MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO.: 231/03/99D

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of a charge laid by the Director of Proceedings against B medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Wednesday 4 and 11 June 2003

PRESENT: Dr D B Collins QC - Chair
Mrs J Courtney, Dr J C Cullen, Dr R W Jones,
Associate Professor Dame N Restieaux (members)
Ms G J Fraser - Secretary (for first part of call only)

COUNSEL: Ms M McDowell the Director of Proceedings
Mr H Waalkens for respondent

The Application

1. Dr B is a surgeon. He practices in xx. On 26 March 2003 the Director of Proceedings laid a disciplinary charge against Dr B. The details of the charge are explained in the next paragraph. On 17 April Dr B made application under s.106(2)(d) Medical Practitioners Act 1995 ("the Act") for orders suppressing publication of his name and any identifying features pending determination by the Tribunal of the charge. On 15 May 2003 the Director of Proceedings filed a detailed memorandum opposing Dr B's application. On 23 May 2003 counsel for Dr B responded to those submissions. On 29 May 2003 counsel for Dr B advised the Tribunal that his client was content to let the Tribunal rule on his application without the need for a hearing. That is to say, he was willing to let the Tribunal deal with his application on the basis of the written material received by the Tribunal. The Director of Proceedings had previously adopted a similar stance. The Tribunal convened (by way of telephone conference) on 4 and 11 June. By a majority of three to two the Tribunal concluded Dr B's interim application should be granted. The parties were advised of the majority's decision on 14 June. The Tribunal now gives the reasons for its decision and apologises for the delay in delivering the reasons for its decision. The delay is attributable to two members of the Tribunal being overseas during the latter half of June.

The Charge

2. The charge alleges Dr B mismanaged a patient during the period 6 to 18 December 1999. The Director of Proceedings has alleged that Dr B's shortcomings, if established, constitute disgraceful conduct in a professional respect, or alternatively, professional misconduct.

3. The particulars of the charge allege:

> *"1. Between 6 December 1999 and 15 December 1999, [Dr B] failed to ensure the adequate preparation of [the patient's] bowel prior to surgery in that [he]:*
>
> *(a) inadequately communicated to [the patient] to fast prior to surgery; and/or his wife the need for [the patient] to fast prior to surgery; and/or*
>
> *(b) inadequately instructed nursing staff at xx Hospital of the need for [the patient] to fast prior to his surgery; and or*
>
> *(c) failed to ensure that adequate corrective bowel preparation agents*

were administered to [the patient] on becoming aware that [the patient] had broken his fast;

AND/OR

2. *Failed to adequately assess [the patient] post-operatively; before 1200 hours on 18 December 1999;*

AND/OR

3. *Failed to adequately and appropriately respond to [the patient's] clinical presentation in that [he] failed to re-operate, at any time after 0700 hours and between 2400 hours on 17 December 1999;*

AND/OR

4. *Between 1100 hours on 17 December 1900 and 1200 hours on 18 December 1999 failed to consult with, and/or transfer care of [the patient] to an appropriately qualified specialist surgeon in a timely manner;*

AND/OR

5. *Failed to adequately, and in a timely fashion, document in the clinical notes [Dr B's] operative and/or post-operative care in relation to [the patient]".*

Summary of Grounds for Application

4. The notice of application identifies four grounds which are raised in support of the application. Those four grounds are:

"1. Dr B denies the charge.

2. The charge is one of 'disgraceful conduct' with a corresponding high risk of damage to [Dr B's] name and reputation as a consequence of any publicity wherein he may be identified.

3. Any publicity of his name/identity or that of his employer runs the risk that [Dr B's] employment may be terminated.

4. Publicity of Dr B's name will also risk unnecessary and unreasonable damage and upset to his family including his wife and children."

5. On 30 April Dr B swore an affidavit in support of his application. In his affidavit Dr B explains:

5.1 He has been a registered medical practitioner in New Zealand since 9 January 1975.

5.2 He practices as a surgeon in the public and private sectors in xx.

5.3 He has not previously been charged with any offence.

5.4 He ardently denies the allegations and explains that:"… *at all times [he was] trying to do his best for [the patient]"*.

