

COURT OF APPEAL

RECORD SHEET

NATURE OF JURISDICTION: MEDICAL TRIBUNAL

FILE NO/S: CA 40086/97

DELIVERED: 31 JULY 1997

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PARTIES: WILLIAM GAYED V MERRILYN WALTON

JUDGMENT OF: MASON P; MEAGHER JA; STEIN JA

COUNSEL:
 Appellant: P BRERETON AND E PIKE
 Respondent: M JOSEPH SC

SOLICITORS:
 Appellant: WHITEHEAD GREEN & COOPER
 Respondent: D SWAIN, HEALTH CARE
 COMPLAINTS COMMISSION

CATCHWORDS: Medical Practitioners - professional misconduct - removal from register - excessive prescription of drugs of addiction to patients - appeal against Tribunal's findings on credibility - whether appealable error by specialist tribunal whether order excessive - role of disciplinary procedure - deterrence and protection of public - fitness to practice

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

CA 040086/97

**MASON P
MEAGHER JA
STEIN JA**

Thursday 31 JULY 1997

WILLIAM GAYED V. MERRILYN WALTON

JUDGMENT

MASON P: Mr Brereton, who argued this case for the appellant in excellent submissions for which the court is very grateful, has put the case, and it is a sad case, at its highest. Notwithstanding those submissions, I am of the view that the appeal should be dismissed.

On 21 February 1997 the Medical Tribunal found the appellant guilty of professional misconduct. He had been charged with thirteen complaints of professional misconduct. The Tribunal ordered that his name be removed from the register of medical practitioners of New South Wales; that pursuant to s64(3) an application for review of the first order was not to be made until three years had elapsed from that date; and that the appellant pay the assessed costs of the respondent.

The substance of each complaint as set out in the Complaint dated 21 December 1995 is that (a) the appellant had engaged in conduct which demonstrated a lack of

adequate knowledge, skill, judgment or care in the practice of medicine and/or (b) the appellant had engaged in conduct relating to the practice of medicine that is improper and unethical.

The Complaint contains lengthy particulars, the facts of which were admitted by the appellant before the Tribunal. In substance, the complaint was that in relation to each named patient the appellant prescribed benzodiazepine and narcotic analgesics, being dangerous drugs and drugs of addiction, in quantities in excess of recognised therapeutic standards of what is medically appropriate and at a time when the appellant knew or ought to have known that his patient was an addict and/or that the drug was likely to produce dependency in the patient.

This treatment occurred during the period 1989 to 1992, with the exception of one patient when it extended to 1994. Necessarily the treatment involved failure to exercise responsible medical judgment with serious consequences to the patients. In some cases contravention of the Poisons Act was involved and in some cases the drugs were prescribed for non medical reasons.

In lengthy reasons the Tribunal found the facts referable to each complaint. This involved an assessment of the appellant's evidence in the light of the Tribunal's view of his credibility formed on the basis of the established facts and its opportunity to see him under examination and cross examination.

Nothing put before the court today persuades me that the Tribunal abused its position in any way that would justify this court rejecting the findings below referable to credibility. It was suggested that the appellant has language difficulties

which were not taken into account by the Tribunal. Given that the appellant has held high office in local Government in this country, that he has practised medicine in "English speaking countries for many years, and that he chose to give evidence without an interpreter, I can see no substance in this contention.

The Tribunal's summary referable to patient D bears repetition:

"Summary:

Whereas Dr Gayed portrays himself as the concerned and responsible manager of a person with chronic pain who is later suspected of being an addict, the facts on cross examination appear that Dr Gayed simply continued to prescribe drugs of addiction for patient D without regard to whether or not he might be an addict and in breach of the Poisons Act which required him to obtain an authority for treatment continuing beyond two months.

Dr Gayed's explanations lacked credibility and again, there appeared to be no purpose in not seeking an authority for patient D as an addict, as it would presumably have been readily available. If an authority had been obtained it may have prevented patient D from receiving drugs from another source as well and improved his chances of management as an addict.

