

C O U R T O F A P P E A L

R E C O R D S H E E T

NATURE OF JURISDICTION: APPEAL FROM MEDICAL TRIBUNAL

FILE NO/S: 40520/91

DELIVERED: 19 DECEMBER 1991

HEARING DATE: 3 OCTOBER, 1991

PARTIES: BUTTSWORTH v WALTON

JUDGMENT OF: SAMUELS JA, PRIESTLEY JA, MEAGHER JA,

COUNSEL:

Appellant: N R CARSON (SOLR) : J PAVLAKIS (SOLR)

Respondent: J BASTEN

SOLICITORS:

Appellant: BLAKE DAWSON WALDRON

Respondent: H K ROBERTS, STATE CROWN SOLICITOR

CATCHWORDS: MEDICAL PRACTITIONERS - PROFESSIONAL

MISCONDUCT - MEDICAL PRACTITIONERS

ACT, 1938

EX TEMPORE/RESERVED: RESERVED

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THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40520/91

SAMUELS AP
PRIESTLEY JA
MEAGHER JA

THURSDAY 19 DECEMBER 1991

BUTTSWORTH v WALTON

MEDICAL PRACTITIONERS - complaint of professional misconduct against male psychiatrist under s 27 (1) (a) and s 28(1)(d) of the Medical Practitioners Act 1938 - particulars alleged sexual relationship with female patient both during the subsistence of the relationship of doctor and patient and after the relationship terminated - Medical Tribunal ordered that doctor's name be removed from register -held no basis for intervention of Court of Appeal

ORDER

Appeal dismissed with costs.

CA 40520/91

SAMUELS AP

PRIESTLEY JA

MEAGHER JA

THURSDAY 19 DECEMBER 1991

BUTTSWORTH v WALTON

JUDGMENT

SAMUELS JA: The respondent graduated in medicine from The University of Sydney in 1967 and as a member of the Royal Australian and New Zealand College of Psychiatrists in 1972. He has practised as a specialist psychiatrist since that year, was elected a Fellow of the College in 1976, and from 1976 to 1986 was the Foundation Head of the Psychotherapy Unit at Royal Prince Alfred Hospital. In short, in 1984, when his professional relationship with the complainant, Ms A, commenced, he was an experienced psychotherapist of excellent reputation and recognised competence.

The respondent's complaint was originally filed on 7 May 1991 and, after an amendment of no great consequence, asserted that the appellant had been guilty of professional misconduct within the meaning of s 27(1)(a) of the Medical Practitioners Act 1938 ("the Act") in that he: -

"(i) has demonstrated a lack of adequate judgment and/or care in the practice of medicine; and/or

(ii) he has been guilty of other improper or unethical conduct relating to the practice of medicine."

The particulars furnished read as follows

1. The practitioner was at all relevant times a specialist psychiatrist.
2. The practitioner commenced treating a female patient, Patient A with regular psychotherapy in or about February, 1984 which treatment continued until February, 1988.
3. In and from July 1987 the practitioner formed a personal and professional relationship with Patient A during which
 - (a) he expressed feelings of love towards her which she reciprocated;
 - (b) she, to his knowledge, became emotionally dependent upon him and upon his expressed feelings of affection towards her.
4. The practitioner failed, upon forming the relationship referred to in Particular 3, to thereupon cease his professional relationship with Patient A; notwithstanding the formation of the said relationship the practitioner continued his professional relationship and regular treatment of Patient A until February, 1988.
5. After the termination of their professional relationship in February, 1988 the practitioner continued his personal relationship with Patient A until August, 1988.
6. During the period referred to in Particular 5 the practitioner was aware of the emotional instability of Patient A and of her continued emotional dependence upon him.

7. In August 1987 the practitioner commenced a sexual relationship with Patient A which continued until August, 1988.

Because there was evidence that it would be "detrimental if not dangerous" to Ms A's mental health if she were required to appear before the Medical Tribunal, from which this appeal comes, the case was based largely upon written material including, in particular, an agreed statement of facts which I must set out in full. It was in these terms:

1. Dr.B is a registered medical practitioner who has been in practice as a specialist psychiatrist since 1972. From 1974 to 1986 Dr B. was a Visiting Consultant to Royal Prince Alfred Hospital and from 1976 to 1986 was Head of that Hospital's Psychotherapy Unit.
2. In early 1984 Ms A. was admitted to Royal Prince Alfred Hospital Psychiatry Unit for investigation and treatment. In February she was referred to the Psychotherapy Unit for Dr B's consultant opinion which was obtained in a clinical meeting of about eight doctors. The meeting decided that Ms A. should best be treated by psythotherapy by Dr B.
3. Dr B. treated Ms A. with regular psychotherapy from 24 February 1984 until 18 February 1988. Treatment took place at Jonellen Psychotherapy Clinic, a practice of twelve psychiatrists of which B. was Director. Treatment sessions occurred between two and four times each week throughout this period. Some sessions were recorded on video tape by Dr B. with the consent of Ms A. so that they could be, as they were, shown to trainee psychotherapists and professional meetings of practising psychiatrists and psychotherapists for educational purposes. During her treatment, Ms A. was prescribed Valium medication in decreasing frequency.
4. Prior to referral to Dr B, Ms A had consulted many medical specialists over the previous fifteen years

and had been admitted to various hospitals for medical investigation and treatment on many occasions. Ms A. had a major debilitating psychogenic illness involving interpersonal relationships within her family and her own sense of self worth which affected the ability to interact in everyday life.

5. During her psychotherapy with Dr B, Ms A's condition improved.
6. As the psychotherapy progressed, Ms A. became emotionally less dependent on Dr B. However from July 1987 and as a consequence of the loving relationship which formed and grew between Ms A and Dr B. and until the end of that relationship as referred to hereunder, Ms A. and Dr B. developed a mutual emotional dependency upon each other.
7. In the termination phase of her treatment, in April 1987, Ms A. informed Dr B. that she loved him.
8. In July 1987, Dr B. became aware of his love for Ms A. and informed her of his feelings. Dr B's marriage had broken up in mid 1986 (a year earlier) and at this time Dr B. was emotionally vulnerable.
9. In about August 1987, Dr B. and Ms A. spent a weekend at his home unit at Bondi.
10. During that weekend, on one further occasion prior to February 1988 and on one occasion in about April 1988 they shared their loving feelings and sexual intercourse took place.
11. Ms A. continued to receive therapy at the Jonellen Clinic from Dr B. until February 1988.
12. In February 1988, Dr B. referred Ms A. to Dr Anne Noonan for completion of her therapy. Dr Noonan is a registered medical practitioner carrying on practice at Balmoral.
13. Ms A. attended Dr Noonan for completion of the therapy commenced with Dr B. on fourteen

occasions from about February 1988 until about April 1988.

14. In May 1988 Dr B. and Ms A. commenced going out together. In June 1988 they began to live together. In late 1987 Ms A. had started to train herself as a fashion consultant. From June 1988 this venture became a business partnership with Dr B
15. On 22 August 1988 the loving relationship between Ms A and Dr B. ended.
16. Following the ending of their personal relationship, the business partnership was dissolved upon terms set out in two agreements dated 8.9.88, copies of which are annexed hereto and marked "A" and "B" respectively.
17. On 26 August 1988 Ms A. again consulted Dr A Noonan.
18. Between March 1987 and June 1989 Ms A's general medical practitioner was Dr Sari Larsen at Annandale. On 29 August 1988 following the termination of Ms A's personal relationship with Dr B, Dr Larsen referred Ms A. to another psychiatrist, Dr Helen Borman. A copy of Dr Larsen's consultation notes in respect of his treatment of Ms A is annexed hereto and marked "C".
19. In November 1988, Ms A. consulted Dr W. Childs, a then registered medical practitioner and a psychiatrist who referred MsA. to another psychiatrist, Dr Anne Banning on 6 November, 1988.
20. Ms A. consulted Dr Banning for psychiatric therapy on about 39 occasions between 9 November 1988 and June 1989 when Ms A. discontinued therapy. A copy of Dr Banning's consultation notes in respect of her treatment of Ms A. is annexed hereto and marked "D".

