MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

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DECISION NO: 302/04/119C

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 C medical practitioner of xx

BEFORE THE MEDICAL PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: D B Collins QC (Chair)

Dr F Bennett, Dr I Civil, Ms S Cole and Dr M Honeyman (Members)

Ms K L Davies (Hearing Officer)

Ms G J Fraser (Secretary)

Mrs H Hoffman and Ms P Dunn (Stenographers)

Hearing held at Wellington on Thursday 29 and Friday 30 July 2004

APPEARANCES: Ms K P McDonald QC and Ms J Hughson for the Complaints Assessment Committee ("the CAC")

Mr M McClelland and Ms J Gibson for Dr C.

Introduction

1. On 17 August 2004 the Tribunal issued its decision in which it found the charge against Dr C had been established at the level of "conduct unbecoming a medical practitioner" pursuant to s.109(1)(c) Medical Practitioners Act 1995 ("the Act").

2. The Tribunal has now received and considered submissions from counsel for the CAC and Dr C relating to penalty and an application for name suppression filed by Dr C. In this decision the Tribunal explains its reasons for imposing the following penalties on Dr C:

   (a) Censure;

   (b) An order for costs in the sum of $18,921.43.

   The Tribunal also explains its reasons for:

   (c) Declining Dr C's application for permanent name suppression; and

   (d) Its reasons for granting the complainant name suppression.

Penalty

3. In its decision of 17 August 2004 the Tribunal conveyed its view Dr C's behaviour justified a disciplinary sanction "albeit at the lower end of the spectrum of penalties available to the Tribunal".

4. Having considered the submissions on penalty filed by both parties, the Tribunal reaffirms its assessment Dr C's conduct justifies a disciplinary penalty "at the lower end" of the scale of penalties set out in s.110 of the Act.

Conditions on Practice

5. The CAC has urged the Tribunal impose a condition on Dr C's ability to continue practising. The condition the CAC would like the Tribunal to impose is that he "attend an appropriate communication course".

6. There is merit in this aspect of the CAC's submissions. This case focused upon Dr C's poor communication with the complainant. The Tribunal concluded Dr C did not appreciate his blunt and direct statements could be easily construed as being offensive.

7. To his credit, Dr C has already responded to the Tribunal's findings by attending a 6 hour intensive communications programme run by an organisation specialising in training doctors in the art of communication. The Tribunal has received a report from Dr van den Brink, a tutor in the programme attended by Dr C. The report from Dr van den Brink is promising and indicates Dr C has "learned quickly" and demonstrated an ability to use the communication techniques taught to him.

8. The CAC has advised the Tribunal that the communication course attended by Dr C is "not recognised or approved by the Medical Council". Whilst it would have been more reassuring if Dr C had attended a programme "recognised and approved" by the Medical Council, it would appear Dr C enquired of the New Zealand College of General Practitioners who he should contact about attending a communication course. The course which Dr C attended was one referred to him by the New Zealand College of General Practitioners.

9. The Tribunal is satisfied Dr C has taken appropriate steps to address deficiencies in his style of communication. The fact Dr C has taken the initiative and attended a training programme has persuaded the Tribunal not to impose a condition on Dr C's ability to practise in New Zealand. Having reached this conclusion the Tribunal encourages Dr C to continue to work on his communication techniques.

Censure

10. Doctor C's conduct justifies him being formally censured by the Tribunal. His conduct was unacceptable and he deserves the reprimand inherent in his being censured.

Fine

11. The Tribunal has given careful consideration to imposing a fine on Dr C pursuant to s.110(1)(e) of the Act. The maximum fine that can be imposed under that section is $20,000.

12. The Tribunal believes, when Dr C's conduct is assessed objectively, and when regard is had to the Tribunal's other orders in relation to penalty, and in particular its order in relation to costs, the imposition of a fine is not merited in the circumstances of the case.

Costs

13. Doctor C's counsel has acknowledged the Tribunal will invariably order Dr C pay costs. The issue is how much.

14. In this case the Tribunal's costs were $23,601.88. The CAC's costs were $31,602.28.

15. The High Court has confirmed that, as a general rule of thumb, a professional person found guilty by their disciplinary body should expect to pay 50% of the reasonable costs incurred by the Disciplinary Tribunal. This general rule 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.[1]

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

    16.1 Doctor C's errors were at the lower end of the scale of disciplinary offending;

    16.2 Doctor C was found guilty on one of two particulars of the charge;

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[1] See for example, *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, Jeffries J.

16.3 Doctor C was found guilty of "conduct unbecoming a medical practitioner", not professional misconduct.

17. In assessing the costs incurred by the CAC the Tribunal derives some guidance from the principles which apply to awards of costs in High Court civil proceedings, namely:

17.1 A doctor found guilty of a disciplinary charge should expect to pay costs to the CAC. The extent to which a prosecution succeeds is a relevant factor for the Tribunal to take into account under this heading;

17.2 Costs awards should reflect the complexity and significance of the proceeding;

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

18. 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 a little over four years ago. There has been no suggestion Dr C contributed in any meaningful way to the delays which occurred in this case.

19. The Tribunal understands Dr C has not worked for 18 months of the four year period which has elapsed since the events in question. The Tribunal does not have evidence relating to Dr C's financial circumstances but proceeds on the assumption that an award of costs may have a significant effect on him.

20. In assessing all the factors relevant to an award of costs the Tribunal orders Dr C pay:

➢ 40% of the Tribunal's costs	$9,440.75
➢ 30% of the CAC's costs	$9,480.68
Total	**$18,921.43**

Name Suppression – Dr C

21. Doctor C's application for permanent name suppression is founded on the following four grounds:

21.1 There is no public interest in publishing Dr C's name. The events in question occurred over four years ago and Dr C does not intend to practice medicine on a permanent basis in New Zealand;

21.2 Declining Dr C's application will cause him undue stress;

21.3 No fault has been found with Dr C's clinical management of his patient. Doctor C's errors related to the way he communicated with his patient;

21.4 Allowing publication of Dr C's name might inadvertently lead to the complainant being identified. The complainant has sought and obtained permanent name suppression from the Tribunal.

22. The CAC's reasons for opposing Dr C's application for permanent name suppression are:

22.1 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;

22.2 Public interest considerations justify the Tribunal declining Dr C's application. Specifically the CAC submits:

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

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

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

Principles Applicable to Name Suppression Applications

23. 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".*

24. 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.

25. 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:

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

25.2 The public interest.

Public Interest

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

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

26.2 Accountability and transparency of the disciplinary process;

26.3 The importance of freedom of speech and the right enshrined in section 14 New Zealand Bill of Rights Act 1990[2];

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

27. Each of these considerations will now be examined by reference to Dr C'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 CAC.

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

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

28.1 In *M v Police*[3] 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."*

28.2 In *R v Liddell*[4] 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' ."*

28.3 In *Lewis v Wilson & Horton Limited*[5] the Court of Appeal reaffirmed what it had said in *R v Liddell*. The Court noted:

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2 "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".

3 (1991) CRNZ 14

4 [1995] 1 NZLR 538

5 [2000] 3 NZLR 546

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

28.4 In *Re X*[6] 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*[7] and *Home Office v Harman*[8] where Lords Shaw and Diplock explained the rationale for openness in civil proceedings.

29. The Tribunal appreciates it is neither a criminal nor civil court. However, as Frater J noted in *Director of Proceedings v I*[9]:

> *"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.'*

30. 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*[10] illustrates this point (see also *F v Medical Practitioners Disciplinary Tribunal*[11] and *S v Wellington District Law Society*[12]).

31. 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.

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6 [2002] NZAR 938

7 [1913] AC 47

8 [1982] 1 All ER532

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

10 [1999] 3 NZLR 360

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

12 [2001] NZAR 465

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

32. In this case the Tribunal appreciates Dr C does not propose to practise medicine on a permanent basis in New Zealand. The Tribunal understands Dr C will only practise on a locum basis pending his obtaining a suitable position overseas. Nevertheless, Dr C will on occasions practise in New Zealand and those who wish to consult him are entitled to know of the Tribunal's findings concerning Dr C's methods of communication.

Accountability and Transparency of the Disciplinary Process

33. 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.

34. 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.[13]

35. 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 C's application. This point was noted by Laurenson J in *F v Medical Practitioners Disciplinary Tribunal*[14] 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.

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

14 Supra

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

36. 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.[15]

37. The Tribunal does not know if any media propose publishing its findings in relation to Dr C. 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 C 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 C's name.

Unfairly Impugning Other Doctors

38. A further factor, in the public interest which Dr C has not addressed is the concern that other doctors may be unfairly impugned if Dr C'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.

Doctor C's Interests

39. Doctor C's personal interests can be distilled to two headings, namely:

    39.1 His professional reputation;

    39.2 The stress caused by having his application declined.

Doctor C's Professional Reputation

40. 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.[16]

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

16 Refer *Director of Proceedings v I,* supra

41. The Tribunal is aware Dr C graduated (**not for publication**). He was registered as a xx in New Zealand for 21 years and has been endeavouring to find a suitable position overseas since closing his xx practice in xx early in xx.

42. 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 finding. In this case the Tribunal has concluded Dr C made a serious error which justified disciplinary consequences, albeit at the lower end of the scale of penalties available to the Tribunal. The Tribunal is confident that the experiences of this case has had an indelible impact upon Dr C and that he is highly unlikely to err in the same way again.

43. Nevertheless, the Tribunal believes the risk of damage to Dr C's reputation is, in the circumstances of this case, unlikely to be significant, and that, the risk which might exist is not disproportionate to the seriousness of his errors and shortcomings.

Stress caused to Doctor C if his application is declined

44. The Tribunal has not received evidence to suggest that declining Dr C's application will affect his health. The Tribunal has been told that if Dr C's name is published this will add further to the substantial stress he has already endured. The Tribunal accepts that submission but believes that in the absence of further evidence, stress in itself is not a persuasive factor in this case.

Nature of Dr C's Error

45. Counsel for Dr C has emphasised that the Tribunal made no finding to suggest Dr C's clinical standards were in question. The issue in this case has focused upon Dr C's style of communicating with his patient. The Tribunal accepts that there was no evidence to suggest that Dr C's clinical management of his patient was open to question. On the contrary, all of the evidence before the Tribunal suggested Dr C's clinical management of the complainant was of a high standard. Nevertheless, communicating with a patient is an essential aspect of a doctor's discharge of their professional responsibilities. A doctor who fails to communicate in an appropriate fashion with a patient is failing to adhere to the basic standards expected of a practitioner in this country. The fact that Dr C's clinical standards have not been questioned is not in itself a factor which justifies the granting of his application.

Complainant's circumstances

46. Counsel for Dr C suggested publication of Dr C's name might inadvertently result in the complainant being identified. This submission was based in part upon the suggestion that in an earlier decision of the MPDT, posted on its website, the complainant was named. It was suggested that if Dr C's application for permanent name suppression were declined then, a link might be made between the Tribunal's decision and its earlier decision previously posted on its website. The Tribunal believes the likelihood of the complainant being identified in this way is very remote and that this is not a persuasive factor which would justify granting Dr C's application.

47. In weighing the competing public interest considerations against Dr C's interests the Tribunal has concluded Dr C's application for permanent name suppression should be declined. The Tribunal believes there is not significant risk of harm being caused to either Dr C's reputation or his health if his name should be linked in a public way with the Tribunal's findings.

Complainant's application for name suppression

48. Section 106(2) requires the Tribunal to be satisfied that it is desirable to prohibit publication of a complainant's name after having regard to the public interest, the unlimited interests of a complainant to privacy, and the interests of any other person.

49. In addition to the emphasis contained in s.106(2) to respecting the privacy of the complainant, the Tribunal must also have regard to the special provisions of s.107.

50. Section 107 provides:

> *"**107. Special protections for complainants** - (1) This section applies in respect of any hearing of the Tribunal on a charge laid under section 102 of this Act, where the charge relates to or involves –*
>
> *(a) Any matters of a sexual nature; or*
>
> *(b) Any matter that may require or result in the complainant giving evidence of matters of an intimate or distressing nature.*
>
> *(2) Without limiting section 106(2) of this Act, where this section applies in respect of any hearing of the Tribunal –*
>
> *(a) Before the complainant begins to give oral evidence, the presiding officer shall –*

(i) Advise the complainant of the complainant's right to give his or her oral evidence in private; and

(ii) Ascertain whether or not the complainant wishes to exercise that right; and

(b) If the complainant wishes to exercise that right, the presiding officer shall –

(i) Ensure that no person other than one referred to in paragraph (c) of this subsection is present in the room in which the hearing is being held; and

(ii) Advise the complainant of the complainant's right to request the presence of any person under paragraph (c)(iii) of this subsection; and

(iii) Advise the medical practitioner to whom the charge being heard relates of his or her right to request the presence of any person under paragraph (c)(ix) of this subsection; and

(c) If the complainant chooses to exercise the right to give his or her oral evidence in private, then, while the complainant is giving oral evidence at the hearing, no person shall be present in the room in which the hearing is being held except the following:

(i) The members of the Tribunal;

(ii) The medical practitioner to whom the charge being heard relates;

(iii) The person who is prosecuting the charge;

(iv) Any barrister or solicitor engaged in the proceedings;

(v) Any officer of the Tribunal;

(vi) Any person who is for the time being responsible for recording the proceedings;

(vii) Any accredited news media reporter;

(viii) Any person whose presence is requested by the complainant;

(ix) Any person whose presence is requested by the medical practitioner to whom the charge being heard relates, unless the complainant objects to that person being present;

(x) Any person expressly permitted by the Tribunal to be present.

(3) Without limiting section 106(2) of this Act, where this section applies in respect of any hearing of the Tribunal, the Tribunal may, if it is of the opinion that the interests of the complainant so require, make an order under section 106(2)(b) of this Act forbidding publication of any report or account giving details of any acts alleged to have been performed on the complainant or of any acts that the complainant is alleged to have been compelled or induced to perform or to consent to or acquiesce in."

51. When the Tribunal granted the complainant name suppression it did so knowing he was going to be giving evidence in relation to matters of an intimate or distressing nature and that he was therefore entitled to the benefit of the special protections set out in s.107. As it transpired, no one was present at the hearing other than those identified in s.107(2)(c) of the Act.

52. Section 107 does not limit s.106(2). However, it is apparent that when s.107 is read in conjunction with s.106(2) Parliament intended the Tribunal to have special regard to a complainant's request for privacy, particularly in cases where complainants give evidence of a sexual, intimate or distressing nature.

53. The Tribunal evaluated the following public interest considerations when assessing the application made by the CAC:

53.1 The public interest in knowing the name of a complainant who has made an allegation against a doctor;

53.2 Accountability and transparency of the disciplinary process;

53.3 The importance of freedom of speech and the right enshrined in s.40 New Zealand Bill of Rights Act 1990.

54 After weighing the public interest factors identified in paragraph 32 against the interests of the complainant to privacy, the Tribunal unanimously concluded that the complainant's request for privacy must be respected. Accordingly, the Tribunal ordered that nothing be published which named or otherwise identified the complainant.

Conclusions

55 Doctor C will be:

55.1 Censured;

55.2 Ordered to pay costs in the sum of $18,921.43.

56 Doctor C's application for permanent name suppression is declined.

DATED at Wellington the 1st day of October 2004

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Dr D B Collins QC
Chair
Medical Practitioners Disciplinary Tribunal