Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 58/98/33C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Tuesday 24 November 1998 and Tuesday 1 December 1998

PRESENT: Mrs W N Brandon - Chair
Mr P Budden, Professor B D Evans (Dissenting),
Dr R S J Gellatly, Dr M-J P Reid (members)

APPEARANCES: Ms S D'Ath for Complaints Assessment Committee
Mr C W James for respondent
Ms G J Fraser - Secretary
(for first part of call only)

DECISION ON THE APPLICATION FOR HEARING TO BE HEARD IN PRIVATE AND PROHIBITION OF PUBLICATION OF DETAILS

1. BACKGROUND:

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)(d) of the Act that a complaint against the respondent shall be considered by the Medical Practitioners Disciplinary Tribunal ("the Tribunal").

1.2 **THE** charge against the respondent has been set down for hearing early next year. The venue for the hearing is yet to be finalised, but is likely to be xx notwithstanding that the events giving rise to the complaint occurred elsewhere.

2. THE APPLICATION:

2.1 **THE** application made on behalf of the respondent is for the following orders:

1. The hearing of this matter be in private.
2. The publication of any report or account of any part of the hearing be prohibited.
3. The publication of the whole or any part of any books, papers or documents produced at the hearing be prohibited.
4. The publication of the name of any particulars of the affairs of any witness, complainant or other person connected with the hearing be prohibited.
5. Or, in the alternative, an order suppressing the publication of the name of the respondent doctor pending the determination and findings of the Tribunal at which time further application can be made.

2.2 **THE** hearing of the application was initially set down for Tuesday 24 November 1998. However, due to the unavailability of counsel for the applicant at that time, that hearing was adjourned for one week.

2.3 **UNFORTUNATELY**, counsel was again unavailable at that time, but asked that the Tribunal consider the application 'on the papers'. Counsel for the CAC consented to the matter being dealt with in that manner, and the application was considered by the Tribunal in a teleconference commencing at 8.00 am on Tuesday, 1 December 1998.

3. ORDERS:

FOR the reasons set out below, the Tribunal makes the following orders:

3.1 **THAT** the publication of the name of the respondent is prohibited pending further order of the Tribunal.

3.2 **THAT** the further orders sought in the application are not granted.

3.3 **THAT** this decision not be published beyond the Tribunal, the parties or their counsel in a form which contains any reference to the name of the respondent.

4. GROUNDS UPON WHICH THE APPLICATION WAS MADE

4.1 **THE** application was made on the following grounds:

(a) The charges are denied and will be strenuously defended.

(b) Reporting of the evidence to be advanced at the hearing, and prior to the Respondent having an opportunity to call his evidence has the potential to seriously damage the Respondent's reputation and practice in an unjust manner.

(c) The publication of the Respondent's name has the potential to undermine the care of patients for whom the Respondent is currently responsible as the xx of a xx.

(d) The Respondent is a senior practitioner who is engaged in supervising senior doctors in training. Advanced medical education is based on trust, respect and competence and the publication of the Respondent's name will undermine this process.

(e) The Respondent's personal life has already suffered due to the many charges that the complainant has brought over a ten year period. Publication and reporting of the evidence will cause further harm and distress to the Respondent and his family.

4.2 **NO** affidavits were filed either in support of or in opposition to the application. Submissions on the application from both counsel were made in writing, and submitted in advance of the hearing. Members of the Tribunal, and the Chairman of the Tribunal who presided at a Directions Conference in the matter on 17 November 1998, sought clarification of certain matters raised in the application prior to the hearing thereof.

4.3 **IN** particular, the Chairman and Professor Evans sought further information regarding, *inter alia*, Ground (e). The Tribunal was advised:

(a) That no other "*charges*" had been formally made, however allegations in support of a claim of medical error made to the Accident Compensation Corporation had been made. These allegations resulted in the respondent "*having to respond on many occasions*

over a period of years to ACC."

(b) These allegations all relate to the events which found the charge now before the Tribunal.

5. CAC'S POSITION:

5.1 **THE** CAC's position is that it will abide the Tribunal's decision in respect of the orders numbered "3" and "4" in the respondent's application; it opposes the granting of the orders numbered "1" and "2", on the following grounds:

1. The general principal articulated in Section 106 of the Medical Practitioners Act 1995 is that hearings before the Tribunal be held in public. *W v The Complaints Assessment Committee* (Unreported Wellington District Court MA 122/98).
2. That there are in this case no special circumstance of the type alleged to have been existing in *W*. There is not indication that Dr F will be placed at risk of anything other than the usual embarrassment that accompanies such proceedings where members of the public may attend.
3. That there has already been considerable media publicity about this case and that there is therefore clearly public interest in the matter.
4. There is also a clear public interest reflected in the legislation that professional disciplinary proceedings are seen to be conducted in as transparent and open a manner as possible without overly interfering with the privacy of those involved.
5. That concern about reporting or publication during the course of the hearing can be dealt with by imposition of interim orders of the type sought by the Respondent in Application numbers 3, 4 and 5.

5.2 **THE** Tribunal has proceeded on the basis that the CAC does not oppose the granting of the order numbered "5" in the respondent's application.

6. LEGAL PRINCIPLES:

6.1 **THE** application is made pursuant to Section 106 of the Act. That Section provides:

"106. Hearings of Tribunal to be in public:

(1) Except as provided in this section and in Section 107 of this Act, every hearing of the Tribunal shall be in public.

(2) Where the Tribunal is satisfied that it is desirable to do so, after having regard to the interests of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any one or more of the following orders:

(4) …

(5) …

(6) …

(7) …

(a) …
(b) ...
(c) ..."

6.2 **THERE** have now been a number of cases determined by the Tribunal under this Section. Three of those cases have been taken on appeal to the District Court. The principles developed in those cases can be distilled as follows:

1. The statutory language requires no reconstruction and the better and indeed proper course is simply to abide and apply it. It is a question, always allowing for the presumption (that, except as provided in the section and Section 107 of the Act, that every hearing should be in public) of whether after regard has been had to the mentioned interests, the Tribunal is or is not satisfied that it is desirable that the hearings be in private.

E v The Medical Practitioners Disciplinary Tribunal, AP2154/97, 20/5/97

2. *"Section 106 of the Act requires an exercise to be carried out whereby there is a balancing between the general principle that every hearing of the Tribunal shall be in public, and the desirability of having regard to the privacy of any persons and in the public interest."*

P v The Medical Practitioners Disciplinary Tribunal AP2490/97, 18/6/97

3. The "*public interest"* referred to in Section 106 is the process of disciplining doctors transparently and openly. There is a public interest embodied in the legislation itself in a public hearing.

W v The Complaints Assessment Committee, MA 122-98, 9/7/98

7. REASONS FOR DECISION

7.1 Ground (a):

7.1.1 **THE** fact that the charge is denied, and will be "strenuously defended" cannot, *simpliciter*, be a ground for ordering that the hearing proceed in private, or that publication of details of the charge, and the evidence presented at hearing be prohibited.

7.1.2 **IN** applications of this sort, the Tribunal has consistently adopted the approach that it does not consider that, in and by itself, the fact a complaint is proceeding to a defended hearing is *necessarily* a good enough reason for a hearing to be held in private.

7.1.3 **IF** mere defence of a charge gave rise to an entitlement to privacy, then it would, almost inevitably, be the case that hearings of complaints proceeded in private, with the publication of any details of the parties and the proceedings also generally prohibited.

7.1.4 **SUCH** a proposition is inconsistent with the general principle contained in Section 106 that hearings of the Tribunal "shall" proceed in public, subject of course to such other matters as the Tribunal may, in its discretion, take into account.

7.1.5 **ACCEPTANCE** of this ground by the Tribunal, would also require it to ignore the very clear direction on the part of Parliament that the "public interest" is best served if medical professional disciplinary proceedings proceed in as open a manner as possible, taking into account the privacy of the individuals involved.

7.1.6 **ON** occasion, the charges against the practitioner may be at the lowest end of the scale, such that it may be considered that the prejudicial effect of allowing full publication outweighs other considerations. Conversely, charges may be so serious that, even if the practitioner were ultimately found to be not guilty, that outcome would not be sufficient to restore a previously unblemished reputation.

