

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

**N.S.W. MEDICAL BOARD
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CA 40637191

**CLARKE JA
HANDLEY JA
SHELLER JA**

Friday, 17 July 1992

**BOWEN-JAMES v A DELEGATE OF THE DIRECTOR GENERAL
OF THE DEPARTMENT OF HEALTH**

The appellant, a medical practitioner, was the subject of two complaints to the New South Wales Medical Tribunal. After a lengthy hearing, the Tribunal found that the appellant had been guilty of professional misconduct and ordered that his name be removed from the Register of Medical Practitioners

On appeal, the appellant alleged that the Tribunal, had committed errors of law by -

- (1) making the decision of the Deputy Chairperson and lay member the decision of the Tribunal;
- (2) failing to give sufficient reasons and failure to consider all the evidence;
- (3) failure to apply the correct standard of proof;
- (4) denying the appellant the opportunity to be heard on what orders should have been made following the finding of professional misconduct.

Held:

- (1) The ultimate question raised by the complaint was one to which a 32T (2) applied. That is, the decision of the Deputy Chairperson was the decision of the Tribunal.
- (2) Even if error of law embraces conclusions which can be described as irrational or unreasonable, the reasons of the majority could not be so described. There was no basis for the conclusion that the Tribunal failed to give sufficient reasons or failed to consider all the evidence.
- (3) The majority members of the Tribunal had expressed themselves conscious of the standard of proof applicable to the proceedings and nothing in their determination indicated otherwise than that they had applied it correctly.
- (4) Although the appellant was not consciously or deliberately denied the opportunity to be heard on what orders should be made he was, in fact, denied that opportunity. The appellant should have the opportunity to make submissions to the Tribunal and the Tribunal should reconsider the exercise of its powers under the Medical Practitioners Act.

Medical Practitioners Act 1938

Supreme Court Act

Legal Profession Act 1987

Administrative Decisions (Judicial Review) Act 1977

Veterinary Surgeons Act 1923

Bropho v Western Australia (1990) 171 CLR 1

Attorney General v Davey (1741) 2 Atk 212; 26 ER 531

Grindley v Barker (1798) 1 Bos & P 229; 126 ER 875

Irish Boundary Commission (1924) 59 W Pt 2 517
Atkinson v Brown (1963) NZLR 755
Brain v Minister of Pensions (1947) KB 625
Minister of Pensions v Horsey (1949) 2 KB 526
Picea Holdings Ltd v London Rent Assessment Panel (1971) 2 QB 216
Briginshaw v Briginshaw (1938) 60 CLR 336
Abalos v Australian Postal Commission (1988) 171 CLR 167
Azzopardi v Tasman UEB Industries (1985) 4 NSWLR 139
McPhee v S Bennett Ltd (1935) 52 WN (NSW) 8
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Mifsud v Campbell (1991) 21 NSWLR 725 Allen v Tobias (1958) 98 CLR 367
Bald v Bray (1977) 1 NSWLR 256
Hanrahan v Ainsworth (1990) 22 NSWLR 73

ORDERS

1. Appeal allowed.
2. Orders (1) and (2) of the Tribunal set aside.
3. Otherwise the decision and orders of the Tribunal confirmed.
4. Matter referred back to the Tribunal to re-consider the exercise of its powers under s 32R of the Medical Practitioners Act 1938 in accordance with the judgment of this Court.
5. The appellant be suspended from practice until such time as the Tribunal has re-considered the exercise of its powers under s 32R and made a determination with respect thereto.
6. The appellant to pay the respondent's costs of this appeal.

THE SUPREME COURT
OF NEW SOUTH WALES
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CA 40637/91

CLARKE JA
HANDLEY JA
SHELLER JA

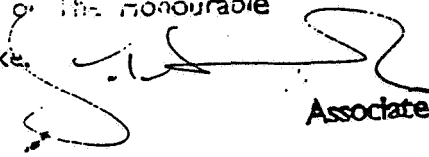
Friday, 17 July 1992

BOWEN-JAMES v A DELEGATE OF THE DIRECTOR GENERAL
OF THE DEPARTMENT OF HEALTH

JUDGMENT

CLARKE JA: I agree with the reasons and orders of Sheller JA.

I concur with the reasons for
judgment of the Honourable
Mr. Justice Clarke.



Associate

Dated 17.7.92

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL



CA 40637/91

CLARKE JA
HANDLEY JA
SHELLER JA

Friday 17 July 1992

BOWEN-JAMES v A DELEGATE OF THE DIRECTOR-GENERAL
OF THE DEPARTMENT OF HEALTH

JUDGMENT

HANDLEY JA: I agree with the reasons for judgment of Sheller JA and with the orders he proposes.

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

Date 17.7.1992.

M Anderson
Associate

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40637/91

CLARKE JA
HANDLEY JA
SHELLER JA

Friday, 17 July 1992

BOWEN-JAMES v A DELEGATE OF THE DIRECTOR GENERAL
OF THE DEPARTMENT OF HEALTH

JUDGMENT

SHELLER JA:

COMPLAINTS

On 15 March 1991 Merrilyn Walton, a duly authorised delegate of the Director General, New South Wales Department of Health, having consulted with the New South Wales Medical Board in accordance with s 32 (1) of the Medical Practitioners Act 1938 ("the Act") made two complaints to the New South Wales Medical Tribunal against Dr Alan Bowen-James of professional misconduct within the meaning of s 28 (1) (d) of the Act, particulars whereof were as follows:

1. (a) From about February 1987, at all material times, "M" was a patient of the practitioner receiving psychotherapy.
- (b) From about late March/early April 1987, at the invitation of the practitioner, patient "M", on occasions, received psychotherapy in coffee shops and restaurants (for which a fee was charged) and would occasionally meet the

practitioner outside the practitioner's home at 18/1 Queens Avenue, Rushcutters Bay, N.S.W.

- (c) During psychotherapy with patient "M", the practitioner disclosed details of his personal life to patient "M". Including details of his childhood and current sexual activity.
 - (d) On or about 28 August 1987 the practitioner and patient "M" engaged in sexual activity at the invitation of the practitioner. The practitioner and patient "M" engaged in sexual activity on approximately six (6) further occasions between 28 August 1987 and September 1987 and, on one (1) occasion, in about December 1987.
2. (a) During a period from about August 1987 to November 1987 the practitioner disclosed to "M" confidential information concerning "A" and "B", who were patients or former patients of the practitioner.
- (b) The said confidential information concerning "A" was as follows:
 - 1. That "A" suffered from a biochemical basis to his mood disorder and endogenous depression and would benefit from being treated with antipsychotic medication.
 - 2. That "A" did not love patient "M".
 - (c) The said confidential information concerning "B" was to the effect that "B" had propositioned the practitioner during therapy."

TRIBUNAL HEARING

The complaints were heard by a Tribunal which consisted of a Deputy Chairperson, Judge Sinclair QC, two registered medical practitioners, Drs R Nield and J Fotheringham and one lay member, Ms P Smith, the Tribunal being so constituted in accordance with s 32M (5) of the Act. The hearing commenced on 13 August 1991 and concluded, on the tenth day, on 30 September 1991, when judgment was reserved to

a date to be fixed. On 10 October 1991 reasons for determination were delivered. These reasons are directed to the first complaint. No mention is made of the second complaint. The first thirty eight and half pages of the document consisted of the reasons of the Deputy Chairperson and lay member. They concluded by finding as follows:

"We find that particular (d) of the Complaint, namely that respondent the engaged In sexual activity with his patient during August, September and December 1987, has been proved and constitutes Professional Misconduct.

We are also satisfied that particular (b) of the Complaint, namely conducting psychotherapy sessions in coffee shops and restaurants, has been proved and demonstrates a lack of adequate judgment and care by the respondent In the practice of medicine.

We are not satisfied that particular (c) of the Complaint has been established."

Drs Nield and Fotheringham were not satisfied that the complaint, by which they meant the first complaint, had been proved. Each gave separate reasons which concluded on page 51. Dr Nield said, in part:

"There is therefore 'reasonable' evidence to support the case. Against this is the inevitable difficulty in absolutely accepting one person against another.

My main doubt arises as a result of the opinion of D J Fotheringham, an experienced psychiatrist and a member of the Tribunal with experience thereof, who feels that the accusation could arise as a fantasy continually reinforced by the acceptance of her story by a wide variety of persons.

In view of the nature of the charge and the severity of the consequences I felt I was not sufficiently convinced beyond the required doubt to support the complainant whilst still thinking the balance was definitely in her favour."

Dr Fotheringham said, in part:

"My conclusion is that DM suffered a Borderline Personality Disorder with increasing emotional disturbance in 1987. She developed a sexual attraction for and transference to Dr

Bowen-James, fantasized about him being an affectionate father (non-rejecting) and developed the fantasy that he had had sexual intercourse with her."

The document continued after the conclusion of these separate reasons:

"Pursuant to Section 32 T(2) of the Medical Practitioners Act the decision of the Tribunal is that the respondent has been guilty of Professional Misconduct as alleged In that Particular (b) of the Complaint has been proved. The Tribunal is not satisfied Particular (c) has been established."

The reference to "Particular (b)" is a slip or typographical error and should read "Particulars (b) and (d)". This is plain from the reasons which were then set out for the orders that were made.

The orders of the Tribunal, pursuant to s 32R, were as follows:

- (1) That the name of Alan Bowen-James be removed from the Register of Medical Practitioners of New South Wales.
- (2) That the time after which the respondent may apply to be registered under the Medical Practitioners Act be a period of 3 years.
- (3) That the name, or any evidence which may identify the complainant DM be not published.
- (4) That the respondent pay the costs of the Department of Health of these proceedings, less a set off of the respondent's costs of the preliminary hearing on 18 and 19 June 1991.

This part of the decision was apparently signed by all four members of the Tribunal.

APPEAL

Section 32U of the Act provides, so far as here relevant, as follows:

"(1) A person about whom a complaint is referred to the Tribunal under s 31, 32 or 32H, or the complainant, may appeal to the Supreme Court against:

(a) a decision of the Tribunal with respect to a point of law; or

(b) the exercise of any power under s 32R by the Tribunal,

within the prescribed time.

(3) In determining an appeal under this section, the Supreme Court may:

(a) dismiss the appeal; or

(b) make such order as it thinks proper having regard to the merits of the case and the public welfare and, in doing so, may exercise any one or more of the powers of the Tribunal under section 32R.

(4) In any case where the Supreme Court dismisses an appeal against an order directing that the name of a registered medical practitioner be removed from the Register or a person has ceased to be registered:

(a) the Court may by its order fix a time after which the person whose name is removed from the Register, or the person who has ceased to be registered, may apply to be registered; and

(b) where a time has been so fixed, the person is not entitled to be registered before that time notwithstanding section 15, 16 or 17 (c) or (d)."

The provisions of s 48 (1) (a) (iv) and (vii) and (2) (f) of the Supreme Court Act assign an appeal from the Tribunal to this Court.

Dr Bowen-James, to whom I shall refer as "the appellant" appealed on the basis of a number of alleged errors of law and also against the exercise by the Tribunal of powers under s 32R.

The grounds of appeal can be usefully gathered under several headings:

1. Making the decision of the Deputy Chairperson and lay member the decision of the Tribunal;
2. The failure of the statutory majority to give sufficient reasons. It was submitted that in a number of respects they had not specifically taken into account submissions put to them by the appellant, had failed to consider all the evidence, to make findings or explain material or critical questions about fact and to address the appellant's submissions.
3. Failure by the statutory majority to apply the correct standard of proof.
4. Denying the appellant the opportunity to be heard on what orders should have been made under s 32R and in making such orders failing to take into account the view of the dissenting members on culpability.

It is convenient to deal with the grounds of appeal in the same order.

MAJORITY DECISION

Subsections 32T (1) (2) and (3) provide:

"(1) The decision of the Chairperson, or a Deputy Chairperson, on any question of law or procedure arising during an inquiry or appeal at which the Chairperson or Deputy Chairperson presides is the decision of the Tribunal for the purposes of the inquiry or appeal.

(2) A decision supported by at least 3 members of the Tribunal with respect to a question (other than with respect to a point of law or procedure) arising during an inquiry or appeal before the tribunal is the decision of the Tribunal or, if 2 members support the decision and 2 members oppose the decision, the decision of the Chairperson or Deputy Chairperson presiding is the decision of the Tribunal.

(3) The Tribunal shall, within one month of making the decision resulting from any such inquiry or appeal, make available to the complainant, the registered medical practitioner concerned and such other persons as It thinks fit a written statement of the decision."

The appellant's submission was based upon the contrast between the language used in s 32T (2) "A decisionwith respect to a questionarising during an inquiry ..." and in s 32T (3) - the decision resulting from any such inquiry". It was submitted that the decision of the Tribunal of 10 October 1991 was not a decision with respect to a question arising during an inquiry.

Further it was submitted that any doubt about this should be resolved in favour of adherence to what was said to be a general principle of the common law that decisions of bodies such as the Tribunal should be unanimous. Reference was made to the rule of construction referred to by six members of the High Court in **Bropho v Western Australia** (1990) 171 CLR..1 at 17-18 which requires clear and unambiguous words before a statutory provision will be construed as displaying a legislative intent to abolish or modify fundamental common law principles or rights.

In my opinion there is no fundamental common law principle or right enjoyed by a member of a profession in New South Wales not to be effected adversely by any decision of a disciplinary tribunal set up under statute unless the members of that tribunal are unanimous in favour of that decision. If there is any general rule it is one of convenience described by Lord Hardwicke in **Attorney General v Davy** (1741) 2 Atk 212; 26 ER 531 and referred to by Eyre CJ in **Grindley v Barker** (1798) 1 Bos & P 229; 126 ER 875 at 237 and 879 when he said: "I think it is now pretty well established that where a number of persons are entrusted with powers not of mere private confidence, but

in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole". The convenience is that the circumstances require that a decision be made. In the report of the Judicial Committee of the Privy Council on questions raised in respect of the Irish Boundary Commission (1924) 59 LJ Pt 2 517 their Lordships said:

"If three Commissioners had once been appointed, then, although in private arbitrations unanimity is necessary, it is otherwise when the matter to be determined is of public concern. This was settled so long ago as 1798 in the case of *Grindley v Barker* This case was followed by Lord Chancellor Cairns, Lord Selborne and several other members of the Judicial Committee in the matter of an arbitration between the Province of Ontario and the Province of Quebec, where the matter was referred by His Majesty to the Judicial Committee. Lord Selborne says 'the view which prevails that unanimity is necessary when power is given to three persons does not depend on anything peculiar to arbitration, it surely would be a general view subject to control either by something expressed in the instrument or by something to be collected by the nature of the power and the duty to be performed under it.' And then he puts the question 'Is not one reason for the distinction that in the public interest it is necessary that the thing should be decided?'; and their Lordships' answers were given in accordance with this view. These authorities seem to their Lordships conclusive. They have no doubt that this is a matter of public interest, and not a matter of merely private concern between the parties concerned, and they, therefore, answer that though in accordance with their answer to Question 1 if no appointment is made the Commission cannot go on, yet if once the three appointments had been made, a majority would rule."

