MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 130/00/56C

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by a Complaints Assessment Committee pursuant to Section 93(1)(b) of the Act against P medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chair)

Dr G S Douglas, Mr R W Jones, Mr G Searancke, Dr L F Wilson (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers (Stenographer)

Hearing held at Rotorua on Monday 29 and Tuesday 30 May 2000

APPEARANCES: Mr M F McClelland and Ms J Elliot for a Complaints Assessment Committee ("the CAC").

Mr H Waalkens and Ms K Garvey for Dr xx.

1.0 SUPPLEMENTARY DECISION:

1.1 **THIS** supplementary decision should be read in conjunction with Decision No. 122/00/56C which issued on 29 June 2000. In that Decision, the Tribunal found Dr P guilty of conduct unbecoming a medical practitioner which reflects adversely on his fitness to practise medicine.

1.2 **THIS** Supplementary Decision issues for the purpose of determining penalties in accordance with Section 110 of the Act.

2.0 THE CHARGE:

2.1 **A** Complaints Assessment Committee initially charged that, in July 1994, Dr P a xx made three errors of clinical judgment in relation to his intra-partum care of Mrs Tracey Waenga which constituted conduct unbecoming a medical practitioner and that conduct reflected adversely on his fitness to practise medicine.

2.2 **AT** the conclusion of the case for the CAC, and with the consent of both the CAC and Dr P, the wording of the Charge was amended to include reference to Dr P's "*clinical*

management of the labour of Mrs Tracey Waenga and the delivery of Adam Waenga". The Tribunal was of the view that the amended wording more accurately described the context within which the Charge arose, and more fairly reflected the substance of the Charge.

2.3 **THERE** were three Particulars contained in the Charge; only one of which was upheld. Nevertheless, the error in clinical judgement on the part of Dr P that was established was very serious, both in terms of the facts and circumstances which the Tribunal was satisfied had been proved by the CAC, and the outcome for Adam Waenga and his parents.

2.4 **IN** considering the nature and level of penalties, Counsel for the CAC submitted that the seriousness of the offending should be reflected in the penalty imposed. In relation to the interim orders for non-publication made by the Tribunal, the CAC submitted that the order should be lifted.

2.5 **IN** making this submission, the CAC refers to the fact that the circumstances of the complaint giving rise to the Charge have now been established "*and have been canvassed in local and national media … The public has a right to know and it is in the public's interest that they do know the name of the doctor involved. It is only then that women who are considering placing themselves under his care can make an informed choice.*"

2.6 **ADDITIONALLY**, the CAC also referred to concerns previously raised by the Tribunal that not identifying Dr P, or his professional status, causes suspicion to fall on all of the other medical practitioners practising in the Rotorua-Taupo district.

2.7 **ON** the issue of costs, the CAC referred to *Cooray v Preliminary Proceedings Committee* (unreported, AP23/94, Wellington Registry, 14/9/95, Doogue J) a decision in respect of an award of costs by the Medical Council under the 1968 Act (which Act applies in the present instance by virtue of Section 154(f)(ii)).

2.8 **IN** that case Justice Doogue reviewed the relevant authorities and concluded that:

"… It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide … In other cases where it has considered that such an order is not justified because of the circumstances of the case, … the Council has made a downwards adjustment."

2.9 **AGAINST** these submissions, Counsel for Dr P has pointed out that the facts of *Cooray* were very different to this case. In *Cooray*, the practitioner was found guilty of disgraceful conduct, and in circumstances involving issues of sexual misconduct. The Tribunal accepts that no such element of deliberate harm is present in this case. Mr Waalkens submits that costs of substantially less than 40% would be a reasonable contribution.

2.10 **IN** relation to the CAC's submission that the interim name suppression orders ought to be discharged, Mr Waalkens refers to the evidence submitted at the hearing to Dr P's credit. Dr P, Mr Waalkens submitted, is a practitioner who is well thought of in the local

community, and he has made a significant contribution to the local community and to women's health generally.

2.11 **THE** Tribunal does not doubt that this issue is *"unquestionably the most concerning aspect for Dr P."* In essence, Mr Waalkens submitted that this case is quite different to those cases in which the Courts, including the Court of Appeal, have refused name suppression. *"There can be no public interest in "knowing the character" of Dr P"*, submits Mr Waalkens.

2.12 **MR** Waalkens urged the Tribunal to take into account the references provided at the hearing *"which point to a practitioner seriously committed to the wellbeing of women's health in the region - a commitment which can only be damaged by [lifting] name suppression to the ultimate disadvantage of the community as a whole"*, and also certain matters of fact which were established at the hearing of the Charge and which could be regarded as exculpatory in the context of the ultimate findings against him.

2.13 **MR** Waalkens also submitted that lifting the interim orders would adversely impact on Dr P's young children, and his aged parents, who are in frail health and who reside in xx.