The distinction drawn by Dr Gayed between 'habituation' and 'addiction' in the circumstances is not one that is recognised by the medical profession. He continues to hold such an opinion even after attending his reeducation programme." (Reasons p33)

The Tribunal summarised its conclusions in the following terms:

"The Tribunal is conscious of the fact that the principal issues to be determined by us are the conduct of the respondent [ie the appellant in this appeal] in respect to the named patients during the period from June 1989 to May 1992 and the consequences which follow from his admitted departure from the standard of skill and care required of a medical practitioner in New South Wales. The paramount issues relevant to the appropriate orders to be made by the Tribunal are the assessment of the capacity of the respondent to conduct himself properly and competently as a member of the medical profession and the maintenance of the standards of the medical profession to ensure

the health and welfare of the public. The determination of such issues involve an assessment of the credibility of the respondent and the reliability of the assertions set out in his written statement and in his evidence. As an aid to assessing the credibility of the response of the respondent to these complaints considerable time was spent in cross examination on events which occurred before 1989 which are an integral part of the overall response of the respondent in respect of the treatment of and the background of these patients who have been in his care for many years before 1989. The Tribunal also bears in mind the substantial written material presented to us as to the reputation, character and competence of the respondent which in substance has not been challenged. A further relevant matter of significance is the evidence of the considerable further medical education of the respondent since 1992.

The substance and gravity of the respondent's misconduct is apparent on a re reading of the first four complaints as set out in the first three pages of these reasons for determination. Such conduct was constantly repeated in respect of other patients as set out in the further particulars recorded on pages 4 to 11 of these reasons. It must not be overlooked that the respondent admits all allegations of fact set out in the particulars including the detailed account of his prescribing as set out in the schedules annexed to the complaint. The particulars include -

The repeated prescription of dangerous drugs and drugs of addiction in quantities in excess of recognised therapeutic standards of what is medically appropriate.

The prescription of such medications when the respondent knew, or ought to have known, that the patient was an addict and/or the drugs were likely to produce dependency in the patient.

The appropriate prescription on a long term basis of medication such as nembudeine and fortral ampoules for the treatment of long standing chronic pain.

The failure to consider and/or provide more appropriate treatment options.

Die failure to make an keep for a proper period adequate medical records.

The failure to obtain appropriate authority from the

Department of Health to prescribe such dangerous drugs of addiction in disregard of his legal obligations under section 28 of the Poisons Act.

Such misconduct on the part of the respondent, during the relevant period, must be considered in the light of the facts that the respondent is an experienced medical practitioner who has been in practice in New South Wales for more than thirty years and has been counselled and warned on two prior occasions by officers of the Pharmaceutical Services Branch of the Department of Health in 1983 and 1987 in respect of similar misconduct. (Reasons pages 54 and 55). "

Of relevance to the appellant's argument on the appeal that the order made by the Tribunal was inappropriate, the Tribunal made further detailed findings referable to the appellant's credibility. These are relevant not just in their own right but as reflecting upon the appellant's present capacity and willingness to recognise the seriousness of his past misconduct.

The Tribunal found that it was unable to accept the appellant as a truthful and reliable witness in respect of many issues which arose in the course of the hearing. It gave examples of what it described as his mendacity at pages 55 and 56 of its Reasons. These include, firstly the many substantial inconsistencies previously mentioned in the reasons between the appellant's written statement and his oral evidence; secondly, the prevarication of the appellant in the course of cross examination concerning his explanation for a long standing repeated and what was described as utter disregard of legal obligations to obtain authority under section 23 of the Poisons Act; thirdly, his explanation for not following the advice of the Department in 1983 in respect to drugs of addiction. Other specific findings are set out on page 56 of the Tribunal's Reasons.

In assessing the question of the standard of medical care provided by the appellant, the Tribunal stated that. it was very comfortably satisfied that in respect of the identified patients the appellant had been prescribing inappropriate medication recklessly and dangerously over long periods.

"He has prescribed for addicts and probably created addicts. His style of practice has been to continue to accede to patients' requests for drugs; he spent little time with them then. Rarely, until recently, has he attempted to find other forms of therapy.