In the course of his submissions counsel for the appellant placed considerable reliance on the statement, quoted above, by Lord Selborne in the arbitration between the Canadian Provinces. But properly understood this does no more than illustrate that the distinction, made by the Judicial Committee in 1924, is between matters of public interest and matters of merely private concern. In matters of the former kind

the general rule is as stated by Chief Justice Eyre but must give way to and is controlled by the intent of the legislature as collected from the scope and provisions of the relevant statute. The rule was considered by the New Zealand Court of Appeal in *Atkinson v Brown* (1963) NZLR 755, At 766 the presiding member of the court, North J, said, having referred to the judgment of Eyre CJ:

"But short of this the general rule will prevail, for I am satisfied that this tribunal, constituted as it is by a Public Act and affecting as it does the welfare of the public service and indirectly the welfare of the community as a whole, must be regarded as dealing with matters in some respects of a general nature' and therefore as coming within the scope of the general rule."

The Court of Appeal concluded that the general rule that the majority would conclude the minority applied. Reference was made to the decision of Denning J (as he then was) in *Brain v Minister of Pensions* (1947) KB 625. A decision of a tribunal, whose members were unable to agree, rejecting a claim for a pension was challenged. His Lordship acknowledged at 626 that the rule, whereby decisions are reached according to a majority vote is firmly established in all cases, where one body alone is 'competent to reach a decision. "The very necessity of coming to a decision compels recourse to a majority vote, for in that way alone can finality be achieved." However, he regarded this sacrifice to necessity as involving the introduction of a considerable margin of error for the avoidance of which the law had devised two methods; one not to accept a majority vote at all but require every decision to be unanimous and, in default, to let the matter be reheard with different persons sitting on the tribunal, the analogy being to trial by jury; and the other to give a right of appeal. Because in the particular case any appeal was by leave on a point of law but there was no appeal on a question of fact, his Lordship concluded that the

decision had to be unanimous. In stating the principles as he did his Lordship made no reference to the authorities which I have cited. Moreover as was pointed out by North J his Lordship's decision could lead to Injustice. Thus in *Minister of Pensions v Horsey* (1949) 2 KB 526 a majority decision In favour of the grant of a pension was set aside. Similarly If the decision of the Medical Tribunal must be unanimous the view of a majority of three that a complaint should - be dismissed would, consistent with the submission, require, apparently, that there be a rehearing. The Court of Appeal in New Zealand felt no need to decide whether *Brain v Minister of Pensions* was correctly decided but concluded that it was only of limited application (at 767). Even if correctly decided, it decided no more than that where an alternative tribunal is readily available under the provisions of the statute the argument from convenience loses much of its force (at 769). In *Picea Holdings Ltd v London Rent Assessment Panel* (1971) 2 QB 216 a three member Divisional Court, after referring to the decision of the New Zealand Court of Appeal, concluded (at 224-5) that *Brain's* case was a very special case and that in the case before them there was no reason for departing from the general principle. In both the New Zealand case and the English case it was held that tribunals consisting of a number of persons established by statute to make decisions involving the rights of members of the public, in one case a board of appeal established under the New Zealand Public Service Act to review decisions punishing officers for breach of discipline and in the other a rent assessment committee set up under the Rent Act to determine the fair rent of dwelling houses, could make decisions by a majority.

Section 32T (1) addresses decisions as to questions of law or procedure matters peculiarly for the Chairperson or Deputy Chairperson, whose qualification is that they be judges of the District

Court (a 32N) (1) and (7). Section 32T (2), In part, addresses the potential problem of an equal division amongst the members of – a tribunal which must consist of four persons (a 32M); compare a 32K (1) which makes a decision supported by at least two members of the Professional Standards Committee on 'any question arising during an Inquiry the decision of the Committee. The Professional Standards Committee consists of two registered medical practitioners and one & lay person. In this respect comparison can be made with the Legal Profession Act 1987 Pt 10 which provides for a Panel, a Board and a Tribunal consisting of an uneven number of persons; see s 138, 142 and 151. No express provision is made for division. It may have been thought unnecessary to provide that questions of law or procedure should be determined by the Chairperson, since, in the case of the Board and the Tribunal, which are concerned with the hearing of complaints, the majority consists of persons with legal qualification. The absence of any provision in the, Legal Profession Act for a division of opinion amongst the members of the bodies constituted by that Act may have been thought to be consistent with a legislative intent that the general rule applies and that the decision of the majority is the decision of the whole.

Considerable, emphasis was placed by the appellant's counsel upon the seriousness of a finding and the need for accuracy said to be more likely to be achieved by unanimous decision. The analogy to the decision of a jury referred to by Lord Denning was urged upon us. However, the Act is concerned to regulate the entitlement of a person to be registered as a medical practitioner and the right to practise medicine that that carries; s 23B (2). In large measure this has to do with the protection of the public. If a complaint is made these considerations point to the need for speedy and final determination of the question.

The availability of a majority decision is consistent with this. The requirement that any decision be unanimous increases the likelihood of Inconclusiveness and delay not to mention the considerable expense of an aborted hearing. Section 32T (2), If it applies, ensures that in an inquiry there Is a decision. The decision of two members which prevails over the decision of the other two is the decision of the judicial member, an Important safeguard.

It is against this background that it is necessary to consider whether subs (2) as a matter of proper construction applies to the decision resulting from the Inquiry. The appellant submitted that

1. a decision resulting from an inquiry was not a decision with respect to a question arising during the inquiry;
2. that the questions raised by the complaint arose before the inquiry commenced.

Relevantly the function of the Tribunal nominated and appointed under s 32M is to conduct an inquiry into the complaint; s 320 (1). Schedule 4 to the Act has effect with respect to any inquiry conducted by the Tribunal; s 320 (4). Clause 10 (1) of the Schedule states that it is the duty of the Tribunal to hear inquiries and appeals under the Act and to determine those inquiries and appeals as soon as is reasonably practicable. At such an inquiry the registered medical practitioner concerned and the complainant, if any, is entitled to attend and to be represented by a barrister or solicitor or another adviser; s 32P (1). The Tribunal may grant leave for any other person to appear at an inquiry; s 32P (2). If the Tribunal finds the subject matter of a complaint made against a person to have been proved it may make the orders set out in s 32R (1). The decision resulting from the inquiry referred to in s 32T (3) would include the findings as to the subject

matter of the complaint -and any orders made under s 32K. Section 32T (4) provides:

"A written statement of a decision shall:

- (a) set out any findings on material questions of fact;
- (b) refer to any evidence or other material on which the findings were based; and
- (c) give the reasons for the decision."

As one would expect, everything points to the inquiry continuing, at least, until the decision making findings on material questions of fact and consequential orders, if any, has been made. The inquiry does not conclude when the evidence is complete or when submissions have been made but must embrace consideration of the evidence and submissions and a determination.

Members of a Tribunal nominated and appointed under s 32M and 'required pursuant to s 320 (1) to conduct an inquiry into a complaint, in this case of professional misconduct, are concerned with the questions the complaint raises before it and hence, when considering whether or not the complaint is made out, with questions that arise during the inquiry. In the present case one such question was whether the complainant was a patient of the practitioner. The ultimate question which arises is whether assuming the questions such as that are answered in a particular way the medical practitioner has been guilty of professional misconduct. In this sense, the Tribunal is concerned only with questions which arise during the inquiry. Clause 5 (2) of Schedule 4 enables the Tribunal to deal with a substituted or additional complaint if, during the proceedings before it, it appears such complaint could have been made against the registered medical practitioner concerned. Such a complaint raises a question or questions during the

inquiry. These questions, Eke. the questions the original complaint raises, are in my opinion questions to which s 32T (2) applies. Accordingly the decision of the Deputy Chairperson and lay member was the decision of the Tribunal.

