IN THE COURT OF APPEAL 99.59

SUPREME COURT OF QUEENSLAND

Appeal No. 5888 of 1998

Brisbane

[Medical Board of Qld v Bayliss]

BETWEEN:

MEDICAL BOARD OF QUEENSLAND

Appellant

AND:

PETER JOHN BAYLISS

Respondent

CASE STATED PURSUANT TO S43(1) OF THE *MEDICAL ACT 1939 (QLD)*

McMurdo P
McPherson JA
Thomas JA

Judgment delivered 5 March 1999.

Joint reasons for judgment of McMurdo P and Thomas JA, separate reasons of McPherson JA concurring as to the orders made.

THE QUESTIONS PRESENTED DURING HEARING OF THE STATED CASE TO BE ANSWERED AS FOLLOWS:

1. Did the Tribunal err in law in taking into account an irrelevant consideration that there would be damage to the public interest if the Greenslopes Clinic were to close?

Answer: No.

2. Did the Tribunal err in law in finding in effect that for the purposes of imposing a sanction under the *Medical Act* 1939 (as amended) there is a relevant distinction between deliberate misconduct by positive acts and misconduct by way of deliberate positive omission amounting to gross negligence?

Answer: The court declines to answer this question.

3. **Did the Tribunal err in law in finding that the appropriate sanction was suspension from the Register of Medical Practitioners for a period of three (3) months on the basis that the sanction is unreasonably or plainly unjust?**
Answer: No.

4. **If yes to 1, 2 or 3, what is the appropriate sanction?**
Answer: Unnecessary to answer.

5. **Did the Tribunal fail to take account of a material consideration that the financial and personal burden borne by the respondent would be considered by the medical profession and the public?**
Answer: No.

6. **Was it open to the Tribunal having regard to the findings as a whole to find that the omissions referred to in sub-paragraph 5(3), (6) and (9) of the case stated together endangered the patient's health?**
Answer: Yes.

7. **Having regard to the findings as a whole was it open to the Tribunal to make the findings at sub-paragraphs 5(4), (7) and (10) of the case stated?**
Answer: Yes.

8. **Was it open to the Tribunal to make the finding at paragraph 5(13) of the case stated?**
Answer: Yes.

9. **If the answer to question 6 is "no", was the Tribunal required as a matter of law to make a finding whether or not Xinh Ly's vegetative state was caused by the negligence of the practitioner?**
Answer: Unnecessary to answer.

STAY OF ORDERS OF FRYBERG J DATED 18 FEBRUARY 1998 EXTENDED FOR 28 DAYS FROM TODAY.

CATCHWORDS: **MEDICAL ASSESSMENT TRIBUNAL - case stated - desirability that case include questions raised - misconduct in a professional respect - whether "endangering the health of the patient" is an element of a charge under s35(1)(*l*) *Medical Act 1939 (Qld)* - deliberate positive omission amounting to gross negligence - whether professional misconduct - damage to public interest a relevant consideration on penalty - whether legal error in determination of penalty.**

Counsel: Mr I Hangar QC, with him Mr S Zillman for the appellant.
Mr P Morrison QC, with him Mr D Andrews for the respondent.

Solicitors: Gilshenan & Luton for the appellant.

Gadens Lawyers for the respondent.

Hearing Date: 17 February 1999.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

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Brisbane

Before McMurdo P
McPherson JA
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BETWEEN:

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PETER JOHN BAYLISS

Respondent

CASE STATED PURSUANT TO S43(1) OF THE *MEDICAL ACT 1939 (QLD)*

REASONS FOR JUDGMENT - McMURDO P and THOMAS JA

Judgment delivered 5 March 1999

1 On 6 February 1998, after a fourteen day hearing, the Medical Assessment Tribunal found Dr Bayliss guilty of misconduct in a professional respect. After further proceedings the tribunal ordered (upon certain undertakings of Dr Bayliss as to the manner of performance of procedures involving the administration of anaesthetic) that his registration as a medical practitioner be suspended for 3 months and that he pay 80% of the Board's costs to be taxed. Dr Bayliss wished to challenge the finding made against him of misconduct in a professional respect, and also to challenge the penalty as excessive. The Board wished to challenge the penalty as inadequate.

Case Stated

2 The parties' rights of appeal are limited to a case stated under which relief may be granted only in respect of errors of law and for excess of jurisdiction[1]. The parties applied to the judge who constituted the Tribunal[2], to state a case[3] for the consideration of the Court of Appeal. The question immediately arose whether the grounds upon which the parties wished to challenge the decision disclosed errors of law.

3 His Honour stated what he regarded as the ultimate material facts but unfortunately declined to state the grounds or questions that the case was supposed to raise. His Honour observed, "it is not necessary, since the issues will appear adequately from the outlines of argument which the parties must file and serve", adding that if the parties differed from his view they might seek directions from the Court of Appeal with regard to filing grounds of appeal. As the parties had already been involved before his Honour in very protracted and expensive litigation, it is hardly surprising that they contented themselves with the case as stated by his Honour and opted for the luxury of an appeal not limited by specific grounds. In the result this court encountered considerable difficulty in dealing with the matter.

4 It should be obvious, particularly in an appeal that is confined to questions of law and jurisdiction, that the grounds need to be identified with some precision so that it may be seen whether they are confined to the appropriate limits. We are not aware of any previous occasion on which the Tribunal, or for that matter any other referring body has

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1 *Medical Act* 1939 (Qld), s43(1).

