

THE SUPREME COURT OF  
NEW SOUTH WALES COURT  
OF APPEAL

CA 40207/92

MAHONEY JA  
SHELLER JA  
CRIPPS JA

Thursday 30 April 1992

BANNISTER v WALTON

JUDGMENT

**MAHONEY JA:** Dr John Herbert Bannister is a medical practitioner, an orthopaedic surgeon. Six complaints of professional misconduct and inappropriate and unethical conduct were made against him by the opponent to the present proceedings, Merrilyn Walton.

Between 16 September 1991 and 13 March 1992 the Medical Tribunal heard all the complaints. On 28 April 1992 it gave judgment. It found against Dr Bannister on complaints 1, 2 and 6 and found for him on complaints 3, 4 and 5. It ordered that his name be removed from the Register of Medical Practitioners in New South Wales.

On 29 April 1992 Dr Bannister appealed to this Court against that decision in accordance with s 32U(1) of the Medical Practitioners Act 1938. On that day he sought from this Court a stay of the Tribunal's order in accordance with s 32U(2). It is this application which is now before the court.

Upon an application such as this it is not necessary to canvass in detail ail of the facts before the Tribunal or is findings. They are matters which, in due course, will require consideration by the court on the hearing of this appeal .

Mr Walker, for Dr Bannister, and Mr Sexton, for Miss Walton, put submissions to the court comprehensively but briefly. As the matter is o some importance to Dr Bannister and no doubt to others I shall refer to the facts and the submissions made as far as it is necessary in my opinion do so in order to indicate the conclusions at which I have arrived and my reasons for them.

The evidence upon the present application is contained in the affidavit of Susanna Margaret Khouri of 29 April 1992. Miss Khouri is a solicitor acting in Dr Bannister's interest.

In her affidavit, Miss Khouri said:

"13. The complainant graduated in medicine from the University of Sydney in 1964 and has practised as a specialist orthopaedic surgeon since 1975.

14. I am informed by Dr Bannister and verily believe that he conducts a large referral orthopaedic practice including a large number of workers' compensation patients with current insurance claims. He sees patients in his rooms at Macquarie Street Sydney, Blacktown, Marrickville, Leichhardt, Fairfield and Warrawong. He also conducts lengthy operating lists at Westside Private Hospital on 2-3 mornings per week.

15. I am informed and verily believe he presently has ten patients admitted to Westside Private Hospital. Seven are patients admitted for traction and three are patients awaiting spinal operations."

The judgment of the Tribunal extends over approximately 231 pages. It has, if I may respectfully say so, the marks of having peen composed with considerable care. It states the

detail of the complaints and all of the evidence given support of them. It sets forth the Tribunal's findings upon the factual matters involved. I shall indicate briefly, and by reference to the terms of the judgment, the findings which the Tribunal made and the reasons for them.

I shall deal primarily with complaints 1, 2 and 6. Complaint number 1 relates to Dr Bannister's treatment of a Miss Shirley Patterson in or about December 1986 in respect of a hip replacement procedure. The complaint was:

"The first complaint is that Dr John Bannister being a medical practitioner registered under the Act:

Has been guilty of professional misconduct within the meaning of s 27(1) of the Act in that he:

- (i) has demonstrated a lack of adequate knowledge, experience, skill, judgment and/or care in the practice of medicine; and/or
- (ii) has engaged in other improper or unethical conduct relating to the practice of medicine.

#### PARTICULARS OF COMPLAINT

The particulars of the complaint are as follows:

1. The practitioner performed a total hip replacement operation on a patient, Ms Shirley Patterson, at Westside Private Hospital on 3 December 1986.
2. The practitioner failed to administer prophylactic antibiotics, either before or after this operation.
3. The practitioner failed to ensure sufficient drainage for the wound following this operation.
4. The practitioner failed properly to inspect the wound following this operation.
5. The practitioner failed to institute proper treatment between 7 and 12 December 1986 after it became obvious that the wound was infected,

namely, intensive intravenous antibiotic therapy.

