduct in question "reflect adversely on the practitioner's fitness to practise medicine". Parliament clearly intended in the 1995 legislation to raise the threshold of offending or error in respect of "conduct unbecoming".

3.5 **ANOTHER** factor which militates against a distinction of gravity between conduct unbecoming (as statutorily now qualified), and professional misconduct, is that Divisional Disciplinary Committees (called District Disciplinary Tribunal by McGechan J in *Cullen*) no longer exist under the 1995 Act.

Delay:

3.6 **WE** note the complaint by Mr A arises out of treatment which was provided to him in September and October 1993, nearly five years ago. We do not however accept that delay will result in Mr Curtis being unfairly penalised if his name is not suppressed. It is appreciated that the passage of time is more likely to dim recollection, and his ability to answer the charge

may thereby be affected. On the other hand there may be good reasons why there was such a delay in making the complaint. Such delay, even if inordinate, does not seem to us to be of itself reason to make an order for suppression of name.

Public Hearing:

3.7 **IT** is significant that the presumption in Section 106 of the Act is that hearings of the Tribunal shall be held in public. Section 106(1) provides:

"Except as provided in this Section and in Section 107 of this Act, every hearing of the Tribunal shall be held in public."

3.8 **PUBLICATION** therefore follows unless one or more of the discretionary orders available under Section 106(2)(a) - (d) of the Act are made.

3.9 **SECTION** 106 of the Act reflects a very significant change in direction in the conduct of medical disciplinary cases. Under the Medical Practitioners Act 1968 charges were considered in private, even though the statute itself was silent on the issue. Now, under the 1995 Act, there is a specific direction that such proceedings shall be held in public. It is necessary to make formal application to the Tribunal for suppression or similar orders. There is therefore a presumption that hearings will be conducted in public.

3.10 **IN** discussing the exercise of a discretion to grant name suppression, the Court of Appeal has emphasised a prima facie presumption in favour of openness: *(R v Liddell* [1995] 1 NZLR 538, 545-547). This is consistent with a string of authorities accentuating freedom of speech (enshrined in Section 14 of the New Zealand Bill of Rights Act), open judicial proceedings, and the right of the media to report the latter clearly and accurately. (*Broadcasting Corporation*

of New Zealand v Attorney-General [1982] NZLR120, *Auckland Area Health Board v Television New Zealand* [1992] 3NZLR 406.

3.11 **UNDER** Section 106 of the Act, the Tribunal is expressly directed to consider the public interest. In discussing the role of the public interest in name suppression applications before disciplinary tribunals, Tompkins J, in delivering the Judgment of the Court in *S v Wellington District Law Society* AP319/95 High Court Wellington, 11 October 1996, emphasised the presumption in favour of openness and the purpose of disciplinary tribunal proceedings in protecting the public. His Honour was dealing with a statute with a presumption in favour of public hearings, like the Medical Practitioners Act 1995. The Court noted at page 6:

"We conclude from this approach that the public interest to be considered, when determining whether the Tribunal, or on appeal 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."

3.12 **WHILE** Ms Gibson has emphasised that the charge is not pitched at the most serious level, from our earlier comments it does not follow that the hearing of the charge is not to proceed on the same basis as any other. There is nothing in the Medical Practitioners Act 1995 to suggest that name suppression should be automatic if the medical practitioner perceives the charge to be "less serious". Important issues of medical professional conduct have to be resolved.

3.13 **THE** Tribunal has consistently adopted this balancing approach in other Decisions relating to Section 106, most recently in the case of *Dr JMCW* in Decision 45/98/24C. There is clear public interest in matters of professional practice that fall squarely within the public interest (p 8, para 3.10).

3.14 **IN** order for any restrictions on this basic position to be put in place, the Tribunal must be satisfied that it is desirable to do so, having regard to the interests of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest (Section 106(2)). This is not to say that exceptional grounds must exist, but the Tribunal must be so satisfied.

