MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

PO Box 5249, Wellington • New Zealand
Ground Floor, NZMA Building • 28 The Terrace, Wellington
Telephone (04) 499 2044 • Fax (04) 499 2045
E-mail mpdt@mpdt.org.nz

DECISION NO: 146/00/58D

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 **JOHN EDGAR HARMAN** medical practitioner of Auckland

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Chair)

Dr F E Bennett, Ms S Cole, Dr R S J Gellatly, Mr M G Laney (Members)

APPEARANCES: By consent, there were no appearances on behalf of the Director of Proceedings or Dr Harman.

1. THE APPLICATION:

1.1 **AN** application seeking that the publication of Dr Harman's name and of any details which might identify him, or his professional practice be permanently prohibited has been made on behalf of the respondent, Dr Harman.

1.2 **AN** application seeking interim suppression of this information was granted by the Tribunal by Decision dated 11 May 2000, and the Tribunal's Decision determining the charge is dated 30 October 2000. This Decision should be read in conjunction with those Decisions.

2. BACKGROUND TO THIS APPLICATION:

2.1 **THIS** application is made following the determination of a charge of professional misconduct laid against Dr Harman by the Health and Disability Commissioner's Director of Proceedings. That charge involved allegations that Dr Harman removed an approximately 2 - 3 cm non-specific mass from the right axilla of his patient, Mrs Teresa Procter without obtaining her informed consent, and that he acted in breach of the Code of Health and Disability Consumers' Rights.

2.2 **THE** Tribunal determined that Dr Harman was not guilty of the charge. However, notwithstanding that charge was not upheld, the Tribunal did identify some concerns regarding aspects of Dr Harman's professional practice generally. For example, in regard to his record-keeping and the safekeeping of medical records, recording and returning patients' telephone messages, and his general practice relating to the obtaining of patients' informed consent to surgical procedures.

2.3 **PRIOR** to the hearing of the Charge, an application for interim orders for name suppression and other orders was made. At the hearing of that application, Ms Hollings, Counsel for the Director of Proceedings, emphasised the general trend against ordering name suppression by the courts generally. Ms Hollings submitted that cases such as *Liddell* (*R v Liddell* [1995] 1 NZLR 538) reflected the trend by the NZ Courts in favour of openness, and of granting name suppression 'far less often'.

2.4 **MS** Hollings also submitted that there was nothing exceptional about the circumstances disclosed on behalf of Dr Harman. His commercial interests are no different from other practitioners, and it is increasingly the case that doctors have commercial interests to protect, and that most practise under their own name. In Dr Harman's case, he practises under the name of his clinics, and while his name is relatively well-known, consumers would not necessarily associate him with the clinics.

2.5 **FOR** Dr Harman, Mr Waalkens relied mainly on the case of *R v KA*, (HC, Auckland, T990076, 24/2/99) in which the court suppressed publication of the name of a medical practitioner and his employer, on an interim basis pending the hearing of very serious criminal charges. Mr Waalkens suggested that, considering the work undertaken by the Clinics for the benefit of the community generally, there was a greater risk of harm to the public interest from publication, than from non-publication of Dr Harman's name at that stage.

2.6 **MR** Waalkens emphasised that he was seeking interim orders only, and that, on that basis, there was no real disadvantage to the "*public interest*" if Dr Harman's name was to be suppressed prior to the hearing and determination of the charge.

2.7 **IN** the event, the Tribunal was persuaded that the application should be granted. The reasons for granting the application included:

- because the orders were sought on an interim basis only the Tribunal was not unduly restricting the reporting of the charge or the circumstances in which it arose, and dissemination of information fairly of public interest would not be unduly restricted;
- the matter would be considered afresh once the charge was determined**;**
- there was no obvious public interest to be served if publication of Dr Harman's name was permitted prior to the hearing of the charge;
- it could not be said with certainty that the interests of Dr Harman, his family, the Clinics he is associated with, other undertakings and community work he is involved in and/or his patients, would not be detrimentally affected if his name was disclosed in connection with a disciplinary charge;
- the circumstances of the complaint were confined to a single episode of care and there was nothing to suggest that any other member of the public was at risk;
- it was appropriate to take into account the reputational interests of third parties who had no direct involvement or relevance.

2.8 **THIS** current application is made on the following grounds:

(1) Dr Harman has been acquitted of the charge against him.

(2) The matters upon which the Tribunal granted interim suppression continue to apply - in particular the risk of damage to him and/or the medical practice which he has established.

(3) The risk of publicity and consequential damage and upset to his patients, past and present, continues to apply.

(4) As set out in the affidavit already filed by Mr Harman in support of the application for interim suppression.

2.9 **NO** further submissions beyond those already referred to were made by either counsel in support of or in opposition to this present application and the Director of Proceedings has advised that she neither opposes nor consents to the making of the orders sought.

3.0 **THE DECISION:**

3.1 **FOR** the reasons set out below, the Tribunal has determined that the application should be declined.

