

# *Medical Practitioners Disciplinary Tribunal*

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**DECISION NO.:** 45/98/24C

**IN THE MATTER** of the MEDICAL PRACTITIONERS

ACT 1995

**AND**

**IN THE MATTER** of disciplinary proceedings against **W**

medical practitioner of xx

**BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

**HEARING** by telephone conference on Monday 17 August 1998

**PRESENT:** Mrs W N Brandon - Deputy Chair

Dr A M C McCoy, Dr A D Stewart, Dr A F N Sutherland

Mr G Searancke (members)

**APPEARANCES:** Mr M F McClelland for Complaints Assessment Committee

Mr A J Knowsley for respondent

Ms G J Fraser - Secretary

(for first part of call only)

**DECISION ON THE APPLICATION FOR HEARING TO BE HELD IN PRIVATE AND  
OTHER ORDERS:**

**1. INTRODUCTION:**

**1.1** A Complaints Assessment Committee (“CAC”) established under Section 88 of the Medical Practitioners Act 1995 (“the Act”) has determined in accordance with Section 92 (1)(d) of the Act that a complaint by A and B should be considered by the Medical Practitioner’s Disciplinary Tribunal (“the Tribunal”). The complaint is set down for hearing in xx on 13, 14 and 15 October 1998.

**1.2** **COUNSEL** for Dr W (“the applicant”) has made application to the Tribunal seeking the following orders:

**1.2.1** **THE** hearing of this matter be in private.

**1.2.2** **THE** publication of any report or account of any part of the hearing be prohibited.

**1.2.3** **THE** publication of the whole or any part of any books, papers or documents produced at the hearing be prohibited.

**1.2.4** **THE** publication of the name or any particulars of the affairs of any witness, complainant or other person connected with the hearing be prohibited.

**1.3** **THE** application was accompanied by an affidavit from the applicant filed in support thereof, and Counsel’s Memorandum. The grounds for the application are as follows:

**1.3.1** **THE** hearing will involve matters of a personal nature of the complainant, respondent and deceased patient.

**1.3.2** **MUCH** of the evidence will deal with details of a patient who is not the complainant. The deceased patient’s privacy should be protected. Matters of her personal finances and the arrangements entered into should be protected.

- 1.3.3 THE** privacy of the respondent's personal and family financial affairs should be protected from publication and the public gaze.
- 1.3.4 THERE** are no issues of public safety involved in the hearing. There is no element of warning the public.
- 1.3.5 THE** charges are denied and will be strenuously defended.
- 1.3.6 REPORTING** of the evidence (expected to last over several days) prior to a finding by the Tribunal and prior to the defence having an opportunity to call its evidence has the potential to seriously damage the practitioner's reputation and practice in an unjust manner.
- 1.3.7 THE** health of the respondent's partner and her unborn children (twins) will be at risk if the hearing is not held in private and if publication of details is not prohibited.
- 1.4** A letter from the medical practitioner currently providing obstetric care to the applicant's partner was annexed to the applicant's Affidavit. That letter contains the doctor's obstetric opinion that, if at all possible it would be preferable for the hearing "not to be made public to reduce the stress [to the applicant's partner]".
- 1.5 COUNSEL** for the CAC, Mr M F McClelland has filed a Notice of Opposition and a Memorandum also. All of these documents have been made available to the Tribunal prior to the hearing of the application, by telephone conference, on Monday 17 August 1998.
- 1.6 FOR** the CAC, the application is opposed on the following grounds:
- 1.6.1 IT** is well established that the provisions of the Medical Practitioners Act 1995 create a presumption that disciplinary proceedings are to be in public.

- 1.6.2 THE** charge involves an allegation of disgraceful conduct in a professional respect of a serious nature involving an allegation of breach of trust. As the matter goes to professional misconduct it could be said that there is an element of public interest in the hearing of this matter.
- 1.6.3 THE** fact that the hearing of the matter will concern in part the affairs of a deceased natural person is not a basis for an application that the hearing be held in private or that publication be suppressed.
- 1.6.4 THE** fact that the charges are to be defended cannot be the basis for an application that the hearing be held in private and that publication be suppressed.
- 1.6.5 THERE** is no evidence to suggest that the hearing of this matter in public in accordance with the ordinary provisions of the Medical Practitioners Act 1995 will attract any unusual scrutiny, nor is there any suggestion of reporting of evidence in relation to this matter. Media organisations are typically well aware of the contempt provisions that would apply to any effort to prejudice the conduct of the defence and the law of defamation exists to protect any unlawful damage to the respondent's reputation, in the same manner as any other professional person in a similar situation.
- 1.6.6 NEITHER** the respondent's partner nor her identity is an integral part of the charge, she does not share his name and is not therefore necessarily readily identifiable with the respondent. The respondent's health will not be prejudiced by the hearing of the matter in public and publication of the details in the ordinary course of events, any more than she may suffer stress as a result of her partner participating in a disciplinary hearing that is held in private.
- 1.6.7 APPEARING** in the Memorandum of Counsel filed in support of this opposition.