6. on or after 12 December 1986 the practitioner left Australia and failed to arrange proper continuing care for the patient.
7. The practitioner failed to provide for proper continuing post-operative care for the patient upon his departure from Australia, as a result of which the patient was discharged from Westside Private Hospital on 22 December 1986 when she was not fit to be discharged.

The practitioner failed to keep proper medical records relating to the operation that he had performed and the post-operative visits that he made to the patient.

9. As a result of the practitioner's inadequate treatment, the patient required further surgery on 9 October 1987, namely, needle aspiration of her right hip joint under general anaesthetic and, on 9 December 1987, removal of her hip prosthesis and, on 6 January 1988, the insertion of a further hip prosthesis by another practitioner."

The finding of the Tribunal was stated in its judgment in the following form:

#### OVERVIEW OF COMPLAINT NO 1

This Tribunal is comfortably satisfied on the balance of probabilities that Dr Bannister's treatment was deficient in the following respects:

1. He failed to administer prophylactic antibiotics pre and/or peri operatively.
  - (a) By December 1986 the administration of the prophylactic antibiotics was regarded by such a majority as to be almost unanimous of orthopaedic surgeons in this State as proper practice in the case of a total hip replacement to the extent that the failure to administer would attract severe criticism.
  - (b) Whilst this failure cannot be established to be the cause of the subsequent infection and need for revision surgery, it did deprive the patient of a protection to which she was entitled from a competent surgeon.

2. Between 7 and 13 December 1986 Dr Bannister failed to appreciate either that the patient had a deep wound infection or that there was a probability that a superficial infection could and probably would develop into a deep wound infection.
3. As a result of 2 above, he failed to prescribe the appropriate form of treatment, namely, intravenous antibiotic therapy. The need for such appropriate treatment was heightened by the lack of pre and/or peri operative administration of prophylactic antibiotics.
4. He went overseas without first delegating her continued care and treatment to an orthopaedic surgeon. The need adequately to brief such a delegate was all the greater because of the respondent's failure to keep proper medical records relating to the operation that he had performed. In the light of his experience with Mr King some six months beforehand (see complaint No 2) the requirement to delegate his patient's care to an orthopaedic surgeon prior to his departure should have been all the more obvious.

It is the combination of the foregoing which this Tribunal holds to demonstrate a lack of adequate skill, judgment and care in the practice of medicine within the meaning of s 27(1)(a) of the Medical Practitioners Act. This Tribunal is further comfortably satisfied on the balance of probabilities that the foregoing conduct is in such breach of standards as would reasonably incur the strong reprobation of practitioners of good repute and competence.

However, the allegation that the respondent has engaged in other improper or unethical conduct relating to the practice of medicine is not established.

Accordingly, complaint number 1 is found proved."

The second complaint related to Dr Bannister's treatment of a Mr Maxwell King in or about August 1986. The terms of the complaint were set forth in the Tribunal's judgment in the following form;

COMPLAINT NO 2

Complaint number 2 alleges that Dr Bannister has been guilty of professional misconduct within the meaning of s 27(1)(a) of the Act in that he:

- (i) has demonstrated a lack of adequate knowledge, experience, skill, judgement and/or care in the practice of medicine; and/or
- (ii) has engaged in other improper or unethical conduct relating to the practice of medicine.

Particular 1 alleges:

On or about 13 August 1986 the practitioner operated on a patient, Mr Maxwell King, at Westside Private Hospital in order to remove a cyst in the area of the patient's left hip.

Particular 2 alleges:

The practitioner failed to institute proper treatment on or prior to 20 August 1986 when it became obvious that the wound at the site of the operation was infected, such treatment being intensive intravenous antibiotic therapy.

Particular 3 alleges:

The practitioner failed to provide proper continuing post-operative care to the patient in that he departed on 22 August 1986 for holidays without any or any sufficient delegation to an appropriately qualified medical practitioner of the care of his patient.

Particular 4 alleges:

The practitioner failed to keep proper medical records of the operative procedure and postoperative attendances.