5.5 If his name is published "*it will have an adverse impact not only on [his] reputation, but also on [his] private practice.*

5.6 His public employer (xx) regards the events complained of as "serious misconduct". Dr B is *"desperately concerned that [his] employment may be about to be terminated. Any adverse publicity of [his] name/identity or that of [his] employer … will only exacerbate that situation"*.

5.7 The matters which have given rise to the charge have already been the subject of an inquest. Some publicity (which refers specifically to Dr B) occurred at the time of the Coroner's Court hearing.

5.8 He is concerned publicity may have an impact on his xx daughters aged xx, who are described as being "sensitive children".

5.9 His wife is chairperson of a school board of trustees. Dr B believes that if his application is not granted any adverse publicity will reflect badly on the school and that his wife "*might be asked to step aside as chairperson*".

5.10 His "… *patients whose care [he] is managing (many of them on an ongoing basis) would be seriously jeopardized if publication of [his] name/identity occurred"*. He also suggests publicity would cause unreasonable stress to his patients.

Director of Proceedings Position

6. In her comprehensive submission the Director of Proceedings stresses:

6.1 The legislative regime governing name suppression applications before the Tribunal contains a presumption that proceedings before the Tribunal are to be in public.

6.2 The presumption of innocence is not determinative of interim name suppression applications.

6.3 Dr B's application and supporting affidavit does not disclose any exceptional or unusual circumstances which justify the granting of his application.

6.4 There is insufficient evidence for the Tribunal to conclude that Dr B's employment is likely to be terminated if his application is declined.

6.5 The matters which have given rise to the charge are already in the public domain as a result of the Coroner's hearing which occurred in August 2000.

6.6 It is difficult to assess how publication of Dr B's name could affect his wife's position on the board of trustees of their local school.

6.7 The seriousness of the allegations are public interest factors which justify the Tribunal declining the application.

Applicant's Response

7. In his helpful submissions in response Mr Waalkens emphasises the following points:

7.1 An unfair stigma is associated with publication of the name of a person who is presumed innocent of the charge laid against them.

7.2 There is no basis for any concern that publication will result in further complaints emerging.

7.3 Doctors appearing in the criminal jurisdiction often receive name suppression.

7.4 The High Court indicated in *F v Medical Practitioners Disciplinary Tribunal* [1] that applications for interim name suppressions should be favourably considered.

7.5 The publicity which occurred in relation to this case happened almost xx years ago and no longer has any "currency".

7.6 Dr B cannot get information from his employer about the risks of his continued employment because to do so might jeopardise his continued employment.

Decision of the Majority of the Tribunal (Doctors Dame N Restieaux, J Cullen and R Jones)

8. As mentioned from the outset, three members of the Tribunal believed Dr B's application for interim name suppression should be granted. The majority's reasons for granting name suppression can be analysed under two broad headings, namely:

8.1 Principles applicable to interim name suppression applications, and

8.2 General merits

Principles applicable to interim name suppression applications

9. All members of the Tribunal accept that the starting position when considering the principles applicable to name suppression in the medical disciplinary arena is s.106 Medical Practitioners Act 1995. Subsections 106(1) and (2) provide:

> *"(1) Except as provided in this section and in section 107 of this Act, every hearing of the Tribunal shall be held in public.*
>
> *(2) Where the Tribunal is satisfied that it is desirable to do so, after having regard to the interests of any person (including (again without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any one or more of the following orders: …*
>
> *(d) … an order prohibiting the publication of the name, or any particulars of the affairs, of any person."*

[1] unreported, HC Auckland AP 21/SW01, 5 December 2001, Laurenson J

10. Subsection 106(1) places emphasis on the Tribunal's hearing being held in public unless the Tribunal, in its discretion applies the powers conferred on the Tribunal by section 106(2). Another exception to the presumption that the Tribunal's hearing will be conducted in public can be found in section 107 which creates special protections for complainants where the charge involves a matter of a sexual nature, or where the complainant may give evidence of an intimate or distressing nature.

