Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 14/97/3C

IN THE MATTER of the Medical Practitioners Act 1995

-AND-

IN THE MATTER of a charge laid by a Complaints Assessment Committee pursuant to Section 93(1)(b) of the Act against **JOSEPH RABIDASS SAMI** registered medical practitioner of Palmerston North

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mr P J Cartwright (Chairperson)

Dr J M McKenzie, Dr M-J P Reid, Dr A F N Sutherland

Mrs H White (Members)

Ms G J Fraser (Secretary)

Mr J D Howman (Legal Assessor)

Mrs G Rogers (Stenographer)

Hearing held at Palmerston North on Thursday 5 June 1997

APPEARANCES: Mr M McClelland for the Complaints Assessment Committee ("the CAC").

Mr M Parker for Dr Sami ("the respondent").

SUPPLEMENTARY DECISION:

THIS supplementary decision should be read in conjunction with Decision No. 97/3 which issued on 15 July 1997. In Decision No. 97/3 findings were made by the Tribunal that the respondent's examination of C A on Sunday 23 June 1996 was inadequate in the following three respects:

a) Failure to obtain an adequate history of the patient, having regard to the concerns expressed by the patient's GPs, and/or the patient's parents.

(b) Failure to conduct an adequate physical examination of the patient.

(c) Failure to give adequate advice to the parents of the patient.

The Tribunal went on to determine, based on those findings, that the conduct of the respondent, as established by the proven facts, amounted to professional misconduct.

Decision No. 97/3 concluded with an invitation to Counsel to make submissions as to penalties. Those submissions having now been received, the Tribunal makes the following orders pursuant to Section 154(f) of the Act:

1.0 ORDERS:

1.1 **THAT** the respondent may, for a period not exceeding three years, practise medicine only on condition that his competence be reviewed by the Medical Council under Part V of the 1995 Act. Particular areas which the Tribunal considers should be addressed include basic history taking, patient examination, formulation of diagnostic issues, clinical judgement and management. The respondent is to inform the senior staff at the place of his employment of the conditions placed on his right to practise. The Medical Council is requested to report on the progress of the review to the Secretary of the Tribunal on an annual basis.

1.2 **THAT** the respondent be censured.

1.3 **THAT** the respondent be fined $800.00 (the maximum penalty permitted in terms of the Medical Practitioners Act 1968 is $1000)

1.4 **THAT** the respondent pay $25,142.26 which represents 60% of the costs of and incidental to the inquiry by the CAC, prosecution of the charge by the CAC and the hearing by the Tribunal.

1.5 **THAT** the order made by the Tribunal prohibiting publication of the respondent's name is vacated.

1.6 INTERIM ORDER:

IN submissions to the Tribunal the respondent sought a suspension of any order declining prohibition of publication pending a decision to appeal.

The Tribunal makes an order granting interim suppression of the respondent's name and identifying particulars for a period of 7 days to enable him to file any application to stay the order declining publication pending appeal.

2.0 REASONS FOR ORDERS:

2.1 CONDITIONS OF PRACTISE:

2.1.1 **IN** paragraph 7.3 of Decision No. 97/3 the Tribunal signalled its intention to make an order under Section 110(c) of the Act, (subject to compliance with the transitional provisions of the Act). Counsel was invited to address this aspect in their further submissions.

2.1.2 **MR** McClelland responded by indicating that both the CAC and C's parents agreed that this would be an appropriate case for imposition of conditions on practise, including conditions as to re-training and supervision, to ensure that the deficiencies identified in the course of the hearing, and the Tribunal's decision, were rectified.

2.1.3 **LIKEWISE** Mr Beadle indicated acknowledgment by the respondent of the Tribunal's desire that his practice be reviewed. Mr Beadle went on to suggest that consultants at xx Hospital undertake re-training and supervision of the respondent, but recognising that resources for this purpose are not finite.

2.1.4 **ON** reflection the Tribunal has decided that it would be more appropriate for the Medical Council to assume responsibility for implementation of the conditions on the respondent's right of practise under Part V of the Act. The Tribunal is aware of the

Medical Council's desire of achieving conditions on practise which have the potential of delivering useful results and which are capable of ready implementation.

2.1.5. **SECTION** 154(f) of the 1995 Act provides:

"(f) If the person is found guilty of a disciplinary offence under Part VIII of this Act in respect of that conduct, -

(i) That person may be dealt with under that Part of this Act; but

(ii) Except with the consent of that person, neither the Tribunal nor any court shall have power to make against that person, in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when he or she engaged in that conduct."

2.1.6. **IT** should be noted that the respondent has consented to the making of the order specified in Paragraph 1.1.

2.2 CENSURE:

THE respondent has been found guilty of a serious charge of professional misconduct. An official expression of disapproval must be an inevitable outcome of his offending.

