COURT OF APPEAL

RECORD SHEET

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PARTIES : BOWEN-JAMES v WALTON & ORS

JUDGMENT OF: SAMUELS JA MEAGHER JA HANDLEY

JA COUNSEL:

Appellant: A J SULLIVAN QC/K M CONNOR

1st Respondent: J BASTEN
'/3rd Respondents: I LINWOOD - SUBMITTING APEARANCE

SOLICITORS:

Appellant: TRESS COCKS & MADDOX

1st Respondent: H K ROBERTS, STATE CROWN

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THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40432/91

SAMUELS JA
MEAGHER JA
HANDLEY JA

Monday 5 August 1991

BOWEN-JAMES v WALTON & ORS.

JUDGMENT

THE COURT: By notice dated 18 March 1991 the Medical Tribunal gave notice to the claimant (as we will call the doctor) of complaints that he had been guilty of professional misconduct within the meaning of s 28(1)(d) of the Medical-Practitioners Act 1938 ("the Act"). The first complaint asserted, and we refer only to what appears to be the most significant. of four particulars advanced in support of the principal allegation, that while a female, referred to in the notice as "M", was the claimant's patient receiving psychotherapy (the claimant was at all material times a practising psychiatrist or psychotherapist) she and the doctor, at his invitation, had engaged in sexual activity. The second complaint alleged that while M was a patient of the claimant he disclosed to her confidential information concerning two persons who were then his patients or had formerly been his patients.

The claimant denies all these allegations.

The complaints were first returned before the Chairperson of the Tribunal on 19 April 1991. Thereafter notices to produce documents were filed and served by both the claimant and the Delegate of the Director General of the Department of Health, whom we will call the opponent. Various claims for legal professional privilege were made in respect of documents produced by the claimant and his insurer and solicitors. These matters were debated before a Deputy Chairperson, Sinclair DCJ, on 18 and 19 June and the claims for privilege were upheld.

A judgment upholding the claims of privilege was given on 18 July 1991. During the course of the argument Sinclair DCJ ordered that M's "statements" (we take this to mean the statutory declaration that she made in support of the complaints) and the statements of supporting witnesses should be filed and served on or before 17 July, and that statements of evidence to be given by the claimant and witnesses whom he desired to call should be filed and served on or before 31 July. These orders were, in effect, a direction for the exchange of evidentiary statements. On 26 June 1991 the opponent filed M's statutory declaration and other statements of evidence; but the claimant objects to comply with the order, concerning his statements, which he challenges in the appeal.

Sinclair DCJ informed the parties that in the course of determining the claims for legal professional privilege he had read a file note taken by a Mr Mark Ramsey, who was a solicitor

at Tress Cocks & Maddox who were acting for the claimant. He also indicated that he proposed to send to the other members of the Tribunal, before the commencement of the hearing, M's statutory declaration and the other statements filed pursuant to the orders that had been made. However, we were told by the solicitor who appeared for the second and third opponents, the Medical Tribunal and the New South Wales Medical Board, that this had not been, and would not be, done until we had disposed of the proceedings before us.

The claimant has appealed, contending that his Honour erred in making the orders for exchange of statements, and has also filed a summons in which he seeks orders in the nature of prohibition restraining the Medical Tribunal as constituted for this procedure, or alternatively Sinclair DCJ, from sitting in any inquiry into the alleged conduct of the claimant, restraining any member of the Tribunal from reading any statements filed on behalf of the claimant or the statutory declaration filed by M, and, finally, an order prohibiting the admission into evidence of those statements or that statutory declaration.

In support of the relief sought in the summons two principal arguments were advanced. First, it was submitted that the orders to exchange statements were procedurally unfair because they enabled the Tribunal, and in particular its lay members, to obtain before the hearing commenced knowledge of material in M's statutory declaration, and in the statements of witnesses, which was legally inadmissible and should, in any

event, have been excluded on grounds of 'substantial justice' notwithstanding the terms of cl 1 of Schedule 4 to the Act which provide that:

> "[the] Tribunal is not bound to observe the rules of law governing the admission of evidence, but may inform itself of any matter in such manner as it thinks fit."

Secondly, it was submitted that the procedure (that is, ordering the exchange of statements) should not have been used in a case such as this, where credit was critically in issue, even if the substance of the statements had been strictly in accordance with the legal rules of evidence. That proposition was supported by two assertions. First, that in such a case the cross-examiner (that is,,-counsel for the claimant) was entitled to have the benefit of observing the demeanour of the adversary's witnesses (including, of course, M) while they gave evidence in chief. Secondly, an inquiry such as this was analogous to criminal proceedings so that the claimant should not have been required to disclose his case until the whole of the case against him had been deployed.

