Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 71/98/37C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **KEVIN DAVID KARPIK** medical practitioner of Auckland

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Thursday 8 April 1999

PRESENT: Mr P J Cartwright - Chair
Ms S Cole, Dr M-J P Reid, Associate Professor Dame N Restieaux, Dr B J Trenwith (members)

APPEARANCES: Ms G J Fraser - Secretary
(for first part of call only)

APPLICATION FOR ORDERS PROHIBITING THE PUBLICATION OF ANY REPORT OR ACCOUNT OF ANY PART OF ANY HEARING BY THE TRIBUNAL AND RELATED ORDERS

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 94(3)(a) of the Act that a complaint against Mr Kevin Karpik shall be considered by the Medical Practitioners Disciplinary Tribunal (the Tribunal). The charge has been set down for hearing in Auckland on 10 May 1999. The application by counsel acting for Mr Karpik, Ms Helen Winkelmann, is for the following orders pursuant to Section 106 of the Act:

(a) Prohibiting the publication of any report or account of any part of any hearing by the Tribunal whether held in public or in private;

(b) Prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing;

(c) Subject to the provisions of sub-section 106(7) of the Act, prohibiting the publication of the name, or any particulars of the affairs, or any persons.

1.2 **THE** application is for interim suppression pending the hearing and determination of the charge against Mr Karpik.

2. GROUNDS OF APPLICATION:

2.1 **PUBLICATION** to the extent of naming or identifying Mr Karpik, 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.

2.2 **PUBLICATION** of the name and occupation of Mr Karpik or the nature of the complaint would cause unnecessary public concern.

2.3 **PUBLICATION** of the above mentioned details is likely to cause damage to Mr Karpik's professional reputation which would be disproportionate to the nature of the conduct in issue.

3. AFFIDAVIT OF MR KARPIK IN SUPPORT OF APPLICATION:

3.1 **HE** is an orthopaedic surgeon, having qualified as such in 1995. Currently his practice is divided as to approximately 30% between private practice conducted from rooms at St Marks Road, Auckland and as to about 70% of his practice as a consultant orthopaedic surgeon at Middlemore Hospital.

3.2 **HIS** concern is two-fold. Primarily he is concerned as to the effect such publication will have on his patients. Many of his patients have recently or are about to have significant surgical procedures performed upon them by himself. Many of these patients are frail and elderly with multiple medical problems. He is concerned that should they become aware of the charge and its details the stress they are already under, recovering from, or awaiting surgery, will be added to by the fear that their treatment or proposed treatment is in some way sub-standard or defective. Orthopaedic surgery is by its nature often quite major surgery and the patient's mental well being is regarded as important.

3.3 **SECONDLY** he is a relatively recently qualified specialist who is currently building his reputation in the orthopaedic field. Publication of the charge and details relating to it would,

he has no doubt, have a disastrous impact upon his reputation and practice. In a small medical community like Auckland this would be difficult to recover from.

4. DECISION:

THE application is declined. Reasons for that decision follow.

5. REASONS FOR DECISION:

5.1 **MS** Winkelmann has explained that the circumstances of the charge arise out of the treatment of the complainant in private practice, one in which Mr Karpik is no longer involved. At the time he saw the complainant, Mr Karpik was providing a weekly orthopaedic clinic from the rooms of a group of doctors who had set up a medical practice in Otara. It is through those doctors and that practice that Mr Karpik saw the complainant. Since that time Mr Karpik has ceased his involvement in the Otara practice.

5.2 **THIS** is a formal application pursuant to Section 106(2) of the Act which provides, where the Tribunal is satisfied that it is desirable to do so, having regard to the interests of any person, including without limitation the privacy of the complainant, and to the public interest, it may make an order prohibiting publication of the name, or any of the particulars of the affairs of any person.

5.3 **THE** interests of Mr Karpik have been explained in the grounds supplied in support of his application, and in his affidavit.

5.4 **THE** application for interim suppression of Mr Karpik's name and associated orders requires a balancing of his interests, together with those of the complaint, the patients of Mr Karpik, the CAC and the public interest.

5.5 **IT** is significant that the general principle of Section 106 of the Act is that hearings of the Tribunal shall be held in public. Publication therefore follows unless one or more of the discretionary orders available under Section 106(2)(a)-(d) of the Act are made.

5.6 **ON** behalf of Mr Karpik Ms Winkelmann has indicated, because Mr Karpik's primary concern is the welfare of his patients, more weight should be placed upon that concern than his own position as a relatively recently qualified specialist who is currently building his reputation in the orthopaedic field.

5.7 **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, if that were to be 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 his or her situation was the primary factor, and given undue weight, then the clear parliamentary direction in Section 106(1) of the Act that hearings are to be held in public, and published, could be so easily negated as to make that provision worthless.