2 Ibid s33.

3 Ibid ss43(1), 45.

refused to state the relevant questions that are to be determined.

5 In *R v Rigby*[4] it is noted that it is not a requirement of stating a case that the questions for determination by the Court be included, and no doubt his Honour had in mind such a statement when he decided to leave out the questions. However as a matter of practice it is highly desirable that a case stated should include the relevant questions that are raised. The importance of this can be seen from the above comments and from the review of the procedure by Isaacs J in *Merchant Service Guild of Australasia v Newcastle and Hunter River Steamship Co Ltd [No 1]*[5]. It is of course necessary that the judge include only such questions as conform to s43 of the Act, namely only such questions as may lead to a conclusion that the decision is "erroneous in point of law or is in excess of jurisdiction" or at least such questions as it would be reasonable to argue, conform to that description. While this antiquated procedure continues to exist (despite repeated requests by courts for legislative remedy) it is to be hoped that this experience of refusal by the referring Tribunal to articulate the relevant grounds will not be repeated.

6 Progressively during the hearing of the appeal questions were formulated, and by the end of the hearing the following nine questions had been articulated, although question 9 remained the subject of objection by counsel for Dr Bayliss.

7 The nine questions are:

1. Did the Tribunal err in law in taking into account an irrelevant consideration that there would be damage to the public interest if the Greenslopes Clinic were to close?

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4 (1956) 100 CLR 146, 152.

5 (1913) 16 CLR 591, 619 et seq.

2. Did the Tribunal err in law in finding in effect that for the purposes of imposing a sanction under the *Medical Act* 1939 (Qld) (as amended) there is a relevant distinction between deliberate misconduct by positive acts and misconduct by way of deliberate positive omission amounting to gross negligence?

3. Did the Tribunal err in law in finding that the appropriate sanction was suspension from the Register of Medical Practitioners for a period of three (3) months on the basis that the sanction is unreasonably or plainly unjust?

4. If yes to 1, 2 or 3, what is the appropriate sanction?

5. Did the Tribunal fail to take account of a material consideration that the financial and personal burden borne by the respondent would be considered by the medical profession and the public?

6. Was it open to the Tribunal having regard to the findings as a whole to find that the omissions referred to in sub-paragraph 5(3), (6) and (9) of the case stated together endangered the patient's health?

7. Having regard to the findings as a whole was it open to the Tribunal to make the findings at sub-paragraphs 5(4), (7) and (10) of the case stated?

8. Was it open to the Tribunal to make the finding at paragraph 5(13) of the case stated?

9. If the answer to question 6 is "no", was the Tribunal required as a matter of law to make a finding whether or not Xinh Ly's vegetative state was caused by the negligence of the practitioner?

8 Paragraph 5 of the case stated is in these terms:

"5. The facts were as follows:

(1) Dr Bayliss was at all material times a person registered as a medical practitioner, whose name remained upon the Register of Medical Practitioners, Queensland.

(2) On 13th January 1994 Xinh Ly was a patient of Dr Bayliss at his clinic at Greenslopes.

(3) On that date, Dr Bayliss omitted to provide supplemental oxygen to Xinh Ly, or to cause it to be provided to her, or to provide a system under which oxygen was provided to her, while she was his patient in the immediate recovery area of his clinic.

(4) A reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, would then have provided supplemental oxygen, or have caused it to be provided, or have provided a system under which it was provided to Xinh Ly.

(5) The omissions referred to in paragraph (3) occurred through negligence by Dr Bayliss in his capacity as a medical practitioner.

(6) On the same date, Dr Bayliss omitted to monitor the condition of Xinh Ly by means of a pulse oximeter while she was his patient in the immediate recovery area of his clinic.

(7) A reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs would then have monitored the condition of Xinh Ly by means of a pulse oximeter.

(8) The omission referred to in paragraph (6) occurred through negligence by Dr Bayliss in his capacity as a medical practitioner.

(9) On the same date, Dr Bayliss omitted to provide a dedicated human

monitoring system for Xinh Ly in the immediate recovery area.

(10) A reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, would then have provided such a system for Xinh Ly.

(11) The omission referred to in paragraph (9) occurred through negligence by Dr Bayliss in his capacity as a medical practitioner.

(12) The omissions referred to in paragraphs (3), (6) and (9) together endangered Xinh Ly's health.

(13) The negligence referred to in paragraphs (5), (8) and (11) was so gross as to satisfy the standard required for a finding of misconduct in a professional respect."

It was expressly noted in the case stated that the Tribunal had made no finding as to the extent to which hypoxia was established when Xinh Ly's condition was discovered. The Tribunal's reasons for judgment were annexed to the case stated.

9 The sole ground for the decision was that on those facts, taken together, Dr Bayliss was guilty of misconduct in a professional respect as defined in s35(1)(*ℓ*) of the *Medical Act* 1939.

The finding of professional misconduct

10 The charge brought by the Board against Dr Bayliss was in the following terms:

> "As a medical practitioner registered pursuant to the Act you were guilty of misconduct in a professional respect in that on the 13th day of January 1994 at Brisbane in the state of Queensland in your capacity as a general practitioner you omitted through negligence to do things which any reasonable person guided by those considerations which ordinarily regulate the conduct of human affairs would do, as shall have endangered the health of your patient one Xinh Ly."

