MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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PUBLICATION OF THE NAME OF THE DOCTOR AND ANY DETAILS THAT MAY IDENTIFY HER IS PROHIBITED

DECISION NO: 296/04/118D

IN THE MATTER of the Director of Proceedings

-AND-

IN THE MATTER of a charge laid by the Director of Proceedings pursuant to Section 102 of the Medical Practitioners Act 1995 against M medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Dr D B Collins QC (Chair)

Dr L Henneveld, Dr M G Laney, Dr J M McKenzie, Mr G Searancke (Members)

Ms G J Fraser (Secretary)

Mrs G Rogers

Hearing held at Auckland on Wednesday 26, Thursday 27 and Friday 28 May 2004

COUNSEL: Ms T Baker and Ms L Curtis for the Director of Proceedings

Ms H Winkelmann for Dr M

Introduction

1. On 8 June 2004 the Tribunal delivered its decision in which it found Dr M guilty of a charge of professional misconduct. The Tribunal put in place a timetable for receiving and considering submissions in relation to penalty and name suppression. Unfortunately a series of factors precluded the Tribunal from convening to hear submissions on penalty and name suppression until 4 August. The delays were caused by Tribunal members being overseas, counsel for one of the parties being overseas, and Dr M needing to engage new counsel following the appointment of Ms Winkelmann as a High Court Judge. The Tribunal apologises to the complainant and Dr M for the unfortunate delays that have occurred in concluding this case. On 5 August the Tribunal issued a Minute explaining it had decided to grant Dr M's application for permanent name suppression.

2. In this decision the Tribunal explains its reasons for granting Dr M permanent name suppression and its reasons for imposing the following penalty:

    An order for costs in the sum of $19,267.83

Name Suppression

3. Doctor M's application for permanent name suppression is founded on four grounds, namely:

    3.1 The charge was found by the Tribunal to involve culpability at the lower end of the spectrum and as such, there is no strong public interest in publishing Dr M's identity;

    3.2 Doctor M has an otherwise unblemished record and poses no threat to public safety;

3.3 Doctor M has a medical condition which is likely to be aggravated if her name is published in association with the Tribunal's findings against her;

3.4 Publication of Dr M's name will irreparably damage her professional reputation.

4. The Director of Proceedings' reasons for opposing Dr M's application for permanent name suppression are:

4.1 The principle of openness creates a strong presumption in favour of the public having a right to know what happens in the Tribunal, and the identity of a doctor found guilty of a disciplinary offence;

4.2 Public interest considerations justify the Tribunal declining Dr M's application. Specifically the Director of Proceedings submits:

- Public confidence in the disciplinary process;
- Public safety;
- Educating and informing the public and other practitioners so that they can make an informed choice as to whether or not to engage Dr M

are factors which outweigh Dr M's personal concerns and interests.

4.3 A doctor found guilty of a disciplinary offence should expect to have their name published.

Principles Applicable to Name Suppression Applications

5. The starting point when considering the principles applicable to name suppression in the medical disciplinary arena is section 106 of the Act. Subsections 106(1) and (2) provide:

> *"(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 (again 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: …*
>
> *(d) … an order prohibiting the publication of the name, or any particulars of the affairs, of any person".*

6. Subsection 106(1) of the Act places emphasis on the Tribunal's hearings being held in public unless the Tribunal, in its discretion applies the powers conferred on the Tribunal by section 106(2) of the Act. Another exception to the presumption that the Tribunal's hearing will be conducted in public can be found in section 107 which creates special protections for complainants where the charge involves a matter of a sexual nature, or where the complainant gives evidence of an intimate or distressing nature.

