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**BEAUMONT v. BEESLEY(31) (1938) 60 C.L.R. 438.**

**Court of Appeal: Jacobs P., Reynolds and Hutley JJ.A.**

**Oct. 17-19; Nov. 16, 1973.**

*Medicine-Registered medical practitioner-Publisher, editor and author of magazine-Articles on medical, largely sexual, subjects-Photographs of nude women unrelated to text-Articles recommending as therapeutic commercial drug preparations advertised in magazine--Correspondence column-"Medical jokes" column- Complaint of infamous conduct in a professional respect-Principles applicable-Medical Practitioners Act, 1938, ss. 27, 28, 29 (1) (c) (4), (6).*

B. was born in 1937 and graduated from the University of Sydney in 1961 as a Bachelor of Medicine and Bachelor of Surgery. He was a resident medical officer in a hospital in 1962 and 1963, was posted to the Repatriation Medical Department in 1964 and entered private practice in 1965.

Since 1968 he was occupied principally with medical journalism of a popular kind. He wrote a medical column, at first for the Sun newspaper, later for the Daily Mirror newspaper, under the heading "The Doctor with a Twinkle in his Eye". This was later shortened to "The Doctor with the Twinkle" and then to "Dr. Twinkle". In July 1970 B. registered a company under the

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name of Dr. Twinkle Pty. Ltd. B. left the Daily Mirror in 1972 and, through his company, commenced publication of a magazine called the Dr. Twinkle Medical Journal. Volume 1, number 1 of this magazine was dated October/November 1972 and sold 5,005 copies. There was a photograph of B. on the front cover and another on the title page. In both photographs he was in a medical setting, indicated either by his dress or by the articles and books around him. The magazine was described on the title page as "a medical journal for the public that breaks all barriers between medicine and people". The proprietor and managing director was stated to be Dr. Twinkle. Correspondence was to be addressed to Dr. Twinkle at a post office box number. There was an editorial signed "Dr. Twinkle".

The body of the magazine comprised articles on medical subjects, largely of a sexual nature, a correspondence column, a section on medical jokes and a section called "Your Medical Horoscope for October 1972 by Dr. Strange". Interspersed throughout the text were photographs of nude women which bore no relation to the text. The jokes, the correspondence and the medical horoscope all were crude.

An officer of the Health Department laid before the medical disciplinary tribunal a complaint that B. was guilty of infamous conduct in a professional respect as follows: (1) that B. at all relevant times was a director and the manager of Dr. Twinkle Pty. Ltd.; (2) that the company published the magazine Dr. Twinkle Medical Journal under the editorship of B. who either wrote or was responsible for the magazine's contents; (3) that the magazine prominently contained B. 's photograph; (4) that the magazine debased and degraded the standing and reputation of the medical profession by concentrating on sexual matters and contained many photographs of naked women, not for any scientific or medical reason, but in order to boost circulation; (5) that the magazine indicated

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that the medical profession had no respect for human dignity or for its female patients; (6) that the magazine indicated that the medical profession was prepared to endorse commercial pharmaceutical and health products for reward; (7) that the magazine contained unprofessional advertising of B.; (8) that the articles in the magazine had the effect of endorsing commercial pharmaceutical and health products with the object of inducing members of the public to buy them; and (9) that these products were advertised in the magazine.

The tribunal found the complaint made out and ordered B. 's name to be removed from the register of medical practitioners. On appeal by way of rehearing,

Held: (1) (By Jacobs P. and Reynolds J.A., Hutley J.A. dissenting) The complaint that the appellant had been guilty of infamous conduct in a professional respect in that the magazine which he wrote and published contained unprofessional advertising of the appellant by the appellant had not been made out.

(By Jacobs P. and Hutley J.A.) (2) The high regard in which the medical profession is, and should be, held will be adversely affected not only where a medical practitioner falls short of proper standards in the actual practice of his profession, but also where, in a context associated with his profession, he behaves in a way which destroys or diminishes that regard.

*Marten v. Disciplinary Committee of the Royal College of Veterinary Surgeons* [1965] 1 All E.R. 949, at pp. 953, 954 applied. See also [1966] 1 Q.B. 1, at pp. 9, 10; [1965] 2 W.L.R. 1228, at pp. 1234, 1235.

(3) When a registered medical practitioner undertakes in a magazine article to meet the legitimate interest of the public in medical matters, and in particular sexual matters, he remains bound by the standards appropriate to

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the medical profession in the actual practise of medicine and surgery. A sufficient departure from those standards will constitute infamous conduct in a professional respect.

*Ex parte La Mert* (1863) 4 B. & S. 582; 122 E.R. 578, more fully reported in 33 L.J.Q.B. 69; 9 L.T. 410 and 12 W.R. 201, and *Allbutt v. The General Council of Medical Education and Registration* (1889) 23 Q.BD. 400, followed.

