Medical Practitioners Disciplinary Tribunal

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All Correspondence should be addressed to The Secretary

DECISION NO: 3/97/2C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against P registered medical practitioner of xx

Respondent

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on 12 May 1997

PRESENT: Mr P J Cartwright - Chairperson
Dr R A Cartwright, Dr J W Gleisner,
Associate Professor Dame Norma Restieaux,
Mr G Searancke (members)

APPEARANCES: Mr Rhys Harrison QC for Complaints Assessment Committee
Mr H Waalkens for respondent
Mr R Caudwell - Secretary
Mrs K G Davenport - Legal Assessor
(for first part of call only)

DECISION

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)(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.

2.0 **THIS** is an application made on behalf of the respondent for the following orders:

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

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 respondent is named or identified.

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

4. **SUCH** further orders that the Tribunal deems appropriate.

3.0 **THE** hearing of the application was by telephone conference commencing at 8.00 am on Monday 12 May 1997. In advance of the hearing submissions in support of the application were filed by Mr Waalkens for the respondent. Earlier Mr Harrison had indicated on behalf of the CAC that it consented to the respondent's request for the

hearing to take place in private. Furthermore, Mr Harrison had indicated that the Committee did not oppose the orders for non-publication sought by the respondent, but said it appreciated that this issue was very much within the Tribunal's discretion. Given the CAC's position, Mr Harrison was excused from further participation in the teleconference.

ORDERS:

3.1 **THAT** the hearing by the Tribunal of a charge of professional misconduct dated 20 February 1997 against the respondent be heard in public.

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

3.3 **THAT** publication of the name, or any particulars of the affairs of the respondent, is prohibited.

3.4. **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.

4.0 GROUNDS OF APPLICATION:

4.1 **ANY** public interest in having the matter heard in public, is outweighed by prejudice that the respondent would suffer if the hearing were to be public. In particular:

(a) the complaint resulting in the charge of professional misconduct concerns a discrete issue within a specialised area of medical practice; and

(b) resolution of the complaint will involve complex expert medical evidence and assessment; and

(c) public knowledge of the nature of the complaint, acquired from a public hearing, will in itself cause damage to the professional reputation of the respondent; and

(d) this would be particularly so given that the respondent is one of a small number of medical practitioners in the xx area, and one of an even smaller number of xx; and

(e) it would be unfair for the respondent to suffer damage to his professional reputation where the hearing will centre on an isolated incident.

4.2 **PUBLICATION** of the name and occupation of the respondent, or the nature of the complaint could cause unnecessary and unjustified public concern. In particular:

(a) publication of such details carries the risk of causing distress and concern to other patients whose breast examination and attendant complications have been the subject of assessment by the respondent and

(b) restricted publication, such as publication of the occupation of the respondent or the nature of the complaint, only, would identify the respondent who is one of a small number of medical practitioners in the xx area. Moreover, uncertainty caused by restricted publication would result in speculation and would be unfair to the other medical practitioners in the area.

4.3 **PUBLICATION** of the name and occupation of the respondent, or the nature of the complaint, would result in the respondent suffering damage to his professional reputation which would be disproportionate to the nature of the conduct in issue.

SUBMISSIONS:

4.4 **FOR** the respondent Mr Waalkens submitted, if the application is not successful, then there is a significant risk of damage and/or prejudice to him which will far outweigh any public interest factor. In Mr Waalkens' view this includes the following features:

(a) The case is essentially a private and relatively sensitive one between the patient and the practitioner.

(b) The respondent lives and works in the xx area. He is one of only a small number of medical practitioners in the region and in particular, is one of an even smaller number of xx.

(c) The respondent has been in practice for many years as a xx and this is the first disciplinary complaint he has had.

(d) The respondent is also a family man. His family will be damaged by the inevitable embarrassment of a public hearing with its consequential publicity. This is particularly so in a small community where word of mouth and general communication can and likely would spread.

(e) The subject matter of the case, including the fact of cancer and in particular breast cancer, as well as the interest which the media has in matters medical, means a public hearing of the charge of professional misconduct is likely to attract media interest.

(f) The risk of damage to the respondent's reputation and name is substantial.

(g) Publicity carries with it a significant risk of real and disproportionate damage to the respondent's reputation and his practice.

(h) Publicity whether in the form of a public hearing or by publication carries a real risk of unnecessary and unjustified concern to others. This includes other patients as well as other medical practitioners who refer work to the respondent.

The fact of the allegation of professional misconduct can be widely misconstrued. Other patients and other medical practitioners may develop unnecessary and unjustified concern that their or their other patient's mammograms and x-rays have been misinterpreted.

(i) A public hearing and/or publicity also carries a real risk of unnecessary distress and damage to the patient. Counsel on behalf of the CAC who represents the patient's interests will be able to advance those issues farther.

(j) There are no apparent public interest factors which might outweigh the interests of the privacy of the respondent.

5.0 REASONS FOR DECISION:

5.1 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 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 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) ....."

5.2 **FIRST** the Tribunal will consider the application in so far as it seeks an order that the whole of the hearing be held in private. This is the third such application to have been made to the Tribunal.

