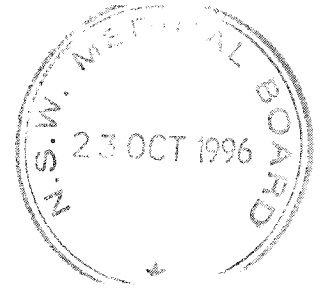


THE SUPREME COURT  
OF NEW SOUTH WALES  
COURT OF APPEAL



CA 40476/96

SHELLER J A

Friday, 13 September 1996

**TAYLOR v HEALTH CARE COMPLAINTS COMMISSION OF  
NEW SOUTH WALES**

**JUDGMENT**

**SHELLER JA:** On 20 August 1996 the claimant, Teresa Taylor, filed a notice of motion seeking, amongst other orders, that the time for filing a notice of appeal from a decision delivered on 21 June 1996 by the Medical Tribunal constituted under Part 11, Div 1 of the *Medical Practice Act 1992* (the 1992 Act) be extended. On the same day the claimant filed a notice of appeal in which the Health Care Complaints Commission of New South Wales (the Commission) is named as the respondent. The claimant seeks to bring her appeal pursuant to s90 of the 1992 Act. Subsection (2) provides that the appeal must be made within twenty-eight days (or such longer period as the Court may allow in a particular case) after the handing down of the decision. The application is supported by the claimant's affidavit sworn on 29 August 1996

which explains why there was delay in filing the notice of appeal and annexes two letters, one of 19 July 1996 from the claimant to the solicitor for the Commission, and the other of 16 August 1996 from the Deputy Commissioner of the Commission indicating that the Commission was of the opinion that no appeal could be made under s90 of the 1992 Act, that the appeal was incompetent and, accordingly, that the Commission did not consent to the appeal being filed out of time.

The application first came before me on 2 September 1996. The Commission indicated, through its legal representative, that it was prepared to agree to the matter proceeding as an appeal, reserving to itself the right to challenge the competency of the appeal in due course before the Court. The claimant, who had travelled from Brisbane for the hearing of her application, wished to argue the question of competency. Accordingly her application for an extension of time was stood over to 3 September 1996 when I heard argument and reserved my decision. During argument Ms Katzmann, who appeared for the Commission, sought and was granted leave to file a notice of motion for an order that the appeal be struck out as incompetent. The notice of motion was filed later on that day.

The point taken about the competency of the appeal depends on the language of s90 (1) of the 1992 Act which provides:

- (1) A person about whom a complaint is referred to the Tribunal, or the complainant, may appeal to the Supreme Court against:

- (a) a decision of the Tribunal with respect to a point of law;  
or
- (b) the exercise of any power by the Tribunal under Division 4 (Disciplinary powers of Committees and Tribunal) of Part 4."

Part 4 of the Act, as its heading indicates, concerns complaints about medical practitioners. Division 2 deals with the making of a complaint. Section 41 within that Division provides that any person may make a complaint and that a complaint can also be made by the New South Wales Medical Board constituted by the 1992 Act or the Director-General of the Department of Health. Section 42 provides that complaints are to be made to the Board or the Commission. The material before me does not enable me to state the way in which the complaint was initiated or processed but neither party attached significance to these matters. Suffice it to say that the Commission was the contradicting party on this application. Division 3 of Part 4 provides for the manner in which complaints are to be dealt with. Section 52 provides as follows:

- "(1) Both the Board and the Commission are under a duty to refer a complaint to the Tribunal if of the opinion that it may, if substantiated, provide grounds for the suspension or deregistration of a registered medical practitioner.
- (2) However, either the Board or the Commission may decide not to refer the complaint to the Tribunal if of the opinion that the allegations on which the complaint is founded (and on which any other pending complaint against the practitioner ~s founded) relates solely or principally to the physical or mental capacity of the practitioner to practise medicine.

- (3) If the Board decides not to refer the complaint to the Tribunal, the Board must instead refer the complaint to a Committee. If the Commission decides not to refer the complaint to the Tribunal, the Commission must instead refer the complaint to the Board."

In the present case the complaint was referred to a Committee.

Division 4 provides for the disciplinary powers of Committees and Tribunal. If a complaint is proved or admitted both the Committee and the Tribunal have various powers which are described in ss61 and 62. These do not include suspending a person from practising medicine for a specified period or deregistering a person. Section 63 (1) provides that a Committee may recommend that a person be suspended from practising medicine for a specified period or that a person be deregistered if the Committee is satisfied that the person does not have sufficient physical and mental capacity to practise medicine. Subsection (2) provides:

"(2) The Committee makes its recommendation by referring the matter with its recommendation to the Chairperson of the Tribunal or to a Deputy Chairperson nominated by the Chairperson."

Subsection (3) provides:

"(3) The Chairperson or Deputy Chairperson may then make an order in the terms, recommended or may make such order as to the suspension or registration of the person as the Chairperson or Deputy Chairperson thinks proper based on the findings of the Committee. "

Section 64 (1) enables the Tribunal by order to suspend a person from practising medicine for a specified period or direct that a person be deregistered

if the Tribunal is satisfied that the person is not competent to practise medicine or is guilty of professional misconduct.

In this case the Committee recommended that the claimant be deregistered, that is to say that her name be removed from the register of medical practitioners kept under the 1992 Act, and on 16 June 1995 Blanche J, as Chairperson of the Tribunal, made an order giving effect to this recommendation by removing her name from the register.

Part 6 of the 1992 Act is headed "Appeals and Review of Disciplinary Action" and Division 1 "Appeals against actions of a Committee". Pursuant to s87 the claimant appealed to the Tribunal against the Committee's finding. Section 87 provides, so far as presently material, as follows:

- "(1) A registered medical practitioner about whom a 'complaint is referred to a Committee, or the complainant, may appeal to the Tribunal against:
- (a) a finding of the Committee; or
  - (b) the exercise of any power by the Committee under Division 4 (Disciplinary' powers of Committees and Tribunal) of Part 4; or
  - (c) the exercise by the Chairperson or a Deputy Chairperson of the Tribunal of any power under that Division.
- (4) The appeal is to be dealt with by way of rehearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the inquiry, may be given.
- (5) The Tribunal may:

- (a) dismiss the appeal; or
  - (b) make any finding or exercise any power or combination of powers that the Tribunal could have made or exercised if the complaint had been originally referred to the Tribunal.
- (6) An appeal under this section does not affect any finding or exercise of power with respect to which it has been made under the Tribunal makes an order on the appeal."

Section 88 (1) provides that a registered medical practitioner about whom a complaint is "referred to a *Committee*" or the complainant may appeal with respect to a point of law to the Chairperson of the Tribunal or a Deputy Chairperson nominated by the Chairperson. Such an appeal relates to a matter before the Committee. It is not concerned with a hearing before the Tribunal.

Division 2 of Part 6, according to its heading, concerns appeals against actions of the Tribunal. Section 89 provides for what is called a preliminary appeal on point of law during an inquiry conducted by the Tribunal or before its commencement. I have set out the relevant part of s90. Section 91 provides for the powers of the Supreme Court on appeal.

The critical question is whether the claimant is, a person "about whom a complaint is referred to the Tribunal". She is clearly not the complainant. The Commission submits that a person about whom a complaint is referred to the Tribunal is a person a complaint about whom has been referred to the Tribunal pursuant to s52 (1) of the 1992 Act and not a person a complaint about whom

has been referred under s52 (2) and (3) to a Committee and who has then appealed to the Tribunal pursuant to s87. The scheme of the legislation is that a complaint which, if substantiated, is in the opinion of the Board or the Commission, serious enough to warrant suspension or deregistration, must be referred to the Tribunal with a right of appeal to the Supreme Court with respect to a point of law, or the exercise of any disciplinary power by the Tribunal, but if the allegations on which the complaint is founded relate solely or principally to the physical or mental capacity of the practitioner to practise medicine it may be referred to a Committee with a right of appeal to the Tribunal but not from the Tribunal to the Supreme Court with respect to a point of law, or the exercise of any disciplinary power by the Tribunal or otherwise.

The claimant pointed out that, in the case of allegations relating to the physical or mental capacity of a practitioner, the Board or the Commission decides whether the complaint is referred to the Tribunal or the Committee. Moreover the complainant appears, pursuant to s90 (1), to have an appeal to the Supreme Court with respect to a point of law or against the exercise of any disciplinary power by the Tribunal from a decision of the Tribunal hearing an appeal against a decision of a Committee. On its face this does not appear to be an equitable regime. If a Committee finds a complaint not made out, the complainant can appeal to the Tribunal, which deals with the matter by way of rehearing with, it may be, fresh evidence or additional evidence. If the Tribunal confirms that the complaint is not made out, the complainant has a

further appeal to the Supreme Court on a point of law. On the other hand, if the Tribunal finds the complaint is made out and exercises its power to suspend or deregister the medical practitioner, the medical practitioner has no appeal to the Supreme Court. Nevertheless, despite the best efforts of the claimant to persuade me otherwise, there could, I think, be no doubt that s90 (1) does not enable a person about whom a complaint is referred to a Committee and who then appeals against the decision of the Committee to the Tribunal, to appeal from the Tribunal's decision to the Supreme Court. Accordingly the claimant's appeal is incompetent and there is no point in making an order to extend the time for filing the notice of appeal.

Ms Katzmann referred me to the unreported decision of Handley JA of 26 July 1996 in *Rohatgi v Health Care Complaints Commission*. In that case the name of the medical practitioner had been removed from the register by order of the Medical Tribunal constituted under the *Medical Practitioners Act 1938* (the 1938 Act). Pursuant to s32V of the 1938 Act, the medical practitioner applied to the Tribunal for a review of the removal. On 22 June 1993, before the commencement of the 1992 Act, the Tribunal dismissed the application. In proceedings for prerogative relief the medical' practitioner succeeded <sup>iii</sup> obtaining an order in the nature of mandamus. On 29 February 1996 the Tribunal made an order subject to conditions that the medical practitioner be forthwith registered as a medical practitioner. . On 3 May 1996 the medical practitioner filed a notice of appeal. The Commission contended that there was

no right of appeal to the Supreme Court from a decision of the Tribunal on a review of an earlier order.

The orders made on 29 February 1996 pursuant to Sch 5 cl 11 (2) of the 1992 Act were deemed to have been made under the 1992 Act and to have effect accordingly. It was submitted that the medical practitioner was "a person about whom a complaint is referred to the Tribunal" because of the complaint made against him and dealt with by striking off in 1988. Handley JA remarked that in considering the question before him it had to be borne in mind that rights of appeal depend on statutory authority, there being no such thing as a right of appeal at common law. He also referred to s32U of the 1938 Act which enabled a person "about whom a complaint is referred to the Tribunal under ss31, 32 or 32H" or the complainant to appeal to the Supreme Court against a decision of the Tribunal with respect to a point of law or the exercise of any disciplinary power by the Tribunal. Those sections made plain the distinction between the rights of appeal in the case where a complaint was referred to a Committee and in the case where a complaint is referred to the Tribunal under the 1938 Act. That distinction has been brought forward into the 1992 Act.

In my opinion the claimant's notice of motion should be dismissed with costs. It follows from my reasons that on the Commission's notice of motion an order should be made that the appeal be dismissed as incompetent. In light of the late

filing of this application I do not propose to make any separate order for the costs of that notice of motion.

**ORDERS**

1. Dismiss the notice of motion of 20 August 1996 with costs;
2. On the notice of motion of 3 September 1996 dismiss the appeal No 40476/96 as incompetent with no order as to costs.

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