**1.7 BOTH** Counsel, Mr A J Knowsley for the applicant and Mr McClelland for the CAC, participated in the first part of the telephone conference to assist the Tribunal.

**2. ORDERS:**

**2.1 HAVING** considered all of the material placed before it, and the further matters made known to the Tribunal by both Counsel in response to questioning by the Tribunal members in the telephone conference hearing, the Tribunal makes the following Orders:

**2.1.1 THAT** the hearing be held in public.

**2.1.2 THAT** the publication of any report or account of any part of the hearing be prohibited.

**2.1.3 THE** publication of the whole or any part of any books, papers or documents produced at the hearing be prohibited.

**2.1.4 THE** publication of the name or any particulars of the affairs of any witness, complainant or other person connected with the hearing be prohibited.

**2.2 ALL** of these Orders shall continue in force pending further order of the Tribunal provided however that any permanent orders will be a matter for the Tribunal's consideration following determination of the charge or at such earlier date as either party or the Tribunal in its discretion may consider appropriate.

**3. REASONS:**

**Background to the complaint:**

**3.1 THE** Tribunal approached its task in this application mindful of the facts made known to it by Counsel, that the complainants are the former wife of the applicant, and her stepfather. The

possibility that the complaints procedures, and this Tribunal, are being employed as firepower in the battlefield of a disintegrating marriage is a factor which the Tribunal does not discount.

**3.2** IN his affidavit, the applicant states that “one of the people behind this complaint is my former business and medical partner...”.

**3.3** IN the Particulars of the Charge, the CAC alleges that the applicant “Breached ethical and professional standards by benefiting as a 50% shareholder of the xx Medical Centre under a mortgage ....”. Thus begging the question as who else has, or might have, also benefited from the conduct of the applicant now the subject of this complaint, but who is not similarly called to account. Thus, the possibility that but for the separation of the applicant and his wife this complaint would not have arisen, and that this complaint may constitute an abuse of process, is not lost on the Tribunal.

**3.4** **HOWEVER**, that such factors might exist does not, in the Tribunal’s view, detract from the seriousness of the charge made against the applicant. Therefore, in determining this application, Tribunal has taken the approach that these background matters, while troubling, are matters more appropriately dealt with at the hearing of the complaint, and it has focussed only upon those matters contained in the grounds advanced in support of, and in opposition to, this application.

**The charge:**

**3.5** **THE** charge is laid by the CAC at the highest level, i.e. the respondent is charged with disgraceful conduct in a professional respect. At this very preliminary stage, and with the benefit

of the barest information, the information provided in the charge laid by the CAC, which has had the benefit of conducting an investigation into the complaint, is a factor (and only one of several) which the Tribunal takes into account in the balancing exercise which founds its deliberations.

- 3.6** **THE** charge, in effect, alleges a breach of the relationship of trust intrinsic to the doctor-patient relationship. Further, the allegation is that the applicant's breach of trust occurred in circumstances where the applicant acquired a direct pecuniary advantage as a result of his conduct.

**Application made pursuant to Section 106:**

- 3.7** **THE** application was made pursuant to Section 106 of the Act. That Section permits the Tribunal to depart from the general principle that every hearing of the Tribunal shall be held in public, "if it 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".
- 3.8** **IT** is by now well-established that s106 requires the Tribunal to exercise its discretion balancing the respective private and public interests, taking into account relevant principles, including the general principle reflected in s106 (1) that hearings are to be conducted in public, (refer *ZX v Medical Practitioners Disciplinary Tribunal*); *P v Medical Practitioners Disciplinary Tribunal*, and *W v Complaints Assessment Committee*.

