

**IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION
ADMINISTRATIVE LAW LIST**

R A Hulme J

22 October 2009

**30057/09 Dr Richard Francis GORMAN & Buck (Raymond)
PAENGA v Medical Board of New South Wales**

JUDGMENT

- 1 **HIS HONOUR:** By Notice of Motion filed on 20 August 2009 the defendant seeks the dismissal of these proceedings pursuant to Rule 13.4(1) of the *Uniform Civil Procedure Rules 2005* on any one or more of the grounds that (a) the proceedings are frivolous or vexatious; (b) that no reasonable cause of action is disclosed; and (c) that the proceedings are an abuse of the process of the court. The major focus of the defendant's submissions at the hearing of the motion was on the question of whether a reasonable cause of action was disclosed.

- 2 The proceedings were commenced by the filing of a summons by the plaintiffs on 27 July 2009. On 6 August 2009 an amended summons was filed in which the following relief is sought:

The plaintiffs seek a order from the Court, which states that Dr. Richard Francis Gorman may, without contravening the restrictions of his suspension from medical practice under s.66 of the Medical Practice Act 1992:

1. Educate and advise health care practitioners and patients in the fields of:

Subluxation complexes

Interictal migraine

the ischemic penumbra state and its extension: the medical polynya.

the treatment of visual field loss by spinal manipulation.

the treatment of the visual field loss which is associated with glaucoma and associated cerebral and ocular vasculopathies;

homonymous altitudinal homonymous hemianopsia

medical conditions, which could respond to treatment of subluxation complexes

vertebro-basilar insufficiency

provocative tests for detecting vertebro-basilar insufficiency

the history of subluxation complexes in medical literature

the Milne score for assessment of minimal brain dysfunction

and other unspecified topics relating to health care.

2. Demonstrate to health care practitioners in the fields the treatment of subluxation complexes, using willing, fully informed patients who have clearly given informed consent,

his outpatient manipulation technique

his manipulation technique, when anaesthesia is used.

3. Investigate patients and perform spinal manipulation therapy on patients in the search for knowledge concerning the extent and ramification of the involvement of spinal derangement in health and disease.

4. Treat patients, by his style of spinal manipulation therapy, in whom (a) preceding treatment supplied by others

or by him, has been ineffective in producing the desired result and (b) informed consent has been obtained; and who specifically request that he should so treat them.

- 3 Dr Gorman is registered as a medical practitioner and practises as an ophthalmologist. In his written submissions he professes to have:

Special and unique knowledge and expertise in the field of spinal manipulation for cerebral vascular illnesses, which is unavailable from any other person in the world, much less than in Australia.

- 4 He has been the subject of proceedings under the *Medical Practice Act* 1992 (and its precursor) since about 1988. He has previously been the subject of findings of professional misconduct and unsatisfactory professional conduct, and has also had conditions imposed upon his registration.

- 5 The second plaintiff is a patient of Dr Gorman who claims to have an interest in Dr Gorman being able to provide treatment to him.

- 6 On 27 March 2007 the Performance Committee of the New South Wales Medical Board (the Medical Board) considered a complaint in relation to Dr Gorman's treatment of a patient. It was resolved that he undergo a performance assessment. On 22 October 2007 a performance assessment was completed and it was concluded that Dr Gorman's professional performance was below the standard reasonably expected. It was recommended that a Performance Review Panel be convened.

- 7 A Performance Review Panel was convened on 4 January 2008. On 18 April 2008 it concluded that Dr Gorman's professional performance was unsatisfactory. Conditions were imposed upon his registration. On 29 April 2008 Dr Gorman lodged an appeal to the Medical Tribunal in respect of that decision. On 14 May 2008 he filed a summons in this Court seeking a stay of the conditions that had been imposed. On 29 May 2008

Hidden J refused that application. An application for leave to appeal to the Court of Appeal was refused on 24 February 2009.

- 8 On 29 August 2008 there was a further performance assessment and once more Dr Gorman's professional performance was found to be unsatisfactory. It was recommended that a Performance Review Panel be convened. On 28 October 2008 it was concluded that the performance assessment in August raised a significant issue of public health or safety. It was resolved that a complaint be made against Dr Gorman to the Health Care Complaints Commission. It was also resolved to convene a hearing to determine whether Dr Gorman should be suspended or have conditions imposed for the protection of the health or safety of any person, or in the public interest.
- 9 On 4 December 2008 a hearing was conducted by the Medical Board. Dr Gorman attended the hearing but refused to participate, claiming that the assessors had acted maliciously and corruptly. He left the hearing room. The Board resolved to suspend Dr Gorman from medical practice. Suspension of a medical practitioner under the *Medical Practice Act* is an interim order. Such an order can be made for a maximum period of 8 weeks but there is provision for a continuation of such order. In the present case the suspension of Dr Gorman has continued through until the present time.
- 10 On 16 December 2008 Dr Gorman filed a summons in this Court seeking a stay of the suspension which had taken effect from 5 December 2008. R S Hulme J refused that application on 18 December 2008.
- 11 On 19 January 2009 Dr Gorman appealed against the suspension by the Medical Board to the Medical Tribunal. A hearing was conducted in May. On 2 July 2009 the Medical Tribunal delivered its decision dismissing the appeal.