2.14 **DR** P accepts that censure will be a penalty, but Counsel submits a fine is not necessary, nor are conditions on Dr P's practice. Finally, Mr Waalkens referred to the impact which the outcome of Mrs Waenga's labour and delivery, and the Tribunal's finding, has had on Dr P, in terms of both his personal life and his professional life.

2.15 **IN** the latter regard, he has resigned from his senior position at xx, and from the position he held as President of the xx.

3. ORDERS:

3.1 **THE** Tribunal has carefully considered all of these submissions, and all of the facts and circumstances established at the hearing of the Charge. It accepts Mr Waalkens' submissions regarding the factual background. However, it equally cannot ignore the seriousness of the error of judgment which the Tribunal was satisfied occurred. Taking into account all of the submissions made in relation to penalty, and to the nature of its findings, set out in its substantive Decision, the Tribunal determines as follows:

(a) **THAT** Dr P be censured.

(b) **THAT** Dr P be fined $700 (the maximum penalty permitted in terms of the Medical Practitioners Act 1968 is $1000).

(c) **THAT** Dr P is to pay $21,968.80 which represents 35% of the costs of and incidental to the inquiry by the CAC, prosecution of the charge by the CAC and the hearing by the Tribunal.

(d) **THAT** the order made by the Tribunal prohibiting publication of Dr P's name is vacated.

(e) **THE** Tribunal orders publication of the above orders in the New Zealand Medical Journal pursuant to Section 138 of the Act.

4.0 REASONS FOR ORDERS:

Conditions:

4.1 **FOLLOWING** the hearing of the Charge the Tribunal was satisfied, on the basis of the seriousness of its finding of culpable error on the part of Dr P, that his management of Mrs Waenga's labour and delivery did not constitute an acceptable discharge of his professional obligations as the xx with overall responsibility for Mrs Waenga's intra-partum care.

4.2 **THE** Tribunal does not accept the CAC's submission that conditions ought to be placed on Dr P's practice, principally because it does not consider that the nature of the error which the Tribunal determined was made, is such that it can readily identify what sort of conditions would best ensure that such an error did not happen again.

4.3 **RATHER**, the Tribunal would prefer to refer its Decision to the Medical Council together with a request that the Council consider whether or not it would be desirable, useful or beneficial for Dr P to undertake a general review of Dr P's practice by way of a competency review pursuant to Part V of the Act.

4.4 **IN** the event that any such review is undertaken, the Tribunal suggests that it include a 'look back' of cases managed by Dr P, bearing in mind that this is the second such Charge which has been brought against Dr P, notwithstanding that the earlier Charge, while initially upheld, was later dismissed on appeal.

4.5 **THE** Tribunal notes in this regard the matters of fact referred to the Tribunal by Mr Waalkens which he submits should be taken into account. The facts referred to which Mr Waalkens has urged the Tribunal to bear in mind relate to events surrounding the delivery of Adam Waenga, and to the fact that Dr P was doing his best for Mrs Waenga and her baby "*on the night [and] he had been on duty for a long time throughout the day*".

4.6 **HOWEVER**, the Tribunal has also borne in mind that Mrs Waenga, who was identified as a 'high risk' patient after a previous caesarean section delivery, went to Dr P, as a private patient so that she could receive the appropriate care and advice of a xx. Mrs Waenga went into hospital for an induction and 'trial of labour'; Dr P chose to have Mrs Waenga induced by a midwife, who was unable to feel her cervix, with the result that no baseline recordings for the fetal heartbeat and no accurate assessment of the cervical state prior to the onset of labour, or spontaneous uterine activity, were available.

4.7 **MRS** Waenga's labour was induced at 0600 hrs by the administration of 2 mg of prostaglandin gel, a dosage which was the subject of some debate at the hearing as expert evidence was given that the protocols at National Women's Hospital and Wellington Hospital are to administer 1 mg only when inducing multiparous women because the uterine response in such women can be unpredictable. Mrs Waenga was permitted to go 'off-site' into Rotorua for approximately 3 hours after induction.

4.8 **DR** P reviewed Mrs Waenga's progress at 1200 hrs and 1755 hrs, but was otherwise not immediately available during the day as he was operating at a private hospital some distance away and the midwives attending Mrs Waenga had to communicate their

concerns regarding the CTG trace to him by telephone and fax. The Tribunal was satisfied that there was sufficient evidence to suggest that the midwives had indicated persistent concerns regarding the CTG trace throughout the afternoon and evening.

4.9 **IN** finding Particular B of the Charge proven, the Tribunal was satisfied that *"In the face of a known risk, and a risk of such magnitude in terms of the potential outcome for both mother and baby, Dr P requested that the syntocin infusion be commenced [at around 0315 hrs after labour had ceased] in an attempt to re-start labour. … For whatever reason, Dr P appears to have ignored, or at least simply failed adequately to take into account, the accumulation of sentinel events and thus the increased level of risk of uterine rupture, and jeopardy for his patients."*

4.10 **THUS**, it is the Tribunal's view that it is not accurate to characterise Mrs Waenga's uterine rupture as a catastrophic event occurring at the end of a long labour, and in the middle of the night, as entirely unexpected or unpredictable. The Tribunal accepted the expert evidence given at the hearing that Dr P's management of Mrs Waenga's labour "*commenced on the basis of incomplete information*", and also that the midwives attending Mrs Waenga expressed concerns regarding the progress of labour and the wellbeing of the baby throughout the day.

