SUPREME COURT OF QUEENSLAND

CITATION:	*Dental Board of Queensland v B* [2003] QCA 294
PARTIES:	**DENTAL BOARD OF QUEENSLAND** (registrant's board/appellant) **v** **B** (registrant/respondent)
FILE NO/S:	Appeal No 10212 of 2002 DC No 2309 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Application for extension of time
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2003
JUDGES:	McPherson JA and Fryberg and Muir JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal by the Dental Board of Queensland allowed.** **2. Set aside paragraphs 2, 3, 4 and 6 of the decision of the Health Practitioners Tribunal made on 11 October 2002.** **3. Order that the matter be remitted to the Tribunal for determination.** **4. Order that until such determination the name of the registrant be suppressed.** **5. Application for an extension of time within which to cross-appeal dismissed.** **6. Order that the registrant pay the Board's costs of the appeal and the application, to be assessed.**
CATCHWORDS:	PROFESSIONS AND TRADES – Medical and related professions – Dentists – Discipline and removal from register – Where Health Practitioners Tribunal constituted only by Judge to hear submissions regarding sanction – Whether natural justice requires assessors to be present EVIDENCE – Burden of proof, presumptions, and weight and sufficiency of evidence – Sufficiency – Standard of proof – Whether *Briginshaw* standard satisfied – Whether appeal on

question of fact

Health Practitioners (Professional Standards) Act 1999 (Qld), s 31, s 34, s 227, s 348

Briginshaw v Briginshaw (1938) 60 CLR 336, followed
Doney v The Queen (1990) 171 CLR 207, considered
M v The Queen (1994) 181 CLR 487, followed

COUNSEL: W Sofronoff QC, with A J MacSporran, for the appellant
C E K Hampson QC for the respondent

SOLICITORS: Gilshenan & Luton for the appellant
Nyst Lawyers for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Fryberg J and the orders he proposes for disposing of this appeal.

[2] **FRYBERG J:** On 11 October 2002 the Health Practitioners Tribunal found that the respondent ("the registrant") improperly took hold of the left breast of the complainant during the course of a dental consultation. By way of sanction it imposed various conditions on the registrant's registration, including a requirement for a chaperone, ordered that no record of the disciplinary action be placed on the register and ordered the registrant to pay the Board's costs. The present proceedings involve an appeal by the Board against the sanction orders and an application for an extension of time within which to appeal against all the orders by the registrant.

The procedural history

[3] In a referral notice filed with the Tribunal under the *Health Practitioners (Professional Standards) Act 1999*[1] on 11 June 2002 the Board asserted two grounds for disciplinary action against the registrant. One was that he had committed (but not that he had been convicted of) an unlawful and indecent assault. That ground was quite rightly ignored by the Tribunal[2]. The second was (in the alternative):

> "[T]he registrant did on the 21st day of May 2001 and during the course of a Dental consultation with [the complainant] improperly take hold of her left breast."[3]

That was the matter before the Tribunal when the proceedings began on 30 September 2002.

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1 Section 126. Future statutory references in these reasons will be to this Act unless otherwise stated.

2 See s 124(1)(i).

3 This was said to be both a ground for disciplinary action and the facts and circumstances forming the basis of that ground. In that respect the notice was deficient. What was alleged may have been sufficient in the first instance to identify the facts and circumstances forming the basis for the ground for the purposes of s 126(3)(d), but was not sufficient to state the ground for disciplinary action under s 126(3)(c). The notice should have identified a ground under s 124(1) in the terms of the relevant paragraph and, if para (a) were relied upon, the relevant paragraph or paragraphs of the equivalent definition in the schedule to the Act.

[4] The Tribunal was constituted by Judge Forde as the member; sitting with him as assessors were Dr Birch, Dr Cheyne and Councillor Dalley. The hearing lasted two days. There were two witnesses for the Board, the complainant and her mother. Both gave their evidence-in-chief by affidavit.[4] The complainant's mother was not cross-examined. The complainant was. Then the registrant gave evidence. All of his evidence was given orally. On the following day, counsel addressed the Tribunal. At the end of their addresses the Tribunal said that the decision would be reserved and raised the possibility of delivering it on Friday of the following week (that is, in 10 days time). Counsel indicated their unavailability for that day. Counsel for the Board said that if the complaint were proved the Board would wish to make submissions on the sanction and said that he would prepare written submissions, which could be handed up. The Tribunal then adjourned.

[5] The Tribunal's suggestion turned into the reality: the decision was handed down on the day he had suggested, namely Friday 11 October. On that day he sat by himself, with no assessors. Each party was represented by a solicitor. The Tribunal delivered prepared reasons for judgment and read out from them what he described as "the proposed orders". Those orders were:

> "(1) The Tribunal is satisfied that the Registrant, on 21st May 2001, and during the course of a dental consultation with the complainant, improperly did take hold of her left breast.
>
> (2) The Registrant is required to be properly supervised, subject to further submissions.
>
> (3) The names of the complainant and the Registrant are to be suppressed.
>
> (4) That no record of the disciplinary action be placed on the Board's register."

