MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 172/01/83C

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

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

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Monday 10 September 2001.

PRESENT: Mrs W N Brandon (Chair)

Dr F E Bennett, Dr J C Cullen, Dr A M C McCoy, Mrs H White (Members)

APPEARANCES: Ms K G Davenport for the Complaints Assessment

Mr H A Waalkens for Dr H

Ms G J Fraser - Secretary

(for first part of call only)

The Charge

1. Dr H is a Medical Practitioner of xx. He faces one charge of professional misconduct relating to his management and treatment of Mrs A (deceased). The events giving rise to the charge occurred in March 1995.

2. Dr H has made two applications to the Tribunal. The first is an application for interim name suppression; the second is an application seeking access to medical records and other documents.

The Application for Name Suppression

3. The application for interim name suppression is made in reliance on Section 106 of the Medical Practitioners Act 1995 ("the Act"), and an affidavit from Dr H has also been submitted in support of that application. The grounds upon which the interim order is sought are said to include but are not limited to:

   (a) Dr H denies the charge.
   (b) The matters in issue took place over six years ago and:
      (i) involved treatment and management of a patient within a public hospital setting where Dr H was entitled to, and did, rely upon others; and
      (ii) to the extent that criticisms are made of the system, publicity may unreasonably be attributed to him;
   (c) Publicity of Dr H's name and/or identity would cause a detrimental effect and damage to his reputation and his practice – out of keeping with the offending alleged.
   (d) Publication will have an unreasonable and detrimental effect upon others including his family and his patients.

4. In his affidavits filed in support of the application for interim name suppression, Dr H deposes as follows:

   (a) that he is the only xx in New Zealand specialising in the area of xx surgery in respect of xx;
   (b) in March 1995 he was working as a 7/10's public hospital appointment. However

since 1997 he has worked full-time in private practice as described above. Accordingly his practice has changed in scope and dimension since the events given rise to the charge occurred;

(c) the complaint raises issues about the systems in place at xx Hospital in March 1995, and other persons were involved in Mrs A's care at the time;

(d) Dr H's practice is dependent upon referrals and he is concerned that adverse publicity would have an effect upon his specialist practice;

(e) he is concerned that adverse publicity would have a "*serious and adverse effect upon many of my patients*". Dr H states that he is concerned that if patients read reports alleging that he has inappropriately managed a patient's care then this would have an adverse effect on patients – particularly those who worry. He is concerned that many patients "*may well be put off having surgery altogether. The patient's confidence in the surgeon is an essential part not only of the relationship between patient and surgeon, but also with the patient's preparing for surgery and recovery post-operation*";

(f) he has not previously had any disciplinary hearings or other similar criticisms or complaints made against him. He is anxious to protect his reputation;

(g) he has a young family and he is concerned that adverse publicity may cause them to suffer distress.

The Application for Access to Medical Records and other Documents

5. In relation to this application, Dr H provided a list of xx in-patients at xx Hospital during March 1995 (listed by xx surgeon). These patients were all in-patients at xx Hospital at the same time as Mrs A.

6. In his affidavit, Dr H disposed to his Counsel (Mr Waalkens) having written to xx Hospital on 17 August 2001 advising that Dr H "*requires the names of all patients in Ward xx as in-patients. We will also need to identify which surgeon was in charge of the specific patients so that we can identify a cross-section of five patient files for each surgeon in order to assess how details are recorded in the notes of visits by the surgeons to the Ward.*".

7. Mr Waalkens' letter went on to advise that:

> "*Mr H also requires the same information for his own patients – that is those in Ward xx during the month of March 1995.*
>
> *I well accept that due to the privacy restrictions, you will not be able to simply provide these documents to me without further direction or authority and in that regard I will obtain from the Tribunal which is dealing with this matter, an order that these records be produced.*"

8. No response to that letter has yet been received. In his affidavit, and in submissions made to the Tribunal by Mr Waalkens, Dr H advised that it was important for him to obtain access to the patient's hospital notes in order that he could from those records ascertain the frequency of ward rounds and as well, the documentation of ward rounds by the medical staff at the time. It was submitted that the system at xx Hospital at the time is of critical importance to Dr H in his defence of the charge of professional misconduct.