2.3 FINE:

2.3.1 **APPLYING** the transitional provisions of Section 154 of the 1995 Act, the maximum fine in this case cannot exceed $1,000.00. Had the respondent's offending taken place after 1 July 1996, the maximum fine payable would have been $20,000.00.

2.3.2 **MR** Beadle submitted that a fine is neither appropriate nor necessary in this case, especially given the possibility that the respondent will be required to practise under some degree of supervision, at least for some period.

2.3.3 **AS** was explained by Mr Beadle, penalties imposed under the previous legislation offer some assistance. Even given the relatively low level of fines, it was rare for a practitioner to be fined the maximum sum of $1,000.00. In cases relating to inadequate examination of patients (for example *Dr D* - NZ Med J 1990; 103:383 and *Dr K* - NZ Med J 1990; 103:384) penalties of $800.00 were imposed together with contributions towards costs. If there is any pattern to be gleaned from the cases, it may be that fines of the maximum amount were reserved for the most serious cases of misconduct or dishonesty. On this basis the Tribunal considers that a fine of $800.00 is appropriate. Imposition of a fine is considered necessary to underline the perceived serious nature of the offending in this case.

2.4 COSTS:

2.4.1 **PURSUANT** to Section 110 of the 1995 Act the Tribunal has the power to order the respondent to pay part or all of the costs and expenses of and incidental to the inquiry and the hearing.

2.4.2 **THE** principles which applied to the exercise of the Medical Council's powers to make orders as to costs pursuant to the 1968 Act are equally applicable to the Tribunal's powers under the 1995 Act.

2.4.3 **A** number of judgements of the High Court have addressed the principles applying to orders for costs against medical practitioners following disciplinary proceedings. In *Cooray v Preliminary Proceedings Committee* [Unreported, AP 23/94, Wellington Registry, 14 September 1995, Doogue J] recent authorities were reviewed by His Honour who concluded at page 9:

".... It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downwards adjustment."

2.4.4 The Tribunal is aware that shortly prior to the hearing the respondent through his counsel indicated that he was prepared to admit the charge, but at a level of conduct unbecoming. The CAC rejected this offer.

2.4.5 **MR** Beadle argued that had the offer to admit the lesser level of offending been accepted, that a hearing would have been unnecessary and costs would have been significantly reduced. Mr Beadle asked that the Tribunal take this into consideration.

2.4.6 **THE** Tribunal understands that the CAC rejected the offer, not only because it was of the view that the conduct the subject of the charge in fact amounted to professional misconduct, but also because it considered that it was for the Tribunal to determine the level of misconduct. As a result a full hearing took place with cross-examination of all witnesses and opening and closing submissions by counsel. In these circumstances the Tribunal considers that no downwards adjustment of costs is warranted.

2.4.7 **SOME** guidance as to the appropriate levels of awards of costs in medical disciplinary proceedings can be obtained from a consideration of earlier decisions of the Courts. That such guidance is apposite was explained in *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 by Richardson J in this way:

"Adherence to past decisions promotes certainty and stability. People need to know where they stand, and what the law expects of them. So do their legal advisers. And a Court which freely reviews its earlier decisions is likely to find not only that the Court lists are jammed by litigants seeking to find a chance majority for change, but also that the respect for the law on which our system of justice largely depends is eroded."

2.4.8 **IN** *Gurusinge v Medical Council of New Zealand* [1989] NZLR 139 the appellant medical practitioner had been ordered to pay costs amounting to $20,000. This was approximately half of the actual expenses incurred. The full Court of the High Court held that such a sum was not excessive and noted that the ordering of payment of costs was not in the nature of a penalty but rather to enable the recovery of costs and expenses of the hearing.

2.4.9 **IN** *O'Connor v Preliminary Proceedings Committee* (High Court) [Admin Div Wellington, 23 August 1990, Jeffries J, CP280/89], an order for costs of $50,000 being two thirds the actual costs incurred, was upheld. Jeffries J acknowledged that orders for costs in this type of proceeding will be substantial and commented that this will be known to any doctor to be so.

2.4.10 **TAKING** into account all the circumstances of this case, including the multiplicity of the deficiencies identified in the respondent's management of C and the need to have a full Tribunal hearing, it is considered that an order for the respondent to pay 60% of the specified costs is appropriate.

2.5 PUBLICATION:

2.5.1 **BY** a Decision dated 16 May 1997 the Tribunal ordered:

"That the publication of the name of the respondent, directly or indirectly, in connection with the treatment or death of C A be prohibited until further order."

2.5.2 **THIS** order was continued as per paragraph 8 of Decision No. 97/3.

