



MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 145/00/66D

IN THE MATTER of the MEDICAL PRACTITIONERS
ACT 1995

AND

IN THE MATTER of disciplinary proceedings against O
medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Thursday 16 November 2000.

PRESENT: Mrs W N Brandon - Chair
Dr J C Cullen, Dr L Henneveld, Dr B D King,
Mr G Searancke (members)

APPEARANCES: Ms T W Davis, Director of Proceedings
Ms C Garvey for respondent
Ms G J Fraser - Secretary
(for first part of call only)

DECISION ON THE APPLICATION FOR NAME SUPPRESSION

1.0 THE APPLICATION:

1.1 BY Notice dated 28 September 2000, the Director of Proceedings has charged that Dr O is guilty of professional misconduct in relation to his care and treatment of his patient, Mr Brian Kennedy-Smith, and that he failed to keep appropriate clinical records. The charge contains a number of particulars of the alleged misconduct.

1.2 THE charge is to be heard at a hearing in Auckland scheduled to take place on 15 December 2000.

1.3 AN application seeking that publication of Dr O's name and any fact identifying him be prohibited until the hearing of the charge, and thereafter as the Tribunal may direct, has been made on his behalf.

2.0 GROUNDS FOR THE APPLICATION FOR SUPPRESSION:

2.1 THE grounds of the application are as follows:

2.1.1 Dr O denies the charge;

2.1.2 Any publicity will invariably result in substantial prejudice to him and to his immediate family;

2.1.3 Dr O's name is relatively uncommon meaning that his children will be easily identifiable, and linked to him;

2.1.4 The matters at issue are confined to this particular case. Any publicity would cause undue concern not only to Dr O's patients but also to the patients of those doctors with whom he works;

2.1.5 Dr O works at four clinics on a regular basis and publicity of his name would have a detrimental effect on all of those doctors with whom he works, being at various locations around xx.

2.2 **THE** Director of Proceedings advised that she neither opposed nor consented to the application, and that while the complainant had initially vehemently opposed the application, she had now decided to take a neutral stance, having now had the opportunity to consider Dr O's affidavit filed in support of his application, and to hear from Ms Davis the background to the application relating to the situation of Dr O's children.

3.0 SUBMISSIONS:

3.1 **FOR** Dr O, Ms Garvey referred to Dr O's affidavit, and to correspondence from a Senior Clinical Psychologist, Ms A, and Dr B, a Psychiatrist, both of whom have been involved in providing psychological care and support to Dr O's children. In his letter, Dr B, advises that Dr O's daughter is especially vulnerable as she has a severe anxiety and depressive illness and has suffered bullying and trauma and has attempted suicide on more than one occasion.

3.2 **IT** is Dr B's opinion that she would be in psychological danger and possibly further danger from self-harm if her father's name was publicised, and this case was the subject of media comment and publicity.

3.3 MS Garvey also advised that the children's mother supported the application for name suppression because of the risk for the children if their father's name was published.

3.4 AS to the other grounds of the application, Ms Garvey accepted that these principally related to the fact that Dr O would be "*rigorously defending*" the charge, and he was concerned that he would suffer damage to his professional reputation if there was publicity about the charge in the meantime. In particular, that "*disproportionate and irreparable harm*" would be caused to his professional reputation if his name was to be published.

3.5 MS Davis submitted that while there was very little evidence as to the current situation of the O children, and no sworn evidence, nonetheless it was for the Tribunal to determine the appropriate weight to be applied to the concerns which had been raised, and she maintained a neutral stance.

3.6 **HOWEVER**, Ms Davis submitted, the other matters raised in support of the application were not unusual or any different to those raised in relation to any such charge, and were not sufficient to displace the presumption in favour of openness, and the fair reporting of court proceedings.

4.0 THE DECISION:

4.1 **FOR** the reasons which follow, the Tribunal has determined that the application for interim name suppression is granted and publication of Dr O's name and any identifying details is prohibited until further order of the Tribunal.