11. Dr Cullen has analysed the language employed by Parliament when enacting section 106(1) of the Act and concluded that Parliament only requires the Tribunal's hearings to be held in public. In his considered view, when Parliament stated in section 106(1) "*every hearing of the Tribunal shall be held in public*" it meant hearings of the Tribunal should be open to the public. Dr Cullen further reasons the requirement for "open" hearings does not mean a doctor's name should be subject to publicity prior to the actual commencement of a hearing by the Tribunal.

12. Dr Cullen reasons that prior to the commencement of a disciplinary hearing there is no statutory guidance that can be gleaned from the Act on whether or not a doctor's name should be suppressed. In these circumstances, Dr Cullen maintains the appropriate course to take is to grant name suppression until the commencement of the hearing.

13. Intertwined in the analysis set out in the preceding two paragraphs is the proposition that a hearing of the Tribunal does not commence until the Tribunal assembles to hear submissions and evidence from the parties. Prior to that stage, any interlocutory or pre-hearing determinations do not form part of the actual "hearing of the Tribunal".

14. This particular point was not raised by either counsel in their submissions. The Tribunal has therefore not had the benefit of submissions on this particular issue.

15. An examination of the law reports indicates that there has been judicial consideration of when a hearing ends (see for example *Ministry of Transport v Nicol* [2] and cases referred to therein), but the Tribunal has not been able to identify any reported decisions which assist

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[2] [1980] 1 NZLR 436

in determining when a hearing of the Tribunal commences for the purposes of section 106 of the Act.

16. Dr Cullen approaches the interim name suppression application on the basis that Parliament has not given specific guidance to the Tribunal on how the Tribunal should determine interim name suppression applications and accordingly, he believes the appropriate and cautious approach is to grant interim name suppression until the commencement of the Tribunal's hearing.

General Merits

17. Doctors Dame N Restieaux and R Jones have focused their attentions upon the substantive merits of the application and have concluded that Dr B has surmounted the threshold for granting interim name suppression.

18. The reasons why Doctors Dame Restieaux and Jones are satisfied that Dr B's name should be suppressed on an interim basis can be succinctly stated.

Patients Interests

19. In considering the "interests of any person" (Section 106(2)) Doctors Dame Restieaux and Jones have paid special regard to the interests of Dr B's patients. They reason that patients of Dr B may be unduly and unfairly concerned to learn Dr B is the subject of disciplinary proceedings. They believe that many of Dr B's patients will not be able to assess what significance (if any) they should place on the fact that disciplinary charges have been brought against Dr B. In these circumstances, Dr B's patients may be tempted to draw negative inferences which may in turn adversely affect the relationship which currently exists between Dr B and his patients.

20. Doctors Dame Restieaux and Jones reason that the public interest in knowing the identity of a doctor charged with a disciplinary offence does not justify jeopardising the important bond of trust between a doctor and patient. In the circumstances of this case it is suggested that the relationship which Dr B has with his existing patients should not be undermined and that this factor weighs heavily in favour of granting interim name suppression.

Doctor's Interests

21. The two members of the majority who have focussed upon the substantive merits of the application have also carefully weighed and considered Dr B's interests.

22. Doctors Dame Restieaux and Jones have concluded that adverse publicity at this juncture may seriously damage Dr B's reputation, particularly in light of the fact that the charge alleges disgraceful conduct. They believe that the fact Dr B has been charged with the most serious of disciplinary offences is likely to generate publicity and that members of the public are also likely to hold Dr B in low esteem because he has been charged with disgraceful conduct in a professional respect. Doctors Dame Restieaux and Jones take the view that even if Dr B is ultimately found not liable, any adverse publicity at this juncture will cause him irreparable harm. This concern was acknowledged in the following way by Fisher J in *M v Police*[3]:

> *"…the stigma associated with a serious allegation will rarely be erased by a subsequent acquittal. Consequently when a Court allows publicity which will have serious adverse consequences for an unconvicted defendant it must do so in the knowledge that it is punishing a potentially innocent person".*

23. Doctors Dame Restieaux and Jones also accept Dr B's concerns about his continued employment at xx Hospital. In his affidavit Dr B says that the Chief Executive of xx (xx Hospital) has told Dr B that the events giving rise to the charge *"may be brought or is likely to bring [Dr B] as well as xx into disrepute"* and "*that this is considered to be serious misconduct"*.