We have set out the terms of cl l of Schedule 4 which, in a not unfamiliar way, confer a statutory power upon the Tribunal to receive evidence which does not satisfy the rules of admissibility by statute or at common law. Furthermore, s 32 O(3)(b) enables the Tribunal in conducting an inquiry to "conduct the proceedings as it thinks fit." It was submitted, however, by Mr Alan Sullivan of Queen's Counsel for the claimant, in a thorough and thoughtful argument from which this

Court derived much assistance, that the discretions which Schedule 4 and s 32 confer must be exercised with deference to the principles of procedural fairness (as to which there can be no dispute) and that the evidentiary discretion in particular must be limited by the principle expressed by Evatt J in The King v The War Pensions Entitlement Appeal Tribunal & Anor; Ex parte Bott (1933) 50 CLR 228 at 256. From those remarks Mr Sullivan derived the proposition that the Medical Tribunal was bound to act "according to substantial justice" and that the admission of evidence is to be regulated, not solely by the wide discretion vested in the Tribunal by dint of Schedule 4, but by the need to comply with the criterion of "substantial justice".

We do not consider that there is any general doctrine which demands the application of some criterion of "substantial justice" as a restriction upon the apparent flexible authority conferred by Schedule 4. In 8ott, the statute there in question itself expressly provided that an appeal tribunal "shall not, in the hearing of appeals, be bound by any rules of evidence but shall act according to substantial justice and the merits of the case and shall give to an appellant the benefit of the doubt ... " Hence, Evatt J's remarks were not exposition of some doctrine of the common law but an explanation of the effect which the statutory formula in that case exerted.

We agree that much of the material in M's statutory declaration, and in the statements of the witnesses to be

called by the opponent, is not legally admissible, because it is hearsay or consists of self-serving assertions.

No doubt the Medical Tribunal has a duty to act judicially, and to observe the requirements of procedural fairness discussed by Deane J in Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 366-8. But it is settled law that that duty "may vary according to the statutoryramework of the particular proceedings and the circumstances of the individual case Bond at 366, citing Russell v Duke of Norfolk (1949) 1 AER 109 at 118 per Tucker LJ. The statutory framework here includes Schedule 4. The presence of the legal defects to which we have referred does not therefore on that account disqualify the material from admission. Nor does it necessarily trigger the exercise of some exclusory discretion. The principle to be followed is, we venture to say, that which was discussed in Jones & Anor,v Sutherland Shire Council (1979) 2 NSWLR 206 and in particular at 215-219. Accordingly, it is in our view perfectly consistent with concepts of procedural fairness to apply a provision such as in cl 1 of Schedule 4 to the Act to admit evidence which may not be legally admissible but which, nonetheless, possesses "rational persuasive power" in respect of an issue material to the proceeding : see McCormick Law of Evidence (1954) par 54, referred to in Jones at 216.

There is, however, an even more conclusive answer to the argument which attacks the orders as unfair. It cannot persuasively be contended that the orders made for the exchange

of evidentiary statements were bad in law because it turned out that the material furnished in response to them contained defects of one kind or another. We see no substance therefore in the first argument.

However, in the alternative the validity of the exchange orders is attacked because of unfairness which they are bound to have produced, even though their terms complied meticulously with legal rules of admissibility.

This argument asserts that disciplinary proceedings of this kind must be regarded as analogous to criminal proceedings so as to comply, as a matter of procedural fairness, with the normal practice of adducing evidence orally from witnesses in criminal trials Butera v Director of Public Prosecutions for the State of Victoria (1987) 164 CLR 180 at 189-90. We pause to note that the practice in criminal trials of requiring witnesses to give their evidence orally "is not immutable"; Butera at 190. But there was, it is said, a failure to observe this principle in the present case because the exchange of statements, which were intended to stand as the witness' evidence in chief, deprived the cross-examiner (that is, counsel for the claimant) of the opportunity of observing the witness' demeanour while he or she gave evidence in chief. Further, the order tended to deprive the claimant of a right to silence to which he was entitled, a point with which we will deal presently when we' consider the appeal.

Inherent in this proposition is the undoubted fact that in the present case questions of credibility will prove of

vital importance. M's assertions are, in the nature of things, unsupported by witnesses able to give direct evidence of the events she describes. Hence, apart from other evidentiary questions, the decision may very well depend upon the view which the Tribunal takes of the credit of M and of the claimant. Accordingly, reliance was placed upon what Wilson J said in Re Singh and Minister of Employment and Immigration (1985) 17 JDLR (4th) 422 at 465

> "In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing."