21. On 16 June 1989, Ms A. took an overdose of Sinequin and Valium medication and was admitted to Royal Prince Alfred Hospital for treatment. She was discharged on 18 June 1989.
22. On 19 June 1989, Ms A. attended Dr Larsen who recommended that she attend Dr Banning. Ms A did not do so. Since June 1989, Ms A. has resided with her family.
23. Ms A. has made no complaint to this Tribunal against Dr B.
24. Dr B. admits that he did have a mutually loving relationship with Ms A. He accepts full responsibility for his departure from proper medical standards and deeply regrets the events which occurred. He does not condone the active befriending of patients during or after therapy or sexual relationships with a patient or ex-patient.
25. Dr B. admits that his conduct in respect of his treatment of Ms A. from July 1987 amounts to professional misconduct.

It will be seen that the appellant admitted that his sexual relationship with Ms A, both during the course of their professional association between August 1987 and February 1988 when their professional association was terminated and, again, between May and August 1988, during which time they were lovers (although the relationship of doctor and patient did not subsist between them), amounted to professional misconduct. Accordingly, the sole ground of appeal was that the order which the Tribunal made under s 32R(1) (g) (ii) that the appellant's name be removed from the register was "unwarranted and too severe". The appeal is authorised by s 32U (1) (b) , and by subs (3) (b) of that section the Court of Appeal may, if it allows an appeal against the exercise by the Tribunal of its

powers under s 32R, "make such order as it thinks proper having regard to the merits of the case and the public welfare".

In order to consider whether the ground of appeal is made out, it is necessary to add some factual material to the matter contained in the agreed statement of facts; and to emphasise other portions of that statement.

First of all, it is important to note that, as para 4 of the agreed statement makes clear, Ms A, before she was referred to the appellant, had over many years suffered from a major debilitating psychogenic illness which adversely affected "her own sense of self worth". It is reasonable, therefore, to regard her, at least in the initial stages of her treatment by the appellant, as a fragile personality who might readily be disturbed by emotional stress.

Secondly, in those circumstances, it seems plain that the appellant should have recognised the care that was necessary to avoid the possibility of imposing upon Ms A emotional pressures which she would be unable to sustain. It seems to me that the situation is well put in the report of 23 July 1991 made by Professor Christopher Tennant. He said

"Under the circumstances described, Dr Buttsworth would meet my strong disapproval for having a sexual relationship with his patient during therapy. I also believe that this behaviour would attract strong disapproval of Dr Buttsworth's peers of good repute and standing. I believe further that Dr Buttsworth's personal and sexual relationship occurring immediately after therapy, meets with my disapproval and would also attract the disapproval of peers of good standing. My reasons for strong disapproval are that the doctor/patient relationship is a protected professional relationship. It is well recognised that sexual feelings for the therapist may develop in therapy and indeed this was particularly the case with a patient such as A.

Dr Buttsworth is himself an extremely experienced psychotherapist of considerable repute in Sydney. He would therefore have recognised the transference issues and the patient's vulnerability. Being as experienced as he was, he should have also recognised his own vulnerability in the context of his marriage breakdown. He should also have been aware of his own counter-transference and taken earlier steps to deal with it."

Thirdly, it was not Ms A who complained to the Complaints Unit. Evidence given in other proceedings before the Medical Tribunal involving another psychotherapist suggested that the appellant and Ms A were in a sexual relationship while she was being treated by him, and it was in consequence of that information that the Complaints Unit instigated an investigation. The appellant who was by May 1990 apprehensive that such an investigation was under way, consulted his insurers who wrote to the Complaints Unit which confirmed that it had the matter under notice. Thereafter, the appellant wrote to the respondent denying (with some lack of candour) the truth of what had been said during the course of the other hearing, and then in August 1990 admitting that a sexual relationship had existed between him and Ms A after psychotherapy had ceased.