SUFFICIENCY OF REASONS

From about 1987 the complainant, DM, was a patient of the appellant. The appellant did not dispute that from about late March or early April 1987 at his invitation the complainant on occasions received psychotherapy in coffee shops and restaurants (for which a fee was charged) and would occasionally meet the practitioner outside the practitioner's home at 18/1 Queens Avenue, Rushcutters Bay. The appellant denied that during psychotherapy with the complainant, he disclosed details of his personal life to her including details of his childhood and current sexual activity. The complainant gave evidence and the appellant denied that on or about 28 August 1987 he and the complainant engaged in sexual activity at his invitation and that they engaged in sexual activity on approximately six further occasions between 28 August 1987 and September 1987 and on one occasion in about December 1987.

The principal evidence in support of the complaint was the statement and oral evidence of the complainant. At the date of the determination she was 36 years of age. Since 1986 she had been employed in a State Government Department. As a child she had had unhappy relations with her parents. She had experienced two failed marriages and for many years had had difficulties in her relationship with her son.

In October 1986 she started to go out with Dr Allison with whom she entered into a sexual relationship. They lived together for about

three or four weeks In January/February 1987. Dr Allison had been consulting the appellant since March 1986 at the recommendation of his then girlfriend, who was also a patient of the appellant. On 27 February 1987 at the suggestion of Dr Allison the complainant consulted the appellant. This was shortly before Dr Allison left for Thailand to do a six month diploma In tropical medicine. The complainant said that she consulted.. the appellant seeking therapy for areas in her life that caused her anxiety and stress, particularly from. her childhood. She said she felt she had been rejected by her parents and suffered from low esteem as a result of which she had difficulty In coping. During April and March 1987 the consultations, generally, took place on a weekly basis, initially at the appellant's rooms at Bondi Junction but then after approximately a month, on his suggestion, discussions between them continued over coffee and they went to a cafe across the road from the appellant's surgery. Thereafter there were frequent sessions in coffee shops and sometimes over a meal in a restaurant, at the suggestion of the appellant.

During May and early June 1987 the complainant visited Dr Allison in Thailand for three weeks and on her return continued to consult the appellant. During June and July 1987 the sessions became more frequent. On 14 August 1987 the complainant again visited Dr Allison in Thailand. On her return she resumed consultations with the appellant, seeing him several times a week. According to her evidence on Fridays she would usually telephone the respondent at about 6 pm and they would decide then to meet in the evening for a session. Such sessions were often held at the cafe Hernandez at Kings Cross. It was on these occasions, she said, that the appellant would talk about his personal life and history. She says that it was at about this time that' she recognised that she had become attracted to the appellant. There was

discussion about "transference". On the day before her second visit to Dr Allison in Thailand the appellant offered her three types of therapy, namely

- (a) A strictly therapeutic relationship. This meant, apparently, that the patient and therapist could discuss anything.
- (b) A therapeutic relationship where certain things were not discussed.
- (c) A relationship which was not strictly patient/therapist.

The appellant said that such a relationship must be mutually agreed upon and could be reviewed by either party at any time. He gave as an example meeting a patient for lunch or going to the cinema together occasionally.

The complainant said that on 28 August 1987 after a session of therapy which lasted for one and a half hours, the appellant suggested that the session should continue after he had attended a meeting. The complainant agreed and went to the appellant's residential unit to await his return. After the appellant returned to his home, at Rushcutters Bay and a display of affection towards her, the appellant said he would like her to stay the night. She said that by this time she felt very attached to the appellant, that it was a complex not sexual attraction, he was kind and gentle and she was accepted by him. She said that although she was surprised that her therapist should make a pass at her she consented to intercourse and stayed overnight at the appellant's unit. During the following month she had intercourse with the appellant on six occasions at his home. She did not stay overnight but left after sexual intercourse because he said he had work to attend to. The complainant said that during this period the appellant confided in her that Dr Allison's ex-girlfriend had propositioned him during therapy and that he had rejected her. She also said that on one occasion she asked

the appellant if he was - going to tell his supervisor, Dr Wynne Childs, about the sexual relationship they were having and that he replied "no way, I would be in therapy for another five years If I did that." For the following four months therapy continued three or four times a week. The appellant did not have intercourse with the complainant again after his de facto wife returned from a visit to the United States on 30 September until December 1987.

Dr Allison returned to Australia from 4 October to 17 November 1987. The complainant was very concerned about her prior sexual relationship with the appellant but felt unable to confide in Dr Allison. Shortly after Dr Allison had returned to Thailand she spoke to Dr Robert Eidus whom she had met as a friend of Dr Allison and confided in him about her sexual relationship with the appellant and asked him to suggest another psychiatrist whom she could consult about the traumatic effect of her sexual relationship with the appellant. On 25 November 1987, she said, she consulted Dr Weidler and disclosed her sexual encounters with the appellant to him although she did not disclose his name. At her next session with the appellant she told him of her disclosure to Dr Weidler whereupon the appellant called her a temptress and a siren and said: "This will kill my mother - I will have to go to America to practise". After further discussion the complainant agreed ,to see Dr Weidler again and tell him that what she had said during the first consultation was not true. This she did when she saw Dr Weidler for the second and last occasion on 3 December 1987.

The complainant said that following this incident the appellant refused to have anything more to do with her sexually. She felt she was being rejected by the appellant but they continued to have sessions, ostensibly to work through what had happened between them and the damaging effects of their sexual relationship on her. Shortly

before the appellant was to travel to the United States for a holiday, at a session late in December 1987 she seduced the appellant and they had sexual intercourse on the floor of his rooms at Double Bay. Thereafter there was no further sexual intercourse between them but she continued to see the appellant frequently and regularly as he had helped her to resolve her problems in relation to her son. During the early part of 1988 she says that most of the therapy sessions took place in coffee shop's. Towards the end of February 1988 the appellant said that he had missed her and would like to resume their sexual relationship to which she responded that- she was just getting into another relationship and declined to do so. She continued regular psychotherapy consultations with the appellant until 9 November 1988. On 16 December 1988 she commenced attending on Dr Morstyn for further psychotherapy.

The appellant absolutely denied any improper relationship between the complainant and him and absolutely denied any breach of confidentiality. At the hearing before the Tribunal the complainant's credibility was challenged in a long and thorough cross examination. The thrust of this was that apart from her evidence about having some psychotherapy sessions in places other than the appellant's surgery her allegations were false. In their reasons the Deputy Chairperson and lay member said:

"It is submitted by Counsel for the respondent that DM is suffering from delusions, that she was going through a very disturbed period between August and September 1987 on her return from Thailand, that she suffered a transient psychotic condition at that time whereby the transference between doctor and patient became in her eyes highly sexualised and that from discussions with Ms R at work she developed the delusion that the respondent was in fact seducing her, her delusion being further reinforced by further conversations with Dr Eidus and Dr Morstyn, such conduct being consistent with a patient suffering from a borderline personality disorder."

They described her answers to the first five questions in cross examination as a significant and disturbing part of her evidence. These were

"Q. I wonder if you could just tell us a little more about your early history. You told us about your first consultation with Dr Bowen-James but I suppose you had seen other psychiatrists for your psychiatric illness before that? A. I don't recall having seen anyone prior to that.

Q. You had never had any medical treatment from anyone for anything to do with the mind prior to seeing Dr Bowen-James? A. Not that I recall, no.

Q. You never sought medical treatment for any psychiatric disturbances or illness before? A. Not that I recall.

Q. Do you think you might have? A. No I don't think so.

Q. Can you be sure about that? A. Not 100 per cent, no."

From later evidence it emerged that she had previously consulted three psychiatrists, Dr N Phillips, on twenty seven occasions between 27 June 1985 and 19 November 1986, Dr Cornelius Greenway, on three occasions on December 1986 and January 1987 and Dr Eng Kong Tan, on one occasion in January 1986.