[6] He then said:

> "They're the proposed orders pursuant to the judgment. Two conditions which it is generally accepted after discussion between the members are that the Board appoint a mentor from outside the Registrant's practice for a period of two years to carry out supervision if necessary; that the Registrant not carry out work without a third person present; and that an entry be made on each clinical record as to whom the third person was.
>
> Now, do either side wish to make submissions about the latter two points which are really supplementary to the reasons on supervision?"

[7] The solicitor for the registrant then made submissions on those two points. The Tribunal then called upon the solicitor for the Board. He said:

> "Your Honour, my instructions are that the Board did wish to be heard in relation to sanction and the expectation was that written submissions would be handed up to the Tribunal in the event of the charge being found proven."

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[4] At least that is the basis on which the parties proceeded, and it is now common ground. There appears to have been some confusion on the part of counsel and the judge about whether the affidavits needed formally to be read. Plainly, they should have been read. That is the only way in which the evidence before the Tribunal can be identified (see s 235), particularly when other affidavits are on the Tribunal's file, and it is also the occasion for any objections to be taken.

The Tribunal accepted the submission and made it an exhibit. It contained nine paragraphs in support of the proposition that the appropriate sanction was suspension for a period of the order of 12 months. After the solicitor for the registrant indicated that he had seen the submission the following exchange took place:

> "HIS HONOUR: … Is it agreed that as a matter of principle that any final punishment can be decided by me sitting without the other members?
>
> MR McCOWAN: Your Honour, I hadn't looked at the question specifically. The provisions of section 217 I don't think would extend to a sanction power. The-----
>
> HIS HONOUR: Questions of law or fact must be decided by the constituting member.
>
> MR McCOWAN: Yes.
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> HIS HONOUR: I can have regard to the views of the - which I have had in relation to the matter under 227.
>
> Mr McCOWAN: Yes.
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> HIS HONOUR: I've had regard to their views in relation to the seriousness of this.
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> Mr McCOWAN: Yes, your Honour. As to the -----
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> HIS HONOUR: All that's been put before me now are two cases which are questions of applying the law, I imagine, to it which are matters more properly in my jurisdiction or my sphere of this jurisdiction.
>
> Mr McCOWAN: Yes."

[8] His Honour then discussed the two cases referred to in the submission with Mr McCowan but made no other reference to it. He then asked Mr McCowan for submissions about having a mentor and Mr McCowan tendered a copy of the conditions which the Board had applied pending the hearing.

[9] Thereafter the Tribunal heard the solicitor for the registrant on those conditions, on s 227 of the Act and on the two cases referred to in the submission. Each solicitor in turn then addressed on costs. His Honour then delivered an ex tempore decision. The transcript of his reasons was held by the State Reporting Bureau in a sealed envelope and was not included in the record before this Court. It should be a matter of public record. I annexe a copy of the reasons hereto.

[10] After the Tribunal delivered those reasons, the following exchange took place:

> "MR MCCOWAN: Your Honour, the suppression, does that still stand?
>
> HIS HONOUR: The suppression order is part of the original order and the other part about the record of the disciplinary action not

being on the Board's register. The reasons for that are set out in the judgment."

[11] The formal order of the Tribunal set out the four paragraphs quoted above[5], the existing conditions which the Board had applied pending the hearing and an order for costs. It omitted to state a period within which the registrant was prohibited from applying for a review of the decision.[6]

[12] On 8 November the Board appealed against the Tribunal's decision. The grounds of appeal are:

> "1. The Tribunal erred in law in failing to properly exercise the discretion relating to the imposition of an appropriate sanction:-
>
> (i) The Tribunal erred in treating the sanction to be imposed as a penalty rather than as a measure imposed for the protection of the public as part of a professional disciplinary process;
>
> (ii) The Tribunal erred in viewing the disciplinary matter as a less serious example of sexual misconduct rather than as a serious example of a breach of trust by a Registered Health Practitioner with a patient; and
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> (iii) The Tribunal erred in failing to give weight to the Registrant's (Respondent's) demonstrated lack of remorse.
>
> 2. The Tribunal erred in law in denying the Appellant natural justice during the course of the hearing concerning sanction:-
>
> (i) The decision of the Tribunal was formulated without regard to the written submissions of the Appellant on the issue of sanction; and
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> (ii) Orders were formulated and made suppressing the name of the Registrant (Respondent) and providing that details of the disciplinary action not be recorded in the Board's register (pursuant to sections 223 and 242(1)(d) of the *Health Practitioners (Professional Standards) Act* 1999 (Qld) as amended ("the Act") respectively) without giving the Appellant the opportunity of being heard.
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> 3. The Tribunal erred in law in ordering that the Registrant's (Respondent's) name be suppressed pursuant to section 223 of the Act.
>
> 4. The Tribunal erred in law in ordering that details of the disciplinary action should not be recorded in the Board's register pursuant to section 242(1)(d) in that the Tribunal failed to have regard to the interests of potential users of the Registrant's services and the public as required by section 242(2) of the Act;"

[13] On 13 December 2002 the registrant filed an application for an extension of time within which to appeal. The application is supported by two affidavits. They

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5 Paragraph [5].

6 Such a statement would seem to have been required by s 241(3).

contain an explanation for the delay which, although not entirely convincing, was not criticised on behalf of the Board. The Board opposed the application only on the ground that the proposed appeal would be one limited to questions of fact. It did not allege any prejudice resulting from the delay.