7. Whereas section 106(1) of the Act contains a presumption that the Tribunal's hearing shall be held in public, there is no presumption in section 106(2) of the Act. When the Tribunal considers an application to suppress the name of any person appearing before the Tribunal, the Tribunal is required to consider whether it is desirable to prohibit publication of the name of the applicant after considering:

7.1 The interests of any person (including the unlimited right of the complainant to privacy); and

7.2 The public interest.

Public Interest

8. The following public interest considerations have been evaluated by the Tribunal when considering Dr M's application:

8.1 The public interest in knowing the name of a doctor found guilty of a disciplinary offence;

8.2 Accountability and transparency of the disciplinary process;

8.3 The importance of freedom of speech and the right enshrined in section 14 New Zealand Bill of Rights Act 1990[1];

8.4 The extent to which other doctors may be unfairly implicated if Dr M is not named.

9. Each of these considerations will now be examined by reference to Dr M's application. In focusing on these public interest considerations the Tribunal notes no specific submissions were received relating to the complainant's interests in this case. The interests of the complainant have been subsumed into the public interest factors urged upon the Tribunal by the Director of Proceedings.

The Public Interest in Knowing the Name of a Doctor Found Guilty of a Disciplinary Charge

10. The following cases illustrate the importance of openness in judicial proceedings:

10.1 In *M v Police*[2] Fisher J said:

> *"In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice be seen to be done."*

10.2 In *R v Liddell*[3] the Court of Appeal said:

> *"… the starting point must always be the importance in a democracy of … open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates of the public' ."*

10.3 In *Lewis v Wilson & Horton Limited*[4] the Court of Appeal reaffirmed what it had said in *R v Liddell*. The Court noted:

> *"… the starting point must always be … the importance of open judicial proceedings, and the right of the media to report Court proceedings."*

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1 "Freedom of expression – everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any forum".

2 (1991) CRNZ 14

3 [1995] 1 NZLR 538

4 [2000] 3 NZLR 546

10.4 In *Re X*[5] the High Court noted:

> *"The principle of open justice dictates that there should be no restriction on publication except in very special circumstances."*

To these cases can be added *Scott v Scott*[6] and *Home Office v Harman*[7] where Lords Shaw and Diplock explained the rationale for openness in civil proceedings.

11. The Tribunal appreciates it is neither a criminal nor civil court. However, as Frater J noted in *Director of Proceedings v I*[8]:

> *"The presumption in s.106(1) of the Act, in fair and public hearings makes it clear that, as in proceedings before the civil and criminal courts, the starting point in any consideration of the procedure to be followed in medical disciplinary proceedings must also be the principle of open justice.'*

12. The Courts have observed that publishing the name of doctors found guilty of professional disciplinary offences fulfils the important public function of educating and informing the public and other health professionals so as to enable them to make informed choices about whom they consult. The judgment of Baragwannath J in *Director of Proceedings v The Nursing Council*[9] illustrates this point (see also *F v Medical Practitioners Disciplinary Tribunal*[10] and *S v Wellington District Law Society*[11]).

13. The Tribunal unhesitatingly acknowledges that in most cases doctors found guilty of a professional disciplinary offence can anticipate that the Tribunal will decline to suppress publication of their name. There is a compelling public interest in members of the community being informed and educated about those found to have breached their professional obligations. Members of the public generally have an interest to choose their doctors and ought to be able to make that decision with all information that is relevant to their decision. If a doctor has been

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5 [2002] NZAR 938

6 [1913] AC 47

7 [1982] 1 All ER532

8 Unreported, HC Auckland, CIV2003-483-2180, 20 February 2004

9 [1999] 3 NZLR 360

10 Unreported, HC Auckland, AP21-SW01, 5 December 2001, Laurenson J

11 [2001] NZAR 465

found guilty of a professional disciplinary offence this may be an important factor in determining whether or not they should be consulted.

14. In this case the Tribunal is firmly of the view that Dr M's errors were a one-off mistake which does not impact upon the quality of the services she provides others. The circumstances of this case were very unusual. Doctor M's errors were at the lower end of the spectrum of culpability. In these circumstances the Tribunal does not believe the public interest in knowing Dr M's identity is an overwhelming consideration.

Accountability and Transparency of the Disciplinary Process

15. A major criticism of the disciplinary regime under the Medical Practitioners Act 1968 was that disciplinary hearings were not heard in public and that the identity of doctors who appeared before the disciplinary bodies was often suppressed. This led to claims that the disciplinary process was neither transparent nor accountable.

16. It is apparent from an examination of the Hansard records concerning the introduction of the Medical Practitioners Act 1995 that those who promoted the legislation wanted the present disciplinary process to be transparent and accountable.[12]

17. The Tribunal fully recognises there is considerable public interest in maintaining accountability and transparency in the disciplinary process and that this factor weighs heavily against Dr M's application. This point was noted by Laurenson J in *F v Medical Practitioners Disciplinary Tribunal*[13] when His Honour noted that if a doctor is found liable following a disciplinary hearing then there is a strong expectation the doctor's name will be published.

The Importance of Freedom of Speech and the Right Enshrined in s.14 New Zealand Bill of Rights Act 1990

18. The public interest in preserving freedom of speech and the ability of the media "as surrogates of the public" to report the Tribunal proceedings has been emphasised on numerous occasions by the Tribunal and appellate Courts.[14]

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12 See for example Hon J Shipley New Zealand Parliamentary Debates Vol 544 p.5065

13 Supra

14 See for example *R v Liddell* and *Lewis v Wilson & Horton Limited* supra

19. The Tribunal does not know if any media propose publishing its findings in relation to Dr M. Regardless of whether or not there is media interest in this case, the Tribunal takes the view that if the media wishes to publish the Tribunal's findings and identify Dr M then the importance of freedom of speech enshrined in s.14 New Zealand Bill of Rights Act 1990 is a factor which weighs against suppressing publication of Dr M's name.

Unfairly Impugning Other Doctors

20. A further factor, in the public interest which Dr M needs to address is the concern that other xx may be unfairly impugned if Dr M's name is suppressed. This point has been emphasised on numerous occasions in criminal courts where Judges have declined name suppression to avoid suspicion falling on other members of the public.

21. The Tribunal is concerned to avoid the fundamental unfairness caused to other xx in xx if they are impugned. Accordingly, the Tribunal proposes to try and minimise the risk of harm to others by suppressing details of the fact Dr M practises in xx.

Doctor M's Interests

22. Doctor M's personal interests can be distilled to two headings, namely:

    22.1 Her professional reputation;

    22.2 Her health.

Doctor M's Professional Reputation

23. The Tribunal accepts that a doctor's professional reputation is an important factor that must be carefully evaluated when considering applications to suppress a doctor's name.[15]

24. (**Not for publication**)…, she is a conscientious and caring practitioner with an otherwise unblemished record and good reputation.

25. In assessing the potential risk of damage to a doctor's reputation it is important for the Tribunal to take into account the degree of the doctor's errors which have led to an adverse disciplinary

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15 Refer *Director of Proceedings v I*, supra

finding. In this case the Tribunal has concluded Dr M's culpability is at the lower end of the scale which attracts disciplinary consequences. The Tribunal is satisfied Dr M's failure to obtain the complainant's informed consent is based upon a misguided belief that she was assisting her patient. The Tribunal is also very confident that the experiences of this case have had an indelible impact upon Dr M and that she is highly unlikely to err in the same way again.

26. The Tribunal believes that risking damage to Dr M's reputation would, in the circumstances of this case, be disproportionate to the seriousness of her errors and shortcomings.

Doctor M's Health

27. The Tribunal has received an affidavit from the health professional who has provided care and treatment for Dr M. The Tribunal has been urged not to publish details of the matters contained in the health professional's affidavit because to do so would defeat the purpose of name suppression. The Tribunal appreciates this concern but at the same time believes it is important that those who read this decision understand why the Tribunal has reached its conclusion.

28. The delicate balance which must be reached between the importance of preserving Dr M's privacy and the Tribunal publicly explaining its reasons for its decision is best achieved by stating that the Tribunal accepts Dr M has a medical condition which does not impact on her ability to discharge her professional responsibility. That medical condition is being treated. The medical condition which Dr M suffers from could well be aggravated if:

28.1 Doctor M's name were published; and

28.2 The details of her medical condition were made public.

29. The Tribunal accepts the force of the submission made on behalf of Dr M that it is not appropriate to risk damage to Dr M's health by publication of her name, or the details of her medical condition in the circumstances of this case. Accordingly, the Tribunal proposes to say no more about the details of Dr M's medical condition.