4. **REASONS FOR DECISION:**

4.1 **IN** deciding the application for interim orders in Dr Harman's favour, the Tribunal commented that the issues were very finely balanced. It was fair to say that the grounds advanced in support of that application did not appear to raise issues which are not present in all such cases. However, in the context of that application, it was equally not obvious that there was any particular 'public interest' to be served in disclosing Dr Harman's identity, or the identity of his practice at that time.

4.2 **IT** must be borne in mind that, at the time such an application is made and considered, the Tribunal has before it only a very small amount of information relating to the charge, and the circumstances in which it arises. Also, Mr Waalkens emphasised, the application sought only interim orders. Once the charge was determined the matter could be considered afresh.

4.3 **AT** that early stage in the proceedings, the Tribunal was satisfied that there may have been some prejudice to Dr Harman, and to his practice and other community work, if there was publicity about the charge on the basis of incomplete information, and before Dr Harman had an opportunity to defend the allegations made against him.

4.4 **ALSO**, the Tribunal was not persuaded that Dr Harman should bear the burden of precedent; that is, that the fact that granting the application might make it difficult for the Tribunal to resist any such applications in the future was not a fair reason to decline the application.

4.5 **THE** Tribunal is satisfied that none of these considerations continue to be relevant, and that the matter must be considered afresh, as was always intended and agreed. In embarking upon its consideration of this application, the Tribunal has taken into account the material and information provided in support of and in opposition to, the application for interim orders; its determination of the charge and the facts and circumstances of the complaint giving rise to the charge, and to the relevant statutory provisions and legal principles.

4.6 **ON** that basis, the Tribunal is not persuaded that any of the grounds which have now been advanced in support of the application are sufficient to displace the presumption as to the reporting of court proceedings in favour of openness. The Tribunal is not persuaded that, especially in the circumstances of this case, the fact that the practitioner has been found not guilty of the charge is, on its own, a sufficient reason to grant the orders sought. However, in determining this application, the Tribunal has taken into account all of the grounds advanced separately and in the aggregate.

4.7 **THE** relevant principles in this context are by now very familiar and the Tribunal has previously referred to the Court of Appeal's statement of principle in *R v Liddell* [1995] 1 NZLR 638 that:

> *"It would be inappropriate for this Court to lay down any fettering code. What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness. Name restrictions as to victims of sexual crimes are automatic (subject to the possibility in a range of cases of orders to the contrary), and they are permissible for accused or convicted persons. But they are never to be imposed lightly. …*
>
> *In considering whether the powers given by s.140 should be exercised, the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates of the public'. These principles have been stressed by this Court in a line of cases … The basic value of freedom to receive and impart information has been re-emphasised by s.14 of the New Zealand Bill of Rights Act 1990." (546)*

4.8 **AT** previous hearings of such applications, counsel have submitted that the Tribunal should be cautious about applying cases from the criminal jurisdiction (with their higher standard of proof) in the context of disciplinary proceedings (where the civil standard applies). However, the Tribunal has taken the approach that as long as the standard of proof which it applies in any particular context is consistent across all of the considerations which are

relevant, then it is satisfied that these cases are relevant, and the Tribunal is bound to apply the relevant legal principles as formulated by the Court of Appeal.

4.9 **ON** appeal, the Tribunal's approach has recently been upheld on the basis that while *"it is true that the purposes of the two types of proceedings are not necessarily the same, … the discretion provided by the two pieces of legislation [s.106 of the Act and s.140 Criminal Justice Act 1985] do not appear, to me, to be materially different at all", Ford v CAC & MPDT,* NP95/00, District Court Wellington, 8/9/00. Both legislative provisions provide that the power to determine such applications is entirely discretionary. Nonetheless, the consideration of this application, as in all such cases, requires a balancing of the practitioner's interests, against the public interest, and the interests of any other persons whose interests may be relevant.

4.10 **IN** the disciplinary context, 'the public interest' has been defined as residing in the principle of open justice, and in terms of the general principles in favour of openness; freedom of speech and the media's right to report proceedings fairly of interest to the public.

4.11 **IT** has been identified variously in previous cases as residing in the public's expectation of the accountability and transparency of the disciplinary process; the maintenance of the public confidence in the integrity of the disciplinary process; public confidence in the medical profession generally, and in the reputation of the profession, and the public interest embodied in the legislation itself: *W v CAC* MA 122-98, 9/7/98 (DC); *ZX v MPDT* [1997] DCR 638; and *P v MPDT*, AP 2490/97, 18/6/97 (DC).

4.12 **AS** Fisher J stated in *M v Police* (1991) 8 CRNZ 14, a case referred to by Mr Waalkens in making the application for interim orders, *"In general the healthy winds of publicity should blow through the workings of the Court … It is important that justice should be seen to be done …"*.

4.13 **IN** *Lewis v Wilson & Horton Ltd* (unreported, CA131/00, 29/8/00), a case decided by the Court of Appeal after the original application was determined, the Court confirmed the trend towards openness, a trend which the Tribunal considers is consistent with the clear intention of Parliament, evidenced by s.106 of the Medical Practitioners' Act 1995 (the Act), that the professional disciplinary process should be open to public scrutiny and be functionally transparent.