The Tribunal indicated its concern that,

'Although the [appellant] has successfully undertaken courses of further medical education since 1992 his evidence disclosed some continuing lack of insight into the responsibilities of a medical practitioner. For example, he still does not appear to understand the obligations imposed on a medical practitioner by the Poisons Act, nor the intent and purpose of the necessity to obtain authorisation in respect of the continued prescription of dangerous drugs.

In respect of many issues initially raised by the [appellant] in his comprehensive written statement, the Tribunal is deeply concerned about the many obvious inconsistencies between his statement and his evidence and apparent basic lack of insight ... as displayed by his responses to many topics raised in cross examination and other evidence adduced at the hearing."

In deciding what orders were appropriate in the circumstances, the Tribunal noted that it was required to take into account in the exercise of its protective jurisdiction the maintenance of the standards of the medical profession, the maintenance of public confidence in the medical profession, and the protection of the community. The Tribunal recorded that it bore in mind the gravity of the consequences of an order removing the name of a medical practitioner from the register. I do not understand these principles to be challenged in the appeal.

Before the orders were made against the appellant he stood before the Tribunal as a general practitioner aged 61. He had been born overseas. He obtained his medical degree in 1964. He had practised for a time in his country of origin before going to England in 1968 where he practised as a general practitioner. He came to Australia in 1972 and between that time and the present he has conducted various medical practices in the Nepean area. He became actively involved in community activities in that area which culminated in his holding the position of the Mayor of the City of Penrith in 1992 and 1993.

The Tribunal took into account what it described as an "impressive battery of references" which attested to the appellant's diligence, efficiency, honest and caring attitude as a medical practitioner. Nevertheless, for the reasons I have summarised, it concluded that striking off in the terms ordered was the appropriate disposition of the matter.

The principles referable to this appeal were, as I understand it, common ground between the parties. The court has the jurisdiction to entertain a general appeal against the exercise of any power by the Tribunal under Division 4 of Part 4 which was the division engaged in the present case. Despite that power, or indeed because of the way it is expressed, it is not open to this court simply to substitute its decision for that of the Tribunal. Being an appeal from a matter involving a broad assessment concerning fitness to practice made in the light of virtually unchallenged findings that the appellant has been guilty of professional misconduct, it is an appeal in which the appellant must point to appealable error as that expression is well known in the case.

Counsel for the appellant focused his attack on two broad grounds. First, he challenged some specific passage in the judgment asserting that there were errors in - approach and fact. Secondly, he argued that the order of striking off with, in effect, a minimum three year period before the appellant could reapply as being outside the range of appropriate responses to the findings that had been made.

Counsel for the appellant submits that deregistration was, in the circumstances, unwarranted by any need for the protection. of the public. Alternatively he submitted that a period of three years before which the appellant could seek readmission was an excessive period.

Counsel emphasised that even where there has been a finding of past professional misconduct there needs independently to be a finding of present unfitness to practice before it would be appropriate for deregistration to occur. We were referred to the remarks of McHugh JA in *Herron v. McGregor* (1986) 6 NSWLR 246 at 258. It was common ground between the parties that the Tribunal's jurisdiction is protective and not punitive, although it was accepted that issues of general deterrence are part of the protective aspect of the jurisdiction.

In *Spicer v. The New South Wales Medical Board* NSW Court of Appeal

unreported 19 February 1981, Hope JA, speaking for the court, said:

"Strict adherence to the statutory requirement relating to the use of drugs of addiction is required of medical practitioners ... the breadth and depth of the illicit drug problem in this community has reached alarming proportions and any medical practitioner who prescribes drugs of addiction other than in accordance with the law is seriously misconducting himself in a professional respect. "

His Honour also said that,

"It is clear beyond argument that the proper handling and prescribing of drugs by medical practitioners are of the greatest importance to the community. If a medical practitioner handles or carries out that very great responsibility in a way which is reckless and which shows disregard to the law, it cannot be said that he is fitted at such a time to be a medical practitioner"

This is a case where professional misconduct of kind described in *Spicer* has been admitted by the appellant and found by the Tribunal. The appellant's principal submission was that, in the period since 1992, the appellant had established and demonstrated that he had reformed his attitude as evidenced by the past professional misconduct. It was in 1992 that the appellant had been visited by representatives of the Department of Health.

