



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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**BY ORDER OF THE
DISTRICT COURT
PUBLICATION OF
THE NAME OR ANY
DETAILS WHICH
MAY IDENTIFY THE
DOCTOR IS
PROHIBITED**

DECISION NO:

280/03/108D

IN THE MATTER

of the Medical Practitioners Act

1995

-AND-

IN THE MATTER

of a charge laid by the Director of
Proceedings pursuant to Section 102
of the Act against B medical
practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL:

Dr D B Collins QC (Chair)

Dr F E Bennett, Mrs J Courtney, Dr A A Ruakere, Dr J L Virtue

(Members)

Ms K L Davies (Hearing Officer)

Hearing held at Napier on Wednesday 8, Thursday 9 and Friday 10
October 2003

APPEARANCES: Mr M Heron for the Director of Proceedings; and
Mr H Waalkens and Ms C Garvey for Dr B

Introduction

1. On 22 December 2003 the Tribunal delivered its substantive decision in which it found Dr B's failure to properly assess and appreciate her patient's circumstances when conferring with her patient by telephone on 9 August 2001 constituted a serious departure from the standards expected of a general practitioner in New Zealand.
2. This supplementary decision is confined to penalty, costs, and whether or not the orders of the District and High Courts granting Dr B interim name suppression, pending the Tribunal's substantive decision, should continue now that she has been found guilty of professional misconduct.

Penalty

3. The Tribunal sought submissions on penalty and name suppression from both parties. These did not become available until 5 February 2004. Both parties invited the Tribunal to defer a decision on name suppression until after the High Court had decided whether or not to allow an appeal by the Director of Proceedings from the District Court's Judgment granting Dr B interim name suppression. The High Court Decision became available on 20 February 2004. The Tribunal then invited both parties to make any further submissions they wished the Tribunal to take into account before determining whether or not Dr B's name should be permanently suppressed. The Tribunal received those submissions and reconvened on 22 March (by telephone conference) to reach a decision.

4. The Tribunal unhesitatingly accepts Dr B is a highly qualified, conscientious and caring medical practitioner. The Tribunal is also confident that Dr B's departures from accepted professional standards on 9 August 2001 were isolated events in her professional career.
5. Having had the opportunity to assess Dr B the Tribunal is in no doubt the Tribunal's adverse findings are, in themselves, a very significant penalty. It is clear Dr B is remorseful, and deeply affected by the events of 9 August 2001, as well as by the fact she has been found guilty of professional misconduct.
6. The Tribunal is also very mindful of the fact the family and friends of Dr B's patient have been immensely affected by the events of this case. The tragic death of Dr B's patient caused intense pain and stress which the friends and family of the patient will continue to endure for many years.
7. In assessing penalty the Tribunal believes its primary task is to "... *protect the health and safety of members of the public ...*".¹ The disciplinary process should not be used as a vehicle for retribution.
8. In this case the Tribunal has discharged its duty to protect the health and safety of members of the public by re-enforcing to Dr B, and members of the profession, that telephone diagnoses are potentially dangerous and should not be undertaken except in extreme circumstances. The factors in place at the time Dr B undertook her telephone diagnosis on 9 August 2001 were such that Dr B seriously departed from professional standards by relying on her telephone assessment of her patient.
9. In assessing the appropriate penalty the Tribunal has focused on whether or not it should impose a fine on Dr B. This is not a case which calls for the imposition of the penalties prescribed under s.110(1)(b) or (c) of the Medical Practitioners Act 1995.
10. The Tribunal has had regard to Dr B's personal financial means, but ultimately has determined that it is appropriate to censure Dr B, with no monetary penalty. The finding of professional misconduct, is in itself, a serious penalty for Dr B.

¹ Section 3(1) Medical Practitioners Act 1995

Costs

11. The Tribunal draws a distinction between the costs of the Tribunal, and those sought by the Director of Proceedings.

Tribunal's Costs

12. The costs of the Tribunal are borne in the first instance by the medical profession. In balancing the circumstances of a doctor found guilty of a disciplinary offence against the interests of the medical profession as a whole, the High Court has said that it is not unreasonable to require the doctor to pay 50% of the costs incurred by the professional disciplinary body.² In making its assessment of costs the Tribunal has had regard to the total amount of costs incurred, in Dr B's ability to pay any order made against her.
13. In this case the Tribunal's costs associated with the hearing of the disciplinary charge on 8, 9 and 10 October were \$36,941.43.
14. Doctor B is ordered to pay \$18,470.71 being 50% of the costs referred to in paragraph 12 of this decision.

Director of Proceedings costs

15. The offices of the Health and Disability Commissioner, and the Director of Proceedings are funded by the State. In assessing the costs incurred by these offices it is not necessary to take account of the interests of the medical profession as a whole. In assessing the amount of costs Dr B should pay the Director of Proceedings, the Tribunal has derived some guidance from the key principles which apply to awards in the High Court civil proceedings, namely:

15.1 A doctor found guilty of a disciplinary offence should expect to pay costs to the Director of Proceedings. The extent to which a prosecution succeeds is a relevant factor to take into account under this heading.