[14] It is convenient to follow the course taken in the argument and defer the question of the cross appeal until after consideration of the appeal.

The Board's appeal: denial of natural justice

[15] The Tribunal "must comply with natural justice"[7]. The appellant relied on the principle applied by the High Court in *Stead v State Government Insurance Commission*:

> "The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Parker L JJ) in *Jones v National Coal Board* ([1957] 2 QB 55 at p 67) in these terms:
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> > 'There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge …. No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.'"[8]

[16] At first glance it is not immediately apparent that there has been any breach of that principle. The Tribunal was constituted only by the judge[9]. While it is true that on 11 October 2002 he appeared initially to have forgotten that he was yet to hear submissions on the question of sanction, he immediately received the Board's submissions when the point was drawn to his attention. They were made an exhibit and the comparable decisions referred to in them were the subject of discussion between the Tribunal and the solicitor for the Board. At a later point in the argument the solicitor was also given the opportunity to make submissions in relation to the other orders made and costs. It is true that there was no discussion between the Tribunal and the solicitor regarding the other eight paragraphs of the Board's submissions, but if the solicitor had wished to expand upon those paragraphs (a somewhat unlikely contingency) he could have done so. The Tribunal had described the conditions which he read out only as "proposed orders" and there is no reason to conclude, nor did Mr Sofronoff QC submit, that he had closed his mind to the Board's submissions.

[17] However the question is whether the Board was able to put its case *properly* before the Tribunal. In formulating the proposed orders the Tribunal had had regard to the views of the assessors[10]. Because the assessors were not present on 11 October those views were necessarily advanced without the benefit of hearing submissions from the Board. In this Court Mr Sofronoff QC submitted that for this reason the final decision should be set aside. Alternatively, he submitted that the Act required the presence of the assessors at the hearing relating to sanction. Although it is arguable that this alternative submission did not involve considerations of natural

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7 Section 219(1)(a).

8 (1986) 161 CLR 141 at p 145.

9 *Health Practitioners (Professional Standards) Act 1999*, s 27.

10 Neither party submitted that there was any error in the Tribunal's so doing.

justice, the registrant did not object that it was outside the grounds of appeal. It is convenient to address the alternative submission first.

Presence of the assessors

[18] The Tribunal is established by s 26 of the Act. Its primary function is to conduct hearings and make decisions relating to disciplinary matters about registrants[11]. In conducting a hearing relating to a registrant the judge must be assisted by two assessors from a professional panel for the registrant's profession and one assessor from the public panel. Proceedings conducted by the Tribunal belong to a class of proceedings called disciplinary proceedings[12]. Disciplinary proceedings against a registrant may be started by the registrant's Board if it reasonably believes a disciplinary matter exists in relation to the registrant[13]. "Disciplinary matter" is defined to mean, so far as is presently relevant, a matter that may provide a ground for disciplinary action to be taken against a registrant under Part 6 of the Act. Grounds for disciplinary action are set out in s 124 of the Act. In the present case the relevant ground was that in s 124(1)(a), "the registrant has behaved in a way that constitutes unsatisfactory professional conduct". There is an extensive definition of "unsatisfactory professional conduct" which it is unnecessary to set out here.

[19] It may be observed at this point that the proceedings before the Tribunal do not constitute a disciplinary matter under the Act; they constitute disciplinary proceedings. "Disciplinary matter" refers to a state of affairs which a Board must believe exists before it starts disciplinary proceedings. Relevantly, a Board starts disciplinary proceedings by referring a disciplinary matter for hearing by the Tribunal[14]. The Tribunal has jurisdiction to hear all disciplinary matters so referred and may deal with more than one disciplinary matter relating to the same registrant in the same disciplinary proceedings[15].

[20] In support of his argument Mr Sofronoff QC relied upon s 227 of the Act. That section provides that questions of law or fact must be decided by the constituting member of the Tribunal, but that in deciding a question of fact the member may have regard to the views of the assessors. He submitted that the presence of members of the relevant profession would be important both in relation to matters of fact affecting a finding of professional misconduct and also with respect to sanction. In my judgment that submission is correct. It is not difficult to imagine questions of fact which will often arise during a sanction hearing. Even if the facts are not disputed the weight to be given to them is also a matter upon which the assistance of the assessors, both professional and lay, may be of great help to the judge. Importantly, s 31 *requires* that the Tribunal be assisted by assessors not simply in hearing a disciplinary matter, but "in conducting a hearing relating to a registrant". That expression is apt to describe the whole disciplinary proceedings. In the absence of compelling language it should not be read down.

[21] For the respondent, Mr Hampson QC submitted that it was not necessary for the assessors to be present before the Tribunal in order to give assistance; or alternatively that the Board had waived the necessity; and thirdly that even if the

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11 Section 30(1).
12 Schedule, "*disciplinary proceedings*".
13 Section 125(1).
14 Section 126.
15 Section 211.

assessors' presence was necessary, they had to be present only for the duration of the hearing of the disciplinary matter, not for the hearing on sanction. Some support for the third submission can be found in s 34:

> "**34. Functions and powers of assessors**
>
> **(1)** The function of an assessor is to advise the tribunal about questions of fact arising during the hearing of a disciplinary matter.
>
> **(2)** To enable an assessor to perform the assessor's function, the assessor may, during the hearing –
>
> (a) ask questions of a witness before the tribunal; and
> (b) discuss any question of fact with a lawyer or other person appearing for a party at the hearing."

