

IN THE SUPREME COURT)
OF NEW SOUTH WALES) C.A. 126 of 1981
COURT OF APPEAL)

CORAH:
REYNOLDS, J .A.
GLASS, J.A.
SAHUELS, J.A.

WEDNESDAY, 22ND JULY, 1981

ELLIOTT v. NEW SOUTH WALES MEDICAL BOARD

Medical practitioner - discipline - appeal from Disciplinary Tribunal – misconduct in professional respect - prescribing narcotic drugs to addicts - conduct continuing after express warning - finding that prescribing irresponsible upheld - no error in order striking name off register - powers under s"29(6) exercised - appeal dismissed.

JUDGMENT

The judgment of the Court was delivered by REYNOLDS, J.A.:

This appeal is brought by a registered medical practitioner, Burnard James Elliott, pursuant to s.29(4) of the Medical Practitioners Act, 1938, against an order of the Disciplinary Tribunal (the Tribunal) made pursuant to sub-s.1 of that section directing that his name be removed from the register of medical practitioners of New South Wales.

The Tribunal had adjudged him guilty of an offence based on charges of misconduct in a professional respect. No appeal is brought in respect of that adjudgment of guilt. The appeal is confined to a submission that on the facts properly to be found a lesser penalty, namely, that by of suspension, is called for having regard to the merits of the case and the public welfare. Reprimand is conceded to be inappropriate.

This Court has always accepted that the provisions of s.29(4) of the Act, that the appeal shall be in the nature of a re-hearing, means in that statute that this court shall hear the matter afresh, but on the material presented to the Disciplinary Tribunal with a discretionary power in this Court to admit fresh evidence if the interests of justice so require. There is no submission to the contrary in this case. We have seen fit to admit a number of affidavits, to the admission of which objection was not taken.

To professional misconduct which is alleged relates to many breaches by the appellant of s28 of the Poisons Act, 1966, extending over a period commencing in March 1979 and concluding in July 1980. That section provides as follows:

“28. A medical practitioner shall not prescribe for or supply to –

- (a) any person a drug of addiction (not being a drug of addiction that may be prescribed or supplied in accordance with paragraph (c)) for therapeutic use by that person continuously for a period exceeding two months or for a period which, together with any other period which, together with any other period for which that drug was to his knowledge, been prescribed or supplied by any other medical practitioner, would result in that drug being prescribed for therapeutic use by that person continuously for a period exceeding two months;
- (b) any person who in his opinion is an addict any drug of addiction (not being a drug of addiction that may be prescribed or supplied in accordance with paragraph (c)); or
- (c) any person any drug of addiction prescribed for the purposes of this paragraph, except as may be authorised by the regulations

unless he so prescribes or supplies that drug in accordance with an authority in respect of that person given to him by the Commission under s 29.”

A drug of addiction is a substance specified in Schedule 8 of the Poisons List, a list proclaimed from time to time pursuant to s8. of the Act. That schedule lists amongst other drugs methadone, as well as the drug Palfium, Dilaudid, pethidine and Retalin. The drug with which we are principally concerned in this appeal is methadone, which is an addictive narcotic drug sometimes used therapeutically as a substitute for heroin in an endeavour to break the habit of a heroin addict. The substance of the misconduct alleged is that for the period mentioned, the appellant repeatedly prescribed methadone and other Schedule 8 drugs to persons whom he knew to, be addicts. That he did so was not and is not now denied.

The appellant was registered as a medical practitioner in the state of New South Wales in 1969, having the appropriate university qualifications. He is now aged thirty-five. He worked firstly in a hospital and then assisting as a general practitioner in a suburban practice. In September .1972 he went to New Zealand to practice there in a small country town to the end of 1978. He had up to that time no experience in dealing with drug addicts. In January 1979 he commenced practice in Bankstown as a general practitioner. He did not in the first instance purchase an existing practice, though subsequently he acquired the goodwill of another practice in the same district.

Shortly after he commenced practice it is apparent that the majority of his patients were young drug addicts to whom he gave prescriptions for methadone in plain breach of 8.28 of the Poisons Act, 1966.

