# *Medical Practitioners Disciplinary Tribunal*

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**DECISION NO.:** 15/97/12C

**IN THE MATTER** of the MEDICAL PRACTITIONERS ACT 1995

**AND**

**IN THE MATTER** of disciplinary proceedings against **C** registered medical practitioner of xx, Respondent

**BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

**HEARING** by telephone conference on the 9 September 1997

**PRESENT:** Mr P J Cartwright - Chairperson
Associate Professor Dame Norma Restieaux,
Dr J Cullen, Dr M-J P Reid, Mr G Searancke (members)

**APPEARANCES:** No appearance by or on behalf of Complaints Assessment Committee
Mr H Waalkens for respondent
Ms G J Fraser - Secretary
Mr B A Corkill - Legal Assessor
(for first part of call only)

**DECISION ON THE APPLICATION FOR PRIVACY**

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 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 xx.

The application made on behalf of the respondent is for the following orders:

**1.** **THAT** the whole of the hearing be held in private (Section 106(2)(a)); and/or

**2.** **PROHIBITING** the publication of any report or account of any part of any hearing by the Tribunal (Section 106(2)(b)), in any manner in which the applicant is named or identified; and/or

**3.** **PROHIBITING** the publication of the name, or any particulars of the affairs, including the occupation, place of residence/practice of the applicant (Section 106(2)(d)); and/or

**4.** **FURTHER** orders as the Tribunal may deem appropriate.

The hearing of the application was by telephone conference commencing at 6.30 pm on Tuesday 9 September 1997. In advance of the hearing a formal application stating the grounds on which it was made had been filed by Mr Waalkens for the respondent with the Tribunal. Earlier, Mr Harrison had

indicated on behalf of the CAC that it neither consented to nor opposed the respondent's application. On that basis Mr Harrison indicated that he would not be present at the telephone conference hearing.

**1.0 ORDERS:**

**1.1** **THAT** the hearing by the Tribunal of a charge dated the 11th day of August 1997 against the respondent be held in public.

**1.2** **THAT** publication of any report or account or any part of any hearing by the Tribunal in any manner in which the applicant is named or identified, is prohibited.

**1.3** **THAT** publication of the name or any particulars of the affairs including the occupation, place of residence/practice of the respondent, is prohibited.

**1.4** **THAT** this decision not be published beyond the Tribunal, the parties or their counsel in a form which contains any reference to the name, or any particulars of the affairs of the respondent.

**2.0 GROUNDS OF APPLICATION:**

**2.1** **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 inevitably would involve sensitive and private information, which in all the circumstances, is best heard in private rather than in public - this notwithstanding the statutory protection which exists for the complainant's evidence.

(b) The applicant is a retired practitioner with no previous disciplinary findings/convictions and with a good reputation.

(c) The entire circumstances mean it is more desirable to hear the matter in private than in public.

**2.2** **PUBLICATION** of the name and occupation of the applicant or the nature of the complaint would cause unnecessary and unjustified public concern.

**2.3** **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 be disproportionate to the nature of the conduct in issue.

**3.0 AFFIDAVIT BY APPLICANT:**

**3.1** **HE** is a registered medical practitioner, but is now retired.

**3.2** **HE** is concerned about any publicity in respect of the case pending its hearing and determination. He does not, however, object to details of the case being known after the hearing and in accordance with the Tribunal's decision (that is, except for mention or publication of his name or other details that might identify him).

**3.3** **HE** has an unusually spelt surname and with a wife and four adult children he is concerned that any reference to him will adversely affect them (*applicant's emphasis*).

**3.4** **HE** is also concerned that any such publicity, as a result of a public hearing and/or a failure to prohibit publication of his name and so forth, may adversely affect his previous patients.

**3.5** **HE** has not had any previous disciplinary findings made against him and nor does he have any convictions of any kind. He considers that he had and continues to have a good professional reputation. He would be distressed if, at this stage of his life, adverse publicity and the spectre of a public hearing were to have a detrimental effect on this.

**3.6** **ALTHOUGH** aware that an order suppressing publication of his name or other details identifying him should, if complied with, stop any adverse publicity, he is concerned at the practical effect that if members of the public and/or the press are present, then it will be difficult to police this aspect. He believes that there would be a real risk that people would nonetheless still talk of the case, in which case he perceives damage will inevitably be caused to him.

**4.0 LEGAL PRINCIPLES:**

**4.1** **THIS** is a formal application pursuant to Section 106 of the Act, the relevant parts of which, for the purpose of the application, provide:

**"106. Hearings of Tribunal to be in public:**

(1) Except as provided in this section and in Section 107 of this Act, every hearing of the Tribunal shall be 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 one 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 any 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.