Particular 5 alleges:

The practitioner charged for hospital consultations for attendances on Mr Max King on the following dates at the Westside Private Hospital without in fact having visited the patient:

12 August 1986  
16 August 1986  
18 August 1986  
24 August 1986  
27 August 1986  
30 August 1986

2 September 1986  
4 September 1986  
7 September 1986  
9 September 1986

Particular 6 alleges:

The practitioner charged for hospital consultations at the orthopaedic surgeon's rate of \$48 per visit for attendances on Mr King on the following dates at Westside Private Hospital notwithstanding that the visits were not made by Dr Bannister but in fact were made by Dr Deutsch, a general practitioner:

27 August 1986  
4 September 1986.

Particular 1 is not in issue. Particulars 5 and 6 are dealt with later in the section dealing with complaints of inappropriate charging."

The findings of the Tribunal were set forth in the judgment in the following terms:

OVERVIEW OF COMPLAINT NO 2

In relation to Particulars 2, 3 and 4 this Tribunal is comfortably satisfied on the balance of probabilities that:

1. Dr Bannister's failure to appreciate the potential for deterioration in the condition of the patient prior to his departure overseas
2. plus his departure for overseas without first delegating his continued care and treatment to an orthopaedic surgeon
3. all within the context of the need adequately to brief such delegate being all the greater because of the respondent's failure to keep proper medical records relating to the operation that he had performed,

taken together demonstrate a lack of adequate skill, judgment and/or care in the practice of medicine to the extent that it demonstrates such serious negligence as, although not deliberate, to portray indifference and an abuse of privileges which accompany registration as a medical practitioner.

Accordingly, the clinical parts of complaint No 2 (Particulars 1 to 4) are found proved."

Complaint No 6 relates to what was referred to Compendiously the Tribunal and before this Court as overcharging. It is not necessary, I think, to set out the full detail of the complaint or of the matters upon which reliance was placed. The complaint related inter alia to allegations of charging for attendance on patients although the doctor was "aware that he had not visited patients on those dates". The Tribunal's findings involved that it concluded that there had been serious and deliberate misconduct by the doctor. I shall set out in my judgment some of the passages of the judgment of the Tribunal in relation to this matter. The Tribunal, in the course of a discussion of the extent of the culpability of the inappropriate charging said:

"The evidence, therefore, comfortably satisfied this Tribunal on the balance of probabilities that the respondent charged for hospital consultations for attendances on the patients at Westside Private Hospital although he was aware that he had not visited the patients on those dates."

The Tribunal subsequently indicated that it was comfortably satisfied on the balance of probabilities inter alia:

"that the respondent knew that the bills were wrong and that he was committing a fraud.

that Dr Bannister had deliberately set up a system containing a large number of defects of which he well knew. Amongst the defects were that he charged for attendances in his own name when he knew he had not attended and, in respect of those days in respect of which he claims that Dr Deutsch attended he did not check whether Dr Deutsch had in fact seen the patients on those days. Indeed the system, established by the respondent was such that it was based upon a presumed attendance by Dr Deutsch on a patient on certain days of the week rather than by actual reference as to whether or not such attendances were made.

that, as to the Respondent's evidence that he believed that he was quite entitled to charge for attendances at a lower rate for Dr Deutsch in an account submitted under his own name, :his Tribunal comfortably finds on the balance of probabilities that the respondent held no such belief."

The Tribunal then said:

"The conduct of Dr Bannister in relation to the system of charging which this Tribunal has found to have existed comprises deliberate deceit. It is a deceit involving the representation to recipients of his accounts that he had personally provided services in the form of hospital attendances when he well knew that he had not in fact provided those services. It is a deceit perpetrated with the motive of financial gain.

The persistence of such deceitful conduct over a continuous period of about five years from 1986 to 1990 comfortably satisfies this Tribunal on the balance of probabilities that his conduct indicates within his character a marked degree of moral turpitude and, to use the words of s 28(1)(f) of the Medical Practitioners Act, it indicates that he is not of good character."

The Tribunal, having referred to Dr Bannister's change in conduct and to the keeping of a diary, said:

"However, the deceitful conduct persisted up until 1990. Furthermore, the evidence of the respondent - and in particular those aspects of it seeking to justify his conduct which this Tribunal has comfortably found on the balance of probabilities to be untrue - compels this Tribunal to find that these changes and this offer have been brought about, not by any change of character, but by the realisation that he has been caught out in his longstanding practice of charging for 'phantom visits'."