4.11 **THE** outcome which eventuated could have been avoided by Dr P intervening at a much earlier time, rather than adopting the 'wait and see' approach that ultimately required emergency action.

4.12 **FURTHER**, the possibility of intervening by delivering Adam Waenga earlier in the evening by caesarean section, which must at least have been an option at the outset in the context of a 'trial of labour', seems not to have been raised by Dr P with either of the midwives attending Mrs Waenga, or with Mr and Mrs Waenga.

Censure:

4.13 **IN** relation to censure, it has long been established that an adverse finding in relation to a professional disciplinary offence will inevitably attract a formal censure. The Tribunal is satisfied that censure is warranted in the circumstances of this case.

Fine:

4.14 **THE** conduct giving rise to the Charge arose in July 1994, prior to the commencement of the 1995 Act, accordingly the provisions of Section 154 apply. As a result, the maximum fine available to the Tribunal is $1,000.00, compared to the maximum available under the 1995 Act of $20,000. The Tribunal accepts that, in relative terms, $700 is near the upper end of the available penalty, but is satisfied that is appropriate in the circumstances of this case.

Costs:

4.15 **THE** Tribunal is satisfied that an adverse finding on a Charge at the lower end of the range of professional disciplinary offences will generally attract a downwards adjustment of the general order of costs awards, 50%, as acknowledged by the High Court in the *Cooray* case. However, as it has already stated, notwithstanding that the Charge was laid, and

upheld, at the lower end of the available range, the Tribunal is satisfied that the seriousness of the finding made against Dr P ought to be fairly reflected in the penalty.

4.16 **ACCORDINGLY**, it is satisfied that in all the circumstances, an order that Dr P contribute $21,968.80, being 35% of the total costs incurred by the CAC and the Tribunal, is fair and reasonable.

Name suppression order discharged:

4.17 **THE** Tribunal has carefully considered all of the submissions made to it in this regard. The Tribunal has also reviewed the submissions made by the CAC in opposition to the original application made on behalf of Dr P, which was granted by the Tribunal. At that time, Mr Waalkens emphasised that the application was for interim name suppression only, accepting that the matter would be re-considered once the outcome of the Charge was known.

4.18 **NOTWITHSTANDING** that name suppression was granted, there was considerable publicity, particularly in the print media, at the time of the hearing. There is clearly a significant degree of legitimate public interest in this case in the local area.

4.19 **ALSO**, there is no doubt that maintaining name suppression orders causes suspicion to fall on all practitioners, particularly in a smaller, regional centre where there may be only a few practitioners, or a small number of specialists within the relevant area of practice. If a Charge is upheld, it is less easy to justify a continuation of any such suspicion on other practitioners.

4.20 **FINALLY** in this regard, whilst the decision whether or not to grant or maintain name suppression is entirely discretionary, the Tribunal is bound to apply the relevant provisions of the Act. Section 106 (1) requires that hearings of the Tribunal shall be heard in public. The consideration of the application for permanent name suppression requires a balancing of Dr P's interests, as explained in the submissions, together with those of Mr and Mrs Waenga's (and any other person), and the public interest.

4.21 **THE** Tribunal must therefore endeavour to balance the competing interests of those persons referred to, and the public generally. The nature of this latter interest has been discussed now in a number of cases in the Tribunal, the District Court and the High Court. In general terms, it has been described as residing in the principle of open justice, the public's expectation of the accountability and transparency of the disciplinary process, the public confidence in the medical profession, the importance of freedom of speech and the media's right to report court proceedings fairly of interest to the public.

4.22 **AS** the Tribunal has stated on similar occasions, Parliament clearly intended that proceedings of the Tribunal should be conducted in the public domain so that the public can have confidence in the integrity of the professional disciplinary process.

4.23 **TAKING** into account all of the factors comprising 'the public interest' it is implicit that members of the public are entitled to receive information that might fairly and reasonably be considered relevant about their doctor, or any practitioner who might become their doctor, or whom they might be considering consulting for private, specialist care; that especially includes information that arises in the professional domain or about a

practitioner's professional practice, unless the Tribunal is satisfied, in the particular circumstances of each case, that the practitioner's private interests outweigh the public interest and such information ought not to be disclosed.

4.24 **ON** balance, and after taking into account all of the submissions made to it, and the nature of its adverse findings against Dr P, the Tribunal is satisfied in this case that the public interest, encompassing as it does all of the factors referred to above, outweighs Dr P's private and professional interests in maintaining suppression of his name from the public domain.

4.25 **THIS** Supplementary Decision of the Tribunal is unanimous.

DATED at Auckland this 15th day of September 2000

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W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal