Medical Practitioners Disciplinary Tribunal

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DECISION NO: 21/97/7C

NOTE: INTERIM ORDER -

NAMES OF PARTIES

NOT FOR PUBLICATION

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 **STUART WHITAKER BROWN** registered medical practitioner of Hamilton

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Mrs W N Brandon (Deputy Chairperson)

Dr F E Bennett, Dr I D S Civil, Dr L F Wilson,

Mr P Budden (Members)

Ms G J Fraser (Secretary)

Ms K G Davenport (Legal Assessor)

Mrs M Walker (Stenographer)

Hearing held at xx on Thursday 14 August 1997

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

Mr H Waalkens for Dr Brown ("the respondent").

SUPPLEMENTARY DECISION:

THIS supplementary decision should be read in conjunction with Decision No. 12/97/7C which issued on 29 September 1997. In Decision No. 12/97/7C findings were made by the Tribunal that the respondent's management and communication concerning Mrs A undertaken between 14 December 1992 and 29 October 1993 was inadequate in the following respects:

(a) Failed to ensure that the specimen taken following removal of a left breast lump of A on 14 December 1992 was properly examined by a pathologist, especially as he was removing the lump on the basis it might be malignant, as suggested by a mammogram dated 20 November 1992.

(b) In a letter dated 18 December 1992, misled Mrs A's GP, and thus Mrs A, by advising that the said lump was a lipoma.

(c) In a consultation held on or about 29 October 1993, lied to Mr A, and Mrs A, by stating that the said specimen had been examined and was benign."

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. 12/97/7C concluded with an invitation to counsel to make submissions as to penalty. Those submissions having now been received and considered by the Tribunal, the Tribunal makes the following orders pursuant to Section 154(f) of the Act:

1.0 ORDERS:

1.1 **THAT** the respondent be censured.

1.2 **THAT** the respondent be fined $750.00 (the maximum penalty permitted in terms of the Medical Practitioners Act 1968 is $1,000.00).

1.3 **THAT** the respondent pay $15,320.60 which represents 50% 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.

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

1.5 INTERIM ORDER:

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

1.5.2 **THE** Tribunal makes an order granting interim suppression of the respondent's name, and the name of any other person, and identifying particulars, including the locality where the practitioner currently practises, for a period of 14 working days to enable

the respondent to file any application to stay the order declining publication pending appeal, or any other orders pursuant to Section 117 and/or 120 of the Act.

2.0 REASONS FOR ORDERS:

2.1 CENSURE:

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

2.2 FINE:

2.2.1 **APPLYING** the transitional provisions of Section 154 of the 1995 Act, the maximum fine in this case cannot exceed $1,000. Had the respondent's offending taken place after 1 July 1996, the maximum fine payable would have been $20,000.

2.2.2 **TAKING** into account penalties imposed under the previous legislation, it was rare for a practitioner to be fined the maximum sum of $1,000. Fines at the upper end of the scale have consistently been reserved for the most serious cases, usually involving a number of incidences of misconduct or dishonesty and usually at the level of disgraceful conduct. On the basis that the offending in this case involved a single incident, and one patient, and the practitioner has been found guilty at the level of professional misconduct, the Tribunal considers that a fine of $750.00 is appropriate.

2.3 COSTS:

2.3.1 **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.

2.3.2 **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.

2.3.3 **THE** Tribunal accepts counsel for the respondent's submission that a costs award is not intended to be punitive and is not to form part of the penalty as such. In requiring the respondent to pay half of the actual expenses incurred, the Tribunal is guided by the findings of the High Court in *Gurusinghe v Medical Council of New Zealand* [1989] NZLR 139, and specifically the Court's comments at page 195 of its decision that:

"The level of costs is such as is likely to deter other practitioners from defending charges. This was a matter to which the Council was specifically referred by Mr McGrath and the Council obviously took it into account in fixing the level of costs at half of the sum sought. Reference to the practice of the Courts in relation to costs is not altogether helpful because the Courts are dealing with a fully funded Tribunal whereas all expenses of the Council have to be met by the Council itself from practitioners' contributions."