The figures taken out by the Tribunal show that between March and 5th June, the significance of, which last date will subsequently appear, the appellant wrote 105 prescriptions for over 3,000 methadone tablets, 57 Palfium tablets and 125 Dilaudid tablets. The appellant claimed before the Tribunal that he was unaware of the provisions of the Poisons Act. The Tribunal said that it had the gravest doubts that he was unaware, but nevertheless extended to him the benefit of the doubt. We would, if it was necessary and appropriate to do so, be inclined to take a less lenient view.

He knew of course that methadone was a drug of addiction and he must have known that its supply was legislatively controlled. His claim of ignorance by reason of spending some six years in New Zealand is difficult to accept. We find it incredible that a modern graduate in medicine would not be aware that there was control of the supply of narcotic drugs to persons who were addicts. We cite only in this connection two pieces of evidence, the first from his own notes supplied to the Tribunal in respect of a patient where he said:

“When seen in early 1979 -----admitted his addiction, and due to my ignorance of the exact legal situation I prescribed methadone tablets for him. One further prescription was given on 12.09.79 of p20. (20 tablets of Palfium) for toothache.”

The second piece of evidence is his answer given in the hearing before the Disciplinary Tribunal:

“Q. Shortly after you commenced practice, did patients come to you who admitted to you, or in respect of whom it was obvious, that they were drug addict?”

A. Yes, in the first few months several patients came admitting addiction. In the first few months they, the majority of my patients whom I now know o be addicts, presented with serious problems requesting the restricted drugs, narcotics, and at that stage I was unaware of the drug problem, the extend of it, and unaware that these patients were feigning problems to achieve their ambition of getting further narcotics.”

Of course he knew that they were restricted drugs.

There is a strong inference indeed that it soon became known to addicts that a newly practising doctor in the area was prepared to supply methadone to addicts and was uncritical of subterfuges employed in order to obtain a supply. The appellant must have appreciated the reason that such a large proportion of his initial patients were drug addicts. He said in evidence that he now saw there was a strong probability that the

word was passed around from one addict to another that he was prescribing narcotics for people with painful conditions.

However, the answer to this appeal does not lie only in the conduct of the appellant prior to 5th June. Though his conduct after 5th June may throw light on the real quality of his conduct prior thereto, he is still entitled to the benefit of the doubt which the specialist tribunal gave him.

By 5th June what he was doing, and the names of the recipients, attracted the attention of the Health Commission of New South Wales which administers the Poisons Act. On that day an inspector, a qualified pharmacist employed by the Commission, called upon the appellant and spoke to him concerning his prescribing of drugs of addiction. The precise details of that conversation do not appear in evidence but it is perfectly clear that departmental concern that the law was being broken was expressed and advice was given which would put beyond doubt the general responsibilities of the appellant in relation to drugs of addiction. There is an indication that the appellant regarded himself as being reprimanded on that occasion.

That visit was followed by a letter on 20th June signed by the Commissioner of the Health Commission of New South Wales which informed the appellant in clear terms of the existence of the statutory provisions to which reference has been made. It enclosed a copy of Schedule 8 and a document headed "recognising and Handling Addicts: Notes for Medical Practitioners". The first two paragraphs of those notes were in the following terms:

"Routine inspections of dispensing records by officers of the Health Commission have resulted in the detection of a substantial number of doctors for persons known to the Commission as opiate addicts.

Drugs obtained on such prescriptions DO NOT help addicts overcome their addiction, they only delay or disrupt proper treatment and add to the pool of illicit drugs traded and used by addicts. Addicts regularly 'do the rounds' of doctors to obtain additional supplies and frequently attend two or more doctors concurrently."

The notice then went on to go give information designed to help medical practitioners to recognise and handle addicts. It set out typical tactics employed by addicts seeking to obtain additional supplies. It further gave a list of addict management centres to which patients consulting the doctor might be referred. This helpful document explained the legislative policy and in cogent terms the reasons for it.

The communication of 20th June is of the utmost significance for, even if there is an unqualified acceptance of the appellant's assertion that he was unaware of the terms of any legislative restriction on the use or prescription of narcotic drugs, he says that he knew by this time that there was a serious drug problem in the suburb of Bankstown. This was a document which in plain terms alerted him to his responsibilities and counselled him as to the pitfalls, the methods to be used to avoid them, and the social necessity for these controls. To the appellant as a novice in this field of medicine it was a communication offering him great assistance and guidance.