The court was taken to evidence that was uncontradicted to the effect that the appellant had in his conduct of his own continuing medical practice changed his prescribing habits and had also undergone extensive re-education with particular reference to matters of drug dependency.

The difficulty for the appellant seems to me to be that the Tribunal was not satisfied that this evidence bore the weight which the appellant placed upon it. On the contrary the Tribunal made findings which extend beyond 1992 the range of factors unfavourable to the appellant on the issue of current unfitness to practice.

Firstly there is the finding of the breach referable to patient M which occurred between 1992 and 1994. Although counsel for the appellant sought to distinguish it

from the pattern of other complaints, there are some similarities with them. At the very least it evidences absence of complete reform in relation to drug prescription in the period up to September 1994.

Secondly, there was the finding at page 57 of the Reasons that the appellant's statement in evidence that after July 1992 he intended to stop prescribing benzodiazepines altogether and his claim that he did so was, the Tribunal held, inconsistent with the records tendered in evidence which showed, for example, that he continued prescribing benzodiazepines until at least December 1993. The Tribunal added that his explanation, "Well, yes, it sometimes takes long", speaking of patient G, completely lacked conviction.

Thirdly, the Tribunal, at the same page of its reasons, found that the appellant's denial of any responsibility in the death of patient B was, in its words, an abject failure to recognise in December 1996 the part he played in respect of the death of patient B.

Fourthly, and in itself a much more substantial answer to the appellant's submission based on demonstrated good conduct since 1992, there were the findings of the Tribunal referable to the appellant's credit as demonstrated in his evidence before it in late 1996 and the inferences and conclusions drawn from that assessment by the Tribunal to which I have already made reference. I have already set out the passages at pages 57 and 58 of the Reasons which draw those inferences adverse to the appellant, notwithstanding a finding in his favour that he has successfully undertaken courses of further medical education since 1992.

It is true that the Tribunal made no reference to the evidence favourable to the appellant from his medical colleague, Dr Levant, that during her observations of him during most of 1996 he had been scrupulous in his attention to matters of dealing with the prescription of drugs. Nevertheless, that cannot trump or in itself negate the Tribunal's own assessment based upon what it heard from the appellant's own mouth and what it recorded as its findings referable to his attitude demonstrated in 1996.

Fifthly, there is the issue of general deterrence, which the appellant accepts as part of the proper consideration of the protection of the public. I think that this concession was properly made (see *Law Society of New South Wales v. Foreman* (1994) 34 NSWLR 408 at 440). Obviously there are cases where the delay between the detection and the determination of professional misconduct referable to the past is so great that such factors are diminished entirely. This is what McHugh JA was referring to in the passage to which reference has already been made. Here, however, the lapse of time is not so significant. And the findings of repeated past misconduct are, in my view, of such a level of seriousness, both generally and for the patients concerned, that general deterrence remains of significance. Spicer's case attests to the need for denunciation by declaring unfitness to practice in appropriate cases.

It is to be remembered that this is a matter of appellant review and that it is not open for us to substitute an order simply because we might have imposed another. Ultimately, Mr Brereton's excellent submissions have not persuaded me that there was any appealable error in the way the Tribunal approached the matter.

Counsel submitted that the passage at page 59 of the Reasons in which the Tribunal stated that it was,

"not satisfied that the substantial further medical education undertaken by the [appellant] since 1992 has remedied the grave defects in his practice of medicine as disclosed- in the evidence adduced in the course of this inquiry".

evidenced two errors: firstly a reversal of the onus of persuasion or proof which was born by the respondent, and secondly, a perverse finding of fact. I disagree. I read that "ultimate finding" of the Tribunal as a summary of what went before in the Tribunal's reasons. It was a finding favourable to the appellant in that it recognised that there had been substantial further medical education. That was the case advanced by the appellant below and primarily advanced here as deflecting or annulling the continuance of unfitness that would prima facie flow from the matters of professional misconduct established up to 1994 in the findings of the Tribunal. In my view, the Tribunal was perfectly entitled to express itself in those terms. In doing so it was not indicating that the appellant bore some ultimate onus of proof to show that he should not be struck off.

