MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

PO Box 24463, Manners Street, Wellington • New Zealand
13th Floor, Mid City Tower • 139-143 Willis Street, Wellington
Telephone (04) 802 4830 • Fax (04) 802 4831
E-mail mpdt@mpdt.org.nz
Website www.mpdt.org.nz

DECISION NO: 232/03/102D

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by the Director of Proceedings against [XYZ] medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Thursday 5 June 2003.

PRESENT: Miss S M Moran (Chair)
Dr J C Cullen, Professor W Gillett, Dr G S Douglas,
Mrs H White (Members)
Ms G J Fraser (Secretary) (for first part of call only)

COUNSEL: Ms M McDowell, the Director of Proceedings
Ms G Phipps for respondent

Decision on the application for Interim Name Suppression

The parties agreed that the Tribunal consider the practitioner's application for name suppression and determine it on the basis of the parties' written evidence and submissions.

The Application

1. Dr [XYZ] is a xx practising in xx. On 3 April 2003 the Director of Proceedings charged Dr [XYZ] with professional misconduct pursuant to section 109(1)(b) of the Medical Practitioners Act 1995 ("the Act"). The details of the charge are set out below. On 7 May 2003 Dr [XYZ] applied for an order suppressing his name and any information which might lead to his identification. Dr [XYZ]'s application is made pursuant to section 106(2)(d) of the Act.

The Charge

2. The charge relates to Dr [XYZ]'s care of a patient in November 1999. The particulars of the charge allege:

> Dr [XYZ] *"having failed to take adequate steps to ensure that the correct surgical site had been identified on [his patient] he commenced surgery on the wrong site"*.

Summary of Grounds for Application

3. The application sets out four grounds:

(a) The adverse impact on the health of a member of the medical practitioner's family.
(b) The adverse impact on the medical practitioner.
(c) The risk of damage to the medical practitioner's colleagues, other health professionals and the organisation at which the event occurred.
(d) No public interest is served by the publication of the medical practitioner's name.

While the application did not specify what period any order, if made, should cover, it is

implicit from counsel's submissions that it should be until the Tribunal makes a finding on the charge, which would cover the hearing of the charge.;

4. Dr [XYZ] has filed an affidavit in support of his application together with submissions of his counsel. Principal points in Dr [XYZ]'s affidavit (and repeated in his counsel's submissions) are:

(a) That there has been significant delay in the investigation and prosecution of this matter. The incident which is the subject of the charge occurred in November 1999. A complaint was made in July 2000. Dr [XYZ] was subject to a two year enquiry and then a further enquiry by the Director of Proceedings. The charge was laid in April 2003. The hearing is scheduled for this August. (Additionally, Dr [XYZ] stated he was served with civil proceedings instituted by the complainant and that this matter has also been the subject of an ACC claim).

(b) That during the aforementioned period, Dr [XYZ] has suffered both stress and distress. The matter has been constantly on his mind which has severely impacted on his enjoyment of life. He has stated that he has managed to cope throughout the lengthy period of the investigation by taking particular care of workloads and employing mental health strategies. He has produced a letter from his physician who supports the application for name suppression with details of the adverse impact which this matter has had on Dr [XYZ]'s health.

(c) That as this charge relates to wrong-sided surgery, Dr [XYZ] apprehends that there will be significant media interest in the matter which will involve more publicity than would ordinarily be the case. He fears that he will not be able to cope with the additional stress of publicity arising from his name not being suppressed at this time. He has stated that he is xx years away from retirement and believes publicity will cause the collapse of those things which underpin his work and personal life. His counsel has submitted that publication of Dr [XYZ]'s name prior to the Tribunal's finding could have the potential of seriously damaging his reputation.

(d) That during the years of investigation there has been no need seen by the office of the Health and Disability Commissioner, despite its careful scrutiny of his actions, to refer him to the Medical Council for competence review; and there have been no previous claims made to ACC alleging medical mishap or medical error at his hands;

and that accordingly there is no particular public interest in early publication of his name.

(e) That at all times he has never been anything other than open and frank with the office of the Health and Disability Commissioner, as evidenced by an extract from a letter to Dr [XYZ] from the Commissioner.

(f) That he is concerned also to protect those persons and organisations whose actions were subject to the investigation which includes the organisation where he practises, and the staff all of whom have been subject to the enquiry and for whom this matter has been extremely stressful.

