Naidu v Medical Board of Australia & Anor [2016] NTSC 8

PARTIES:	NAIDU, Ajay v MEDICAL BOARD OF AUSTRALIA and HEALTH PROFESSIONAL REVIEW TRIBUNAL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 10 of 2015 (21559722)
DELIVERED:	18 FEBRUARY 2016
HEARING DATES:	2 FEBRUARY 2016
JUDGMENT OF:	KELLY J
APPEAL FROM:	HEALTH PROFESSIONAL REVIEW TRIBUNAL

CATCHWORDS:

APPEAL – Appeal on question of law only – Whether Tribunal made findings of fact where no evidence – Evidence available to support findings – No error of law – Inferences not unreasonable – Appeal dismissed

APPEAL – Appeal on question of law only – Whether error of law in treating guidelines as prescriptive – Held no error- Appeal dismissed

APPEAL – Appeal on question of law only – Whether Tribunal erred in elevating objective of providing for health and safety of the community to prime consideration – Held no error – Appeal dismissed

Health Practitioners Act (NT) ss 64(1), 99(1)(g), 157; sch 4 para 4
Health Practitioner Regulation National Law (NT) ss 3(2)(a),3A, 4, 5, 193(1)(a)
Health Practitioner Regulation National Law Act 2009 (Qld)
Northern Territory Civil and Administrative Tribunal Act s 141(1)

Medical Board of Australia and Ajay Naidu [2015] NT Health Professional Review Tribunal (27 November 2015); *The Medical Practitioner v Medical Board of Australia* [2011] ATSC 191; referred to

Clyne v NSW Bar Association (1960) 104 CLR 186; *Health Care Complaints Commission v Do* [2014] NSWCA 307; *Health Care Complaints Commission v Dr Nicolova-Trask* [2014] NSWCATOD 149; *Wilson v Lowery* (1991) 4 NTLR 79; relied on

REPRESENTATION:

Counsel:

Appellant:	M Crawley
Respondents:	G McMaster

Solicitors:

Appellant:	Paul Maher Solicitors
Respondents:	Australian Health Practitioner Regulation Agency

Judgment category classification:	B
Judgment ID Number:	KEL16001
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Naidu v Medical Board of Australia & Anor [2016] NTSC 8
No. LA 10 of 2015 (21559722)

BETWEEN:

AJAY NAIDU
Appellant

AND:

MEDICAL BOARD OF AUSTRALIA
First Respondent

AND:

HEALTH PROFESSIONAL REVIEW TRIBUNAL
Second Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 18 February 2016)

[1] On 27 November 2015, the second respondent ("the Tribunal") made a decision suspending the appellant from practising as a registered health practitioner for a period of four months from 7 December 2015. The decision was made on the application of the first respondent ("the Board") following a complaint to the Board by Patient B. The substance of that complaint was that the appellant had had an affair with Patient B's wife (Patient A) while she was his patient and while also continuing to treat Patient B and the two children of Patient A. In addition, Patient B

complained that DNA testing had confirmed that the appellant, and not Patient B, was the father of the two children of the marriage.

[2] In making its determination, the Tribunal made a finding that having a sexual relationship with Patient A was professional misconduct.[1] That was apparently accepted by the appellant. The Tribunal also found that the breach of trust in continuing to treat Patient B while conducting a sexual relationship with his wife also amounted to professional misconduct.[2] Although admitting the conduct in question, the appellant had submitted to the Tribunal that that conduct amounted to unprofessional conduct only – not to professional misconduct.

[3] The appellant has appealed to this Court against that decision of the Tribunal. The Tribunal has filed a submitting appearance and has been given leave to withdraw from the proceeding.

[4] The notice of appeal sets out the grounds of appeal in the following terms.

1. In relation to Patient B,

    a. The Tribunal misdirected itself as to the nature of professional boundaries;

    b. The Tribunal made findings of fact not supported by any evidence;

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1 *Medical Board of Australia and Ajay Naidu* [2015] NT Health Professional Review Tribunal (27 November 2015) 'Reasons for decision of the Tribunal' [25]

2 Ibid [26]

c. The Tribunal misdirected itself as to how his safety could be put at risk;

d. Erred in categorising the appellant's conduct as professional misconduct.

2. In imposing a four month actual suspension, in addition to the other penalties imposed,

a. the Tribunal misdirected itself in its consideration of protection of the public and for the maintenance of proper ethical and professional standards for the profession,

b. as a consequence of which it imposed a period of suspension that was manifestly excessive.

[punctuation in original]

[5] The appellant seeks orders that a finding of unprofessional conduct be substituted for the finding of professional misconduct, and that the period of suspension from practise be removed or reduced.

