Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 110/99/54C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **RICHARD STRAWSON STUBBS** medical practitioner of Wellington

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Friday 11 February 2000

PRESENT: Mr T F Fookes - Senior Deputy Chair
Dr I D S Civil, Dr J W Gleisner, Dr F McGrath, Mrs H White
(members)

APPEARANCES: Ms K Davies - Hearing Officer
(for first part of call only)

THE APPLICATIONS

1.1 **A** Complaints Assessment Committee ("CAC") referred to the Tribunal a charge against Dr Richard Strawson Stubbs, registered medical practitioner of Wellington, alleging that in providing treatment to a patient prior to performing a particular procedure in December 1993 he failed to obtain her informed consent and that this constituted professional misconduct or conduct unbecoming a medical practitioner which reflects adversely on the practitioner's fitness to practise medicine.

1.2 **THE** charge is to be heard by the Tribunal on 15 March.

1.3 **THE** Tribunal has before it three applications:

(a) An application by the complainant for an order prohibiting the publication of her name and any information that might lead to her identification.

(b) An application by the complainant that the hearing be in private.

(c) An application by the practitioner for an order prohibiting the publication of his name or any details leading to his identification. The application makes it clear that it should be regarded as one for interim suppression of the practitioner's name with any order for such suppression being reviewed after the Tribunal has heard all the evidence in the case and made its finding.

2. THE COMPLAINANT'S APPLICATION FOR SUPPRESSION OF HER NAME:

2.1 **THE** application is not supported by an affidavit but there was attached to the application an extract from a statement previously prepared by the complainant which deals with the effects on her of the events about which evidence will obviously be given.

2.2 **THE** respondent is not opposed to the complainant's application.

2.3 **ON** the information before it the Tribunal accepts the submission of Ms McDonald, counsel for the CAC, that the nature of the medical details likely to be disclosed during the course of the hearing is sensitive and likely to be embarrassing for the complainant. It also accepts that the complaint relates to matters of a highly personal and sensitive nature.

2.4 **THE** Tribunal has no difficulty in coming to the conclusion that the interests of the complainant, and her privacy, require that despite the public interest in the transparency of disciplinary proceedings the complainant's name should be suppressed and an appropriate order will be made accordingly.

2.5 **THE** Tribunal also accepts Ms McDonald's submission that in the event of name suppression not being granted it is likely that people in circumstances similar to those of the complainant would be deterred from making a complaint and that this would undermine the function of the Tribunal. This is an important further reason for the making of the order sought.

3. THE COMPLAINANT'S APPLICATION FOR THE HEARING TO BE HELD IN PRIVATE:

3.1 **S. 106(1)** of the Medical Practitioners Act 1995 provides that, except as provided in that section and in Section 107, every hearing of the Tribunal shall be held in public.

3.2 **S. 106(2)** provides that 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 (among other orders) an order that the whole or any part of a hearing shall be held in private.

3.3 **THE** clear intent of those provisions is that hearings shall generally be in public but may, in whole or in part, be in private where the Tribunal is satisfied, after considering the interests specified in s. 106(2), that that is desirable.

3.4 **THE** practitioner consents to any application for privacy that the complainant might make.

3.5 **THE** decision is, however, to be made by the Tribunal and it is required to consider not only the interests of the parties and the complainant but also the public interest.

3.6 **HAVING** carefully considered the complainant's application and the supporting material the Tribunal is not satisfied that the entire hearing should be held in private and therefore declines to grant the complainant's second application.

3.7 **IN** arriving at its decision the Tribunal has had regard to the following matters among others:

(a) The general desirability and indeed the direction by Parliament that hearings of the Tribunal shall - subject only to the specified exceptions - be held in public.

(b) The fact that on the evidence currently before the Tribunal this is a matter involving a charge which will involve the complainant giving evidence of matters of an intimate or distressing nature.

(c) The fact that as a result of s. 107(2) of the Act the complainant will have a right to give her oral evidence in private (as that term is effectively defined by s. 107(2)(c) of the Act).

(d) That if she exercises that right the complainant will therefore give her oral evidence against the backdrop of her name having been suppressed by order of the Tribunal and of that evidence being given in private.

(e) That the Tribunal also has the power under s. 106(2)(b) to make an order prohibiting the publication of any report or account of any part of any hearing by the Tribunal and that it is at least possible that the Tribunal could make an order prohibiting the publication of any report or account of all or part of the complainant's evidence. The Tribunal is not prepared to make such an order at this stage. No briefs of evidence have as yet been filed and the Tribunal wishes to consider a brief of the complainant's evidence, and to see whether any application for an order under s. 106(2)(b) is made, before forming a final view in this regard.

3.8 **THE** Tribunal is, in other words, satisfied that the position of the complainant can be adequately and fairly dealt with without the entire hearing being held in private.

4. THE PRACTITIONER'S APPLICATION:

4.1 THE grounds on which the practitioner's application is made are that it is desirable to make the order having regard to the interests of the practitioner and to the following particulars:

(1) He is the only surgeon in Wellington performing this type of revision gastric bypass by way of gastric transection and is one of the few specialists in the country who is trained and experienced in this technique.

(2) Publication of his name prior to a finding by the Tribunal has the real potential of seriously damaging his reputation and livelihood in an unjust manner.

(3) Publication of his name prior to a finding by the Tribunal also has the potential of *"scaring off"* patients who might otherwise wish to avail themselves of his services and thereby deprive themselves of the benefit of this surgery.

(4) The damage resulting from name publication would outweigh the interests of the public, such interest which could be satisfied in any event on the finding of guilty should that be the Tribunal's determination, following further review of the name publication issue.