2.5.3 **MR** McClelland submitted, as the Tribunal has now made a serious finding of misconduct against the respondent and handed down its reasons for such a finding, the order prohibiting publication of his name should be lifted. Mr McClelland referred to his earlier argument when the Tribunal was considering an application for the hearing to be held in private, that the circumstances surrounding C's death, the subsequent inquest, and the respondent's involvement in the case had already received significant

media attention. It was Mr McClelland's submission that the public now have a right and it is in the public interest for it to know the name of the doctor involved. Mr McClelland argued it is also in the interests of the medical profession as a whole that the respondent's name be published so that other Registrars working at xx Hospital are no longer under suspicion. Finally Mr McClelland submitted that publication of the respondent's name would also be entirely consistent with the provisions of the 1995 Act.

2.5.4 **FOR** the respondent Mr Beadle submitted that the order prohibiting publication of the respondent's name remain in effect. In support of that submission Mr Beadle referred to the case of *B v B* [Unreported, HC 4/92, Auckland Registry, 6 April 1993, Blanchard J] in which Dr B challenged certain findings and orders made against him by the Dentist's Disciplinary Tribunal, including the Tribunal's decision to lift a name suppression order.

2.5.5 **BLANCHARD** J noted that the Tribunal in its decision had carefully considered the implications of publication and reluctantly taken the view that the suppression of Dr B's name should be lifted. He went on to say at page 99:

"It appears from the Tribunal's use of the word "reluctantly" that it recognises the inconsistency of saying to Dr B that he remains a fit and proper person to practise dentistry provided he is for a period supervised and provided that he adheres to certain conditions and undergoes a course of counselling, yet at the same time holding that the public need to be warned about his prior behaviour so that they can make up their minds whether to become or remain his patients.

The interests which have to be considered when a request is made for a suppression order are those of the practitioner himself, his family and staff, the complainants, his existing patients and persons who may in the future may become patients and other dentists who may unfairly come under suspicion. It is also important that public confidence in the processes of the Tribunal and of this Court should not be undermined by any unnecessary appearance of secrecy.

In normal course where a professional person appears before a disciplinary tribunal and is found guilty of an offence, that person should expect that an order preventing publication of his or her name will not be made. That will especially be so where the offence found to be proved, or admitted, is sufficiently serious to justify striking off or suspension from practice. But where the orders made by a disciplinary tribunal in relation to future practice of the defendant are directed towards that person's rehabilitation and there is no striking off or suspension but rather, as here, a decision that practice may continue, there is much to be said for the view that publication of the defendant's name is contrary to the spirit of the decision and counter-productive. It may simply cause damage which makes rehabilitation impossible or very much harder to achieve.

A disciplinary tribunal should not permit continuance of professional practice, even under supervision and subject to conditions and counselling, if it believes that existing and future patients are at risk of a repetition of the former offending. If there is no such risk or it is believed to be minimal and if the safeguards of supervision, conditions and counselling have been put in place,

then it seems to me that any right of existing and future patients to know that the professional person has been found guilty of certain offences should be treated as subservient to the other interests involved."

2.5.6 **BLANCHARD** J reversed the Tribunal's decision on suppression of name and substituted an order that Dr B's name and any particulars likely to identify him, including the name of the town in which he practised, were not to be published.

2.5.7 **THERE** will inevitably be some consistency of approach in developing and applying principles when considering whether there should be publication of name or not following a finding of professional misconduct in disciplinary proceedings. Nevertheless of equal importance is that any differences between the provisions of separate governing statutes should be identified when embarking upon the exercise.

2.5.8 **IT** is important to bear in mind that the relevant provisions of the Dental Act 1988 (the focus in *B*) are not quite the same as those contained in the 1995 Medical Practitioners Act. Common to each piece of legislation is the requirement, subject to a discretion reposed in each Tribunal to hold hearings in private, that disciplinary hearings shall be held in public.

2.5.9 **IN** the Medical Practitioners Act 1995 there is a further provision which provides special protections for complainants where the charge relates to or involves any matter of a sexual nature, or any matter that may require or result in the complainant giving evidence of matters of an intimate or distressing nature.

2.5.10 **ESSENTIALLY** the nature of the special protection available to a complainant under Section 107 is that the complainant must be advised by the presiding officer before beginning to give oral evidence of the complainant's right to give his or her oral evidence in private. The presiding officer is also required to ascertain whether or not the complainant wishes to exercise that right. If the complainant wishes to exercise that right, the presiding officer is then required to carry out a number of tasks which seem designed to enhance the privacy aspects of the complainant's choice to give his or her evidence in private, including the making of an order prohibiting publication.

2.5.11 **THIS** Section 107 follows immediately after Section 106 requiring Medical Practitioners Disciplinary Tribunal hearings to be held in public. There is no section equivalent to Section 107 in the Dental Act 1988. From this it may be said to follow, at least in theory, that the mechanism contained in Section 107 providing special protections for complainants to give their evidence, is a facility which should have the effect of otherwise limiting the need to make applications for hearings to be held in private. To this extent we think it is implicit that the disciplinary process under the Medical Practitioners Act 1995 has been designed to be a more open and publicly accountable one than the disciplinary process under the Dental Act of 1988.