Shortly after that, the appellant and Ms A both signed two separate 'agreements' which were annexed to the agreed statement of facts as "A" and "B". They are both dated 8 September 1988, and "B" does deal entirely with the business enterprise which the two had endeavoured to run together. But "A", which describes their personal relationship from the latter part of 1987 until the date of that agreement, and included some reference to the mutual business project, seems to be principally designed to protect the appellant against the

possible disciplinary consequences of his personal relationship with Ms A. The final paragraph reads:

"Now recovered from the condition for which she was treated by John, [A] appreciates the effort put into her treatment and the professional integrity John demonstrated during and after treatment. [A] agrees at all times to act to protect John's professional integrity over any issue associated with their professional and personal relationship."

It may be, from what the appellant said in his evidence in chief, that the last paragraph was intended as some protection against a threat which Ms A had made that she would report the appellant, and which he believed to refer to "the unethical nature of the beginning of our relationship." In cross-examination, the appellant was asked about the agreements and the Chairperson ultimately put to him this question:

"A. So, it was self-protective, disagreement (sic I.
take this to be a corruption of "this agreement") ?

A. Yes, it was."

On 8 October 1990 the respondent wrote to the appellant seeking particulars of his relationship with Ms A. On 3 December 1990 the appellant wrote to Ms A giving a somewhat highly coloured account of the proceedings before the Medical Tribunal in which he and Ms A had been mentioned, that being the reference which generated the inquiry which the Complaints Unit was then pursuing. The last part of the letter is in these terms:

"As you are the person concerned, the Complaints Unit will either ask for you to co-operate with them and attend the court voluntarily or just force you to attend

by Subpoena as they did with [A]. Whatever way they go about it you and I will end up in court and be forced to reveal all the intimate details of our loving relationship and how it came about. As in Win's and other cases this will involve details of your illness, your relevant past personal and family life, and your treatment. And of course details of my personal life. It will be a terrible invasion of privacy for both of us and our families, particularly as the details will be published in the media probably on a day-by-day basis. The Complaints Unit will of course want our relationship to be seen as an illicit sexual affair.

What can be done? Most importantly if you do nothing it will happen.

However you and only you may prevent all this if they are informed in advance that you have no complaint. And this, if you wish to do it, will have to be done right away - posted by Wednesday afternoon December 12th. I am not suggesting that you deny anything just to say you have no complaint. It's up to you. Do something now or we go to court. If you decide to do something I am including the relevant details. Of course I would like to discuss this matter more with you.

I am terribly upset about all this and I am truly sorry. With my love"

With the letter the appellant enclosed the draft of a document which he suggested Ms A might sign and send to his insurance company. It is headed "Re: Dr Buttsworth" and reads as follows:

"I write to let it be known that having been a patient of Dr Buttsworth and subsequently in an open, committed and loving relationship with him, that I have no complaint about Dr Buttsworth."

The Medical Tribunal pointed out that there was no evidence that the document had ever been signed or that Ms A had ever complained to the Complaints Unit. Describing the letter, the Tribunal said that it

was "clearly designed to dissuade [Ms A] from taking action concerning" the appellant, and continued:- "It is demanding and has an overall veiled threatening effect." I agree. I agree also with the Tribunal's further comment that he could have saved Ms A any risk of the rigours he mentioned by frankly admitting his conduct and its professional consequences to the Complaints Unit.