(4) (By Jacobs P.) The magazine, taken as a whole, was an affront to any reader who bought it expecting information of medical nature or advice on a medical question, and was directly calculated to bring the medical profession into disrespect and to cause a loss of public confidence in the profession. This was not because of the subject matter or content of the principal articles, but because of the rest of the content and the form of the magazine.

(By the court) (5) The appellant was guilty of infamous conduct in a professional respect in publishing the magazine, and in endorsing, in articles in the magazine, pharmaceutical and health products which were advertized in the magazine.

(6) The appeal should be dismissed, but (by Jacobs P. and Hutley J.A., Reynolds J.A. dissenting) the court should exercise its powers under s. 29 (6) of the *Medical Practitioners Act, 1938*, and should fix a period of two years after which the appellant might apply to have his name restored to the register

#### **CASES CITED.**

The following cases are cited in the judgments:

- *Allbutt v. The General Council of Medical Education and Registration* (1889) 23 Q.B.D. 400.
- *La Mert, Ex parte* (1863) 4 B. & S. 582; 122 E.R. 578; more fully reported BEAUMONT v. BEESLEY(31) (1938) 60 C.L.R. 438.

in 33 L.J.Q.B. 69; 9 L.T. 410 and 12 W.R. 201.

- *McCoan v. General Medical Council* [1964] 1 W.L.R. 1107; [1964] 3 All E.R. 143.
- *Marten v. Disciplinary Committee of the Royal College of Veterinary Surgeons* [1965] 1 All E.R. 949; see also [1966] 1 Q.B. 1 and [1965] 2 W.L.R. 1228.
- *E Tziniolis, Ex parte; Re Harvey* (1959) 76 W.N. (N.S.W.) 686.

The following additional cases were cited in argument:

- *Allinson v. General Council of Medical Education and Registration* [1894] 1 Q.B. 750.
- *Anderson and the Medical Practitioners Act 1938-1964, Re* (1967) 85 W.N. (Pt. 1) (N.S.W.) 558.
- *Australian Sporting Club Ltd., Ex parte; Re Dash* (1947) 47 S.R. (N.S.W.) 283; 54 W.N. 63.
- *Baron v. Rose* [1972] 2 N.S.W.L.R. 793.
- *Bhattacharya v. General Medical Council* [1967] 2 A.C. 259.
- *Bonham's Case* (1610) 8 Co. Rep. 114a; 77 E.R. 646.
- *Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336.
- *Da Costa v. Cockburn Salvage & Trading Pty. Ltd.* (1970) 124 C.L.R. 192.
- *Faridian v. General Medical Council* [1971] A.C. 995.
- *Fitzgerald, Ex parte; Re The New South Wales Medical Board* (1945) 46 S.R. (N.S.W.) 111; 63 W.N. 16.
- *Gardiner v. General Medical Council* (1961) 105 Sol. Jo. 525.
- *Hoile v. The Medical Board of South Australia* (1960) 104 C.L.R. 157.
- *Hughes v. Architects' Registration Council of the United Kingdom* [1957] 2 Q.B. 550.
- *Libman v. General Medical Council* [1972] A.C. 217.
- *Meehan, Ex parte; Re Medical Practitioners Act* [1965] N.S.W.R. 30

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- *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243.
- *R. v. The General Council of Medical Education and Registration of the United Kingdom* [1930] 1 K.B. 562.
- *Sloan v. General Medical Council* [1970] 1 W.L.R. 1130; [1970] 2 All E.R. 686. *Telegraph Newspaper Co. Ltd., The v. Bedford* (1934) 50 C.L.R. 632.
- *Tziniolis, Ex parte; Re The Medical Practitioners Act* (1966) 67 S.R. (N.S.W.) 448; 84 W.N. (Pt. 2) 275.
- *Victorian Stevedoring and General Contracting Co. Pty. Ltd., The v. Dignan* (1931) 46 C.L.R. 73.
- *Wallace, Re* (1866) L.R. 1 P.C. 283.
- *Ziems v. The Prothonotary of the Supreme Court of New South Wales* (1957) 97 C.L.R. 279.

#### APPEAL.

This was an appeal pursuant to s. 29 (4) of the *Medical Practitioners Act*, 1938, from a decision of the disciplinary tribunal constituted under s. 28 thereof, whereby the appellant was adjudged guilty of infamous conduct in a professional respect within s. 27, and whereby it was ordered, pursuant to s. 29 (1) (c), that his name be removed from the register of medical practitioners. The facts are set out in the judgment of Jacobs P.

*J. F. Staples*, for the appellant.

*C. A. Porter*, for the respondent.

*Cur. adv. vult.*

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**Nov. 16.**

**JACOBS P.** This is an appeal from the decision of the medical disciplinary tribunal given on 6th April, 1973, whereby the appellant, Dr. Montagu Beesley, was adjudged guilty of infamous conduct in a professional respect within the meaning of s. 27 of the Medical Practitioners' Act, 1938, and whereby it was ordered pursuant to s. 29 that his name be removed from the register of medical practitioners. The grounds of appeal are as follows: (1) The tribunal erred in finding the appellant guilty of infamous conduct in a professional respect. (2) The tribunal erred in directing that the name of the appellant be removed from the register of medical practitioners. (3) The tribunal erred in failing to find, pursuant to s. 29(2) of the Act, that the offence was such that, from the circumstances in which it was committed, or that the conduct was such that it did not, in the public interest, disqualify the appellant from practising his profession.

The complaint against the appellant was in the following terms: "That Montagu Beesley, a person registered under the Medical Practitioners Act, 1936-1972, was guilty of infamous conduct in a professional respect as follows: (a) In or about the months of October and November 1972 and at all material times he was and still is a director and manager of a company known as Dr. Twinkle Pty. Ltd. (b) The said company published and he as its director and manager personally caused to be published a magazine called "Dr. Twinkle Medical Journal" during the months of October and November 1972.

He was the editor of the said magazine and either wrote or was responsible for the material therein contained. (c) The said magazine prominently contained his photograph as a doctor and purported to be a magazine.

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produced by a registered medical practitioner for the information of the

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general public and was distributed to the general public. (d) The said magazine debased and degraded the standing and reputation of the medical profession in that (i) it concentrated on sexual matters not for any scientific or medical reason but in order to boost circulation and for the same reason contained many pictures of naked women, treating the naked female form as an object to excite the erotic interests of readers; (ii) the whole magazine indicated that the medical profession had no respect for human dignity and in particular for women patients of medical practitioners; (iii) the magazine indicated that the medical profession was prepared to endorse commercial pharmaceutical and health products for reward. (e) The said magazine contained unprofessional advertising of Dr. Beesley and advertising otherwise than in accordance with s. 42(2) (b) of the *Medical Practitioners Act*. In particular it described Dr. Beesley as "the real Macquarie Street Specialist Doctor", it invited inquiries and correspondence on medical matters from members of the public, it invited members of the public to seek Dr. Beesley's medical advice and it invited members of the public to seek Dr. Beesley's advice as a reference doctor for the operation of mammoplasty. It advertised Dr. Beesley as a doctor. (f) In the said magazine Dr. Beesley wrote medical articles on subjects such as vitamin E, skin care and sex having the effect and purpose of endorsing commercial pharmaceutical and health products with a medical opinion so as to persuade the public to buy them. The same products were also directly advertised in the said magazine by commercial advertisements from which said advertisements Dr. Beesley through his company received a financial reward. Commercial products so endorsed by Dr. Beesley were various preparations of vitamin E, various skin preparations, anti smoking lozenges and female contraceptives. The magazine also advertised other products in a journal claiming to be medical.

At the hearing before the medical tribunal it was proved that the appellant was the director and manager of Dr. Twinkle Pty. Ltd. and was a shareholder in that company. A copy of the magazine Dr. Twinkle Medical Journal Volume 1, No. 1, October/November 1972 was tendered and it was proved that it had a net sale of 5,005 copies. The complainant relied solely upon this publication to support the complaint.

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Before going to that publication something may be said of the appellant himself. He was born in 1937 and enrolled in the Faculty of Medicine at the University of Sydney in 1954, graduated in 1961 as Bachelor of Medicine and Bachelor of Surgery. He became a junior resident at the Royal Prince Alfred Hospital in 1962 and a senior medical officer at the Prince of Wales Hospital and Prince Henry Hospital in 1963. In June of that year he received appointment as resident medical officer at the Repatriation General Hospital, Concord. The following year he was posted to the Repatriation Medical Department in York Street. In 1965 he left the Department and entered into private practice at 14 Victoria Street, Lewisham; a little later he took a room in Macquarie Street where it would seem that he concentrated in his consultations upon the psychological problems of his patients. As well as that he had a number of insurance patients and repatriation patients. He continued to have his room in Macquarie Street until the hearing of the present complaint against him, although it would appear that his practice was a very small one occupying him no more than one afternoon a week. Since 1968

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his time has been mainly spent and his earnings have mainly come from medical journalism of a popular kind.

In 1968 he commenced to write what has been described as a medical column in the Sun newspaper. In the middle of 1970 he transferred to the Daily Mirror and continued to write a column in that newspaper until August or September 1972. These medical columns commenced in 1968 under the heading "The Doctor with the Twinkle in his Eye". This was shortened to "The Doctor with the Twinkle" and then to "Dr. Twinkle". In July 1970 the appellant registered a company under the name Dr. Twinkle Pty. Ltd. When the appellant ceased to write for the Daily Mirror in 1972 he planned to bring out a publication of his own to be published by Dr. Twinkle Pty. Ltd., the company which he had registered. It is the first issue of that publication which  
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has led to the present action against him.

The publication is called Dr. Twinkle Medical Journal. It has a photo of the appellant upon the cover and another photo of him on the title page. In both photos he is in a medical setting, either by his dress or by the articles and books around him. The journal is described on the title page as "the only medical journal of its kind in the world - now produced in Australia for the first time. International, Independent-A Medical Journal for the Public That Breaks all Barriers between Medicine and People". The proprietor and managing director is stated to be Dr. Twinkle. All inquiries and correspondence are invited to be addressed to Dr. Twinkle at a post office box number. There is an editorial signed "Doctor Twinkle".

The first article is on the subject matter of Vitamin E. The second article is on what is described as Augmentation Mammoplasty (breast prosthesis). There is then an article on Vasectomy followed by an article on Diet; then follows an article called Ski and Stay Healthy, followed by an article on Smoking and then an article on Acne and Pimples; next there is an article under the main heading Sex and Psychiatry which deals with orgasm particularly in relation to masturbation. Then there is an article on Bed Wetting amongst Children followed by an article on the Ages of Australian Womanhood, dealing mainly with the sexual attitudes of women in society. The magazine concludes with a correspondence column, a section on medical jokes and a section headed "Your Medical Horoscope for October 1972 by Dr. Strange".

When the journal is so described it would appear to fall into a category of publication which in modern times would meet a real public demand. There is a great public interest in medical subject matters which is reflected in columns in the popular press and journals and in a great output of popular books on a wide variety of medical subjects. Some of them are written under pseudonyms as in the present case and some are written by members of the medical profession under their own names. In its judgment the tribunal stated of the present journal that it was clearly designed to attract the interest not of members of the medical profession but rather that of the

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general public, but this is to describe the journal without necessarily criticising it. Clearly it was not and was not intended to be a journal for members of the medical profession, but little if any so called medical journalism in modern times has any different intention. It is true, as the tribunal stated, that the appellant clearly wished to pursue the profession of a journalist relying on his position as a medical practitioner as publisher and writer of a magazine to attract

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purchasers for it. However, this of itself does not provide an answer to the question whether the appellant was guilty of infamous conduct in a professional respect.

At this stage it is convenient to deal with one of the charges against the appellant, namely, that the magazine contained unprofessional advertising of Dr. Beesley. The journal was written under a pseudonym, but it did have his photograph in it, and it is true that persons who knew him-"friends and acquaintances and his patients"-could recognize his identity. However, I feel considerable doubt whether it could be said that the magazine contained unprofessional advertising of Dr. Beesley. It does not do so in the sense of inviting members of the public generally to employ his services as a medical practitioner. If that were the only matter in issue I do not think that any action by the disciplinary tribunal would be called for.

However, it is not the only matter in issue at all. The appellant wrote and published this magazine holding himself out to the public as a medical practitioner fit and qualified to inform the public upon medical subject matters. As I have said, there is a great interest in the public in such subject matters, particularly when they bear upon sexual problems. I would not say that this is not a legitimate interest which can be met by the medical profession, but, when a member of that profession undertakes to meet this interest

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of the public in medical knowledge, he remains bound by standards appropriate to the medical profession in the actual practice of medicine and surgery. Mr. Staples has submitted that the appropriate standards in such circumstances are to be found in the standards of journalism rather than in the standards of the medical profession. Even if it be assumed that the magazine presently being considered met the standards of journalism, I would not agree that no different duty arises from the fact that the writer is and states himself to be a member of the medical profession. If he departs from those standards in those circumstances he may be guilty of infamous conduct in a professional respect. The medical profession is one which in all its aspects is highly regarded in the community and it is essential that that high regard be maintained. The regard may be lessened or lost not only where a medical practitioner falls short of proper standards when directly practising medicine or surgery, but also where, in a context associated with his profession, he behaves in a way which destroys or diminishes the reputation which the profession is entitled to have and the confidence which may properly be placed in it by members of the public. That this is so is amply borne out by the authorities, and it does not appear to me that there is any basis for distinguishing the use of the words "infamous conduct in a professional respect" in the English law from their use in New South Wales law. In particular I would refer to two authorities. In *Ex parte La Mert*<sup>1</sup> the professional man who published a work entitled *Self Preservation, A Popular Treatise on the Cure of Nervous and Physical Debility* was held capable of being found by the tribunal to be guilty of infamous conduct in a professional respect. Likewise in *Allbutt v. The General Council of Medical Education and Registration*<sup>2</sup> a medical practitioner who published a book entitled *The Wife's Handbook* was held by the court thereby to have been capable

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<sup>1</sup> (1863) 4 B. & S. 582, 122 E.R. 578.

<sup>2</sup> (1889) 23 Q.B.D. 400.

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of being found guilty of infamous conduct in a professional respect. Those decisions were given under a law which gave no right of appeal in the true sense to any court. If there had been a right of appeal, it may be that the decision in each case would not have stood upon appeal, but the decisions do show that publications by a medical practitioner may, in proper cases, be infamous conduct in a professional respect. However, it seems to me that these cases, particularly the second of them, provide a warning that, where there is a full appeal from the decision of a professional tribunal, a publication must be closely scrutinized in order to see that the objection to the publication does not lie merely in a dislike within the profession of a ventilation of some particular medical subject matter.

With this thought in my mind I turn back to the publication presently being considered. I find it to be one which in part of its content and in most of its form is directly calculated to bring the medical profession into disrespect and to cause the general public to lose that confidence in the profession which it is so essential to retain. I do not refer to the main articles in subject matter or to a large degree in content. The public wants knowledge on these subject matters and they are entitled to have that knowledge. They are entitled in my view to have it from popular medical writing as well as from a medical practitioner by word of mouth in a surgery consultation. However, the medical practitioner, whether he is in his surgery or at his desk, is not entitled to affront members of the public who hear or read his advice. In my opinion this journal is an affront; it is filled with photographs of women in a state of unqualified and irrelevant nudity which may or may not be permissible in "girlie" magazines, but which cannot in their irrelevance and their frankness be imposed upon those members of the public who purchase the magazine in the belief that it is a proper attempt to inform them on medical subjects. Next there is the material under the heading "Medical Jokes". These are crude, little more than adolescent. They are not calculated to allay anxieties by a humorous but humane treatment of difficult medical subject

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matters. They are such as to provide a shock to any serious reader who approaches the magazine with confidence in the stature of the editor and writer as a member of the medical profession. The same may be certainly said also of the correspondence column and of the so-called medical horoscope. If the writer did not hold himself out to be a member of the medical profession then the journal might be able to be regarded as a joke, in however poor taste, a parody as the tribunal called it. The gravamen of the charge against the appellant seems to me to be that the great majority of purchasers would purchase because they regarded it as a journal written by a member of the medical profession in order to inform them on medical subject matters. They would be met with material which is a travesty of such a purpose, material which would most likely shock and embarrass them by its irrelevancy and its departure from the accepted standards of treatment of medical subjects. That is why the conduct of the appellant can be regarded as infamous in a professional respect.

Similar reasoning can be applied to the complaint made against the appellant that by material in the magazine he, for gain to himself, endorsed commercial pharmaceutical and health products with a medical opinion. I would approach this question as follows. A member of the public who purchases this magazine which purports to be written by a member of the

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medical profession is entitled to read material on the various medical subject matters with the degree of confidence which the public have come to have in members of the medical profession. Such a member of the public, constantly throughout the articles in this magazine, would read endorsement of proprietary medical products. I do not say that there is here a breach of s. 45 of the Medical Practitioners Act, but there is a situation where the confidence which the member of the public is entitled to repose in the medical practitioner who is writing for them is shaken and destroyed by the fact that that medical practitioner is making a profit from the advertising in the magazine directly

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related to the various proprietary products which he is endorsing. It is a situation of conflict between his duty to inform accurately and his interest in obtaining profits from the advertisers and this places him in an intolerable position in relation to his medical standing. In my view this is infamous conduct in a professional respect. It is little or no different from the obtaining of money from the various proprietors directly as an inducement to recommend their various products in his medical articles.

I am, therefore, of the opinion that by this journal the appellant betrayed the standards which could be expected of a member of the medical profession. He did so particularly in the two respects to which I have adverted, by presenting his medical writing to the public in a way calculated to destroy the confidence of the public in the medical profession, and by presenting his medical writings to the public with endorsement of proprietary products for his own profit in a way calculated to destroy the confidence of the public in the medical profession.

The question remains whether the penalty imposed was the appropriate penalty for these lapses. Upon this question it must be borne in mind that the case made against the appellant related to this one lapse only. Apparently subsequent copies of the magazine published before the hearing before the disciplinary tribunal did not warrant action against him. It has been submitted that an appropriate course in the present case would be merely a reprimand or caution, but I do not agree. The lapse from proper standards of behaviour is a substantial one, and, before the appellant should be allowed to practise his profession, there should be a period during which he can certainly come to realise that the high standards of the medical profession are required of him in his writing as much as in the more direct practice of his profession. The question then is whether that purpose can be achieved by suspension from practice for a period of twelve months or whether a longer period is required. In the latter case, under s. 29, the period must be an indefinite one. Great weight must be given to the decision of the tribunal upon the appropriate order to be made in the particular circumstances. It is this factor which has primarily led me with some hesitation to uphold the *BEAUMONT v. BEESLEY*(31) (1938) 60 C.L.R. 438.

order of the tribunal rather than to substitute a period of twelve months' suspension pursuant to s. 29(1)(b). However, in such a case as this it appears clear that the period during which in the public interest and the public welfare the appellant should not practise as a medical practitioner is a limited one. The conduct, although it comes within the class of infamous conduct in a professional respect, is conduct in respect of which a lesson can be learnt. The offers of undertakings were not accepted by the tribunal but if, during a period of time, the appellant follows a course of conduct consonant with such of the proffered undertakings as will be applicable

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despite his removal from the register and if there be no subsequent lapses in conduct or character which would throw a different light on his application, there seems no reason why he should not be able to apply for restoration after an appropriate period. The court has a power under s. 29(6) which the disciplinary tribunal did not have, namely, to fix a time after which the appellant may apply to have his name restored to the register. I am of the opinion that the court should exercise this power under s. 29(6) and in dismissing the appeal fix a time of two years after which the appellant may apply to have his name restored to the register. The appellant should pay the costs of the appeal.

**REYNOLDS J.A.** In this appeal I have had the advantage of reading in draft form the judgments of Jacobs P. and Hutley J.A., in which the relevant facts have been set out and the leading authorities referred to.

I have come to the view that the conduct of the appellant relating to publication of Dr. Twinkle's medical journal, and his conduct in endorsing in the manner he has done various pharmaceutical products, amount to infamous conduct in a professional respect for the reasons advanced by Jacobs P. I also share his views in respect of that conduct which is alleged to constitute unprofessional advertising.

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The matter that has troubled me is the question of what order should follow these findings. On general principles, it can be said that the power to make an appropriate order under s. 29 of the *Medical Practitioners Act*, 1938, has been given to a tribunal specially equipped by experience, learning and, so far as the majority of the members of the tribunal are concerned, by membership of the medical profession, to deal with the subject matters committed to it. In these circumstances, especially, its consequential order should not be interfered with, unless it fell within the well-established rules which justify the intervention of an appellate court in the case of the exercise of a discretionary judgment. The Act provides that a right of appeal to this court shall be in the nature of a re-hearing (s. 29(4) ). It also provides that the court may make such order as it thinks proper, having regard to the merits of the case and the public welfare. The question is whether the use of these words and phrases evince a legislative intention that special and different principles apply to a review of the consequential order when a registered person has been adjudged guilty. It is somewhat difficult to see how the public welfare can relate to the question of whether a registered person was correctly adjudged guilty.

On the question of penalty, the public welfare can, of course, have a direct bearing. I do not think that the legislative directives to this court require it to ignore the principles which experience and authority have shown should be applied in reviewing discretionary orders. In deciding what is a proper order, a court must accord considerable weight to the order of the tribunal to which original responsibility was given.

Taking into account the merits of the case may be thought to be a direction unnecessary to address to this court, and, even if consideration of the public welfare was intended to add a new and special element requiring consideration, it does not, in my view, have any particular relevance in this case. I say that because the appellant has not indicated an intention or desire to practise medicine in the future. He wishes in the future, as in the past, to

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use his position as a registered medical practitioner, to lend authority to writings of the kind which have been described by my brother judges. It is in these circumstances that I am not prepared to accord any weight to the argument that the public welfare, despite a finding of infamous conduct, requires that the ranks of the medical practitioners should not be depleted.

The order appealed from implies a view that the appellant had, by reason of his conduct, demonstrated an unfitness to remain a registered person. Not only do I think that it has not been shown that this exercise of a discretionary power was affected by any vice justifying the intervention of this Court, but I think it was a view that could well be preferred to others. Where a question of fitness is involved, a limited period of suspension is not generally appropriate. A showing of fitness at some future time will enable the appellant, if it becomes necessary, to invoke s. 29(4) which requires consideration of the public welfare in such a case. The onus of showing fitness should rest upon him, and fitness should not be assumed to be re-established in a year's time, or indeed in any stipulated time.

On this appeal it has been accepted, as it has in cases decided by this court, that the appeal is not limited to the order consequent upon the judgment of guilty, but lies in respect of the finding as to guilt. No submission was made to the contrary.

I find myself unable to agree with the view of the other members of the court that this court should invoke its power under s. 29(6) of the Act. I think it is preferable that the question of the restoration of the appellant's name to the register should remain within the jurisdiction of the disciplinary tribunal under s. 29(8).

I am of the view that the appeal should be dismissed with costs.

**HUTLEY J.A.** I have read in draft form the judgment of the President in which the relevant facts are fully set forth and I do not consider it necessary to recapitulate them.

Before this Court council for the appellant submitted that, as the acts relied upon to constitute infamous conduct in a professional respect did not arise in the course of any strictly professional relationship, i.e., between doctor and patient or doctor and fellow doctor, it was not properly characterized as conduct in a professional respect. Though it is in these relationships that conduct which may be classed as infamous usually occurs, it is well established that it is by no means so limited, e.g., publications for general distribution by a doctor may constitute infamous conduct: *Ex parte La Mert*<sup>3</sup>. The accounts of this case in 33 L.J.Q.B. 69, 9 L.T. 410 and 12 W.R. 201, are more detailed and explicit than in 4 B. & S. 592, the Law Journal Report and the Law Times Report referring to "venereal disease" and the report in 12 W.R. 201 referring to "disease of the generative organs". Another instance is *Allbutt v. The General Council of Medical Education and Registration*<sup>4</sup>.

I agree with the President that both these cases provide a warning against treating the publication by a doctor of what are regarded as morally subversive ideas as infamous conduct.

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That infamous conduct cannot be so limited is confirmed in my opinion by the judgment of the Divisional Court in *Marten v. The Disciplinary Committee of the Royal College of Veterinary Surgeons*<sup>5</sup>. There, in a precisely analogous case, a veterinary surgeon who was also a farmer was charged with conduct disgraceful in a professional respect and argued that because the conduct arose in the course of his farming activities he could not be guilty. The argument failed, and

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<sup>3</sup> (1863) 4 B. & S. 582; 122 E.R. 578.

<sup>4</sup> (1889) 23 Q.B.D. 400.

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Lord Parker C.J., with whom Marshall and Widgery JJ. agreed<sup>6</sup>, said<sup>7</sup> : "Counsel for the appellant says that as a matter of law a professional man's conduct cannot be said to be disgraceful to him in a professional respect unless it was done 'in pursuit of his profession' and he would add that 'in pursuit of his profession' meant 'in the course of the practice of the profession'. For my part I see no valid ground for limiting the words in the manner suggested. If, of course, the conduct complained of is equally reprehensible in anyone, whether a professional man or not, as for example, conduct constituting some traffic offence, that conduct would not come within the expression. If the conduct, however, though reprehensible in anyone is in the case of the professional man so much more reprehensible as to be defined as disgraceful, it seems to me that it may, depending on the circumstances, amount to conduct disgraceful to him in a professional respect in the sense that it tends to bring disgrace on the profession which he practises. It seems to me, though I do not put this forward in any sense as a definition, that the conception of conduct which is disgraceful to a man in his professional capacity is conduct disgraceful to him as reflecting on his profession, or, in the present case, conduct disgraceful to him as a practising veterinary surgeon. Looked at in that way, which I think is the correct way, there was here abundant evidence on which the Disciplinary Committee could come to the conclusion that the conduct was disgraceful to the appellant in a professional capacity. At any rate, bearing in mind that this court, as has been said many times, is loath to interfere with the findings of a Disciplinary Committee on such a matter as this, I could not myself possibly interfere."

Similarly, certain types of reprehensible conduct by a doctor in his private life could be infamous conduct in a professional respect, e.g., a doctor who exhibited sadistic tendencies of an extreme kind in personal relationships may be guilty of infamous conduct, as it is in fundamental conflict in the eyes of the public with his role as a healer of the sick.

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<sup>5</sup> [1965] 1 All E.R. 949; see also [1966] 1 Q.B. 1; [1965] 2 W.L.R. 1228.

<sup>6</sup> [1965] 1 All E.R. 949, at p. 954; see also [1966] 1 Q.B. 1, at p. 10; [1965] 2 W.L.R. 1228, at p. 1235.

<sup>7</sup> [1965] 1 All E.R. 949, at pp. 953,954; see also [1966] 1 Q.B. 1, at pp. 9, 10; [1965] 2 W.L.R. 1228, at pp. 1234, 1235.

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The role and status of the medical profession is a subject of controversy and for a doctor merely to take upon himself the advocacy of views popular among his colleagues as to this role and status does not constitute infamous conduct. To undermine the regard in which the medical profession is held by attacking, in a proper manner, its pretensions and deficiencies is not bringing it into contempt in the way it is alleged Dr. Beesley did. A person who criticized the role and status of the medical profession is paying tribute to its importance by his attacks, the aim being to reform it.

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**(HUTLEY J.A.)**

Dr. Twinkle's Medical Journal, by showing doctors as sniggering adolescents in dealing with nude patients, must have a debasing effect upon any type of medical profession in any community.

The appellant, through his counsel, sought to protect his type of journalism by invoking the fear that, if the charge of infamous conduct is not confined to strictly professional relationships, it could be used to intimidate medical heretics. This is only to confuse the issue. Though in the past it would appear that certain medical heretics have been penalized in this way, and the medical disciplinary tribunal and the court must be careful to ensure that these errors are not repeated, the distinction between propagating unpopular and unusual ideas and propagating ideas in the way Dr. Twinkle's Medical Journal did is quite clear. A doctor who enters into the world of journalism as a doctor writing on medical subjects and seeking status for his pronouncements by describing himself as a doctor has to be judged as a doctor. His publications are part of his professional life and bring honour or dishonour to the profession by their tone and substance where they purport to convey medical information to those who seek it for their own instruction. They cannot adopt the tone of "girlie" magazines.

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The judgment of the President contains a description of Dr. Twinkle's Medical Journal Vol. 1 Pt. 1, and in my opinion the journal can only bring contempt upon the medical profession, and its publication is infamous conduct in a professional respect.

I am also of the opinion that in the publication Dr. Beesley was guilty of unprofessional advertising. Restriction of advertising is one of the most common features of organized professions in countries of the Anglo-Saxon world. Advertising is severely frowned upon by most, if not all, organised professions. In United Kingdom it is of itself infamous in a professional respect. The warning notice published by the Disciplinary Committee of the General Medical Council in November, 1957 (Hadfield-*Law of Ethics for Doctors* (1958) p. 360) is substantially identical with bylaw 25 of the New South Wales Branch of the Australian Medical Association which the appellant's counsel submitted was the statement of professional obligation to which the appellant had, and recognised he was, subject rather than the code of ethics of the Australian Medical Association referred to in the decision under appeal are quite explicit. Bylaw 25 reads: "(a) No member shall be a party to the appearance of a notice of his life or the publication of his portrait in the public press. (b) No member shall advertise, whether directly or indirectly, for the purpose of obtaining patients or promoting his own professional advantage; or for any such purpose, shall procure or sanction or acquiesce in the publication of notices commending or directing attention to his professional skill, knowledge, training, services or qualifications or depreciating those of others, or shall be associated with or employed by those who procure or sanction such advertising or publication."

In *Ex parte Tziniolis; Re Harvey* <sup>8</sup>(8) Moffitt A.J., as he then was, said in relation to a doctor: " `To advertise' means to call a matter to the attention of another, or perhaps more accurately in the present context, to make a matter known generally, to the public or to a section of the public." In my opinion Dr. Twinkle's Medical Journal advertises the appellant-it does more

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<sup>8</sup> (1959) 76 W.N. (N.S.W.) 686, at p. 689.

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than advertise, it indulges in vulgar puffing of a man whose entitlement to describe himself as "the real Macquarie Street Specialist Doctor" is nil.

It was suggested that this advertisement was not for the purpose of obtaining patients. This may be arguable, but it was for the promotion of his own professional advantage. I do not consider that the fact that "Dr. Twinkle" is a pseudonym affects the matter because the advertisement was in conjunction with two photographs which would enable him, and which were clearly intended to enable him, to be easily identified. Not only, in my opinion, was he guilty of advertising, but it was advertising of a most objectionable kind.

In the course of the appeal his counsel drew the court's attention to popular publications by doctors in which their degrees and credentials were set out. These may or may not be advertising. That the need of the public for medical information must be satisfied and that in order to be satisfied the public is entitled to know the qualifications of the authors of the material supplied must, I think, be recognized, but I think it is possible to distinguish in most cases between advertising and what is necessary to properly authenticate the quality of material being presented. Where the more rigorous exposition of medical ethics comes into conflict with the public interest or the public welfare, medical ethics must give way (see s. 29 (2) and s. 29 (4) of the Medical Practitioners Act). However, I can see no extenuating circumstances in the publication of puffed credentials and, in my opinion, the appellant has been guilty of advertising for the purpose of his professional advantage in such a manner as to constitute infamous conduct in a professional respect.

In respect of the charge that he endorsed commercial pharmaceutical and health products with a medical opinion for gain to himself, I agree with the judgment of the President.

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The question of the proper penalty has given me cause for anxious consideration.

Though the views of the Medical Tribunal are to be given great weight, I do not accept the view of the Privy Council as expressed in *McCoan V. General Medical Council*<sup>9</sup>(9) as appropriate to the responsibility of the court, the appeal being a rehearing. The court is enjoined to consider the public welfare. This requires that the court has to look beyond the effect upon the medical practitioner, and his particular desserts, and to consider what effect the penalty will have upon the public. This may require on occasions harsh deterrent penalties, on other occasions special leniency, in order to permit the special skills of the practitioner to be utilized.

As the appellants counsel pointed out doctors are trained at great public expense and are in short supply. The public welfare requires that those who are able to function properly as doctors should be permitted to do so or, if for disciplinary reasons they have to be prevented from practising, such period of prevention should cease when they have reformed.

The appellant's breaches of medical ethics do not prove that he does not have technical skill as a doctor. No evidence reflecting on his technical skill was given, so that he emerges from the evidence as a technically competent medical practitioner either devoid of understanding or lacking the will to

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<sup>9</sup> [1964] 1 W.L.R. 1107; [1964] 3 All E.R. 143.  
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obey the code of medical ethics. It should not be impossible for such a person to establish in the future his fitness to resume practice. However, I consider that the burden should be placed upon the appellant to demonstrate that he has become fit to be admitted to practice so that suspension is inappropriate. His fitness has to be judged by his conduct henceforth.

I agree with the orders proposed by the President.

*Appeal dismissed with costs. By majority, a time of two years fixed after which appellant may apply to have his name restored to register.*

Solicitors for the appellant: *G. D. Campbell & Co.*

Solicitor for the respondent: *R. J. McKay* (Crown Solicitor).

A. HILLER,  
Barrister.