7.1.7 **IN** circumstances of either sort, the fact that the charge is to be strenuously defended, and that such defence may have been perpetuated over several years, might weigh more heavily in the balance.

7.1.8 **HOWEVER**, neither circumstance applies in the present instance. The charge is at the middle level of professional misconduct. Further, the central issue involves an alleged failure on the part of the respondent to obtain informed consent; an issue in which the public generally have a legitimate interest, and one which is fundamental to medical practice, most especially in the last ten years following the publication of the Cartwright Report in 1988 (the currency of this complaint).

7.1.9 **FURTHER** factors taken into account by the Tribunal, included the fact that the events at issue took place in a regional centre other than xx where the hearing is to be held, and that they occurred in the context of a relatively common field of practice (the relief

of pain), such that it is likely that this case may have wider implications and interest for the public generally and the medical profession, regardless of the outcome.

7.1.10 **IN** such circumstances, the reporting of a hearing involving issues of general public and professional interest is unlikely to lead inevitably to the public identification of the respondent.

7.1.11 **IN** such circumstances, suppression of the identity of the practitioner without any other prohibitions (which is sought in the application in the alternative), is seen by a majority of the Tribunal as a fair compromise of the interests of the respondent, the complainant, the wider public interests and the general principles of the Act.

7.2 Ground (b) – Potential damage to respondent's reputation and practice as a result of reporting of evidence given at the hearing:

7.2.1 **THE** respondent's concern that publication of the evidence given in the hearing prior to a finding by the Tribunal and prior to the respondent having an opportunity to call his own evidence has the potential to damage his reputation and practice "in an unjust manner" overlooks the nature of the issues to be canvassed at the hearing, and the other legal and procedural safeguards which are available to the respondent.

7.2.2 **THE** potential for the hearing of disciplinary charges, or more particularly, the reporting of the hearing of disciplinary charges, to impact upon a practitioner's reputation cannot be denied. This is a significant factor to be taken into account by the Tribunal in the balancing exercise at the heart of its consideration of applications for privacy, and that approach has been taken by this Tribunal.

7.2.3 **HOWEVER**, as stated above, this present hearing involves issues which are legitimately of public and professional interest, whatever the outcome for the

respondent. As always the Tribunal must endeavour to balance the competing interests of the respondent, and the public generally, this latter interest identified variously in previous cases as residing in the principle of open justice, the public's expectation of the accountability and transparency of the disciplinary process, the importance of freedom of speech and the media's right to report Court proceedings fairly of interest to the public.

7.2.4 **WHETHER** or not the evidence to be given at the hearing ultimately impugns the respondent's reputation is a factor which (unfortunately) is present in all hearings in which a complaint is made against an individual in his or her professional capacity.

7.2.5 **THE** statement of the Australian Court of Appeal in *Independent Commission Against Corruption v Chaffey & Ors* [1993] 30 NSWLR 21, is apposite:

> *"Where a proceeding is heard in public, a party to it may well suffer harm from the publicity of it. That harm may range from mere embarrassment to grave damage to reputation. However, the fact that will result if the discretion be exercised in favour of a public hearing does not mean that the party has not been dealt with with procedural fairness. In some cases, the public interest or other ends to be served by the discretion may outweigh the right of the individual not to be harmed by the proceeding. In so far as legitimate expectation or the like is relevant, parties involved in such proceedings may not expect that in no circumstances may their reputation suffer from their involvement, or generally ...."*

7.2.6 **THE** Tribunal does not accept that the potential for damage to be caused to the respondent's reputation and practice as a result of the *reporting* of evidence (rather than as a result of the identification of the respondent) is 'unjust' in any way. In determining this application, the Tribunal must proceed on the basis that all of the evidence given at the hearing will be given in good faith, and that the respondent will have the opportunity to challenge the evidence given against him by way of cross-examination and other procedural safeguards.

7.2.7 **THE** reporting of evidence given to the Tribunal, and in criminal trials and civil proceedings generally, is in any event subject to a number of restraints and procedural safeguards, all of which the respondent could have recourse to if necessary, either in the course of the hearing, during the giving of evidence by any party, or subsequently if it was necessary to pursue remedies against any other party.