The alternative way in which the appeal was argued was the submission that the order that was made by the Tribunal was outside the range of acceptable disposition for cases of the type that had been found against the appellant. We were referred to *R v. Warfield* (1994) 34 NSWLR 200 at 207D, a case involving a criminal appeal but which I am content to accept as stating by analogy a relevantly applicable principle. Speaking in that criminal law context, it was said by Hunt J CJ at CL that,

"What must be looked at is whether the challenged sentence is within the range appropriate to the objective gravity of the particular offence and to the subjective circumstances of the particular offender and not whether it is more severe or more lenient than some other sentence (other than that of a co offender) which merely forms part of that range."
"

It was submitted by counsel that the order was outside an appropriate range when viewed in the light of a number of decisions by the Tribunal to which the court was taken. Counsel argued that this was a case where the upper limit of an appropriate range might be a fine or possible suspension, and that the Tribunal should have been prepared to have imposed a less stringent order, particularly if coupled with a condition withdrawing the appellant's authority to prescribe class 8 drugs.

While obviously in a matter such as this it is appropriate to look at the cases said to form the so called evidence of the range, there is always a difficulty in getting help from individual cases because of the problem of drawing comparisons between one case and the next. Each must be looked at according to its own facts. Some of the cases to which we were taken .did not involve a finding of professional misconduct. Some did and it may be recognised that there was the appearance of what may have been a lighter order made than here.

It may be that if there is any deficiency it is in the level of order made in some of those cases, although perhaps they are explicable by their relative age. This is a problem which has been around, but it is getting worse. What was an acceptable response in one period of time may not necessarily be an acceptable one now, although I do not place that as the ultimate basis of my reasoning.

When pressed, counsel for the appellant frankly, and I think properly, conceded that the cases to which we were taken did not suggest that deregistration could never be a proper disposition in relation to a case of established professional misconduct of the nature involved here. Spicer's case, which after all is the only case in this court to which any reference has been made, contains a statement by Hope JA, with the concurrence of his judicial brethren, that the Tribunal could well have taken a much more serious view of the appellant's conduct in that case and removed his name from the roll.

In considering what is a proper range, I think it is appropriate that this court recognise that it is entertaining an appeal on a matter of what can loosely be called penalty from an experienced and specialised tribunal. Some of the authorities relied upon by counsel for the appellant involved the Judge who was a member of the Tribunal whose decision is challenged in this present case.

In referring to the experience of a specialised tribunal, I acknowledge that it does not necessarily carry over, at least in the case of medical practitioners, to experience in detecting matters of credibility. I am not saying that doctors do not have that capacity, but I am not to be taken to have overlooked that submission. But in a matter of fitness to practice consequent upon established findings, including findings of present attitude which this court accepts as I have previously indicated, it is appropriate that due deference be given to the position of the Tribunal below. It is also appropriate, as is obvious, to repeat that it is only an order that is outside the range that would attract appellant review.

In the present case, it seems to me that the following factors leave me comfortable that the matter was within the range of appropriate disposition. There was no specific error in the judgment below. The findings are, in my view, serious. They indicate repeated conduct over a considerable period of time and the findings referable to patients B and D are, I think, of considerable seriousness. There were two prior warnings in 1983 and 1987 which, according to the Tribunal's reasons at page 55, were in respect of similar misconduct. Finally, there are the matters which the Tribunal found and inferred referable to the appellant's present attitude and understanding which derived from its own assessment of him as a witness.

Given this group of matters, I would reject the appeal on the alternative ground of being an excessive penalty. I propose that the appeal be dismissed with costs.

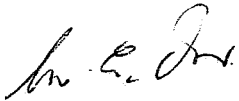
MEAGHER JA: I am afraid I agree.

STEIN JA: I agree with the reasons given by Justice Mason. In my opinion, the findings of the Tribunal and its orders were well justified on the evidence placed before it. I agree with the orders proposed by the President.

MASON P: Those are the orders of the court.

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

26/8/97
Date


Associate.