

QIDWAI v BROWN

Court of Appeal: Hutley, Samuels and Priestley JJA

21 February; 14 March 1984

Medicine - Medical practitioners - Misconduct in professional respect - Test for Proof of professional reprobation required - Departure from norm not sufficient - Appendectomy on day-stay basis - Medical Practitioners Act 1938, s27(1)(c).

Held: (1) The test to determine whether there has been "misconduct in a professional respect" within the *Medical Practitioners Act 1938, s 27(1)(c)*, requires proof that there have been departures from accepted procedures and that those departures have been subject to professional reprobation by fellow practitioners of good repute and competence. (101 E,102G,105C)

Ex parte Meehan; Re Medical Practitioners Act [1965] NSW 30, adopted and applied.

(2) A departure from accepted procedures may be unusual and may be the subject of doubt or difference of opinion in the profession without necessarily amounting to misconduct in a professional respect. (102E-F,102G,105C)

(3) Conducting an appendectomy in 1980 on a day-stay basis in private consulting rooms had not been proved to be professional misconduct. (102C,122G,107AC)

CASES CITED

The following cases are cited in the judgments:

Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1.

Browne v Dunn (1894) 6R 67.

Keene, Ex parte (1926) 26 SR(NSW) 463; 43 WN 136.

Meehan, Ex parte: Re Medical Practitioners Act [1965] NSW 30.

R v General Medical Council [1930] 1 KB 562.

Taxation, Federal Commissioner of v Whitfords Beach Pty Ltd (1982) 56 ALJR 240; 39 ALR 521.

APPEAL

This was an appeal against the findings of the Medical Disciplinary Tribunal by which the appellant was found guilty of misconduct in a professional respect and reprimanded.

R L Hunter QC and JL B Allsop, for the appellant.

M R Einfeld QC and I D Roche, for the respondent.

Cur adv vult

14 March 1984

HUTLEY JA. This is an appeal from a decision of the Medical Disciplinary Tribunal given on 23 June 1983, by which the appellant was found guilty of professional misconduct in a professional respect and reprimanded. The evidence establishes that the appellant has high credentials as a surgeon.

The complaint which was referred to the tribunal was set out in full in the

judgment appealed from. It related to an appendectomy performed on a Mrs Tohme on 27 August 1980. This was done on a day-stay basis, and in fact had been successful

The tribunal found the following particulars established:

- (1) That the rooms in which the appendectomy was carried out were inadequate in certain respects.
- (2) That there were no adequate surgical theatre lights.
- (3) That the post-operative recovery facilities were inadequate.

As in the proceedings before the tribunal it was conceded that these particulars were not made out, the tribunal's findings cannot stand.

It was also conceded that as there is no mandatory obligation that a non-registered person be not permitted to attend operations and that his wife, who assisted him, was - though not registered in New South Wales - a skilled person. This means that the charge was not made out, as the tribunal agreed.

It follows that in any event it will be essential for the court to review the propriety of reprimanding the appellant.

The two remaining matters are:

- (1) Whether the performance of elective appendectomy, otherwise than in a hospital, was professional misconduct in a professional respect; and
- (2) whether the failure of the appellant to require the patient to stay overnight was in the same category.

In *Ex parte Meehan; Re Medical Practitioners Act* [1965] NSW 30 at 36. Sugerman J said:

"Deviations from accepted procedures in the actual practice of the art may sometimes become, and with reason, the subject of professional reprobation, although unattended by any taint of moral obliquity. But in this branch also of the subject, decision must be dependent upon the circumstances of the particular case and upon questions of degree."

The court then had to consider whether the conduct was "infamous". This pejorative adjective has now been omitted but, in my opinion, Sugerman J provides the test to be applied by this Court, namely, whether there have been departures from accepted procedures and whether these departures have become the subject of professional reprobation.

That what was done by the appellant was unusual. The tribunal found that the operation had never been performed as a day-stay procedure before August 1980. This is not, however, decisive. 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.

That the evidence as to what the appellant did would at the time he did it attract professional reprobation required careful analysis by the tribunal. The evidence of Dr Morgan, a surgeon of distinction, as to this was as follows:

"Q. Do you hold any opinion as to the performance of appendectomy in facilities other than a hospital? A. Yes.

Q. As at August 1980? A. Yes. My opinion, and I believe that of

(Objected to by Mr Carson.)

HIS HONOUR: Restrict it in the first place to your own opinion.

WITNESS: I was going to introduce the day care committee of which I was a member. That is why I mentioned that.

HIS HONOUR: Q. If you would just restrict it? A. I believe that body

cavities should not ordinarily be opened in a day surgical care. That means the cranial, chest, or abdominal cavity.