11 The *Medical Act* permits the Board to charge a practitioner with "misconduct in a professional respect", and without limiting the meaning of that expression, s35 sets out numerous defined types of conduct by medical practitioners that are to be included within that term. Relevantly one of its subparagraphs declares that a practitioner is guilty of such misconduct who,

> (*ℓ*) "whether in his or her capacity as a general practitioner or as a specialist omits though negligence to do something which any reasonable person guided by those considerations which ordinarily regulate the conduct of human affairs would do, or does something which a reasonable person claiming such general or special qualifications would not do, or shows in any other way the absence of such reasonable skill and attention as shall have endangered the health of the patient or prolonged the patient's illness or period of convalescence."

12 Questions 6 and 7 above raise a question of law, namely whether the findings of fact were capable of sustaining the conclusion that Dr Bayliss' acts "endangered the health of the patient" within the meaning of those words in s35(1)(*ℓ*) of the Act. It is also a question of law whether the facts as found are capable of establishing negligence so gross as to satisfy the standard required for a finding of misconduct in a professional respect.

13 The primary argument is founded on the circumstance that the Tribunal (his Honour) expressly declined to determine whether the brain damage suffered by Xinh Ly was caused by the omissions that were found against Dr Bayliss. His Honour took the view that Xinh Ly was endangered by the system whether or not it was demonstrated that the system was actually responsible for the catastrophic result. His Honour further took the view that the system exposed Xinh Ly to a risk of brain damage and that she was thereby endangered irrespective of the actual consequences. His Honour's reasons for judgment include the following:

> "A great deal of energy was expended by both sides on the question of whether the brain damage suffered by Xinh Ly was caused by the omissions described above.

> Apparently, this was because the view was taken that if the causal link could be demonstrated, the requirement of s35(1)(ℓ) of the *Medical Act* 1939 that the health of the patient be endangered would be satisfied conclusively. However, as both counsel conceded during addresses, proof that a given danger eventuated is not the only way of proving the existence of the danger. In my judgment, it is sufficient for the purposes of the section for the Board to have demonstrated that the omissions described created a risk of brain damage to Xinh Ly. It does not have to prove that this risk became an actuality.
>
> There was no real challenge on the part of Dr Bayliss to the existence of such a risk. Indeed, the whole system of observation which he described was designed to counter this risk. The risk was that an unmonitored patient, with no reserve of oxygen in her system and with no oximeter in place to give warning of her condition, might cease breathing and develop hypoxia."

14 His Honour then rejected various hypotheses proposed by Dr Bayliss as possible explanations for the brain damage, and concluded that:

> "The evidence points overwhelmingly to the conclusion that the brain damage was caused by hypoxia, the major risk against which the precautions discussed above should have been taken. It is not necessary that I make findings regarding the extent to which hypoxia was established when Xinh Ly's condition was discovered. Just who discovered Xinh Ly's condition and the events which surrounded that discovery were the subject of considerable controversy. For the purposes of this hearing, the existence of the danger to which I have referred is sufficient to satisfy the requirements of s35(1)(ℓ) of the Act."

15 In accordance with a longstanding decision of Philp J[6] on the interpretation of s35(1)(ℓ)[7] the Board framed the charge as omitting through negligence to do certain things "*as shall have endangered the health of your patient.*" Arguably the italicised words are not a necessary ingredient in a charge based upon the first part of s35(1)(ℓ). The commas in that subsection[8] arguably divide the paragraph into three separate parts, and the italicised words apply only to a charge framed under the third part. However Philp J,

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6 *In Re A Medical Practitioner* [1960] Qd R 601.

7 Then numbered s35(xii).

8 Quoted in para 11 above.

whilst apparently conceding that this would be the grammatically correct construction, regarded it as a penal provision, and drew attention to the implication that may follow from the words "shows in any *other* way...the absence of skill etc as shall have endangered the health of the patient". On this basis his Honour apparently considered that such a requirement was intended to be a necessary ingredient in all charges framed under this subsection.

16 Although our initial reading of the paragraph inclined towards a strict grammatical construction, there is some force in the view which Philp J took, and the decision having stood for so long, we are not inclined to overrule it. Understandably the Board framed the charge in reliance upon this interpretation of the section, and the litigation was conducted on that footing. We would therefore hold that this was an element of the misconduct which was alleged against Dr Bayliss, and that the Board had to prove that Dr Bayliss' conduct (in effect his inadequate system in relation to post-operative recovery) was such "as shall have endangered the health of your patient Xinh Ly".

17 Counsel for Dr Bayliss submitted that in the absence of any finding of a causal link between Dr Bayliss' system and the patient's ultimate condition and in the absence of a finding that the patient was not actually being observed by anyone when her difficulties commenced, it could not be found that the absence of an appropriate system endangered the patient's health. The argument was put in various ways but its essence is that the risk that needed to be guarded against was that an unmonitored patient without oxygen supplements and with no oximeter in place might cease breathing and develop hypoxia before medical assistance could prevent or minimise the consequences. The submission is that in the absence of the finding that the patient was actually unmonitored when she stopped breathing it cannot be said that Dr Bayliss' system endangered her health.

18 The answer depends on the meaning of "as shall have endangered the health of the patient". We do not think that "shall have" can inject additional meaning to the primary word "endangered". These words merely supply the tense. The essential meaning of "endanger" is to expose to danger, or to imperil[9]. It falls short of a meaning such as "caused harm to". It is concerned with exposure to risk rather than the actual consequences. If actual consequences were intended to be necessary, a word such as "damaged" would have been used.

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[9] Macquarie Dictionary 3rd Edn.

19 As may be gleaned from the reasons for judgment annexed to the case stated, the original danger was that which was produced by the administration of the anaesthetic. Unless a patient were to be closely monitored when recovering from the effects of the anaesthetic there would be a possibility that ordinary breathing reflexes would not re-start, and that very quickly irreversible brain damage would occur. With that in mind, the fact that Dr Bayliss had rejected advice to purchase and use oximeters, had failed to provide a system of provision of oxygen for the initial recovery stage and had failed to institute a system which would provide personal monitoring of each patient until initial recovery was established, afforded an adequate basis for a finding of negligence. In fairness, Dr Bayliss' system provided for general monitoring by those who happened to be in the vicinity, but this could not ensure constant surveillance of an individual patient. The combination of the above factors to our minds were sufficient to entitle a reasonable Tribunal to hold that Dr Bayliss' system was such as to endanger the health of every patient subjected to such a system, including that of Xinh Ly. We agree with the Tribunal's conclusion -

> "In my judgment it is sufficient for the purposes of this section for the Board to have demonstrated that the omissions described created a risk of brain damage to Xinh Ly. It does not have to prove that this risk became an actuality".

20 A further point raised by counsel for Dr Bayliss is that too high a level of conduct was insisted upon, in as much as the charge was limited to a failure to do something which *any reasonable person* would do. The submission is that this must mean a layperson, and that the standards required of medically trained personnel are not to be imported into this part of s35(1)(ℓ). The passage in question is "omits through negligence to do something which any reasonable person guided by those considerations which ordinarily regulate the conduct of human affairs would do". The subparagraphs of s35(1) do not bear the marks of legal scholarship and they may fairly be described as a rambling excursus extending the meaning of "misconduct in a professional respect" by the expression of various broad categories of conduct. It may well be that the relevant phrase in s35(1)(ℓ) asserts that medical practitioners are not exempt from the requirement of using common sense, but we do not think that it should be read so as to exempt the medical practitioner in question from his or her identity as a medical practitioner. The section is badly drawn, but the court must within reason attempt to make sense of it. We would not construe s35(1)(ℓ) as referring to a person devoid of medical knowledge. On the construction (favourable to the practitioner) of this subsection by Philp J, which we are prepared to accept, the subject of the "health of the patient" is included in this section. This highlights the artificiality of construing the section as referring to a person devoid of medical knowledge. This submission should be rejected.

21 As to the question of whether the facts as found established negligence so gross as to satisfy the standard required for a finding of misconduct in a professional respect, we

are content to accept the approach stated by the members of the New South Wales Court of Appeal in *Pillai v Messiter [No 2]*[10] and in particular the views expressed by Kirby P. This acknowledges that mistakes may be made by the most conscientious professional person, and that in determining whether there has been "misconduct in a professional respect" it is necessary to find something more than mere negligence by the civil standard. A finding is justified however if the negligence, though not deliberate, is so serious that it portrays indifference and an abuse of the privileges which accompany registration as a medical practitioner. A question of degree is involved in such an assessment. It is not amiss to observe that the assessment in this case was made by a Supreme Court judge with the assistance of two experienced qualified medical assessors. It is enough to say that the deficient system that was found to exist was sufficiently substandard to justify the finding, and that no legal error is demonstrated in this respect.

22 So far as Dr Bayliss' appeal against the finding of misconduct is concerned, it is now possible to answer questions 6, 7, 8 and 9.

6. Was it open to the Tribunal having regard to the findings as a whole to find that the omissions referred to in sub-paragraph 5(3), (6) and (9) of the case stated together endangered the patient's health?

Answer: Yes.

7. Having regard to the findings as a whole was it open to the Tribunal to make the findings at sub-paragraphs 5(4), (7) and (10) of the case stated?

Answer: Yes.

8. Was it open to the Tribunal to make the finding at paragraph 5(13) of the case stated? **Answer: Yes.**

9. If the answer to question 6 is "no", was the Tribunal required as a matter of law to make a finding whether or not Xinh Ly's vegetative state was caused by the negligence of the practitioner?

Answer: Unnecessary to answer.

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10 (1989) 16 NSWLR 197.

Imposition of penalty

23 In the course of fairly extensive reasons for the imposition of penalty his Honour canvassed all of the available options, notably pecuniary penalty, striking off, and suspension. In addition, it was appropriate for his Honour to take into account the effect of the proceedings themselves and the effect of the order for costs that it proposed to make against Dr Bayliss[11].

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[11] *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498, 508-509.

24 Among many other factors mentioned by his Honour in determining the appropriate penalty his Honour observed "it does seem to me that there must be some risk of damage to the public interest through the closure of the Greenslopes clinic, if that were to occur, and the consequent lack of convenient facilities and competition between them in Brisbane". This was mentioned in the context of earlier statements that "it is plain that there is a large community demand for Dr Bayliss' services" and that there were limited alternatives available, the only similar facilities being at Caboolture, Bowen Hills and Spring Hill.

25 Quite obviously it was appropriate for his Honour, in the context of deciding the right of continuation of practice of a medical practitioner, to advert to the public interest. Different views might be available as to the accuracy of his Honour's views on that particular matter, but if any error is to be found in that respect it is an error of fact, not an error of law, and it is not a matter for further contemplation by this court.

26 It follows that question 1 should be answered "no".

27 The next question concerns the distinction that was drawn between negligence by

omission and negligence by commission. The essence of the charge was negligence by omission. Section 35 seems to be the product of an age when some store was placed in the distinction between nonfeasance and misfeasance, and the difference between negligence by positive act and negligence by omission. The distinction in our view has little contemporary relevance. The same conduct may, according to the way it is described, be characterised as an act or an omission. For example, in a driving case, "failing to keep a proper lookout" may be regarded as an omission; but if it is seen in context the offence may be seen as the positive act of "driving without keeping a proper lookout". The same may be said in the present case where the omission was to institute a more effective system, while the positive expression of the same misconduct would be "anaesthetising patients without instituting a proper recovery system".

28 There is however a perplexing paragraph in his Honour's reasons which advert to this subject.

> "In this regard one important aspect needs to be noticed. This is a case of negligence by omission. The Board placed no reliance on the general concept of misconduct in a professional respect. It relied only on the extended statutory definition. What has been said in some of the cases about deterrence of misconduct by others related to circumstances of deliberate misconduct by positive acts and is not necessarily applicable, or as applicable, in this case. The threat of a sanction is notoriously less effective as an inducement to careful conduct than it is as a deterrent of deliberate acts of misconduct."

29 The last sentence contains a dubious proposition. However the observation leads nowhere in particular. The reference to "what has been said in some of the cases about deterrence..." is obscure, and the cases are not identified. There is in any event a distinction between comments which an appeal court considers would have been better left unsaid and an actual misdirection[12]. We are unable to ascribe any clear meaning to

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[12] *R v McNamara* (CA No 261 of 1998, 1 December 1998, para 21).

the observation that statements in unnamed cases were "not necessarily applicable, or as applicable, in this case". His Honour's observations also included the following:

> "As this case shows, if warnings are ignored or reasonable expenditure is not incurred for financial reasons when it ought to be incurred, a system may be of such a nature that it amounts to professional misconduct to treat a patient or to permit a patient to be treated, for example by anaesthesia, under it".

This suggests that the relevant conduct was seen in its correct context.

30 We do not consider, reading his Honour's remarks on penalty as a whole, that any operative error can be discerned in this respect. Question 2, which purports to state "in effect" what his Honour found, does not accurately paraphrase his Honour's findings. We would accordingly decline to answer question 2.

31 The next question raises the appropriateness of the order for suspension of Dr Bayliss from the Register for three months. The Board contends that his conduct was so serious that such a suspension was inadequate and plainly unjust. Dr Bayliss on the other hand contends that when considered along with the other consequences it is excessive and plainly unjust.

32 Counsel for the Board submitted that one of the factors which make the matter so serious was the fact that the misconduct reduced the patient to a vegetative state. However it would have been grossly unfair had the Tribunal acted on this footing in imposing a penalty, given the fact that it had expressly declined to make any finding of causation in its determination of misconduct. The Tribunal made no such finding either in the determination of misconduct or during the procedure concerned with imposition of penalty. It is simply not open to the Board to make such a submission to this court. The misconduct was essentially limited to the circumstances that Dr Bayliss' system was substantially deficient or "gross", that it was not momentary or a "one off" occasion, that

parsimony was involved and that he had rejected reasonable suggestions of improving the system.

33 Counsel for Dr Bayliss referred to his Honour's express remark that "the appropriate order to make would be an order in the nature of a pecuniary penalty" followed by a rejection of that course because the maximum pecuniary penalty available under current legislation was $3,000.00. The Tribunal's options were limited by the statute. No error is involved in a Tribunal opting for the most desirable, or the least undesirable of a limited number of available options, when, as the Tribunal correctly perceived, it would have been inappropriate to impose no penalty at all. If the maximum fine available would be absurdly low, there is no error in rejecting that option, provided that a more appropriate result can be achieved. In the present case we can see no error in the Tribunal's ultimate decision to order suspension for a relatively short (but by no means financially insignificant) period. The Tribunal was obviously fully and appropriately aware of the other disadvantages suffered by Dr Bayliss by reason of the legal proceedings, including the order which the Tribunal made that Dr Bayliss pay 80% of the Board's costs. The relevance of these disadvantages, and the alleged failure of the Tribunal to take them into consideration were probably intended to be raised by question 5. It however actually raises a narrower and somewhat remote question. It is enough to note that on any view of it, question 5 should be answered "No".

Conclusion

34 The questions have been answered in the course of these reasons for judgment. It will however be convenient to restate the questions and answers.

1. Did the Tribunal err in law in taking into account an irrelevant consideration that there would be damage to the public interest if the Greenslopes Clinic were to close?

Answer: No.

2. Did the Tribunal err in law in finding in effect that for the purposes of imposing a sanction under the *Medical Act* 1939 (as amended) there is a relevant distinction between deliberate misconduct by positive acts and misconduct by way of deliberate positive omission amounting to gross negligence?