7.2.8 **THE** potential for any professional person who faces disciplinary charges to be caused embarrassment, or distress, or reputational damage will be present in every case. It will not however, again in itself, be sufficient to justify a hearing in private, or a prohibition on reporting of the hearing and the matters at issue. This will apply *a fortiori* where the subject-matter of the hearing is fairly of public and professional interest.

7.3 Ground (c) – Potential harm to patients currently under the care of the respondent:

7.3.1 **THE** Tribunal was divided as to the weight to be accorded to this ground of the application. The majority of the Tribunal are of the view that the interests of patients currently under the care of the respondent, in this case, persons who are terminally ill, are best served by candour.

7.3.2 **THE** view of Professor Evans in dissent, is that whilst he accepts that the interests of the respondent, the claimant and the public generally must be balanced, in this instance, and on the basis of the very brief information placed before the Tribunal, he regards the risk that damage to the confidence of terminally ill patients currently being cared for by the respondent outweighs the other considerations taken into account by the Tribunal. It is Professor Evans' view that these patients are especially vulnerable; that they are not able to access alternative facilities, or other practitioners with the skill and experience of the respondent; and because any inappropriate publicity might cause a

great deal of anguish to the relatives of terminally ill patients cared for by the respondent both presently and in the past, no publicity about the complaint or the hearing ought to be publicly known until the Tribunal has had an opportunity to hear all of the evidence to be presented in the case against the respondent, and the outcome of the complaint was known.

7.3.3 **PROFESSOR** Evans favoured the granting of the orders numbered (2), (3) and (4) in the application.

7.3.4 **THE** skill and expertise in this area of practice possessed by Professor Evans carries considerable weight and his view of the application was persuasive. However, after considerable debate and discussion of all of the material placed before the Tribunal, the compromise of granting the alternative order (5) sought, was agreed by a majority vote of the members.

7.3.5 **PROFESSOR** Evans asked that his dissent from this Decision and his reasons, be recorded.

7.4 The Further Grounds:

7.4.1 **THE** Tribunal is satisfied that neither of the final two grounds advanced in the support of the application advance the issues beyond the discussion and determination recorded above.

7.4.2 **IN** relation to Ground (d) of the application, the respondent seeks only that his name not be published. That part of the application is granted.

7.4.3 **THUS**, with regard to the concern that the respondent's teaching and supervision of senior doctors in training will be undermined if his name is published, the Tribunal is satisfied that the orders made by it adequately address this concern, without precluding

any more general educative benefits which might flow from a public hearing (and reporting) of this complaint.

7.4.4 **AT** Ground (e), reference is made to the fact that the allegations founding this complaint have been made over the past ten years. Counsel for the CAC referred to the fact that there has already been considerable media publicity about this case. None of that publicity was presented to the Tribunal, nor is the Tribunal aware of the nature, extent or timing of that publicity.

7.4.5 **IF** it is correct that this matter has already received widespread publicity, and/or that there is any element of vexation (rather than mere persistence) on the part of the complainant, the Tribunal is of the view, again in a majority, that these factors provide further support for requiring that the hearing of the complaint should be in public, and the issues dealt with as openly as possible.

7.5 Conclusion:

7.5.1 **AFTER** carefully considering all of the matters presented to it, both individually and collectively, it is the view of the majority of the members of this Tribunal that it is desirable that the hearing of this complaint should proceed in public, and that no orders prohibiting the reporting of the hearing, or of any evidence given at the hearing (subject to the requirements of Section 107 of the Act), should be made at this time.

7.5.2 **THE** Tribunal is satisfied, again in the majority, that an order prohibiting publication of the name of the respondent should be made pending further order of the Tribunal.

7.5.3 **ACCORDINGLY**, the Tribunal grants the application in part:

(a) That the publication of the name of the respondent doctor is prohibited pending the determination and findings of the Tribunal, or further order, or orders, of

this Tribunal.

(b) That this decision not be published beyond the Tribunal, the parties or their counsel in a form which contains any reference to the name of the respondent.

7.5.4 **THE** orders sought numbered 1 to 4 of the Application For Hearing In Private and Prohibition of Publication of Details, are not granted.

DATED at Auckland this 16th day of December 1998.

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W N Brandon

CHAIR