24. Doctors Dame Restieaux and Jones believe the comments attributable to the Chief Executive of xx must be taken seriously, and that the Tribunal should not prejudice Dr B's continued employment in the public sector at xx by declining his application for interim name suppression.

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[3] (1991) CRNZ 14

Patient's Family

25. The majority of the Tribunal have given careful consideration to the concerns Dr B has advanced about the effects of publicity upon his daughters and his wife. The majority do not believe that those factors justify the granting of interim name suppression and to this limited extent, the majority agree with the reasoning set out in the minority's decision.

Decision of Minority of the members of the Tribunal (Dr D Collins QC, Mrs J Courtney)

26. In the minority's view the requirement in s.106(1) that the Tribunal's hearings be held in public mirrors the principle that, except in unusual and rare circumstances, regular Court proceedings are conducted in public. An effect of that principle in our regular Courts is that defendants will rarely receive name suppression. Four cases can be cited to illustrate this point:

- In *M v Police*[4] Fisher J said:

  "In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or offences, or if the absence of publicity might present the defendant with an opportunity to re-offend".

- In *R v Liddel* [5] the Court of Appeal said:

  "… 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 the latter fairly and accurately as 'surrogates of the public'…. The basic value of freedom to receive and impart information has been re-emphasised by s.14 of the New Zealand Bill of Rights Act 1990 …

  The room that the legislature has left for judicial discretion in this field means that it would be inappropriate for this Court to lay down any fettering code. What has to be stressed is the prima facie presumption as to reporting is always in favour of openness. Name restrictions as to the victims of sexual crimes are automatic (subject to the possibility in a range

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4 (supra)
5 [1995] 1 NZLR 538

of cases of orders to the contrary), and they are permissible for accused or convicted persons. But they are never to be imposed lightly, and in cases of conviction for serious crime the jurisdiction has to be exercised with the utmost caution".

- In *Lewis v Wilson & Horton Ltd* [6] the Court of Appeal re-affirmed what had been said in *R v Liddell*. The Court noted:

  "… the starting point must always be the importance of freedom of speech recognised by s.14 of the New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report Court proceedings".

- Recently, in *Re X* [7] the High Court distilled the relevant principles relating to name suppression applications to a number of propositions including:

  "The principle of open justice dictates that there should be no restriction on publication except in very special circumstances."

In that case the intended victim of a crime had his name suppressed. However, that order was revoked prior to the person concerned giving their evidence in Court.

27. The cases referred to in the preceding paragraphs all involved criminal prosecutions. Apart from *Re X*, the cases cited examine the broad discretion conferred on Courts in criminal cases by s.140 Criminal Justice Act 1985 to suppress the name of an accused or convicted person.[8] It is axiomatic that medical disciplinary hearings are not criminal prosecutions.[9] Nevertheless, the minority believe guidance can be derived from the criminal law jurisdiction when applying the requirement of public hearings contained in s.106(1) Medical Practitioners Act 1995 to an application for name suppression by a doctor charged with serious offending.

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6 [2000] 3 NZLR 546

7 [2002] NZAR 938

8 Section 140 Criminal Justice Act provides: Court may prohibit publication of names – (1) Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

28. A number of decisions of the Tribunal, and appellate Courts have recognised the importance of the requirement set out in s.106(1) of the Act that hearings of the Tribunal shall be heard in public when the Tribunal considers name suppression applications filed by a doctor. For example: in *Harman v Medical Practitioners Disciplinary Tribunal* [10] the District Court held:

> *"The Tribunal referred in its judgment to the well known statement of principle [in] R v Liddell … That decision is to the effect that the prima facie presumption as to reporting is always in favour of openness and that in considering whether a power to prohibit publication should be exercised the starting point is the importance in the democracy of freedom of speech, open judicial proceedings and the right of the media to report the matter fairly and accurately as 'surrogates of the public'. These freedoms are re-emphasised by s.14 of the New Zealand Bill of Rights Act 1990. In this case that presumption is reinforced by the statutory injunction to the Tribunal that it should hear proceedings in public".*

