Medical Practitioners Disciplinary Tribunal

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DECISION NO.: 4/97/7C

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against **B** registered medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Wednesday 18 June 1997

PRESENT: Ms W N Brandon - Chairperson
Dr R A Cartwright, Professor B D Evans, Dr A M C McCoy,
Ms S Cole (members)

APPEARANCES: Mr M McClelland for Complaints Assessment Committee
Mr H Waalkens for respondent
Ms G J Fraser - Secretary
Mrs K G Davenport - Legal Assessor
(for first part of call only)

DECISION

1.0 **THIS** was an application seeking orders pursuant to Section 106 of the Medical Practitioners Act 1995. The application was advanced in the absence of any affidavit evidence and, in advancing the application, Counsel for the applicant doctor, Mr Waalkens, relied on the grounds set out therein. Mr Waalkens submitted that any public interest in having the matter heard in public was outweighed by the prejudice that the applicant doctor would suffer if the hearing were to be held in public. In particular, Mr Waalkens submitted:

(a) The complaint resulting in the charge against the applicant concerns a private matter between the applicant and the complainant.

(b) Resolution of the complaint will involve hearing sensitive and expert medical evidence.

(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 applicant.

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

2.0 **MR** Waalkens also sought orders prohibiting the publication of any report or account of any part of the hearing in such a way that the applicant doctor is named or identified and prohibiting the publication of the name or any particulars of the affairs including the occupation, place of residence/practice of the applicant. Mr Waalkens also sought such further orders as the Tribunal might deem appropriate.

3.0 **AT** the outset, Mr Waalkens referred to the decision of the District Court *P v The Medical Practitioners Disciplinary Tribunal*, which decision was released only today. In that decision, the Tribunal's decision declining an application that a hearing be held in private was

upheld. The view expressed by Mr Waalkens was that in seeking to persuade this Tribunal to grant this application in light of the decision issued today, he was "facing an uphill battle".

4.0 **THE** Tribunal reiterated the approach taken by it in *E* (Ref: 97/1C, 7 May 1997) that each application will be considered on its own merits and on the basis of the particular facts and circumstances presented. To the extent it might be necessary, the Tribunal confirms that it cannot, and will not, fetter its discretion or pre-determine any matters placed before it for determination and, whilst earlier decisions might provide guidelines or general guidance for the Tribunal, no previous decision will be determinative in any subsequent case.

5.0 **IN** this present case, Dr B faces very serious charges. In particular the charges brought against Dr B are particularised in the following respects:

'**THE** Complaints Assessment Committee pursuant to Section 93 (1) (b) of the Medical Practitioners Act 1995 charges Mr B registered medical practitioner of xx with disgraceful conduct in the professional respect OR professional misconduct OR conduct unbecoming a medical practitioner which affects adversely on the practitioner's fitness to practise medicine in that his management and communication concerning A undertaken between 14 December 1992 and 29 October 1993 was inadequate in one or more of 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."

6.0 **THE** allegation that a medical practitioner deliberately misled the complainant's wife and her GP, and that he lied to the complainant and his wife are serious and thus the alleged offending must be regarded as being at the higher end of the scale. The Complaints Assessment Committee (CAC), and the complainant, carry a heavy burden of proof and, in the event the particulars are not upheld, the potential harm to the medical practitioner's reputation as a result of the mere fact of his having faced charges at that level is a significant consideration in terms of the factors to which the Tribunal must have regard in balancing the interests of "any person" and the public interest as it is required to do pursuant to Section 106(2) of the Act.

7.0 **FOR** the CAC, and for the complainant, Mr McClelland advised the Tribunal that both the CAC and Mr A sought a public hearing. Mr McClelland submitted that the grounds advanced by Mr Waalkens in support of the application did not take this case out of the ordinary as, in Mr McClelland's submission, the grounds advanced in support of the application did not indicate any factors which would not be present in every complaint brought to the Tribunal.

8.0 **MR** McClelland advised that the CAC and the complainant did not oppose the Tribunal's making the orders numbered (2) and (3) in the application, if the Tribunal was so minded. It was Mr McClelland's position for the CAC and the complainant that, given the observations

of Judge Joyce in *P v Medical Practitioners Disciplinary Tribunal* (AP No. 2490/97, 18/6/97), this application should not be granted.

8.1 **IN** particular, the Tribunal noted the comments of the Court in that case in relation to the potential for public knowledge of the nature of the complaint acquired from a public hearing to cause damage to the professional reputation of the applicant.

8.2 **IN** *P (supra)* the Court said:

"As was also said by Counsel for the respondent, there is likely never going to be a case where reputation is not in 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."

8.3 **HOWEVER**, against that, this Tribunal, in considering the potential for a public hearing to cause damage to the professional reputation of this applicant given the seriousness of the allegations made against him, was mindful of the necessity to give proper weight to that aspect of the applicant's case. It would seem to be inevitable that the more serious the allegations made, the more potential there is for damage to be caused to the professional reputation of the medical practitioner applicant and the legislature has made no distinction, in Section 106(1) in terms of the level of the charges laid (and that is consistent with the provisions of Section 109) in directing that, subject to Section 106(2) and Section 107, " ..... every hearing of the Tribunal shall be held in public".

9.0 **THUS**, against these factors, the Tribunal is required to undertake a balancing exercise and to take into account the, albeit undefined, "public interest" in public hearings and the applicant practitioner's request for a private hearing.

10.0 **HAVING** carefully considered the submissions advanced by Mr Waalkens both in the grounds set out in the application and in the course of the hearing, the Tribunal is not persuaded that the particular facts and circumstances argued in this application justify departure from the general principles stated in Section 106(1) of the Act that hearings of the Tribunal shall be heard in public.

11.0 **CONSISTENT** with the findings of the Tribunal in *P* (Ref 97/2C), 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, particularly in this case, a respondent facing serious charges, in deciding that the hearing should be held in public.

12.0 **ACCORDINGLY**, having weighed all of the relevant considerations raised, both expressly and impliedly, in the submissions made by Mr Waalkens and Mr McClelland, the Tribunal is not satisfied that it is desirable that this hearing be heard in private.

13.0 **ACCORDINGLY**, the Tribunal declines to order that the whole of the hearing of this matter should be held in private. However the Tribunal grants the orders that:

(a) **THE** publication of any report or account or any part of the hearing by the Tribunal in any manner in which the applicant 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 applicant, is also prohibited pending further order of this Tribunal.

DATED at Auckland this 26th day of June 1997.

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W N Brandon

DEPUTY CHAIRPERSON