Medical Practitioners Disciplinary Tribunal

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NAME OF COMPLAINANT

NOT FOR PUBLICATION

(by Decision of District Court *M & ANOR v CAC* (Wellington District Court, MA 106/99, Ongley J)

DECISION NO.: 64/98/32C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **DAVID ANTHONY WILDE** medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Tuesday 2 February 1999

PRESENT: Mr P J Cartwright - Chair

Mr P Budden, Dr I D S Civil, Dr A M C McCoy, Dr M-J P Reid

(members)

APPEARANCES: Ms K McDonald for Complaints Assessment Committee

Mr C W James for respondent

Ms G J Fraser - Secretary

(for first part of call only)

DECISION ON APPLICATIONS FOR NAME SUPPRESSION

1. BACKGROUND:

1.1 **A** Complaints Assessment Committee (the 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 against Dr David Anthony Wilde (the respondent) shall be considered by the Medical Practitioners Disciplinary Tribunal (the Tribunal). The charge against the respondent has been set down for hearing in Wellington on 7, 8 and 9 April 1999. The respondent's application is for suppression of his name pending the findings of the Tribunal.

1.2 **IN** addition A, the complainant, has made application to the Tribunal for suppression of her name.

2. GROUNDS OF RESPONDENT'S APPLICATION:

2.1 **THE** charges are denied and will be strenuously defended.

2.2 **PUBLICATION** of the respondent's name prior to a finding by the Tribunal and prior to the respondent having an opportunity to call his evidence has the potential to seriously damage his reputation and practice in an unjust manner.

2.3 **IN** the respondent's own words:

"The charge of professional misconduct brought against me has a significant potential to harm my reputation and professional standing in this community of xx. I have a high professional profile and am reliant upon my reputation to attract referrals. While the substantive issues concern a surgical procedure and related consultations more than 11 years ago, the charge of professional misconduct raises issues such as competence to practice which in the public domain could result in irreparable harm to my practice. I have been in practice in xx for over 22 years and have during this time not been subject to any disciplinary proceedings. Although in common with my peers, I have been happy to have clinical outcomes assessed by peer review, I am extremely anxious about adverse publicity which could naturally flow if my name is given currency before the Tribunal has finally

determined its findings. I understand if I am found guilty that publication of my name can be considered as being part of the penalty, but that is another question. I am merely asking for way is termed interim suppression."

3. GROUNDS OF COMPLAINANT'S APPLICATION:

3.1 **MS** A is employed as xx and xx for xx at xx. She has been employed in this capacity for the past 2 years and the position involves a high profile, both in the media and the general public arena. Her name is publicly synonymous with xx at xx. Any publication of her name in this matter would be likely to adversely impact on her standing both personally and as a senior employee of xx. It would also be likely to detrimentally affect the public perception of xx at xx.

3.2 **XX** generally have a high public and media profile. This is particularly so at xx following a xx into the care and treatment of a past xx. Since this time, the service has been the focus of extreme public and media scrutiny. Publication of Ms A's name would be likely to provide renewed interest in the service on what is a totally unrelated matter.

3.3 **MS** A's employment includes regular involvement in the investigation of complaints by xx consumers against the service and/or individual medical practitioners. For this process to function properly, it is essential that complaints are treated impartially. If Ms A's name were to be published in this particular complaint, it may suggest that her personal experience, in bringing this complaint, indicates a bias in favour of the consumer. This is clearly not the case, but name publication may well lead to some, both professionals and consumers, drawing this incorrect conclusion.

3.4 **THE** complaint relates to matters of a high personal and sensitive nature. Given the matters set out above, publication of Ms A's name would have a greater affect on her life than it would on a complainant without her high profile in xx. Public and media knowledge of Ms A's complaint would be likely to increase the burden of stress she has suffered already in this matter.

3.5 **IN** the event of name suppression not being granted, it is likely that persons in circumstances similar to those of Ms A would be deterred from making a complaint. This in turn would undermine the function of the Tribunal.

4. RESPONDENT'S APPLICATION: UNANIMOUS DECISION

4.1 **THE** application is declined. Reasons for that decision follow.

4.2 **THIS** is a formal application pursuant to Section 106(2) of the Act which provides, 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, and to the public interest, it may make an order prohibiting publication of the name, or any of the particulars of the affairs of any person. An interim order for suppression of the respondent's name pending the findings of the Tribunal, is sought pursuant to Section 106(2)(d) of the Act.