Answer: The court declines to answer this question.

3. Did the Tribunal err in law in finding that the appropriate sanction was suspension from the Register of Medical Practitioners for a period of three (3) months on the basis that the sanction is unreasonably or plainly unjust?

Answer: No.

4. If yes to 1, 2 or 3, what is the appropriate sanction?

Answer: Unnecessary to answer.

5. Did the Tribunal fail to take account of a material consideration that the financial and personal burden borne by the respondent would be considered by the medical profession and the public?

Answer: No.

6. Was it open to the Tribunal having regard to the findings as a whole to find that the omissions referred to in sub-paragraph 5(3), (6) and (9) of the case stated together endangered the patient's health?

Answer: Yes.

7. Having regard to the findings as a whole was it open to the Tribunal to make the findings at sub-paragraphs 5(4), (7) and (10) of the case stated?

Answer: Yes.

8. Was it open to the Tribunal to make the finding at paragraph 5(13) of the case stated?

Answer: Yes.

9. If the answer to question 6 is "no", was the Tribunal required as a matter of law to make a finding whether or not Xinh Ly's vegetative state was caused by the negligence of the practitioner?

Answer: Unnecessary to answer.

35 Both appeals have failed. In the circumstances there should be no order as to costs.

36 The parties have agreed that the stay of the orders of Fryberg J, which remains in force only until determination of the appeal, should be extended for a period of 28 days. Order accordingly.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 5888 of 1998

Brisbane

Before McMurdo P.
McPherson J.A.
Thomas J.A.

[Medical Board of Qld. v. Bayliss]

BETWEEN:

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AND:

PETER JOHN BAYLISS Respondent

CASE STATED PURSUANT TO S43(1) OF THE *MEDICAL ACT 1939 (QLD)*

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 5 March 1999

1 Settling a stated case for the opinion of a court on a question of law is now largely a lost art, if it was in fact a skill ever possessed ever by anyone at all. The law reports abound with instances in which stated cases have been remitted by a superior court for the case to be restated. Where this form of procedure is employed, the practice is for the party who seeks to use it to deliver a copy of a draft case to the other side for consideration and, if thought fit, amendment. If the parties cannot agree on it, the judge or other tribunal who is being required to state the case must in the end determine the form in which it is to be settled. As such, it must conform to certain requirements, otherwise the court to whom it is to go is said to lack what is described as "jurisdiction" to entertain it. See *Merchant Service Guild of Australasia v.*

Newcastle & Hunter River Steamship Co. Ltd. (No. 1) (1913) 16 C.L.R. 591, 619; *Schumacher Mill Furnishing Works Pty. Ltd. v. Smail* (1916) 21 C.L.R. 149, 151.

2 In origin, the procedure by way of case stated was designed to enable the parties to obtain a speedy determination of a question of law without having to go through the process of a common law jury trial; or, where the proceedings were before some other tribunal, without having to resort to one or more of the prerogative writs. It is, as s.43(1) of the *Medical Act 1939* provides or implies, intended to expose for decision a "point of law" or excess of jurisdiction, and not a question of fact. See *Boese v. Fairleigh Estate Sugar Co.*(1919) 26 C.L.R. 477, 483, where the statement of Real J. to that effect in *Stenhouse v. Forth* [1908] St.R.Qd. 226 was approved by the High Court. From this it follows that, unless the statute authorising it expressly so provides, or (perhaps) unless the parties agree to it, the court to which the case is stated is not at liberty to draw inferences of fact from those stated: *Boese v. Fairleigh Estate Sugar Co.* (1919) 26 C.L.R. 477, 483.That is because, unless otherwise provided, the procedure is not an "appeal" that attracts the power of this Court acting under O.70, r.11 to draw inferences from facts found or facts not in dispute; in that respect, there is a marked contrast with the explicit provisions of O.39, r.1. What is to be stated in the case are the "ultimate" facts (and not the evidentiary facts) on or from which the question of law may be recognised as arising, always, however, bearing in mind, that, as Isaacs J. pointed out in *Merchant Service Guild v. Newcastle & Hunter River Steamship Co.*(1913) 16 C.L.R. 591, 621, "what would be primary or evidentiary facts for the purpose of one question may be ultimate facts for the purpose of another".

3 In the present case, the stated case sets out the ultimate facts, which, if I may respectfully say so, are, with possibly one exception to be mentioned, stated with admirable clarity. It does not, however, state any question or questions of law for the decision of this Court. In *Byers v. Rolls* (1877) 5 Q.S.C.R. 34, the Full Court remitted a case to be restated

which did not state either sufficiently or at all the question or questions to be decided. "Under these circumstances", said Cockle C.J., "we are unable to decide the question; because the statute requires them to be raised for us, and raised for us they are not". By contrast, in *The Queen v. Rigby* (1956) 100 C.L.R. 146, 152, the High Court said:

> "When s.36 speaks of setting forth the facts it means the facts which, if the law is applied to them, will decide the matter of the appeal. To them must be added the grounds on which the decision proceeded. It is not required that questions should be appended, although, of course, to append them will not vitiate the case.".