15.2 Costs awards should reflect the complexity and significance of the proceeding.

² See for example *Newburger v Veterinary Surgeons Board*, unreported, High Court Wellington, AP103/94, 7 April 1995, Doogue J

- 15.3 Costs should reflect a fair and reasonable rate being applied to the time taken to investigate the case, as well as preparing for and conducting the prosecution. The emphasis is on reasonable as opposed to actual costs.
16. The Tribunal has had regard to the ability of Dr B to pay costs and to ensure that any order for costs the Tribunal makes is not viewed as a punishment.
17. In this case, the costs of the investigation, the disbursements, and the costs of counsel instructed to prosecute the charge were fair and reasonable. The schedule of costs submitted to the Tribunal included a reference in two places to the name suppression issue. The Tribunal does not believe it appropriate for any order for costs to incorporate anything associated with the name suppression hearing. Accordingly, the sum of \$2,294 has been excluded from the Tribunal's consideration of the costs application.
18. In this case, the Tribunal believes that it is appropriate Dr B be liable for 30% of the costs of the Director of Proceedings, namely \$12,919.02.

Name Suppression

19. The District and High Courts ordered Dr B's name be suppressed pending the determination of the charge by the Tribunal. Although the decision of those Courts related to interim, as opposed to permanent name suppression, the Tribunal has carefully studied and considered those two decisions when determining whether or not Dr B's name should remain suppressed.
20. The Tribunal believes different principles apply when considering the circumstances of a doctor charged with a disciplinary offence from those of a doctor found guilty of professional misconduct. A doctor found guilty of a disciplinary charge is not able to call in aid the presumption of innocence and plead that they will be unfairly punished if their name is published in circumstances where their conduct has not been found wanting.
21. The Tribunal is required to identify and weigh the competing interests of the public, Dr B, and those of the patient's family and friends.

Public Interest

22. In this case, the key public interest considerations are:

22.1 The importance of public confidence in the integrity and transparency of the medical disciplinary process. This point was made in the following way by Doogue DCJ in *Harman v MPDT*³.

“... the objects of the Act to protect the public will be served by openness of reporting of proceedings. The public interest requires the identification of those practitioners who fall below the required standards There also has to be public confidence in the process by which discipline is imposed on the medical profession”.

22.2 The right of the public and in particular, potential patients to know the identity of a practitioner found guilty of a disciplinary offence so as to enable them to make an informed choice about whether or not they engage the services of the doctor (refer *F v MPDT*).⁴

22.3 The need to avoid suspicion unfairly falling upon other doctors. In this case there has already been publicity identifying Dr B as a “xx doctor”. That publicity occurred at the time of the hearing of the charge and breached the District Court orders concerning interim name suppression. The Tribunal is disturbed the District Court’s order was not adhered to by the New Zealand Press Association. Notwithstanding its disquiet about the breach of the Court’s order, the Tribunal recognises that any general medical practitioners in xx could be unfairly suspected of having been found guilty of professional misconduct if Dr B’s name is continued to be suppressed.

22.4 The seriousness of the doctor’s conduct is also a factor that must be taken into account in assessing the public interest. In this case, whilst the finding against Dr B is that she seriously departed from accepted professional standards, the penalty imposed reflects the Tribunal’s belief Dr B poses no threat to public safety.

³ DC Auckland, NP4275/00, 3 May 2002

⁴ HC Auckland, AP21 SWO1, 5 December 2001, Laurenson J

Doctor's Interests

23. The key factors relating to Dr B's personal circumstances are:
- 23.1 The potential harm to her reputation if her name is published. The Tribunal accepts Dr B is likely to suffer adverse publicity if her name is published. Any adverse publicity may, at least in the short term, adversely affect Dr B's practice.
- 23.2 The distress which Dr B and her family will invariably suffer as a consequence of adverse publicity.
- 23.3 On 22 March counsel for Dr B advised the Tribunal that Dr B's employers had put her on notice that if she did not receive permanent name suppression then her employment would be in jeopardy. The Tribunal is very perturbed by the actions of Dr B's employer. However, the Tribunal cannot become involved in Dr B's employment issues which, no doubt, will be pursued in an appropriate forum.

Interests of Other Persons

24. No submissions have been received that relate specifically to the interests of the family and friends of Dr B's late patient. Their interests have effectively been fused into the "public interest" consideration identified in paragraph 21 of this decision. The Tribunal takes account of the advice it has received that the experiences of this case has caused Dr B to plan a change in her career.
25. After assessing the competing considerations, the Tribunal unhesitatingly believes that the public interest considerations significantly outweigh Dr B's personal interests and concerns. In particular, the Tribunal is totally convinced the public's confidence in the openness and transparency of the medical disciplinary process, as well as the need to avoid the finger of suspicion being unfairly pointed at other general practitioners in the Hawkes Bay greatly outweigh the Tribunal's concerns that Dr B's reputation, and the distress she and her family will suffer. The Tribunal's decision cannot be influenced by the questionable conduct of Dr B's employer.
26. The Tribunal's decision on name suppression will not take effect until 21 April 2004.

Conclusion

27. Doctor B is censured pursuant to s.110(1)(d) Medical Practitioners Act 1995.
28. Doctor B is ordered to pay \$12,919.02 to the Director of the Proceedings and \$18,470.71 to the Tribunal pursuant to ss.110(1)(f)(iii) and (iv) Medical Practitioners Act 1995.
29. Doctor B's application for name suppression is declined.
30. The secretary of the Tribunal is required to publish this decision on the Tribunal's website and arrange for a summary of this decision to be published in the New Zealand Medical Journal. This order is made pursuant to s.138(2) Medical Practitioners Act 1995.

DATED at Wellington this 7th day of April 2004

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D B Collins QC

Chair

Medical Practitioners Disciplinary Tribunal