We must interpolate that what was in debate in that case was the requirement of s 2(e) of the Canadian Bill of Rights that no law of Canada should be construed or applied so as to deprive a claimant "of a fair hearing in accordance with the principles of fundamental justice". But leaving this aside, it can hardly be contended that the tender of a written statement is evidence in chief with an unfettered right of cross-examination is an inadequate method of assessing credibility. It may be that to watch a witness giving evidence in chief may provide assistance to the cross-examiner, on the other hand, where the witness' statement is available some time in advance of his or her actually giving evidence, the cross-examiner has the practical benefit of a committal; and the opportunity to prepare cross-examination well in advance, knowing exactly what it is that the witness may be expected to say. This is an undoubted forensic advantage.

We find it impossible to conclude that compliance with the orders should be restrained for this reason; and we do not feel compelled to any such conclusion by any-of the authority placed before us.

it was also submitted that Sinclair DCJ, who has read not only the, statutory declaration and the statements, but the file note to which we have referred, should not on that account further participate in the inquiry. The members of the Tribunal have not seen this material, and the summons seeks orders restraining them from doing so. The question is that posed in The Queen v Watson; Ex parte_ Armstrong (1976) 136 LR 248 at 264

> "The question is whether it has been established that it might reasonably be suspected by fair--minded persons that the learned judge might not resolve the questions before him with a fair and unprejudiced mind."

See also Re JRL; Ex varte,CJL (1986) 161 CLR 342 at 370 where Brennan J said:

> "It is reasonable for the husband to apprehend in those circumstances that the judge will not be able, however conscientiously she tries, to remove from her mind the impermissible effect of the discussion she had in chambers and thus to bring an impartial and unprejudiced mind to the determination of the matter pending in the court."

We do not think that fair--minded persons with knowledge of the facts, that is, the statutory declaration, statements and file note, would conclude that an experienced judge of the District Court would be precluded by having read them from approaching' the inquiry with the requisite degree of detachment

and impartiality, We take the same view, in the circumstances, of the susceptibilities of the members of the Tribunal. in the first place cl 1 of schedule 4 permits them to have regard to material not legally admissible. Secondly, if the judge (as he has indicated, he will) covers the material circulated to them with an appropriate warning to the effect that reasonable satisfaction "should not be produced by inexact proofs, indefinite testimony, or indirect inferences", Briginshaw v Briginshaw (1938) 60 CLR 336 at 362) we see no reason to conclude that it might reasonably be supposed that their minds might be corrupted.

We add that we do not regard the contents of the file note as constituting any threat to judicial detachment.

That brings us finally to the appeal, where the point is that the order that the claimant should furnish statements of the evidence that he proposed to give denied him procedural fairness on these grounds. First, because the order places the ,claimant in the invidious position of having to apply for leave to give oral evidence If he fails to comply with the order to furnish his statement. As to that, it is by no means clear from the transcript (which is a private transcript, as it were, made by an employee of the claimant's solicitors and furnished to us without objection) what the precise scope of the order was. However, it seems (and in this respect the transcript is a little obscure) that Sinclair DCJ did contemplate the necessity to apply to lead oral evidence in the absence of a statement. However, we would regard it as improbable in the

extreme that an application by the claimant to give oral evidence, though he had not furnished a statement, would be rejected,

Secondly, it is submitted that these proceedings being, as has already been submitted, akin to criminal proceedings, the learned judge should have regarded the claimant as possessing a right to silence which authorised him to say nothing until the whole of the adversary's case had been ;completed; whereas the order, of course, on its face, compels prior disclosure of the claimant's case. That, it is contended, is unfair because it deprives the claimant of some element of the surprise which his counsel might be able to employ in cross-examination of M and would enable M to tailor her evidence to conform with the matters-advanced in the claimant's statement.

It is true, as Police Service Board & Anor v Morris (1994-85) 156 CLR 397 indicates, that, the right to silence or she privilege against self-incrimination may apply in disciplinary proceedings of the kind there in question which exposed a police officer to what were undoubtedly penalties intended to constitute punishment. At 403 Gibbs CJ pointed out that it was well established that a person "cannot be compelled to answer a question whenever the answer would tend to expose him to 'any kind of punishment' - 'anything in the nature of a penalty'

But it is clearly established that the power of the court to discipline a medical practitioner, alike with the

Court's similar power in respect of lawyers, is "entirely protective".

As the High Court said in The New South Wales Bar Association v Evatt (1968) 117 CLR 177 at 183

> "The power of the court to discipline a barrister is, however, entirely protective, and, notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved."