29. In *F v Medical Practitioners Disciplinary Tribunal* [11] one of the many questions the Court was asked to focus upon concerned the appellant's contention that the Tribunal had mis-directed itself when deciding not to continue an interim name suppression order. It was said the Tribunal had wrongly applied the criminal law presumption of public hearings to the doctor's application to continue suppression of his name. In that case the doctor submitted that the higher public interest of "openness" in criminal hearings should not be automatically transposed to medical disciplinary proceedings. The High Court held there was a fundamental distinction between name suppression in criminal cases and those which arose in a professional disciplinary forum. The Court noted:

> *"… there is … a fundamental distinction, but on closer examination the impact of this is likely to be more apparent rather than real".*

30. The Court proceeded to say s.106(2) Medical Practitioners Act 1995 required the Tribunal to take into account the interests of the practitioner. The Court said in the context of that case (the practitioner had been found guilty of conduct unbecoming a medical practitioner) the Tribunal should have regard to the possibility:

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9 *Re A Medical Practitioner* [1959] NZLR 782, *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139, *Guy v Medical Council of New Zealand* [1995] NZAR 67

10 DC Auckland NP 4275/00, 3 May 2002, J Doogue DCJ

11 Unreported HC Auckland AP 21-SW01, 5 December 2001, Laurenson J

> *"… that the charges brought against the practitioner might be found to be unfounded or so trivial that a finding of misconduct is not warranted. In such a case the practitioner will continue to practice. Therefore it is reasonable that the right to practice should not be prejudiced by the practitioner being identified in relation to allegations which do not, at the end of the day, have any bearing on his ability to do so.*
>
> *… therefore pending determination of the charges it will usually be quite reasonable in most cases to make interim orders for non-publication of name"* (emphasis added).
>
> The Court proceeded to observe that if a doctor is found liable following a disciplinary hearing then there is a strong expectation the doctor's name will be published.

31. The suggestion in *F* that it would be quite reasonable in most cases to make interim orders for name suppression pending determination of disciplinary charges against a doctor is a clear indication from the High Court that the Tribunal should give favourable consideration to applications to name suppression pending determination of disciplinary charges against the doctor. The observations of the High Court must carry considerable weight.

32. It must be said however that the comments of the learned Judge in *F* were *obiter dicta.* With the greatest of respect and deference to the High Court Judge, the minority members of the Tribunal believe they must assess each application for name suppression on its merits and faithfully apply the legislative criteria set out in s.106(2) Medical Practitioners Act 1995 when considering name suppression applications.

33. It would be unfortunate if the idea were to gain currency that there is a presumption in favour of name suppression whenever a doctor applies to the Tribunal under s.106(2)(d) to have their name suppressed pending determination of disciplinary charges. Such a presumption could not be reconciled with the Tribunal's duty to carefully exercise the discretion conferred upon the Tribunal by s.106(2) after applying the criteria specified by Parliament.

Interests of the Practitioner

Damage to Reputation

34. In his affidavit Dr B says that if his "… *name and/or identity is published in connection with this case … it will have an adverse impact on not only [his] reputation but also on [his] private practice"*.

35. The minority members of the Tribunal accept that, on balance, there is likely to be harm caused to Dr B's reputation if publicity is given to the fact that a charge of disgraceful conduct has been laid against him. However, they are not convinced that Dr B will suffer significant harm if his application is declined. Whilst the allegations are serious they must be viewed in perspective. It is not uncommon for very serious allegations to be heard by the Tribunal which undoubtedly impact upon the standing and reputation of the doctor concerned. Allegations of sexual and drug abuse are examples of charges in this category. The allegations against Dr B focus on the way he is said to have managed one patient three and a half years ago. The surgery in question is of a kind which Dr B no longer performs. In these circumstances the Chairperson and Mrs Courtney conclude that declining Dr B's application may cause some harm to his reputation but if he does suffer harm it is unlikely to be significant. Having made these observations the minority members of the Tribunal also accept that it would be unfortunate if Dr B's reputation were damaged by reason of his name being associated with allegations which at this juncture have not been proven. However, the minority members of the Tribunal do not believe publicity will cause Dr B serious adverse consequences.

36. The conclusions of the minority members of the Tribunal that publicity is unlikely to have "serious adverse consequences" for Dr B is partially reinforced by the fact that the matters giving rise to the charge are already in the public domain as a result of publicity given to a Coronial inquest into the patient's death. There is no suggestion that publicity had the slightest impact upon Dr B's reputation.

Dr B's employment at xx Hospital

37. As mentioned earlier in his affidavit Dr B says that the Chief Executive of xx (xx Hospital) has told him that the events giving rise to the charge "may have brought or is likely to bring

[Dr B] as well as xx into disrepute" and "that this is considered to be serious misconduct". Furthermore Dr B suggests that if publicity is given to the fact that a charge has been brought his 8/10ths position at xx Hospital may be terminated.

38. The evidence does not satisfy the Chairperson of the Tribunal, and Mrs Courtney that Dr B's fears for his future employment at xx Hospital are well founded. The matters complained of occurred three and a half years ago. If Dr B's employer had concerns about the matters raised by the charge, then it should have satisfied itself about the appropriateness of Dr B's continued employment long before the charge was laid with the Tribunal. The fact that the patient's death has been investigated by a Coroner in a public forum in xx underscores this point. xx must have known about this matter since at least xx and cannot now seriously call into question Dr B's continued employment because of the possibility of publicity being given to the fact the Director of Proceedings has brought a charge against Dr B.

Practitioner's Family

Dr B's daughters

39. Dr B has invited the Tribunal to have regard to the interests of his daughters aged xx. Dr B's two youngest children are described as being *"… particularly shy adolescents and would be devastated by any adverse publicity associated with their name"*. The oldest daughter is xx years old. She does not live at home. Dr B says she *"would crawl into her shell in relation to any publicity"*.

40. All members of the Tribunal accept that any publicity associated with this charge will cause distress to Dr B's daughters. However there is no evidence before the Tribunal to suggest Dr B's daughters will suffer emotional injury or ill health if his application is declined. It would be unusual if immediate members of a doctor's family were not concerned and distressed by publicity associated with a disciplinary charge against the doctor. Normally when stress and emotional harm to a doctor and/or his family is relied upon as a ground for name suppression the Tribunal has the benefit of medical evidence explaining the effects upon the person concerned if publicity occurs in relation to a disciplinary charge. There has been no evidence of that kind provided to the Tribunal. In this regard there is much force in the submission of the Director of Proceedings that there is no evidence before the Tribunal

which points to unusual circumstances which justify the granting of an interim order for name suppression.

Doctor's wife

41. All members of the Tribunal accept without hesitation that Mrs B will also be distressed if publicity is given to the fact that a charge has been brought against her husband.

42. In his affidavit Dr B suggests that if his application is declined Mrs B may have to step aside as chairperson of the Board of Trustees of the school because *"… adverse publicity surrounding the B name would reflect adversely on the College"*.

43. The Tribunal does not accept that the reputation of the school in question will be adversely affected if Dr B's application for interim name suppression is declined. There is no connection between the charge which Dr B faces, and the reputation of the school. Furthermore, the Tribunal does not accept that any fair minded person would expect Mrs B to resign from her position on the Board of Trustees of the school because of allegations made about the way her husband discharged his professional responsibilities.

Dr B's patients

44. Dr B suggests that the patients whose cases he is managing "*… would be undermined and seriously jeopardized if publication of [his] name/identity occurred"*.

45. The minority of the Tribunal are willing to accept some of Dr B's patients may be concerned for him and upset if publicity is given to the charge. However, in the absence of further evidence they cannot accept that the care of Dr B's patients will be "undermined and seriously jeopardized" if his application is declined.

Public Interest

46. Section106(2) requires the Tribunal to have regard to the "public interest" when determining whether or not to suppress publication of the name of an applicant.

47. In *S v Wellington District Law Society*[12] the High Court examined the concept of "public interest" in relation to an application to suppress the name of a lawyer subject to disciplinary proceedings. In considering a provision in the Law Practitioners Act 1982 similar to s.106(2) Medical Practitioner's Act 1995, a full bench of the High Court said:

> *"… 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 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".*

48. More specifically, in *Re X* Hammond J reiterated the "public interest" considerations stated in a number of criminal cases. His Honour said the following about "public interest":

> *"… public interest in knowing the name of an offender is a very powerful one. In the case of an offender, the absence of publicity may cause suspicion to fall on other members of the public. The publicity may lead to the discovery of additional evidence of offences, and the absence of publicity may allow an offender to re-offend."*

49. The following "public interest" considerations have been evaluated by the minority members of the Tribunal when considering Dr B' application:

49.1 The public's interest in knowing the name of a doctor accused of a disciplinary offence;

49.2 Accountability and transparency of the disciplinary process;

49.3 The importance of freedom of speech and the right enshrined in s.14 New Zealand Bill of Rights Act 1990 [13];

49.4 The extent to which other doctors may be unfairly implicated if Dr B is not named;

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[12] [2001] NZAR 465

49.5 The possibility that publicity might lead to discovery of additional evidence;

49.6 The extent to which the absence of publicity may allow an opportunity for further alleged offending.

50. Each of these considerations will now be examined by reference to Dr B' application.

Public interest in knowing the name of a doctor accused of a disciplinary offence

51. Prior to the Medical Practitioners Act 1995 coming into force, medical disciplinary proceedings were heard in private. The Medical Practitioners Act 1968 conferred upon the Medical Council and the Medical Practitioners Disciplinary Committee the power to direct that the effects of any orders made by those bodies be published in the New Zealand Medical Journal [14]. That power effectively enabled the Medical Council and Medical Practitioners Disciplinary Committee to publish the name of a doctor after they had determined disciplinary proceedings against the doctor.

52. Section 106 and 107 of the Medical Practitioners Act 1995 reflect Parliament's wish that the Medical Practitioners Disciplinary Tribunal conduct its hearings in public. Furthermore, in the view of the minority members of the Tribunal, Parliament determined that unless the grounds for suppression set out in s.106(2) and 107 are established the names of those who appear before the Tribunal are able to be published. When the Medical Practitioners Bill was introduced into Parliament in 1994 the then Minister of Health, the Hon J Shipley said:

> *" A major criticism of the existing disciplinary procedure is that hearings are held in private. In order that justice is seen to be done the Bill provides for hearings to be held in public, except that, after having regard to the interests of any person and to the public interest, the Tribunal may order that part or all of a hearing should be heard in a private session, or indeed, prohibit the publication of any report or account of any part of the hearing or any materials produced at the hearing …. The Tribunal will be able to make an*

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[13] "Freedom of expression – 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".

[14] S.65 Medical Practitioners Act 1968

> *order prohibiting the publication of the name or any particulars of the affairs of any person".*[15] (emphasis added)

These intentions were achieved when sections 106 and 107 were enacted.

53. It is important to note that those who promoted the new legislation were concerned that the public desire to know what was happening in medical disciplinary cases was frustrated by the provisions of the 1968 Act which required disciplinary hearings to be heard in private. Parliament responded to those concerns by enacting sections 106 and 107 Medical Practitioners Act 1995 so as to fulfil the public's wish to know, inter alia, the identity of doctors who appear before the Medical Practitioners Disciplinary Tribunal. Doctors wishing to apply for suppression of their name when they appear before the Tribunal need to appreciate that Parliament clearly expected that the identity of doctors charged with a disciplinary offence before the Tribunal would, generally, be able to be published.

Accountability and Transparency of the Disciplinary Process

54. It is in the public interest, and the interests of the medical profession for the medical disciplinary process to be transparent. Associated with transparency is the desirability of ensuring the profession and public have confidence in knowing those who appear before the Tribunal will usually be identified if their conduct justifies the bringing of a disciplinary charge against them. The requirements of transparency and accountability are factors which tend to counteract suppression of the name of a practitioner who appears before the Tribunal.

Importance of Freedom of Speech and Section 14 New Zealand Bill of Rights Act 1990

55. 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* and *Lewis v Wilson & Horton Limited* stressed:

> *"… 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' "*

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[15] New Zealand Parliamentary Debates vol 544 p 5065

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 Tribunal.

Other Doctors May Be Unfairly Impugned

56. A further factor, in the public interest, which doctors seeking name suppression must overcome is the concern that by suppressing the name of a practitioner charged with a disciplinary offence, other doctors may be unfairly suspected of being the doctor charged. This point has been emphasised on a number of occasions in criminal courts where Judges have declined name suppression to avoid suspicion falling on other members of the public.

57. Dr B is one of many medical practitioners in xx. The size of the xx medical community is such that it is unlikely any particular doctor will be linked with the charge before the Tribunal if Dr B's name is suppressed. If there is any possibility other members of the xx medical community will be unfairly suspected of being the doctor charged in this case, then the Tribunal can address that concern by suppressing details of the fact Dr B practices in xx.

Possibility of Disclosure of Additional Evidence

58. A reason sometimes advanced in criminal cases for declining name suppression is that by publishing the name of an accused further evidence may come to hand. The possibility that such further evidence will be disclosed if a doctor's name is published is a further factor in the public interest against suppressing the identity of a doctor charged before the Tribunal.

59. In the case before the Tribunal the allegations relate to events said to have occurred in 1999. No other charges have been brought against Dr B. In his affidavit Dr B stresses that aside from this charge he has not been subject to any disciplinary charges or complaints. The Director of Proceedings has not challenged this evidence.

60. The minority members of the Tribunal fully acknowledge the fact there is one charge against Dr B stemming from one complainant and relating to events that are said to have occurred 3½ years ago are factors which weigh against the public interest concern that publicity could result in further evidence emerging.

The Extent to Which the Absence of Publicity May Allow an Opportunity for Further Alleged Offending

61. Name suppression applications are sometimes declined in criminal cases in order to minimise the opportunity for an alleged offender to embark on further alleged offending. This consideration is mentioned by the minority members of the Tribunal for the sake of completeness. Nothing has been put before the Tribunal to suggest this is a legitimate concern in this case.

Summary of Position of Minority Members of the Tribunal

62. The minority members of the Tribunal are very satisfied that the following public interest considerations significantly outweigh the matters advanced by Dr B in support of his application; namely:

    62.1 The public's interest in knowing the name of a doctor accused of a disciplinary offence;

    62.2 Accountability and transparency of the disciplinary process;

    62.3 The importance of freedom of speech and the right enshrined by s.14 New Zealand Bill of Rights Act 1990.

63. In the view of the Chairperson and Mrs Courtney Dr B's application fails to meet the threshold for granting interim name suppression. More specifically they reiterate:

    63.1 They accept that on balance there is likely to be harm caused to Dr B's reputation if publicity is given to the fact a disciplinary charge has been brought against him. However, there is nothing about the charge or the evidence adduced to support Dr B's application to suggest he will suffer serious adverse consequences to his reputation by declining the application.

    63.2 The evidence does not illustrate any merit in the suggestion that Dr B's employment with xx will be terminated if he is publicly identified in association with the charge.

63.3 Dr B's family will be distressed if he is publicly identified as having been charged. However there is no evidence to suggest Dr B's family will suffer mental injury or other ill health as a result of his application being declined.

63.4 The suggestion that Mrs B may have to resign from the Board of Trustees of a school, and the reasons advanced for that proposition are not convincing.

63.5 There is no evidence to suggest that the safety and well being of Dr B's patients will be compromised as a result of his application being declined.

Conclusions

64 This decision highlights the difficulties which the Tribunal is required to come to terms with when dealing with name suppression applications brought by medical practitioners charged with a disciplinary offence.

65 The majority members of the Tribunal are satisfied Dr B should be granted interim name suppression. Accordingly, the Tribunal orders that Dr B's name, and any particulars which would identify him as a xx practitioner are suppressed until the commencement of the hearing of the charge which, at this juncture is scheduled to occur on 25 August 2003.

DATED at Wellington this 15th day of July 2003

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D B Collins QC
Chair
Medical Practitioners Disciplinary Tribunal