Central to the determination of the questions raised by the complaint was whether or not the complainant's evidence should be accepted. The Deputy Chairperson and lay member said in their reasons:

"The Tribunal has the benefit of approximately 250 pages of comprehensive submissions from both Counsel which have been of great assistance to us - but the issue is one of the credibility of the 2 principal witnesses. We have already stated our opinion that little weight can be attributed to the evidence of the respondent except in so far as there is corroboration, and there is very little of that. To the extent that some expert evidence of any disorder of the mind of DM is based on, or principally on accepting the

respondent's statement, such evidence must be discounted. The Tribunal has no hesitation in preferring the opinion expressed by Dr Morstyn, and supported by Dr Ellard to the opinion expressed by Dr Barclay and Professor Cawte as to the severity of the personality disorder of DM."

They had pointed out that the appellant had made false statements in various applications made by him seeking positions.

Ms M Thorman, a solicitor in the employ of the Complaints Unit of the New South Wales Health Department, gave evidence that during a telephone conversation with the appellant shortly after he had received a copy of the statutory declaration of the complaint of the complainant, he had said: "D.. has never set foot in my house". In his own statement dated 18 March 1991 he said that the complainant did actually come into his apartment on a number of occasions, possibly three or four over the period from late August 1987 to mid September 1987, when she turned up unannounced and pressed on his buzzer. During his evidence he denied having used the words "She has never set foot in my house" and said that the words that he used were "She has never been here" or "D.. has never been here". The respondent conceded that one of the things he noticed when he skimmed through the complainant's statutory declaration was the allegation that she had come to his unit and had sex with him there. His evidence before the Tribunal was that "D.. did not go to that unit but she did go to another unit that I had lived in" meaning thereby his present residence at Yarranabee Gardens as distinct from the unit in which he resided in 1987.

Referring to the false statements made by the appellant in his applications for positions the Deputy Chairperson and lay member said:

"The significance of the abovementioned false statements goes beyond what is stated in the documents. The respondent was on notice before his evidence began of the substance of the attack on his credit. He had access to most of the documents. His response to cross examination

was one of evasion, shifting his ground and, we are quite satisfied, lying on his oath. Having witnessed his performance we are firmly of the opinion that it is proper to state at this stage of our judgment that on any material issue in dispute we are unable to accept his evidence in the absence of corroboration. Such finding however does not conclude this inquiry. The question remains - are we satisfied to the required degree to accept the evidence of the complainant."

They went on to say later in their reasons :

"The assessment of the truthfulness and the reliability of the evidence of DM is a more complex issue and it must be recognised that proof of the principal complaint, namely of sexual intercourse, and to a less extent the other complaints rests squarely upon her evidence."

They expressed themselves conscious of the standard of proof applicable to the proceedings and enunciated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and referred to relevant passages from the judgments in that case. They then continued:

"The allegations made against the respondent are allegations of sexual misconduct. Although these are not criminal proceedings, the Tribunal is of the opinion that the admonitions of the appellate courts, as to the danger of convicting, or in this case finding the allegations proved to the requisite degree, on the uncorroborated evidence of a complainant, apply with full force to these proceedings.

The consequences of an adverse finding by this Tribunal would be disastrous for the respondent."

The Deputy Chairperson and lay member expressed themselves as comfortably satisfied that the complainant had discharged the requisite standard of proof of the complaint for reasons which included the following:

"1. DM impressed us as a truthful and reliable witness in respect of her complaint.

4. The totality of evidence of Dr Phillips, Dr Morstyn and Dr Ellard suggests that her disorder was not as severe as alleged by the respondent.

7. We do not accept the respondent as a truthful witness. His detailed recollection of events concerning a patient in 1987 - 88, without the benefit of any clinic notes is difficult to accept, In any event, and bearing In mind his limited efforts to find his medical records we doubt whether he ever did take adequate notes.

10. The respondent's statement to Ms Thorman, "D.. has never set foot in my house" was a deliberate lie in respect of material issue and indicates a consciousness of guilt in his mind in respect of the alleged sexual intercourse."

They were satisfied that particular (d) and (b) had 'been proved but not particular (c).

In their reasons the Deputy Chairperson and lay member said:

"In an effort to establish that the complainant. is a pathological liar and/or suffering from delusions in respect of her allegations of misconduct by the respondent every conceivable aspect of her life which might support such a conclusion has been brought to the attention of the Tribunal."

In the result there was a substantial body of evidence from psychiatrists, and this evidence was summarised in their reasons. Having considered it they said:

"With one possible qualification, the Tribunal prefers the assessment of her personality as explained by those doctors who have treated and recorded her mental state namely Dr Phillips, Dr Morstyn and Dr Ellard and we accept the observations of Dr Morstyn and Dr Ellard that the patient they had treated is not the lady described in the statement of the respondent.

We do not accept the severity of her disturbance or disorder to be that described in the evidence of the respondent. We are of the opinion that the respondent has exaggerated her symptoms - albeit unconsciously or deliberately, in an attempt to fabricate a history to suit his diagnosis of Borderline Personality Disorder as a springboard to support the further assertion of her as a pathological liar.

The qualification with regard to her credibility is her evidence that she does not remember having any psychiatric

treatment before February 1987. We also bear in mind that Dr Morstyn and Dr Ellard did not have the history of her consultations with Dr Phillips and that Dr Allison says in his statement that In August 1987 she was very disturbed and distressed, which he qualified in his evidence."

The appellant's appeal must be against the decision with respect to a point of law. It is not clear that this always equates with showing that the Tribunal erred in law in a particular respect. But in light of my overall conclusion it is unnecessary further to investigate the distinction if it exists.

In full and careful written submissions counsel for the appellant identified what were said to be the errors of law in the decision as follows:

"(1) Items of evidence of substantial probative value on the matter in issue were not taken into account in the findings of the Deputy Chairperson and the lay person. Such items of evidence were either ignored altogether or were mentioned only in passing. It is our submission that it is not enough to make passing reference to such evidence; it must be shown in the reasons for the decision that such evidence has been taken into account and weighed and evaluated together with all other relevant evidence, and also it must be shown how any evidence that is contrary to a finding of fact which is made is assimilated or accommodated.

(2) Submissions of high relevance to the issues before the Tribunal, advanced on behalf of the Appellant before the Tribunal, were not addressed by the Deputy Chairperson and the lay person. Such submissions were either ignored altogether or were mentioned only in passing without explanation as to how the issues they raised were assimilated or accommodated. It is our submission that it must be shown in the reasons for the decision that such submissions have been considered and properly assimilated in making findings of fact.

(3) As a result of the errors under (1) and (2), findings of fact were made for which there was insufficient evidence; that is to say, findings of fact were made which, to a rational and impartial observer, were not rationally

supportable on the evidence. Or, alternatively, because of the errors under (1) and (2) , the finding that there had been professional misconduct by the Appellant was not reasonably open on the evidence."

In particular the error of law was said to be that the decision did not take into account and properly consider

- (a) the evidence of expert medical witnesses when considering the reliability of the complainant's evidence;
- (b) the complainant's denial of having had extensive psychiatric treatment before beginning her treatment with the appellant;
- (c) the complainant's denial that she had told anyone that she suspected incest with her father, which the appellant submitted on the basis of Dr Allison's evidence was a false denial;
- (d) the complainant's denial that she had ever taken heroin or amphetamines, which the appellant submitted was false;
- (e) the complainant's failure to produce the diary upon which she relied in providing the details of the alleged sexual relations between her and the appellant;
- f) the Deputy Chairperson and lay member's failure to make findings on complaint 2.

It was further urged that the matters referred to in (a), (b), (c), (d) and (e) above were either not referred to or referred to only in passing and the appellant's submissions were not considered or properly addressed. Further, it was said that on many occasions it had been submitted on behalf of the appellant that the complainant's allegations may have had their source "in fantasy, daydreams, or some other form of feeling or belief arising as a distortion of her sexualised transference" and not be psychotic delusions or conscious and deliberate

lies. It was said that these submissions had not been addressed in the reasons of the Deputy Chairperson and the lay member. In this regard contrast is drawn between their reasoning and that of Dr Fotheringham.

