IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2006-485-761

IN THE MATTER OF	an appeal pursuant to Section 106(2)(d) of the Health Practitioners Competence Assurance Act 2003
BETWEEN	DAVID EDWARD LYALL ZIMMERMAN Appellant
AND	DIRECTOR OF PROCEEDINGS Respondent

Hearing: 30 March 2007

Appearances: A H Waalkens QC and A L Credin for Appellant
K P McDonald QC and J C Hughson for Respondent

Judgment: 29 May 2007

In accordance with r 540(4), I direct the Registrar to endorse this judgment with a delivery time of 3 pm on the 29th day of May 2007.

RESERVED JUDGMENT OF CLIFFORD J

Introduction

[1] This is an appeal under the Health Practitioners Competence Assurance Act 2003 ("the Act") against part of a decision of the Health Practitioners Disciplinary Tribunal ("the Tribunal") where, by a majority, the Tribunal declined to grant the appellant permanent suppression of his name and of any details that might identify him.

Background

[2] Dr Zimmerman was charged with a single disciplinary offence of professional misconduct containing various particulars. The particulars related to treatment undertaken by Dr Zimmerman in May and June of 2002 to insert three implants into the upper jaw of a patient, towards the front of the mouth, to assist in keeping a denture in place. The implants all had attachments which were designed to clip into a denture. The procedure was not successful. After two further operations, Dr Zimmerman's patient was seen by an oral and maxilliofacial surgeon, who inserted four new implants. The patient was then treated by a second dentist, who completed the treatment planned by inserting a bridge.

[3] By the time the Tribunal considered the charge in September 2005, it was reduced to four particulars:

a) Failing to carry out appropriate planning;

b) Failing to advise of the risks of the proposed treatment and thereby failing to obtain informed consent;

c) Embarking upon surgery for which he was not adequately experienced or qualified; and

d) Failing to keep appropriate records.

[4] In October 2005, Dr Zimmerman was found guilty of professional misconduct by a reference to the particulars of failing to obtain informed consent and failing to keep adequate records. Dr Zimmerman does not appeal against that finding.

[5] After a further hearing on penalty and name suppression in December 2005, the Tribunal ordered that Dr Zimmerman be censured, pay approximately $21,000 of costs, and that permanent name suppression be declined.

[6] It is against the Tribunal's decision to decline permanent name suppression that Dr Zimmerman now appeals.

The decision under appeal

[7] In its decision on questions of penalty and name suppression, made on 20 December 2005, the Tribunal recorded that Dr Zimmerman had been found guilty of professional misconduct, but that the findings made by the Tribunal were at the lower end of the spectrum of culpability. In doing so, it noted that Dr Zimmerman was a conscientious dentist, that he had undertaken extensive continuing education programmes, that the disciplinary process had in itself been a salutary lesson for Dr Zimmerman, and that he was unlikely to ever appear before the Tribunal again.

[8] It also noted that, the events in question having occurred in 2002 and 2003, the stress of waiting for the Tribunal to consider his case had been a punishment for Dr Zimmerman. Further, Dr Zimmerman had assured the Tribunal that he would no longer practise in the field of complex implant work, and that he would confine his implant work to the preparation and placement of prosthetics for implants. The Tribunal recorded that if the undertaking had not been given, the Tribunal would have placed conditions on Dr Zimmerman's ability to practise which would have reflected the terms of his undertaking to the Tribunal.

[9] On name suppression, the Tribunal noted that whereas s 95(1) of the Act created a presumption that Tribunal hearings were to be held in public, the question of suppression did not involve a presumption, but rather a decision requiring the Tribunal to consider whether, having had regard to the interests of any person (including the unlimited right of the complainant to privacy) and the public interest, it was desirable to prohibit publication.

[10] In considering the question of permanent name suppression, the Tribunal noted that once a practitioner had been found guilty of a disciplinary offence then, in contrast to questions of interim suppression, the Tribunal was less likely to be influenced by concerns that the practitioner may be unfairly punished by adverse publicity.

[11] The Tribunal considered a number of public interest considerations, namely:

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 of the New Zealand Bill of Rights Act 1990; and

e) The extent to which other dentists might be unfairly impugned if Dr Zimmerman's application for permanent suppression were granted.