4.3 **THE** interests of the respondent have been explained in the grounds supplied in support of his application.

4.4 **CLEARLY** the application for interim suppression of the respondent's name requires a balancing of his interests, together with those of the complainant, the CAC and the public interest.

4.5 **THE** case advanced by Mr James on behalf of the respondent is clearly aligned with a deemed presumption of his innocence pending outcome of the charge.

4.6 **IT** is significant that the general principle of Section 106 of the Act is that hearings of the Tribunal shall be held in public. Publication therefore follows unless one or more of the discretionary orders available under Section 106(2)(a)-(d) of the Act are made.

4.7 **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 no proceedings could be held in public. There is unlikely ever to be an instance when the reputation of the respondent medical practitioner is not in issue. But if his or her situation was the primary factor, and given undue weight, then the clear parliamentary direction in Section 106(1) of the Act that hearings are to be held in public, and published, could be so easily negated as to make that provision worthless.

4.8 **THAT** publication of the respondent's name in this case may have some impact on his reputation, cannot be denied. Equally, it may cause some distress. However, such impact will be apparent in every case where a medical practitioner faces a charge under the Act. The issue arises only after a practitioner has been charged. Parliament would have been aware of this when drafting Section 106(1), so that cannot form the basis for an order made under Section 106(2) of the Act.

4.9 **IN** terms of publicity that may be offered to this case, the Tribunal considers, on the limited information available, that it should not excite any particular interest such as may lend itself to sensational reporting. Fair and accurate reporting of the proceedings of the Tribunal is allowed,

but the respondent medical practitioner would have open to him various measures to seek redress in the event of any defamation or contempt occurring.

4.10 **THE** respondent has legal remedies open to him if he is dissatisfied with any publication which may take place. This factor should not unduly influence the Tribunal. It is certainly not sufficient, in a case where there is no evidence of any particular interest in publishing details by the media, to form the basis of an order suppressing publication of name by the Tribunal.

4.11 **HAVING** considered the interest of the respondent, the Tribunal notes that the interests of the complainant have been recorded in the grounds of her application. It is also noted, on the advice of Ms McDonald, that the complainant has no objection to the respondent being granted interim suppression of name. Replying to a question from the Chair, Mr James explained non-opposition to each party's suppression of name application was a tit-for-tat arrangement. Ms McDonald said she did not necessarily agree this was the case. It is our interpretation, although not opposing respondent application, that the complainant does not go so far as to support the making of the interim suppression order sought by the respondent.

4.12 **FINALLY** there is the public interest to be considered. Section 106 of the Act reflects a very significant change in the direction of the conduct of medical disciplinary cases. Under the Medical Practitioners Act 1968 charges were considered in private, even although the statute itself was silent on the issue. Now, under the 1995 Act, there is a specific direction that such proceedings shall be held in public.

4.13 UNDER Section 106 of the Act, the Tribunal is expressly directed to consider the public interest. In discussing the role of the public interest in name suppression applications before disciplinary tribunals, Tompkins J in delivering the judgment of the Court in *S v Wellington District Law Society* AP 319/95, High Court, Wellington, 11 October 1996, emphasised the presumption in favour of openness and the purpose of disciplinary tribunal proceedings in protecting the public. His Honour was dealing with a statute with a presumption in favour of public hearings, like the Medical Practitioners Act 1995. The Court noted at page 6:

"We conclude from this approach that the public interest to be considered, when determining whether the Tribunal, or on appeal this court, should make an order prohibiting the publication of the report of the proceedings, requires consideration of the extent to which publication of the proceedings would provide some degree of protection to the public, the profession, or the court. It is the public interest in that sense that must be weighed against the interests of other persons, including the practitioner, when exercising the discretion whether or not to prohibit publication."

4.14 IT follows the Tribunal must endeavour to balance the competing interests of those persons whose interests have already been explained, and the public generally, this latter interest identified variously in previous cases as residing in the principle of open justice, the public's expectation of the accountability and transparency of the disciplinary process, the importance of freedom of speech and the media's right to report Court proceedings fairly of interest to the public.

4.15 THE Tribunal has consistently adopted this balancing approach in other Decisions relating to Section 106. There is clear public interest in matters of professional practice that fall squarely within the public interest.

