

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

CA 40253/08

**IPP JA
McCOLL JA**

Tuesday, 24 February 2009

**Dr Richard Francis GORMAN v NEW SOUTH WALES MEDICAL
BOARD & ANOR**

Judgment Ex tempore

- 1 **IPP JA:** On 18 April 2008 a Performance Review Panel handed down a decision directing that conditions be imposed on the registration of Dr Gorman with effect from that date. The conditions in question numbered eight.
- 2 Prior to announcing the conditions, the Performance Review Panel, found that Dr Gorman's professional performance was unsatisfactory in that it was below the standard reasonably expected of a practitioner of an equivalent level of training or experience.
- 3 Dr Gorman appealed against the Panel's orders to the Medical Tribunal and also applied to the Supreme Court for a stay of the conditions. While his application for a stay was on foot he requested that the appeal against the Panel's orders not be heard.
- 4 Hidden J dismissed Dr Gorman's application for a stay.
- 5 Of the eight conditions, his Honour only dealt with two. His reasoning in relation to the two that he did deal with was very sparse. The essential basis of his Honour's decision was the following paragraph 5:

"A good deal of the plaintiff's argument was directed to the merit of the appeal, rather than the need for a stay. Nothing he put could warrant a conclusion that if the conditions imposed by the panel remained in force the purpose of the appeal would be frustrated or the benefit of success in the appeal would be lost. Nor am I persuaded that any of the conditions is so onerous or places such a fetter upon his right to practise, that the interests of justice would require that it be stayed for the period of several months until the appeal could be heard."

- 6 It was on the basis of this reasoning that his Honour said, "It is necessary to refer only to two of the conditions.
- 7 Much of Dr Gorman's argument was indeed based on the merits of the appeal, in particular what he described as, at least in this court as, bad faith on the part of the Panel. It does not appear that in the proceedings before Hidden J he used the expression "bad faith" but he did make various submissions that could fall under that general heading.
- 8 In his application for leave to appeal to this court, Dr Gorman relies on only one ground of appeal, namely what he describes as "bad faith". He does not raise deficiency of reasons of Hidden J as a ground of appeal, although he asserts that he is aggrieved at the failure of Hidden J to deal with his arguments. In my view there is much to be said for Dr Gorman's complaints in this regard but as he does not appeal on those grounds it is not necessary for me to deal with this issue further.
- 9 So, the only question before this court as raised by Dr Gorman is whether Hidden J erred when dealing with the question of bad faith.
- 10 The papers before this court are inadequate. Dr Gorman is an unrepresented litigant and is plainly unfamiliar with all the requirements of presenting an application of this kind. It is by no means clear what affidavit material was before Hidden J and it is Dr Gorman's responsibility in law to ensure that the correct material is before the court.

11 From the material before the court there is no evidence on which this court could come to a conclusion that it was arguable that there was bad faith on the part of the Panel.

12 There are the vestiges of an argument in that respect. For example, in earlier proceedings, on 15 February 2002, the Medical Tribunal of New South Wales imposed certain conditions on Dr Gorman's practice of medicine. One of those conditions was that Dr Gorman's right to practise medicine was:

"That he refrain from manipulating the spine of any patient by way of treatment for symptoms pertaining to the patient's visual apparatus or cerebro-vascular systems until publication of the results of a controlled trial with an independent observer in a peer review journal to the effect that spinal manipulation is an acceptable treatment for such symptoms."

13 The Tribunal's reason for imposing this condition was to the effect that the condition would "prevent Dr Gorman from using manipulation for the treatment of specific symptoms until a properly controlled trial establishes that the conditions are necessary".

14 Dr Gorman appealed to this court against the imposition of that condition.

15 Sperling J with whom Heydon J and Hodgson J agreed, pointed out that there was evidence that the treatment that Dr Gorman was undertaking and which the Tribunal disapproved of might be beneficial, if not in every case then in some cases at least. Sperling J pointed out (at [108]):

"The critical finding and support of the new conditions was that of 'the potential to harm members of the public'."

16 His Honour observed out that there was no finding by the Tribunal that spinal manipulation as such was unacceptably dangerous.

17 The conclusion which his Honour arrived at was expressed in these terms:

"In these circumstances, the Tribunal provided no basis for the critical finding that the administration of spinal manipulation by Dr Gorman gave rise to potential harm to members of the public constituting an unacceptable risk."

18 The conditions so set aside by the Court of Appeal bear an uncanny resemblance to the conditions that once again have been imposed on Dr Gorman as conditions 3 and 4.

19 Nevertheless, the Panel acted on the strength of a report by independent assessors. There is no suggestion that the assessors were biased and there is no other evidence to suggest bias on the part of the Panel or any other relevant body. The mere resemblance between the conditions set aside by this court some six years ago and the imposition of similar conditions again are not sufficient to establish bad faith.

20 Accordingly, on the evidence before this court, I would not be prepared to grant leave to appeal on the grounds of bad faith.

21 For those reasons, I would not grant leave to appeal.

22 **McCOLL JA:** I agree.

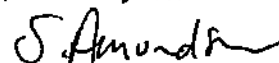
RICHARDSON: I would seek my client's costs of the leave application.

APPLICANT: I'll pay the costs.

23 **IPP JA:** Mr Gorman to pay the costs of the Medical Tribunal.

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

Dated: Tuesday, 24 February 2009


Associate