**The public interest**

- 3.9** **THE** essence of the grounds upon which this application is advanced is that the hearing will involve disclosure of matters of a personal nature involving persons, including the applicant, whose privacy should be protected, and who may suffer harm if it is not.
- 3.10** **HOWEVER**, it is the Tribunal's view that these allegations involve matters of professional practice that fall squarely within the public interest. It is also now well-established that the public interest in the Act is clearly the process of disciplining doctors transparently and openly. There is a public interest in a public hearing embodied in the legislation itself; *W v CAC*.
- 3.11** **THE** Tribunal accepts Mr Knowsley's submission that "The term "public interest" is certainly not synonymous with what the public is interested in". It agrees that no proper interest derives from the publication of the private details which might be disclosed about the applicant, and others, perhaps most notably about a deceased person who cannot present her account of the events at issue.
- 3.12** **BUT** the fact that matters private will be open to public scrutiny at the hearing is incidental to the fact that the matters which are the focus of the inquiry are legitimately of interest to the public generally. In this case matters which are fundamental to the doctor-patient relationship and the proper conduct of professional practice.
- 3.13** **MR** McClelland is correct in submitting that the legislature intended that hearings should be held in public so that the public should have confidence in the integrity of the disciplinary process. If a complaint such as the present, dealing as it does with such fundamental issues, were to be



heard in private, any public perception that in matters involving the conduct of professional practice the professions 'look after their own', may be reinforced and the integrity of the disciplinary process undermined.

### **The nature of the complaint**

- 3.14 MR** Knowsley has submitted that because the matters which are the subject matter of the complaint do not involve the applicant's clinical practice, there are no issues of public safety involved and therefore no element of warning required for the public.
- 3.15 THE** Tribunal does not agree that the two issues necessarily follow. Notwithstanding the absence of complaint about the applicant's clinical practice, the complaint does involve issues which are perhaps even more fundamental than the applicant's clinical care of his patient. As stated above, this complaint involves serious allegations about the applicant's care of his patient in the overall context of his professional conduct in this case.
- 3.16 THE** level of the charge reflects the fact that the scrutiny of professional practice by the disciplinary processes is not limited only to clinical care. What constitutes disgraceful conduct in a professional respect may well be conduct which, if engaged in by another person, would not attract sanction. It cannot therefore be correct to assume that because the complaint is non-clinical no issues of public safety arise, and therefore no element of warning required for the public.
- 3.17 IN** any event, the fact that the complaint does not involve issues of clinical care, does not, in the Tribunal's view, outweigh the public interest in the issues which the complaint does raise, for the reasons already stated.

### **The interests of the complainant**

**3.18 THE** complainants, effectively represented by Counsel for the CAC, have indicated their view that there is an important public interest to be served in matters proceeding to a public hearing.

As stated above, the Tribunal is not unaware that the motivations of the complainants may be other than a genuine concern for the public interest in the professional issues raised by their complaint, and this may be reflected in their desire for a public hearing.

**3.19 THE** Tribunal is not without sympathy for the applicant's desire to protect matters of a personal nature, particularly involving him and his former wife, and he and the now deceased patient. However, for the reasons already stated, the Tribunal is of the view that the release of private matters into the public domain may be an unfortunate consequence of the hearing of the matters properly at issue as a result of this complaint.

**3.20 IN** any event, at this preliminary stage, it is difficult to estimate the extent to which, if at all, matters of a private nature involving the applicant and his former wife will be relevant to the matters at issue in the complaint involving as it does the conduct of the applicant in his professional capacity.

### **Interests of the applicant and his partner**

**3.21 EVERY** case which comes before the Tribunal has the potential to cause harm to the professional reputation of the respondent, and potential embarrassment and discomfort to the respondent's family.

**3.22 FOR** these reasons, the Tribunal has adopted the approach that it may be appropriate to make orders protecting the identity of the parties, and prohibiting publication of any account of the hearing, or any documentary material, which might identify the respondent, pending the outcome of the complaint. These orders are supported by the Tribunal's powers under Section 142 of the Act.