3.15 **AS** the Tribunal noted in its Decision 14/97/3C in the case of a charge laid by the CAC against *Dr Sami,* Section 106 contains factors which require the Tribunal to exercise a cautious approach when granting exemptions to the basic proposition that the hearing be held in public. The *Sami* case concerned a revisiting of orders made under Section 106 and the mandatory nature of reporting in Section 138 of the Act. Nonetheless the Tribunal's observations about the significance of Section 106 are of relevance in the present case (at page 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."

3.16 **MR** McClelland submitted that the complainant's view is that the public interest would best be served by proceeding as intended under the Medical Practitioners Act 1995, with no special dispensation. Mr McClelland added that this case does not concern matters of an intimate personal nature which could be emotionally distressing to the complainant.

3.17 **WHILE** technically the interests of a respondent medical practitioner in non-disclosure are a matter to which the Tribunal can have regard under Section 106, there is merit in Mr McClelland's submission that if this were a determining factor, then no proceedings could be

held in public. There is unlikely ever to be an instance where the reputation of the respondent medical practitioner is not in issue. But if the respondent medical practitioner's situation was the primary factor and given undue weight, then the clear Parliamentary direction in Section 106(1) that hearings are to be held in public, and published, could be so easily negated as to make that provision worthless.

3.18 **PARLIAMENT** obviously intended that hearings should be in public for the very reasons identified by the Tribunal as set out earlier in the case concerning *Dr Sami,* namely that the public should have confidence in the integrity of the disciplinary process. If the Tribunal were to find the charges not proved, then the respondent medical practitioner will not face any penalty and effectively will be exonerated. In our view the public has a right to know this as much as it has a right to know the outcome of the proceedings in terms of the effect of any order under the compulsory reporting provisions in Section 138 of the 1995 Act.

3.19 **THAT** publication of the name of Mr Curtis 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 cannot form the basis for an order made under Section 106(2) of the Act.

3.20 **IN** terms of publicity that may be afforded to this case, from the CAC's perspective Mr McClelland submitted it is unlikely that this case will excite any particular interest, even within the Hastings community, such as may lend itself to sensational reporting. Fair and accurate

reporting of the proceedings of the Tribunal is allowed, but the respondent medical practitioner would have open to him various measures to seek redress in the event of any defamation or contempt occurring.

3.21 **MR** Curtis has legal remedies open to him if he is dissatisfied with any publication which may take place. There is merit in Mr McClelland's submission that this factor should not unduly influence the Tribunal. It is certainly not sufficient, in a case where there is no evidence of any particular interest in publishing details by the media, to form the basis of an order suppressing publication of details by the Tribunal.

3.22 **PUBLICATION** of the hearing in accordance with the provisions of the Act will provide the necessary transparency that is called for by the Act, in circumstances where particularly sensitive personal issues are not to be disclosed.

3.23 **THE** Tribunal's Decision was reached by a clear majority, with the dissent of one member being recorded. That member's anxiety relates to a perception that doctors practising in smaller centres may suffer differential exposure following refusal to make a suppression order, at least in the interim. The majority does not consider this to be a factor in this instance.

3.24 **IN** declining to make the order sought the Tribunal adopts the concluding comments of the recent judgment of the Court of Appeal in *The Queen v Dare* 25/6/98 Judgment of the Court delivered by Goddard J CA 195/98:

"We find no reason in Mr Dare's case to grant name suppression on the grounds of personal embarrassment and privacy considerations or simply on the basis of his acquittal given the absence of any other compelling reasons."

3.25 **IN** delivering this Decision the Tribunal has had due regard to the judgments of Judge Joyce QC in similar matters : *E v Medical Practitioners Disciplinary Tribunal* (which is reported in the District Court Reports under the name of *ZX v Medical Practitioners Disciplinary Tribunal*) and *P v Medical Practitioners Disciplinary Tribunal*. We have also considered the oral judgment of Judge CN Tuohy in *W v The Complaints Assessment Committee* (Wellington District Court MA : 122-98 9 July 1998). In our view nothing in these judgments detracts from the balancing process which the Tribunal, in the exercise of its discretion under Section 106 of the Act, has endeavoured to undertake correctly in this instance.

DATED at Auckland this 1st day of October 1998.

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P J Cartwright

CHAIR