

COURT OF APPEAL

RECORD SHEET

NATURE OF JURISDICTION:	MEDICAL TRIBUNAL - DEPUTY CHAIRMAN JUDGE COOPER
FILE NO/S:	CA 40008/95
DELIVERED:	31 AUGUST 1995
HEARING DATE:	21 JUNE 1995
PARTIES:	MACARTHUR v WALTON
JUDGMENT OF:	PRIESTLEY JA HANDLEY JA POWELL JA
COUNSEL Appellant:	C. GEE QC / R. GREENHILL
Respondent:	J. BASTEN SC
SOLICITORS: Appellant:	EDSON PIKE, CROWS NEST
Respondent:	DAVID SWAIN, HEALTH CARE COMPLAINTS COMMISSION
CATCHWORDS	MEDICAL PRACTICE ACT 1992 S 90 - PROFESSIONAL MISCONDUCT - QUESTION OF LAW - DISTINCTIONS FR QUESTION OF FACT
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ALLOWED/DISMISSED	APPEAL DISMISSED - LEAVE TO CROSS-APPEAL GRANTED - CROSS APPEAL ALLOWED
NO OF PAGES	11

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40008/95

PRIESTLEY JA
HANDLEYJA
POWELLJA

Thursday, 31 August 1995

MACARTHUR v WALTON

MEDICAL PRACTICE ACT 1992 S 90 - PROFESSIONAL MISCONDUCT OF
MEDICAL PRACTITIONER - APPEAL ON QUESTION OF LAW -
DISTINCTIONS FROM APPEAL ON QUESTION OF FACT - Medical

Tribunal finds medical practitioner guilty of professional misconduct by
inappropriately touching patient - s 90 Medical Practice Act 1992 confers appeal
against decision of Tribunal only on a question of law or against exercise of
Tribunal's disciplinary powers - practitioner seeks to establish appeal against
Tribunal's decision on a question of law by arguing: 1. because of indirect testimony
and indirect inferences the Tribunal cannot, as a matter of law, have been
reasonably satisfied of the facts; 2. absence of evidence which a reasonable tribunal
would accept; 3. error in law by Tribunal in reaching its decision without hearing
certain evidence; 4. denial of procedural fairness to the practitioner - the
complainant cross-appeals for an order that the practitioner pay the complainant's
costs of proceedings before the Tribunal. Held: appeal must fail as no error of law
can be demonstrated -

determinations of primary fact which are necessarily based on the Tribunal's opinion of the reliability of witnesses and their evidence not vulnerable to attack as an error of law - question whether evidence ought to be accepted in whole or in part or ought to be accepted as sufficient to establish a fact itself a~ question of fact - Tribunal not bound to observe rules of law governing admission of evidence - no denial of procedural fairness.

ORDERS

1. Appeal dismissed with costs.
2. Leave to cross-appeal granted.
3. Cross-appeal allowed with costs.
4. Tribunal to determine complainant's application for costs according to law.
5. Cross-respondent to have certificate under Suitor's Fund Act in respect of the costs of the cross-appeal.

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40009/95

PRIESTLEY JA
HANDLEYJA
POWELLJA

Thursday, 31 August 1995

MACARTHUR v WALTON

PRIESTLEY JA: I agree with Handley JA.

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40008;95

PRIESTLEY JA
HANDLEY JA
POWELL JA

Thursday 31 August 1995

MACARTHUR v WALTON

JUDGMENT
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HANDLEY JA: This is an appeal by a practitioner from findings and orders made by the Medical Tribunal. The Tribunal found that the practitioner had been guilty of professional misconduct by inappropriately touching Patient A on the pubic area following an operation at Armidale Hospital on 18 October 1993 and by inappropriately touching Patient B on the pubic area following another operation on 10 November 1993. Both patients were young women. Following the publication of its reasons and findings on 9 December 1994 the Tribunal heard further argument and on 19 January 1995 it ordered that the practitioner be suspended from practise for six months and that a condition be imposed on his registration that he take no part in the transfer of patients from the operating table to the recovery trolley. The orders were to take effect on and from 10 February. On 25 January, an appeal to this Court having been filed, Powell JA on certain undertakings continued that stay until the determination of the appeal or further order.

The appeal conferred by s 90 of the *Medical Practice Act 1992* against a decision of the Tribunal lies only from a decision on a question of law or against the exercise of the Tribunal's disciplinary powers. This appeal is directed to the findings of the Tribunal, the practitioner recognising that its orders are unassailable if the findings cannot be disturbed.

Senior counsel for the practitioner sought valiantly to extract a decision on a point of law from the Tribunal's reasons. The serious consequences of its findings and orders for the practitioner motivate such a search but do not guarantee its success. A challenge to the standard of proof applied by the Tribunal was abandoned in the light of this Court's decision in *Arvind v Walton* (unreported, 21 February 1995) which applied the reasoning in *Bannister v Walton* (1993) 30 NSWLR 699 to proceedings under the 1992 Act. Most of the other so-called points of law raised on behalf of the practitioner were nothing of the kind. The ground of appeal that the decision was against the evidence and the weight of the evidence only emphasized the practitioner's difficulties.

The charges against the appellant related to events of short duration, fifteen seconds or so, occurring under bright light in an operating theatre. Six witnesses testified to those incidents. Their accounts differed in detail but agreed in substance. Counsel for the practitioner sought to maximise these differences and erected arguments based on them. As presented these arguments were directed in the main to the reliability of the witnesses and the weight to be given to their evidence in the light of the criticisms of counsel for the practitioner. They did not involve the application of a legal standard and raised no question of law.

The practitioner submitted that the Tribunal arrived at its conclusions by relying on inexact proofs, indefinite testimony and indirect inferences and hence as a matter of law the Tribunal cannot have been

'reasonably satisfied' of the facts." This was an attempt to dress up a submission on fact as a submission of law but the disguise was transparent.

It was directed to the findings of primary fact which were necessarily based on the Tribunal's opinion of the reliability of the witnesses and their evidence. As Glass JA said in *Azzopardi v Tasman Industries* (1985) 4 NSWLR 139 at 156-7:-

"the ... determination of (primary) facts by a reasoning process marred though it be by patent error, illogicality or perversity will ... never be vulnerable to attack as an error of law ... "

I am not suggesting for one moment that the findings of the Tribunal could be so described and counsel for the practitioner made no such submission. Nevertheless the extreme examples given by Glass JA demonstrate that lesser errors cannot involve questions of law either.

The practitioner's alternative submission "that the concept of an absence of evidence must embrace the absence of evidence which a reasonable tribunal could accept" fails as a submission of law for the same reasons. The question whether evidence ought to be accepted in whole or in part or ought to be accepted as sufficient to establish a fact is itself a question of fact. See *Azzopardi* at 155. As Glass JA further demonstrated in that case at 156 the party not bearing the legal onus who raises as a question of law the submission that there is no evidence on which a tribunal of fact can find some allegation established assumes against himself that the evidence has been accepted. The alternative submission for the practitioner does not do this and hence fails to raise a question of law. There was ample evidence to support all the findings made by the Tribunal and that is the end of any question of law in the practitioner's direct challenge to its findings. Indeed it

seems to me that the principles in *Abalos v Australian Postal Commission* (1990) 171 CLR 167 would have required the dismissal of this appeal even if the statute had allowed an appeal on questions of fact.

Grounds 4 and 5 of the notice of appeal alleged error by the Tribunal in rejecting written statements by Ms Bacigalupo, the Deputy Director of Nursing at the hospital. A nurse, Ms Blake was cross-examined in relation to the conversations with Ms Bacigalupo referred to in those statements which were said to be inconsistent with her evidence. When counsel for the practitioner later tendered those statements they were rejected. Neither counsel called Ms Bacigalupo as a witness and as a result counsel for the practitioner was not able to cross-examine her in relation to the conversations with Ms Blake. The practitioner submitted that the Tribunal erred in law in rejecting the tender and in reaching its decision without hearing the evidence of Ms Bacigalupo "whom the complainant ought to have called". Clause 1 of Schedule 2 of the Act provides that the Tribunal is not bound to observe the rules of law governing the admission of evidence and may inform itself of any matter in such manner as it thinks fit. It is clear therefore that the Tribunal did not err in law in rejecting the statements and in making findings without the evidence of Ms Bacigalupo. See *Qantas Airways v Gubbins* (1992) 28 NSWLR 26 at 32.

The practitioner's final submission was that the Tribunal had denied him procedural fairness. This, if established, would involve an error of law. See *Yates Property Corporation v Darling Harbour Authority* (1991) 24 NSWLR 156 at 186. The factual basis for this contention was that the complainant had not asserted two separate touchings of the patient on 18 October 1993 but the Tribunal in resolving the differences between the witnesses found that this had occurred. It was said that the practitioner had no opportunity to be heard on that issue and to argue against such a finding.

There is no substance in this contention. The whole incident lasted about fifteen seconds and any attempt to split this into separate periods lacks reality. The allegations against the practitioner were simple and uncomplicated. As counsel for the complainant submitted "the concession by the appellant that he had his right hand on the patient under a thin blanket rendered the issue in dispute a very restricted one. In substance it was whether his hand at all times stayed on the iliac crest of the pelvic bone or whether it slid down onto the pubic area of the patient." I would reject this ground of appeal. The appeal therefore fails and must be dismissed with costs. This and some earlier appeals from the Tribunal have in substance been incompetent because no reasonably arguable questions of law were involved. In future cases of this kind the Court may be prepared to make orders for indemnity costs against an appellant bringing an incompetent appeal.

The complainant filed a summons for leave to cross-appeal, time having been extended by Powell JA for this purpose. The proposed cross-appeal challenged the Tribunal's failure to make an order that the practitioner pay the complainant's costs of the proceedings. The Tribunal had jurisdiction to make such an order. See Schedule 2 e113. It published its reasons and findings on 9 December 1994 and on 16 December heard submissions as to the orders it should make. Counsel appearing for the complainant sought an order that the practitioner pay her costs of the proceedings. When the Tribunal published its further reasons and made orders on 19 January 1995 it failed to deal with costs either in its reasons or its orders. The following day the judicial member was asked by the solicitor for the complainant to reconvene the Tribunal to deal with this issue. His Honour's other judicial duties prevented him from hearing this application until 27 April and he then heard argument on the question of jurisdiction.

He held that the proceedings had concluded on 19 January with the publication of the Tribunal's further reasons and the making of its orders and that it no longer had jurisdiction.

The application for costs heard and rejected by the Judge on 27 April was supported by an affidavit from the complainant's solicitor, Mr David Swain, in which he said that on 16 December the counsel he was instructing on behalf of the complainant made an application for costs. The arguments before the Tribunal on that day were not recorded. The official transcript does not show that such an application was made but is not inconsistent with this having been done. The judicial member stated in his reasons of 27 April that he could not recall such an application but he did not assert the contrary. No evidence was led on behalf of the practitioner on this issue and the solicitor for the complainant was not cross-examined.

In these circumstances the complainant must be taken to have established that an application for costs was made on 16 December. The Tribunal, for whatever reason, failed to determine that application. It is not necessary to decide whether the Tribunal has a power, analogous to that available to courts under their inherent or implied jurisdiction or an express slip rule, to deal with errors and omissions in the formal orders after the proceedings as a whole have come to an end. In the present case, with respect, the Tribunal failed to deal with all the matters properly before it according to law and this failure constitutes an error of law. See *Yates Property Corporation v Darling Harbour Authority* (1991) 24 NSWLR 156 at 186. In appropriate proceedings this Court could make an order in the nature of mandamus requiring the Tribunal to hear and determine the outstanding application for costs according to law but relief of this kind can also be granted in appellate proceedings limited to errors of law. See *Hill v King* (1993) 31 NSWLR 654.

Senior counsel for the practitioner sought to support the decision that the Tribunal now lacked jurisdiction to deal with this application. However a tribunal such as this cannot deprive itself of jurisdiction by an express or constructive refusal to exercise it. In my opinion leave to cross-appeal should be granted, and the cross-appeal allowed. The following orders should be made:-

1. Appeal dismissed with costs.
2. Leave to cross-appeal granted.
3. Cross-appeal allowed with costs.
4. Proceedings remitted to the Tribunal to hear and determine the complainant's application for costs according to law.
5. Cross-respondent to have a certificate under the *Suitors Fund Act* in respect of the costs of the cross-appeal.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA40008/95

PRIESTLEY JA
HANDLEY JA
POWELLJA

31st August 1995

MACARTHUR v .WALTON

JUDGMENT

POWELL JA: I agree with Handley JA.

IN THE SUPREME COURT
OF THE NEW SOUTH
WALES COURT OF APPEAL

CA 040008/94

POWELL JA

25 January 1995

PETER MACARTHUR v MERRIL YN WALTON

JUDGMENT

POWELL JA: By Notice of Motion filed, by leave, this day, the Claimant, who is the Appellant in what is, in substance, an appeal from a decision of the Medical Tribunal ("the Tribunal") delivered, and Orders made by the Tribunal, on 19th January of this year, seeks, in substance, Orders, first, staying the Order of the Tribunal suspending the Claimant from the practice of medicine for a period of 6 months and placing a condition on the Claimant's registration as a medical practitioner thereafter; and, second, either, an Order staying the operation of the Order of the Tribunal revoking an earlier non-publication Order made in the principal proceedings, or, if there be no power to make such an Order, an Order by this Court prohibiting publication of the proceedings before the Tribunal and its findings, and the names of the Claimant and of those of the Claimant's patients who were associated with those proceedings.

The proceedings before the Tribunal apparently arose out of

complaints made by either, the relevant local Health Service ("the Health Service"), or, the Medical Board ("the Board") by members of the hospital staff of one of the hospitals at which the Claimant was, and is. a visiting medial specialist, those complaints being to the effect that, on each of two nominated days, the Claimant, having performed surgery within his specialty, and while then assisting in the procedure of moving the anaesthetised patient from the operating table to the transfer trolley. touched the patient in Question - each such patient being a female patient - in an inappropriate manner in an area described generally as "the pubic area".

As the result of the complaints Which were made by the members of the hospital staff, a variety of actions appear to have been taken by various people or bodies: first, so It would appear the Health Service resolved to terminate forthwith the clinic.³¹ privileges to which, as a visiting medical specialist at the hospital concerned, the Claimant was entitled at that hospital; second, complaint if first made to the Health Service, were then made to the Board; and third, following investigations made by the Police, the Claimant was charged with several counts of aggravated indecent assault, in respect of which charges he was later committed for trial.

It would appear that, following an appeal by the Claimant, the committee of review appointed by the Minister of Health ordered that, subject to the Claimant giving certain undertakings which are recorded in its report to the Minister, the Claimant be allowed to continue to enjoy his clinical privileges.

Following upon its receipt of the formal complaint, he Board, in

its turn lodged a formal complaint with the Tribunal. That complaint appears, in the first instance, to have come before the then Chairperson of the Tribunal on 15t July last, at which time, as it would seem, the then Chairperson made, until further order, the non-publication Order to which I have earlier referred. Thereafter the then Chairperson appointed Cooper DCJ, one of the Deputy Chairpersons of the Tribunal, to preside on the inquiry into the complaint and the Board nominated two medical practitioners and the usual lay member to sit with Cooper DCJ as members of the Tribunal for the purposes of the inquiry.

As I have earlier noted, the Claimant has been committed for trial at the District Court in the relevant circuit town, it being thought, at the present stage, that he will be formally arraigned before a Judge of the Court during the course of February next, albeit that it is not anticipated that his trial on the indictment later to be presented will occur before October, or even later, this year.

In accordance with what seems now to be a common, if not the usual, practice, the Tribunal constituted for the purpose of the inquiry into the complaint appears first to have proceeded to examine whether or not the complaints which were made to it were in fact made out on the evidence. In its Reasons for Decision, on this aspect of the inquiry, which were delivered on 9th December 1994, the Tribunal concluded that, on each of the two occasions to which I have earlier referred, the incidents complained of did take place, but that, in respect of another incident of which complaint had been made, there was nothing inappropriate in what was done.

Thereafter, the Tribunal invited submissions as to what, if any orders of a disciplinary nature might be called for in the circumstances.

Although the Orders made by the Tribunal following those submissions, which Orders as I have earlier noted were made on 19th January of this year, are those which give to the present application. The concern of the Claimant's advisers as to the time within which an appeal might be lodged led them to lodge the Notice of Appeal to which I have earlier referred meantime.

As might be expected, the Notice of Appeal having been lodged prior to the making of those Orders, the Notice of Appeal requires some amendment - one adds that, unless some more substantial grounds of appeal than those set out in the existing Notice of Appeal are to be relied upon, the Claimant's prospects of success on the hearing of the Appeal would not be great.

The Orders made by the Tribunal were, first, that the Claimant be suspended from practising medicine for a period of 6 months; second, that there be imposed on the Claimant's registration a condition relating to his not participating in the transfer of patients from the operating table to the transfer trolley; third, that all prior non-publication orders be revoked; fourth, that the names of the patient and parents and other material by which they could be identified not be published; and, after submissions made following delivery of the Tribunal's Reasons for Consequential Orders, that there be, in effect, a stay of operation of the principal Orders until 5.00 p.m. on Friday next, 27th January 1995.

In seeking to support the first of the Orders which the Claimant seeks in his Notice of Motion, Mr R.J. Burbidge Q, C., who appears with Mr F C Corsaro for the Claimant, has put trial, notwithstanding the form of the grounds of appeal taken in the Notice of Appeal, the appeal is one which is of substance, and one which involves a serious question of law In seeking to develop this submission, Mr. Burbidge submitted that, in applying, as it did, the standard of proof discussed in the decision of the High Court in *Briginshaw v. Briginshaw*; and *Rejtek v Elroy*, the Tribunal erred. Mr. Burbidge accepts that. in order that that proposed ground of appeal be regarded as one of substance, the Claimant will need to persuade this Court that leave to reargue the recent decision of this Court in *Bannister v. Walton* J ought to be granted, but he submits that, despite the fact that the High Court refused special leave to appeal from this Court's decision in *Bannister v. Walton*'. such leave ought to be granted having regard to the recently expressed view of the Supreme Court of South Australia (*T. v. Medical Board South Australia*) that the appropriate standard of proof to be applied in medical disciplinary matters is "the criminal standard", which view so it, is said - although my understanding is to the contrary - was not drawn to the attention of the High Court on the application for leave to appeal from the decision of this Court in *Bannister v Walton*.

Other grounds of appeal have been foreshadowed, it being

sufficient to note that one is to the effect that, upon a proper analysis of the evidence placed before the Tribunal, it could properly be said that there was no evidence before the Tribunal upon which it might found its principal findings of fact.

In these circumstances, so Mr. Burbidge submitted, a stay of the operation of the Order for suspension was warranted, for, unless which given the extent of the present demands upon the Courts' time, is highly unlikely - the appeal could be brought on in the very near future the Claimant's right of appeal will, in fact, prove to have been of no value, as the period of suspension might well have expired before the appeal is disposed of.

In seeking to support the application for a stay of the operation of the order revoking the non-publication Order, Mr Burbidge submitted that publication of the Reasons for Decision of the Tribunal would have a serious impact upon the Claimant, first, by seriously damaging his professional reputation and, more importantly, by possibly leading to an injustice to him in relation to his impending trial in the District Court, without, so it was submitted, any countervailing advantage to the public in the particular area in which the Claimant practices and all this notwithstanding that the appeal may ultimately be upheld.

The Opponent opposes the making of either of the Orders sought upon the grounds, first, that the appeal is without substance, in that there is no real ground of law upon which an attack on the findings of the Tribunal can be mounted; and, second, that there having been a full examination by the Tribunal, and a determination by it of the

complaints, no ground has been made out for the continuation of the non-publication order, but, on the contrary, the public interest dictates that the findings of the Tribunal now be made public.

The principles to be applied in relation to applications such as that which I am now concerned to deal have been examined in two fairly recent decisions, the first being that of Mahoney JA sitting alone in *Katellaris v Walton* (1991), the second an interlocutory decision of the Court Mahoney, Sheller, and Cripps JJA in *Bannister v Walton*.

Despite the fact that 18 judgments to which I have just referred would indicate that the granting of such a stay is anything but a matter as of course in matters such as this, I am disposed to think that it is an appropriate case in which a stay ought to be granted, at least in relation to the Claimant's suspension from practice. What disposes me to that view is, not so much the strength of the appeal - for, as I have earlier indicated, it seems to me that the Claimant faces considerable difficulty in that regard - but the fact that, having regard to the existing commitments of the Court of which I am presently aware, it is unlikely that, even if it were expedited, the appeal could be brought on, and determined, before a significant part, if not the whole, of the period of suspension would have expired if no stay be granted. This being so, so it seems to me, it is appropriate to grant a stay since the Claimant's right of appeal would otherwise be of no value to him.

I turn, then, to the question of the non-publication order.

I can well understand the Claimant's concern that, If the non-publication order not be continued, his reputation may well be damaged, even if, as he would have it, he is to succeed in his appeal, as also can I understand the concern of the Claimant that, if the reasons for decision of the Tribunal now be published, it is at least possible that his pending trial in the District Court could be prejudiced. However, it seems to me that, on balance, the non-publication order ought not to be continued.

The Claimant's concern as to the possible effect which publication may have upon his reputation, can, I think, properly be, at least met, if not overcome, by the Claimant making it abundantly clear, in the event that publicity is given to the Tribunal's Reasons for Decision, that he has already lodged, and proposes vigorously to prosecute, the appeal in regard to the findings and Orders which have been made against him.

The Claimant's concern as to the possible effect of publicity on his trial is, as it seems to me, readily met by the fact that there are procedures which are available to the Claimant, and also in the District Court, which can, as it seems to me, ensure that the Claimant is not to be prejudiced in his trial. Thus, it could be that, on his being arraigned in the near future, the Claimant could apply for a change of venue to a Court sufficiently distant from the circuit town in which he has been committed to stand trial in the first instance. Further, as it seems to me, it could be open to the Court to adjourn, or to postpone, the trial until such time as any publicity might be dissipated, and, indeed, until such time as the Claimant, if he is to succeed' in his appeal, has available to him the advantage of a decision of this Court on the Appeal.

As the Claimant's concerns can, in my view, be met in the ways which I have indicated. It seems to me that the public is now entitled to know that the complaints were made and have been examined, and that a determination has been made in respect of them, so that the members of the public who might otherwise be concerned to consult, or otherwise seek the assistance of the Claimant are able to decide for themselves on the question whether or not they wish to do so.

In the result, subject to the giving of the undertakings to which I will shortly refer, I would propose to stay so much of the Orders of the Tribunal as would suspend the Claimant from practice.

The undertakings to which I refer are, first, an undertaking in terms of the condition which the Tribunal has directed should be imposed on the claimant's right to practise in future, that undertaking being given without admission; and, second, an undertaking that the Claimant will seek an Order that the appeal in this matter be expedited, and in the event of that Order being granted, that the Claimant will take all such steps as might be necessary, or reasonable, to be taken in order that the appeal be brought on for hearing at the earliest convenient date.

Having regard to the fact that each of the Complainant and the Opponent has been partially successful, the costs of the application should be costs in the appeal.

Subject to those undertakings being given the formal Orders

which I would make are

- 1, ORDER : that so much of the Order of the Tribunal made 19th January 1995 as would suspend the Claimant from the practice of medicine for 6 months be stayed until the determination of the appeal: and
2. ORDER that the costs of today's application be costs in the Appeal.

MR CORSARO: Would your Honour please note that I have instructions to give those undertakings.

HIS HONOUR: It being noted that the Claimant, by his counsel, and without admission as to the first, give, the several undertakings which I have indicated, I now formally make the Orders which I foreshadowed,

Footnote:

After this judgment was delivered, the Court, delivered its judgment in *Arvind v Walton* (21st February 1995), in which judgment the Court (inter alia) declined to review the judgment in *Bannister v Walton* (1992) 30 NSWLR 699) and confirmed that the standard of proof to be applied in medical disciplinary matters is the civil standard.