- 12 On 21 July 2009 Dr Gorman filed a notice of intention to appeal from the decision of the Medical Tribunal to the Court of Appeal. A notice of appeal from the whole of the decision of the Medical Tribunal was filed in the Court of Appeal on 22 September 2009.
- 13 Mr Bourke, counsel for the defendant, acknowledged at the outset the hurdle faced by his client on the present application in that it must be established that even on a view of the plaintiffs' case at its highest there is no arguable case. Reference was made to the well known authority of *General Steel Industries Inc v Commissioner for Railways (NSW)* 1964 112 CLR 125. Reference was also made to *Penthouse Publications Limited v McWilliam* (Court of Appeal 14 March 1991, unreported) where Priestley JA said that final dismissal or summary judgment would only be permitted when it is plain to the court that on no reasonable view of the attacked pleadings is there any point in allowing the case to go to trial.
- 14 Mr Bourke conceded that the power to grant declaratory relief is wide and I accept that this is so. The Court has a broad discretion but that discretion is not completely unfettered. In *Oil Basins Ltd v The Commonwealth* [1993] HCA 60; (1993) 178 CLR 643 Dawson J said (at 648-649):

In *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd.* (24) in a passage cited in *Forster v. Jododex Australia Pty. Ltd.* (25), Lord Dunedin set out the requirements which must be satisfied before a court will exercise its discretion to make a declaration:

"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought."

And in *Ainsworth v. Criminal Justice Commission* a majority in this Court said (26):

"It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter by laying down rules as to the manner of its exercise.' However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have 'a real interest' and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' or if 'the Court's declaration will produce no foreseeable consequences for the parties'."

- 15 Mr Bourke accepted that Dr Gorman had a "real interest" in the relief that he seeks and also accepted that there was a "proper contradictor". However, he submitted that the amended summons disclosed no reasonable cause of action because the declarations sought were concerned with "abstract or hypothetical questions" and not a matter of legal controversy.
- 16 It was submitted that there is no legal dispute between Dr Gorman and the Medical Board in that Dr Gorman's status is clear. At present he is a suspended medical practitioner and by virtue of s 100(1) of the *Medical Practice Act* he is taken not to be a registered medical practitioner.
- 17 It was contended that the declaratory relief sought in the present proceedings was not of a type that this Court would contemplate making. It was submitted that what Dr Gorman is in reality seeking is an advisory opinion from this Court as to the nature of the law applying to him whilst he is subject to the suspension. Dr Gorman conceded that that is was his purpose in bringing the proceedings. By way of example, in the first paragraph of the relief sought he is seeking to have set out the nature and limits of any advice he might be permitted to give. He cited examples of people coming to him complaining of having a pain in their leg or suffering from diarrhoea and said that he is in a quandary knowing whether he can

render any advice and, if so, to what extent. What he wants, in effect, is for the Court to tell him what he can and cannot do.

- 18 When I asked Dr Gorman whether he had considered consulting a lawyer and obtaining legal advice by that means he said that he had not. His view was that, "*Lawyers have got no idea. They are just ignorant as everybody else in the community*".
- 19 It has been held that relief should not be granted if what is sought is an advisory opinion upon a hypothetical question. I was referred to *Australia Institute of Private Detectives Ltd v Privacy Commissioner* (2004) 139 FCR 394. The issue in that case was whether relief was available where the declarations sought were to the effect that disclosure of personal information by or to the applicant's members for the purpose of investigating matters concerning litigation or potential litigation was not contrary to the provisions of the *Privacy Act 1988* (Cth). The Commissioner sought to have the proceedings dismissed upon the bases that the Federal Court lacked jurisdiction, or that no reasonable cause of action was disclosed because the pleadings could not possibly justify the making of the declarations sought.
- 20 Sackville J held in the Commissioner's favour on both bases. In the course of doing so he referred to *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 and said:

The joint judgment accepted that the Court may have jurisdiction and power to declare that conduct which has not yet taken place will not be in breach of a contract or a law and that such a declaration will not be hypothetical in the relevant sense, citing *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305, per Barwick CJ. However, they noted (at 356 [48]) that there is a crucial difference between an advisory opinion and a declaratory judgment, namely:

... the fact that an advisory opinion is not based on a concrete situation and does not amount to a binding

decision raising a *res judicata* between parties. [Accordingly] where the dispute is divorced from the facts, it is considered hypothetical and not suitable for judicial resolution by way of declaration or otherwise.