It may be surmised that it was on the authority of this passage in the joint judgment of *The Queen v. Rigby* that the learned judge in this instance declined, when stating the case to this Court, to append questions. We are, of course, bound to follow what was said there, rather than the decision in *Byers v. Rolls*. But, before doing so, it is necessary to examine the particular statutory provision under which the case was stated in *The Queen v. Rigby*. It was s.36(1) of *The Land Acts,* 1910 *to* 1953, which provided that a person desiring to appeal from a decision of the Land Appeal Court on the ground that the decision was erroneous in point of law could apply in writing to that court to state and sign a case "setting forth the facts and grounds of decision for appeal thereon" to the Full Court. The case was then to be transmitted to the Supreme Court, "where, as s.38 provides, the Full Court must determine every question of law arising thereon". This account of the statutory provisions, which is taken from the report of *The Queen v. Rigby* (1956) 100 C.L.R. 146, at 147, shows it to have been rather different from s.43(1) of *The Medical Act 1939*, which expressly requires the "grounds of decision for appeal" to be set out in the case stated, and does not require this Court to determine "every question of law arising thereon".

4 Although s.43(1) does not in terms require a statement of questions of law, but only of the grounds of the decision, the remarks quoted from *The Queen v. Rigby* show that it would not have been improper to have stated questions of law in this instance. It would certainly have

been convenient if some such questions had been stated. What seems clear, however, is that the failure to include them does not deprive this Court of jurisdiction to determine questions of law that can be shown to arise from the facts and the grounds of the decision as "set forth" in the case stated to this Court. It is another matter whether it justifies the set of interrogatories, or all of them, which the parties delivered to this Court at and during the hearing. It is for us, and not for the parties, to say whether those questions, or any and which of them, arise for decision as matters of law in the course of these proceedings.

5 In that regard, there are admittedly difficulties about what may legitimately be referred to in identifying the matters of law to be decided on a case stated. In *Boese v. Fairleigh Estate Sugar Co.* (1919) 26 C.L.R. 477, 483, the High Court exclaimed against the "mass of material", including the original plaint, the judgment of the magistrate from which an appeal had been taken to a District Court judge, the evidence taken, his Honour's own judgment, and the case stated. It is clear from this and other authorities that at least the evidence at the hearing below is not to be included, or, if included, that it is not to be referred to in deciding the questions of law arising on the stated case. The parties to the present proceeding appeared not to dispute that matter. It is to my mind doubtful whether the Tribunal's reasons can be resorted to. Section 43(1) of the Act requires the "facts" and "the grounds of decision for appeal" to be set forth in the case, which appears to me to be an exhaustive description of what may be included in it. If the reasons may legitimately be referred to, they can, in my opinion, at most be used, as Windeyer J. has said, in "elaboration" of express statements in the case itself. See *Marshall v. Whittaker's Building Supply Co.* (1963) 109 C.L.R. 210, 217. It follows that they may not be used to contradict, to vary, or even to fill in any real or supposed gaps, in such statements.

6 With these matters in mind, I turn to the facts and the grounds of the decision set forth in the case stated. The facts stated by the Tribunal appear in the joint reasons of McMurdo P. and Thomas J.A., which I have had the advantage of reading. In my respectful opinion, the

principal question in this case is the relevance, if any, of the finding in para.5(12) of the stated case. It says that the omissions referred to in paras.5(3), (6) and (9) "together endangered Xinh Ly's health". Those particular subparas. of para.5 of the case state as facts that Dr Bayliss (3) omitted to provide supplemental oxygen to Xinh Ly while she was in the recovery area in his clinic; (5) that he omitted to monitor the condition of Xinh Ly by means of a pulse oximeter while she was in the recovery area; and (9) that he omitted to provide a dedicated human monitoring system in that area. Each of these omissions then falls to be considered in conjunction with the individual findings in paras.5(4), 5(7) and 5(10) that, in relation to each of them, the provision of such precautions was something which "any reasonable person guided by those considerations which ordinarily regulate the conduct of human affairs" would have done. The words quoted appear in the first limb of s.35(1)(*l*) of the Act, which provides that a medical practitioner is guilty of misconduct who "omits through negligence" to do something in accordance with the standard so described.

7 Mr Morrison Q.C. on behalf of Dr Bayliss sought to import into the first limb of s.35(1)(*l*) the words that appear at the end of that provision, which are "as shall have endangered the health of the patient ...". But it is, to my mind, really quite clear that this is an exercise in interpretation which it is not possible to perform. Section 35(1)(*l*) provides that a medical practitioner is guilty of misconduct in a professional respect who:

> "(*l*) whether in his or her capacity as a general practitioner or as a specialist omits through negligence to do something which any reasonable person guided by those considerations which ordinarily regulate the conduct of human affairs would do, or does something which a reasonable person claiming such general or special qualifications would not do, or shows in any other way the absence of such reasonable skill and attention as shall have endangered the health of the patient or prolonged the patient's illness or period of convalescence;"

As can be seen, para (*l*) has three limbs, each of which describes a separate form of misconduct in a professional respect. The final words "as shall have endangered the health of the patient"

qualify only the third limb of the paragraph. On any ordinary reading of the paragraph, it is not legitimate to treat those concluding words as applying to the first limb as well as the third. They can be construed as operating only on and qualifying the expression "show ... the absence of such reasonable skill and attention ..." in the third limb. Neither naturally or as a matter of syntax can they be fitted on to or connected with the first limb, which was the part of s.35(1)(*l*) under which the relevant findings in paras.5(3), (6) and (9) were made. A different view of this provision was adopted by Philp J. in *Re A Medical Practitioner* [1960] Qd.R. 601, 605; but, with great respect to that learned judge, I am unable to accept it as correct. Even if the provision is penal in its effect, it is not possible to read the first limb (as it used to be said) *ejusdem generis* with the third limb of s.35(1)(*l*) as if it, too, required proof of danger to health as a prerequisite to a finding of professional misconduct in respect of it. In this particular, I differ from the view adopted by McMurdo P. and Thomas J.A. in their reasons.