Submissions were put as to the extent to which failure to refer to particular evidence or submissions or the making of only passing reference to them or faulty, perhaps perverse, reasoning involved error of law. The appellant relied upon s 32T (4)

The submission echoed the judgment of Samuels JA in *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728 and the reference by his Honour to the consideration of all the evidence in a case as an incident of judicial duty. His Honour went on to point out that it is plainly unnecessary for a judge to refer to all the evidence led in the proceedings or to indicate which of it is accepted or rejected. The extent of the duty to record the evidence given and the findings made depend, as the duty to give reasons does, upon the circumstances of the individual case. Accordingly, a failure to refer to some of the evidence does not necessarily, whenever it occurs, indicate that the judge has failed to discharge the duty which rests upon him or her. "However, for a judge to ignore evidence critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the judge - as the defendant's denial of having consumed alcohol - may promote a sense of grievance in the adversary and create a litigant who is not only 'disappointed' but 'disturbed' .. It tends to deny both the fact and the appearance of justice having been done. If it does then it will have worked a miscarriage of justice and have produced a mistrial and resulted in what I would take to be an error of law which is reviewable on appeal. Whether it is an error of law or an error of fact, it seems to me a failure by the judge to do what the

nature of the office requires." Both the other members of the Court, Clarke JA and Hope AJA, reserved or did not find it necessary to decide whether there was an error of law.

The requirement in s 32T (4) that a written statement of a decision of the Tribunal shall

- (a) set out any findings on material questions of fact;
- (b) refer to any evidence or other material on which the findings were based; and
- (c) give the reasons for the decision

is not that all the evidence be referred to or all the submissions be referred to. What the section requires is that the statement refer to any evidence or other material on which the findings were based. The general law requires that the reasons of a Tribunal expose the grounds for the decision; see per Kirby P in *Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd* (unreported, Court of Appeal, 24 April 1992) per Kirby P at 5 and the cases there cited. The reasons for determination satisfy these requirements. It is not suggested that there was no evidence to support the decision of the Tribunal.

Part of the appellant's argument initially was directed to seeking, by leave, to have the Court not follow the decision of the majority in *Azzopardi v Tasman UEB Industries* (1985) 4 NSWLR 139 or, at least, confine its application. In his judgment Glass JA, with whom Samuels JA agreed, quoted from *McPhee v S Bennett Ltd* (1935) 52 WN (NSW) 8 at 9 a passage which included the following:

"The question of whether there is any evidence of a particular fact is also a question of law: *Sittingbourne Urban District Council v Lipton Ltd* (1931) 1 KB 539 at 544 and *Mersey Docks and Harbour Board v West Derby Assessment Committee* (1932) 1 KB 40 at 110-111. But if there is evidence of the fact, the question whether that evidence ought to be accepted in whole or in part or ought

to be accepted as sufficient to establish the fact, is Itself a question of fact and not a question of law, unless, of course, there Is some law which provides that the particular evidence, when given, is to be taken to establish the fact.....There is no rule of law that such a tribunal must believe the evidence, because It is all one way. I can accept all, or some or none of it."

Later in his judgment Glass JA said:

"It has been suggested that since judges unlike juries are required to give reasons a perversity of result will or may suggest an error at some stage of the reasoning process :and the perversity will then rise to a level of an error of law Errors may be committed by a workers' compensation judge at any one of three points viz determining the facts by way of primary findings and inferences, directing himself as to the law and applying the law to the facts found. At the first stage the determination of facts by a reasoning process marred though it be by patent error, illogicality or perversity will, as has been said, never be vulnerable to attack as an error of law by an applicant for compensation."

Although the suggestion early in the submission that these statements of principle would be challenged by the appellant was not pursued, it was sought to confine them by reference to the judgments in the judicial review case of Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 and the judgment of Samuels JA in Mifsud v Campbell at 728. In Bond's case the High Court was concerned with the provisions of the Administrative Decisions (Judicial . Review) Act 1977 In his judgment at 355-356 Mason CJ, with whom Brennan J agreed, said:

"The question whether there is any evidence of a particular fact is a question of law: McPhee v S Bennett Ltd (supra); Australian Gaslight Co v Valuer General (1940) 40 SR 126 at 137-8. Likewise, the question whether a particular inference can be drawn from facts found. or agreed is a question of law: Australian Gaslight case; Hope v Bathurst City Council (1980) 144 CLR 1 at 8-9. This is because, before the inference is drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions : Federal Commissioner of Taxation v Broken Hill

South (1941) 65 CLR 150 at 155, 157, 160. So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 481-483.

But it is said: '(t)here is no error of law simply in making a wrong finding of fact'; *Waterford v The Commonwealth* (1987) 163 CLR 50 at 77 per Brennan J. Similarly, Menzies J observed in *R v District Court; ex-parte White* (1966) 116 CLR 644 at 654:

'Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (eg illogical) inference of fact would not disclose an error of law.'

Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place."

See also the joint judgment of Toohey and Gaudron JJ, particularly at 384. These dicta seemed to me entirely consistent with what was said by Glass JA in *Azzopardi*; see also *Randwick Municipal Council v Manousaki* (unreported, Court of Appeal, 26 September 1988). Deane J in his judgment at 367 said that a breach of duty to act judicially constitutes an error of law which will vitiate the decision. Acting judicially involves acting rationally and reasonably. In my opinion the dictum of Glass JA states the law as we should apply it. However I do not think that, even if error of law embraces, in some circumstances, conclusions which can be described as irrational or unreasonable, the reasons of the statutory majority could in any respect be so described.

I do not accept as a general proposition that the Deputy Chairperson and lay member failed to consider any part of the evidence or any part of the submissions. They said, as I have quoted, that the Tribunal had the benefit of approximately 250 pages of comprehensive submissions from both counsel which had been of great assistance to them. These submissions referred to those parts of the evidence which are now said to have been ignored. In my opinion, no basis is shown for the conclusion that the submissions or the evidence referred to were ignored. It was, I think, a correct assessment that the outcome of the inquiry depended largely if not entirely upon the credibility of the two principal witnesses. The Deputy Chairperson and lay member gave reasons for not accepting the evidence of the appellant unless corroborated. This assessment of his evidence which depended upon established falsity in statements made by him and his responses in cross examination is unchallengeable.

The assessment of the complainant's evidence had to take account of her denial in cross examination of earlier psychiatric treatment and of the medical evidence. Part of the medical evidence was that of Dr J Ellard who had treated the complainant. The Deputy Chairperson and lay member summarised his evidence and it was not suggested that this summary was not accurate. Describing this evidence they said:

"Clinically his firm impression is that she is not suffering from a borderline personality disturbance. In relation to the opinion of the respondent Dr Ellard says that if a number of years ago DM was showing borderline disturbance in full force 'It does not go away quickly - it would certainly still be there or there would be firm echoes of it still there.' He has not noted any indicators that she suffers from delusions in the psychiatric sense nor has she ever suggested that she was suicidal. In respect of the respondent Dr Ellard says DM expressed some resentment about him but not a passionate desire to punish him. Assuming that the description of the patient as set out in

the statutory declaration of the respondent to be correct such a condition, says Dr Ellard, would not have required four or five attendances a week.

Dr Ellard says that the patient has neurotic problems derived from her early experiences and throughout her life she has repetitively run her life inefficiently and to her own distress, particularly in relation to men and that is what has required some sorting out. She has been a very anxious person so she certainly has problems in her personality. It is a quantitative thing."