At the interview of 5th June references was also made to power of the Health Commission under s29 of the Poisons Act to give an authority to prescribe or supply drugs of addiction. At this time the appellant, novice though he was, in matters relating to drug addiction and its management, was treating some patients for their addiction under a regime about which he had read in some learned journal. It was a programme which involved the administration of methadone and another drug.

He did not make application to commence or continue this treatment until 26th July, and he explained this delay of over seven weeks by reference to some industrial problem affecting the mails. On that date he wrote a letter seeking permission to treat four heroin addicts on "a withdrawal basis" by administering methadone and the other drug. That application, having passed through proper channels, was refused, and the refusal was communicated by a letter dated 15 August, 1979. However, he had continued prescribing methadone for a number of people in the intervening period of time in purported pursuance of this programme without having the requisite approval.

On 19th December, 1979, he was once more interviewed by the same inspector who had interviewed him on 5th June, this time accompanied by another inspector. A

transcript was made of the conversation which then took place, which was received in evidence before the Tribunal. By this time the Commission's Officers had become aware that notwithstanding the oral communication of 5th June and the written communication of 20th June a large number of scripts had been written for narcotic drugs and dispensed in the surrounding area and it now appeared that most, if not all, of the scripts were written for patients who admitted addiction. The appellant asserted in that interview that the only reason he would write scripts for narcotic drugs for these patients would be if they had acutely painful conditions.

The evidence discloses that after the conversation of 5th June until 8th July, 1980, the appellant wrote 205 prescriptions for 3,168 methadone tablets, 500 Palfium tablets and 95 Dilaudid tablets, and that in all these cases the prescriptions were for persons who he knew to be or who were in his opinion addicts.

Whatever may be thought of his conduct prior to 5th June, 1979, it is beyond question that thereafter he deliberately and persistently broke the law and ignored the advice provided to him by the Health Commission. The consequences that ought to flow from this misconduct depend upon a proper understanding and evaluation of it and what it tells as to the fitness of the appellant to be a registered practitioner.

The Tribunal concluded that the vast quantity of addictive drugs to which reference has already been made was prescribed irresponsibly and that the appellant, at least after June 1979, chose to act deliberately in defiance of the law and that he pursued his own course releasing into the community large quantities of narcotic drugs for for sale or use.

Counsel for the appellant submitted that the Tribunal had erred in point of fact on a number of matters in its reasons. There we have examined and, although there can perhaps be some criticisms directed in respect of one of one or two matters, they are of no materiality in relation to the general pattern of misconduct so persistently followed, nor to the conclusions which the Tribunal reached, and they certainly do not tend to invalidate its ultimate view of the facts. He also submitted that subjective factors and other considerations, including the circumstances under which the prescriptions were issued were not given sufficient weight by the Tribunal in considering the question of an

appropriate order. Even if the Tribunal did err in this respect, and there is nothing to suggest that it did, all the circumstances will be considered on this appeal.

Counsel has submitted in this respect that the appellant was not motivated by a desire for personal gain, that he was doing what he did in the certain knowledge that it could not be concealed and that he was moved by compassion for his patients to such an extent that he yielded to this emotion and broke the law.

A number of things may be said as to this last submission. Firstly, it is not clear whether this compassion was induced by the complaints of pain which a number of these avowed addicts were making or by the fact that the patients were addicted and were craving further fuel to feed their addiction. The appellant asserted in evidence that after June, with the exception of three cases, the only times he prescribed narcotic drugs were for relief of acute pain to addicts who could not otherwise be relieved. He produced case histories of most, if not all, of the patients in question. It is perfectly clear that this contention cannot be sustained. There are numbers of cases where he prescribed methadone to an addict for no other reason than that that person was an addict. The fact should not be ignored that on each of these occasions, with minimal exceptions, when he was breaking the law he received payment subsidized by public funds for the very act of breaking the law.