[6] Unprofessional conduct is defined in the *Health Practitioner Regulation National Law* (NT) ("the National Law")[3] as "professional conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner by the public or the practitioner's peers".[4] Professional misconduct is defined to include:

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[3] The *Health Practitioner Regulation (National Uniform Legislation) Act* s 4 provides that the Health Practitioner Regulation National Law, as in force from time to time, set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld) applies as a law of this jurisdiction and, as so applying, is referred to as the *Health Practitioner Regulation National Law* (NT).

[4] Section 5: a non-exclusive list of examples follows the definition.

(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;

(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 health practitioner being a fit and proper person to hold registration in the profession.[5]

[7] An appeal lies from the Tribunal to this Court on a question of law only.[6] The three grounds of appeal which were pressed on the hearing of this appeal were:

(a) a contention by the appellant that the Tribunal had made findings of fact in paragraphs [50] and [51] of its reasons for decision for which there was no evidence;

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5 Section 5

6 The Tribunal was established by the *Health Practitioners Act* ("HPA"). HPA s 99(1)(g) provided a right of appeal from the Tribunal to the Supreme Court on questions of law only. By an amendment to the HPA which came into effect on 1 June 2015, the Tribunal was replaced by the Northern Territory Civil and Administrative Tribunal ("NTCAT") as the body to which matters of this kind were to be referred by the Board. This matter had been referred to the Tribunal by the Board under s 193 of the *Health Practitioner Regulation National Law* (NT) before those amendments came into effect. Under the transitional provisions [HPA s 157], in those circumstances the Tribunal was obliged to continue to deal with the matter in accordance with the former legislation. It was common ground that that included the right to appeal in s 99(1)(g). [A similar right of appeal exists from NTCAT to the Supreme Court under the *Northern Territory Civil and Administrative Tribunal Act* s 141(1).]

(b) a contention by the appellant that the Tribunal had misinterpreted the Codes referred to in the reasons for decision and wrongly elevated them to prescriptions rather than guidelines; and

(c) a contention by the appellant that the Tribunal had wrongly elevated the objective in the National Law of providing for the health and safety of the community from a merely relevant consideration to the prime consideration.

Ground 1: (the contention that findings of fact were made for which there was no evidence)

[8] The appellant contends that there is no evidence to support the findings made at paragraphs [50] and [51] of the Tribunal's reasons for decision. Those paragraphs read as follows:

> 50. His [ie Patient B's] emotional safety was certainly put at risk. His mental safety may have been put at risk. His life was substantially disrupted.
>
> 51. That those risks and the disruption was caused by his own medical professional who by doing so had breached the medical practitioner code of conduct no doubt added to the angst.

[9] If there is evidence which, if believed, would support a finding of fact made by the Tribunal, there is no error of law. Findings of fact which are perverse or against the weight of the evidence, or based on reasoning which is demonstrably unsound are not errors of law. If there are facts on which an inference might be drawn, there is no error of law. If there is no

evidence to support a finding of fact there is an error of law. If an inference which has been drawn is unreasonable (in the sense that no reasonable decision maker could possibly draw the inference) there is an error of law.[7]

[10] The questions for this Court are whether there is any evidence capable of supporting the relevant findings of fact by the Tribunal and, in the case of inferences which have been drawn, whether there are facts capable of supporting the inferences and whether the inferences are so unreasonable that no reasonable decision maker could have drawn them.

[11] Patient B swore a statutory declaration dated 25 September 2015. In the last paragraph of that statement he said:

> I respected the friendship that I developed with Dr Naidu and I trusted him. As a consequence of separating with my wife, I have lost everything, my business, properties I made working three jobs for over ten years and access to my children.

[12] It seems to me that this is evidence which is capable of supporting the finding by the Tribunal that Patient B's life was substantially disrupted.

[13] Annexed to that statement are copies of a series of highly emotionally charged emails passing between Patient B and the appellant's wife including the following, from Patient B:

> … I am more hurt that your fucking bastard of a husband ate my food and shat in my plate, shows what type of bastard human being he is. No wonder u are always so stressful like me …

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[7] *Wilson v Lowery* (1991) 4 NTLR 79, 84-5; see also the discussion of these general principles in D Mildren, *The Appellate Jurisdiction of the Courts in Australia* (Federation Press, 2015), 16-18

> Just don't let [the appellant] come in front of me I will show him who needs to leave town.
>
> My heart broke when your fucker husband started screwing my wife with out giving regard to our friendship.[8]

[14] That is evidence that Patient B did suffer emotional harm as a result of the appellant's conduct and is capable of supporting the finding that the appellant's conduct put Patient B's "emotional safety" at risk. It is in any event a common sense inference which the Tribunal was entitled to draw that having sex with Patient B's wife and fathering the two children he believed were his, would have adverse (probably devastating) emotional consequences for Patient B. That inference is plainly not unreasonable.

