

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

**CA40354/95**

**MAHONEY P  
COLE JA  
BEAZLEY JA**

**MONDAY 27 MAY 1996**

**ROBERT BARNABY DUNCAN LEICESTER v MERRILYN  
WALTON**

The appellant was a doctor who had been the subject of 4 complaints made to the Medical Tribunal of New South Wales in respect of his prescribing of dangerous drugs and drugs of addiction. The appellant admitted the conduct complained of at the inquiry. The Tribunal concluded that there had been a gross departure from the standards of skill, care and judgment required of all medical practitioners, and ordered, among other orders, that the appellant be suspended from practice for a period of six months.

The appellant appealed to this Court under s90(1) *Medical Practice Act 1992* against the severity of the punishment imposed.

HELD: dismissing the appeal: (1) Having regard to the breaches of professional conduct demonstrated by the material before the Tribunal, the conditions imposed by the Tribunal were appropriate in the circumstances. (2) The orders of the Tribunal be upheld except for Order 1 which is to be varied so as to read "from 27 May 1996", rather than "from 17 June 1995".

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**ORDERS**

The Court orders that:

1. Order 1 of the Orders made by the Tribunal be varied so as to delete the words "from 17 June 1995" and replaced by "from 27 may 1996".
2. The other orders that were made by the Tribunal will remain effective

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**JUDGMENT**

MAHONEY P: The Court is in a position to give judgment in this matter and I will ask Justice Beazley to give the first judgment.

BEAZLEY JA: This is an appeal brought by the appellant under s 90(1) of the *Medical Practice Act 1992*. The appellant was the subject of four complaints which were made to the Medical Tribunal of New South Wales in respect of his treatment of four patients. The Tribunal delivered its determination and published its reasons for determination on 17 May 1995.

During the inquiry into the four complaints, the appellant conceded that he had not acted properly. Consequently, the only determination for the Tribunal to make was the appropriate sanction which ought to be imposed having regard to the admitted conduct of the appellant.

In its reasons the Tribunal set out the particulars of each complaint, the history of the complaints, the investigations which it had undertaken, the evidence of the doctor himself, together with the evidence of a Doctor Ian Cheung, a registered medical practitioner of thirty three years experience who had been a member of the Medical Board at one time and who gave evidence in support of the appellant. It is not necessary for the purposes of my reasons to re-state the Tribunal's findings in respect of those matters.

Having reviewed that material, the Tribunal set out its conclusions for determination (at pp 185 and 186 of the Appeal Book or pp 19 and 20 of its reasons). Again it is not necessary to reiterate the Tribunal's conclusions. However, it is perhaps important to emphasise that having come to its conclusion that there had been a gross departure from the standard of skill, care and judgment which was required of all medical practitioners, the Tribunal added that it was unable to accept with confidence the appellant's explanations for his conduct. The Tribunal considered that his credit was tainted to some extent by an element of self justification and also noted that the appellant's clinical notes were inadequate to support the prescription of dangerous drugs and drugs of addiction. It found that the totality of the appellant's misconduct in respect of the four patients who

were the subject of the complaints, led it to the conclusion that the appellant was practising in such a way as to be a danger to those particular patients and to the public.

The Tribunal then referred to the law and in particular to the decision of this Court in *Spicer v New South Wales Medical Board* (Court of Appeal, 19 February 1981, unreported). Its reference to that law was appropriate and correct. Before determining the appropriate sanction which ought to be imposed, the Tribunal then referred to the personal factors affecting the appellant.

Before this Court, the appellant again accepted that he had not acted in accordance with the standards required of a medical practitioner in respect of the four patients subject of the complaint, and also accepted that his conduct was such that some punishment was called for. He said, however, that the punishment that had been imposed by the Tribunal was too severe in the circumstances. In particular, he challenged the appropriateness of any period of suspension and also requested review of the conditions imposed upon him by Orders 3 and 4 made by the Tribunal. In his submission that the orders of the Tribunal were too harsh, he relied upon many of the same factors as had been relied upon before the Tribunal. He said that he is now 64 years of age and has been in practice for

over 37 years. He belongs to a family which boasts four generations of doctors and he referred to the matter of pride in being able to retain his practising certificate, having regard to his long and formerly unblemished service in the medical profession.

He pointed out that he believed that he had complied with the conditions which had been imposed by the Tribunal and, in particular, with condition two, which required him to undertake a suitable program of self education in the identification and management of various forms of drug addiction.

The respondent submitted that the Court ought not to interfere with the orders made by the Tribunal. Counsel for the respondent referred the Court to a number of authorities including the Court's decision in *Huang v Walton* (unreported, 20 April 1993) and also *Bannister v Walton* (1993) 30 NSWLR 699 in support of this submission.