Q. You say you believe the body cavity A. Yes, the head and the chest and the abdomen should not be opened in a day surgical centre, in an operative way.

MR ROCHE: Q. What is the reason for your holding that view? A. I think that a line has to be drawn somewhere in terms of what is safe and what is unsafe and what may need to be done in addition to the operation that a surgeon sets out to do and there is, of course, the question of post-operative care of the patient."

That Dr Morgan felt strongly that what was done deserved strong condemnation is clear. He was, however, confined to his personal opinion, he gave no direct evidence of general professional opinion.

The report of the Day Surgery Committee, which is dated 19 September 1981, is in evidence. Though it could not, in my opinion, have been properly used to condemn the appellant for what he did in August 1980, it, in fact, contains no recommendations against day-stay appendectomies. There is, therefore, no evidence in the complainant's case that day-stay procedures for appendectomies had attracted professional reprobation in 1980.

The respondent sought to find support in witnesses called for the appellant and his anaesthetist, Dr Sundaraj, who was also before the tribunal but acquitted. Dr Fisk, a distinguished anaesthetist, after expressing the opinion that whether or not to perform an appendectomy on a day-stay basis was the prerogative of a surgically skilled doctor, went on to say it was a procedure he would not like to perform. Dr Holland, another distinguished anaesthetist, gave a written statement that under conditions which were in this case fulfilled, appendectomy is suitable for day-stay procedure. Under cross-examination, he explained he was speaking as an anaesthetist, but this does not, in my opinion, weaken his testimony. The surgeon and the anaesthetist are co-operating in the one operation, and have complementary appreciations of the difficulties of operations. The evidence of expert and independent anaesthetists is, in my opinion, sufficient to establish that there is a respectable, though minority, view that such operations, in the circumstances existing in respect of this operation, are acceptable. Where this exists, it cannot be said that the one who acts on the minority view is guilty of professional misconduct. There is the further fact that other countries with medical standards not incompatible with those recognized in this country, ie, the United Kingdom and Malaysia, accept day-stay appendectomies.

In my opinion, the appeal should be allowed, the finding that the appellant was guilty of misconduct in a professional respect and the reprimand set aside with costs here and before the tribunal. As there was no evidence to sustain the finding, the tribunal made, in addition to errors of fact, an error of law, and the respondent is entitled to a certificate under the *Suitors' Fund Act, 1951*.

SAMUELS JA. I have had the opportunity of reading in draft the judgments prepared by Hutley JA and Priestley JA. I agree with their reasoning and with the orders which Hutley JA proposes.

PRIESTLEY JA. The Medical Disciplinary Tribunal heard a complaint

against Dr K A Qidwai pursuant to the *Medical Practitioners Act 1938*,

s 27(1)(c), alleging that he had been guilty of misconduct in a professional respect, in that:

"I. When he undertook a surgical procedure, namely an appendectomy, upon Mrs Khaldie

Tohme of 3/64 Amy Street, Campsie, on or about 27 August 1980 he did so in the following circumstances:

(a) In a non-emergency situation.

(b) In private consulting rooms at 25 Malvern Street, Croydon.

(c) The said private consulting rooms were inadequate in that:

(i) There was no operating table, only an examination couch;

(ii) There were no adequate surgical theatre lights;

(iii) There were no appropriate post-operative recovery facilities available.

II. By virtue of I above the surgery was undertaken in circumstances and conditions which were inadequate and not in accordance with the standards required for the practice of surgery in New South Wales.

III. He undertook surgery in a non-emergency situation which he knew or ought to have known should have been carried out in a hospital, and not in private consulting rooms, namely, an appendectomy upon Mrs Khaldie Tohme on or about 27 August 1980.

IV. By virtue of I and II above he carried out a surgical procedure without due care for the safety of the patient concerned, namely Mrs Khaldie Tohme of 3/64 Amy Street, Campsie on or about 27 August 1980.

V. He employed in connection with his professional practice an assistant, namely, his wife, who is not a duly qualified or registered person and permitted her to attend operations upon patients and treat patients in respect of matters requiring professional discretion or skill.

VI. He carried out medical procedures not in accordance with the standards appropriate for the practice of medicine and surgery in New South Wales on a patient, namely Mrs Khaldie Tohme on or about 27 August 1980 in that he allowed her to be released from medical care within five hours of performing appendectomy upon her."

The tribunal found particulars I, II, III, IV and VI were proved and constituted misconduct in a professional respect. The tribunal also found that particular V had been made out in fact, but although of the view that Dr Qidwai was unwise to have employed an unregistered person, it did not amount to misconduct in a professional respect. The tribunal concluded that the proper order against Dr Qidwai was that he be reprimanded.

