Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 10/97/11C

NOTE: NAME OF APPLICANT NOT FOR PUBLICATION

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of an application under Section 106 of the Act made by **H** registered medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on the 18 August 1997

PRESENT: Mrs W N Brandon - Chairperson
Associate Professor Dame Norma Restieaux,
Dr A F N Sutherland, Dr B J Trenwith,
Mr G Searancke (members)

APPEARANCES: Mr K W Harborne for Complaints Assessment Committee
Mr H Waalkens for applicant
Mr R Caudwell - Secretary
Mrs K G Davenport - Legal Assessor
(for first part of call only)

DECISION ON THE APPLICATION FOR PRIVACY

1.0 **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) of the Act that a complaint by Mrs A against Dr H should be considered by the Medical Practitioners Disciplinary Tribunal. The CAC has reason to believe that grounds exist entitling the Tribunal to exercise its power under section 109 of the Medical Practitioners Act.

2.0 **BY** application dated 15 August 1997 counsel for the applicant sought the following orders:

2.1 **THAT** the whole of the hearing of this matter should be held in private (s106(2)(a)); and/or

2.2 **PROHIBITING** the publication of any report or account or any part of any hearing by the Tribunal (s106(2)(b)) in any manner in which the applicant is named or identified; and/or

2.3 **PROHIBITING** the publication of the name or any particulars of the affairs including the occupation, place of residence/practice of the applicant (s106(2)(d)); and/or

2.4 **FURTHER** orders as this Tribunal may deem appropriate.

3.0 **THE** hearing of the application by the Tribunal was by telephone conference commencing at 7.00 pm on Monday 18 August 1997. In advance of the hearing submissions in support of the application were filed by Mr Waalkens, counsel for the applicant, and in opposition by Mr Harborne, counsel for the CAC.

4.0 GROUNDS OF APPLICATION:

4.1 **THE** grounds for the application advanced on behalf of the applicant were as follows:

4.1.1 Any public interest in having the matter heard in public, is outweighed by the prejudice that the applicant would suffer if the hearing were to be in public. In particular:

(a) The inquiry will inevitably have to look at the overall care and treatment of the late Mr B and any concern or criticisms in that regard may be perceived by those attending a public hearing to be criticism/concern in respect of the applicant.

(b) The applicant's overall role in the care and treatment of the late Mr B was a lessor one such that an inquiry into the entire matter carries with it a real risk of damage to the applicant's professional reputation.

(c) The applicant has no prior complaint or disciplinary findings or convictions and has a good reputation both professionally and otherwise.

(d) The entire circumstances of the case mean it is more desirable to have a hearing in private rather than in public.

4.1.2 Publication of the name and occupation of the applicant or the nature of the complaint would cause unnecessary and unjustified public concern.

4.1.3 Publication of the name and occupation of the applicant or the nature of the complaint would result in the risk that the applicant will suffer damage to his professional reputation which would disproportionate to the nature of the conduct in issue.

5.0 **IN** submissions in support of the application Mr Waalkens submitted that there were ten factors in favour of granting the application which ought to be considered by the Tribunal. The applicant also filed an affidavit in support of the application. At the outset Mr Waalkens acknowledged the requirements of Section 106 of the Act which says that -

"Except as provided in this Section and in Section 107 of this Act, every hearing of the Tribunal shall be held in public."

5.1 **HOWEVER**, it was Mr Waalkens' submission that, in the present case, there were a number of factors to be taken into account which made it desirable for the Tribunal to hold the hearing of the complaint made against the applicant, in private.

5.2 **THE** ten factors which Mr Waalkens submitted for consideration by the Tribunal were as follows:

5.2.1 **THE** potential damage to the doctor's reputation. Mr Waalkens accepted that this would be a factor in every disciplinary hearing however, in the present case, the doctor was very anxious about the potential damage to his reputation, particularly as this is the first complaint which has arisen against this practitioner in 32 years of practice.

5.2.2 **THE** risk of damage to other persons, in particular Mr Waalkens referred to the practitioner's family, his patients and his partner in practice.

5.2.3 **THE** practitioner is charged with conduct unbecoming, the lesser of the various charges which could be laid against practitioners. The events giving rise to the complaint are wide ranging and involve aspects of the complainant's father's care at xx Hospital and at xx Private Hospital. There were a number of other doctors involved in the care of the patient (now deceased) whose treatment is at issue and a complicated medical history, and course of events, will required to be traversed at the hearing.

5.2.4 **THIS** is the first charge of any description which this practitioner has faced in his professional career.

5.2.5 **THE** allegations, and the events giving rise to the charge, involve a doctor/patient relationship, a relationship of confidentiality, which would be exposed to publicity if the hearing of the complaint proceeds in public.

5.2.6 **THE** consequences of holding hearings in public were highlighted at a recent hearing of the Tribunal held in xx. At that hearing it had proved difficult to obtain witnesses, especially expert witnesses, as practitioners and other professionals (for example a staff nurse) had been reluctant to attend the hearing and give their evidence in public. It was inevitable that witnesses names were mentioned in the course of the hearing

and there was a real sensitivity on the part of witnesses who were especially reluctant to give evidence in public.

5.2.7 **ALTHOUGH** name suppression was sought in addition to the application for a hearing in private, or in the alternative if that application was not granted, name suppression alone was not sufficient to protect the privacy of the practitioner. The practitioner practises in a relatively small locality, he has an unusual name, and it is inevitable that there would be discussions about the complaint, and matters raised at the hearing, if the hearing was held in public.

5.2.8 **UNDER** other similar disciplinary legislation, for example the Law Practitioners Act, charges of conduct unbecoming (i.e. charges at the lowest level) were dealt with at a local level, and all are held in private. It is only charges at the highest level, i.e. disgraceful conduct only, that are heard at a national level, with a mandatory requirement that the hearing proceed in public, similar to that contained in Section 106(1) of the Act.

5.2.9 **RAISED** as a query only, Mr Waalkens indicated that the complainant in this matter desires publicity about the complaint, and that is a reason for the complainant's seeking that the hearing proceed in public.

5.2.10 **THE** allegations made against the practitioner are disputed. The applicant regards his professional reputation very seriously and he is genuinely petrified at the prospect of facing the disciplinary hearing.

5.3 **MR** Waalkens also made submissions to the Tribunal regarding the application seeking name suppression up to, and during the course of, the hearing. Mr Waalkens submitted that it was entirely appropriate that name suppression be granted and that any such orders should extend to prohibiting the publication or reporting of the practitioner's name, affairs, or any other identifying, or potentially identifying, details, pending further order of the Tribunal.

5.4 **FOR** the CAC, Mr Harborne submitted that the culture of disciplinary hearings had changed and that Section 106 was a mandatory provision providing that disciplinary hearings be held in public unless the Tribunal was satisfied, on a specific basis that it was not in the interests of any person to hold a hearing in public.

5.5 **MR** Harborne submitted, that in the present circumstances, neither the complainant's desire for privacy, or the public interest, were such as to make it desirable that this hearing by held in private.

5.6 **MR** Harborne referred to Mr Waalkens' submissions that the charge made against the practitioner was potentially damaging to his career and/or potentially damaging to his business. However, Mr Harborne submitted, that nothing which had been said by Mr Waalkens suggested any issues other than those normally present in such proceedings.

5.7 **MR** Harborne submitted that there was more reason to order a private hearing in the more serious cases, and in this case, involving as it does a charge of conduct unbecoming, did not warrant a private hearing. In Mr Harborne's submission, if the Tribunal was minded to grant

the application in this case, it was difficult to envisage the circumstances in which the Tribunal would order a hearing be held in public.

5.8 **MR** Harborne submitted that the present case was analogous to name suppression cases involving criminal charges. Mr Harborne cited *Roberts v Police* (1989), and the cases referred to therein.

5.9 **MR** Harborne also submitted that the possibility that the applicant practitioner might be damaged by any publicity was a factor which was present in every case, and in this case was not of sufficient weight to outweigh the public interest generally. There was nothing unusual about this case which warranted the granting of the application. Mr Waalkens had raised nothing more than the natural concerns of every practitioner charged with a disciplinary offence.

5.10 **MR** Harborne indicated that the CAC would not object to an interim order for name suppression until the hearing, however he reserved the CAC's position and indicated that the CAC might wish to invite the Tribunal to review any such order at the commencement of the hearing.

6.0 **IN** response to questions from members of the Tribunal, Mr Harborne indicated that the family involved in this proceeding was not actively seeking publicity. Mr Harborne was unaware of any approach by the family to the news media.

6.1 **MR** Waalkens, on this point, submitted that a private hearing did not necessarily deprive the public of finding out about the circumstances of the case. The Tribunal's recent decisions tended to be lengthy and it was by no means the case that a private hearing inevitably meant that the public was deprived of finding out what had happened, particularly as the Tribunal's decisions were a matter of public record and, depending upon the outcome, the Tribunal was free to make any orders it considered appropriate regarding publication of the charges, and the circumstances of each particular case.

6.2 **ALSO** in response to questions, it was made clear to the Tribunal that the clinical context in which this charge arose was complex and involved other practitioners. It was not clear from the charge before the Tribunal, why only this practitioner had been singled out and charged in relation to the events giving rise to the charge.

6.3 **BOTH** Mr Harborne and Mr Waalkens indicated to the Tribunal that they had, thus far, only been able to undertake a preliminary, and relatively cursory, examination of the matters at issue and the extent to which other practitioners were involved, and the range of issues which would be canvassed at the hearing were not matters which they could take any further at this stage. However, Mr Waalkens did indicate that it was not part of the practitioner's defence to try to blame somebody else for the events with which this practitioner is charged.

6.4 **IT** should also be noted that the Tribunal had before it details of the charge only. The charge is not currently particularised and Mr Waalkens and Mr Harborne could only indicate that they had discussed the lack of particulars and that this was a matter which would be dealt with at the Directions Conference in this proceeding scheduled for Friday 22 August 1997. All

Tribunal members were concerned with the very limited nature of the information available to it.

7.0 REASONS FOR DECISION:

7.1 **THIS** is a formal application pursuant to Section 106 of the Act seeking principally an order that the hearing of the charge be held in private. In the alternative, counsel for the applicant sought orders prohibiting the publication of the name of the practitioner, and any other details or information which might identify the practitioner.

7.2 **SECTION** 106 provides:

"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 (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 of 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) Subject to subsection (7) of this section, an order prohibiting the publication of the name, or any particulars of the affairs, of any person.

3. Every application to the Tribunal for an order under this section shall be heard in private, but the other parties to the proceedings and the complainant (if any) shall be entitled to be present and to make submissions with regard to the application.

....."

7.3 **AS** a first step the Tribunal considered the application in so far as it seeks an order that the whole of the hearing be held in private. There have now been a number of such applications brought, and the issues raised in this application do not, in general terms, differ markedly from those previously considered by the Tribunal. However, as the Tribunal has previously stated, Section 106(2) confers a discretionary power on the Tribunal to order that the whole or any part of the hearing shall be heard in private where the Tribunal is satisfied that it is desirable to do so.

7.4 **IN** exercising that discretion, the Tribunal must balance the competing factors of the public interest, defined variously 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, against the interests of the individual practitioner, particularly a practitioner facing non-criminal disciplinary charges. In balancing these factors, and in making its assessment, the Tribunal must consider the extent to which holding the hearing in public provides some degree of protection to the public, and to the medical profession, against the interests of the practitioner and decide whether or not it is desirable in the particular facts and circumstances of the case before it, to depart from the legislative presumption that disciplinary hearings are to be held in public.

7.5 **IN** re *P* (unreported) AP No. 2490/97, the Court referred to two of the factors raised in submission this application:

7.5.1 **FIRST**, the issue as to the potential damage to the practitioner's reputation which might be caused if the hearing is to be held in public. The Court referred to the fact that, in *P* as in this present case, the medical practitioner in question practised in a smaller centre and could, or might inevitably, be more readily identified, and thus the subject of discussion in the community with long lasting effects on the practitioner, his family, and his practice. The Court upheld the submission made on behalf of the Tribunal's counsel that "there is likely never going to be a case where reputation is not an issue. The mere fact that the medical practitioner in question may practise in a smaller centre and - in a field where but a couple or so may similarly be practising - can surely not of itself command a private hearing. That approach would be a step along a road towards a state of affairs where the nature of the hearing you got was simply decided by the sort of locality in which you practised".

7.5.2 **THE** Court went onto refer to its decision in *E* (unreported) AP No. 2154/97 that each case will require consideration on its particular merits or the lack of them. In carrying out the weighing exercise, the Tribunal must satisfy itself, *on the basis of the evidence before it*, whether or not it is desirable to make any of the orders set out in Section 106(2).

8.0 DECISION:

8.1 **AFTER** carefully considering all of the ten factors raised in support of this application by Mr Waalkens, and the submissions made on behalf of the CAC by Mr Harborne, the Tribunal is satisfied that, in the particular circumstances of this case it is desirable that the hearing of the charge, particularly as it is currently framed, be held in private.

8.2 **THE** Tribunal is also satisfied that it is desirable that it make an order prohibiting the publication of the practitioner's name, and any report or account of the hearing, or any particulars of the affairs of the practitioner, pending further order of the Tribunal.

8.3 **IN** coming to this decision, the Tribunal has carefully considered all ten factors advanced by Mr Waalkens, however it is particularly influenced by the following factors:

8.3.1 **THAT** the charge is at the lowest level of the charges available to the Tribunal under Section 109 of the Act;

8.3.2 **THAT** the charge, as currently framed, is not particularised and the Tribunal has no, or no sufficient knowledge, of the extent to which it will be necessary to examine the conduct of other practitioners involved in the care of the late Mr B, and thus the extent to which it will be necessary for other practitioners to appear at the hearing and give evidence regarding their participation in the events giving rise to the charge;

8.3.3 **THAT** the extent to which it is in the public interest that the events giving rise to this charge be canvassed in public is, at least at this very preliminary stage of the

proceedings, unclear and the fact that the hearing is to be held in private will not necessarily prevent either the events, or the identity of the practitioner involved, ultimately being publicised. That is a matter which can be reviewed by the Tribunal at any time.

8.4 **IN** referring specifically to these factors, the Tribunal does not intend to indicate that other factors, particularly those raised in opposition to the application by Mr Harborne, have not been carefully considered and taken into account.

8.5 **HOWEVER**, on balance, the Tribunal is satisfied that, in the circumstances of this particular case, it is desirable that the hearing of this charge proceed in private.

ORDERS:

9.0 **ACCORDINGLY**, the Tribunal grants the application and orders as follows:

9.1 **THAT** the whole of the hearing of the charge be held in private.

9.2 **THAT** the publication of any report or account of any part of the hearing by the Tribunal in any manner in which the applicant is named or identified be prohibited pending further order of the Tribunal.

9.3 **THAT** the publication of the name or any particulars of the affairs including the occupation, place of residence/practice of the practitioner be prohibited pending further order of the Tribunal.

Dated at Auckland this 29th day of August 1997.

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W N Brandon

CHAIRPERSON