(g) That Dr [XYZ] has sought to protect xx as much as possible from knowledge of these proceedings because of this person's mental health and confirms that this person is involved in his work and whose sense of self is intrinsically linked to Dr [XYZ]'s professional career. He has produced a letter from xx's medical general practitioner who confirms he has been this person's doctor for over 20 years and that xx, who has been prone to recurrent episodes of depression during that time, is on regular anti-depressant medication and is likely to remain on it for the foreseeable future. The general practitioner has stated that xx's mental health is still vulnerable to major life stressors and that the present proceedings pose a threat to this person's mental health. In his opinion, publication of Dr [XYZ]'s name would significantly add to that threat.

The Director of Proceedings' Submissions

5. The principal points raised in the Director's submissions are:

(a) That the Act enshrines the principle of *Open Justice* concerning medical disciplinary proceedings, notwithstanding the discretion vested in the Tribunal to grant name suppression in appropriate cases.

She referred to the well established principles that there is a strong presumption in favour of open judicial proceedings and cited relevant cases.

(b) With regard to the present case, she submitted that the evidence provided to the Tribunal did not identify very special or exceptional circumstances warranting displacement of the presumption of openness.

(c) The Director accepted that while Dr [XYZ] has suffered and continues to suffer stress as a result of the Commissioner's investigation and the subsequent filing of the charge there is unlikely ever to be a case where a practitioner does not suffer stress as a result of disciplinary proceedings.

(d) With regard to the civil proceedings referred to by Dr [XYZ], the Director clarified that they had been discontinued and could not therefore be considered a current *"stressor"*.

(e) With regard to xx, while the Director accepted that disciplinary proceedings can be stressful for members, she referred to the letter from xx's general practitioner and submitted that there was a lack of evidence as to *how* publication of Dr [XYZ]'s name would significantly threaten xx's mental health apart from the practitioner's broad statement of opinion that it would do so. She stated there was no analysis or reasoning provided for his broadly stated view.

(f) With regard to Dr [XYZ]'s assertion regarding the impact of publicity on his place of work and other individual staff members involved in this proceeding, the Director submitted that the organisation and the staff members involved are aware of these proceedings and have throughout the course of the Commissioner's investigation process and the Director of Proceedings' process been legally represented. In the absence of an agreement on the facts a number of those staff members will be called by the Director to give evidence. She submitted there had been no application for name suppression made on their behalf. (However, Dr [XYZ]'s counsel has stated in her submissions that such an application may well be made at the commencement of the hearing). The Director has further submitted that no corroborating evidence has been provided, in support of Dr [XYZ]'s application, of the organisation's or individuals' concerns regarding possible publicity about this case; and that the concerns Dr [XYZ] has identified can be protected by means other than suppression of his name.

(g) With regard to the public interest, the Director referred to her general submissions relating to the established legal principles regarding open justice and submitted that there was strong public interest in wrong-side surgery (as acknowledged by Dr [XYZ]).

(h) Finally, the Director submitted that in balancing the competing factors of privacy and public interest, there was nothing out of the ordinary or exceptional in this case to displace the principle of open justice.

The principles applicable to name suppression

6. The Tribunal has, on previous occasions, set out the principles which apply regarding applications by medical practitioners for suppression of their name pending determination of charges by the Tribunal. (See Decision No. 216/02/95C; Decision No. 221/02/97C; Decision No. 230/03/100D)

Hearings shall be held in public

7. When considering the principles applicable to name suppression involving medical disciplinary cases the starting point is section 106 of the Medical Practitioners Act 1995.

8. Section 106 of the Act provides:

> *"(i) Except as provided in this section and in section 107 of this Act, every hearing of the Tribunal shall be held in public.*
>
> *(ii) 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 or 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) *… an order prohibiting the publication of the name, or any particulars of the affairs, of any person."*

9. Section 106(1) is mandatory in that it provides that *every* hearing of the Tribunal *shall* be held in public but then vests in the Tribunal a discretion to grant name suppression in appropriate cases.

10. When the Tribunal is considering an application for an order prohibiting publication of the name of any person it must have regard to *the interests of any person* and to *the public interest*.

11. The *interests of any person* include Dr [XYZ].

12. The Tribunal may also have regard to persons other than the practitioner. In this particular case, the interests of xx has also been brought to the attention of the Tribunal as a matter which it should take into account when considering Dr [XYZ]'s application for name suppression.