Dr Qidwai appealed to this Court against the findings of professional misconduct. I think his appeal should be upheld because I do not think that professional misconduct was established against Dr Qidwai before the tribunal.

Before dealing with the facts I will first set out my understanding of "misconduct in a professional respect". The relevant text of s 27(1)(c) is:

"(1) Where a complaint that a person who, as a registered medical practitioner

(a) ...

(c) has been guilty of misconduct in a professional respect; ...

is made to the investigating committee ... the investigating committee shall, subject to subsection (1c), investigate the complaint."

Until 1972, par (c) read "... guilty of infamous conduct in any professional respect", as had the corresponding section in earlier acts. The same phrase appeared in the English Act in a slightly different context.

What was meant by "infamous conduct in a professional respect" in the New South Wales statute was dealt with in detail in *Ex parte Meehan; Re Medical Practitioners Act* [1965] NSW 30 by Sugerman J, as he then was.

He discussed the English and Australian cases and said (at 35, 36):

"Consideration of the cases and of the provisions of the legislation in force in this State suggest that the only generalization as to the meaning in that legislation of 'infamous conduct in any professional respect', which can be attempted as capable of application to the varying situations which may arise, is that it refers to conduct which, being sufficiently related to the pursuit of the profession, is such as would reasonably incur the strong reprobation of professional brethren of good repute and competence. Like the word 'infamous' such suggested alternatives as 'disgraceful' or 'dishonourable' or 'shameful' must be understood by reference to this context of professional disapprobation; and due regard must be had to the varying classes of conduct to which these epithets, used in this special professional sense, may come to be applied. Some forms of misconduct by medical practitioners may in themselves bear the badge of iniquity, in general as well as in professional estimation, and thus be 'infamous' in the ordinary, as well as in the special professional, sense. Other forms of misconduct may be 'infamous' in a professional sense and yet not be so regarded in the ordinary and general use of that expression. Then there are those whose infamy is a matter of degree and which, if they are reasonably to be regarded as infamous in a professional respect, must be accompanied by some element of moral turpitude. Deviations from accepted procedures in the actual practice of the art may sometimes become, and with reason, the subject of professional reprobation, although unattended by any taint of moral obliquity. But in this branch also of the subject, decision must be dependent upon the circumstances of the particular case and upon questions of degree. In short, whether moral turpitude is a necessary ingredient of 'infamous conduct in any professional respect' is a matter on which no general rule can be laid down, the answer being dependent upon the nature of the conduct which is in question in each instance.

In the present case departure from an approved surgical practice, thereby exposing patients to unnecessary hazard, rather than moral obliquity, is the essence of the matter, the infringement being of basic professional tenets as to which there is no suggestion of doubt or difference of opinion in the profession and to which, indeed, the appellant has said that he himself subscribed.

Taking all the circumstances of the case into consideration, I find no ground for disturbing the tribunal's conclusion that the plaintiff was guilty of infamous conduct in the professional respect mentioned, and am in agreement with that conclusion."

Later (at 38) he referred to the doctor's conduct as being "wrongful ... in a professional respect". The other members of the court, Walsh J and Wallace J, as they then were, did not, in their separate judgments, deal with the meaning of the phrase in the same detail but Wallace J referred, with qualified approval, as had Sugerman J (at 35) to what Scrutton LJ in *R v General Medical Council [1930] 1 KB 562* at 569, said about the same phrase in the corresponding English Act:

"It is a great pity that the word 'infamous' is used to describe the conduct of a medical practitioner who advertises. As in the case of the Bar so in the medical profession advertising is serious misconduct in a professional respect and that is all that is meant by the phrase 'infamous conduct'; it means no more than serious misconduct judged according to the rules written or unwritten governing the profession."

From the foregoing it seems to me to be right to say that while the words in the *Medical Practitioners Act* remained "infamous conduct" the test in a case such as the present was whether the practitioner was in such reach of the written or unwritten rules of the profession as would reasonably incur the strong reprobation of professional brethren of good repute and competence. In applying this test in regard to a rule of professional practice it would be of relevance, but not conclusive, to see whether the rule said to be broken was one, as in *Meehan's* case, "as to which there was no suggestion of doubt or difference of opinion in the profession".

