ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF APPELLANT

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-008248

UNDER	Section 106(2) of the Health Practitioners Competence Assurance Act 2003
IN THE MATTER OF	An appeal
BETWEEN	B Appellant
AND	PROFESSIONAL CONDUCT COMMITTEE Respondent

Hearing: 21 October 2009

Appearances: A H Waalkens QC and B Mills for Appellant
L van Dam for Respondent

Judgment: 6 November 2009 at 3:30 pm

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 6 November 2009 at 3:30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date………………………..

Solicitors: *Chapman Tripp, P O Box 2206, Auckland*
Fax: (09) 357-9099
Minter Ellison Rudd Watts, P O Box 2793, Wellington
Fax: (04) 498-5001 – L van Dam

Counsel: *A H Waalkens QC, P O Box 106215, Auckland*
Fax: (09) 377-5071

Introduction

[1] In its decision 12 November 2008 the Health Practitioners' Disciplinary Tribunal made findings of professional misconduct against the applicant, Mr B, a registered psychologist. The findings arose from aspects of his treatment of Ms S. The Tribunal ordered that Mr B's registration be suspended for 18 months and that if he resumed practice he was to practice for three years in accordance with strict conditions. He was ordered to pay costs of $10,000 and was censured. Mr B does not challenge any of those decisions. Mr B's appeal, a general appeal brought pursuant to s 109(2) Health Practitioners' Assurance Act 22003 (HPCAA) is against the Tribunal's refusal of his application for permanent non-publication of his name.

[2] In determining such an appeal the approach to be taken is that described in *Austin Nicholls & Co Inc v Stichting Lodestar*.[1] The appellant has the burden of showing that the first instance decision was wrong. However, the appellate court has the responsibility of making its own assessment of the merits:

> [16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment.

[3] Mr B says, in support of his appeal, that the Tribunal:

a) Misinterpreted the evidence regarding the effect of publication of Mr B's name on some of his former patients;

b) Failed to give adequate weight to the harm to Mr B's family in the event of publication of his name;

c) Failed to consider Mr B's own distress at all;

d) Gave undue weight to the public interest factors that might exist in this case;

[1] [2008] 2 NZLR 141 (SC)

e) Treated the case as one involving a rehabilitative approach which was incorrect because the appellant had ceased practice and did not intend to resume practice;

f) Failed to consider the proportionality of its refusal to suppress Mr B's name as part of the overall penalty;

g) Misunderstood the professional conduct committee's position as opposing permanent name suppression whereas the PCC did not, in fact, take that position.

Name suppression under the HPCAA

[4] In general the question of name suppression is approached by reference to the presumption of open justice described by the Court of Appeal in *R v Liddell*:[2]

> The starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings and the right of the media to report the matter fairly and accurately as "surrogates of the public".

[5] Displacement of the presumption of open justice is to be approached with care; in *Lewis v Wilson & Horton Limited*[3] Elias CJ identified as relevant factors whether the person had been acquitted or convicted, the seriousness of the offending, the adverse impact of publication on the rehabilitation of the person concerned, the public interest in knowing the character of the person seeking name suppression and the circumstances personal to the person, concluding that:

> The Judge must identify and weigh the interests, public and private, which are relevant in the particular case. It will be necessary to confront the principle of open justice and on what basis it should yield. And since the Judge is required…to apply the New Zealand Bill of Rights Act 1990 it will be necessary for the Judge to consider whether in the circumstances the order prohibiting publication…is a reasonable limitation upon the s 14 right to receive and impart information such as can be demonstrably justified in a free and democratic society (the test provided by s 5). Given the congruence of these important considerations, the balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting was to be overcome.

[2] [1995] 1 NZLR 538 AT 546 per Cooke P
[3] [2003] 3 NZLR 546

[6] However, under s 95(2) HPCAA the threshold for granting name suppression in disciplinary cases is a lower threshold, namely whether suppression is "desirable". Section 95 requires hearings before the Tribunal to be held in public (unless the Tribunal orders otherwise) but s 95(2) provides that:

> 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 (an application by any of the parties or on its own initiative) 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.