An appeal has been lodged to this Court against the Tribunal's order. Provision for appeal is made by s 32U of the Medical Practitioners Act, 1938. An appeal may be brought to this Court against a decision of the Tribunal "with respect to a point of law" or in respect of - as I shall describe the

matter sufficiently though perhaps slightly inaccurately - against the sentence or order which has been made under s 32R.

There is no issue as to the power of this Court to grant an appropriate stay if the circumstances warrant it. Provision is made by s 32U(2) for this Court to:

"stay any order made by the Tribunal, on such terms as the court sees fit, until such time as the court determines an appeal made under this section."

No issue has been raised as to the principles on which the Court is required to act. The matter has conceptually been obvious and it is not necessary to examine further what are the relevant matters under s 32U(2).

The main grounds on which the application for a stay has been based are generally as follows: firstly, that it is necessary for a stay in order to deal with the patients presently under the care of Dr Bannister. Secondly, that if a stay is not granted, and particularly if the appeal is successful, there will be a substantial income loss by the doctor. Thirdly, there will be irreparable detriment to the doctor's reputation unless a stay is granted. Fourthly, as I shall put it briefly, the doctor has been found not to be unfit technically or clinically and the matters found against him do not warrant the immediate effect of the order.

I have stated the matters under these headings. I do not intend, of course, to comprehend exhaustively all of the ways in which Mr Walker has put the matter on behalf of Dr Bannister but it will be convenient to refer to these as being the main matters, indicating the nature and scope of the application.

Mr Sexton, for Miss Walton, submitted three main reasons why the application should be refused. He referred to the objects of the relevant portion of the Medical Practitioners Act. He referred to the nature of the findings as showing that Dr Bannister was not a proper person to be permitted to practice medicine in this State, and he referred to the likelihood, or lack of likelihood, of success of the appeal.

The Tribunal in its findings expressed the view that if complaints 1 and 2 had been the only complaints made and found against Dr Bannister the appropriate order would have been a reprimand. Without expressing any conclusion as to whether this is a correct finding I shall, for present purposes, assume it to be so. I shall infer that, were it not for complaint No 3, the Tribunal would not have found the complaints established such as to warrant the doctor's disqualification. However, the Tribunal took into account not merely the findings on complaints No.s 1 and 2 but also "all the evidence". Its order that his name be struck from the Register was made taking into account the totality of its findings. It is necessary to approach the matter on that basis.

If the findings that have been made - in particular the finding in respect of complaint No 6 - be correct, then the doctor is clearly not a person of a character appropriate for the practice of medicine.

This, as it has been put to the Tribunal for the opponent, is a matter of importance. As is apparent from, for example, s 15 of the Medical Practitioners Act, the "good character" of a practitioner

is important in determining whether he should be allowed to practice medicine in this State. The right to practice affords to a practitioner privileges and opportunities which are not available to others. He is expected to maintain a relationship with patients who are affected by his character. The relationship is one which touches matters such as trust, confidence, confidentiality and right conduct. Clinical capacity is by no means the only consideration to which regard is to be had in determining whether a person is appropriate to practice medicine. It is necessary that the public be protected against those who, though having the appropriate clinical skills, do not have the character appropriate for the opportunities and privileges which the right to practice gives.

In saying this I am not indicating a concluded view, that is, a final view as to the character of Dr Bannister. This is a matter which no doubt will be determined when the appeal is finally heard but it is proper to take into account the findings of the Tribunal after a long and detailed hearing and if the doctor is as the Tribunal has found him to be the possibility of the relevant harm to the public must be taken into account in deciding the present application.

Refusal of the stay is apt to cause damage to Dr Bannister. It is not necessary to repeat what Mr Walker cogently has put to the Tribunal. He has, as I have indicated, referred to the effect of the loss of practice and

the loss of income. As far as the doctor is concerned that matter is plain. It needs no explanation.

He has referred to the effect of the finding of the Tribunal's order upon the doctor's reputation. That effect, to a great extent, has already accrued. To some extent the grant of a stay would mitigate the effect of the order upon his reputation. But it is not necessary, I think, to indicate why, the order having been made, his reputation will already have been affected. I do not think that the grant of a stay, in the present context, would have a great effect upon this particular issue. However, it is a matter which the court should, in my opinion, take into account.

I have referred also to the effect of the order for removal of his name from the Register upon the position of those who presently are his patients. However, this is a matter which can, at least to a substantial extent, be dealt with.

As was pointed out during argument the possibility of patients having to be transferred from one practitioner to another always exists. If a practitioner is incapacitated or dies, arrangements of this kind have to be made and no doubt the making of such arrangements is not unprecedented.

The court has - against the possibility that the application might be refused - asked the parties to offer sensible arrangements which can be made and in respect of which an order can be made by the court. The court will make appropriate arrangements so far as it can do so consistently with its findings in order to prevent, or mitigate, such harm as may be caused to the patients by the maintenance of the order made by the Tribunal.

I have taken into account, as Mr Sexton has suggested, the likelihood of success of the appeal. It is not necessary to expand upon this at great length. on the grounds of appeal, as presently formulated, grounds 2, 3 and 4 are not likely to succeed. They are drafted briefly and without particulars. However, it is proper to take into account, as Mr Walker indicated in argument, that these grounds have been drafted in haste and that there has not been proper time to detail all of the matters which in due course counsel will require to detail in the form of the grounds of appeal. I take that into account.

I take into account the substance of the grounds, as far as I am able to understand them, and what may be the expansion of them by reference to particular findings or aspects of the evidence.

Ground 1 relates to the onus of proof of the complaints found against Dr Bannister. In the judgment the Tribunal made reference to this in some detail. The court has been informed by Mr Sexton. that both parties agreed that the proper principle to be adopted was that discussed by the High Court in Briginshaw v Briginshaw, (1938) 60 CLR 336. It may be that the court, on the appeal, will be asked to consider whether some particular variation of the test arising from Briginshaw, v Briginshaw was to be applied in the present case having regard to the precise nature of the allegations made, and perhaps to the extent to which they involve illegality or matters of that kind.

It may be asked to consider whether the Tribunal properly applied that standard of proof. However, taking these matters into account I do not think that this is, in the end, a matter in which there is a strong likelihood that the appeal will be successful.

I have, as I have said, taken into account the likelihood of success of the appeal. I do not think that it is a matter which weighs very heavily in the circumstances but it is a matter to be weighed in the balance.

The present application involves also an order for expedition of the hearing of the appeal. That is, in my opinion, an order which, in principle, should be made. If an order for expedition is made then the period of disqualification, if the appeal succeeds, will have been short rather than long.

Reference has been made (counsel is not of course to be tied to statements made in argument) to the possibility that six-seven weeks may be required to prepare the matter for hearing. In these circumstances, it will not be practical to fix a date for hearing, or even to fix a timetable for preparation of the case for hearing. It may be, in those circumstances, appropriate that the court order that - having agreed that the appeal should, in principle, be expedited - the parties discuss with the Registrar an appropriate timetable for preparation of the appeal papers and for, in due course, the grant of a date for hearing. I would propose that the court indicate merely that, in principle, the appeal should be expedited and that the matter be referred to the Registrar for such a purpose.

In all the circumstances I do not think that an order should be made for a stay of the order which the Tribunal has made.

I am conscious of what has been said as to the doctor's clinical capacity. I shall assume, without deciding, that the Tribunal was of the view that, were the matter related only to clinical capacity and to the clinical standards of the doctor I use "clinical" in the broadest sense the public would not greatly be at risk by the maintenance of his registration. This is indicated by what they have said in relation to complaints 1 and 2, and their view that if they were the only complaints established a reprimand would be sufficient. But, taking\_ into account the findings which have been made in relation to complaint 6, I do not think that it is appropriate that the order be stayed.