It seems clear from ss 240-241 that a decision on the question of sanction is made *after* completing the hearing of a disciplinary matter.

[22] It is implicit in that argument that s 34 should be construed as if the word "sole" were inserted before "function". I do not think that is a correct construction. It is true that the use of the definite article at the commencement of the section tends to support exclusivity, but the result of such a construction would be a dysfunctional section. A question about which advice may be given must arise during the hearing of the disciplinary matter, but there is no requirement for the advice to be given during that hearing. Consequently, on that construction, an assessor could give advice on a question of fact relevant to sanction if the same question arose during the hearing of the disciplinary matter, but not otherwise. That seems an unlikely outcome.

[23] There is more force in Mr Hampson's first submission. It is not necessary for an assessor to be present during a hearing in order to advise the Tribunal about questions of fact arising during the hearing or otherwise to provide assistance. If the assessor does not wish to exercise the rights conferred by s 34(2) there appears no reason why, subject to the question of natural justice, the assessor should not be appraised of the issues and the evidence by a transcript or other method.

[24] Mr Sofronoff submitted that s 228 supported the contrary view. He submitted that s 228(1) envisages the presence of the assessors until a decision is made under subdivision 4, i.e. ss 240-244. Because s 241 set out the Tribunal's obligation to decide on sanction, it followed that the assessors must be present until a decision was made. However this argument does not indicate why the presence of the assessors at a hearing relating to sanction would be necessary for them to give assistance on matters arising during that hearing. One might expect that ordinarily the assessors would be present, but as presently advised I would not be disposed to find that the presence of all assessors throughout the sanction hearing was mandated by the Act. It is unnecessary to express a concluded view on the point or on Mr Hampson's alternative submission that the assessors' presence was waived, as this case really turns on Mr Sofronoff's first argument[16].

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16 See para [17].

The assessors' advice

[25] Mr Hampson did not explicitly address that argument, which first appeared clearly only in this Court. He did however raise the question of waiver sufficiently for the court to consider whether the Board waived its right to have its submission considered by the assessors. In support of that view it may be said that the assessors patently were not present and the Tribunal raised the question of whether their presence was necessary with the Board's solicitor. If his submissions did not tacitly accept that it was not essential for them to be present, they at least did not propose the opposite. Had the Board wished its submissions to be placed before the assessors, it could have said so. On the other hand the parties were presumably taken by surprise by the absence of the assessors. The question of whether the assessors should consider the Board's submissions was not explicitly raised. The Board's solicitor might have thought that the Tribunal would reserve its decision and place the submissions before the assessors in order to obtain their assistance. Whatever he thought, he certainly did not explicitly waive any right to have the Board's submissions properly considered. He was not there as an advocate; on the contrary, arrangements had been made at the end of the original hearing for counsel to prepare the Board's submissions on the only question which it was thought would arise. I have come to the conclusion that the circumstances do not demonstrate an implicit waiver of its rights.

[26] In my judgment the failure of the Tribunal to ensure that the assessors' advice on sanction was informed by the Board's submissions on that question constituted a breach of the rules of natural justice. The assessors' assistance on the question of sanction is not a marginal matter. In all but the most extraordinary case their assistance will be important to the Tribunal's decision. It is assistance given from the perspective of the profession and the public. Its importance is reinforced by the mandatory terms of s 31. The parties are entitled to have their submissions considered by the assessors and to have assistance given to the Tribunal in the light of that consideration. I would reject Mr Hampson's submission that it is for the Tribunal to decide whether it wishes to receive assistance in the circumstances of the case, but in any event, in the present case the Tribunal did receive advice from the assessors. It was advice given without knowledge of the Board's submissions on sanction. For this reason the appeal must be allowed.

[27] It is unnecessary to decide whether there may be circumstances in which this Court would itself exercise the power under s 241. It would be incongruous for the Court to do so in this case. The Tribunal's orders should be set aside and the matter remitted to it to be dealt with pursuant to s 241 of the Act. For this reason it is desirable to say little about the questions of law raised in the other grounds of appeal.

The suppression order

[28] Section 223 of the Act provides, "The tribunal may, by order, suppress the name of the registrant to whom the disciplinary proceedings relates *[sic]*." The consequence is that a person who "publishes, in a public way, information that identifies, or is likely to identify, a registrant to whom a suppression order under s 223 relates" is guilty of contempt of the Tribunal. On the first day of the hearing before the Tribunal, counsel for the registrant sought a suppression order. No evidence to justify this order was referred to, no reasons were advanced in submissions in

support of it and no notice of the application was given to the Board. Lacking instructions, counsel for the Board was unable to make submissions on the point, but he pointed out to the Tribunal that generally the public interest required the registrant's name to be published. Without giving reasons the Tribunal ordered suppression of the name until judgment in the matter.