(4) .....

(5) .....

(6) .....

(7) .....

(a) .....

(b) .....

(c) ....."

**4.2** **THERE** have been but a handful of cases considered by the Tribunal since the Act came into force on 1 July 1996. Two of the Tribunal's rulings on privacy applications similar to this one have gone on appeal to the District Court.

**4.3** **BOTH** District Court judgments are helpful in articulating the approach to be taken in interpreting the statutory provisions, particularly the relevant parts of Section 106 of the Act. In *E v The Medical Practitioners Disciplinary Tribunal*, AP 2154/97, Judgment 20.5.97, the Court commented at pp 11-12:

*"The Court is of the view that the statutory language requires no reconstruction and that the better and indeed proper course is simply to abide and apply it. Thus it simply becomes a question, always allowing of course for the presumption, of whether after regard has been had to the mentioned interests, the Tribunal is or is not satisfied that it is desirable that the hearings be in private."*

Of course, the presumption referred to in the aforementioned extract is the presumption contained in Section 106(1) of the Act that, except as provided in the section and in Section 107 of the Act, that every hearing of the Tribunal shall be held in public.

**4.4** **IN** *P v the Medical Practitioners Disciplinary Tribunal* AP 2490/97, Judgment 18.6.97, (p8), the District Court upheld the approach taken by the Tribunal in the case under appeal when it said:

*"Section 106 of the Act requires an exercise to be carried out whereby there is a balancing between the general principle that every hearing of the Tribunal shall be in public, and the desirability of having regard to the privacy of any persons and in the public interest."*

**4.5** **FOR** completeness, when discussing the legal principles to be applied in applications of this nature, it is apposite to note the reminder contained in *S v Wellington District Law Society,* High Court, Auckland AP 319/95, Wellington, Judgment 22.10.96. A full bench conveyed a reminder that proceedings before the Society's Disciplinary Tribunal are not criminal proceedings

in which there is a very plain and pervading presumption in favour of openness rooted in the importance of freedom of speech and the right of the media to report for the public. Nor are such proceedings punitive in the ordinary sense.

**5.0 REASONS FOR DECISION:**

**5.1** **IN** prefacing remarks the Legal Assessor, Mr Corkill, said he felt it was unfortunate that Mr Harrison, counsel for the CAC, did not take part in the telephone conference call, his position having been intimated earlier as being that he neither supported nor opposed the application. Mr Corkill explained this was unfortunate because he took the view that it fell to him, in one sense, to put up some balancing points with regard to the submissions made by counsel for the respondent doctor, Mr Waalkens. In doing so Mr Corkill endeavoured to make it clear that he did not as legal assessor have a personal view on the merits of the application, but was doing so in the hope that the Tribunal would thereby have the advantage of hearing two points of view on the application.

**5.2** **AT** the conclusion of the hearing Mr Waalkens asked for a right of reply to some of the points made by Mr Corkill. There was some discussion as to whether this was appropriate, because it raised the unusual possibility of counsel responding to submissions made by the legal assessor.

**5.3** **IN** the course of the discussion on this aspect, the Chairperson asked Mr Waalkens if there was any precedent. Mr Waalkens said that he did not want to elevate the matter, and was prepared to leave the issue on the basis that it be noted he had asked for a right of reply, which he would normally have been accorded, if the submissions which the legal assessor had made had been made by counsel for the other party.

**5.4** **THE** Chairperson was about to indicate that he would err on the side of caution, when Mr Waalkens interrupted him to say that he would leave the matter on the basis that he wished it recorded that he had asked to be heard in reply. Mr Waalkens then left the telephone conference call.

**5.5** **THE** way events unfolded, as above, was unfortunate and was compounded by the fact that it occurred in a conference call. The Chairperson was inclining to the view that he would err on the side of caution by permitting a right of reply, but Mr Waalkens precluded that possibility by leaving the call.

**5.6** **IN** the unusual circumstances, where the legal assessor felt he was obliged to place some balancing points before the Tribunal, and given that Mr Waalkens had requested a right of reply, the Tribunal accedes to the view expressed subsequently by Mr Corkill, that Mr Waalkens should be given that opportunity. Mr Waalkens was duly informed by the Secretary that submissions in reply would be heard from him, and he was requested to provide such submissions in reply by 1.00 pm on Friday, 12 September 1997. All submissions made by Mr Waalkens have been taken into account in the formulation of the reasons for the decision which follow.

