MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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PUBLICATION OF THE NAME OF THE DOCTOR IS PROHIBITED

DECISION NO: 283/04/118D

IN THE MATTER of the MEDICAL PRACTITIONERS ACT 1995

AND

IN THE MATTER of disciplinary proceedings against M medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HEARING by telephone conference on Thursday 4 March 2004

PRESENT: Dr D B Collins QC - Chair

Dr I D S Civil, Dr L Ding, Dr L Henneveld, Mr G Searancke (members)

APPEARANCES: Mr J Tamm for the Director of Proceedings

Ms H Winkelmann for respondent

Ms G J Fraser - Secretary

(for first part of call only)

Reasoned decision on the application for Interim Name Suppression

Introduction

1. Doctor M practises as an xx in xx. On 19 December 2003 the Director of Proceedings laid a disciplinary charge against Dr M. The charge alleges Dr M failed to obtain a patient's informed consent before performing an abdominoplasty procedure and/or failed to inform the anaesthetist and/or theatre staff of the proposed procedure before anaesthesia was commenced. It is alleged Dr M's shortcomings constitute professional misconduct, or, in the alternative conduct unbecoming a medical practitioner.

2. On 11 February 2004 Dr M applied for orders suppressing publication of her name and any identifying features. She also sought orders prohibiting publication of the details of a supporting affidavit from a registered psychologist and the grounds for her application.

3. On 20 February the Director of the Proceedings filed detailed submissions in opposition to Dr M's application.

4. The Tribunal convened (by telephone conference) on 4 March 2004 to consider and determine the application. On 5 March 2004 the Tribunal advised the parties that the application would be granted until the Tribunal had determined the charge against Dr M at which point the Tribunal would consider whether or not to extend its interim orders. The Tribunal apologises for the delay in providing reasons for its decision. The reasons for the delay relate solely to the chairperson's commitments in a very lengthy trial.

Basis of Application

5. It is not necessary or appropriate to explain the basis of Dr M's application in great detail. Suffice to say the Tribunal has received and considered a report from a registered psychologist who has advised the Tribunal Dr M was suffering from a significant psychological condition that appears to have been caused by stress and anxiety associated with the charge that has been brought against Dr M.

6. In addition to the medical grounds advanced in support of her application Dr M submits her application should be granted because:

6.1 She denies the charge;

6.2 She has an unblemished record;

6.3 There was no public interest in the publication of her name at this juncture.

Grounds of Opposition

7. The Director of Proceedings filed very helpful submissions which carefully analysed the legal principles applicable to name suppression applications.

8. The Director of Proceedings' submissions commenced with an analysis of sections 106(1) and 106(2)(d) of the Medical Practitioners Act 1995 ("the Act") which provide:

> *"Hearings of the Tribunal to be in public –*
>
> *(1) Except as provided in this section and 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 the public interest [the Tribunal] … may make …*
>
> *(d) … an order prohibiting the publication of the name, or any particulars of the affairs of any person."*

9. The Director of Proceedings submitted section 106(1) and section 106(2)(d) create a strong presumption in favour of open judicial proceedings (*R v Liddell* [1995] 1 NZLR 538, *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546, *Ford v CAC* (unreported DC Wellington, NP95/00, 8/9/2000), *P v MPDT* (unreported DC Auckland, AP2490/97, 18/6/97)).

10. In her submissions the Director of Proceedings emphasised the Tribunal is required to balance public interest considerations against the interests of Dr M (*Pilkington v MPDT* (unreported

HC Auckland, AP21/SW01, 5/12/01, Laurensen J; *S v WDLS* [2001] NZAR 465; *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360).

11. The public interest considerations identified by the Director of Proceedings are:

11.1 The importance of freedom of speech and the right enshrined in s.15 of the New Zealand Bill of Rights Act 1990;

The Director of Proceedings relies on the principle of "freedom of speech" and submits that important principle would be compromised if Dr M's application were granted;

11.2 The public's interest in knowing the identity of a practitioner charged with a disciplinary offence;

The Director of Proceeding submits that identifying doctors charged with a disciplinary offence is an important aspect in educating and informing the public as well as other health professionals about the disciplinary process;

11.3 Accountability and transparency of the disciplinary process;

The Director of Proceedings suggests that public confidence in the disciplinary process may be compromised if Dr M's name and identity cannot be published.

Principles followed by the Tribunal

12. When exercising its discretion under s.106(2)(d) of the Act, the Tribunal must consider whether it is "desirable" to order name suppression by assessing whether or not the factors adduced by Dr M outweigh the public interest or the interests of the complainant. That is to say, the Tribunal must be satisfied Dr M has met the threshold of "desirability" before her application can be granted.

13. There is no presumption in favour of granting applications for interim name suppression pending determination of a disciplinary charge.

14. Justice Frater recently stated in *Director of Proceedings v I* (HC Auckland, CIV/2003/385/2180, 20 February 2004):

> *"… it is important to emphasize … that each case must be considered on its own facts. There can be no general presumption either in favour of, or against name suppression and that applies in all contexts. In each case the onus is on the applicant to satisfy the decision maker/s, on the balance of probabilities, that the presumption in favour of open justice should be departed from."*

Reasons for Tribunal's Decision

15. The Tribunal has carefully weighed the factors relied upon by Dr M against the public interest considerations advanced by the Director of Proceedings and the complainant's opposition to the application.

16. In this case the Tribunal believes it is desirable Dr M's name and identifying features should be suppressed pending determination of the charge by the Tribunal.

17. In reaching this conclusion the Tribunal stresses the factor in Dr M's application which it finds persuasive, is the risk of exacerbation of what is already a serious psychological condition. The Tribunal does not believe Dr M's denial of the charge and her previous record are in themselves persuasive factors. Nor does the Tribunal accept that there is no public interest in allowing publication of Dr M's name.

18. In this case, the Tribunal is concerned that publication of Dr M's name at this juncture may cause further deterioration to her psychological well-being. Such an outcome would be disproportionate to the principles of open justice and the public interest considerations advanced by the Director of Proceedings.

19. The Tribunal's concerns are based upon a psychological report prepared by an experienced and respected psychologist whose concerns have persuaded the Tribunal that it is desirable to prohibit publication of Dr M's name and identifying features until the Tribunal has determined the charge against her.

20. The Tribunal has on many occasions stressed the need for transparency and openness in this proceeding. Section 106(1) emphasizes that the Tribunal's hearings will be held in public. Section 106(1) recognises the principle of open justice. The Tribunal's decision in this case should not be regarded as a departure from the Tribunal's previously expressed stance that medical disciplinary proceedings should be open and transparent.

21. In the circumstances of this case however, the Tribunal is satisfied Dr M has established that it is desirable nothing be published which identifies her until the Tribunal has determined the charge against her.

22. The Tribunal has given careful consideration to Dr M's request that the Tribunal suppress publication of her psychologist's report and the medical grounds upon which her application is based. The Tribunal is willing to prohibit publication of the psychologist's report. However the Tribunal believes it is important for the complainant, the profession and the public to understand in general terms why the Tribunal has departed from the principle of "open justice" in this case. Accordingly the Tribunal is not willing to suppress the reasons advanced by Dr M in support of her application. The Tribunal has endeavoured to explain in general terms the medical grounds relied upon by Dr M in support of her application and believes nothing stated in this decision unreasonably compromises Dr M's privacy. The Tribunal is not willing to suppress publication of anything contained in this decision.

DATED at Wellington this 30th day of April 2004.

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D B Collins QC

Chair

Medical Practitioners Disciplinary Tribunal