8 It is true that, as has already been mentioned, para.5(12) of facts stated in the case says that the omissions referred to in paras.5(3), (6) and (9) "together endangered Xinh Ly's health"; but that statement or finding of fact is not an ingredient of, nor does it impinge upon or affect the status of, the facts set forth in those paras.5(3)(6) and (9), each of which is a statement of fact complete in itself, with an existence independent of what appears in para.5(12). Expressing it in a slightly different and more extended way, the general finding of professional misconduct made against Dr Bayliss depends for its existence on the facts stated in paras.5(3), (6) and (9); and as appears from paras.5(4), (7) and (10), each of them is referable to the first, and not the third limb, of s.35(1)(*l*). In respect of those matters, the relevant omission is stated in each of paras.5(5), (8) and (11) to have "occurred through negligence" by Dr Bayliss as medical practitioner. Those nine paragraphs, whether taken together, or even in cognate groups of three at a time, suffice in law to satisfy the first limb of s.35(1)(*l*), quite apart from what is said in para.5(12) about endangering health. It is that "negligence" in paras.5(5), (8) and (11) that is the

prerequisite for the ultimate conclusion of misconduct in a professional respect which appears in para.5(13). What is said in para.5(12) does not enter into that finding. It could, and, on my view of the proper interpretation of s.35(1)(*l*), should, have been omitted altogether.

9 It does not, however, follow from the fact that para.5(12) is there, or even that a finding to that effect was made, that the Tribunal took into account an irrelevant consideration in the course or for the purpose of arriving at the conclusion of professional misconduct that is stated in para.5(13). It is true that the next full paragraph of the stated case, which is para.6, sets out that:

> "6. The sole ground for the decision was that on those facts, taken together, Dr Bayliss was guilty of misconduct in a professional respect as defined in s.35(1)(*l*) of the *Medical Act* 1939."

Since "those facts taken together" include the statement in para.5(12), it would, on the face of it, suggest that, in arriving at its conclusion of misconduct in a professional respect, the Tribunal did take account of a fact, namely that the omission referred to in paras.5(3), 5(6) and 5(9), endangered Xinh Ly's health. In my respectful opinion, however, it is clear that, whatever para.6 may say about it, para.5(13) shows that a complete finding of misconduct in a professional respect was made before and independently of anything that is said in para.5(12) about endangering the patient's health. In para.5(13) the negligence is said to be so "gross" as to satisfy the standard required for such a finding. But, even if I am wrong about this, I would in any event agree with what is said on this subject by McMurdo P. and Thomas J.A. in their reasons. The health of a patient is capable of being "endangered" even though the danger or risk does not in fact eventuate and produce actual injury to health. This conclusion is not affected either by the use of the grammatical form "shall have" in the third limb of s.35(1)(*l*), or by the presence in that provision of the definite article *"the* patient", rather than the more indefinite "*a* patient". For that purpose, no more is required than the existence of at most one patient whose health has been endangered, even if no injury to his or her health was sustained

as a result. The effect of the matter stated in para.5(12) is that Xinh Ly's health was put at risk by the negligent omission of all of the precautions specified in paras.5(3), (6) and (9); and that remains so, whether or not the omission of those precautions in fact brought about her present unhappy condition. Hence, if it is in law relevant to the first limb of s.35(1)(*f*), the conclusion in para.5(12) is not in law erroneous.

10 In other respects, I agree generally with the reasoning and conclusions of McMurdo P. and Thomas J.A., and with the answers they propose to give to the various questions presented for our consideration at the hearing of the stated case. The only qualification I would add is that I do not consider it either necessary or appropriate, whether for purposes of elucidation or otherwise, to refer to the reasons of the Tribunal in order to arrive at those answers.

11 My assent to their Honours' reasons extends to the answers to questions 1 and 3 concerning the penalty imposed. For what it may be worth, there is authority in *Hornsby Shire Council v. Phillips* (1960) 5 L.G.R.A. 227, 233, that questions of law may include questions concerning the ambit of a discretion under a statute, and the matters to which, by law, it may or may not have regard in exercising it. On that footing, questions 1 and 3 are capable of being considered as raising questions of law relevant to the exercise of the Tribunal's discretion in arriving at the penalty to be imposed. However, I am not persuaded that in imposing the penalty, the Tribunal took into account any consideration that was or is irrelevant, including, among other matters, the impact on the public interest, referred to in para.9(2) of the stated case, of closing the Greenslopes clinic.

12 The stated case does not ask by whom the costs should be paid. However, having regard to the fact that, before this Court, both the Board and the medical practitioner have failed in their contentions, I agree that the appropriate result is that each party should pay its or his own costs; or, in other words, that there should be no order as to costs on either side.