[15] The Tribunal also found that Patient B's "mental safety may have been put at risk". The finding was that his mental safety "may have been" (not was) put at risk. That, too, it seems to me is a common sense inference the Tribunal was entitled to draw from the nature of the appellant's conduct, without further evidence, and one which is not unreasonable in the relevant sense.

[16] That leaves the statement by the Tribunal that the fact that "those risks and the disruption was caused by his own medical professional who by doing so had breached the medical practitioner code of conduct no doubt added to the angst". It is true that the thrust of Patient B's statement (and the emotional

[8] I was also referred to emotionally charged statements made by Patient B recorded in the transcript of the hearing before the Tribunal. Counsel for the appellant at that hearing submitted that this was not proper material for the Tribunal to take into account. However, the Tribunal was entitled to have regard to these matters if it so chose. It is not bound by the Rules of evidence and may inform itself in any manner it sees fit. [*Health Practitioners Act* s 63(10) and Schedule 4 para 4]

texts to the appellant's wife) was the betrayal of trust as a friend – not as a doctor. However, I take this statement to be an inference drawn from the primary facts which were not in dispute. As the Tribunal said in subsequent paragraphs:

> 54. It may be a rhetorical question to ask whether that was done as his neighbour and friend or as his doctor. But the only reason it is rhetorical is because the situation was so confused there can be no sensible answer.[9]
>
> 55. Again that was not the fault of Patient B.

[17] The same point was made by the Tribunal earlier in its reasons:

> 34. Perhaps the starting point is the recognition that the Practitioner should not have been treating his neighbours who were also his good friends. That was a dual relationship. There then existed both a friendship and a professional doctor/patient relationship.
>
> .....
>
> 43. It is obviously difficult when conducting a dual relationship to avoid confusing the relationships and that clearly happened.
>
> ...
>
> 46. The different roles or relationships between friend and medical practitioner are not so clear as to be able to appreciate in which role he had the sexual relationship with Patient B's wife and fathered his children.

[9] It is not, of course, an actual rhetorical question, but the Tribunal's meaning is tolerably clear from the second sentence.

[18] The major basis for the Tribunal's finding that the appellant had been guilty of professional misconduct was that he had failed to keep these relationships distinct. He had been guilty of what was described in the Tribunal's reasons as "boundary violations". I am therefore unable to conclude that the inference complained of is so unreasonable that no reasonable decision maker could have drawn it. This ground of appeal must fail.

Ground 2: Did the Tribunal misinterpret the Codes referred to in the reasons for decision and wrongly elevate them to prescriptions rather than guidelines?

[19] The appellant also contends that the Tribunal's characterisation of the appellant's conduct by reference to various Codes of Conduct misinterprets the terms of the Codes. The way in which the Tribunal is supposed to have misinterpreted the Codes was not detailed in either the appellant's written or oral submissions.

[20] The appellant contends further that the Tribunal "appears to have elevated the Codes to a prescription, rather than simply an aid despite the Codes themselves making it clear that their purpose is to assist Boards in their role of protecting the public".

[21] In its reasons for decision, the Tribunal noted that the matter was referred to it by the Board pursuant to s 193(1)(a) of the National Law and that the

Board alleged that the appellant had behaved in a way that constitutes professional misconduct as defined by s 5 of the National Law.[10]

[22] The Tribunal set out the factual allegations[11] and particulars of the manner in which the Board alleged that those factual allegations amounted to professional misconduct.[12] It then recited the factual background, including the investigations of the Board.

[23] The factual allegations were that:

(a) the appellant provided medical care to Patient A between May 2008 and August 2014;

(b) he commenced a sexual relationship with her in April 2009;

(c) there was inadequate note taking in relation to a number of the consultations;

(d) the appellant provided medical care to Patient B (the husband of Patient A) between October 2008 and March 2011 without recognising there was a conflict of interest;

(e) the appellant provided medical care to Patients C and D (the children of Patient A born 3 July 2010 and 27 July 2011); and

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10 Reasons for decision of Tribunal, [1] - [2]

11 Ibid [3]

12 Ibid [4]

(f) the appellant is the biological father of Patients C and D and continued to provide medical care after becoming aware they were his children.

These allegations were not disputed by the appellant.