The Deputy Chairperson and lay member preferred the assessment of the complainant's personality of Drs Phillips, Morstyn and Ellard and accepted the observations of Dr Morstyn and Dr Ellard that the patient they had treated was not the lady described in the statement of the appellant.

The only attack that could be mounted against the acceptance of the evidence of these experts was that neither Dr Ellard nor Dr Morstyn were aware of the complainant's previous consultations with Drs Phillips, Greenway and Eng Kong Tan. But the Deputy Chairperson and lay person stated that they had borne in mind that Dr Morstyn and Dr Ellard did not have the history of her consultations with Dr Phillips. Having so weighed the expert evidence they said that the complainant impressed them as a truthful and reliable witness in respect of her complaint. The substance of the argument was that the members of the Tribunal might have accepted other evidence or should have explained in more detail why they preferred the evidence they did. With all respect, in my opinion, it was open to the members to accept the evidence they did and their doing so does not give rise to a point of law which could found an appeal under s 32U (1) (a).

It is apposite to quote from the judgment of McHugh J in *Abalos v Australian Postal Commission* (1988) 171 CLR 167 at 178:

"... where a trial judge has made a finding of fact contrary to the evidence of a witness but has made no reference to that evidence, an appellate court cannot act on that evidence to reverse the finding unless it is satisfied 'that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion. Watt or Thomas v Thomas (1947) AC 484 at 488."

For these reasons I do not think the appellant made good its argument that the Deputy Chairperson and lay member erred in law in failing to comply with requirements of s 32T (4). Clearly those members of the Tribunal took account of the first answers given by the complainant in cross examination and the medical evidence. Even so on the questions raised by the particulars in (b) and (d) they accepted her evidence. I do not regard this as irrational or illogical or unreasonable.

I turn to consider other particular matters said not to have been taken into account or properly considered. The question of whether the complainant had ever told anyone that she suspected incest with her father was not referred to in any of the reasoning. The argument was addressed in the appellant's written submissions to the Tribunal. There is no reason to suppose that it was not considered. In the submission it was put that the complainant's denial of ever telling anyone that her father had done anything sexually to her was a deliberate lie. The particular passage in cross examination of the complainant by the appellant's counsel was as follows:

"Q. So you have never had any sexual fantasies about your father? A. Not that I can recall.

Q. Do you think you might have had some but you have forgotten? A. No. He repulsed me, I didn't like him at all.

Q. Thinking back and looking upon it as a child, do you think you might have had sexual fantasies about your father? A. No not at all.

Q. Can you recall him doing anything sexually to you? A. No not at all.

Q. Have you ever told anyone that he did? A. No I don't think so.

Q. Have you ever told anyone that you had sexual fantasies -about your father? A. No I haven't, because I haven't had them"

I do not pause to consider whether the submission of a deliberate lie was open on this cross examination. The submission that the complainant's denial was a deliberate lie was based on evidence given by Dr Allison when asked by counsel for the respondent Director of the Complaints Unit to comment on a passage in the appellant's statement In_ their reasons, in a part I have quoted, the Deputy Chairperson and lay member stated their opinion that little weight could be attributed to the evidence of (the appellant) except insofar as there was corroboration. No doubt this explains the reliance placed by the appellant on Dr Allison's evidence. The passage, at the bottom of page i7 of the appellant's statement, was:

"Over the following sessions (DM) gave a variable history, the consistent features of which were the themes of suspected or actual incest (with her father), antipathy towards her mother, a general suspicion of men coupled with an overwhelming dependence on men, and a passionate desire to punish those who 'denied' her 'happiness', a notice which for (DM) was synonymous with the immediate and -unconditional gratification of her desires, often sexual. At first (DM) described an abysmal childhood of pain and neglect. She felt certain that her father had abused her and that I could help her unlock the secrets of her childhood. Over time this speculation evolved into a claim of genuine incest, an assertion which she adhered to for many sessions, until she abandoned the belief that she actually was assaulted in favour of the belief that her father

converted his incestuous feelings into rejection and contempt."

Dr Allison's evidence was:

"Well, to begin with, the opening on the bottom of page 17, these are elements of DM's history I am familiar with and I am sure she would agree as well. She did suspect incest with her father, there was a large degree of antipathy towards her mother and perhaps a general suspicion of men."

Though admitted, what Dr Allison said was in a form which, on this question, had no evidentiary weight and was equivocal. It was incapable of supporting the submission that the complainant had deliberately lied about this matter. Clearly the Deputy Chairperson and the lay member so regarded it and in the circumstances of the case the fact that no reference was made to this is without significance.

The complainant's denial that she had ever taken heroin or amphetamines has even less significance. The appellant gave evidence that the complainant said she had taken heroin and amphetamines. Dr Morstyn did not obtain a history of 'either amphetamine or heroin use. Dr Ellard's evidence was:

"Q. Would you say that there was an amphetamine abuse? A. There was. use of it, there was amphetamines, there was marijuana. I have half a memory of there being some heroin, but this is a long while ago, and long since it happened, and it did not concern me. There is no doubt that she had torment during part of her life.

Q . What if I said that she denied saying in Court that she never (sic) used heroin? A. I didn't go into it in detail. I am certain she had used other things like marijuana, it is in my memory.

Q. But your impression is that she had smoked marijuana? A. My impression is that she smoked pot and tried other things. That was my impression. My recollection is a period of turbulence. I didn't go into any detail. She was young, and it is a long time ago."

The Deputy Chairperson and lay member made plain their reasons for rejecting the appellant's evidence unless corroborated. The cross examination of the complainant was as follows:

"Q. Can you recall ever telling him you had experimented in the past with heroin?

A. No, I never told him that."

Q. Have you ever done it? A. I have never ever b experimented with heroin.

Q. Or cannabis? A. When I was younger I shared the odd joint with my friends, yes. I have never purchased any myself .

Q. Did you ever tell him you had a binge on amphetamines? A. What are amphetamines?

Q. Speed? A. No I have never taken speed.

Q. You haven't told Dr Bowen-James that? A. Never."

I reiterate, that in my opinion, this part of the evidence did not require to be expressly dealt with or commented on in the reasons. No member of the Tribunal regarded it as significant. Even less did it require the Deputy Chairperson and lay member not to accept the complainant's evidence of the complaints in issue.

In her statutory declaration, said to be dated 29 October 1990, and detailing her complaint the complainant referred to "my diary" and provided details of the dates and places of meeting with the appellant by reference thereto. Her evidence contained the following questions and answers:

"Q. You say there in paragraph 10 that you saw him on your return on certain occasions and you have dated them? A. Mmm

Q. Now it was 5 June, 14, 19 and 25 June, right? A. Yes.

Q. Where did you get those dates from? A. From a small diary that I had.

Q. When you made your statement? A. Yes

Q. Where is that diary now? A. I don't really know where it is

Q. Have you looked for it? A. Yes, I have had a look for it. I can't find it.

Q. You made your statement in October of 1990, so did you have that diary then? A. Yes, I think so.

Q. When was the next occasion you saw the diary? A. I don't recall seeing it since then.

Q. Where did you keep it after you had made your stat dec? A. Well, over - since I had it I kept it in a small sort of shoe box. It was a small diary and there are a couple of them and I kept them in with some cards and things from my son, merit cards from school, a few other belongings that didn't fit in the filing system very well.

Q. Did you have reason to move home at some stage, or have you ever had reason to move your home at various stages since October of 1990.? A. I moved in early December and then again recently.

Q. When was the first occasion that you started to look for the diary again? A. When I received a subpoena to issue documents related to this case and that was when I was at Lane Cove, living at Lane Cove.

Q. You had lived at Lane Cove over what period? A. From early December about.

Q. 1990? A. Yes, 1990, until I moved from there six months later, early June I think.

Q. But you had received the subpoena before then? A. Yes."

And in cross examination:

"Q. You had a diary? A. Yes, that's right.