4.14 **IN** *Lewis* the Court of Appeal stated that *"The Judge must identify and weigh the interests, public and private, which are relevant in the particular case. It will be necessary to confront the principle of open justice and on what basis it should yield"*. This statement of principle is entirely consistent with the requirement contained in s.106 that when considering applications for name suppression the Tribunal must balance the competing interests which are relevant in the circumstances of each individual case.

4.15 **IN** relation to the consideration of the interests of any other persons, it is a relevant consideration in this case that maintaining name suppression orders causes suspicion to fall all practitioners, particularly if there are relatively few specialists practising within either the relevant area of specialist practice and/or the relevant geographical area, both of which apply in this case. The hearing of the charge, and the Tribunal's decision, have both been reported in the local news media.

4.16 **GIVEN** that the Tribunal did express some general concerns regarding Dr Harman's practice, it hardly seems fair that other specialists, especially those who practice as "*breast surgeons*" should have to suffer any continuation of suspicion that they were the subject practitioner. For example, the Tribunal was concerned that Dr Harman was unable to produce any of his records relating to Mrs Procter's care and treatment. He was not able to produce a consent form signed by her, which the Tribunal considers is a serious omission on his part.

4.17 **HOWEVER**, as a matter of fact, Mrs Procter confirmed that Dr Harman did make notes; she complained that he was so busy taking notes that she felt he did not pay sufficient attention to what she was saying. She was also sure that she did sign a consent form. In those circumstances, and because the Tribunal determined, as a matter of fact, that Dr Harman did provide Mrs Procter with the information and advice that was necessary and appropriate in the circumstances, the Tribunal was satisfied, on the balance of probabilities that Dr Harman did make an adequate patient record and that informed consent had been obtained from Mrs Procter.

4.18 **THE** Tribunal was also satisfied that it was clear that Dr Harman may have misunderstood Mrs Procter's instructions. While the Tribunal was satisfied that notwithstanding these matters Dr Harman was not guilty of any professional disciplinary offence, nonetheless, the matters giving rise to the Tribunal's concerns were not unimportant or insignificant.

4.19 **PRACTITIONERS** have a professional responsibility to keep clear, accurate and contemporaneous patient records. It is a responsibility owed to their patients, and it is

very much in their own interest also. As has been said on previous occasions, any practitioner who fails to maintain proper records, or who cannot provide proper or adequate documentation in the context of misconduct hearings or litigation generally, is at risk of an adverse finding.

4.20 **TWO** further matters are relevant considerations: first, that 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.

4.21 **SECONDLY,** it is the principal purpose of the Act to protect the health and safety of members of the public by prescribing or providing for mechanisms to ensure that medical practitioners are competent to practise medicine. One of the ways in which the professional disciplinary processes contribute to this purpose is by setting standards and fulfilling an educative role generally within the profession; it is clear that the Tribunal's decisions do provide a focus for debate and discussion.

4.22 **THIS** is especially relevant in the context of an important and often controversial issue such as 'informed consent', and Dr Harman gave evidence of his involvement in giving lectures at meetings of his College and contributing papers at professional seminars on this topic.

4.23 **THE** Tribunal accepts that it will frequently be the case that discussion and debate about the issues does not require identification of the individuals involved. However, in this case, the Tribunal considers that there are a number of reasons why Dr Harman's identity may be disclosed. For example, the complainant, Mrs Procter, has not sought any similar suppression of her identity; Dr Harman is directly involved in the professional continuing education processes on this topic, and because other Auckland specialists in the same area of expertise should not have suspicion fall upon them. Accordingly, the Tribunal considers that in this case, Dr Harman's identity is information that is of legitimate public and professional interest.

4.24 **WHILST** initially the Tribunal was concerned that patients, and potential patients, might be anxious if they were aware of the charge laid against Dr Harman, it is no longer satisfied that is the case. Dr Harman has after all been found not guilty of the charge, although the Tribunal accepts that he considers that this is a reason to grant the application. However, having been acquitted of the disciplinary charges, Dr Harman is now in a position to allay any concerns patients may raise, and also the fact that he was found not guilty has been reported in the news media, albeit his name was not able to be disclosed in those reports.

4.25 **THE** Tribunal also notes that one of the grounds cited in support of this application is that Dr Harman is concerned to protect his commercial interests and the interests of his clinic. It was clear to the Tribunal that Dr Harman's practice is a significant business enterprise. However, for the reasons outlined above, and particularly because granting permanent name suppression causes suspicion to fall on all such practices, the Tribunal considers that

it would be unfair if the potential for some 'commercial' prejudice to be caused to similar professional practices was disregarded. If this is genuinely a concern held by Dr Harman, it must equally apply to other practices.

4.26 **FOR** all of these reasons therefore, the Tribunal is not satisfied that this is a case which requires that the 'prima facie presumption in favour of open reporting' should be displaced, or that granting permanent name suppression can be justified in the circumstances of this case.

5. ORDERS:

5.1 **ACCORDINGLY,** the Tribunal orders:

5.1.1 That the application for permanent suppression of Dr Harman's name or of any fact identifying him and/or his medical practice and/or any clinics associated with him, is dismissed.

DATED at Auckland this 7th day of December 2000

.....

W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal