New Zealand Health Practitioners Disciplinary Tribunal

Suite 317, 3rd Floor, Harbour City Tower
PO Box 10-781, Wellington, New Zealand
Telephone: 64 4 499 0431 Facsimile: 64 4 499 0662
Email: dathlaw@paradise.net.nz
Website: www.hpdt.org.nz

DECISION NO: **26/Den05/05D**

IN THE MATTER of the Health Practitioners Competence Assurance Act 2003

-AND-

IN THE MATTER of a charge laid by the Director of Proceedings pursuant to Section 91(1)(a) of the Health Practitioners Competence Assurance Act 2003 against **DR D**, Registered Dentist of

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Dr D B Collins QC (Chairperson)

Dr C Lloyd, Dr H Trengrove, Dr W Hawke and Ms W Davis, (Members)

Executive Officer: Ms S D'Ath (Executive Officer)

HEARING: Held by way of telephone conference on 9 December 2005

Introduction

1 This decision explains the Tribunal's reasons for the penalties it imposes on Dr D, and its reasons why a majority of the Tribunal have decided that Dr D's application for permanent name suppression should be declined.

2 The Tribunal's substantive decision was delivered on 13 October 2005. In that decision the Tribunal sought written submissions from counsel for both parties on penalty and Dr D's application for permanent name suppression. There were unavoidable delays incurred in the Tribunal receiving those submissions. The Tribunal was not able to reconvene to consider counsels' submissions until 9 December. Neither counsel wished to make any oral submissions to the Tribunal on 9 December.

Penalty

3 The Tribunal has carefully considered all of the penalty options available under s.101(1) Health Practitioners Competence Assurance Act 2003 ("the Act").

4 The factors which have influenced the Tribunal in determining the appropriate penalties in this case are:

4.1 Doctor D has not previously been the subject of any disciplinary action. He is 58 years old and has practiced dentistry for 34 years. Doctor D is entitled to considerable credit for having not previously been the subject of any disciplinary action.

4.2 Doctor D has been found guilty of professional misconduct. However, the findings made by the Tribunal are at the lower end of the spectrum of culpability.

4.3 Doctor D is a conscientious dentist. He has undertaken extensive continuing education programmes and is a member of ten dentistry societies and organizations in New Zealand and overseas.

4.4 The disciplinary process has in itself been a salutary lesson for Dr D. He is unlikely to ever appear before the Tribunal again.

4.5 The events in question occurred in 2002 and early 2003. Both Dr D and the complainant have had to wait a considerable time whilst the complaint was investigated and prosecuted before the Tribunal. The stress of waiting has, in this case, been a punishment for Dr D and an unfortunate burden for the complainant and her husband.

4.6 Doctor D has assured the Tribunal he will no longer practice "in the field of complex implant work" and that he will confine his implant work to the preparation and placement of prosthetics for implants.

4.7 The Director of Proceedings succeeded in establishing professional misconduct in relation to two out of the five particulars of the charge that were considered by the Tribunal (a further particular was withdrawn by the Director of Proceedings).

4.8 The costs incurred by the Director of Proceedings and the Tribunal in preparing for and conducting the three day hearing were substantial.

4.8.1 The costs incurred by the Director of Proceedings were $43,538.21;

4.8.2 The costs incurred by the Tribunal were $29,473.33.

5 After balancing these factors, and considering the submissions made by both parties the Tribunal has determined:

5.1 Doctor D should be censured. This order is made pursuant to s.101(d) of the Act;

5.2 Doctor D should pay costs comprising:

5.2.1 30% of the costs incurred by the Director of Proceedings ($13,061.63)

5.2.2	30% of the costs incurred by the Tribunal	($8,841.99)
	Total	$21,903.62

This order is made pursuant to s100(1)(f)(iii) and (iv) of the Act.

6 The order for costs reflects:

6.1 The Tribunal's understanding of Dr D's ability to meet an award for costs;

6.2 The fact Dr D has been found guilty in respect of just two out of five particulars of the charge considered by the Tribunal;

6.3 The need to balance Dr D's interests against the profession as a whole. It is the profession as a whole which ultimately bears the costs of the Tribunal [1];

6.4 The Tribunal's assessment of the overall reasonableness of Dr D paying $21,903.62 in the circumstances of this case.

7 The Tribunal has recorded Dr D's undertaking to restrict his practice in relation to implant surgery in paragraph 4.6 of this decision. If that undertaking had not been given the Tribunal would have placed conditions on Dr D's ability to practice which would have reflected the terms of his undertaking to the Tribunal.

8 The Executive Officer will publish a summary of this decision in the Dental Council newsletter. This order is made pursuant to s.157(2) of the Act.

Name Suppression

9 Doctor D was granted interim name suppression pending the determination of the charge. The Tribunal's reasons for granting Dr D interim name suppression are set out in Decision No.6Den/05/05D, dated 4 April 2005.

10 Mr Waalkens submitted the Tribunal should take the unusual course of granting Dr D permanent name suppression, even though he has been found guilty of professional misconduct. Mr Waalkens' submission was primarily based on the following propositions:

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[1] refer *Vasan v Medical Council of New Zealand*, HC Wellington AP43/91 18 December 1991, Jeffries J

10.1 Doctor D's offending was at the lower end of the scale;

10.2 Doctor D has undertaken not to practice in the field of complex implant surgery. He is therefore no longer likely to pose a risk to his patients.

11 The Director of Proceedings has strenuously opposed Dr D's application for permanent name suppression on the grounds that public interest considerations outweigh Dr D's personal concerns.

Relevant Legislation

12 The Tribunal explained in its interim name suppression decision the relevant legislation. As stated in the Tribunal's earlier decision, the starting point when considering applications for name suppression by health professionals is s.95(1) and (2) of the HPCA Act, which substantially replicates s.106(1) and (2) of the Medical Practitioners Act 1995. Subsections 95(1) and (2) of the HPCA Act provide:

> *"(1) Every hearing of the Tribunal must be held in public unless the Tribunal orders otherwise under this section …*
>
> *(2) If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make 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".*

13 Whereas s.95(1) of the HPCA Act contains a presumption that the Tribunal's hearings shall be held in public, there is no presumption in s.95(2) of the Act. Where 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 <u>desirable</u> to prohibit publication of the name of the applicant after considering:

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

13.2 The public interest.

Permanent Name Suppression

14 Whilst there is no presumption for or against granting name suppression in s95(2)(d) of the Act, the reality is different considerations apply once a practitioner has been found guilty of a disciplinary offence. Once a practitioner has been found guilty by the Tribunal the likelihood of name suppression being granted is reduced. The reasons for this are self evident:

14.1 Adverse publicity may be a penalty in itself. The Tribunal may in appropriate cases be willing to avoid adverse publicity being unreasonably imposed upon a health practitioner before the charge has been heard and established;

14.2 Once a health practitioner has been found guilty of a disciplinary offence the Tribunal is less likely to be influenced by concerns the practitioner may be unfairly punished by adverse publicity.

Public Interest

15 The following public interest considerations have been evaluated by the Tribunal when considering Dr D's application:

15.1 Openness and transparency of the disciplinary process;

15.2 Accountability of the disciplinary process;

15.3 The public interest in knowing the name of a doctor charged with a disciplinary offence;

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

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

15.5 The extent to which other dentists may be unfairly impugned if Dr D's application is granted.

Openness and Transparency of Disciplinary Proceedings

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

16.1 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".*

16.2 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 …."*

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

> *"…the starting point must always be …the importance of open judicial proceedings …."*

17 To these leading 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.

18 The Tribunal appreciates it is neither a criminal nor a civil Court. However, as Frater J noted in *Director of Proceedings v I*[8] when explaining the scope of s.106 of the Medical Practitioners Act 1995:

> *"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."*

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3 (1991) CRNZ 14
4 [1995] 1 NZLR 538
5 [2003] 3 NZLR 546
6 [1913] AC 47
7 [1982] 1 All ER 532
8 [2004] NZAR 635

Accountability of the Disciplinary Process

19 Closely aligned to the concept of openness and transparency is the need to ensure that the disciplinary process is accountable and that members of the public and profession can have confidence in its processes. This point was noted by Baragwanath J in *Director of Proceedings v Nursing Council* [9] where His Honour drew upon the writings of Jeremy Bentham and Viscount Haldane in *Scott v Scott* to illustrate the importance of accountability in professional disciplinary proceedings.

Public Interest in Knowing the Identity of a Dentist Charged With a Disciplinary Offence

20 There is a well recognised public interest in members of the public, as well as other members of the profession knowing the identity of a health professional charged with a disciplinary offence. The interest lies in providing members of the public and other members of the profession with information which may influence their decision to consult with the person who is the subject of the charge.

21 The public interest in knowing the identity of a health professional who is the subject of a disciplinary finding was referred to in *Director of Proceedings v Nursing Council* under the heading of "Education and alerting the community to risk". It was also a factor referred to in *F v Medical Practitioners Disciplinary Tribunal*[10] where the Court, relying on *S v Wellington District Law Society*[11] noted:

> *"(a) The public interest is the interest of the public, including members of the profession, who have a right to know about proceedings affecting a practitioner …*
>
> *(c) In considering the public interest the Tribunal is required to consider the extent to which publication of the proceedings would provide some degree of protection to the public or the profession …".*

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[9] [1999] 3 NZLR 360
[10] Unreported HC Auckland, AP21-SW01-5 December 01, Laurenson J
[11] [2001] NZAR 465

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

22 The public interest in preserving freedom of speech and allowing the media "as surrogates of the public" to report Tribunal proceedings has been approved on a number of occasions by appellate Courts[12].

23 The Tribunal does not know if the media proposes reporting anything about the findings made against Dr D. If the media wish to publish reports about the Tribunal's proceedings and identify Dr D then clearly the importance of freedom of speech enshrined in s.14 New Zealand Bill of Rights Act 1990 is a factor which weighs against Dr D's application.

Unfairly Impugning Other Dentists

24 A further factor in the public interest is the concern that other dentists may be unfairly impugned if Dr D'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 profession.

Decision

Reasons for the Majority of the Tribunal

25 In this particular case, Dr Trengrove, Dr Lloyd and Ms Davis have determined that Dr D's application for permanent name suppression should be declined. Their reasons for reaching this conclusion can be summarized as being:

25.1 The public interest factors identified in paragraphs 16-24 of this decision substantially outweigh the interests of Dr D and his immediate family. In particular the majority of the Tribunal have determined:

- The need for openness and transparency in the disciplinary process;
- The need for the disciplinary process to be seen as accountable;

[12] See for example, *Liddell* and *Lewis* (supra)

- The public interest in knowing the identity of a health practitioner found guilty of professional misconduct

outweigh the interests of Dr D as set out in his counsel's written submissions.

25.2 The majority of the Tribunal are particularly concerned that Dr D's failure to properly inform his patient of the risks of the treatment he was undertaking placed the health and safety of his patient at risk. The majority of the Tribunal refer to s3(1) of the Act and identify protecting the health and safety of members of the public as being a significant role of the Tribunal. The majority of the Tribunal have determined that declining Dr D's application will help ensure members of the public have an opportunity to know Dr D should not undertake complex implant work. They reason that if Dr D's application is granted members of the public will not know Dr D should not undertake complex implant work. This lack of knowledge may unreasonably compromise the health and safety of Dr D's patients.

25.3 Doctor D has been found guilty of professional misconduct. Declining Dr D's application for permanent name suppression is viewed by the majority of the Tribunal as part of the broader penalties Dr D should accept in this case.

Reasons of the Minority of the Tribunal

26 Doctor Hawke and the Chairman have concluded that in this case it is desirable to grant Dr D's application . Doctor Hawke is very satisfied that Dr D's personal interests and the interests of his family substantially outweigh the public interest in this case. In particular, Dr Hawke has been influenced by the fact that Dr D is in the twilight of his career. He has not previously appeared before a disciplinary body.

27 The Chairman and Dr Hawke have both been influenced by the following points:

27.1 Doctor D's offending was at the lower end of the scale of culpability. Adverse publicity would, in these circumstances, be a form of punishment that is disproportionate to Dr D's level of offending;

27.2 The Tribunal has unanimously accepted Dr D's undertaking not to perform complex implant work in the future. Having accepted this undertaking, the minority reason there is no ongoing risk to members of the public being exposed to the possibility of Dr D undertaking work that he is not qualified to perform.

28 This case highlights the difficulties which the Tribunal frequently encounters when considering applications for name suppression by health practitioners. All members of the Tribunal have very conscientiously reflected on the submissions made by both parties and none have found it easy to determine the outcome of the application. The chairman in particular records that he has found in favour of Dr D's application by the narrowest of margins.

Conclusion

29 Doctor D's application for permanent name suppression is declined. However, as it is possible Dr D may wish to appeal the decision of the majority of the Tribunal, the Tribunal's decision declining Dr D's application for name suppression will not take effect until 25 January 2006.

DATED at Wellington this 20th day of December 2005.

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D B Collins QC
Chairman
Health Practitioners Disciplinary Tribunal