I emphasise that, in saying what I have said and by what I do, I am not expressing any concluded view in relation to the matter of character arising from complaint No 6. This is a matter which, in the end, must be decided by this Court on the appeal. But, taking into account the findings of the Tribunal after a long and exhaustive hearing and the careful judgment given, this Court must look to the possibility that, if the stay be granted, a right of practice will be preserved during the period of the stay to a person of the character indicated by the Tribunal.

This is not a matter which lightly should be granted. This is not a matter which I think should be allowed to happen. I think, balancing the considerations one against the other, in the end the proper order is that the application for stay be refused.

I would propose, therefore, that the order be that the application for stay be refused, that an order be made in principle for the expedition of the hearing of the appeal, that the matter be referred to the Registrar for the purpose of preparing a timetable for the preparation of the appeal papers and that, in due course, a date for the hearing of the appeal be fixed by the court.

Counsel may, if they desire, offer argument in relation to the costs of the present appeal.

Those are the orders which I would propose.

SHELLER JA: I agree.

CRIPPS JA: I agree.

(At 2.15 pm, Short Minutes handed up)

MAHONEY JA: This matter came before the court this morning and the court gave judgment in which it set forth the conclusion which it had reached in relation to the application or stay of the order. It indicated that provision should be made by agreement between the parties which would enable the Interests of outstanding patients of Dr Bannister to be safeguarded. The parties have sensibly and commendably come to an agreement in relation to the matters which are necessary for this purpose and that agreement has been embodied in a clause of the short minutes of order which have been handed to the court.

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The court notes that Dr Bannister may be required to give evidence in legal proceedings in relation to the treatment of patients who were patients prior to the date of the order, 28 April 1992. It is not necessary to determine whether this amounts to acting as a medical practitioner. It may well not be: it is sufficient if the court notes the matter. The court will therefore note the matter in note 1 and makes the orders in pars 1 and 2 of the short minutes of order which I have initialled and placed with the papers.

I hereby certify that this and the preceding 17 pages are a true copy of the reasons for judgment herein of his Honour Mr. Justice Mahoney and of the Court.

*J. Mitchell*

Associate.

Date: 30/4/1992

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COURT OF APPEAL

C.A. 40207 of 1992

JOHN HERBERT BANNISTER

Appellant

MERRILYN WALTON

Respondent

In the Medical Tribunal below:

MERRILYN WALTON

Complainant

JOHN HERBERT BANNISTER

Respondent

SHORT MINUTES OF ORDER

The Court orders:

1. That the hearing of the Appeal be expedited.
2. That the Order made by the Medical Tribunal that the Appellant's name be removed from the Register of Medical Practitioners of New South Wales be stayed until 31 May, 1992 in order to allow the Appellant to see patients for the purpose of, if necessary, preparing a report as to their current medical condition when referring them back to their general Practitioner.

The Court Notes:

1. That Dr Bannister may be required to give evidence in Court in legal proceedings in relation to the treatment of patients prior to 28 April, 1992.

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Tel: (02) 258 6000  
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Ref: JPP:SMK3705/90

DATED: 30 April 1992



Solicitor/Counsel for Appellant



Solicitor/Counsel for Respondent

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

COURT OF APPEAL

C.A. 40207 of 1992

JOHN HERBERT BANNISTER  
Appellant

MERRILYN WALTON  
  
Respondent

In the Medical Tribunal below:

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Complainant

JOHN HERBERT BANNISTER  
Respondent

The Court orders;

1. That the hearing of the Appeal be expedited.
2. That the Order made by the Medical Tribunal that the Appellant's name be removed from the Register of Medical Practitioners of New South Wales be stayed until 31 May 1992 in order to allow the Appellant to see patients for the purpose of, if necessary, preparing a report as to their current medical condition when referring them back to their general practitioner.

SHORT MINUTES OF ORDER

The Court Notes:

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Ref: JPP:SMK3705/90

1. That Dr Bannister may be required to give evidence in Court in legal proceedings in relation to the treatment of patients prior to 28 April, 1992.

DATED: 30 April 1992



Solicitor/Counsel for Appellant



Solicitor/Counsel for Respondent