Discussion - Interests of Dr [XYZ]

Damage to Dr [XYZ]'s reputation

13. The Tribunal is not satisfied that Dr [XYZ]'s reputation will be seriously damaged if his name is published. The charge relates to an incident involving one patient nigh on four years ago. Further, Dr [XYZ] has acknowledged *"responsibility for a mistake"* in his affidavit (at para 15) where he quotes the opinion of the Health & Disability Commissioner who recorded *"I acknowledge that Dr [XYZ] has always admitted responsibility for this mistake. I also acknowledge the assistance he has given my office during the course of this investigation."* The Tribunal does not at this stage (and must not) infer anything adverse regarding the reference to responsibility for a mistake. Presumably, the defence will be inviting the Tribunal to consider the context in which any mistake arose and submitting that it should not invite disciplinary sanction. The point to be made is that in the context of an application for name suppression, while the fact of the charge itself has caused significant concern for Dr [XYZ], the charge must be viewed in perspective. The allegation contained in the charge does not reflect upon Dr [XYZ]'s integrity.

14. Admittedly, the fact that there have been no ACC claims against Dr [XYZ], alleging medical error or medical mishap (other than the present one); and that the Medical Council has not sought any competence review, in the ensuing years, is a matter which can be raised at the hearing and is one which reflects favourably (rather than adversely) on Dr [XYZ]'s professional reputation.

Stress suffered by Dr [XYZ]

15. The Tribunal notes that when a doctor is charged with a disciplinary offence it is more often than not that he or she will suffer stress as a result. However, when stress is put forward as a ground in support of name suppression, the Tribunal would, in the normal course of events, expect to receive medical evidence regarding the effects of the stress upon the health of the doctor concerned.

16. In this case, a letter has been received from Dr [XYZ]'s physician. The Tribunal accepts that Dr [XYZ] is suffering both stress and distress which has impacted upon his health.

17. The Tribunal further accepts that Dr [XYZ]'s stress is likely to be aggravated if his name is published prior to the commencement of the hearing of the charge.

18. The Tribunal also accepts that the effects of such further stress may adversely affect Dr [XYZ]'s ability, prior to the hearing, to function as a xx to the best of his ability. Any interim publicity, until the hearing, may also compromise Dr [XYZ]'s ability to prepare his defence of the charge which he is to face.

19. The Tribunal has also had regard, under this heading, to the time factor involved from when the complaint was first brought to Dr [XYZ]'s notice down to the proposed date of hearing. It accepts that a lengthy delay can add to a stressful situation.

xx

20. While the Tribunal acknowledges that there is force in the Director's submission regarding the limited weight of the medical evidence advanced concerning xx's mental health, the Tribunal is prepared, at this juncture, to accept it on face value.

The Organisation and involved staff

21. The Tribunal has not found persuasive, the argument on behalf of Dr [XYZ], that the impact of publicity on the organisation and others involved is a reason to suppress his name. There is no corroborating evidence, other than Dr [XYZ]'s assertion regarding this; and, in any event, we agree with the Director that should the concerns to which Dr [XYZ] has referred be established, they can be protected by means other than suppression of Dr [XYZ]'s name.

Interests of the Complainant

22. No submissions were made regarding the complainant's personal interest.

The Public Interest

23. Section 106(2) requires the Tribunal to have regard to *"the public interest"* when considering an application for name suppression.

24. It should be made clear that there is *all* the difference between a matter which is *in* the public interest as distinct from a matter which is *of* public interest, that is, of curiosity to the public.

25. It is in the former sense which the Tribunal must address. This concept was dealt within the case of *S v Wellington District Law Society* [2001] NZAR 465 relating to an application for name suppression by a lawyer subject to a disciplinary proceeding. A full bench of the High Court, when considering the relevant provision in the Law Practitioners Act 1982 (not dissimilar from s.106(2) in the Medical Practitioners Act 1995), observed:

> *"… the public interest to be considered, when determining whether the Tribunal, or on appeal to 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 were to 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 a practitioner, when exercising a discretion whether or not to prohibit publication".*

26. This Tribunal has adopted an evaluation process similar to that adopted in the Tribunal's recent Decision No. 230/03/100D (28 May 2003). The matters evaluated are those which have been identified in relevant case law.

27. The following *"public interest"* considerations have been evaluated by the Tribunal when considering Dr [XYZ]'s application:

(a) The public interest in knowing the name of a doctor accused of a disciplinary offence;
(b) Accountability and transparency of the disciplinary process;
(c) The importance of freedom of speech and the right enshrined in s.14 New Zealand Bill of Rights Act 1999 which provides that *"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form"*;
(d) The extent to which other doctors may be unfairly implicated if Dr [XYZ] is not named;
(e) The possibility that publicity might lead to discovery of additional evidence;
(f) The extent to which the absence of publicity may allow an opportunity for further alleged offending.