Conclusion

30. In weighing the competing public interest considerations against Dr M's interests the Tribunal has unanimously concluded Dr M's application should be granted. The Tribunal believes Dr M's

reputation, and her health should not be jeopardised in a case where her culpability was at the lower end of the spectrum of disciplinary offending.

Penalty

31. In assessing penalty the Tribunal has taken account of the following factors:

    31.1 Doctor M has been found guilty of professional misconduct in relation to one of two particulars of the notice of charge;

    31.2 Doctor M's offending was at the lower end of the scale of offending that attracts disciplinary sanctions;

    31.3 Doctor M has learnt a salutary lesson from the disciplinary process and is unlikely to appear before the Tribunal on similar matters in the future;

    31.4 This is Dr M's first and only disciplinary experience.

32. At the conclusion of the substantive hearing the Tribunal indicated it did not believe that this was a case which justified a penalty other than an order for costs under s.110(1)(f) Medical Practitioners Act 1995.

33. Having reflected on its findings, in the circumstances of this case the Tribunal confirms that the only penalty it will impose in this case is an order for costs.

Quantum of Costs

34. In this case the Tribunal's costs were $31,126.81 and the costs of the Director of Proceedings were $22,723.73.

35. The High Court has confirmed, that as a general rule of thumb, a professional found guilty by their disciplinary body should expect to pay 50% of the reasonable costs incurred by the disciplinary tribunal. This general guide reflects the fact that disciplinary proceedings are paid for by members of the profession and that the Tribunal's task, when making assessments of costs is

to balance the interests of the practitioner whose conduct has been found wanting against the interests of the profession as a whole.[16]

36. In assessing what portion of the Tribunal's costs Dr M should pay the Tribunal has paid particular attention to the following factors:

36.1 Doctor M's errors were at the lower end of the scale of disciplinary offending;

36.2 Doctor M was found guilty on one out of two particulars of the charge;

36.3 Doctor M's case involved careful consideration of the distinction between professional misconduct and conduct unbecoming a medical practitioner and to some extent her case was of a "test" nature;

36.4 Doctor M is now self employed and a substantial order for costs could cause her hardship and undue strain.

37. The Tribunal believes different considerations apply when assessing the amount of costs a doctor should pay the Director of Proceedings. The reason for this is that the Director of Proceedings office is funded by the State. In assessing the costs incurred by the Director of Proceedings the Tribunal derives some guidance from the principles which apply to awards of costs in High Court civil proceedings, namely:

37.1 A doctor found guilty of a disciplinary charge should expect to pay costs to the Director of Proceedings. The extent to which a prosecution succeeds is a relevant factor for the Tribunal to take into account when under this limb;

37.2 Costs awards should reflect the complexity and significance of the proceedings;

37.3 Costs should reflect a fair and reasonable rate being applied to the time taken to investigate the complaint as well in as preparing for and conducting the prosecution. The emphasis is on reasonable as opposed to actual costs.

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[16] *Cooray v Preliminary Proceedings Committee* unreported HC Wellington, 23/94 Doogue J; *Vasan v The Medical Council of New Zealand* unreported, HC Wellington, AP43/91 Jefferies J.

38. A factor which the Tribunal has taken into account in this case is its concern about the delay in investigating and bringing the charge to the Tribunal. The events in question occurred three and a half years ago. There has been no suggestion Dr M contributed in any meaningful way to the delays which occurred in this case.

39. In assessing all of the factors referred to in paragraphs 36 and 37 of this decision the Tribunal orders Dr M pay:

$12,450.72 being 40% of the costs of the Tribunal

$ 6,817.11 being 30% of the costs of the Director of Proceedings

Total $19,267.83

Summary

40. The Tribunal grants Dr M permanent suppression of her name and directs nothing be published which identifies her as an xx practitioner.

41. Doctor M is ordered to pay $12,450.72 costs in relation to the hearing by the Tribunal, and $6,817.11 by way of costs to the Director of Proceedings.

DATED at Wellington this 23rd day of August 2004

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D B Collins QC

Chair

Medical Practitioners Disciplinary Tribunal