QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Nursing and Midwifery Board of Australia v Bannister* [2021] QCAT 55
PARTIES:	**NURSING AND MIDWIFERY BOARD OF AUSTRALIA** (applicant) **v** **MAURA KATHRYN BANNISTER** (respondent)
APPLICATION NO/S:	OCR355-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	10 March 2021
HEARING DATE:	24 February 2021
HEARD AT:	Brisbane
DECISION OF:	Judicial Member D J McGill SC Assisted by: Ms H Barker, Ms S Hopkins, Mr M Halliday
ORDERS:	**1. The Tribunal decides that the conduct of the respondent set out in the amended referral amounted to professional misconduct.** **2. The Tribunal reprimands the respondent.** **3. The respondent is disqualified from applying for registration as a health practitioner for a period of two years from the date of this decision.** **4. The respondent is prohibited, under the National Law s 196(4), from providing any health service for a period of two years from the date of this decision.** **5. The parties bear their own costs of the proceeding.**
CATCHWORDS:	PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – NURSES – DISCIPLINARY PROCEEDINGS – enrolled nurse not authorised to administer medication – helping to care for elderly, frail family friend - provided unprescribed dose of morphine –

friend died – cause of death unclear, may have been hastened by morphine – registration not renewed – not worked as a nurse since – professional misconduct – sanction

Health (Drugs and Poisons) Regulation 1996 (Qld).
Health Practitioner Regulation National Law (Queensland) s 193B, s 196.
Coroners Act 2003 (Qld) s 39(3), s 51(2).

Health Care Complaints Commission v Do [2014] NSWCA 307.
Health Ombudsman v Kimpton [2018] QCAT 405.
Legal Services Commission v Madden (No 2) (2009) 1 Qd R 149.
Medical Board of Australia v Blomeley [2018] QCAT 163.
Nursing and Midwifery Board of Australia v Carol [2011] QCAT 264.
Nursing and Midwifery Board of Australia v FH [2010] QCAT 675.
Nursing and Midwifery Board of Australia v Fisher [2018] VCAT 1340.
Nursing and Midwifery Board of Australia v Roe [2018] WASAT 92.
Nursing and Midwifery Board of Australia v Seijbel-Chocmingkwan [2015] QCAT 283.
Nursing and Midwifery Board of Australia v Tainton [2014] QCAT 161 .
Pharmacy Board of Australia v Thomas [2011] QCAT 637.
Psychology Board of Australia v GA [2014] QCAT 409.

APPEARANCES & REPRESENTATION:

Applicant:	K Reid solicitor from Clayton Utz
Respondent:	Self-represented

REASONS FOR DECISION

[1] This is a referral by the applicant of disciplinary proceedings against the respondent under the Health Practitioner Regulation National Law (Queensland) ("the National Law") s 193B. In accordance with the *Health Ombudsman Act* 2013 (Qld), I am sitting with assessors Ms H Barker, Ms S Hopkins and Mr M Halliday.

[2] The respondent was a registered health practitioner, being an enrolled nurse. The applicant alleges that the respondent behaved in a way which constituted professional misconduct, in that she administered a controlled drug to a person who was elderly and frail, in circumstances where the drug exceeded the dosage prescribed for the patient, and where her registration was endorsed that she was not qualified to administer medication. Later that day, the elderly person died. It is

alleged that the respondent's action was in breach of the *Health (Drugs and Poisons) Regulation* 1996 (Qld), certain provisions of the Code of Ethics for Nurses, and certain provisions of the Code of Professional Conduct for Nurses, being both Codes approved by the applicant.[1]

[3] The applicant further alleges that in so acting the respondent displayed a culpable disregard for the life, safety or health of the elderly person. A third allegation is that the respondent made certain comments to staff at her place of employment that she had assisted an elderly person to die by the administration of morphine.

[4] The applicant has gathered a quantity of material, and provided an outline of submissions to the Tribunal. The respondent has not provided any material to the Tribunal, although in response to notice of an amended referral the respondent advised that she had not remained registered since the expiry of her then current registration, and that she was currently experiencing an episode of depression as a result of her circumstances. She asserted that at the time she was not acting as a nurse but as a family friend of the deceased, and said that her subsequent statements were careless. The respondent also appeared by telephone at the hearing, but did not oppose the application, saying she just wanted the matter to be concluded.

Background

[5] There is no statement of agreed facts, but the following facts emerge from the material placed before the Tribunal by the applicant. The respondent was born in 1961 and was first registered as an enrolled nurse in August 1998. For some time up to August 2014 she was employed as an enrolled nurse at a Brisbane hospital. At that time her registration noted that she was not endorsed to administer medication.