## 6.0 REASONS FOR DECISION:

### 6.1 SENSITIVE AND PRIVATE INFORMATION WHICH IS BEST HEARD IN PRIVATE RATHER THAN IN PUBLIC

**6.1.1** **THE** first ground of the application goes some way towards acknowledging that this is a protection which exists as much in the interests of the privacy of a complainant, as it does in the interests of any other person. That this is so is borne out by addition of the

words by Mr Waalkens to the first ground of the application, "... *notwithstanding the statutory protection which exists for the complainant's evidence*."

**6.1.2** **MENTION** already has been made of two Tribunal rulings which went on appeal to the District Court. In the first of those cases, *E*, a significant feature of the application to have the hearing in private (granted by the District Court in overturning the Tribunal's ruling), was that it came from both the complainant and the respondent doctor. Recorded in the judgment was the advice of experienced counsel for the appellant doctor, and the CAC, that "*such a combination of doctor and patient in context of this kind would be most unusual*." Obviously the concern of the complainant not to have matters of a most intimate nature discussed in the public arena was a primary reason for one of the Court's conclusions, that "*There surely can be no proper public interest in material as in this case*".

**6.1.3** **IN** the second case, *P*, it is noted in the judgment of the District Court, which upheld the Tribunal's ruling that the hearing be held in public rather than in private, that the complainant patient had consented to the making of an order for a private hearing. Nonetheless that factor, obviously in combination with others, was not sufficient to disturb the statutory presumption that the hearing be held in public.

**6.1.4** **THE** point in mentioning these two cases, in the context of the first ground of the application, is to highlight the fact that the application has received absolutely no support from either the complainant or from counsel for the CAC, Mr Harrison. The advice of Mr Harrison will be recalled, that he neither consented to nor opposed the application.

In the Tribunal's considered view it is implicit in this position that the CAC will abide the decision of the Tribunal and does not seek in any way to influence the making of its ruling.

**6.1.5** **SECTION** 106(3) of the Act specifically permits the presence of a complainant at any privacy application hearing and the right to make submissions with regard to the application. The notified non-appearance of Mr Harrison can be taken as an implicit waiver of such right to be present and to make submissions, a default situation that occurred in neither of the other two cases referred to when there was an appearance by counsel for the CAC at both hearings.

## 6.2 RETIRED PRACTITIONER WITH NO PREVIOUS DISCIPLINARY FINDINGS/CONVICTIONS AND WITH A GOOD REPUTATION

**6.2.1** **WHILE** the Tribunal acknowledges that this ground could provide a risk of damage to the reputation of the doctor and his family, the Tribunal does not consider that it constitutes a sufficiently serious ground when weighing the merits of the application for the hearing to be held in private. On the other hand, however, the Tribunal is minded to observe that this ground may well have some substance when it considers the merits of (2), (3) and (4) of the application. Risk of damage to the reputation of a doctor and members of his or her family must always be an inherent factor when the hearing of a disciplinary charge against a professional person is conducted. But to conclude that such a risk ought to be an important factor when considering an application for the hearing of such a charge to be held in private would, in the Tribunal's view, elevate it to a higher level than is either necessary or appropriate. As was observed by counsel for the

respondent in *P*, "*... there is likely never going to be a case where reputation is not in issue.*"

## 6.3 CHARGE STRONGLY DENIED

**6.3.1** **MR** Waalkens explained that the charge will be rigorously defended and in any event, even if proved, that at most the conduct in question would come in at the lower end of the scale.

**6.3.2** **THE** experience of the Tribunal, thus far, and of the Committee and the Council which preceded it, is that invariably charges against doctors will be defended.

**6.3.3** **IN** and by itself the Tribunal does not consider that this is necessarily a good enough reason for a hearing to be held in private. In any event, as was the position faced by the Court in *E*, the Tribunal does not find it necessary to reach a view one way or the other. Its conclusion can be reached without any particular consideration of it. On the other hand it could be a factor to be weighed in the balance when considering (2), (3) and (4) of the application.

## 6.4 INEFFECTIVENESS OF ORDER AS TO NAME SUPPRESSION ONLY

**6.4.1** **THE** thrust of this submission, as it is understood by the Tribunal, is that a name suppression order only, and ancillary orders, are insufficient to secure the protection sought. In the Tribunal's view this submission is tantamount to arguing that nothing short of an order for a hearing to be held in private will suffice. Mr Waalkens in his oral

submissions at the conference call described this concern as the "*tongues wag*" syndrome.

**6.4.2** **IN** his directions to the Tribunal, Mr Corkill characterised this submission as being somewhat anecdotal in nature and not a factor which he would see as being decisive in an application of the nature under consideration.