5.3 **ONE** of the major criticisms of the disciplinary procedures in the 1968 Medical Practitioners Act was that hearings were held in private. The general principle which is reflected in Section 106(1) of the Act is that hearings should be conducted in public. That disciplinary proceedings against medical practitioners should generally be held in public accords with the principles of open reporting and the public interest, emphasised by the Court of Appeal in *R v Liddell* [1995] 1NZLR 538, 546-547, in this way:

"..... 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". These principles have been stressed by this Court in a line of cases extending from *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 to *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 where a number of the intermediate decisions are cited. 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. And the principles just mentioned may be seen in vigorous - and, to some, even startling - operation in the Supreme Court of Canada in ..... 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 that the prima facie presumption as to reporting is always in favour of openness."

While there may be tensions on occasions between the need for public and open reporting and privacy issues, there are many instances in, for example, the criminal law, where the public interest in open hearings and privacy concerns of the parties are balanced without difficulty. 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 of the public interest."

5.4 **IN** his submissions Mr Waalkens argued nine reasons why he considers there are no public interest factors which outweigh the particular professional and family features of the respondent. In the Tribunal's judgement these features, in their totality, do not outweigh the principle of open justice, the public expectation of accountability and transparency of the disciplinary process, and similar provisions in legislation covering the conduct of other professional groups of people such as lawyers and dentists.

5.5 **IN** arguing the application on behalf of the respondent Mr Waalkens' conceded that the subject matter of the case, including the fact of cancer, breast cancer in particular, as well as the interest which the media has in medical matters, means that a public hearing of the charge of professional misconduct is likely to attract media interest. In the Tribunal's assessment media interest in this context translates to public interest given the observation of the Court in *R* v *Liddell* (supra) (2) " ... the right of the media to report ..... fairly and accurately as "surrogates of the public" ....."

5.6 **HAVING** considered carefully the submissions advanced by Mr Waalkens, both prior to and in the course of the hearing, the Tribunal has not been persuaded that the particular facts and circumstances argued in this application justify departure from the general principle stated in Section 106(1) of the Act that hearings of the Tribunal shall be heard in public. In making its assessment the Tribunal has considered the extent to which holding the hearing in public should provide some degree of protection to the public and the medical profession. It has then weighed the public interest in that sense against the interest of the respondent in deciding that the hearing should be held in public.

5.7 **HOWEVER** the Tribunal is more favourably disposed to the application for orders for non-publication of the name, identity, or any particulars of the affairs of the respondent. The Act has expressly recognised that in medical disciplinary proceedings, there will be occasions when privacy orders are appropriate. The Act attempts to balance the general principle in favour of the open administration of justice with the particular issues raised by the medical disciplinary process.

5.8 **MR** Waalkens is correct in his assessment that Section 62 of the Dental Act 1988 has very similar terms to that of Section 106. Mr Waalkens explained he has had the privilege of appearing for many dental practitioners before the Dentists Disciplinary Tribunal. He said he knows of only one case where name suppression, when sought, was not granted - notwithstanding the very similar provisions of Section 62. Mr Waalkens explained that these orders had commonly covered the period during the hearing of the charges and even after an adverse finding had been made. Mr Waalkens went on to explain this has happened even with practitioners who have had a second appearance and second adverse disciplinary findings made before the Dentists Disciplinary Tribunal.

5.9 **FINALLY** Mr Waalkens explained what he described as a common practice in the High Court where disciplinary matters are the subject of an appeal. Apparently where a practitioner challenges findings of professional misconduct it is the invariable practice of the Court to make name suppression and prohibition of publication orders pending outcome of an appeal.

5.10 **AGAINST** this background, in considering whether there should be publication, Mr Waalkens submitted that the Tribunal must consider the extent to which to do so would provide protection to the public or to the medical profession. He added this must be weighed against any damage to the respondent or to others. In the view of Mr Waalkens the position of an applicant medical practitioner must be even stronger than in a case following a positive disciplinary finding against him, particularly in the circumstances of this case where the allegation of professional misconduct is strenuously denied.

5.11 **IN** support of the application Mr Waalkens referred the Tribunal to *B v B* (High Court, Auckland HC4/92, 6/4/93 Blanchard J), in which the Court considered an appeal by a dental practitioner against various findings of the Dentists Disciplinary Tribunal concerning five female patients. Professional misconduct had been found in a number of respects relating to alleged sexual/inappropriate touching of some of the patients. The Tribunal had declined to grant name suppression and to otherwise prohibit publication of the identity of the practitioner. He appealed numerous aspects of the Tribunal's judgement including name suppression. The Court made an order forbidding publication of the name of the dentist, and any particulars likely to identify him, including the place where he practised. The Court was influenced by the fact that the practitioner was not prevented from continuing with practice and had indeed been subjected to supervision orders. The Court was also influenced by its assessment that there was a minimal risk of repetition. That was in a case involving serious and proven misconduct. In the view of Mr Waalkens this feature must be more strongly weighted for the respondent.

5.12 **HAVING** considered carefully the submissions made by Mr Waalkens, the Tribunal has been persuaded to make orders numbered 3.2 and 3.3 which appear at page 3 of the decision. It should be noted that the third of such orders is less restrictive than was applied for. The first order, that the whole of the hearing be held in public, if it remains undisturbed, may result in there being some public interest in the proceedings. In the Tribunal's view such public interest, in a comparatively small community, would be unduly fettered if the order was to extend beyond the specific provisions of Section 106(2)(d) of the Act.

6.0 **ON** The application of Mr Harrison, and without opposition from Mr Waalkens, the hearing of the charge has been adjourned to Friday 27 June 1997 commencing at 9.00 am.

Dated at Auckland this 28th day of May 1997.

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P J Cartwright

CHAIRPERSON