[6] In July 2014 the respondent assisted in caring for an elderly lady who was receiving palliative care at home, being looked after by her family, and with the attention of her general practitioner, who had been caring for her since 2009. She suffered from significant health problems, including ischaemic heart disease, chronic kidney disease and emphysema, and her health had gradually declined over that period of five years. She had been admitted to hospital on 29 June 2014 because of increasing shortness of breath, but was discharged to a family home on 10 July 2014 after sustaining a fall in the hospital. On 14 July the GP was told by telephone that the lady was not eating, and he suggested fentanyl lozenges. On 15 July he was told that she was not taking the lozenges, and prescribed liquid morphine. She had not previously been on liquid morphine.

[7] It appears that after the lady left hospital it became difficult to give her medication, and her condition deteriorated. She was not seen by a palliative care team, or another care team, or a doctor, at home before she died. The respondent was not paid for her assistance, which was provided on the basis that she was a friend of the family, although they knew that she was an enrolled nurse. They did not know of the note on her registration, or that she did not practice in palliative care.

[8] The general practitioner had prescribed for the lady an oral solution of morphine 5 mg/ml ("Ordine") which was to be taken "one to two mls by measure two to three times a day when required." The lady's daughter, who was generally giving this, was very upset at the distress of her mother, and concerned that her mother was not

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1 National Law s 39.

actually swallowing the doses that she was given.[2] On 16 July 2014 the respondent was at the lady's home in the morning, and knew that the lady had already received one dose of Ordine shortly before. She then provided the lady with a further dose of Ordine, in a quantity greater than that prescribed, without any direction from the general practitioner to do so. Thereafter she did not render or arrange medical assistance for the lady, who passed away later that morning.

[9] Following her death, toxicology reports indicated that she had a potentially fatal level of morphine in her blood. She also had potentially fatal levels of another opioid, fentanyl; two fentanyl patches were found on her body after death, but there was nothing to suggest that the respondent was responsible for them.[3] The forensic pathologist noted that interpretation of drug levels can be difficult, particularly in a palliative setting, that administration of opioid medication palliatively to achieve patient comfort can accelerate death, and that the medical disease of the deceased was of such severity that death was not unexpected.

[10] On 17 July the respondent was at work and made comments to colleagues to the effect that she had helped the deceased to die, that she was proud of this, and that she believed in euthanasia, believed that it should be discussed, and more of it should occur. She referred to herself as the angel of death, and as Dr Kevorkian. When questioned about these statements by her employer, the respondent admitted that the morphine she had administered to the deceased was not a normal dose, because she was not going to let the deceased suffer, and said that she had acted in the best interests of the deceased. Following this, her employment was terminated on about 26 August 2014.[4] Her registration as an enrolled nurse expired on 30 May 2015. At the hearing she said that she had not worked since, as a nurse or otherwise.

[11] In December 2016 a coronial inquest was held into the death of the deceased. The respondent gave evidence at the inquest, where she claimed privilege, and answered questions only under direction. As a result, nothing she said can be treated as evidence in this matter.[5] The coroner did not commit her for trial on any charge.

[12] The initial disciplinary referral to the Tribunal was filed on 1 November 2019. At the hearing the applicant was given leave to file an amended referral, which amended the second allegation, in a way favourable to the respondent.

Characterisation of conduct

[13] The definition of "professional misconduct" in the National Law is as follows:

> ***professional misconduct***, of a registered health practitioner, includes—
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> (a) unprofessional conduct by the practitioner that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and

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2 HB (ie Hearing Book page) 654, 655.

3 There is some evidence they were applied by someone else, believing they were for a purpose other than pain relief.

4 HB 37.

5 *Coroners Act* 2003 (Qld) s 39(3). In order to avoid acting on this indirectly, I have not read the report of the Coroner. See also *Coroners Act* 2003 (Qld) s 51(2).

(b) more than one instance of unprofessional conduct that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and

(c) conduct of the practitioner, whether occurring in connection with the practice of the health practitioner's profession or not, that is inconsistent with the practitioner being a fit and proper person to hold registration in the profession.

[14] The Tribunal has evidence from an expert witness that the actions of the respondent breached the fundamental ethical obligation of nursing, not to harm the patient.[6] In addition, it breached the Regulation, in that she was not authorized to administer Ordine, or indeed any medication. What she did failed to minimize the risk of harm from the drug, and she did not value a culture of safety in health care, or act to maintain the community's trust and confidence in the nursing profession.

[15] Euthanasia is a controversial topic, but as the law stands, it is not legal to cause the death of any person, subject to certain defences not relevant here, even if the person was expected to die anyway in the not too distant future. In factual terms there may be a fine line between making a person as comfortable as possible while waiting for death to come, and acting to speed its arrival, but the legal position is quite distinct, even if the latter can be seen as objectively reducing the suffering of the person. There is an important difference between easing the passing, and speeding the passing. The obligation on the respondent was to comply with the law as it stood at the time, and her private views as to what the law should be were irrelevant.

