SUPREME COURT OF QUEENSLAND

CITATION:	*Medical Board of Qld v Thurling* [2003] QCA 518
PARTIES:	**MEDICAL BOARD OF QUEENSLAND** (registrants board/respondent) **v** **GREGORY PETER THURLING** (applicant/appellant)
FILE NO/S:	Appeal No 6842 of 2003 DC No 4624 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Health Practitioners Tribunal at Brisbane
DELIVERED ON:	21 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2003
JUDGES:	de Jersey CJ, Davies JA and Mullins J Judgment of the Court
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	PROFESSIONS AND TRADES – MEDICAL AND RELATED PROFESSIONS – MEDICAL PRACTITIONERS – DISCIPLINE, AND REMOVAL FROM AND RESTORATION TO REGISTER – INFAMOUS CONDUCT OR MISCONDUCT IN PROFESSIONAL RESPECT – PARTICULAR CASES – where appellant commenced and maintained sexual relationship with patient – where appellant suspended for 12 months – whether suspension manifestly excessive *Anti-Discrimination Act* 1991 (Qld), ch 3 *Health Practitioners (Professional Standards) Act* 1999 (Qld), s 59 *Sex Discrimination Act* 1984 (Cth) *Re a Medical Practitioner* [1995] 2 Qd R 154, approved *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630, approved *Medical Board of Queensland v Bayliss* [2000] 1 Qd R 598, approved *Medical Board of Queensland v Martin* [2000] 2 Qd R 129, distinguished *Ooi v Medical Board of Queensland* [1997] 2 Qd R 176,

approved

COUNSEL: D H Tait for the appellant
J A Logan SC, with A J MacSporran, for the respondent

SOLICITORS: Harry McCay for the appellant
Gilshenan & Luton for the respondent

[1] **THE COURT:** The appellant is a general medical practitioner who has for many years practised in Yungaburra, on the Atherton Tableland in Far North Queensland. The respondent, the Medical Board of Queensland, charged the appellant with unsatisfactory professional conduct in that between 1 August 1996 and 31 January 1997 he commenced and maintained a sexual relationship with one of his female patients. The charge was heard by the Health Practitioners Tribunal constituted by a District Court Judge assisted by three assessors, two of whom were medical practitioners and the third, a member of the public drawn from a panel.

[2] The Tribunal upheld the charge, while dismissing two other separate charges. It determined that the appellant's registration as a medical practitioner be suspended for 12 months, and made some ancillary orders. The appellant seeks an order setting aside the suspension, which he contends is manifestly excessive. He also particularly challenges a finding by the Tribunal that he exploited the complainant for his own sexual gratification.

[3] It is convenient to deal first with the challenge to that factual finding. An appeal from the Tribunal to this court lies only on a question of law. It is therefore necessary for the appellant to demonstrate that the finding is one which could not reasonably have been made.

[4] The complainant, whose affidavit evidence on the matter was accepted by the Tribunal, became a patient of the appellant in late 1993. Over about three months in 1996, at least three acts of sexual intercourse occurred between the appellant and the complainant, at the appellant's instigation, including once in the consulting room of his surgery at Malanda. The Tribunal found that it was the complainant who ended the relationship. The Tribunal accepted this account from the complainant:

> "Following the last sexual intercourse I had with Dr Thurling I had decided that it was not right as he was my doctor and we shouldn't be having a relationship. I recall a telephone call from Dr Thurling when he phoned me at the Lake Eacham Caravan Park where he said to the effect 'Why aren't you coming to the surgery anymore'. I said 'Because I think what you're doing is not appropriate for a doctor and a patient'. He said 'Are you trying to tell me that I am a bad person?' I said, 'Well, you're not a good person'. He said 'It is the only way I have of socialising'. I didn't know what to say after that so I hung up. I had ceased seeing Dr Thurling as his patient at the time and I decided not to have anything more to do with him."

[5] The finding of exploitation by the appellant of the complainant for his own sexual gratification is drawn from these observations by the learned Judge constituting the Tribunal:

> " … It is almost trite to observe that a medical practitioner is plainly in a position of trust and power in relation to a patient. Any exploitation of that relationship necessarily involves exploitation of the patient. [The complainant] had discussed with the registrant her domestic difficulties and her unhappy personal situation. He must have known of her position of vulnerability. Unlike certain other cases that have come before this Tribunal, the relationship here was not one founded on a genuine and mutual emotional attachment. The circumstances surrounding the acts of intercourse as outlined by [the complainant] demonstrate to my satisfaction an exploitation of that vulnerability by the registrant for his own sexual gratification. Her evidence, by way of example, included the following:
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> > 'After we had finished the sexual intercourse I had a shower and I went home. It was clear to me that I was there simply for sexual intercourse. Dr Thurling said 'goodbye'. I had the impression that he had finished with me and I wanted to go so I left and went home.'"

[6] The evidence accepted by the Tribunal was that the complainant had told the appellant that she was living in an unsatisfactory domestic situation, in that she was forced to live with a male person, against her inclination, because of a mutual financial arrangement concerning the dwelling. Counsel for the appellant sought to downplay the suggested vulnerability of the complainant, but in our view the evidence identified by the Tribunal was adequate to justify its conclusion. In particular, and specifically in relation to penalty, Counsel contrasted this complainant's vulnerability with that of a patient suffering mental illness, or a victim of prior sexual abuse, or an extremely lonely person, or a victim much younger than the doctor. None of that however detracts from the finding made by the Tribunal. This was, on any reasonable view, conduct directed by the appellant towards his own sexual gratification, by means of the complainant, his patient, whom he had through that professional relationship identified as a person with whom he might so engage; and with the additional circumstance that he knew that she was saddled with an unsatisfactory domestic situation which caused her concern.