[29] The Tribunal's reasons when published on 11 October disclosed a proposal to order "The names of the Complainant and the Registrant are to be suppressed" and that order was subsequently made. No power to order suppression of the name of the complainant was identified, although the Tribunal referred to s 236(1)(j). Nothing turns on that. As to the registrant, the Tribunal wrote, "The nature of the offence and the age of the Registrant warrant such an order." Mr Sofronoff submitted that these were irrelevant considerations. He also submitted that the nature of the offence and the age of the respondent provided insufficient reason for making such an order in the absence of any insight by the respondent into the nature of his misconduct and any sign of remorse from him.

[30] Section 223 contains no indication of the factors to be taken into account in making an order. The section itself is set in a subdivision dealing with procedural matters; apparently the power may be exercised at any time the Tribunal is seized of the matter. An order provides only limited protection for the registrant: it founds a charge of contempt of court only against a person who "publishes, in a public way". That is not necessarily tautologous, but it is necessarily imprecise. "Publish" is not a verb of precise denotation and in at least one area of law, defamation, publishing in a private way is a comprehensible concept. In the present context the term seems to suggest widespread publication, although I would not wish to be taken as suggesting that it directs enquiry only to the number of persons to whom publishing occurs. This suggests that one purpose of a suppression order is to protect the registrant from public opprobrium. Such opprobrium may be particularly harsh to a well-known registrant if it occurs before the end of disciplinary proceedings or thereafter if a ground for disciplinary action is not established. It may also give rise to unfairness in cases involving sensational or salacious facts. Perhaps other examples could be imagined. On the other hand it must be remembered that there are good reasons why the Tribunal sits in public[17]; and widespread publication of an accused registrant's name may embolden timid complainants to reveal further examples of professional misconduct.

[31] After the Tribunal has decided on disciplinary action, different considerations arise. It would in my view be an unusual case in which a suppression order would properly be made simply in order to prevent public shaming of the registrant. It must be supposed that the legislature was not unaware that decisions under s 241 tend to attract widespread publicity with the humiliation which that entails.

[32] It is not appropriate for this court to circumscribe the discretion conferred by s 223. In the exercise of that discretion after disciplinary action has been taken, the nature of the disciplinary matter and the age of the registrant are relevant considerations. So are the absence of any insight into the nature of the registrant's misconduct and the absence of remorse. Doubtless there are many others. The Tribunal is required to have regard to all relevant circumstances before making a suppression order,

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17 Section 222(1), *Re Manwaring* [1997] 2 Qd R 612.

including the advice of the assessors, and to weigh the circumstances in the light of the purposes of disciplinary proceedings and disciplinary action:

> "(a) to protect the public;
> (b) to uphold standards of practice within the health professions;
> (c) to maintain public confidence in the health professions."[18]

He must give proper reasons for whatever decision he reaches on an application under the section. On this appeal we should not attempt to pre-empt that decision.

Recording the order

[33] When the Tribunal decides to impose conditions on a registrant's registration he must also decide "whether the details of the conditions must be recorded in the Board's register for the period for which the conditions are in force"[19]. The Tribunal's reasons when published on 11 October disclosed a proposal to impose conditions on the registrant's registration and to order that no record of the disciplinary action be placed on the Board's register. The proposal was carried into effect. It is unclear whether the Tribunal received advice from the assessors on this question. If he did that advice, like the advice on sanction, was uninformed by submissions from the Board. However the Board said nothing on this question in its written submissions[20] and its solicitor did not seek to be heard on it. I would infer that the Board had no relevant submissions to make. There was therefore no denial of natural justice in relation to the making of this order. However a non-recording order can operate only in relation to conditions imposed. Because the conditions are to be set aside the non-recording order must fall also.

[34] The Tribunal advanced the proposal not to record the conditions "for similar reasons" to those supporting the suppression order, namely the nature of the offence and the age of the registrant. However except in an impairment matter the Tribunal is obliged to decide that conditions must be recorded unless he "reasonably believes it is not in the interests of users of the registrant's services or the public to know the details"[21]. The decision of the Tribunal failed to address these issues. It also failed to explain how the two reasons upon which he did rely in making the order affected these issues. Indeed it is far from clear that the Tribunal even considered those reasons in relation to these issues. If the question of a nonrecording order arises on the Tribunal's reconsideration of the case he will no doubt address these matters.

[35] Neither party addressed the court on whether "or" in the expression just quoted should be read conjunctively; in other words whether both conditions must be satisfied before it is open to the Tribunal to order nonrecording. Unless the Tribunal on reconsideration is satisfied of at least one of the conditions, this question will not have to be considered. For both these reasons I would express no opinion on it.

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18 Section 123.

19 Section 242(1)(a).

20 It seems that the Board did not advert to s 242. It did not even make a submission on whether a record of the suspension for which it contended should remain on the register after the suspension ended: see s 242(1)(c).

21 Section 242(2).

Inadequacy of the sanction

[36] Most of the appellant's submissions on the inadequacy of the sanction sounded as questions of fact. No appeal lies on such questions[22]. However some specific matters may usefully be addressed.