4.16 PARLIAMENT obviously intended that hearings should be in public, for the reasons identified by the Tribunal in a case concerning Dr Sami (Decision 14/97/3C), namely that the public should have confidence in the integrity of the disciplinary process. If the Tribunal were to find the charge

not proved, then the respondent will not face any penalty and effectively will be exonerated. In our view the public has a right to know this as much as it has a right to know the outcome of the proceedings in terms of the effect of any order under the compulsory reporting provisions in Section 138 of the Act.

4.17 **HAVING** endeavoured to weigh and balance carefully the competing interests of the persons and the public interest referred to in Section 106(2) of the Act, for the reasons given the Tribunal has not been persuaded that the order sought by the respondent should be made, and it is therefore declined.

4.18 **IN** delivering this Decision the Tribunal has had due regard to the judgments of Judge Joyce QC in similar matters: *ZX v Medical Practitioners Disciplinary Tribunal* [1997] DCR 638 and *P v Medical Practitioners Disciplinary Tribunal* AP 2490/97, 18/6/97. We have also considered the oral judgment of Judge Tuohy in *W v the Complaints Assessment Committee*, MA 122-98, 9/7/98. In our view these judgments emphasise the balancing process which the Tribunal, in the exercise of its discretion under Section 106 of the Act, has endeavoured to undertake in this instance.

5. COMPLAINANT'S APPLICATION:

MAJORITY DECISION (OF MR BUDDEN, DR CIVIL AND DR MCCOY)

5.1 **THE** complainant, Ms A is employed as a xx and xx for xx at xx. This is a high profile position.

5.2 **LIKE** the respondent in this case, Ms A is concerned that any publication of her name would adversely affect her standing in her professional position and moreover, would detrimentally affect

the public perception of xx at xx. In particular it is put forward that publication of Ms A's name would provide for renewed media interest and public scrutiny of the xx at xx.

5.3 **BECAUSE** Ms A's employment involves investigation of complaints, there is concern that her experience, as a complainant, would be perceived unfairly as indicating bias in favour of her consumer complainants.

5.4 **THE** reasons for the application for complainant privacy, in this case, are strikingly similar to those of the respondent doctor. The primary concern is with reputation and that knowledge of her involvement in such proceedings would have an influence on public views of her impartiality.

5.5 **THE** Tribunal acknowledges that the complainant's position as a xx and xx for xx at xx does put her in public view. However the majority of the Tribunal felt that the possible impact on her employer of her action in bringing this case was of minor concern. In fact it could be seen as helpful to the public to learn that a person of her standing also encountered problems with her health care and that there is now a more open system for dealing with complaints against medical practitioners.

5.6 **WITH** regard to the matters being of a highly sensitive nature, the Tribunal is aware that any disclosure by a patient of their medical treatment is by itself intrusive of their privacy. The Act allows for special protection for complainants in Section 107. The details of the complainant's medical treatment are scant. However, the majority of the Tribunal felt that they did not warrant applying the provisions of Section 107 in this case.

5.7 **IT** is noted that the complainant faces public scrutiny regularly in the course of her employment and thus might be in a better position to deal with any publicity which might ensue from this case.

5.8 **IT** is recognised that certain considerations apply to complainants in regard to privacy. However, it is deemed unfair by the majority of the Tribunal, and contrary to natural justice, that the respondent should have his application rejected and the complainant hers accepted for substantively the same reasons. Accordingly her application is likewise declined.

6. COMPLAINANT'S APPLICATION:

MINORITY OPINION (MR CARTWRIGHT AND DR REID)

6.1 **THE** grounds of the complainant's application variously discuss her interests, both personal and as a senior employee of xx. In addition reference is made to the interests of xx generally and of xx in particular. We wish to make it clear that neither of the latter interests have been taken into account by us in formulating the minority opinion which follows. In our view those are not interests which, on the facts of this application, by themselves, justify exercise of the discretion under Section 106(2) of the Act in favour of the complainant.

6.2 **IN** paragraph 4 of the complainant's application is explained her concern that her experience as a complainant could be perceived unfairly as indicating bias in favour of her consumer complainants. In the view of the minority there is no evidence to substantiate this concern. It seems to us to be somewhat speculative in nature. Accordingly it has not been taken into account in our consideration of the complainant's application.