[7] The challenge to the 12 months suspension (stayed on 8 August 2003 pending the determination of this appeal) was based on the contention that the Tribunal failed to give sufficient weight to this combination of particular features:

(a) the appellant did not contest the charge, and in fact admitted it at an early stage;

(b) the comparatively brief relationship, which was "consensual", occurred in 1996 and there had been no demonstrated professional misconduct on the part of the appellant since;

(c) the relationship was terminated by the complainant herself, suggesting there was not "dependence or a lack of independent thought";

(d) before coming before the Tribunal in respect of this charge, the appellant had been suspended under s 59(1) of the *Health Practitioners (Professional Standards) Act* 1999, on 30 April 2002 to 6 September 2002, until the Tribunal allowed his appeal against that suspension, which had been based on the premise that it was necessary "for the purpose of protecting vulnerable persons": the suspension was overturned because of the Tribunal's view that suspension was not, in terms of the statutory provision, "the least onerous [response] necessary to protect the vulnerable persons"; and

(e) the appellant is the only medical practitioner in Yungaburra, with the next doctor and hospital a 15 minute drive away in Atherton; he is the only doctor providing a "bulk billing" facility, and many of his patients are welfare recipients who could not easily afford to meet a "gap" payment.

[8] Counsel for the appellant referred us to outcomes in a number of other cases. A 12 months suspension was ordered by the Medical Assessment Tribunal in *Medical Board of Queensland v Martin* [2000] 2 Qd R 129, but that case is complicated by the circumstance that the doctor and patient developed an enduring relationship and in fact lived together for at least five years. On the other hand, Counsel for the respondent Board referred to a range of other cases which would support the view that this response was not inappropriate, and could possibly in that context be considered even lenient.

[9] The contention that the relationship was relevantly consensual ignores the feature that it arose out of the inherently unequal professional relationship between doctor and patient, and was in this case additionally characterized by the aspect of exploitation found by the Tribunal.

[10] The learned Judge accepted the complainant's evidence that the relationship had had a detrimental effect upon her, and expressed "real doubt that the [appellant] has yet shown any clear insight into the inappropriate nature of his conduct". His Honour said the appellant's conduct "falls well below the standard that might reasonably have been expected of him by both the community and his professional peers".

[11] That maintaining a sexual relationship with a patient is professional misconduct by a medical practitioner is very well established, and confirmed in reasonably contemporary decisions. See *re a Medical Practitioner* [1995] 2 Qd R 154, 160-164 per Dowsett J. The Hippocratic Oath itself admonishes the doctor against such conduct: "Into whatsoever houses I enter, I will do so to help the sick, keeping myself free from all intentional wrongdoing and harm, especially from fornication with woman or man, bond or free …" (Butterworth's Medical Dictionary 2nd ed, p 812). The vice is what Dowsett J described as breach of the "special trust toward and power over a patient" developing from "intimate access to the body and psyche of the patient". That breach occurs regardless of

consent, although the penalty for sexual depredation committed on a patient without the patient's consent would obviously be much more substantial, if not severe. All these propositions hold notwithstanding what are said to be the changing morés of society. Indeed, there are signs of greater modern understanding and deprecation of the harassment of women in respect of sexual advances made in other situations of imbalance of power, for example, in the workplace – see *Sex Discrimination Act* 1984 (Cth), *Hall v A & A Sheiban Pty Ltd* (1989) 85 ALR 503, *Aldridge v Booth* (1988) 80 ALR 1, *Anti-Discrimination Act* 1991 (Qld) Chap 3. In this context, the Tribunal's apprehension whether the appellant had insight into the inappropriate nature of his conduct – albeit that conduct may not have amounted to "harassment" as defined in that statutory context – was not misplaced.

[12] The court should be circumspect in its approach to the determination of a tribunal of this character which, although constituted by a Judge, contemplates the Judge's being assisted by assessors from the medical profession, and a member of the lay public. The exercise of judicial discretion is no doubt thereby intended to be informed directly by the expression of professional and community views and expectations. Compare, as to other jurisdictions, *Bhattacharya v General Medical Council* [1967] 2 AC 259, 265; *Daly v General Medical Council* [1952] 2 All ER 666, 667; and *Craig v Medical Board of South Australia* (2001) 79 SASR 545, 556.

[13] All of the matters summarized above in the lettered paras were clearly put before the Tribunal. Its expression of reasons is unexceptionable. The learned Judge has not referred expressly to the limited medical resources available to the residents of Yungaburra, and the public interest is a relevant consideration (cf. *Medical Board of Queensland v Bayliss* [2000] 1 Qd R 598, 609-610), but that issue was covered comprehensively in the testimonial evidence, especially in the statement dated 31 January 2003, from Councillor Nelson. It is unfortunate, of course, that this inconvenience should ensue. But if a suspension of this order is otherwise necessary for the protection of the public – and that must be the rationale for the order (*Ooi v Medical Board of Queensland* [1997] 2 Qd R 176, 177, *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630, 637), it would simply be expedient to ignore that necessity in the interests of convenience.

[14] In our view, no ground has been established on which this court could properly lift the suspension or reduce its duration. No error of law has been established.

[15] The appeal is dismissed, with costs to be assessed.