IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 13711 of 1985
COMMON LAW DIVISION)

CORAM: YELDHAM. J.
FRIDAY, 19TH JULY, 1985

MANNING v. WARD
JUDGMENT

HIS HONOUR: This is a case stated by a Magistrate who dismissed in Information against the defendant charging her with advertising herself to be willing to perform a medical service contrary to the provisions of s 42(2) of the Medical Practice Act 1938. That sub-section provides inter alia,

> "(b) No registered medical practitioner shall, otherwise than in accordance with the regulations, advertise himself or hold himself out to be entitled, qualified, able or willing to practise medicine or surgery in any of its branches, or to give or perform any medical or surgical advice, service, attendance or operation."

By s39A of the Act s42, inter alia, is said to apply to bodies corporate.

The regulation to which reference is made in the sub-section is reg 31which empowers a registered medical practitioner to cause an advertisement to be inserted in a newspaper specifying that practitioner's place of business and certain other matters, and it provides in sub-reg 2 that it shall not include any matter relating to the registered medical practitioner other than what is there specified.

Regulation 29 provides that:

> "A registered medical practitioner shall not advertise himself or hold himself out to be entitled, qualified, able or willing to practise medicine or surgery in any of its branches or to give or perform any medical or surgical

advice, service, attendance, or operation otherwise than in the manner expressly authorised by this part."

In other words it repeats in substance the prohibition contained in s42 (2) (b), but it is the latter under which the defendant in the present case was charged, and it is that sub-section, accordingly, which it is principally necessary to consider.

The agreed facts before the Magistrate were that at all relevant times the defendant was a registered medical practitioner, that on or about 19 March she caused to be inserted in a newspaper circulating in the Bondi area an advertisement in the following terms:

> "LASER
> TATTOO REMOVAL
> Birthmarks, skin blemishes, small broken veins, moles warts and portwine marks and skin cancers
> AT MEDICAL CENTRE
> IN EASTERN SUBURBS
> We direct bill, Medicare only required.
> PHONE: 398 5213
> 9am – 5pm"

That newspaper was published on 21 March and it was agreed that the advertisement was one in respect of the performance of the medical services within the meaning of the relevant sub-section.

It was agreed also that at all material times the defendant carried on medical practice at the Medical Centre referred to in the advertisement and that the telephone number given was the telephone number of the defendant.

The Magistrate dismissed the information on the basis that the advertisement did not constitute an advertisement of the defendant contrary to the sub-section because her name was not mentioned in it.

The question asked in the case is whether that determination was erroneous in point of law. In my opinion that question should be answered in the affirmative. The absence of the name of the defendant does not necessarily of itself require a finding that she did

not advertise herself. The word "advertise" in s42(2)(b) is not to be restricted or construed in some artificial sense, notwithstanding the argument of Mr Jenkins who appeared for the defendant that the section was a penal one, concerned only with ethical questions as between doctors, and that in consequence it should be strictly construed.

In ex parte Bowen re Blumer (1962) N.S.W.R 445 the Full Court was concerned with similar restrictions and similar regulations concerning veterinary surgeons. There the Court said at p 448 that the word "advertise" in the relevant section should not be restricted as it would be if contrasted with "publish" or "print" and it pointed out that there were various ways in which a professional man, if so minded, may advertise and the word in the context in which it was found there should not be confined to the positive acts which are commonly associated with the word. In that case it was held that for a veterinary surgeon to give an interview to a journalist on professional subjects and to permit photographs to be taken in a professional setting for publication constituted acts of advertising when done by a veterinary surgeon.

Mrs Fleming has referred me to two authorities which would support the view that the prohibition is not to be narrowly construed. The first is a decision of Moffitt, A.J. as he then was, in exparte Tziniolis re Harvey 76 WN 686 and in particular at 689. There his Honour said:

> "An advertisement may therefore advertise a matter which it does not positively state but which the advertiser intends the reader to understand and which the reader, by reason of the term used in the framing of the advertisement, does understand, and in that sense that matter is advertised."

The second authority was a decision of the Full Court of the Federal Court in Rothmans of Paul Mall (Australia) Limited v The Australian Broadcasting Tribunal 58. A.L.R. 675 and 684. In the course of the judgment of the Court, which was a joint one, their Honours referred with approval to what Moffitt AJ had said in the passage which I have set out. Their Honours pointed out also that methods of human communication are almost infinitely various and often extremely subtle.

Mr Jenkins submitted that the use of the word "we" and the publication of the address as being that of the medical centre in the Eastern Suburbs did not enable the reader to detect that is was the defendant herself rather than some other person or persons who

was held out as being able and willing to remove blemishes of the type specified in the advertisement, but in my opinion the normal meaning to the reader of such advertisement would be that all persons at the medical centre in the Eastern Suburbs, if there are more than one, would be willing to do it.

It is not irrelevant to note that it was the defendant who caused the advertisement to be inserted and that the agreed facts indicate that at all times she carried on medical practice at the medical centre and that the telephone number was hers. There is no suggestion in the facts before the Magistrate that it was the telephone number of any other person or persons, but be that as it may, I do not think that it is an answer to the prosecution to say that because there may have been more than one person at the centre that it was not an advertisement of a particular person.

Mr Jenkins submitted that when the true object of the sub-section is analysed, it being, as he submitted, a matter of ethics rather than the protection of any person or persons, it is plain that the advertisement must be of a named person, but I do not agree.

In my opinion the advertisement here is saying in substance, “I am a doctor at the medical centre in the Eastern Suburbs and my phone number is 398 5213 and I will perform various advertised services.” The absence of a name does not matter. The address and the phone number are sufficient advertisement of the person whose address it is and who may be reached by telephone the number in question.

In those circumstances I am of the opinion that the defendant did advertise herself and hold herself out as being qualified, able or willing to perform the various services specified.

I answer the question asked in the stated case in the affirmative.

I set aside the Magistrate’s decision dismissing the Information and remit the matter to him with this expression of opinion so that he might deal with the proceedings according to law.

I order the defendant to pay the costs of the plaintiff.

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

Date 19-7-85

Associate