[37] The Board submitted both to the Tribunal and in this Court that the respondent's

(a) false denial of the complaint, necessarily resulting in the complainant being cross-examined at the disciplinary hearing;
(b) false attribution to the complainant of the making of a false complaint against him; and
(c) maintenance of those false assertions in sworn evidence before the Tribunal

displayed a lack of remorse and insight into the inappropriateness of his conduct. The Tribunal made no finding on that submission. He should have done so. The absence of remorse and insight are matters relevant to sanction. The Tribunal was not bound to conclude that the appellant lacked remorse and insight. It was open to the Tribunal to find that the respondent was very conscious of his misconduct and deliberately set about exculpating himself by false evidence, regardless of the cost to the complainant. Such conduct would not have been inconsistent with insight and possibly remorse, though it would have been reprehensible and meriting significant sanction.

[38] The appellant also submitted that the Tribunal took irrelevant matters into account. The first such matter was said to be the fact that the respondent was a young man. In my judgment that fact was not irrelevant.

[39] Second was the fact found by the Tribunal that the respondent's employer failed to provide adequate staff, leaving him in a vulnerable position. It is not for this court to consider whether that finding was correct. As a general proposition, if an employed registrant were placed by his employer in a vulnerable position through no fault of his own, that would be a consideration relevant to determining the appropriate sanction. In the present case I am not satisfied that the Tribunal took the fact into account on sanction. The finding occurred early in the Tribunal's reasons, at a point where he was dealing with the question whether the respondent was guilty of unsatisfactory professional conduct. Moreover, in his reasons delivered after reading the Board's written submissions and hearing its solicitor, the Tribunal noted that the absence of a staff member did not excuse the registrant. He found that the presence of a third person was needed "to avoid any misunderstanding" but also found, "This was not a case of misunderstanding."[23]

[40] I would add that a finding that this was not a case of misunderstanding was not inevitable once the registrant's evidence was rejected. There was evidence given by the complainant from which, on the balance of probabilities, a misunderstanding might have been inferred:

> "At this stage I heard Dr [B] say to me, 'Can I touch you there?' I believed that his hands were occupied in my mouth and to the best of my ability I grunted 'yeah'. I then felt him grab my left breast with his hand fairly quickly and then he released his hand."

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22 Section 348.
23 See Annexure A.

In his submissions on sanction the registrant's solicitor referred to cases of consensual touching; he submitted that the case "could well be a constructive consent situation" and that such a finding would be a mitigating factor. Perhaps that would have been so; but a finding of mistake would also have required the Tribunal to take into account the registrant's deliberate conduct described above[24].

[41] The third alleged irrelevant matter was based on an observation made by the Tribunal in the course of argument on costs on 11 October. The Tribunal asked if the costs of the proceedings were a sanction giving rise to general deterrence and the solicitor for the Board agreed that they were. The Tribunal observed that in this case the costs may involve thousands of dollars compared with a criminal case in which people "might get a fine of $1000 if they plead early enough in an assault". The solicitor responded, "Indeed". The exchange does not demonstrate that the Tribunal addressed the sanction question as though it were an issue of punishment rather than a determination of the interests of the public. On the contrary the Tribunal expressly referred to s 123 at the beginning of his reasons on sanction. It is always dangerous to assume that a judge adheres to views expressed during argument in his or her final decision.

Application for an extension of time to cross appeal

[42] The registrant led evidence in support of his application and the Board did not challenge that evidence. It alleged no prejudice. The Court heard argument on the substance of the cross appeal. The outcome of the application depends upon the view taken on the merits of the cross appeal.

[43] As already observed an appeal to the Court of Appeal may be brought only on a question of law. Mr Hampson submitted that the registrant did not need to go further than demonstrate the existence of issues which involve questions of law. I would reject that submission. It is true that in *Ruhamah Property Co Ltd v Commissioner of Taxation*[25] the High Court held that if a question of law were involved in the decision of a Taxation Board of Review, the whole decision of the Board, not merely the question of law, was open to review. However the section there under consideration provided that a taxpayer might appeal from any decision "which, in the opinion of the High Court, involves a question of law." That is very different from s 348. In my judgment the latter section permits an appellant to raise only questions of law.

[44] Mr Hampson identified two related questions in the appeal. The first arose from what was submitted to have been an application by the Tribunal of the wrong standard of proof. The second was whether the Tribunal's decision was unsafe. As to the first it was submitted that the correct standard of proof for the Tribunal to have applied was that identified in *Briginshaw v Briginshaw*[26]; and that, even though the Tribunal purported to apply that standard, when one looked at the evidence it was not the standard applied. As to the second, reference was made to the decision of the High Court in *Doney v The Queen*[27]. It was submitted that the

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24 Para [37].
25 (1928) 41 CLR 148.
26 (1938) 60 CLR 336.
27 (1990) 171 CLR 207.

question was whether it was safe for the Tribunal to have drawn a number of inferences. It is convenient to deal with the second question immediately.

Doney v The Queen

[45] The actual decision of the High Court in *Doney* is embodied in the following passage:

> "It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.
>
> It is necessary only to observe that neither the power of a court of criminal appeal to set aside a verdict that is unsafe or unsatisfactory nor the inherent power of a court to prevent an abuse of process provides any basis for enlarging the powers of a trial judge at the expense of the traditional jury function. The power of a court of criminal appeal to set aside a verdict on the ground that it is unsafe or unsatisfactory, like other appellate powers, is supervisory in nature. Its application to the fact-finding function of a jury does not involve an interference with the traditional division of functions between judge and jury in a criminal trial."[28]

[46] In the present appeal it was not argued that there was such a defect in the evidence that, taken at its highest, it would not sustain the Tribunal's finding. In other words it was not argued that there was no evidence to support the decision. The appeal was to the supervisory function of this Court in its application to the fact-finding function of the Tribunal, to adapt the words of the High Court. Quite apart from the dubious applicability of that doctrine to a non-jury context, the submission raises not a question of law but a question of fact. The supervisory function is based upon the interpretation of statutory provisions in common form throughout Australia equivalent to s 668E (1) of the *Criminal Code*:

> "The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal."