5.0 REASONS FOR DECISION:

5.1 THE legal principles relating to such applications are by now well-known:

“What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness ...”, and the right of the media to report such proceedings as “surrogates of the public”, R -v- Liddell [1995] 1 NZLR 538;

“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 ...”, M -v- Police (1991) 8 CRNZ 14; and,

“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”; Lewis -v- Wilson & Horton Ltd (unreported, CA131/00, 29/8/00).

5.2 SECTION 106(1) and (2) of the Medical Practitioners Act 1995 provide as follows:

“(1) Except as provided in this section and in section 107 of this Act, every hearing of the Tribunal shall be held in public

(2) 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 any 1 or more of the following orders:

- (a) An order that the whole or any part of a hearing shall be held in private:*
- (b) An order prohibiting the publication of any report or account of any part of any hearing by the Tribunal, whether held in public or in private:*
- (c) An order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*
- (d) Subject to subsection (7) of this section, an order prohibiting the publication of the name, or any particulars of the affairs, of any person.”*

5.3 **THUS** the task for the Tribunal in determining all such applications is to balance the general principle that all hearings of the Tribunal shall be in public against the interests of the practitioner and, where applicable, any other person. The Tribunal’s power to grant or dismiss the application is entirely discretionary, subject of course to the requirement that it must observe the principles of natural justice.

- 5.4** **THE** interests of the public generally have been identified variously as residing in the principle of open justice, the public expectation of accountability and transparency in the professional disciplinary process, the maintenance of public confidence in the integrity of the disciplinary process and the medical profession generally, the importance of freedom of speech and the media's right to report proceedings fairly of interest to the public. It has also been submitted on previous occasions, and the Tribunal agrees, that it is important to distinguish between 'the public interest' and what the public 'might be interested in'.
- 5.5** **THE** subject matter of the charge will also be relevant to the Tribunal's consideration of an application for name suppression. For example, it has consistently taken the approach that, while every such application will be considered on its own merits, applications are rarely granted if the charge contains allegations of sexual misconduct.
- 5.6** **THE** rationale for this approach is the so-called 'flushing out principle' which refers to the possibility that other complainants (or potential witnesses) might come forward as a result of publication of the practitioner's name, and the charge; *P -v- MPDT*, AP2490/97, 18/6/97(DC); *CAC -v- Fahey* (Decision 105/99/55C).
- 5.7** **NO** such considerations apply in this present case.
- 5.8** **IN** weighing the respective interests in this case, and taking into account both the subject-matter of the charge and the level of the charge laid against him, the Tribunal considers that the severity of the potential risks for Dr O's children is the paramount consideration, and outweighs all of the other interests that the Tribunal is required to take into account. Dr O

has deposed to their vulnerability, and to the significant risk of self-harm that is present in relation to all xx children. That these concerns arise in relation to the O children as a result of events which are entirely unrelated to the charge is also a relevant consideration.

5.9 **IT** is therefore the Tribunal's view that the application should be granted in the interests of protecting the children from any adverse consequences which might flow if Dr O's name was to be published. It will reconsider this decision after the outcome of the charge is known.

5.10 **IT** is satisfied that, at least at this preliminary stage of the proceedings, there is no evidence to suggest that the charge as it is currently framed raises any wider issues, such as the need to protect the health and safety of members of the public generally, which would justify, or require, publication of the charge and Dr O's name.

5.11 **AS** to the other grounds raised, the Tribunal does not consider that these raise any issues that are not present in relation to all professional disciplinary charges and they would not on their own and in the normal course, warrant the granting of name suppression.

5.12 **THE** Tribunal's decision is unanimous.

6. ORDERS:

6.1 **THE** Tribunal orders as follows:

6.1.1 **THE** publication of Dr O's name and any identifying particulars is prohibited until further order of the Tribunal.

DATED at Auckland this 7th day of December 2000.

W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal