

COURT OF APPEAL

RECORD SHEET

COURT: SAMUELS JA PRIESTLEY JA MEAGHER JA

NO: CA 40252/90

APPEAL: CHILDS v WALTON

APPEAL FROM: MEDICAL TRIBUNAL

KEY WORDS: MEDICAL PRACTITIONERS PROFESSIONAL
MISCONDUCT - MEDICAL PRACTITIONERS ACT 1938 -
"IN THE PRACTICE OF MEDICINE".

COUNSEL:
Appellant: - J GLISSAN QC/M STEVENS

Respondent - N R COWDERY QC/M LYNCH

SOLICITORS:
Appellant - TRESS COCKS & MADDOX

Respondent - H K ROBERTS

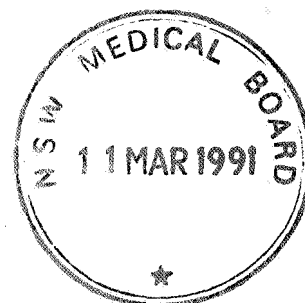
HEARING DATE: 17 SEPTEMBER, 1990

JUDGMENT DATE: 13 NOVEMBER, 1990

LENGTH OF HEARING: 2 HOURS

EXTEMPORE/RESERVED: RESERVED

ALLOWED/DISMISSED DISMISSED



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THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40252 of 1990 SAMUELS
JA PRIESTLEY JA
MEAGHER JA
Tuesday, 13 November 1990

CHILDS v WALTON

MEDICAL PRACTITIONERS - complaint of professional misconduct under ss 27(1)(a) and 28(1)(d) of the Medical Practitioners Act 1938 in one respect conduct complained of occurred after doctor/patient relationship had terminated but at a time when former patient still emotionally dependent upon former psycho-therapist - held that words "in the practice of medicine" do not have temporal meaning but describe the nature of the relevant conduct which demonstrates one of the defects specified in s 27(1)(a) hence that conduct is not limited to conduct in the course of treatment.

ORDER

Appeal dismissed with costs.

THE SUPREME COURT
OF NEW SOUTH WALES
OF APPEAL

CA 40252 of 1990 COURT

SAMUELS JA
PRIESTLEY JA
MEAGHER JA

Tuesday, 13 November 1990

CHILDS v WALTON

JUDGMENT

SAMUELS JA: The appellant qualified in medicine in 1959 and in psychiatry in 1967. In 1968 she commenced practice as an analytic psychotherapist and five years later qualified as a psychoanalyst. From 1984 she moved away from what might be termed classic psychoanalytical practice towards a form of therapy which she described as humanistic or psychodynamically based supportive psychotherapy. The principal element of difference between that mode of therapy and the classic psychoanalytical technique is that whereas in the latter the analyst maintains a passive and almost anonymous posture, in the former the therapist enters into "a working alliance" with the patient. It was, she told the tribunal in her evidence, "a very egalitarian relationship, it is not a power relationship". The appellant, quoting from the work of Professor Stanley Grebens, referred to the belief of humanistic analysts "that the essential vehicle of change is a friendly relation between therapist and patient". I mention the nature of the appellant's

professional technique in order to make clear at the outset she was committed to a form of therapy which had important features which differed from the therapeutic style of, perhaps, the majority of psychotherapists; an aspect which must be fully taken into account when considering the issues which were before the Medical Tribunal and are now before us.

The actual complainant (whom I will call 'RS') first consulted the appellant in July 1985. For approximately the next three years the appellant saw RS for the purposes of therapy once and sometimes twice each week. On 1 June 1988 RS' therapy ended and the relationship of doctor and patient between her and the appellant was terminated. In March 1989, shortly after the final meeting between the two, RS made a complaint to the Health Department Complaints Unit and, following investigation, the complaint was referred to the Tribunal.

The complaint may be summarised in the following way.

First, it was alleged that the appellant had been guilty of professional misconduct within the meaning of s 28(1)(d) of the Medical Practitioners Act 1938 ("the Act") in various respects relating to her treatment of and general relationship with RS during the course of RS' therapy, and in respect of events which took place between them following the termination of the formal doctor and patient relationship; and, secondly, of other items of professional misconduct concerning her disclosure to RS after the

termination of their professional relationship of confidential information concerning four patients or former patients of the appellant.

In addition, during the appellant's evidence, the Tribunal, acting under cl 5(2) of Schedule 4 of the Act, deemed that another complaint had been referred to it. This was that the appellant had been guilty of professional misconduct in that she had improperly engaged in a personal relationship with an ex-patient, Dr W, between January and May 1986, and between May 1986 and 1988, "having had him in therapy treatment between 1976 and December 1985".

There were thus three heads of complaint. The first concerned the professional and social relationship between the appellant and RS. The second, which the respondent submitted really encompassed four separate complaints, asserted the disclosure of confidential information, and the third concerned the appellant's relationship with Dr W. The first complaint was supported by twenty eight paragraphs of material which purported to particularise the complaint but which, as the Tribunal observed, set out in narrative form "an account of a relationship". Indeed, few of these 'particulars' attempt to indicate precisely the nature of the misconduct alleged, or to specify under which of the possible heads set out in s 27(1)(a) any act or omission is to be subsumed. Each of the complaints is introduced with the formula that the appellant had been guilty of

professional misconduct "within the meaning of section 28(l)(d) of the Act". Section 28(l)(d) merely provides that a complaint may be made that a registered medical practitioner "has been guilty of professional misconduct". The definition of what constitutes professional misconduct is, as I have already indicated, to be found in s 27(l)(a). My own view is that it would be desirable for a complainant to particularise the complaints made by specifying the acts or omissions upon which the complainant relies, and then indicating which of the professional defects in s 27(l)(a) each is said to constitute.

In the present case the Tribunal made very clear findings of "professional misconduct", but did not indicate the specific professional defect demonstrated by particular acts or omissions or combinations of conduct within the categories specified in s 27(l)(a) which, so far as relevant, provides:

("..... 'professional misconduct', in relation to a registered medical practitioner, includes the following.

(a) any conduct that demonstrates a lack of adequate -

- (i) knowledge;
- (ii) experience;
- (iii) skill;
- (iv) judgment; or
- (v) care,

by the practitioner in the practice of medicine;" There follow other stipulations of "professional misconduct" which are irrelevant for present purposes, and then s 27(l) concludes "or any other improper or unethical conduct relating to the practice of medicine". Hence professional misconduct includes a lack of an adequate degree of any of the elements prescribed in s 27(l)(a), or any other relevant improper or

unethical conduct. I have supplied the emphasis.

It appears that the respondent put the case before the Tribunal upon two bases, which led to argument concerning the definition of professional misconduct or more exactly, perhaps, the nature of the proof by which it was to be established. The respondent first submitted that the appellant's conduct demonstrated a lack of adequate knowledge, skill, judgment or care in her practice of medicine (thus adopting all the heads in s 27(1)(a) except "experience") and that this constituted professional misconduct. In the alternative, and on the assumption that the test propounded in Qidwai v Brown (1984) 1 NSWLR 100 and confirmed in Pillai v Messiter (No 2) (1989) 16 NSWLR 197 remained applicable in the determination of professional misconduct as now defined, the respondent submitted that the conduct of the appellant was such as to attract the strong reprobation of her professional brethren of good repute and competence (in addition to demonstrating a lack of adequate, knowledge, skill or care in her practice of medicine). Thus the respondent advanced the argument that it was open to make a case of professional misconduct under s 27(1)(a) which did not involve proof of 'reprobation', as I will call it, and, in the alternative, to move outside the statute and prove, as it were, a case at common law, which did depend upon the proof of 'reprobation'.

The Tribunal held that the new s 27(1) had "broadened the definition of 'professional misconduct' to include conduct which falls short of conduct which would incur the reprobation

of fellow practitioners of good standing and repute. Such conduct might more accurately be seen as 'unprofessional conduct' indicating that the practitioner requires assistance in his or her practice". However, where it was sought to prove improper or unethical conduct the common law or Qidwai test remained "as the appropriate yardstick".

In the end these questions were of no significance. The form of particulars given, about which I have expressed reservations, was not challenged by the appellant and she evidently was in no way prejudiced by the lack of specification of the precise professional default which the facts to be proved were said to constitute. As to the definition of professional misconduct or the proof necessary to establish it, the Tribunal ultimately concluded that all the allegations had been established and each of the three complaints had been made out. It arrived at that conclusion by "applying what has been referred to as the Qidwai test" and added : "However, any deficiency of proof on this test would have been supplied, in the Tribunal's view, by the application of the interpretation of s 27(1) (a) which does not depend upon proof that the conduct would meet with the reprobation of fellow practitioners of good standing and repute". Bearing in mind the Tribunal's earlier remarks, to which I have referred, it *would* seem that it took all the allegations to assert conduct which attracted 'reprobation' and judged them all by the Qidwai test. But, it is not clear to me whether the Tribunal's conclusions amount to findings that the conduct proved demonstrated a lack of

adequate knowledge and so forth as contended by the respondent but to a degree that constituted impropriety, or whether the Tribunal was making a finding under the wider formula "or any other improper or unethical conduct relating to the practice of medicine"; or, as the respondent seemed to urge, whether it was making what might be described as findings upon an allegation at common law which was not founded in the terms of the statute.

None of this either is now of any account. The parties are agreed that it is unnecessary to pursue the question of proof of professional misconduct since the Tribunal has made against the appellant the strongest findings open to it, which would overreach any finding of less gravity. The appellant therefore accepted the task of displacing findings of impropriety under the Qidwai test, and the appeal proceeded accordingly. I emphasise that (leaving aside the appeal against the order under s 32R removing the appellant's name from the Register) this appeal lies only "with respect to a point of law" (s 32U(1)(a)), so that this Court has no authority to make a general review of the Tribunal's findings of fact.

Mr Glissan QC and Mr Stevens who conducted the appellant's case with commendable clarity and concision, recognised the difficulties placed in their way by the Tribunal's findings of fact, which were adverse to the appellant in every material particular. They acknowledged that they had no option but to yield to these findings and fight the

appeal within the constricted area which that concession (rightly made) left open to them. I do not think it necessary, therefore, to recapitulate the facts found and carefully and fully set out in the Tribunal's decision, save to the extent necessary to supply some indispensable context.

As I have indicated the first complaint asserted misconduct in respect of transactions which took place between the appellant and RS after therapy (and their active relationship of doctor and patient) terminated on 1 June 1988. These included a sexual encounter initiated by the appellant, a holiday together in Vanuatu and general incidents of close friendship. Regarding the first of these the Tribunal accepted the respondent's submission that:

"Having offered friendship and then sex, which was accepted by RS, the appellant then expressed to RS a clear indication that she was using RS merely as an experiment to explore her sexual preferences. To do so, knowing RS had been a victim of incest and was still troubled by it and by her marriage, after her therapy had formally ended, shows a callous disregard for RS's mental and emotional well-being and is properly to be deplored".

The Tribunal found that this behaviour of the appellant constituted proof of misconduct.

The appellant, however, submitted that the appellant's duty to RS ended with the termination of the doctor-patient relationship. Therefore nothing which occurred after that terminal point was relevant, or capable of anchoring a finding of professional misconduct. The submission contended that the words "in the practice of medicine" set boundaries to the period within which it was possible for a practitioner to

behave to or concerning a patient in such a way as to be guilty of professional misconduct.

I do not think, with all respect, that this argument is sound. The phrase "in the practice of medicine" does not have a temporal meaning, but rather a qualitative or descriptive character. It does not circumscribe the period during which the conduct impugned must occur if it is to be capable of satisfying the prescription; it describes its nature. The conduct must be such as to demonstrate the lack of a quality (eg adequate knowledge) necessary in the practice of medicine. The conduct is the vehicle by which a specified defect is revealed. Hence the act or omission constituting the conduct (see the definition of "conduct" in s 27(1)) need not occur while the relationship of doctor and patient exists between a complainant and the practitioner. It may occur at any time.

It need not be conduct which occurs in the course of treating a patient. The only requirement is that it must demonstrate one of the specified deficits. It is often risky to construe by paraphrase, but in this case I think it is accurate to say that s 27(1)(a) contemplates conduct by a practitioner that demonstrates his or her lack of one or more qualities indispensable to the practice of medicine; or, in the case of lack of adequate experience, to the particular procedure undertaken.

Since there is no occasion for it in the present case I will not venture further into the construction of s 27(1) save to observe that its final words (whether or not "other" means

that proof of the defects stipulated in s 27(1)(a) requires evidence of 'reprobation') clearly regard the conduct itself as the gravamen of the complaint, rather than the professional incompetence which the conduct reveals. In my view, therefore, the first submission fails.

Secondly, the appellant submitted that the Tribunal erred in rejecting the evidence of the appellant's expert witnesses, because in doing so it failed to recognise that this testimony established the existence of an alternative school of psychiatric practice which did not reprobate the appellant's practice regarding confidentiality and the use of 'friendship' as a tool of therapy.

A departure from a generally accepted procedure does not necessarily constitute professional misconduct. There may be different schools of medicine and disputes between them. Adherence to the practice of a minority group does not alone entail professional misconduct. "Every innovation has to be performed for a first time. That something has not been done is not proof that it ought not to be done" : per Hutley JA in Qidwai at 101. But in that case (in which these questions were discussed) there was no evidence that what the doctor had done had attracted contemporary professional reprobation : see at 102. As Priestley JA said at 106-7: "On all the material in the case I do not think it was right to conclude that Dr Qidwai was in breach of any generally accepted standard in the medical profession".

The position in the present case is significantly different. The Tribunal accepted that the evidence of those experts called by the respondent established that the appellant's conduct would have attracted the strong reprobation of the appellant's peers. On the other hand it expressed the opinion that: "The views expressed by the psychiatrists called by the respondent do not represent independent views of her peers." The Tribunal went on to observe that even if these were the views of a group "which maintained supportive therapy is different, this group is still obliged to adhere to the conduct of the profession as a whole." I see no error in that statement. Novelty itself is neutral. By itself it should neither attract nor disarm professional reprobation. But a new departure in professional practice or technique must conform to the accepted ethical standards of the profession. It will be a question of fact in each case whether criticism proved amounts to no more than professional dissent or conservative distaste for novelty, or, on the other hand, to the professional reprobation which founds professional misconduct.

In the instant case the Tribunal, for reasons which it amply explained, and which are immune to challenge, rejected the professional opinions of the appellant's expert witnesses. Hence there was no material before the Tribunal which might have impaired its comfortable satisfaction (Briginshaw v Briginshaw (1938) 60 CLR 336 at 361) that the conduct impugned constituted professional misconduct.

Thirdly, the appellant submitted that the breaches of

confidentiality - a complaint based on the appellant's disclosure to RS of details concerning the problems and treatment of patients or former patients - amounted to the legitimate psychiatric technique known as 'debriefing'. 'Debriefing' involves disclosure by a therapist of a patient's problems and the means adopted to alleviate them, perhaps to enable the therapist to relieve the intense emotional pressure imposed by the conduct of psychotherapy, or perhaps to obtain in the exchange generated by discussion a professional revelation hitherto denied. So described the process is one familiar to all professionals.

But the appellant contended that 'debriefing' remained proper even though in the course of disclosure the patient's identity was revealed. I find it impossible to understand how such a proposition can be supported. It was denounced by the respondent's experts and rightly rejected by the Tribunal. This submission fails.

Fourthly, it was submitted that the third complaint, concerning Dr W, was not authorised by s 32(o) of the Act read with cl 5 of Schedule 4. In my view the procedure adopted was precisely authorised by cl 5(2). Furthermore, there is the very considerable difficulty that the point, understandably enough, was never taken below. If the objection rests on denial of natural justice it is disposed of by the statute. If upon reasonable apprehension of bias it was waived. This submission also fails.

Finally, the appellant challenged the orders that her

name be removed from the register (the Tribunal fixed three years as the time after which she might apply to be registered) and that she pay the sum of \$55,917 by way of costs.

An order removing from the register is made in protection of the public. It is not intended to be punitive. But, of course, it has the gravest consequences.

The appellant tendered a large number of impressive testimonials ranging from professional appreciations by other psychiatrists to character references from other medical practitioners, former patients and persons prominent in various roles in the community. All this material describes the appellant in the highest terms. Each of the persons furnishing a reference had evidently been told, and expressly noted, that the appellant had been found guilty of three charges of professional misconduct. The precise manner in which the referees recorded this information naturally differs from one to another.

In one case the referee carefully set out with complete accuracy the nature of the Tribunal's relevant findings. In other references the gravity of the findings seems not to be appreciated; and, as the Tribunal said, some referees apparently thought that no more than errors of judgment were involved in the behaviour giving rise to the complaints. One referee, for example, said: "While I acknowledge that the process of having her personal life scrutinised in an adverse setting has exposed some human failings and uncovered an unwise choice of confidants, I strongly believe that having had these

indiscretions publicly aired has been punishment enough." Another, having expressed the view that the appellant had been for her the model of a "caring broad-minded innovative psychiatrist "found the findings of the Tribunal" incongruous with the person who was my supervisor and with her teachings".

A number of the referees suggested that the breakdown of the appellant's marriage of thirty years had been a significant contributing factor in the conduct which the Tribunal had found to be improper. Many advanced the view that, in those circumstances, a period of supervised practice might be appropriate.

I will not traverse the whole of the character evidence which was covered by the Tribunal fully and carefully; and I bear in mind that the making of an order under s 32R is an exercise of discretion with which this Court should not interfere save upon the well understood grounds which authorise intervention in such cases. There are, however, certain aspects of the matter to which I must refer, although the Tribunal referred to them in arriving at its conclusion.

First of all, the finding against the appellant in respect of her conduct concerning RS is a very serious one, involving what the Tribunal regarded "as a callous disregard for RS's mental and emotional well-being" which was "properly to be deplored." Accordingly, the misconduct established cannot in any sense be regarded (as some of the character witnesses evidently perceived it) as no more than an error of judgment brought about by the intensity of emotional pressure,

and hence a casual aberration unlikely to recur. Secondly, the Tribunal, upon all the evidence, was of the opinion that the appellant exploited the therapeutic relationship, not only in her conduct with RS, but with Dr W also. The Tribunal recognised that the breakdown of the appellant's marriage and the failure of her relationship with Dr W had both influenced her conduct, but rightly regarded this as demonstrating a lack of emotional stability which might very well recur if she were again exposed to pressures of the same kind.

Thirdly, it seems plain that any therapist who undertakes psychodynamic supportive therapy involving relationships of a closer, warmer and less formal kind than those which normally exist between therapist and patient, must be on guard to a special degree against permitting the therapist's own emotional pattern to affect the doctor/patient relationship. I believe I appreciate the general nature and purpose of the technique which the appellant adopted. I do not understand it to be suggested, however, that it involves a complete abdication of the guiding and directing role which all therapists presumably must fill; although, in the appellant's case, to a considerably less detached and Olympian degree than is the norm when classic psychotherapy is being conducted.

The extent to which the appellant's personal affairs affected her professional conduct, and the likelihood of such misconduct recurring are of vital importance in determining the nature of what is, as I have said, an essentially protective order. If punishment only were involved then different

considerations would apply. But here, in truth, what is involved is a means of protecting members of the public from what the Tribunal decided was a serious example of misconduct which caused actual detriment to those whom it exploited.

Fourthly, the Tribunal found that the appellant had not been truthful which, as the Tribunal observed, is in itself a circumstance touching the appellant's fitness to practise.

Fifthly, it cannot seriously be suggested that a' practitioner of the appellant's experience and capacity needed, or could benefit from, the kind of supervision which Dr Kyneur and Professor Katz suggested. This consideration leads to the final and perhaps the most important element.

Sixthly, although Dr Kyneur gave evidence, with which the Tribunal dealt in detail, that the appellant appeared to recognise that her conduct had fallen short of the standard required and was entirely contrite, and that she had told him that the breakdown of her marriage in 1985 had made her "emotionally vulnerable and distraught and accessible to professional misconduct" (at least it seems in his letter of 17 April 1990 that Dr.Kyneur is referring to something he was told by the appellant and not to his own opinion) the appellant did not herself give any evidence to this effect.

After Dr Kyneur and Professor Katz had given their evidence Judge Staunton asked counsel for the appellant whether he intended to call her. He said that he did not. The Chairperson pursued the matter thus:

"I should draw your attention to what Dr Kyneur has said about what your client told him on 8 April and what her recognition now was or then was of her conduct falling short of professional standards. It seems to me that if the doctor accepts that as the fact, then the matter should be viewed in different light, one of which is she steadfastly maintains that she did nothing wrong,

do you follow me?"

I do not know whether the transcript is corrupt at this point but it seems that counsel's answer simply was:- "May I hand up documents first"; and I do not see that the matter was further taken up by counsel. I would not have expected it to be pursued by the learned Chairperson since the vital question had already been asked. The appellant was not called and therefore she did not give any evidence concerning her response to the adverse findings made against her. I recognise that a situation of this kind, which not uncommonly arises in criminal proceedings, presents difficulties for accused persons and their legal advisers. An accused who has strenuously denied that she had anything to do with the crime charged may well find it embarrassingly difficult, when the question of penalty arises, to seek the mitigation that might be found in the final admission of guilt and the expression of contrition. But this is no more than an inevitable consequence when, as in the present case, there has been a clear conflict of fact resolved in favour of the complainant.

In his address Mr Glissan, at the outset, said:

"There is a significant quantity of material before the Tribunal that asserts, first, that Dr Childs at the time these lapses of judgment occurred, for a very lengthy period was herself the subject of particular stresses, stresses which psychiatrists would recognise and which they would be sympathetic to." (I have supplied the

emphasis myself).

He went on to deal most persuasively and fully with the character evidence, stressing the unimpeachable nature of her conduct up to the events which had brought her before the Tribunal, the assistance which she had given to patients and colleagues, her compassion and her technical efficiency. Then, counsel asked the rhetorical question: "Can it be said, in light of these testimonials, that Dr Childs is somebody from whom the community needs protection?" And he continued by referring to the breakdown of the appellant's marriage and the fact that it was shortly after that "that Dr Childs continues the error of judgment, because in my submission it cannot be claimed to be more than an error of judgment, however gross it may be, it remained an error of judgment, of entering into a husband and wife relationship with Dr W which went on for some considerable time"; and added that it was during that period of instability in her life that "those other errors of judgment occurred".

While therefore counsel endeavoured to attribute the appellant's misconduct to the stress of her broken marriage, and described her as someone who has "legitimately, for reasons which are explainable in material before the Tribunal, fallen from grace", there is no direct submission and, indeed, could not have been, that the appellant had recognised fault and was sorry. There is no evidence that she had or that she was. The law does not require the expression of contrition as the satisfaction of some arcane ritual. In cases such as this,

where the protection of the community is the paramount interest, contrition, if accepted as honest, may indicate that no occasion for protection exists. In the present case, however, although counsel most eloquently contended that there was no need to protect the community from Dr Childs, the lynchpin of such an argument, namely her recognition that what she had done was wrong, not the least of its fault being that it had damaged former patients who were still dependent upon her, was wholly lacking.

On these grounds, and taking account of the Tribunal's reasons in which I generally concur, I see no basis for the conclusion that the Tribunal fell into any error in making the order which it did. Indeed, I am of the view that removal from the register was the only appropriate step to take. The fact that the Tribunal stipulated that three years must elapse before an application for registration could be made is not to be regarded as converting the order into no more than a suspension. But, it does, at least, hold out to the appellant the possibility of being able again to serve the community, although the Tribunal's rider does not of course bind any admitting authority to accept the appellant as soon as the stipulated period has elapsed.

I can see no ground upon which the order for costs can be impeached.

I would dismiss the appeal with costs and confirm the Tribunal's orders.

I Certify that this and the 18
preceding pages are a true copy of
the reasons for judgment herein of
The Honourable Mr. Justice Samuels.

M Anderson.

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40252 of 1990

SAMUELS JA
PRIESTLEY JA
MEAGHER JA

Tuesday 13 November 1990

CHILDS v WALTON

PRIESTLEY JA: I agree with Samuels JA.

I Certify that this is a true
copy of the reasons for
judgment herein of The
Honourable Mr. Justice Priestley.

Date 13-11-90

Mawell
Associate

THE SUPREME COURT)

NEW SOUTH WALES }

COURT OF APPEAL }

CA 40252 of 1990

CORAM: SAMUELS JA
PRIESTLEY JA
MEAGHER JA

TUESDAY, 13 NOVEMBER, 1990

CHILDS V. WALTON

JUDGEMENT

MEAGHER JA: I agree with Samuels JA.

That this is a true
the reasons for
ment herein of The
Honourable Mr. Justice Meagher

Date 13-11-90 *L. Mason*