[47] That form of provision has received detailed consideration from the High Court:

> "Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. …In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are

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28 (1990) 171 CLR at pp 214-5.

> separately dealt with by [the section]. The question is one of fact which the court must decide by making its own independent assessment of the evidence…."[29]

Questions of fact are undoubtedly excluded by s 348 from those which may be raised on appeal to this Court from the Tribunal. The submission should be rejected.

Briginshaw v Briginshaw

[48] In its reasons for judgment the Tribunal wrote, "The Tribunal is aware of the standard of proof being on the balance of probabilities but having regard to the seriousness of the allegation and the need to adjust the degree of confidence required before an adverse finding could be made: *Briginshaw v Briginshaw*; *Medical Board of Queensland v Ali.*" The submission for the registrant was that despite this awareness the Tribunal failed to apply that standard. It sought to demonstrate this simply by reference to the Tribunal's findings on the issues and on credibility in relation to the evidence. It proposed as the issue, "How widespread is the number of mistakes and how serious are the mistakes?" Even assuming that it is theoretically possible to raise a question of law in this way, it is a task of breathtaking difficulty.

[49] The submission sought to make the following points:

(a) this was a case of word against word;
(b) the complainant's account was inherently unlikely having regard to certain undisputed facts;
(c) the Tribunal misinterpreted the use to which the registrant's notes could properly be put;
(d) the Tribunal had erred in assessing the registrant's credibility against the complainant's evidence and a hearsay account of the evidence of the registrant's employer Dr Utama;
(e) the Tribunal had failed to give proper weight to discrepancies in the complainant's evidence.

It was submitted that where the Tribunal's understanding of the facts led it to make a discretionary judgment different from what it would have made had it properly appreciated the facts, the error was one of law.

[50] Although the registrant's outline of argument seemed to propose that the *Briginshaw* standard was not established because the case against the appellant relied solely on the word of the complainant, Mr Hampson conceded in argument that it was possible to satisfy the standard in such a case. The first point was therefore relegated to the status of a contextual fact. The second gained nothing from the use of "inherently". It depended entirely on a judgment about the facts. Neither point advances the registrant's appeal.

[51] The third point referred to Exhibit 4, a handwritten note made by the registrant on the day of the incident. To understand the point it is necessary to know some of the surrounding circumstances. The incident occurred at the beginning of the day's work. It was not contested that later that morning the complainant reported the incident by telephone to Dr Utama. Subsequently Dr Utama told the registrant of the complaint. Later that afternoon the registrant telephoned the complainant. They

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29 *M v The Queen* (1994) 181 CLR 487 at p 492.

gave radically different accounts of what was said. According to the registrant the complainant in effect admitted the falsity of her complaint and said that she intended to teach him a lesson for being rough. According to the complainant the registrant in effect apologised for what he had done. Later that evening the registrant telephoned Dr Utama and gave a version of the conversation with the complainant. The registrant could not recall whether Dr Utama told him to document the conversation, but in any event he did so. He gave the note to Dr Utama the next day as his account of the conversation. It began, "- pt called, appologising [*sic*] to me for what she had done, and alegations [*sic*] made."

[52] Dr Utama was not called as a witness; no affidavit had been obtained from him. However the complainant deposed in her affidavit:

> "The next day I recall receiving a telephone call from Dr Utama who told me that [the registrant] had told him that I had called him ([the registrant]) to tell him that I was teaching him a lesson for being rough. I told Dr Utama that [the registrant] had actually rung me to apologise. I even gave him the number he had called from which was 5575 9100."

No objection was taken to that evidence and the complainant was not cross-examined about it. The registrant in cross-examination initially accepted as correct the suggestion, "You rang Dr Utama at home just around 7 o'clock the same night, the 21st of May, and you told him that she had rung you to apologise," but almost immediately denied the second proposition, suggesting that Dr Utama may have misunderstood. He admitted that the following afternoon Dr Utama confronted him with the allegation that he had lied in the conversation the previous evening when he said that the complainant had called him to apologise. He denied that he then persisted in the allegation. He said that Dr Utama had made the point that he could look at the phone records to prove that he rang the complainant and conceded that he had responded, "There is no need to check your phone records because I did call her".

[53] Cross-examined about the note the registrant suggested that the wording was a form of shorthand which he used to mean "patient was called". The difficulty with that explanation was that if it were true, the shorthand was not used consistently. It was a matter for the Tribunal to decide whether it accepted the registrant's explanation as true. It rejected his evidence, finding that he was not candid with the Tribunal or with Dr Utama. It was in the best position to assess the registrant's credibility. Even if there were an appeal on questions of fact, this is not a matter on which this Court would reverse the Tribunal's finding; *a fortiori* when the appeal is limited to questions of law. The Tribunal did not misinterpret the use to which the note could be put.