2.3.4 **IN** determining the level of costs at 50% on the basis of the *Gurusinghe* decision, the Tribunal has taken into account the fact that *Gurusinghe* was a case involving four charges of sexual impropriety on the part of *Dr Gurusinghe* and findings of disgraceful conduct.

2.3.5 **IN** this present case, the respondent faced a single charge particularised in three respects. In finding the respondent guilty of the charge, and all three particulars proven, the Tribunal found the respondent guilty of a serious breach of trust, which cannot be anything but a fundamental component of the doctor/patient relationship.

2.3.6 **THE** respondent maintains his denial of the allegations and, through counsel, has indicated to the Tribunal that he does not accept the Tribunal's findings in respect of the third Particular.

2.3.7 **COUNSEL** for the CAC has submitted that, given the seriousness of the Tribunal's findings, it would be appropriate for the Tribunal to impose a period of suspension pursuant to Section 110(1)(b) of the 1995 Act. The Tribunal carefully considered that submission but has determined that, in the present case involving as it does a single incident, rather than a pattern of conduct, a period of suspension is not warranted.

2.3.8 **THAT** is not to say that the Tribunal has come to its decision as to the level of costs to be met by the respondent on the basis that, in the absence of other penalties available to it, it has intended the level of costs to form part of the punishment, rather it reflects the fact that the respondent will not be prevented from continuing to practise and requiring the respondent to pay 50% of the costs is fair and reasonable in all the circumstances.

2.3.9 **THEREFORE**, taking into account all of the circumstances of this case, it is considered that an order for the respondent to pay 50% of the specified costs is appropriate and fair.

2.4 PUBLICATION:

2.4.1 **BY** a Decision dated 26 June 1997 the Tribunal declined to order that the whole of the hearing of this matter should be held in private, but granted orders that:

(a) "The publication of any report or account of any part of the hearing by the Tribunal in any manner in which the [respondent] is named or identified is prohibited pending further order of the Tribunal;

and

(b) The publication of the name or any particulars of the affairs including the occupation, place of residence and/or practice of the [respondent] is also prohibited pending further order of this Tribunal."

This order was continued at the hearing of the charge against the respondent.

2.4.2 **COUNSEL** for the CAC submits that as the Tribunal has now made a finding of professional misconduct against the respondent and handed down its reasons for such a finding, the order prohibiting publication of his name should be lifted.

2.4.3 **FURTHER**, the circumstances of this case have been published in local and national media, which reports have included reference to the respondent's place of residence and/or practice, in breach of the Tribunal's order referred to above, and counsel for

the CAC has submitted that the public now has a right to know, and it is in the public interest that they do know, the respondent's name. Mr McClelland has also submitted that it is in the interest of the medical profession as a whole that the respondent's name be published so that other surgeons operating in his locality are no longer under suspicion.

2.4.4 **THE** respondent has strenuously argued for the non-publication orders to remain. The Tribunal records that a TVNZ camera crew attended at the hearing and that the television reporter advised the Tribunal that he was a representative from the "Holmes Show".

2.4.5 **COUNSEL** for the respondent, Mr Waalkens, submits that such publicity would be out of keeping with the level of misconduct established in this case. Mr Waalkens has also submitted:

(1) That such a level of likely publicity will impact adversely on the respondent's reputation.

(2) Publication of the respondent's name will affect others adversely and quite unnecessarily, than particular references made to the respondent's patients who have been successfully treated by him. Unnecessary concern, alarm and possibly even doubt can only be caused in the minds of other patients if his name is published.

(3) Publication will inevitably have a disastrous affect on the respondent's family.

(4) Publicity will also have a detrimental affect upon the respondent's wife's practice and community work.

(5) There is no evidence that any other surgeons operating in the same locality as the respondent are under suspicion or have otherwise been brought into disrepute as the result of publicity which has already occurred.

2.4.6 **IN** this latter respect, the Tribunal records that, to the extent that other surgeons operating in the same locality as the respondent might have been brought under suspicion, that can only have occurred as the result of the news media's breach of the Tribunal's express order prohibiting publication of the respondent's place of residence and/or practice. The fact that, by breaking the Tribunal's orders the news media have potentially jeopardised the reputation of other surgeons practising in the same locality as the respondent, can hardly be a ground to rescind the Tribunal's orders.