(5) It was requested that the application be regarded as one for interim suppression of the practitioner's name to be reviewed at a later stage.

(6) The harm which would occur to the practitioner (and to potential patients to a degree) as a result of name publication is "not commensurate with, deserving of or appropriate should the finding be one of not guilty. Such harm should not occur as a matter of course merely because the medical practitioner has been charged with an offence. Granted such result may be an unavoidable or even appropriate penalty on a finding of guilty but that point is not reached until the Tribunal has heard all the

evidence and made its finding. Until that time, the medical practitioner is entitled to some protection if his personal circumstances so warrant it. The public interest factor should not be so predominant that it overrides all other competing interests, particularly when the risk of damage caused by name publication is inordinately harsh and unjust bearing in mind that he has not as yet been found guilty and bearing in mind that the application can be considered as one for interim suppression only."

4.2 **THE** CAC neither consented to nor opposed the practitioner's application.

4.3 **THE** provisions of the Act require that, when it is considering applications for interim suppression of a medical practitioner's name, the Tribunal is required to exercise its discretion by balancing the practitioner's interests together with those of the complainant, the CAC and the public interest.

4.4 **THE** Tribunal has consistently adopted the approach that while the interests of a respondent medical practitioner in non-disclosure are a matter which the Tribunal can properly take into account under Section 106, if that were to be the determining factor then no proceedings could be held in public and no respondent practitioner's name could be published before the decision as there is unlikely ever to be an instance where a respondent medical practitioner's interests in terms of his or her reputation, family or commercial interests will not be in issue simply by virtue of the fact that he is facing disciplinary charges.

4.5 **THE** Tribunal fully appreciates the position of a respondent medical practitioner who denies a charge brought against him or her and intends to defend it. It understands that such a practitioner might well feel that even if the charge is dismissed his or her reputation and commercial interests may have been damaged in a way which cannot be fully repaired by the finding in his or her favour.

4.6 **THE** fact is nevertheless that Parliament has determined that, subject only to the specified exceptions, the public interest requires that medical disciplinary proceedings be as open and as transparent as possible. The issue which the Tribunal therefore has to determine in this case is whether the interests of the practitioner when balanced with those of the public interest are sufficient to persuade it that an order prohibiting the publication of the name of the respondent practitioner until the Tribunal has arrived at its decision should be made.

4.7 **THE** Tribunal has carefully considered all of the grounds advanced in the practitioner's application. His application is not supported by any affidavit amplifying the grounds of the application (which are set out in full above). The Tribunal does not consider that any of those grounds is sufficient to require it to order that there should be interim suppression of the respondent practitioner's name. It does not consider that there is anything which is sufficiently compelling to distinguish Dr Stubbs' case from the many others in which respondent practitioners have had to endure publication of their name prior to the Tribunal's decision being arrived at. Indeed the Tribunal is of the opinion that if it granted interim suppression to Dr Stubbs it would find it difficult to resist future applications by other practitioners for suppression of their names until the Tribunal's decision had been arrived at. This is because there appears to be nothing exceptional about the

circumstances which are dealt with in the grounds advanced. Grounds 2, 3, 4 and 6 could be advanced by most, if not all, practitioners in private practice and Ground 1 is not sufficient to persuade the Tribunal that an order should be made. A number of High Court decisions have emphasised the presumption in favour of openness and the purpose of disciplinary tribunal proceedings in protecting the public interest and 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" (S v Wellington District Law Society* (AP 319/95, High Court, Wellington 11/10/96 per Tompkins J).

4.8 **THE** practitioner's application will therefore be dismissed.

4.9 **THE** result of the Tribunal's decision on the various applications is that the complainant's name will be suppressed and that of the practitioner will not be. Some practitioners may consider such a result unfair. It is however necessary to appreciate that if the complainant's name is not suppressed there is the potential for her to suffer considerable distress as a result of something which occurred in her private life. For the doctor, however, the potential of harm to his reputation and standing arises as a result of something which allegedly happened in his professional capacity. The risk of public scrutiny of the actions of a practitioner is a hazard with which many professional people have to live. This does not, however, mean that clients or patients of those professionals should have to suffer distress as a result of publication of their name in association with a report of intimate or embarrassing consequences which are alleged to be a consequence of consultation with

the professional. As was said by Ongley DCJ in *Wilde v CAC* (MA 106/99, District Court, Wellington, 31/3/99):

"Allied with the privacy issue is the practical consideration that publication of details of health treatment is bound to be a deterrent to the laying of a complaint by persons who might otherwise have a justifiable grievance. If resort to the Tribunal is likely to carry with it the embarrassment of public disclosure of private and intimate information the consequences will surely dissuade complainants who have a need of access to the Tribunal. It is possible that practitioners may be embarrassed on occasions by publication of allegations against them which turn out to be unfounded. The balance between the competing considerations cannot be resolved fairly by adopting the same consequence of publication for both the complainant and the practitioner."

4.10 **NOTHING** in this decision implies any view whatsoever as to the merits of the charge. The Tribunal has not seen any briefs of evidence and thus could not have, and has not, formed any such view.

5. ORDERS:

5.1 **FOR** the foregoing reasons the Tribunal orders:

5.1.1 **THAT** publication of the name of, or any particulars or information which might tend to identify, the complainant is prohibited.

5.1.2 **THAT** the other application made by the complainant, and the application made by the respondent practitioner, are each dismissed.

6. **FINALLY** the Tribunal records that neither counsel was able to attend the telephone conference and neither sought that it be adjourned to some later date. The applications were therefore considered *"on the papers"*.

DATED at Wellington this 22nd day of February 2000.

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T F Fookes

SENIOR DEPUTY CHAIR