In my opinion, having reviewed the reasons of the Tribunal, which, as I have said, carefully reviewed the relevant evidence, the orders of the Tribunal ought not to be interfered with. The findings of the Tribunal revealed that there had been a serious breach of the standards which are required by this community of its medical practitioners. Those breaches called for a period of suspension and in my opinion a period of six months was an

appropriate period.

I also consider that the conditions imposed by the Tribunal were appropriate conditions having regard to the breaches of professional conduct which were demonstrated by the material before the Tribunal.

I would propose that the appeal be dismissed, but that the orders of the Tribunal be varied so as to delete from Order 1 the words "from 17 June 1995".

MAHONEY P: Subject to one matter, I agree with the judgment that has been given by Justice Beazley. The power of the Court in relation to this appeal arises from ss 90 and 91 of *the Medical Practice Act 1992*. The Court has on prior occasions in relation to analogous powers under other legislation dealt with the extent of its power on a review of the exercise of the, as I may call it, disciplinary power of the Tribunal and it is not necessary for the Court to review what there has been said: see *Edelsten v Ward* (Court of Appeal, unreported, 23 June 1994).

However I note that the details of the circumstances giving rise to the orders in question are contained in the Court's orders of 13 June 1995 and of 6 and 22 November 1995. A copy of the transcript of the proceedings today will be included in the Court papers for such further reference as

may be necessary.

In relation to the orders to be made I would not differ from the orders two, three, four, five, six and seven made by the Tribunal. The Court is informed that order eight has already been complied with. It is necessary for the Court of course to make an order different in literal terms from order one, that order suspended the appellant from practice for a period of six months from 17 June 1995. It is necessary for the Court to make an order being such order as it thinks proper having regard to the merits of the case and the public welfare. I am conscious that from the date of the making of the order the appellant has been subject to the detrimental effects of the present appeal. No doubt he has been significantly affected by the existence of the appeal in which he has been able to do and in what others will do with him. The fact that the appeal has been pending for this period is to a significant extent perhaps attributable to his own action. The circumstances of what occurred in November 1995 are recorded in the judgments to which I have referred. However, I am conscious that during the time he has been subject to the detrimental effects flowing from the existence of the appeal, and I think myself that I would have given some credit for that. I would have been inclined to adopt a course analogous to that adopted apparently by the Tribunal in relation to the period of suspension, as referred to in order two, that is to

make the balance of the suspension operative for a period of four months from today. However that is not a matter upon which in the end I feel it necessary to dissent.

I agree with the orders which have been proposed.

COLE JA: On this appeal it is unnecessary to consider the nature of an appeal to this Court, see ss 90 and 92 of *the Medical Practice Act 1992* and the judgment of Justice Kirby in *Huang v Walton* (unreported, 20 April 1993) at 4 and 5. If it be necessary to show error in the Tribunal's decision, that has not been shown. If this Court is obliged to consider the facts **as** found by the Tribunal fresh for itself I would not vary the findings of the Tribunal.

I agree with the reasons and orders proposed by Justice Beazley on the understanding that orders one to seven of the Tribunal are confirmed with order one operating from today.

MAHONEY P: The order of the Court therefore is that the orders made by the Tribunal below are varied so that in order one the words "from 17 June 1995" are deleted and there are substituted for those words "from 27

May 1996". Otherwise the orders are confirmed and the appeal is dismissed. The dismissal must be effective with costs. The effect of the order that has been made Doctor is, I think, apparent from what has been said. There will be a suspension of six months from today and the other orders that were made by the Tribunal will remain effective. That may mean that you will in the future if you so desire have to apply to the appropriate authority under the Act for any variation of those orders that you may feel it appropriate to make. That is not a matter for the Court at this stage.

The orders of the Court are therefore as I have indicated.

APPELLANT: May I make one plea your Honour in order to fulfill my present commitments? Would it be possible to defer the order until one month from today rather than from today's date so that I may fulfil my commitment to my patients and also to the medical service in Newcastle.

MAHONEY P: What's the attitude of the respondent to that?

KATZMANN: We would oppose that your Honour, the public interest would warrant that the order would commence today.

MAHONEY P: No I'm afraid doctor we don't see it appropriate to do that.

APPELLANT: The public interest is bettered by my tying off loose ends in the practice

and obtaining further doctors to look after my patients your Honour.

MAHONEY P: I think you may take it the Court is conscious of such matters but it took those into account in making the orders that it did and the Court would not propose to vary the orders that have been announced.

ADJOURNED

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

Date 27.5.96

P. Beazley  
Associate