28. The Tribunal addressed each of these considerations in turn:

(a) *The public interest in knowing the name of a doctor accused of a disciplinary offence.*

Under the previous Medical Practitioners Act (1968), hearings were held in private. One of the public concerns which Parliament addressed when debating the present Act was the public's wish to know the identity of medical practitioners who appear before the Medical Practitioners Disciplinary Tribunal, hence the enactment of s.106(1) requiring that every hearing shall be held in public while reserving a discretion to the Tribunal, in appropriate cases, under s.106(2).

(b) *Accountability and transparency of the disciplinary process*.

It is in the public interest that the public and members of the medical profession have confidence in the disciplinary process which is more likely to be ensured if the

process is transparent; and that those who transgress (in the disciplinary sense) are held accountable.

The requirements of transparency and accountability are matters which tend to militate against suppression of the name of a practitioner who appears before the Tribunal.

(c) *The importance of freedom of speech and the right enshrined in s.14 New Zealand Bill of rights Act 1990.*

The public interest in preserving freedom of speech and the ability of the media "as surrogates of the public" to report Tribunal proceedings have been stressed on numerous occasions by the Tribunal and appellate courts. The Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 and *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546 stressed:

> *"…. 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 [proceedings] fairly and accurately as 'surrogates of the public'"*

is an important factor which weighs against suppressing the name of an accused. The same considerations apply to doctors charged with an offence before the Medical Practitioners Disciplinary Tribunal.

(d) *The extent to which other doctors may be unfairly implicated if Dr [XYZ] is not named.*

It is contrary to the public interest that if a doctor's name is suppressed, suspicion may fall, unfairly, on other doctors.

This is not a matter which has been raised in this case.

(e) *The possibility that publicity might lead to discovery of additional evidence.*

This is not a reason advanced in this case. The charge relates to an incident involving one patient in November 1999. No other charge has been brought against Dr [XYZ]; and in his affidavit he has stated he has not been the subject of other claims. This evidence was not challenged by the Director.

When assessing Dr [XYZ]'s application, the Tribunal has borne this in mind. The

possibility of disclosure of additional evidence is remote.

(f) *The extent to which the absence of publicity may allow an opportunity for further alleged offending.*

This is not a matter with which the Tribunal need concern itself. There is nothing before the Tribunal which could give rise to this issue.

Tribunal's Decision

29. The Tribunal considered the merits of Dr [XYZ]'s application to be marginal.

30. The only matters which weighed with the Tribunal were the claims relating to Dr [XYZ]'s health and the mental health of xx. While it found slight the weight of the medical evidence relating to xx, it was prepared at this juncture to accept it at face value; and it did accept the stress which Dr [XYZ] has suffered thus far to be significant. The Tribunal was concerned that Dr [XYZ] should be able to continue with his professional duties and prepare for the hearing of this charge. The Tribunal considered the combination of these matters to be sufficient to persuade it to make an interim order for name suppression until the commencement of the hearing. However, the Tribunal was not satisfied on the evidence before it that it should make an order for interim name suppression beyond that time.

31. Further, the Tribunal does not accept the submission of Dr [XYZ]'s counsel that there is no public interest in publication of Dr [XYZ]'s name.

Order

32. Having given careful consideration to all of the issues raised by Dr [XYZ] and his counsel, the submissions in opposition of the Director of Proceedings, and the issues affecting the public interest, the Tribunal is prepared to grant an interim order suppressing Dr [XYZ]'s name (and any particulars leading to his identification) until the commencement of the hearing of the charge.

DATED at Wellington this 13th day of June 2003

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S M Moran

Deputy Chair

Medical Practitioners Disciplinary Tribunal

Addendum

Since determining Dr [XYZ]'s application for name suppression, the Secretary of the Tribunal received a letter on Monday 9 June 2003 from the legal adviser acting for the organisation and representing the interests of those staff or consultants employed by or who use the organisation in addition to Dr [XYZ], in relation to these proceedings. The legal adviser anticipates receiving instructions to file an application (with a supporting affidavit) as soon as possible this week seeking suppression orders at the upcoming Tribunal hearing for the organisation and all those others associated with the organisation apart from Dr [XYZ] (although the organisation supports his application as well).

The Tribunal wishes to issue its decision regarding Dr [XYZ]'s application without delay, and does so.

However, in view of the legal adviser's letter, the Tribunal considers it appropriate that publication of the names of the organisation and those staff and consultants associated with this matter be suppressed until their application for name suppression is filed and heard.