The Tribunal dealt with the matter in careful detail, which it seems to me now unnecessary to recapitulate. It found that the particulars were proved, and that a psychiatrist of the appellant's standing and experience should have known how to have handled the situation when Ms A declared that she was in love with him, a declaration which, on the evidence, was one which was by no means uncommon in the course of psychotherapy, and which experienced therapists should be alert to deal with. The Tribunal expressed the view that his failure to have handled the situation in a professional manner indicated the depth of his lack of clinical judgment. The findings continue: -

"He appears not to have given any serious thought to the impact which his sexual responses to her would have on her mental health. If he did give the matter any thought, then he either ignored the likely consequences of his relationship or else he was not concerned with any possible adverse outcome for her. The respondent's handling of Ms A's problems appears to have been inadequate or not finalised. She had further need for intense psychiatric help and it seems, from a perusal of medical records, that his behaviour aggravated or reactivated her previous difficulties in responding appropriately to men. The respondent accelerated the termination phase of therapy to allow the personal relationship to become established. Accelerating or shortening the termination phase in a patient with severe long standing problems, who has been undergoing intense therapy, can precipitate acute illness, including

suicide attempts and depression. He lacked judgment and failed to display adequate care for a patient under his medical management."

The Tribunal, to summarise its conclusions, regarded this as a serious "dereliction from proper conduct" constituting a breach of traditional ethics (that is, the proscription of sexual relationships between doctors and their patients) greatly aggravated by the particular standing of the respondent and Ms A. It was an example of a therapist who indulges in a sexual relationship with a patient "especially where the patient has acknowledged that sexual problems lie at the very root of her psychological difficulties" totally undermining the therapeutic role. Moreover, the continuance of this sexual relationship after a relatively "short pause in contact, following the cessation of therapy" was also blameworthy. With all of these findings I entirely agree. No doubt, Dr Banning's notes of what Ms A told her when she took over her management should be considered with caution.

But Dr Banning's analysis of Ms A's situation made, it seems, at their first consultation on 9 November 1988 seems very much in point. The comment is "Very bereaved by the loss of the relationship with JB, as well as the loss of her Therapist. She now feels the progress she made in Therapy is lost - she saw JB as a good Therapist, but a terrible, critical partner with his own needs." This, to my mind, neatly illustrates the inappropriate nature, to say the least, of a sexual relationship, either during the course of psychotherapy or shortly after the professional relationship has ended, between a therapist and his or her patient. In the course of psychotherapy the patient reveals everything and the psychotherapist nothing. The latter is dominant and the patient dependent. The psychotherapist has no "needs"; his

or her function is to serve (in a broad way) the needs of the patient. The change in role is likely to, and in this case did, place emotional burdens on Ms A, the patient, which she should not have been asked to carry and which, plainly, had the most adverse effect upon her medical condition.

The order made by the Tribunal was attacked principally upon two grounds. First, it was submitted that the Tribunal misdirected itself as to the onus of establishing the risk of the appellant offending again with some other patient. What the Tribunal said was this:

"The Tribunal finds that it is not satisfied that there is not an appreciable risk of the respondent re-offending with another patient."

However, there is no onus whether to the standard required by Briginshaw v Briginshaw (1938) 60 CLR 336 at 361, or of any other kind, upon the respondent to establish the likelihood of the appellant's behaving again in the same way with another patient. The respondent, having proved the case, is entitled to apply that evidence to sustain the order which she thinks the circumstances warrant. The appellant may certainly advance matter in mitigation and he bears the onus of establishing that material on the ordinary balance of probabilities. Accordingly, the passage which I have quoted from the Tribunal's findings is a correct statement of how the position stood; and there was no error of law.

Secondly, it was submitted that whatever the onus might have been, there was no evidence upon which a finding could have been made that there was a risk of any kind of the appellant's re-offending; and it was said that this appeared to be conceded by the respondent. However, I am afraid that I can see no such concession in the portions

of the material to which reference was made. Indeed, counsel for the respondent before the Tribunal said:- "It is our respectful submission that there is and remains a risk", while conceding, as it was proper, that the evidence was that the risk was low and that there was no expert evidence to the contrary. However, the Tribunal, which is an expert body, was not bound to accept the evidence of Professor Katz and Dr Barclay to this effect, and counsel, indeed, did not do so. The submission was that there was a risk, and counsel continued:- "It is our respectful submission that monitoring and supervision at this point of time is not sufficient. It is our submission that Dr Buttsworth knew what he was doing was unethical at the time he did it. He consciously, albeit contrary to his own standards as he espoused (sic) them, chose to ignore and disregard those standards. The fact that he deliberately did so and permitted his personal feelings to override his professionalism must, in our respectful submission, impact on the risk of recurrence." I can see no trace of any concession here.