- 21 Sackville J characterised what the applicant before him was seeking as "an advisory opinion from the Court without reference to any concrete facts". Further, he said:

In the present case ... no facts material to a specific dispute between the Institute and the Commissioner are pleaded. No consequences would flow from the making of declarations, at least without a series of further factual findings and determinations on issues of law.

- 22 This is highly analogous to the present case. The declarations sought by Dr Gorman are couched in broad and sweeping terms without reference to any factual context in which they could be said to apply. That is nowhere more obvious than in the first declaration sought, particularly as it concludes with the words, "*and other unspecified topics relating to health care*". The second declaration sought refers to "*willing, fully informed patients who have clearly given informed consent*". No attempt is made to define what is a "willing, fully informed patient", who that patient might be, or what is "clearly given informed consent". There is no evidence upon which findings of fact in relation to such matters could be made. The third declaration sought is that it would not be a contravention of Dr Gorman's suspension from practice for him to "*investigate patients and perform spinal manipulation therapy*". What patients and in what circumstances are the questions begged. The same applies to the final declaration sought.

- 23 Dr Gorman is concerned that he has the ability to provide treatment, or to educate and advise others as to treatment, that would be of enormous benefit to everyone. He accepts that he is presently suspended but wants the Court to tell him what he can and cannot do whilst subject to that suspension. Mr Bourke pointed out that the answers to Dr Gorman's concerns, in large part, can be found by reference to relevant legislation.

For example he referred to the provision of s 10AC of the *Public Health Act* 1991 which provides that a person must not engage in spinal manipulation in the course of providing a health service unless the person is a registered chiropractor, medical practitioner, osteopath, or physiotherapist, or a student in any of those professions who is under supervision. Dr Gorman had no answer for the proposition that the provisions of that section would render it impossible for this court to consider making a declaration that he should be permitted to perform spinal manipulation therapy as sought in paragraphs 2, 3 and 4 of the amended summons. From that point Dr Gorman retreated to a proposition that he should at least be entitled to a declaration in the form of paragraph 1 of the amended summons.

- 24 In relation to that aspect of the relief sought, Mr Bourke submitted that for it to be an appropriate matter for declaratory relief there must be a legal dispute between the parties as well as there being a discreet set of facts upon which a determination could be made. He submitted that the matters in paragraph 1 of the amended summons involved such complexity and uncertainty that were incapable of resolution. Moreover, it was impossible for there to be an adequately clear set of facts upon which the Court could make any determination in relation to those matters because it could not be known in advance the particular circumstances in which Dr Gorman might involve himself in providing education and advice to health care practitioners and patients. Reference was made to *Challenge Bank Ltd v Mailman* (Court of Appeal 14 May 1993, unreported) where, with the implicit agreement of Kirby P and Priestley JA, Mahoney JA said:

If a declaration of rights is to be made it should be able to be made in a form which provides practical assistance or at least clarification. Ordinarily, a declaration does two things: it identifies a factual context and it states the rights which parties have in or as a result of that context. If the statement of either of these is of such complexity that the declaration will not be of practical assistance or will be confusing, the court would ordinarily not make it. ... It would ordinarily not make a declaration involving detailed qualification of the circumstances in which that entitlement will arise, for

example, where the contingencies affecting the circumstances in which the entitlement will arise involve various possibilities which cannot be appropriately or conveniently stated in a declaration.

- 25 In the present case it would be impossible for the Court to make any of the declarations sought by Dr Gorman which identifies with any specificity a factual context or that states the rights anyone might have as a result of that context.
- 26 Dr Gorman has raised many other arguments in his opposition to the defendant's motion. Many of them are irrelevant (for example, the Medical Board is biased and references to the United Nations Universal Declaration of Human Rights) or became irrelevant when his attention was drawn to the provision of the *Public Health Act* referred to earlier. Some of the submissions made were extravagant – for example, that this Court would “injure millions upon millions of persons worldwide, who possibly suffer from the ubiquitous, mind-diminishing illness, which was uncovered by Dr Milne and the first plaintiff” if the relief sought was not granted.
- 27 In support of the proposition that a declaration in the nature of an “advisory opinion” relating to future events is appropriate, Dr Gorman referred to the recent decision of *Hunter and New England Area Health Service v A* [2009] NSWSC 761. I have read that judgment of McDougall J. It does not purport to be anything in the nature of an advisory opinion. His Honour made declarations as to the effect of a document called an “advanced care directive” that were based upon specific facts found upon the evidence presented to him. It is in stark contrast to the present case in which declarations are sought upon factual bases that are incapable of being established.
- 28 I am satisfied that on a view of the pleadings most favourable to the case for the plaintiffs there is no arguable case. On no view of the matter would it be appropriate for the Court to make any of the declarations sought. No reasonable cause of action is disclosed.

29 The proceedings are dismissed.

30 The first and second plaintiffs are to pay the defendant's costs as agreed or assessed.