[12] The Tribunal noted that openness in judicial proceedings was an important consideration. It referred to comments of Frater J in *Director of Proceedings v I* [2004] NZAR 635, where, in explaining the scope of s 106 of the Medical Practitioners Act 1995, Frater J had commented that a starting point to be followed in medical disciplinary proceedings was the principle of open justice.

[13] The Tribunal noted the importance of considerations relating to the accountability of the disciplinary process, and the public interest of knowing the identity of a dentist charged with a disciplinary offence, for questions relating to suppression. In this context, it referred to *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360, *F v Medical Practitioners Disciplinary Tribunal* HC AK AP 21-S40L 5 December 2001, Laurenson J, and *S v Wellington District Law Society* [2001] NZAR 465, as all recognising the public interest in members of the public knowing the identity of the health professional the subject of a disciplinary finding. It also referred to the press's right to report, and the concern that without the publication of Dr Zimmerman's name, other dentists may be unfairly impugned.

[14] In reaching its decision declining permanent name suppression, the majority of the Tribunal determined that the public interest factors substantially outweighed Dr Zimmerman's interests. The majority was particularly concerned that Dr

Zimmerman's failure to properly inform his patient of the risks of the treatment placed the health and safety of his patient at risk. The majority of the Tribunal referred to s 3(1) of the Act, and identified protecting the health and safety of members of the public as being a significant role of the Tribunal. The majority concluded that declining Dr Zimmerman's application would help ensure members of the public had an opportunity to know Dr Zimmerman should not undertake complex implant work. Unless his name was published, members of the public would not know he should not undertake such work, and that lack of knowledge might unreasonably compromise the health and safety of his patients. As he had been found guilty of professional misconduct, the refusal of his application for permanent name suppression was viewed by the majority as part of the broader penalties he should accept.

[15] The minority of the Tribunal, the Tribunal's chairman, Dr David Collins QC, and Dr Hawke, concluded that suppression was desirable. Dr Hawke was very satisfied that Dr Zimmerman's personal interests and those of his family outweighed the public interest in publication. Dr Zimmerman was in the twilight of his career and had never previously appeared. Dr Collins recorded that he had found in favour of suppression by the "narrowest of margins".

[16] Both Dr Collins and Dr Hawke were influenced by the fact that Dr Zimmerman's offending was at the lower end of the scale of culpability and that adverse publicity would, in those circumstances, be a form of punishment disproportionate to the level of offending. Further, the Tribunal had unanimously accepted Dr Zimmerman's undertaking not to perform complex implant work. Having accepted that undertaking, the minority did not consider there was any ongoing risk to members of the public being exposed to the possibility of Dr Zimmerman undertaking work that he was not qualified to perform.

[17] The Tribunal concluded as follows (para 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.

Submissions on appeal

[18] Although there was some difference in emphasis as regards these matters, counsel for both Dr Zimmerman and the Director were in general agreement on the approach to be taken by this Court in an appeal by way of rehearing such as this. The Court would only interfere with what was the exercise of a discretionary judgment on the part of the Tribunal if the Court found that:

a) The Tribunal erred in principle (for example, by applying the wrong legal test); or

b) The Tribunal took into account irrelevant considerations or ignored relevant ones; or

c) The Tribunal's decision was plainly wrong.

[19] In any consideration of the Tribunal's decision, it was accepted that although due regard was to be paid to the views of the Tribunal, this Court had an overarching supervisory responsibility in relation to disciplinary proceedings. It was also recognised that this Court should accord less weight to the views of the specialist tribunal in considering an appeal on name suppression than it would otherwise accord if the decision under appeal was one peculiarly within the expertise of the members of the Tribunal, such as a decision on a technical, dental or medical matter.

[20] If this Court were to reach any one of those conclusions, then the Court should consider the matter afresh, adopting the approach outlined by Lord Cooke in *Preiss v General Dental Council* [2001] 1 WLR 1926 (PC), as applied by Baragwanath J in *J v Director of Proceedings* HC AK CIV-2006-404-2188 17 October 2006.