Why then, if one puts aside the motive of gain, did he do it? He has said that if he had known how serious the consequences of his breaking the law would have been, he would not have done it. His answers are quite extraordinary, and they amount to an assertion that, in the belief that the most he could fear for breaking the law was that he would be reprimanded again as he had been in June, or have his right to prescribe narcotics withdrawn, he was prepared to allow his compassionate feelings to prevail, but if on the other hand the sanctions were more serious his compassion would have to yield. I quote his actual words:

“If I had been aware of the serious consequences that were possible I definitely would not have continued to prescribe narcotics.”

It is not easy to categorise or explain his conduct but there can be no doubt that it amounted to professional misconduct of a serious kind, as his counsel properly concedes. Nor can there be any doubt that, as the Tribunal found, it was irresponsible.

As it is what we consider to be his irresponsibility which lies at the heart of this matter, it is well that express reference should be made in these reasons to examples of his lack of responsibility. We do so under three headings as propounded by counsel for the respondent. They are:

1. Though he claimed that after June 1979 he had only prescribed in cases where the addict was suffering acute pain and for the relief of that pain, there are many cases where the evidence shows that he wrote scripts for methadone for addicts simply because they were addicts.
2. That he prescribed methadone to addicts who, to his knowledge, were being treated by another medical practitioner by the controlled administration of methadone in a programme designed to effect withdrawal. He knew or ought to have known that the control dosage was not provided in bulk but only upon administration and he did this despite an express admonition in the document of 20th June and without knowledge of the therapeutic dose which was being administered under the programme. There are many cases where this occurred to which our attention was drawn.
3. That he was irresponsible in prescribing in point of amount. He exercised no medical judgment and was responsive only to the addicts' requests. There are numbers of cases of this kind.

This Court in Spicer v the New South Wales Medical Board & Ors. (unreported, Court of Appeal, 19th February, 1981) dealt with a similar problem and expressed views which are much in point. Hope J. A., with whom the other members of the Court agreed, said:

“The Tribunal expressed its opinion as to the seriousness of what was involved in this conduct by saying that strict adherence to the statutory requirements relating to the use of drugs of addiction is required of medical practitioners', and that 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. In my opinion that is an entirely correct approach to the matter.”

He later said:

“In my opinion 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 a disregard to the law it cannot be said that he is fitted at such a time to be a medical practitioner.”

The legislative scheme, including s. 28 of the poisons Act, indicates that the public is to be protected by legislative control and that the treatment of addicts by the use of addictive drugs must be confined to persons specially skilled and specially authorised to do so. My medical practitioner, including the appellant, could not fail to be aware of the implications involved in irresponsible prescribing. He certainly could not be unaware after receipt of the communication of 20th June.

The question which must next be considered is whether the conduct demonstrates unfitness on the part of the appellant to be registered as a medical practitioner. It is argued that, because he has in recent times not transgressed in respect of the prescription of narcotic drugs and because there is a body of evidence that in other respects the appellant is of good character and properly performs his duties and carries out his responsibilities as a medical practitioner, and because he has engaged in public service activities, what has happened is an aberration which, even if it indicated unfitness at an earlier stage, does not mean that he is now shown to be unfit. We are unable to accept this submission.

In our opinion the conduct established by the evidence shows such a lack of appreciation of the high responsibility, which is imposed upon a medical practitioner that it is symptomatic of an underlying unfitness to discharge it. In our opinion the Tribunal, limited to the alternatives provided by s.29, was quite correct in giving the direction it did that the appellant's name be removed from the register. Having so concluded, the appropriate order is that the appeal be dismissed.

However, we have come to the view, having regard to all the circumstances, including the fact that the appellant had a good record otherwise than in respect of the prescribing of narcotic drugs and has shown himself capable and desirous of rendering public service, to his comparative youth and to our view that there is such a chance of his appreciating the extent of his responsibilities and carrying them out, that we should exercise a power which was not available to the Tribunal but is available to us under s.29 (6), and we should fix a time after which the appellant may apply to have his name restored to the register I and it is our view that that time should be fixed as in substance three years .

The order of the Court is the appeal is dismissed with costs, and the order and directions of the Disciplinary Tribunal are confirmed. 1st September, 1984, is fixed as a time after which the appellant may apply to have his name restored to the register. This order shall take effect on 1st September, 1981.