[16] Apart from this, there are processes which are ordinarily followed when a person who is terminally ill is to be palliated. This is a matter to be discussed with family members, regard is had to any advanced care directive or views then expressed by the patient, and there will be an end of life plan worked out and put in place by a palliative care term, or at least by the general practitioner of the patient. None of this was done in the case of this patient, and it appears that it was not expected that she would die as soon as she did.[7] Where palliation is appropriate, it should occur in a proper manner, and follow the usual procedures.

[17] One serious aspect of this is that the respondent provided medication which was outside the parameters prescribed by the responsible medical practitioner, in circumstances where she was not allowed by her registration to administer medication, and particularly controlled drugs. The applicant submitted that this was analogous to acting in breach of a condition imposed on her registration, and referred to *Nursing and Midwifery Board of Australia v Fisher* [2018] VCAT 1340 at [69]. There is a difference in the nature of the breach here, but the seriousness of the breach is similar.

[18] That the respondent was not acting in the course of her employment is not to the point. She was using her nursing knowledge, and was trusted by the family of the deceased to apply her nursing expertise in caring for the deceased. She was in a practical sense acting as a nurse, and therefore was obliged to comply with the professional and ethical standards expected of an enrolled nurse of her experience.

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6 HB 686 +.

7 Statement of Dr J Stevenson para 95; HB 305.

[19] With regard to the second allegation – that there was culpable disregard for the life, safety or health of the deceased by the respondent in acting as she did – this is a serious allegation, but it does not go so far as to allege that the respondent intended to shorten the life of the deceased. Rather it is alleged that she acted in wrongful disregard of the possibility that by administering such a dose she could well bring about that effect. In the light of the evidence available about the respondent's behaviour on 16 July, and her statements on 17 July, the appropriate inference is that she did deliberately disregard the possibility that what she did could well shorten the life of the deceased, and such behaviour was in the circumstances culpable.

[20] As to the third allegation, about the statements made the next day, I accept that those statements were made, and that for the respondent to speak in that fashion was inconsistent with the behaviour to be expected of an enrolled nurse of her experience. It is one thing to have and to express a view on whether euthanasia should be legalized, and whether that should be discussed; it is another to support a failure to comply with the existing law in order to bring about that outcome. I consider that the remarks can fairly be interpreted as falling on that side of the line, and that in making them the respondent fell below the standard of behaviour the community is entitled to expect from an enrolled nurse.

[21] Overall therefore I have no hesitation in treating the respondent's behaviour on these occasions as satisfying both paragraph (a) and paragraph (c) of the definition of professional misconduct.

Sanction

[22] In imposing a sanction, the health and safety of the public are paramount.[8] Disciplinary proceedings are protective, not punitive in nature.[9] Relevant considerations include both personal and general deterrence, the maintenance of professional standards and the maintenance of public confidence.[10] Insight and remorse on the part of the respondent are also relevant.[11] What matters is the fitness to practice of the respondent at the time of the hearing.[12] A list of factors which may, in a particular case, be relevant, was given by the State Administrative Tribunal of Western Australia in *Nursing and Midwifery Board of Australia v Roe* [2018] WASAT 92 at [55].

[23] In the present case the death of the deceased may well have been accelerated by the actions of the respondent. This upset the members of the deceased's family, who complained that it was not a matter the respondent should have taken into her own hands, and that they had relied on the respondent's nursing knowledge in caring for the deceased.[13] She had taken it upon herself to decide something which it was not for her to decide. Afterwards, at the hospital, the respondent's comments were, as the applicant submitted, glib and insensitive at best. Overall she breached, in a very serious way, the fundamental obligation of a nurse, indeed of any caring professional, to do no harm to the patient.

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8 National Law, s 3A, s 4.

9 *Legal Services Commission v Madden (No 2)* (2009) 1 Qd R 149 at [122].

10 *Health Care Complaints Commission v Do* [2014] NSWCA 307 at [35]; *Health Ombudsman v Kimpton* [2018] QCAT 405 at [79].

11 *Medical Board of Australia v Blomeley* [2018] QCAT 163 at [140] – [143].

12 *Pharmacy Board of Australia v Thomas* [2011] QCAT 637 at [31].

13 HB 655.

[24] The respondent has shown little indication of remorse for her conduct, and her assertion that she was acting in a private capacity and not as a nurse shows an absence of insight into the wrongfulness of her conduct. On the other hand, following her comments she lost her job, and thereafter she did not renew her registration as a nurse. She has been away from the profession ever since. This is a relevant factor.[14] It is also appropriate to recognise that she may find herself in a difficult position, because anything she says in a positive way to provide evidence of remorse, or insight into inappropriate conduct, may potentially assist in exposing her to a criminal charge.