[21] The recent decision of Gendall J in *Professional Conduct Committee v Martin* HC WN CIV-2006-485-1461 27 February 2007 was cited as a further example of that approach.

[22] With reference to that approach, Mr Waalkens' submission was that the Tribunal had got the matter wrong and could be seen to have done so particularly as regards the Tribunal's reason that declining Dr Zimmerman's application would help ensure members of the public had an opportunity to know that Dr Zimmerman should not undertake complex implant work. Given that the Tribunal had accepted Dr Zimmerman's undertaking not to carry out such work, and that in the absence of such an undertaking it would have imposed equivalent conditions, it was not logical, as a reason for declining suppression, to refer to the consideration that publication was necessary to ensure that members of the public knew that Dr Zimmerman should not undertake complex implant work. In those circumstances, that lack of knowledge could not unreasonably compromise the health and safety of Dr Zimmerman's patients, contrary to the conclusion to that effect reached by the majority of the Tribunal. This had been recognised by the minority, in its reasons.

[23] Mr Waalkens also submitted that, as regards the professional misconduct finding reached by the Tribunal, the purpose of drawing attention to the need to maintain appropriate professional standards in this area did not require publication of Dr Zimmerman's name. That purpose had already been achieved by the publication, without details of his name, of the facts of the case and the decision reached by the Tribunal.

[24] Further, Mr Waalkens argued that the Tribunal had been wrong in concluding that Dr Zimmerman should accept publication of his name as part of the "broader penalties" imposed on him, given that he had been found guilty of professional misconduct. Mr Waalkens' submission was that name publication was not a "penalty" and, accordingly, that the majority had also erred in this respect.

[25] On that basis, I was asked to reconsider the matter, particularly again having regard to the Tribunal's unanimous finding that Dr Zimmerman's conduct was at the lower end of the spectrum of culpability, to the undertaking he had given that had been accepted, and to the further evidence tendered by Dr Zimmerman by way of affidavit that I was invited to accept.

[26] In her submissions, Ms McDonald emphasised that the presumption in s 95(2) in favour of openness supported publication. She referred to the recent decision of *T v Director of Proceedings* HC CHCH CIV-2005-409-2244 21 February 2006, where Panckhurst J reasoned as follows (para 35):

> … Obviously, the section is to be read as a whole. Unlike the previous Medical Practitioners Act 1968, the present Act requires a public hearing of disciplinary charges, unless the Tribunal orders otherwise … The requirement of public hearing necessarily impacts in relation to ss(2) of the section. It empowers and enables the Tribunal to ameliorate the impact of a public hearing by making orders in terms of the sub-section where it is desirable to do so, including, of course, an order granting name suppression. The scheme of the section means, in my view, that the publication of names of persons involved in the hearing is the norm, unless the Tribunal decides it is desirable to order otherwise. Put another way, the starting point is one of openness and transparency, which might equally be termed a presumption in favour of publication.

[27] She said the essential test the Tribunal needed to consider was whether the private interests of Dr Zimmerman outweighed the public interest in publication. In this, she emphasised the consideration that the primary purpose of the disciplinary powers of the Tribunal was the protection of the public, a factor which was confirmed by s 3 of the Act, where it referred to the principal purpose of the Act as being to protect the health and safety of members of the public.

[28] She said that the Tribunal had properly understood and applied the correct legal approach. As regards the question of the undertaking, she said that suppression ran counter to the important public interest of the disciplinary process remaining open and transparent. Further, she supported the reason of the Tribunal that unless there was publication of Dr Zimmerman's name in connection with the conduct in this case, patients and potential patients would be denied a right to know about a matter which might have some bearing on their treatment. Further, and as regards Dr Zimmerman's additional affidavit evidence (to which she objected) that he intended to limit his practice to specialised areas of craniofacial pain, jaw and sleep disorders from May 2007, potential patients of his should still have the right to know about an adverse disciplinary finding that had been made against him in relation to the informed consent issues.

[29] She noted that, although the Tribunal in its penalty and suppression ruling acknowledged that Dr Zimmerman's misconduct was at the lower end of the spectrum of professional misconduct culpability, nevertheless the Tribunal had also concluded in its finding on that matter that Dr Zimmerman's records had been grossly inadequate, and well below the standards expected. Further, Dr Zimmerman's failure as regards obtaining informed consent was a serious omission. She pointed to the following extract from the Tribunal's substantive decision of 14 October 2005 (para 150):

> In this case Dr Zimmerman's records were so grossly inadequate a disciplinary sanction is required in order to maintain professional standards. It is unusual for a health practitioner to be sanctioned in a disciplinary forum because of the inadequacy of their records. However in this case, Dr Zimmerman has fallen so far below accepted standards the Tribunal believes it must record a disciplinary finding against Dr Zimmerman.

[30] More generally, she said that permanent suppression could have the effect of appearing to give a favoured position to a professional person in comparison to others who, in the civil courts, could not reasonably expect their name to be suppressed. Further, publication was necessary to avoid undermining the public confidence in the Tribunal and this Court by unnecessary appearances of secrecy. Dr Zimmerman's contention that damage would be caused to him and his new practice was speculative.

Discussion

[31] I acknowledge at once that it is difficult to avoid the conclusion that there was a flaw in the majority's logic, where they reasoned that granting Dr Zimmerman's application might unreasonably compromise the health and safety of his patients, because they would not know he should not undertake complex implant work. Given that Dr Zimmerman had undertaken not to carry out such work, and the Tribunal had accepted that undertaking, it is difficult to see how that lack of knowledge could compromise patient health and safety.

[32] Having said that, I do not think that logical slip rendered the Tribunal's decision wrong.

[33] The Tribunal had concluded that, if that undertaking had not been given, it would have placed conditions on Dr Zimmerman's ability to practise which would have reflected the terms of his undertaking. Therefore, the majority's conclusion that protection of the health and safety of members of the public was supported by publication, notwithstanding the undertaking, can be seen as an affirmation of the importance of providing to the public details of the outcome of disciplinary proceedings. That is, although the undertaking could protect the health and safety of the public from Dr Zimmerman being involved in work involving complex implants, that is not to say that the public did not have a general interest in knowing the outcome of the hearing against Dr Zimmerman. In other words, that Dr Zimmerman had undertaken not to carry out complex implant work did not take away from the fact that the Tribunal, in the absence of that assurance, would have imposed such conditions and that, further, the public were entitled to know that fact. If Dr Zimmerman's name were suppressed, they would not.

[34] I also do not think the Tribunal erred as regards the reference to publication being part of the "broader penalties" Dr Zimmerman should accept. I do not think that that reference reflects any misunderstanding by the Tribunal of the difference between penalties strictly so called under the Act, and the question of name suppression. That name publication involves a "penalty", in the sense of an undesirable outcome for a practitioner, goes without saying, and is no doubt very much part of the reasons for Dr Zimmerman's appeal.

[35] I note that Mr Waalkens himself had made a submission to that effect to the Tribunal, in its hearing on penalty and suppression. He had submitted that publication of one's name is for the dental professional probably the most harmful aspect of the disciplinary findings and that declinature to grant name suppression certainly had a significant penalty effect. Any decision to decline permanent suppression was, he submitted, in "the nature" of the penalty. Given that submission, which the comments of the Tribunal now complained about can be understood as being in response to, I do not see how those comments can be pointed to to say that the Tribunal erred in some material way.

[36] More broadly, in my view, the Tribunal showed that it understood and applied the correct legal test. The decisions of the majority reflect a balancing of the public interest factors and Dr Zimmerman's interests, as set out in Mr Waalkens' written submissions to the Tribunal on penalty. Those written submissions traversed a range of issues, including:

a) Dr Zimmerman was in the last few years of his practising career. Publication of his name would have an irreparable effect on him and his practice.

b) Publication would also badly affect his wife, with whom he works. They were both proud and very private persons. Dr Zimmerman was fearfully and deeply concerned at the adverse effects publicity would have on his practice.

c) Given the level of criticisms and findings adverse to Dr Zimmerman, they were not the type which required the public to know who he was. Rather, the public were entitled to know that the case had been dealt with and that the standards had been determined and set.

[37] Having considered those submissions, the majority concluded that the public interest in publication outweighed Dr Zimmerman's private interests in suppression. That is not a conclusion that, on the basis of the matters before the Tribunal, I find to be wrong in the relevant sense.

[38] I turn now to Dr Zimmerman's application to file additional affidavit evidence. As briefly noted above, that affidavit evidence was to the effect that he had made a decision to get out of general dentistry and intended to limit his work to the specialised areas of craniofacial pain, jaw and sleep disorders – work that would not involve implant dentistry. Further, to that end he had completed a number of courses, including obtaining the qualification of Fellowship of the American Academy of Craniofacial Pain. He was in the process of setting up a new practice dedicated to tempro-mandibula disorders and sleep dentistry. He would be closing his existing practice in May 2007, and had written to his patients advising them of

these developments. He was, he concluded, desperately concerned at the damage that would be caused to him and his new practice, as well as his existing general dentist practice, if name suppression with respect to this matter were not attained.

[39] As regards my decision as to whether or not to accept this new evidence, I was referred to the relevant High Court Rule, r 716, and the cases referred to in *McGechan* with respect to that rule.

[40] I have read and considered those cases, and have also carefully considered Dr Zimmerman's affidavit.

[41] I have considerable uncertainty as to whether I should accept Dr Zimmerman's further affidavit. In this I find myself at one with Doogue J in *TVNZ Ltd v Southland Fuel Injection Ltd*[1], referred to in *McGechan* at para HR716.02. There, Doogue J was on appeal considering a discretionary decision, the same position I find myself in. As a matter of simple logic, it is difficult to see how further evidence can properly affect the correctness or otherwise of a discretionary decision made without such evidence. This is, I think, the very issue referred to by Doogue J in that decision. I also note the general reluctance of Courts to accept further evidence on appeal, as instanced in the *Telecom*[2] and *Comalco*[3] decisions referred to by *McGechan*. I note further that the proposed additional evidence, in substance, addresses matters similar to those that were before the Tribunal, that is, matters relating to Dr Zimmerman's undertaking. The further evidence is of substantially the same nature as that undertaking, although I accept it takes it further as a matter of fact. It does not introduce, however, any further category of consideration.

[42] I have therefore decided that I will not grant Dr Zimmerman's application to adduce further evidence. In reaching that decision, I note that even if I had considered it appropriate to accept Dr Zimmerman's further evidence, it would not have altered my finding that the majority decision of the Tribunal should be upheld.

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1 HC Wellington AP298/94, 16 March 1998

2 *Telecom Corp of NZ Ltd v Commerce Commission* [1991] 2 NZLR 557; (1991) 3 PRNZ 259 (CA)

3 *Comalco NZ Ltd v TVNZ Ltd* (1996) 10 PRNZ 573; [1997] NZAR 97

I say that because, as already noted, the further evidence goes to a matter which had been considered by the Tribunal, namely, Dr Zimmerman's willingness to cease practice in the area of dentistry that gave rise to the disciplinary charges against him. I have considered the way in which that matter was dealt with by the Tribunal, and – if I had regarded it as formally admissible – would not have found anything in the affidavit to change that decision. Furthermore, I think it is also possible to see from the matters covered in Dr Zimmerman's affidavit that publication now may be less likely to have an adverse impact than would have been the case either if he had intended to continue practice in the implant area, or in more general dentistry.

[43] I note also that I have given consideration to the fact that this appeal has only now been heard, some five years after the events in question. I accept immediately that this is an undesirable delay, and that delay can be a relevant factor. However, I do not consider that that matter alters my finding as to whether or not the majority of the Tribunal erred in the decision it reached.

[44] I note finally that, following the hearing, and at my invitation, I was provided with a number of decisions of the High Court, District Court and various tribunals, where permanent suppression orders had been made, notwithstanding that a disciplinary charge had been upheld. I have reviewed those decisions, and in particular the extracts from them brought to my attention. As has often been said, each case is to be decided on its own facts and, whilst I found those decisions of interest, they did not affect the assessment of the Tribunal's decision that I have already set out in this judgment.

[45] I therefore dismiss the appeal.

[46] Costs will follow the event. If counsel are unable to agree on costs, they may make written application to me, any such application to be made by no later than 5 pm, Friday, 29 June 2007.

Clifford J

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