9. Mr Waalkens and Dr H confirmed that the only reason they are seeking these documents is for the purposes of Dr H's defence of the charge, and that the appropriate undertakings to preserve confidentiality would be given.

The CAC's Opposition to the Applications

10. For the CAC, Ms Davenport filed documents in opposition to both applications. In relation to the application for interim name suppression, the CAC's objection was made principally upon the grounds that there was nothing out of the ordinary about the charge laid against Dr H. The matters relied upon in support of the applications indicated that Dr H's personal and professional circumstances were no different to any other doctor facing similar charges.

11. The CAC referred to the decision of *S v Wellington District Law Society* (AP319/95, High Court, Wellington, 11/10/96), which case referred to the presumption in favour of openness, and that the public had a legitimate interest in the identity of any practitioner charged with a professional disciplinary offence. Ms Davenport referred to the requirement that the Tribunal balance the respective interests of the practitioner and the public generally in determining whether or not a doctor's name ought to be published.

12. Ms Davenport also referred to the Tribunal's decision 30/98/18D, *Re E* in which the Tribunal said at page 5:

> *"There is never going to be a case where reputation is not an issue. Many medical practitioners have a close involvement in their community activities and many doctors often practise for several years without a blemish on their records. In times of hightened accountability and a sharper focus on consumerism there will be a first time experience of the professional disciplinary process. Nevertheless the facts as averted by Dr E whose affidavit is available to be weighed in the balance of considering an application of this nature."*

13. It was Ms Davenport's submission for the CAC that, in this case, the public interest outweighed Dr H's desire for privacy.

14. In relation to the application for access to the medical records, the CAC referred to the list of patients and their patient numbers identified by Dr H in his affidavit. Ms Davenport submitted that the purpose of Dr H's enquiry is no doubt to establish by looking at the records sought the standards in relation to record-keeping applied by other xx surgeons visiting patients on the same ward, in the same institution, at the same time as the events giving rise to this charge occurred.

15. Ms Davenport submitted:

(a) This issue [i.e. what is the appropriate standard?] is usually the subject of expert evidence. Dr H can call as many experts as he wishes to depose to the appropriate standards in practice. This will address any concerns he might have about the appropriate standard being applied to his conduct. However, Ms Davenport submitted, unless the Tribunal was invited to make a comparison of all of the individual patients, of the same age, frailty and with the same complaint as Mrs A, any comparison would be unhelpful. Every patient and situation must be judged on the needs of each patient and cannot be treated generically.

(b) The CAC did not know whether the list provided by Dr H is a complete picture of all of the patients on Ward xx at the time, or how Dr H obtained the information he has provided. If it is not a complete list of all of the patients treated on the same ward as Mrs A, during the same period of time, then how and why has the selection of names been made?

(c) The provisions of the Health Information Privacy Code (Rule 11) prohibit the disclosure of personal health information unless the information is required for one of the purposes permitted under the exceptions to Rule 11. Ms Davenport submitted that none of the criteria for exception were met by Dr H's application.

(d) Rule 10(f)(ii) of the Health Information Privacy Code provides that a health agency that holds health information must not use the information for any other purposes unless the health agency believes that non-compliance with the code is necessary for the conduct of proceedings before any Court or Tribunal. The commentary to this Rule states that this provision is limited by the provisions of the Evidence Amendment Act [No.2] 1980. The Evidence Amendment Act prevents the disclosure of the information to which the Code applies, except with the consent of the patient concerned (Sections 32 and 33, Evidence Amendment Act). The Tribunal's power to order the documents produced may override these provisions.

(e) If Dr H was to obtain the consent of each of the patients whose records he wished to access, then the records may of course be disclosed. In which case, the CAC would not require the patient to be identified, but Ms Davenport would need to know every other piece of health information (identifiable or non-identifiable) so that their symptoms, age and disease can be compared with Mrs A.