6.3 **WE** are left to consider the application by reference to the complainant's concerns that:

- *"... Any publication of her name in this matter would be likely to adversely impact on her standing both personally and as a senior employee of xx."*
- *"The complaint relates to matters of a highly personal and sensitive nature. ... Public and media knowledge of Ms A's complaint would be likely to increase the burden of stress she has suffered already in this matter."*

6.4 **THE** first point we think should be made is that whether the Tribunal is satisfied it is desirable to grant Ms A's application for name suppression, must be decided after having regard to her privacy, in her capacity as the complainant. Section 106(2) expressly directs the Tribunal to have regard "to the privacy of the complainant". When considering applications for name suppression from both a respondent medical practitioner and a complainant, it is simply the interest of the former which is under focus, whereas it is the privacy of the latter which is <u>expressly</u> under focus (minority's emphasis).

6.5 **BECAUSE** it is the complainant's privacy which is central to the application under consideration, the minority believes that her own individual consciousness or perception of her situation, in other words her subjective assessment, is a relevant consideration. From what has been explained by counsel on her behalf, it is abundantly clear to the minority that public and media knowledge of Ms A's complaint would be likely to increase the burden of stress she has already suffered in this matter.

6.6 **THE** minority considers that the decision of the majority fails to draw an essential distinction between the roles of a complainant and of a practitioner. If the complainant's name is not suppressed, we see a potential for her to suffer distress, in both her personal (and professional) capacity, as a result of something which occurred in her private life. For the doctor the potential

of harm to his reputation and standing arises as a result of something which happened in his professional capacity. In the opinion of the minority, the private life perspective of a complainant's application for name suppression is a significant factor which may, perhaps almost invariably, outweigh the merit of a similar application from a respondent medical practitioner.

6.7 **THE** complainant will be obliged to give her evidence in what are essentially adversarial proceedings. Therefore it is essential that she is able to do this in what she feels is a safe environment. It would be the thin edge of the wedge for the complainant if this was not to be the case. The majority's reference to Section 107 of the Act as not warranting application in this case, is considered by the minority to be premature. The special protections given to complainants under Section 107 of the Act are additional to the discretionary orders which are available under Section 106, and apply only at the hearing.

6.8 **THE** minority considers there is considerable merit in Ms McDonald's submission, in the event of name suppression not being granted, it is likely that persons in circumstances similar to those of Ms A would be deterred from making a complaint. This in turn could undermine the function of the Tribunal.

6.9 **THIS** was certainly the experience of the Medical Practitioners Disciplinary Committee (the Committee) which was explained in an affidavit completed recently by Dr D C Williams, former Chairman of the Committee, for the purpose of certain proceedings in the High Court. He explained his view, and that of the Committee members, that it was in the public interest that privacy should be afforded complainants. They felt that if patients have the fear that their private medical matters would be exposed to public gaze, this could discourage them from making

complaints, which would not be in the public interest. For this reason Dr Williams explained the work of the Committee may have been hampered by issues relating to the sensitivities of complainants had it not held its inquiries in private.

6.10 **THERE** is also judicial precedent for the proposition that complainants in medical disciplinary proceedings are entitled to seek privacy. In the *Director of Proceedings and the Health & Disability Commissioner v The Nursing Council of New Zealand*, HC, Wellington, 774/98, 7/12/98, Baragwanath J at 31 explained that:

"... The high importance of a complainant's privacy interest is not in my view to be imperilled by an implication that Parliament has overridden the Court's inherent power to consider its business in such manner as the interests of justice may require."

and at 32:

"... There is the complainant's privacy interest which in any normal case is obvious. (The case of a mischievous complainant making a false complaint is another matter)."

and at 33:

"... The public interest in a patient's privacy is likely to be high and often absolute;"

and finally at 35:

"... The obligations of the Nursing Council when considering an application ... include ... considering the interests and wishes of the complainant/consumer (patient) including any particular privacy interests which require protection;"

6.11 **IN** considering the public interest, which Section 106(2) obliges, the minority considers that the identity of this individual complainant is simply not a matter of importance to the public. In declining the respondent's application for name suppression the minority considers it does not follow, as a quid pro quo, that the complainant's application should be similarly dismissed.

6.12 FOR the reasons given the minority would grant the complainant's application for name suppression.

DATED at Auckland this 17th day of February 1999.

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P J Cartwright

CHAIR