



New Zealand
Health Practitioners
Disciplinary Tribunal

DECISION NO: 6/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 against
DR D, Registered Dentist of

BEFORE THE HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

TRIBUNAL: Dr D B Collins QC (Chair)

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

Ms S D' Ath (Executive Officer)

Hearing held: by way of telephone conference on 18 March 2005

APPEARANCES: Mr J Tamm for the Director of Proceedings .
Mr H Waalkens QC for Dr D.

Introduction

- 1 Dr D is a dentist who practises in..... The Director of Proceedings has laid a charge against Dr D with the Tribunal. The charge has been laid pursuant to s.91(1) Health Practitioners Competence Assurance Act 2003 (“HPCA Act”).
- 2 The charge against Dr D alleges that between 10 May 2002 and 14 February 2003 Dr D mismanaged dental services he provided to a patient. The particulars of the charge can be summarised as alleging Dr D:
 - (a) Failed to undertake appropriate planning for the placement of implants in his patient;
 - (b) Failed to properly warn his patient about unfavourable long term results of using “ball attachments instead of bar attachments” to support an over denture in his patient’s upper jaw;
 - (c) Failed to correct an implant;
 - (d) Placed an implant fixture in his patient when no matching prosthetic component was available;
 - (e) Failed to keep adequate records of the history of his treatment of and contact with his patient.

3 The charge alleged Dr D's conduct amounted to professional misconduct as defined in s.100(1) of the HPCA Act.¹

4 The charge was set down for hearing on 18, 19 and 20 April. However the Tribunal has since learned the complainant is undergoing chemotherapy and will, understandably, not be available on the dates initially allocated to hear this case. The hearing will now proceed on 4, 5 and 6 July 2005.

5 Dr D has applied for orders suppressing publication of his name and identifying features pending the Tribunal determining the charge laid against him.

Basis of Application

6 Doctor D's application for interim name suppression is based on the submission that his interests and those of his family outweigh public interest considerations and that it is accordingly desirable he be granted interim name suppression pending determination of the charge against him.

7 Dr D has sworn an affidavit explaining he graduated in 1971 and has been in private practice as a general dentist since graduating. Doctor D practises by himself in anurban area.

8 In his affidavit Dr D explains that he has not appeared before any disciplinary body prior to the laying of this particular charge. Doctor D did have a complaint made about him in 2001, however, that matter was investigated but no charge resulted. Doctor D has explained there are no other complaints about him or any other matters relating to him that are under investigation.

9 Doctor D is very concerned that his hard earned reputation will be undermined if he is not granted interim name suppression pending determination of the charge.

¹ Professional misconduct is defined in s.100(1)(a) and (b) of the HPCA Act:

“(a) ... any act or omission that in the judgment of the Tribunal, amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner was registered at the time the conduct occurred; or

(b) ... any act or omission that, in the judgment of the Tribunal, has brought or was likely to bring discredit to the profession that the health practitioner practiced at the time the conduct occurred; ...”

- 10 Doctor D's wife works with him as his practice manager. Doctor D has explained he is very concerned that if his name is published in conjunction with the charge his wife will become upset and distressed. Doctor D had a similar concern about their five children.
- 11 Doctor D's main concern appears to be an apprehension that if his name is published in circumstances where only the allegations are known then he will be severely prejudiced and his reputation and practice will suffer undue hardship.

Basis of Opposition

- 12 The Director of Proceedings submits that public interest considerations outweigh the personal interests of Dr D and members of his family. The Director of Proceedings has referred to an analysis of public interest considerations set out in an earlier decision of the Tribunal² and suggests the following public interest considerations make it undesirable to grant Dr D's applications:
- (a) Openness and transparency of the disciplinary process;
 - (b) Accountability of the disciplinary process;
 - (c) The public interest in knowing the name of a dentist charged with a disciplinary offence;
 - (d) The importance of freedom of speech and the right enshrined in s.14 New Zealand Bill of Rights Act 1990;
 - (e) The extent to which other dentists may be unfairly impugned if Dr D's application is granted.

Relevant Legislation

- 13 In earlier decisions³ the Tribunal set out the relevant legislative provisions and an analysis of public interest considerations. Paragraphs 14 to 27 of this decision have been adopted from those earlier decisions.

² *Re A 2Med/04/01D*, 15 February 2005

³ *Re A (supra)*; *Re Aladdin 4/Den04/02D and 5/Den05/04D* March 2005;

14 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”.*

15. Subsection 95(1) of the HPCA Act emphasises the Tribunal’s hearings are to be held in public unless the Tribunal, in its discretion applies the powers conferred on the Tribunal by s.95(2) of the Act. Another exception to the presumption that the Tribunal’s hearings will be conducted in public can be found in s.97 which creates special protections for witnesses required to give evidence of a sexual, intimate or distressing nature.

16. 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 desirable to prohibit publication of the name of the applicant after considering:

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

(b) The public interest.

Public Interest

17. As foreshadowed by the Director of Proceedings' submissions the following public interest considerations have been evaluated by the Tribunal when considering Dr D's applications:
- (a) Openness and transparency of the disciplinary process;
 - (b) Accountability of the disciplinary process;
 - (c) The public interest in knowing the name of a doctor charged with a disciplinary offence;
 - (d) The importance of freedom of speech and the right enshrined in s.14 New Zealand Bill of Rights Act 1990⁴;
 - (e) The extent to which other dentists may be unfairly impugned if Dr D's application is granted.
18. Each of these considerations will now be examined by reference to Dr D'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 complainants have been subsumed into the public interest factors urged upon the Tribunal by the Director of Proceedings.

Openness and Transparency of Disciplinary Proceedings

19. The following cases illustrate the importance of openness in judicial proceedings:
- (a) In *M v Police*⁵ 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".
 - (b) In *R v Liddell*⁶ the Court of Appeal said:

⁴ "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".

⁵ (1991) CRNZ 14

⁶ [1995] 1 NZLR 538

“... the starting point must always be the importance in a democracy of ... open judicial proceedings”

(c) In *Lewis v Wilson & Horton Ltd*⁷ 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”

20. To these leading cases can be added *Scott v Scott*⁸ and *Home Office v Harman*⁹ where Lords Shaw and Diplock explained the rationale for openness in civil proceedings.

21. The Tribunal appreciates it is neither a criminal nor a civil Court. However, as Frater J noted in *Director of Proceedings v I*¹⁰ 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.”

Accountability of the Disciplinary Process

22. 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*¹¹ 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

23. 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

⁷ [2003] 3 NZLR 546

⁸ [1913] AC 47

⁹ [1982] 1 All ER 532

¹⁰ [2004] NZAR 635

¹¹ [1999] 3 NZLR 360

members of the profession with information which may influence their decision to consult with the person who is the subject of the charge.

24. The public interest in knowing the identity of a health professional who is the subject of a disciplinary charge 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*¹² where the Court, relying on *S v Wellington District Law Society*¹³ 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 ...”.*

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

25. 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 Courts¹⁴.
26. The Tribunal does not know if the media proposes reporting anything about the charges faced by 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

27. 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

¹² Unreported HC Auckland, AP21-SW01-5 December 01, Laurensen J

¹³ [2001] NZAR 465

¹⁴ See for example, *Liddell and Lewis* (supra)

occasions in Criminal Courts where Judges have declined name suppression to avoid suspicion falling on other members of the profession.

Decision

- 28. The Tribunal has carefully weighed Dr D's interests (including the interests of his wife and children) against the public interest considerations set out in this decision.
- 29. The Tribunal is satisfied there is a risk of harm to Dr D's reputation and his practice, and that his wife and children may suffer some stress if Dr D's application is declined.
- 30. The Tribunal is satisfied the personal interests of Dr D marginally outweigh public interest considerations in this case and that, it is therefore desirable to grant Dr D's application pending determination of the charge.
- 31. The Tribunal has been influenced in its decision by the fact the charge involves one case, and to date, nothing has been brought to the Tribunal's attention to suggest the profession and public should be concerned about Dr D's standards of practice.
- 32. Doctor D's circumstances are readily distinguishable from those of Dr Aladdin whose application for name suppression has been recently declined by the Tribunal. Doctor Aladdin was facing two charges before the Tribunal and a further charge before the Dentists Disciplinary Tribunal.
- 33. The Tribunal orders nothing be published which names or otherwise identifies Dr D until the Tribunal has determined the outcome of the charge, at which point, the Tribunal will again consider whether or not it is desirable to prohibit publication of Dr D's name and identifying features.

DATED at Wellington this 4th day of April 2005.

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D B Collins QC
Chair
Health Practitioners Disciplinary Tribunal