(f) The CAC does not believe that the medical records sought are necessary to ensure that Dr H receives a fair hearing, and the disclosure sought by Dr H is in any event prohibited by the Health Information Privacy Code.

16. In response, Mr Waalkens was adamant that the other patients' records are necessary to enable Dr H to fairly defend the charge. He could not be more specific as he "*did not wish to show his hand*" at this stage. Mr Waalkens stated that Rule 11(2)(i) and (ii) applied. The information that Dr H was looking for is the records other surgeons made at the time. Mr Waalkens did not accept that the evidence could be given by way of expert evidence, or by calling other xx surgeons with patients in Ward xx, at the same time as Mrs A.

The Decision – Interim Name Suppression

17. The application for interim name suppression is dismissed.

Reasons

18. The case in support of the application for name suppression advanced by Mr Waalkens in his submissions, and given the cases relied upon: *M v The Police* [1991] 8CRNZ 14, 16, and *CAC v H* 97/11C, 29/8/97 relied upon the general principle that a respondent medical practitioner must be presumed innocent of the charge pending the Tribunal's decision.

19. However, it is also the case that the general principle contained in s.106 of the Act is that hearings of the Tribunal shall be heard in public, subject to certain exceptions, relevantly, the power to make orders under s.106(2).

20. As the Tribunal has consistently stated, while technically the interests of a respondent medical practitioner in non-disclosure are a matter to which the Tribunal can have regard under Section 106, if that were to be a determining factor, then name suppression would be the norm. For example, there is unlikely ever to be an instance when the reputation of the respondent medical practitioner is not in issue. But if the doctor's circumstances were the determining factor, or were otherwise given undue weight, then the clear intention of Parliament contained in section 106 would easily be negated to such an extent that the provision had little effect.

21. In this present case, the likely effects of publicity on Dr H, his patients, his family and his practice are not unusual or exceptional. Again, as the Tribunal has often stated, the fact that a practitioner practises in a specialist area of practice, or in a provincial centre, cannot determine the matter. If the Tribunal were to place undue weight on matters of that sort, then unfairness would result to practitioners practising in tertiary centres, or in more general areas of practice.

22. Inevitably, publication of Dr H's name may have some impact on his reputation or his practice. Equally it may cause him, or his family, some distress. In some circumstances the reality that there may be elements of prejudice and/or discomfort for practitioners and their families in such cases may weigh more heavily in favour of granting the application to suppress publication of the practitioner's name on an interim, or even final, basis. The Tribunal is not satisfied that there are any such elements present in this case.

23. The Tribunal has carefully considered the statements made by Fisher J in the *M* case cited by Mr Waalkens. However that case involved an appeal from the District Court by a medical practitioner whose trial on criminal charges was pending. The Tribunal is satisfied that no such level of seriousness, or potential prejudice, is likely to be caused to Dr H as a result of any publicity about the present charges.

24. Further, as was stated in another of the Tribunal's recent decisions: Decision 164/01/73D (Wiggins) while it is entirely proper for the media to publish the fact that a professional disciplinary charge has been laid against a practitioner, and the general nature of the charge, it would be improper for any of the news media to publish material suggesting what the outcome of the charge is likely to be, or to pre-judge the evidence in support of, or in defence to the charge.

25. Publication of such material is likely to be seen as an attempt to incite prejudice against parties to the proceedings or to influence witnesses or the Tribunal, and thereby effect the practitioner's right to a fair hearing. Publication of such material would leave the publisher potentially in contempt, which state of affairs can be addressed by the High Court in its inherent jurisdiction. Furthermore, the law relating to defamation and privacy would also apply to such publications. The Tribunal considers that it would be improper and/or unfair if it were to proceed to consider applications for name suppression on the basis that the news media may not publish a fair, balanced and lawful reporting of the charge.