[7] Panckhurst J considered the threshold for name suppression under s 95(2) in *T v Director of Proceedings*[4], finding that it was unnecessary for there to be "compelling or exceptional circumstances" to justify the making of a permanent suppression order though observed that:

> [42] ...that said, I am of the view that following an adverse disciplinary finding more weighty factors are necessary before permanent suppression will be desirable. This, I think, follows from the protective nature of the jurisdiction. Once an adverse finding has been made, the probability must be that public interest considerations will require that the name of the practitioner be published in the preponderance of cases. Thus, the statutory test of what is "desirable" is necessarily flexible. Prior to the substantive hearing of the charges the balance in terms of what is desirable may incline in favour of the private interests of the practitioner. After the hearing, by which time the evidence is out and findings have been made, what is desirable may well be different, the more so where professional misconduct has been established...
>
> [43] But, of course, in exceptional circumstances the test is not to be applied on account of the adverse finding. That would be contrary to the statutory test. And, in any event, the desirability test is suitable in the post "conviction" environment for the reasons I have endeavoured to explain.

Did the Tribunal misinterpret the evidence regarding other former patients?

[8] Evidence was adduced from the current therapists of four former clients as to what impact publication of Mr B's name might have. The Tribunal referred to this evidence generally and summarised its effect at paragraph 145.1 of its decision:

---

[4] HC CHCH CIV-2005-409-002244 21 February 2006 Panckhurst J

> The view was expressed that those clients were still very vulnerable, and that publicising [Mr B’s] name could lead to a situation where the trust on which current relationships were built would be harmed.

[9] However, the Tribunal did not put substantial weight on that issue, concluding at paragraph 151.1 that:

> Reference has been made to the potential harm which could occur for former patients of [Mr B] who are still the subject of therapy. This is an important point, which the Tribunal has considered very carefully. But it is a point which must be seen in context. The Tribunal is satisfied that those clients can and should be managed by insightful and informed therapists. The point is entitled to weight, but in the end it is not determinative.

[10] Mr Waalkens QC, for Mr B, pointed out, first that the evidence of the four therapists had been accepted without challenge by either the PCC or the Tribunal itself. He further submitted that characterising the effect of the evidence as being that potential harm “could” occur in the event of publication of Mr B’s name seriously understated the effect of the evidence. I briefly review the evidence that was before the Tribunal.

[11] Dr Lightstone, a registered psychologist, deposed as to a former patient of Mr B whom she was currently treating. This patient had an “extremely complex condition”. Patients with this condition could, Dr Lightstone said, take years to get to the point of trusting a psychotherapist enough to confide at a level that created the opportunity for effective treatment and the patient had achieved this with Mr B. Dr Lightstone considered that the patient was able to trust her within a matter of a few months because of the previous work done by Mr B with the patient. But she considered that if Mr B’s name was to be published in the context of an investigation:

> ...it is likely that ‘transfer’ of trust that our relationship is built on will be shattered and years may need to be added to her already long treatment to compensate...publication of the respondent’s details would have an adverse effect on W’s therapeutic process. At the best this could lead to a longer recovery process; at the worst it could lead to a substantial regression in the progress she has made so far.

[12] Ms Janet Diamond, a registered counsellor, deposed as to a former patient of Mr B who is suffering from Complicated Post-Traumatic Stress as well as other psychological complications. Ms Diamond considers that her patient:

> ...continues to put into practice many of the strategies imparted by [Mr B] as well as still using the self-care strategies that he taught. My client verbalises frequently how significant this work was. His work helped her to see that she could change and that she could experience the world as a safe place. This change in her belief system has enabled an opportunity for the continuation of my work with this.
>
> The vulnerability of this client is still extremely high. I am concerned that if [Mr B's] name is made public it would shake F's confidence in her therapy with Mr B. This could seriously compromise all the therapeutic work to date, as well as contribute to her retraumatization and, or a disassociation process.

[13] Mr Bullen, a clinical psychologist, currently treats four former clients of Mr B. He said:

> [Mr B] formed strong and trusting relationships with all the clients. The therapeutic interventions he used with them were appropriate and scientifically based. All reported how they made significant progress with [Mr B]...I believe it would have a negative impact on his former clients were his name to be published as a result of the charges he is facing.

[14] Finally, Ms Bell, a psychotherapist, deposed as to a long term patient of hers suffering severe Post Traumatic Stress Disorder whom she said:

> ...is making slow but steady which is built on the work she did with [Mr B]. Patient X saw [Mr B] 15 years ago following a breakdown in which he was instrumental in assisting her through to being able to function at home again. X holds [Mr B] in high regard as having played an important role in her recovery...
>
> It is my professional opinion that the publication of [Mr B's] name would have a detrimental effect on X's progress. It could very well disturb the foundation of trust she has established within herself as a result of their work together. If this were to occur it would be serious as it would replicate aspects of the trail X experienced in her own history – which led to her difficulties.

[15] I agree that the Tribunal's view that the effect of the evidence was that former patients "could" suffer harm did not accurately reflect the evidence before it which, as can be seen from the portions of affidavits I have referred to, was to the effect that publication of Mr B's name "would" cause harm.

[16] Section 95(2) specifically requires the Tribunal to consider the interests of "any person" and in the present case the interests of these former patients should have been accorded significant weight. It is not to say that in every case the interests

of former patients will justify the same amount of weight being accorded them. But in the present case, the nature of the treatment that was given, the fact that these former patients are still being treated and are still highly vulnerable should, I consider, have been regarded as determinative in this case.

[17] I go on to consider the other issues raised by Mr B but, as will become apparent, none have sufficiently serious implications as the effect of publication on these former patients.

Did the Tribunal err in the weight it placed on the effect of publication on Mr B's family?

[18] Mr B produced to the Tribunal a letter from his family's general practitioner which confirmed, amongst other things, that Mr B has a teenage daughter (then 17) with a significant learning disability and that his then 25-year-old son had a malignant melanoma and had surgery shortly before the hearing. I enquired as to the current state of Mr B's son's health and Mr Waalkens told me that the prognosis of this form of melanoma was such that even after five years with no further symptoms following surgery the expected survival rate was only 25%

[19] The Tribunal referred to the evidence regarding Mr B's family but concluded that the impact on a practitioner's family of publication was

> ...a point that routinely arises in these cases and has to be balanced against the other factors identified.

[20] The Tribunal is of course right that publication of a practitioner's name almost always has an adverse impact on the practitioner's family and that this factor has to be balanced against other factors. However, in this particular case it appears from the evidence that this family is more vulnerable than most. In particular, at the time of the Tribunal's decision Mr B's son was facing major surgery for what could easily have been (and may yet prove to be) a terminal illness at a very young age. The stress of that circumstance would be extreme in any family and I consider that greater weight ought to have been placed on this factor.

Did the Tribunal fail to consider Mr B's distress?

[21] At paragraph 111.2.7 the Tribunal referred to a submission made by his counsel that he was obviously distressed. However this did not appear anywhere in the Tribunal's findings regarding name suppression. I agree that distress (and remorse) by a practitioner is a relevant factor and should have been taken into account. However, it is not a factor that would normally attract significant weight. There is no suggestion, for example, that Mr B's own health was at stake. As a result, although the Tribunal should have taken it into account I do not see it as a factor that would have altered the outcome.

Did the Tribunal give too much weight to public interest factors?

[22] The Tribunal identified the public interest factors that were to be taken into account, namely openness and transparency of disciplinary proceedings, accountability of the disciplinary process, the public interest in knowing the identity of a health practitioner charged with a disciplinary offence, importance of freedom of speech and the right recognised by s 14 New Zealand Bill of Rights Act 1990 and the risk of unfairly impugning other practitioners. In its discussion of the public interest factors the Tribunal found that there were strong public interest factors and that:

> ...there are significant adverse findings which had been made by the Tribunal. Normally, the view if taken that the public is entitled to know of these matters – whether or not those persons are clients of the practitioners involved. What is important is the right of the public to be fully and fairly informed.
>
> Whereas, until the Tribunal made its findings, the practitioner was entitled to the presumption of innocence, that position has now changed.
>
> A further relevant factor is that there are other health practitioners who could be unfairly impugned if the application were granted.

[23] Mr Waalkens submitted that in the present case the public interest factors identified did not warrant the weight accorded them. First, there was no strong need for the public to know Mr B's name. First, Mr B has ceased to practice as a psychologist. At the time of the hearing he had not practiced for thirteen months. He has made it plain to the Tribunal that he does not intend to go back on this

decision and has, in fact, asked that his name be removed from the register. This was not referred to by the Tribunal. This is not a case where the public's right to an informed choice in selecting a practitioner will be affected.

[24] Nor is it likely that suppression of Mr B's name will impugn other practitioners. Although this was referred to (and apparently given weight) by the Tribunal there does not, in fact, appear to have been any evidence to suggest that this risk existed. Mr B practiced as a registered psychologist in a large city centre. This is not a case where he practiced in a small community or where there were very few practitioners of a particular specialty. It is unlikely that suspicion will fall on other registered psychologists.

Did the Tribunal err in taking a rehabilitative approach?

[25] It is apparent from the discussion regarding non-publication of name and of aspects of the penalty that the Tribunal proceeded on the basis that a rehabilitative approach was appropriate. This was notwithstanding that Mr B's counsel had indicated Mr B's intention to withdraw from practice altogether.

[26] I do not think that the Tribunal necessarily erred in taking a rehabilitative approach; a practitioner may well indicate an intention but later changes that view. In setting down the conditions for practice the Tribunal has acknowledged Mr B's current intention by prefacing the conditions by saying that they would apply "if" Mr B chose to resume practice after the period of suspension.

Proportionality

[27] Mr Waalkens submitted that, taken together with the other aspects of the penalty, refusal of permanent name suppression was disproportionately harsh. He invited me to compare the present case with decisions such as *MacDonald v Professional Conduct Committee*[5] which involved excessive prescription of morphine by the doctor to a patient with whom she was in an intimate relationship. In that case the doctor was suspended for five months and required to contribute

$100,000 to the costs of the proceeding. In that case, though, the doctor's name was not suppressed (though details of her employer were).

[28] In the present case Mr B was suspended for 18 months. The costs award against him was $10,000, relatively modest, though the Tribunal did recognise that even this amount might cause hardship and invited Mr B to discuss payment over time. The finding of professional misconduct against Mr B was summarised by the Tribunal as being related t

> …the use of a controversial type of therapy, numerous boundary violations over a period of at least five years, and a failure to meet the obligations the practitioner had as to informed consent.

[29] The patient, Ms S, exhibited symptoms of post traumatic stress disorder and had a history of childhood sexual, physical and psychological abuse by her father. In addition to symptoms of PTSD Mr B diagnosed disassociative identity disorder (DID). Despite some setbacks Ms S did make good progress, this being recorded b y her GP in advice to the ACC. However, by 2006 Ms S had made a decision to end her therapy with Mr B. The main areas giving rise to the complaint against Mr B were issues as to boundaries between Mr B and Ms S. Mr B worked from home and there were several occasions when Ms S arrived to find him still in his dressing gown or having breakfast. Sometimes he took her with him to attend to personal errands. On one occasion when Ms S did not keep an appointment Mr B visited the house and climbed in through an open window to check that Ms S was alright.

[30] The other major aspect of the charges against Mr B related to a type of therapy he used known as "holding therapy" where Ms S would lie across Mr B's lap with her head on a pillow. This form of therapy contributed to Ms S's feelings of confusion at the prospect of ending therapy with Mr B.

[31] It is evident that this was very serious offending. It was offending of an entirely different type to *MacDonald*. But given the extreme vulnerability of the patient concerned and the use of unorthodox therapy without informed consent the Tribunal did not err in treating the matter seriously. However, I find the

---

[5] HC AK CIV-2009-404-001516 20 July 2009 Lang J

proportionality aspect rather unhelpful in resolving whether non-publication of the name is desirable or not. For the reasons connected with Mr B's personal situation and with the situation of his former patients I have already concluded that non-publication of the name is desirable. In the absence of those factors I would not have regarded the overall penalty as disproportionately harsh.

PCC opposition

[32] At paragraph 148 of its decision the Tribunal recorded a submission by counsel for the PCC as being that

> ...rehabilitation and privacy interests did not outweigh the open justice principles described above.

[33] This conveyed that the PCC had opposed the non-publication of Mr B's name. However, counsel for the PCC confirmed that before the Tribunal, as in this Court, it took a neutral position on that aspect and did no more than make submissions on the law for the assistance of the Tribunal. The Tribunal's perception of the PCC's position was therefore wrong.

Conclusion

[34] I am satisfied that there are compelling factors connected with the safety of Mr B's former patients and with the personal stress to Mr B and his family that clearly outweigh the public interest factors associated with the publication of a practitioner's name and make it desirable that his name not be published. I therefore make a permanent order for the non-publication of Mr B's name and all his identifying details.

[35] I was not addressed on the question of costs and counsel may, if they wish, address that issue by way of memoranda filed on behalf of the appellant within 14 days and on behalf of the PCC within 7 days thereafter.

P Courtney J