**3.23 IT** is satisfied that it is appropriate to make such orders in this case. It is also satisfied that the interests of the applicant and his partner will be fairly and reasonably protected by such orders. In making these orders other matters which the Tribunal took into account included:

**3.23.1 THE** fact that the hearing is to proceed in xx, rather than in xx where the events at issue occurred, and where the applicant and his partner reside;

**3.23.2 THE** applicant's partner does not share the applicant's surname and will be associated with a public hearing only by choice rather than by nomenclature association;

**3.23.3 THE** applicant's partner is pregnant with twins following IVF treatment. The applicant's due date is 12 January 1999. The pregnancy was therefore embarked upon well after this complaint arose (the date of the complaint being March 1997). Any risk that a public hearing of the complaint might jeopardise the applicant's partner's pregnancy was one that was foreseeable at the time the applicant's partner underwent IVF treatment and was therefore voluntarily assumed;

**3.23.4 THE** Tribunal accepts that the fact of the complaint, the circumstances in which it

arises, and the hearing itself, whether in private or public, are all factors which may cause the applicant's partner additional stress. However, again for the reasons already given, it is of the view that the non-publication orders made are adequate to ameliorate the effect of the progress of this matter to a public hearing. Progress which, by the time of the hearing, will have taken some 18 months or so;

**3.23.5** **THE** applicant has legal remedies open to him if he is dissatisfied with any publication, whether by the media or private individuals, while the orders made are extant, or by virtue of the laws of defamation.

#### **The interests of the deceased patient**

**3.24** **BOTH** Counsel have indicated that the private affairs and intimate details of the deceased patient will be the subject of evidence given at the hearing.

**3.25** **ONCE** again, at this very preliminary stage, and on the basis of the evidence before the Tribunal in this application, it is difficult to gauge the extent to which it will be necessary and relevant to detail and discuss the private affairs of this patient at the hearing of the complaint.

**3.26** **TO** the extent that this complaint requires evidence of the deceased person's affairs to be given at the hearing, the Tribunal is reassured by Mr McClelland's advice, at paragraph 20 of his submission, that there is nothing to suggest any wrongdoing on the part of the deceased, and nothing in the information available to the CAC which suggests any outcome that may taint the deceased patient's reputation, as might be inferred from the applicant's affidavit.

**4. CONCLUSION:**

- 4.1 TAKING** into account all of the matters placed before it, the Tribunal has determined that this is a clear case in which the public interest requires that the hearing be in public.
- 4.2 IN** coming to this decision, the Tribunal has been mindful of the need to balance the interests of the public with the interests of the applicant, his partner, the complainants, and the deceased patient whose transaction with the applicant while he was her medical practitioner, is the subject matter of the complaint. The Tribunal has endeavoured to come to a decision which fairly reflects those competing interests.
- 4.3 IN** essence, the balancing exercise in this case distils to a contest between the applicant, and his partner, and the public interest. The interests of the other parties which require consideration, on balance, weighing in favour of a hearing in public.
- 4.4 IN** making its decision, the Tribunal is also influenced by the seriousness of the charge, and the fundamental nature of the issues involved. The allegation of a breach of trust in the context of the doctor-patient relationship, concomitant with an allegation of pecuniary advantage, is an allegation of the most serious kind. It is an allegation that goes to the heart of professional practice. As such, this hearing involves issues that are quite properly of interest to the public generally.
- 4.5 THE** public interest in the Act is unequivocally the *process* of disciplining medical practitioners transparently and openly. That is clearly the intention of the legislature. That is also consistent with the processes in other judicial and quasi-judicial forums.

- 4.6 THAT** public interest however will always be balanced against the real risk that disclosure of the identity of persons accused of an offence, and the nature of the allegations made against them, will cause irreparable or disproportionate harm to the individual, his or her reputation, or their family.
- 4.7 THOSE** risks have been carefully considered by this Tribunal, as have the particular circumstances and context of this complaint.
- 4.8 THE** Tribunal has also considered the extent to which holding this hearing in public will protect the reputation of the medical profession generally; maintain public confidence in the integrity of the disciplinary processes, and reinforce the high standards of personal conduct which medical practitioners are required to maintain in their professional practice.
- 4.9 IN** this regard, the Tribunal carefully considered the submission made by Mr Knowsley that, because the complaint did not involve any complaint of a clinical nature, there were no issues of public safety involved. For the reasons given, the Tribunal does not agree that the consideration of what constitutes ‘public safety’ should be so confined. In an area of professional practice which frequently involves a relationship of dependence, and the care of persons whose capacity may be diminished by illness, age or infirmity the concept of ‘public safety’ should be given its widest possible interpretation.
- 4.10 IT** has weighed all of these factors against the interests of the applicant and his partner, and those other persons who may be affected if this hearing proceeds in public.

**4.11** **ON** balance, the Tribunal is satisfied that the hearing should proceed in public, but with orders in place to protect the identity of the applicant, and the other parties, pending further order of the Tribunal.

**DATED** at Auckland this 27<sup>th</sup> day of August 1998.

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W N Brandon

DEPUTY CHAIR