26. Accordingly, while the Tribunal would be very concerned if there was a prospect of the evidence relating to the charge being canvassed and prejudged prior to the hearing, and that would be improper, the Tribunal cannot act on any assumption that such would occur.

27. Mr Waalkens also referred to a further decision of this Tribunal; *CAC v H*, Decision 10/97/11C. In that case the practitioner, a general practitioner, was granted name suppression in part because other health professionals, including another doctor, had been involved in the care of the patient which gave rise to the professional disciplinary charge. However, in this present case, the events giving rise to the charge occurred in a public

hospital setting, which, by virtue of that fact alone, makes it inevitable that other health professionals would be involved in the events which will be canvassed at the hearing.

28. The Tribunal is not satisfied that, in this case, this is sufficient ground to warrant the granting of the application for interim name suppression. The Tribunal has taken into account all of the facts and circumstances of this case presented thus far, and those disclosed in *CAC v H*. It is satisfied that the fact that the name of the practitioner was suppressed in that instance, at least in part on the basis that others were involved in the events at issue in that case, merely highlights the fact that every such application will be considered and determined on its own facts, and after balancing the interests of the practitioner and any other person, including the public interest generally.

29. Accordingly, in this case, the Tribunal is satisfied that there is no basis to warrant the granting of the application for interim name suppression in all the circumstances of this case.

Application for access to medical records

30. This application is also dismissed. Furthermore, the Tribunal considers that it is premature to make any such application without the practitioner and/or Counsel, first making reasonable efforts to obtain the consent of the persons to whom the health information sought relates. The application, expressed as it is in terms of Dr H's right to conduct his defence of these charges in any way he and his Counsel see fit, seeks to turn the Health Information Privacy Code on its head.

31. The clear tenor of the Code is to protect the individual's right to have personal health information protected from disclosure, except to the extent that:

(a) disclosure is necessary for their care and treatment;
(b) otherwise in accordance with the purposes for which the information is given and/or collated; or
(c) disclosure is provided for in the Code and/or relevant legislation.

32. Neither of (a) or (b) apply, and the Tribunal is not satisfied that the purposes for which Dr H is seeking the information fall within any of the exceptions provided for in Rules 10 and 11 of the Code. It is the Tribunal's view that the "*court proceedings*" referred to in Rules 10(f)(ii) and 11(2)(I)(ii) are proceedings which relate to, or are commenced by, the individual to whom the health information sought relates. i.e. there has to be some direct causal nexus or link between the person whose records are sought and the "*court proceedings*", or other matters giving rise to the exception. In this case, the link is tenuous at best. The patients whose records are sought 'just happen' to have been on the same hospital ward at around the same time as Mrs A.

33. Further there is no connection whatsoever between Dr H and these patients. He was not involved in their care or treatment. Accordingly:

(a) there is no benefit for the patients resulting from the disclosure of their personal health information, or to the public generally; and
(b) the purposes for which the information is now sought are totally unrelated to the purposes for which the information was given, compiled and retained.

34. Furthermore, recourse to the exceptions to the Health Information Privacy Code protections is only necessary if the individual concerned either refuses or is unable to give consent to the disclosure. There is no evidence before the Tribunal that any such consent has been sought.

35. Mr Waalkens also advised the Tribunal that Dr H obtained the information he has disclosed to the Tribunal because, as a doctor employed by the xx Hospital at the time, he received a computer print-out which contained the names of all of the patients on the ward (and their respective health providers) at the time. The Tribunal is not persuaded that disclosure of this information to the Tribunal or for any other purpose other than that for which it was compiled, is a proper disclosure.

36. The Tribunal considers that the proper process would be, or would have been, for Mr Waalkens to have drafted a generic letter explaining what information was being sought; for what purpose; and to whom it would be disclosed, together with appropriate

undertakings to protect the individual's privacy, and forwarded a number of copies to xx Hospital. That generic letter should have been provided to the hospital under cover of a letter requesting the hospital to identify the patients who were on the ward at the same time as Mrs A and to forward a copy of the generic letter to each of them, together with a covering letter from the hospital explaining that the request for disclosure had been received, and seeking the patient's consent to disclose the information sought, or to make the records and other documents available.