It is plain that the appellant was, until this episode, a practitioner of good repute and standing, and of highly acknowledged competence. However, on this occasion he fell far below the standards which I imagine he regarded as proper. That itself was a matter which the Tribunal was entitled to consider. But more than that, the letter of 3 December, together with the document which he suggested that Ms A might sign, together indeed with the agreement of 8 September 1988, indicate to me a selfish concern for his own professional safety which does not support the protestations of contrition, guilt and shame which he advanced and which were, indeed, supported by Dr Barclay, for example, who, in his report of 15 August 1991, said:- "I would see no risk of him being involved in this way with a patient again." It is

evident that the Tribunal, for reasons which it gave, was not prepared to take the same view of the matter. The submission made about this by Mr Carson and Mr Pavlakis for the appellant was that the Tribunal failed to give sufficient weight to what I might call the subjective matters urged in favour of the appellant, or to the public interest in the continuation of the appellant's availability to serve the community in his specialist field.

The subjective matters, however, seem to me to assume incorrectly that an order made by the Tribunal under s 32R of the Act is a punitive one. If it were, and it is not, then matters relating to the saving of the cost of a protracted hearing and the release of Ms A from the ordeal of giving evidence, the appellant's shame, his personal ordeal, the absence of any other blemish, and matters of that kind, would be material. But when the purpose of an order is to protect the public, these matters diminish in weight, if indeed they are left with any substance at all. Equally, the public interest in the appellant's continuing in practice must be weighed against the public interest in protecting patients from any repetition of the conduct exhibited in this case. It certainly cannot be said that because the appellant was a distinguished psychotherapist he is entitled to require the Tribunal and this Court to put the protection of the public in the hazard. Similarly, there is a significant want of logic in evidence which asserts firstly, that there is no risk, or only a very slight risk, of any further offence of this kind, but which goes on to recommend that if the appellant is permitted to continue to practise, it would be desirable that "he be in either treatment or supervision with a senior colleague". Treatment or supervision suggest, of course, that the appellant is no longer fully in command of his professional resources and, more to the point, indicates

the underlying assumption that contrary to the statement made, there is in fact a risk that he will offend again.

An order of the kind made by the Tribunal, although protective and not punitive in purpose, undoubtedly has the most severe consequences for the practitioner concerned. However, the Tribunal had the opportunity of seeing and assessing the witnesses, an advantage of course denied to us, and is intended to draw upon its own professional knowledge and experience: Re Medical Practitioners Act 1938-1964; Re Appeals of Johnson & Anderson (1967) 2 NSW 357 at 365. I can see no basis upon which this Court would be justified in intervening to set aside or vary the order made. I would therefore dismiss the appeal with costs.

I Certify that this and the 15
preceding pages are a true copy of
the reasons for judgment herein of
The Honourable Mr. Justice Samuels.

Date 19 12 . 1991

M Anderson
Associate

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40520/91

SAMUELS AP

PRIESTLEY JA
MEAGHER JA

Thursday, 19 December 1991

BUTTSWORTH v WALTON

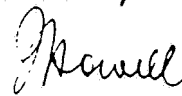
PRIESTLEY JA: I agree with what has been said by Samuels JA.

For myself, I add that the appellant's fundamental breaches of his professional obligations as a psychiatrist to his patient Ms A were equally fundamental breaches of his more general professional obligations to his profession and the public. It seems to me highly desirable that the enforcement of these obligations should be firmly maintained

I fully agree with the orders made by the Tribunal. In my opinion the appeal should be dismissed with costs.

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

Date 19-12-91


Associate

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40520/91

CORAM: SAMUELS AP
PRIESTLEY JA
MEAGHER JA

Thursday, 19 December 1991

BUTTSWORTH v WALTON

JUDGMENT

MEAGHER JA: I agree with Samuels AP.

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

Date 19/12/91


Associate