Q. Where did you last see that? A. The last time I can recall seeing It was in about October, I think, when I was seeing Monica Thorman at the Complaints Unit about drafting my complaint.

Q. Yesterday you were not sure whether you had it when you went to see Monica Thorman? A. I'm pretty sure that I did have it then, yes .

Q. Are you absolutely sure? A. I'm quite sure that I did have it. Not a hundred percent, but I am almost sure that I did have it.

Q. What makes you sure that you had it? A. Because I thought about it and I can recall referring to it in front of her and I didn't actually know Monica until about that time. I didn't see her previously in 1989. I was talking to Bruce at that stage.

Q. Did you ever refer to it when you were seeing Dr Morstyn? A. Did I refer to it as in look at it in front of him?

Q. Yes. A. No, I don't think so.

Q. Are you sure about that? A. No, I'm not sure about that, but I can't recall doing that.

Q. You think it would be unlikely if you had? A. I can't think of any reason why I would have done that."

It was submitted to the Tribunal that the complainant must have intentionally disposed of the diary or intentionally not produced it. On the evidence and particularly in light of the nature of the cross examination it was not open to the ' Tribunal to have found that the complainant had by her deliberate act destroyed the diary or withheld it; compare *Allen v Tobias* (1958) 98 CLR 367 at 375. The evidence was that the complainant could not find the diary. This being so, its absence was of no significance and the fact that the Deputy Chairperson and lay member did not refer to it was of no significance.

No reason is given by any member of the Tribunal for the failure to deal with the second complaint which is not mentioned. If application

had been made for relief In the nature of mandamus there would no doubt have been considerable force in an argument that pursuant to ss 32A (1) and 32T the Tribunal was bound to inquire into the complaint. Such an Inquiry involves a determination. Senior counsel for the appellant when asked said he did not submit that the appellant had a cast iron defence to the second complaint in the sense that, independently of the findings made by the statutory majority of 'the Tribunal, the' evidence of witnesses the Tribunal accepted on other issues led inevitably to a conclusion on the second complaint in favour of the appellant.. I do not regard the failure to deal with the second complaint as revealing an error of law in the inquiry into the first complaint.

ONUS OF PROOF

The Deputy Chairperson and lay member referred to the judgments of Starke and Dixon JJ in *Briginshaw v Briginshaw* at 352 and 361 as setting the standard of proof to be applied The appellant argued that a finding agreed to by two members and dissented from by two others could not satisfy the required standard of proof. It is pointed out that the reasons for decision of the Deputy Chairperson and lay member make no reference to the fact that, on the same evidence, two members of the Tribunal came to a different conclusion.

There is nothing unusual about a member or members of a tribunal being satisfied to the required standard and another member or other members not being so satisfied. The legislature might require that a finding of a complaint could not be made unless all members of the tribunal were so satisfied. But, for reasons that I have given, the legislature has not here so provided. Nor is there any reason to suppose that the Deputy Chairperson, an experienced judge, and the

lay member did not take account -of the view of the dissenting members both during the hearing and when their reasons had been prepared.

During the course of argument a question was raised as to the extent to which the expert members of the Tribunal, the medical practitioners and particularly Dr Fotheringham, a psychiatrist, could rely on their own expertise. In *Kaliil v Bray* (1977) 1 NSWLR 256 this Court. considered an appeal against a finding of the disciplinary tribunal constituted under the Veterinary Surgeons Act 1923 which comprised five veterinary surgeons. At 262 Street CJ said

"The purpose of setting up the tribunal, with its membership drawn from the ranks of veterinary surgeons, is to enable it to do the very thing that either a Bench of justices or a jury may not do, that is to say, to draw upon its own expert resources to resolve such questions of expert science as might emerge from the objective, or lay facts proved in evidence before it. In doing so it will, no doubt, give due weight to such expert evidence, if any, as may be placed before it. But the ultimate responsibility for forming an expert view upon which the disciplinary powers will be exercised or withheld is with the tribunal itself. This is a responsibility to be discharged by drawing upon its own internal resources of knowledge of veterinary science."

In the same case at 265 Moffitt P said:

"The second matter to which I wish to refer concerns the tribunal using its own expert knowledge in weighing the significance of evidence concerning the symptoms testified to by lay witnesses. I agree with the observations of the Chief Justice concerning this class of evidence. Where a tribunal of experts is empowered to judge matters within their expertise, it would be a denial of a dominant reason for so constituting the tribunal, that they, or a superior court, deny to them the use of their expert knowledge in judging the matter before them. The limit upon their so doing is that they act with a due regard for the demands of justice

However, lest what has been said should lead to any unqualified and unannounced use of expert knowledge by an expert tribunal, I should emphasise that the subtle demands

of justice required of any tribunal should not be overlooked. There are considerable dangers In an expert tribunal using expert knowledge in respect of which there is a genuine difference of view within the body of the profession concerned. The issue should then be dealt with by evidence. In any event it is best that the subject matter of expert opinion considered relevant by the expert tribunal be clearly brought to the attention of the parties at the appropriate time."

Glass JA agreed with the judgments. of both the Chief Justice and the President. Where a tribunal set up to consider complaints against the members of a profession consists of a judicial officer, persons drawn from the ranks of the profession concerned and a lay member, it follows that the legislature intended that each should bring a particular resource to resolve the questions in issue. A particular resource of the judicial officer is the weighing of evidence on contested issues. The particular resource of the lay member, representing the more general community, is that ability, said to reside in juries, of determining sensibly issues of fact; see per Kirby P in *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 88. In this case the Deputy Chairperson and lay member weighed the conflicting evidence and were satisfied that the complaints were established to the necessary standard of proof. I do not think that the fact that two other members of the Tribunal, in this case, the medical practitioners, were not so satisfied indicates that a failure by the statutory majority to apply the necessary standard of proof .

OPPORTUNITY TO BE HEARD ON ORDERS UNDER S 32R

It is agreed that the appellant's counsel made no submissions on what orders should be made. It would have been appropriate if counsel for the appellant had during the course of his argument indicated that he wished to have an opportunity to be heard on. the form of any

orders.. The Tribunal could have decided then when it wished to hear him. Again at the time the determination was announced an application could have been made to be heard on the orders to be made. Certain it is the appellant was not consciously or deliberately denied the opportunity to be heard. However, the fact remains that the appellant was entitled to be, but was not, heard on what orders should be made; compared for example, ex parte Kelly; re Teece (1966) 85 WN (Pt -1S 151 at 156. I think the appellant should have an opportunity to put his submissions. The question ,arises as to whether we should deal with them or the matter should be referred back to the Tribunal. Section 32U (1) allows an appeal to be brought against the exercise of any power under s 32R by the Tribunal. Pursuant to subs (3) in determining an appeal under the section the Court may make such orders as it thinks proper having regard to the merits of the case and the public welfare and, in doing so, may exercise any one or more of the powers of the Tribunal under s 32R. Moreover in my opinion s 75A of the Supreme Court Act applies and pursuant to subs (7) the Court may receive further evidence.

CONCLUSION

I think the appellant should have the opportunity to make his submissions to the Tribunal with the consequence that if he sees fit he can appeal against such exercise of power by the Tribunal. Accordingly, the appeal should be allowed to the extent that orders (1) and (2) of the Tribunal be set aside and the matter referred back to the Tribunal to consider again the exercise of its powers under s 32R of the Act. In the meantime, pursuant to s 32U (3) (b) an order should be made suspending the appellant from practice until such time as the Tribunal has re-considered the exercise of its powers and made a determination with respect thereto. Otherwise the appeal should be dismissed with costs.

I Certify that this and the ⁴⁰
preceding pages are a true copy of
the reasons for judgment herein of
The Honourable Justice Shelier.

Date


Associate

17 July 1992.