2.5.12 **A** second reason why we believe the focus of the new Medical Practitioners legislation is on greater openness in a new environment, derives from a comparison which can be made between the "Publication of orders" provisions in the two statutes.

2.5.13 REFERRING again to the Dental Act provisions which were before Blanchard J in *B*, in that case counsel for the Tribunal had argued, because the Dental Council might decide to publish the effect of the Tribunal's order under Section 67, the Tribunal could not be prohibited from publishing Dr B's name. In rejecting this argument, his Honour said the dispensation available under one section was not intended to override an order prohibiting publication of a name. His Honour added that existence of a name suppression order would not prevent or inhibit the Dental Council in publishing the effect of the Tribunal's order (emphasis added).

2.5.14 SECTION 67 of the Dental Act relevantly provides:

"67. Publication of orders -

(1) Where -

(a) The Council or the Dentists Disciplinary Tribunal has made an order under this Part of this Act in respect of any dentist and no appeal against that order has been brought within the time limited in that behalf; or

(b) Any Court has made an order under this Act in respect of any dentist, -

the Secretary to the Council shall, if the Council in its discretion so directs, but subject to any order made under section 62 of this Act, cause a notice stating the effect of the order to be published in the New Zealand Dental Journal and such other publications as may be directed by the Council." (Tribunal's emphasis).

2.5.15 BY comparison the equivalent provision in the Medical Practitioners Act 1995, Section 138 relevantly provides:

"138. Publication of orders -

(1) Where the Council makes an order under this Act in respect of any medical practitioner, the Registrar shall, if the Council in its discretion so directs, cause a notice stating the effect of the order, and the name of the medical practitioner in respect of whom the order is made, to be published in such publications as the Council may order.

(2) Where the Tribunal makes an order under this Act in respect of any medical practitioner, the Secretary shall cause a notice stating -

(a) The effect of the order; and

(b) The name of the medical practitioner in respect of whom the order is made; and

(c) A summary of the proceedings in which the order is made -

to be published in such publications as the Tribunal may order.

(3) Where a court makes an order under this Act in respect of any medical practitioner, the Registrar or the Secretary, whichever is appropriate, shall cause a notice stating -

(a) ...
(b) ...
(c) ...

(4) Subsections (2) and (3) of this section shall apply subject to -

(a) Any order made under section 106 of this Act; and

(b) Any order of any court."

2.5.16 **THE** differences between the two sections are immediately clear. Under the former (Dental) Act, provided no appeal has been brought, the Dental Council has a discretion only to publish the effect of an order made by the Dentists Disciplinary Tribunal. Under the latter (Medical Practitioners) Act, it is mandatory "shall" to publish not only the effect of the order but also the name of the medical practitioner and a summary of the proceedings. Although publication under each Act is subject to the existence of any previously made suppression orders, section 138 sets out very clearly that an order for the name of the doctor shall be published. In effect we consider that section 138 requires the Tribunal to reconsider any previously made section 106 suppression order. Given the mandatory nature of section 138 it seems to the Tribunal that there is a presumption in favour of publication of an order made against a medical practitioner which does not have the same force in respect of an order made against a dentist.

2.5.17 **IN** light of the differences identified between publication of orders affecting dentists and doctors, we believe that the comments of Blanchard J in *B* have less application when as in this case, the Tribunal is re-visiting a suppression order made against a doctor.

2.5.18 **IT** will be recalled that the respondent's application for the hearing of the charge against him to be held in private was declined. Full reasons were given for that decision. Although not expressly stated in the order suppressing his name, it is implicit in that order that the Tribunal considered that the respondent was entitled to the protection of suppression of his name pending a determination of his guilt or otherwise

of the offence with which he was charged. The charge against him has now been found proven.

2.5.19 **THE** hearing was conducted in public. Although not determinative of a final decision concerning publication of name and identifying particulars, the respondent has already received media attention. More importantly, however, are the following factors which have influenced the Tribunal:

First the provisions of the Act emphasise the principle that proceedings will be conducted openly.

Secondly while refusal to prohibit publication is not intended to be part of the penalty which the Tribunal may impose, it is acknowledged that the effect of publication may be punitive. However, the Tribunal emphasises that the transparency of the disciplinary process and its outcome is an important protection both for the profession and for the public. More generally publication readily identifies for the public what measures are in place to protect it and to facilitate informed choice of professional medical services.

2.5.20 **FOR** these reasons the Tribunal declines to continue the interim order to prohibit publication of the respondent's name and identifying particulars.

DATED at Auckland this 15th day of October 1997

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P J Cartwright

Chairperson

Medical Practitioners Disciplinary Tribunal