**6.4.3** **THE** Tribunal is not so blasé as to consider that there is no risk of any publicity adverse to a medical practitioner following the hearing of a disciplinary charge in public, but with appropriate orders in place as to prohibition of publication pursuant to Section 106(2)(b)(c) and (d) of the Act. Nonetheless, the Tribunal does not believe that this risk, in itself, would justify the rather Draconian step of ordering that virtually all Tribunal proceedings be held in private. It would seem to the Tribunal that the mischief feared by Mr Waalkens, if it was to eventuate on a particular occasion, would need to be dealt with under the contempt provisions of the legislation. However, it is also acknowledged that such punitive action would not necessarily ameliorate any damage already caused to reputation.

## 6.5 HEARING IN PUBLIC POTENTIALLY THREATENING TO WITNESSES AS WELL AS TO RESPONDENT DOCTOR

**6.5.1** **MR** Waalkens explained there was a very real concern that an order for name suppression did not give enough protection to either the doctor, or the doctor's witnesses in some cases. Mr Waalkens gave as an example a hearing held in public in xx recently where the doctor's name had been suppressed in the interim, but television

cameras were present for part of the hearing. Whilst the cameras did not film the respondent doctor, witnesses for the doctor were filmed and at least one of the witnesses spoke by telephone with Mr Waalkens following the hearing to voice his concern. While the doctor's name was suppressed in the newspapers, names of witnesses were not and this also caused distress.

**6.5.2** **THE** Chairperson has spoken to Mrs Brandon who chaired the hearing in xx referred to by Mr Waalkens. From her it is understood that counsel were asked, and consented to the presence of television cameras, Mr Waalkens making clear his position that he had no objection so long as there was no filming of his client, the respondent doctor. Apparently there was filming for only a very brief period, no witnesses were filmed and as much as anything the television crew seemed to be more interested in the advent of the new Tribunal.

**6.5.3** **BEFORE** commencement of the proceedings in xx it should be clarified orders had been made prohibiting:

(a) Publication of any report or account or any part of the hearing by the Tribunal in any manner in which the respondent doctor be named or identified; and

(b) Publication of the name or any particulars of the affairs including the occupation, place of residence and/or practice of the respondent doctor.

**6.5.4** **MRS** Brandon reminded the television people and other members of the press who were present of the existence of the above orders both prior to their filming of the proceedings, and again at the conclusion of the hearing.

**6.5.5** **FINALLY** Mrs Brandon reminded the television people that they were required to adhere to the Chief Justice's pilot rules "Electronic Media Coverage of Court Proceedings". They specifically deal, at paragraphs B.6 and B.7 with the issue of:

- Protection of identification, whether pictorially or by voice (B.6) and
- The cover of witness testimony by expanded media coverage per se (Rule B.7)

The television reporter present confirmed to Mrs Brandon that he was familiar with the pilot rules and that any broadcast of the filmed material would be in accordance with them.

**6.5.6** **ON** the basis of the information given by Mrs Brandon to the Chairperson, the Tribunal is satisfied that the television filming of the recent Tribunal sitting in xx is not a proper ground for ordering that this hearing be held in private.

## 6.6 HEARING IN PRIVATE NOT NECESSARILY A BAR TO PUBLICATION OF OUTCOME

**6.6.1** **MR** Waalkens submitted that a private hearing did not necessarily deprive the public of finding out the circumstances of the case. 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 on 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.

**6.6.2** **ALL** of what Mr Waalkens has said in this submission is undoubtedly true. Nonetheless in the Tribunal's view the submission seems somewhat to overlook the fact that the culture of disciplinary hearings against doctors has changed. The submission tends to ignore the presumption that disciplinary hearings shall (*emphasis added*) be held in public unless the Tribunal is satisfied, on a case by case basis, that it is desirable in the interests of any person, and to the public interest to do so.

## 7.0 CONCLUSION:

**7.1** **AS** has been stated previously by the Tribunal in a number of decisions concerning similar applications, Section 106(2) of the Act confers a discretionary power on the Tribunal to order that the whole or any part of a hearing shall be heard in private where the Tribunal is satisfied that it is desirable to do so. In exercising that discretion, the Tribunal must balance the various competing factors of the public interest, including where applicable, the principle of open justice, the public expectation of the accountability and transparency of the disciplinary process, the importance of freedom of speech and the media's right to report Court and Tribunal proceedings fairly of interest to the public, against the interests of an 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, on 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.

**7.2** **IN** this case the Tribunal has not been persuaded, for the reasons given, that it is desirable to depart from the legislative presumption that disciplinary hearings are to be held in public. However, pending the outcome of these proceedings, the Tribunal concludes that it would not offend against the public interest in making the orders which the Tribunal has made whereby publication of the name and occupation of the respondent is prohibited together with the ancillary orders which have been made.

**DATED** at Auckland this 29th day of September 1997.

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P J Cartwright

CHAIRPERSON