In 1972 the *Medical Practitioners Act*, s 27(1)(c), was amended to its present form. Is the test to be extracted from *Meehan's* case applicable to the new form of words? I think so, for various reasons. The corresponding legislation in New South Wales regarding dentists was amended in 1927 in the same way as the *Medical Practitioners Act* in 1972, in apparent response to a sequence of Full Court decisions on the *Dentists Act* 1912 (the last of which was *Ex parte Keene (1926) 26 SR (NSW) 463; 43 WN 136*). These had shown the same difficulties with "infamous conduct" as Scrutton LJ referred to in *R v General Medical Council*. A new *Dentists Act* in 1934 retained the change. In *Meehan's* case Wallace J made a plea for amendment of the *Medical Practitioners Act* in language reminiscent of Scrutton LJ. The whole tenor of Sugerman J's judgment was to read "infamous conduct in any professional respect" in a sense corresponding to "misconduct in a professional respect". Thus, on an orthodox approach to construction everything points to the words of the 1972 amendment being meant in the same sense as the courts had construed "infamous conduct in any professional respect" to have. Finally, if it is permissible to have regard to second reading speeches in parliament at the time of the introduction of legislation to see what mischief is to be remedied (see per Mason J in *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd (1982) 56 ALJR 240 at 247; 39 ALR 521 at 533*) held is obtained in this instance. *New South Wales Parliamentary Debates*, third series, vol 99 records the Minister as saying in his second reading speech in regard to the relevant amendment (at 786):

"Some of the most important amendments are being made in respect of the disciplinary powers contained in the Act. The phrase 'infamous conduct in any professional respect' has been altered to 'misconduct in a professional respect' as being in keeping with modern usage as exemplified by the *Dentists Act, 1934*."

I come now to what took place before the tribunal. The material consisted chiefly of evidence given by various medical practitioners including Dr Qidwai.

[His Honour considered some evidence before the tribunal and concluded:]

The two particulars remaining for consideration are III and VI. These raise the general question whether the carrying out of appendectomies in what are known as day surgeries and the release of patients upon whom appendectomies have been carried out after what has been called "day-stay" is "misconduct in a professional respect". Before dealing with this central question it is appropriate to refer to an observation made by the tribunal towards the end of its reasons. In the course of his address counsel for the complainant had begun to make submissions concerning Dr Qidwai's motivation in carrying out appendectomies on a day-stay basis. It is clear from the context of his recorded submissions that he was on the point of submitting that Dr Qidwai was carrying out the appendectomies for his own private purposes without regard to the interests of the particular patients. The solicitor for Dr Qidwai intervened, using plain terms. He said that Dr Qidwai was being accused of telling a lie when that had not been put to him and the question of motivation was being put which again was not put in cross-examination. The following exchange is then recorded:

"His HONOUR: I have not read his evidence from yesterday. Were these matters put to him?"

MR ROCHE: In fairness to the tribunal I must say they were not put in specific terms. They were not put.

His HONOUR: You cannot then raise them."

This was a proper and every-day application of a rule of fairness which has been recognized for a long time: see *Browne v Dunn (1894) 6 R 67*; *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR I* at 15-26. Towards the end of its findings the tribunal said it felt bound to make some further observations. One was that it had some disquiet about the truthfulness of Dr Qidwai in making an assertion that he had made in evidence and the other was that the tribunal felt it had ample cause to wonder whether there had been a proper and correct diagnosis in the appendectomies carried out at his surgery. No such suggestions had been made to Dr Qidwai in the course of his being questioned in evidence. In my opinion it is quite unfair to him to say such things about him when the subject matter had not been raised with him in his evidence. In the way the hearing of the complaint developed the matters dealt with were not issues in the case. In my opinion the observations should not have been made.

The principal issue in the appeal was whether the appendectomy upon Mrs Tohme on 27 August 1980, was misconduct in a professional respect in the sense I have earlier described. In this case that means asking whether it was in such breach of standards accepted by the medical profession in this State as would reasonably incur strong reprobation of fellow practitioners of good repute and competence. I do not think that the complainant made out a case that it was.

[His Honour then summarized the evidence before the tribunal from surgeons and anaesthetists and concluded:]

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. In saying this I hope it is clear that I have been dealing with the question whether a particular standard of medical practice existed in New South Wales in 1980. I have at no stage dealt with the related but quite different question of the desirability of appendectomies being carried out on a day-stay basis. This is a question on which I express no opinion and which I leave to the appropriate authorities.

For the reasons I have given I do not think the first necessary ingredient (the alleged standard) of the complaint against Dr Qidwai was established. Even had this been established I do not think the second ingredient was made out. It was not shown that competent and reputable practitioners generally would strongly reprobate Dr Qidwai's conduct. That it was not shown is clear from the evidence of Drs Fisk, Richardson and Holland. I should add, however, that the two ingredients are obviously related. Had the standard existed the facts about the necessary reprobation may well have been different.

I agree with the orders proposed by Hutley JA.

Finding of the Medical Tribunal set aside

Solicitors for the appellant: *Dawson Waldron*.

Solicitor for the respondent: *H K Roberts* (State Crown Solicitor).

N J HAXTON,

Barrister.