[25] The applicant submitted that the appropriate sanction is that the respondent be reprimanded, that she be precluded from applying for registration as a registered health practitioner for a period between six and ten years from the date of the Tribunal's order, and that she be prohibited from providing any health service during the preclusion period.[15] A submission that a costs order should be made against the respondent was withdrawn at the hearing. In view of the serious nature of the conduct, a reprimand is appropriate.

[26] A number of decisions were referred to as comparatives, although the applicant conceded that none provided a good example of similar circumstances. Some cases followed conviction of serious criminal offences, but apart from the fact that the respondent has not been convicted of any criminal offence, the relevant conduct was more serious in those cases. In one case a nurse gave an unauthorized injection of morphine, and then committed a sexual offence on the patient.[16] In another the practitioner had been convicted of a number of offences of extreme violence, including attempted murder.[17] In *Nursing and Midwifery Board of Australia v FH* [2010] QCAT 675 a preclusion period of eight years was imposed on a person convicted of sexual offences, including one count of rape, committed about twenty years earlier, although it was said that a period of five years would have been appropriate but for a failure to disclose the charges when applying for renewal of registration. In that case the nurse had surrendered his registration after being sentenced to imprisonment, only a little over a year before the order of the Tribunal.

[27] I was also referred to matters involving administration of medication without authorization, or contrary to the practitioner's formal limitations. These cases resulted in periods of suspension, or a relatively short preclusion period, but in the circumstances are less serious overall than the present.

[28] It is also relevant to bear in mind that the expiry of any preclusion period will not lead to the automatic return of the respondent to practice. Given her time away from practice, it would be necessary for the respondent to undergo some retraining, and to satisfy the applicant that she was a fit and proper person to be registered at that time. If she has been unable to work for so long because of depression, the applicant may well require evidence from her that she does not have any current impairment at that time. It may be in practice unlikely that the respondent would take the trouble to return to nursing for only a few years.

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14 *Nursing and Midwifery Board of Australia v Tainton* [2014] QCAT 161 at [36]; *Psychology Board of Australia v GA* [2014] QCAT 409 at [38], [40].

15 Under the National Law s 196(4). A breach of such an order is an offence: s 196A.

16 *Nursing and Midwifery Board of Australia v Carol* [2011] QCAT 264: 8 years preclusion from order.

17 *Nursing and Midwifery Board of Australia v Seijbel-Chocmingkwan* [2015] QCAT 283: 10 years preclusion from order, proposed by the parties in joint submissions.

[29] Although there is no evidence that any depression of the respondent was precipitated by these events, the timing suggests that it was, and in the circumstances I am prepared to draw that inference. It follows that in a practical sense the respondent withdrew from nursing as a result of these events, and in such a situation I consider it appropriate to frame a preclusion period by reference to her overall time away from nursing. She has been away from nursing for six and a half years, and a preclusion period of two years from the date of the order would mean a period away from the profession of at least eight and a half years. It would be expected that even after that time there would be some additional period required, to retrain and to satisfy the requirements of the applicant, so that the real effect of such a period would mean at least nine years away from the profession. That may be compared with the period away from the profession in *Carol* of twelve years, taking into account the time prior to the order, in what I regard as a worse case.

[30] It may be that any preclusion period in this case is academic, and the respondent will never return to nursing. Nevertheless, it is appropriate that there be a period fixed, because of the consideration of general deterrence. Practitioners need to be aware that conduct such as this can be expected to lead to the loss of their profession, or at least a substantial time away from it. I consider that the period of two years, in addition to the time which has already passed, will be sufficient for that purpose. The length of the preclusion period after the order in this case is so short because it has taken so long for this proceeding to be brought, and to be resolved.

[31] The applicant also seeks that the respondent be prohibited from providing any health service for the duration of the preclusion period, on the basis that her conduct in this case involved her disregarding clear limitations on her registration. In circumstances where a health practitioner has misused medication, there is concern about the possible future misuse of medication if the practitioner is able to continue to provide any health service, even if not a registered health practitioner. Although again in this case such a restriction is likely to be academic, because of that consideration I agree that it is appropriate to make such an order.

[32] I have had the benefit of the assistance of the assessors in this matter. The decision of the Tribunal is therefore as follows:

1. The Tribunal decides that the conduct of the respondent set out in the amended referral amounted to professional misconduct.

2. The Tribunal reprimands the respondent.

3. The respondent is disqualified from applying for registration as a health practitioner for a period of two years from the date of this decision.

4. The respondent is prohibited, under the National Law s 196(4), from providing any health service for a period of two years from the date of this decision.

5. The parties bear their own costs of the proceeding.