[54] Hearsay evidence was admissible in the Tribunal[30]. There can be no error of law in using it to assess credibility. It was submitted on appeal that the Tribunal should have concluded that any evidence which Dr Utama could have given had he been called would not have assisted the Board's case: *O'Donnell v Reichard*[31]. However the relevant part of Dr Utama's statement was before the Tribunal and the accuracy of the report given by the complainant was unchallenged. It is true that there was no opportunity to cross-examine him on behalf of the registrant, but there was no

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30 Section 219(1)(c). The reference by the Tribunal in its reasons to s 179(1)(c) was a slip.

31 [1975] VR 916.

application for an adjournment to allow him to be called or for the hearsay to be struck out on the ground of unfairness. No doubt there were sound forensic reasons for not making such an application. It is too late to complain on appeal of the use to which the evidence was put. The circumstances disclose no error of law.

[55] Finally it was submitted that the discrepancies in the complainant's evidence were such that her evidence could not have enabled the Tribunal to be satisfied of her version of events to the requisite standard, nor to make a favourable finding as to her credibility. The discrepancies were described by Mr Hampson as "not just a succession of factual points … but points whose effect is one in total, and the Tribunal misdirected itself on the evidence." It is implicit in that submission that they were a succession of factual points. They do not cease to be so because a number of them are assembled and the findings criticised. They do not demonstrate that the Tribunal applied the wrong standard of proof.

[56] In my judgment the proposed appeal is not on questions of law. I would refuse the application.

[57] The orders should be:

1. Appeal by the Dental Board of Queensland allowed.
2. Set aside paras 2, 3, 4 and 6 of the decision of the Health Practitioners Tribunal made on 11 October 2002.
3. Order that the matter be remitted to the Tribunal for determination.
4. Order that until such determination the name of the registrant be suppressed.
5. Application for an extension of time within which to cross-appeal dismissed.
6. Order that the registrant pay the Board’s costs of the appeal and the application, to be assessed.

[58] **MUIR J:** I agree with the reasons of Fryberg J and the orders he proposes for disposing of this appeal.

Annexure A: Ex Tempore Reasons for Form of Order – 11 October 2002

"HIS HONOUR: In the reasons for judgment in this matter, the Registrant is required to be supervised. In a letter of the Dental Board of 6th June 2002, certain conditions were placed upon the Registrant, namely "(i) to (vi)".

It is not contested that those conditions can apply further in the future, with an added condition that the Board appoint a mentor from outside the Registrant's practice for a period of two years to carry out supervision, if necessary.

It was argued by the Board that a period of suspension would be appropriate. In both cases referred to, of Saidden, a decision of the New South Wales Dental Board, and the other decision of Dr Ho, for the Dental Board New South Wales, both fairly recent decisions, periods of suspension were placed upon practitioners. Both of those practitioners were convicted of criminal offences.

In the first instance, in Saidden's case, it was a conduct on a number of occasions by massaging, inappropriately. In Ho's case, there was an element of planning involved and one might describe as bizarre conduct which would be of concern to this Tribunal for patients, and periods of suspension were justified in both instances.

In The Medical Board of Queensland against Dr "H", a decision of this Tribunal, 4th of June 2001, conduct of a more serious nature in relation to suggestions and attempted oral sex were, obviously, in a different category to the present case of the charge being of firmly grabbing a breast of a patient for a few moments. Conduct like this has to be deterred.

The comments of Justice Fryberg sitting in the Medical Assessment Tribunal, on the 18th of December 1997 are relevant. Those comments appear at page 6 of The Medical Board of Queensland v Dr "H" decision.

> "The community is entitled to know that medical practitioners who transgress the grounds of proper professional behaviour, will be dealt with and punished by the Tribunal and, more importantly, that, in appropriate cases, the public will be protected from their activities by periods of suspension or by the de-registration of the practitioner. On the other hand, the public also expects that the circumstances of individual cases will be taken into account to ensure fairness in the particular case."

The Tribunal cannot apply a principle of suspension to every case. It would be inequitable to do so because circumstances differ. The particular circumstances here, and which concern the Tribunal at the outset, was that a young practitioner was left without assistance during the course of a consultation. The person, for some reason, did not appear when she was supposed to have appeared. That, of course, does not, in any way, excuse the Registrant but it does reflect upon the need in professional practices where there is intimate touching, by virtue of the procedures, to have a third person there to avoid any

misunderstanding. The findings are that the Registrant did grab the patient's breast on the outside of her clothing.

The suspension of three months in The Medical Board of Queensland v "H" was, in my view, fully justified. In the present case, we have a 24 year old practitioner who, in his early months of practice, was exposed to a temptation he could not resist. Apart from the humiliation of coming before the Tribunal and being found guilty of a serious charge under the Act, he has conditions placed upon him which he has to inform any other practitioners practising with him. He is also to pay the costs of these proceedings, which will be substantial.

The orders will be in terms of the judgment which will be published. I further order that the Registrant pay the Board's cost of the investigation, to be fixed at $1,826.49.

I further order that the Registrant pay the Board's cost of these proceedings, to be assessed on the District Court scale for matters greater than $50,000.

The other orders are in terms of the suspension – of the supervision, rather, which I have already read into the record."