2.4.7 **IN** determining whether or not to vacate its orders prohibiting publication, the Tribunal is required to have regard to the interests of any person and the public interest.

2.4.8 **IN** support of counsel's submissions, the respondent has produced some 10 references, all from senior medical practitioners who have known, and worked with, the respondent for many years. All of the referees have referred to the respondent's high level of professionalism, performance and dedication.

2.4.9 **A** number of the references referred to the respondent's work as a paediatric surgeon who has, for many years, carried a very heavy workload in this area and who has carried out his work skilfully and with sensitivity and compassion.

2.4.10 **IN** considering just where the public interest lies in ordering publication, or non-publication, the Tribunal must take into account not only the wider public interest in maintaining the public's confidence in the medical profession for example, but also the interests of those members of the public who are, have been, or might be, patients, or the parents of patients, cared for by the respondent.

2.4.11 **INEVITABLY**, publication of a finding of professional misconduct against a doctor has the potential to undermine a patient's, or a parent's, confidence in that doctor. In this present case, to the extent that the findings reflect on the respondent's competence, certain of the shortcomings on the part of the respondent which formed the basis of the charge were in the nature of a systems failure which failure seems to have been an isolated failure and which failure the respondent has taken steps to remedy. That is a factor which the Tribunal has weighed carefully.

2.4.12 **FURTHER**, balanced against the Tribunal's finding that the respondent gave an untruthful response to a question directly asked in circumstances where at least an inference could be made that the lie was motivated by self interest, are the attestations on the part of his professional peers that the respondent's honesty in clinical situations is unquestioned.

2.4.13 **MR** Waalkens has also expressed to the Tribunal the respondent's genuine regret about this entire matter, and that regret was apparent to the Tribunal at the hearing. Nevertheless, the Tribunal cannot, and does not, ignore the fact that it was satisfied on the evidence presented to it that the respondent did lie to the complainant and,

having lied to the complainant in response to her question directly asked, perpetuated that deception over a period of several months.

2.4.14 **IN** coming to its decision to vacate the orders made preventing the publication of the respondent's identity the Tribunal has taken into account all of these significant factors, and the clear intention of Parliament in enacting the relevant provisions of the Act that public confidence in the disciplinary process should not be undermined by any unnecessary appearance of secrecy, or of procedures carried on behind the closed ranks of professional allegiance. The Tribunal is mindful that the effect of vacating its non-publication orders is punitive. The Tribunal emphasises that is not an intended consequence, but the inevitability of that consequence cannot, in the Tribunal's opinion, be a sufficient reason for preventing publication. If it were, then it would always be the case that the names and identity of practitioners who are found guilty of professional disciplinary offences are not published.

2.4.15 **THE** intent of the Act is clearly that the disciplinary process be open to public scrutiny. The transparency of the disciplinary process and its outcome is an important protection both for the profession and the public.

2.4.16 **IT** should also be borne in mind that the respondent's application for the hearing of the charge against him to be held in private was declined. Full reasons for that were given in the Tribunal's Decision dated 26 June 1997. In granting the application that the respondent's name and identity be protected pending the determination of the

charges, the Tribunal considered that the respondent was entitled to such protections pending the outcome of the hearing.

2.4.17 **AS** already stated, the Tribunal determined that the charges were proven against the respondent and, although by no means determinative, the respondent has already received media attention.

2.4.18 **ACCORDINGLY**, and on balance, the Tribunal now orders that the non-publication orders made in June 1997 are vacated. The Tribunal accedes to the respondent's request that an interim order preventing disclosure of the respondent's identity be made to enable the respondent to file an application to stay any of the orders contained in this Decision, pending appeal.

2.4.19 **THAT** interim order is to expire 14 working days (as defined in Section 2 of the Medical Practitioners Act 1995) after the date of receipt of this decision by the respondent.

DATED at Auckland this 16th day of December 1997

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W N Brandon

Deputy Chairperson

Medical Practitioners Disciplinary Tribunal