37. In the event that all or some of the individuals could not be contacted, or were deceased, then appropriate applications could be made and determined by the Tribunal.

38. However, the Tribunal is also not persuaded that the information relating to what other doctors' practices might have been or what systems were in place at xx Hospital at the relevant time on any other information sought from the patients' files, could not be provided to the Tribunal by way of expert evidence or by having other doctors practising in the same area at the same time, giving evidence of their own practices to the Tribunal. This sort of evidence is frequently provided to the Tribunal and is consistent with the legal principles generally applicable; see for example, *B v Medical Practitioners Disciplinary Committee* (HC, Auckland, 11/96, Elias J); *Rogers v Whitaker* (1992) 175 CLR 479; *Ongley v MPDC* [1984] 4 NZAR 369 et al.

39. While the Tribunal accepts entirely Dr H's, and his Counsel's, right to run their defence of the charge as they see fit, the particulars of the charge against Dr H are not, on their face, especially unusual. However, in this case, Dr H's defence requires the disclosure of private information belonging to individuals who could never have contemplated that their personal health information would be disclosed, either by the doctor responsible for their care at the time, or another doctor entirely.

40. The Tribunal accepts Ms Davenport's submission that disclosing other patients' records in an attempt to compare the record-keeping of other doctors with Dr H's may require the disclosure of a substantial amount of each patient's information. It will be necessary to put those patients' care and treatment into context in order to ascertain if any differences in the records can be explained on any basis other than that advanced by Dr H. Selection of the

patients may also be an issue, and the criteria for their inclusion in the records disclosed to the Tribunal will require explanation.

41. The Tribunal has also assumed that the information ultimately presented to it is likely to be non-identifiable in relation to any particular patient. However, the Tribunal cannot assume that the patients concerned will have no objection to their records being made available for perusal by Dr H, his legal advisers, any experts giving evidence on his behalf, and the CAC's advisers and any expert witnesses. The Tribunal is therefore satisfied that all of the patients concerned must be asked to give their consent to their records being made available in this way, and be given the opportunity to refuse.

42. Taking all of these factors into account, the Tribunal is not satisfied that it is appropriate for it to grant the orders sought in the absence of Dr H and his counsel first seeking consent from the patients concerned.

43. Mr Waalkens suggested that it was impractical to seek consent as the process was likely to take some time, and involve a lot of "*messing about*". However, the Tribunal notes that the events to which the charge relates occurred some five years ago. There has also been a coroner's inquest into Mrs A's death. If the Tribunal's experience in these matters is any guide, the matter is likely to have been with the Complaints Assessment Committee for at least 12 to 18 months prior to the charge being laid.

44. If the notion of obtaining these other records for the purposes of Dr H's defence of this charge has arisen only relatively recently, then so be it. That does not seem to the Tribunal to be a good and sufficient reason to override the patients' rights to protect their personal health information from any disclosure if that is their wish.

45. An individual's right to privacy in respect of their health information is an important right, and one which the legislature of this country has seen fit to expressly protect through the Privacy Act, and the Health Information Privacy Code. They are not rights which this Tribunal should interfere with or set aside without good cause, or unless there is no other alternative. It is not satisfied that either of those factors have been demonstrated in this present application, or that it is otherwise not reasonably practicable for Dr H or his

advisers to seek the patients' consent. The Tribunal has therefore determined that Dr H should immediately seek consent from the patients concerned and it will reserve leave for him to renew his application when the outcome of that process is known.

Orders

46. The Tribunal orders as follows:

(a) the application for interim name suppression is dismissed;

(b) the application for access to medical records and documents is dismissed;

(c) leave is reserved to Dr H to renew his application when the outcome of any requests for consent to disclose the health information sought, is known.

DATED at Wellington this 26th day of September 2001

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W N Brandon

Chair

Medical Practitioners Disciplinary Tribunal