5.8 **THAT** publication of Mr Karpik's name in this case my 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. It is

probably not possible to distinguish between the position of an older more experienced specialist, and one who is younger, less experienced and consequently building a reputation in his or her specialist field. No doubt each will feel some vulnerability at having to face a disciplinary charge. 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.

5.9 **ALTHOUGH** Ms Winkelmann accepts that normally there is virtually no publicity associated with cases prosecuted before the Tribunal, she considers there must remain the possibility of publication given that the proceedings are held in public. In terms of publicity that may be afforded this case, the Tribunal considers, on the limited information available, that it should not excite any particular interest 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.

5.10 **THE** respondent has legal remedies open to him if he is dissatisfied with any publication which may take place. 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 name by the Tribunal.

5.11 **HAVING** considered the interest of Mr Karpik, the Tribunal notes that his primary concern is the welfare of his patients. The Tribunal will have regard to them under the umbrella of *"the interests of any person"* in Section 106(2) of the Act.

5.12 **WE** note many of Mr Karpik's patients have recently or are about to have significant surgical procedures performed upon them by himself. That many of these patients *"are frail and elderly with multiple medical problems"* must, in our view, be common to the waiting lists of most surgeons. We do not consider that a special case exists for the patients of orthopaedic surgeons as a class of specialist medical practitioners. If we were to ascribe merit to this application on the basis of a concern for the patients of the respondent doctor, then we think there would be hardly any cases which would not be deserving of orders for interim name suppression. We believe the precedent thereby created would defeat the clear parliamentary direction in Section 106(1) of the Act, that hearings be held in public, and published.

5.13 **THAT** said, however, is not to say that concern for patient welfare can never be a ground for the making of an interim suppression of name order under Section 106(2) of the Act. Each case must be considered on its own particular facts. In this case it is our conclusion that there is insufficient specificity to warrant the making of the orders sought on the grounds of concern for patient welfare.

5.14 **SPECIFICALLY** Section 106(2) of the Act directs the Tribunal to have regard to *"the privacy of the complainant"*. No application has been made by or on behalf of the complainant in respect of her privacy. However at a Directions Conference on 17 February 1999 the Chair of the Tribunal asked counsel for the CAC, Mr Harrison QC, to obtain instructions as to the attitude of his client to the application for name suppression made by Mr Karpik. Apparently Mr Harrison wrote to his client seeking those instructions. We understand that the application for name suppression and supporting affidavit was also copied to Mr Harrison by Ms Winkelmann. Having spoken to Mr Harrison Ms Winkelmann advises

that the complainant instructed him that she consented to Mr Karpik's application for name suppression.

5.15 **IT** was not argued by Ms Winkelmann that because the complainant consents to the application for interim name suppression made by Mr Karpik, that therefore is a factor which should assist the Tribunal in granting the application. However if this is an inference which could be drawn from the submissions which have been made by Ms Winkelmann in support of the application, then it is the Tribunal's position that it is required to exercise a discretion in terms of Section 106(2) of the Act and the focus of the exercise of that discretion is that the Tribunal *"is required to be satisfied that it is desirable to do so"*. Accordingly, notwithstanding the consent of the complainant which has been given in this case, the exercise of the discretion nevertheless remains solely the responsibility of the Tribunal.

5.16 **FINALLY** there is the public interest to be considered. Section 106 of the Act reflects a very significant change in the direction of the conduct of medical disciplinary cases. Under the Medical Practitioners Act 1968 charges were considered in private, even although 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.

5.17 **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* AP 319/95, 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."

5.18 **IT** follows the Tribunal must endeavour to balance the competing interests of those persons whose interests have already been explained, 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.

5.19 **THE** Tribunal has consistently adopted this balancing approach in other Decisions relating to Section 106. There is clear public interest in matters of professional practice that fall squarely within the public interest.

5.20 **PARLIAMENT** obviously intended that hearings should be in public, for the reasons identified by the Tribunal in a case concerning Dr Sami (Decision 14/97/3C), namely that the public should have confidence in the integrity of the disciplinary process. If the Tribunal were to find the charge not proved, then Mr Karpik 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 Act.

5.21 **HAVING** endeavoured to weigh and balance carefully the competing interests of the persons and the public interest referred to in Section 106(2) of the Act, for the reasons given the Tribunal has not been persuaded that the order sought by Mr Karpik should be made, and it is therefore declined.

5.22 **IN** delivering this Decision the Tribunal has had due regard to the judgments of Judge Joyce QC in similar matters: *ZX v Medical Practitioners Disciplinary Tribunal* [1997] DCR 638 and *P v Medical Practitioners Disciplinary Tribunal* AP 2490/97, 18/6/97. We have also considered the oral judgment of Judge Tuohy in *W v the Complaints Assessment Committee*, MA 122-98, 9/7/98. In our view these judgments emphasise the balancing process which the Tribunal, in the exercise of its discretion under Section 106 of the Act, has endeavoured to undertake in this instance.

DATED at Auckland this 21st day of April 1999.

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P J Cartwright

CHAIR