This principle is of equal application in the case of medical practitioners. Skinner v Beaumont (1974) 2 NSWLR 1.06 at 107

. and 113. Accordingly, the procedures of the Tribunal cannot attract the kind of reasoning which was adopted in Morris.

There is a further ground for rejecting the argument that an inquiry before the Medical Tribunal partakes of essential elements of a criminal proceeding so as to attract a right to silence. In Edelsten v Richmond & Ors (1987) 11 NSWLR 51 this Court, applying of course the provisions of s 32W of the Act, expressed the opinion that that section conferred upon the Tribunal a discretionary power to continue proceedings before it, even though there were current criminal proceedings against the medical practitioner relating to the subject matter of the complaint. Hope JA, with whom Priestley JA and Clarke JA agreed, said at 61:

> "Despite the concern that the law has long had to protect persons accused of criminal offences in relation to the making of self-incriminating statements, the right to silence, as it is called, Parliament must have considered that there was a public interest in the

> investigation of a complaint against a medical practitioner which, in a particular case, might outweigh the public interest in the right to silence. The section does not contemplate that every disciplinary proceeding will continue notwithstanding the existence of criminal proceedings but equally it does not contemplate that the existence of criminal proceedings will preclude the disciplinary proceedings from continuing. The discretion given to the Tribunal involves a balancing of the public interest in the investigation of the complaint with the public interest in the observance of the right to silence."

That expression of opinion was followed and applied by the Court in Ibrahim v Walton. Court of Appeal, 23 April 1991, unreported. The existence of s 32W and the way in which it was construed in Edelsten clearly discriminate between criminal proceedings, which involve a right to silence, and proceedings before the Medical Tribunal, which do not. In Ibrahim Hope AJA, with whom the other members of the Court, Samuels JA and Priestley JA agreed, said, at 3, in the course of considering the competition which had there arisen between criminal proceedings and an inquiry before -the Tribunal:

> "However, -in relation to complaints against a medical practitioner, there are matters other than his interest or the public interest in the right of silence to be considered, and those include the interest of the public in the proper performance by medical practitioners of the undoubted privileges and powers which they have in relation to their patients, and in the protection of members of the public who are patients from any abuse of those powers or privileges. In some cases it is obvious that the public interest in protecting patients should be given priority to that of the person complained about who is also subject to the criminal proceedings."

And a little later on, his Honour added, in respect of

the earlier decision in Edelsten,:

> "It was there decided that what the Tribunal has to do, among other things, is to balance the interest of the public in the two respects to which I have referred and also to take into account the important interest of the respondent in his right of silence, as well as the other circumstances of the case, and it is a matter of discretion to decide whether or not to proceed with the
>
> complaint before' the criminal proceedings are heard."

In our opinion, there is no right to silence or any privilege against self-incrimination upon which a medical practitioner, answering a complaint before the Tribunal, is entitled to rely. Indeed, we would endorse the observations made by Hope AJA in Ibrahim. There is a public interest in the proper discharge by medical practitioners of the privileges which the community accords to them, and in the due accounting for the exercise of the influence which the nature of the occupation permits them, and indeed requires them, to exert over their patients. They are not, of course, officers of the Supreme Court, and, accordingly, the precise force of the decision in in Re Veron Ex parte Law Society of New South Wales_ (1966) 84 WN (Pt 1) 136, particularly of what was said at 141-2, cannot apply. Nevertheless, we are of the opinion that if a medical practitioner fails to answer by giving his or her account of the matters charged, there can be no complaint if the Tribunal draws the unfavourable evidentiary inference which absence from the witness box commonly attracts.

We therefore do not consider that any unfairness is involved in requiring the claimant to file with the Tribunal the text of any evidence he proposes to give in answer to the complaints. It was said that once M has conveyed to her the

substance of the claimant's answer, she may use that information to tailor dishonestly the evidence which she will give. But the facts she proposes to offer in proof of her complaint are already a matter of record. She has, in the forensic sense, only a limited freedom of manoeuvre. If she should succumb to the temptation to improve her own story by borrowing some of the claimant's account, she will expose herself, we would think, to extremely damaging cross-examination. We make it perfectly clear that nothing we nave said is intended to pre-empt the Tribunal's freedom to decide how much, if any, of the proofs filed should be rejected as of insufficient probative value. That is entirely a matter for the Tribunal when the hearing commences, and after argument. However, we see no ground for concluding that any member of the Tribunal, including Sinclair DCJ, should be restrained from sitting or that the orders for the exchange of statements should in any way be modified. Accordingly, we would dismiss the appeal and the summons, each with costs.

I certify that this and the 14 preceding pages are a true copy of the reasons for judgment herein of the Court.

M Anderson
Associate

Date 7.8.1991.