[24] The Board alleged that this behaviour amounted to professional misconduct because:

(a) he failed to maintain professional boundaries by commencing a sexual relationship with Patient A who was a person under his care;

(b) he failed to terminate the treating relationship with Patient A prior to or after the sexual relationship commenced;

(c) he failed to maintain adequate medical records for Patient A;

(d) he failed to maintain professional boundaries by continuing to treat Patient B who was a person under his care with whom he had a conflict of interest because unknown to Patient B, he had commenced a sexual relationship with Patient A, who was Patient B's wife; and

(e) he failed to maintain professional boundaries by treating Patient C and Patient D, because:

(i) he had an ongoing sexual relationship with Patient A who was Patient C and Patient D's mother;

(ii) he provided treatment to Patient C and Patient D without disclosing to Patient B the existing conflict of interest due to his relationship with Patient A; and

(iii) he provided treatment to Patient C and Patient D knowing that he was their biological father.

[25] After initially denying that he had done anything wrong,[13] the appellant admitted that in maintaining a sexual relationship with Patient A he had "breached the code of conduct and therefore [had] been guilty of professional misconduct." He accepted that his conduct warranted sanctioning by the Tribunal.[14] However, the appellant maintained before the Tribunal that his conduct in continuing to treat Patient B while maintaining a sexual relationship with Patient B's wife did not amount to professional misconduct, but only to unprofessional conduct.

[26] The appellant submitted that the relevant question was "whether the safety of Patient B could have been put at risk by virtue of consulting [the appellant], in circumstances where [the appellant] was in a relationship with the wife of Patient B".[15] The Tribunal considered that test to be "rather too narrow"[16] and referred to the "*Statement on Sexual Relationships Between*

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13 Ibid [16]

14 Ibid [20], [24]

15 Ibid [29]

16 Ibid [30]

Health Practitioners and their Patients" released in 2004 which states at para 1.2:

> It is the health practitioner's responsibility to behave ethically at all times, and to maintain professional boundaries with patients and the patient's immediate family members and significant others.

[27] The Tribunal also quoted the explanation of the concept of "professional boundaries" and the reasons for maintaining them set out in para 2.5 of that publication and went on to quote from a further publication, *"Sexual Boundaries: Guidelines for doctors"* released in October 2011.

> Good medical practice relies on trust between doctors and patients and their families. It is always unethical and unprofessional for a doctor to breach this trust by entering into a sexual relationship with a patient, regardless of whether the patient has consented to the relationship. It may also be unethical and unprofessional for a doctor to enter in[to] a sexual relationship with a former patient, an existing patient's carer or close relative of an existing patient, if this breaches the trust the patient placed in the doctor.

[28] The Tribunal was perfectly entitled to quote from publications of professional bodies intended to provide ethical guidelines and to take account of those guidelines. I see nothing improper in the Tribunal's treatment of this material and nothing which could be characterised as impermissibly elevating the guidelines to a prescription. As noted by the NSW Civil and Administrative Tribunal in *Health Care Complaints Commission v Dr Nicolova-Trask,*[17] these published guidelines simply repeat

[17] [2014] NSWCATOD 149

long established ethical principles relating to medical practitioners.[18]

Ground 3: Did the Tribunal err by elevating the objective in the National Law of providing for the health and safety of the community from a merely relevant consideration to the most important consideration?

[29] The final point made in the appellant's written submissions is that in *The Medical Practitioner v Medical Board of Australia*[19] the Supreme Court of the ACT held that a dealing with one patient, not illustrative of risk of repetition or of some wider failure, could not be said to constitute a risk to public safety. It does not follow, as contended by the appellant that "the imposition of a significant period of suspension in circumstances where there was no finding or even suggestion of a risk of re-offending would tend to indicate that the Tribunal has misunderstood what its object in protecting the public means or requires".

[30] In furthering the object of providing for the protection of the public[20] the Tribunal is not limited to considering whether a practitioner is a risk to public safety and the Tribunal at no point made a finding that the appellant did constitute a risk to public safety. Orders made by the Tribunal on a finding of professional misconduct are not intended to punish the

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18 Ibid [68]

19 [2011] ATSC 191

20 The National Law s 3(2)(a)

practitioner but to protect the public.[21] However, as the Tribunal noted, protection of the public is not limited to protecting particular patients of a particular medical practitioner from the effects of that practitioner's misconduct. It includes protecting the public from similar misconduct by other medical practitioners and upholding public confidence in the medical profession by denouncing acts of professional misconduct.[22]

[31] In its "consideration of protection of the public"[23] the Tribunal took into account as "one of the primary considerations" ... "that at the time the misconduct took place [the appellant] appears not to have been aware of his professional obligations".[24] It was entitled to do so. Ensuring that a registered medical practitioner who does not understand his ethical obligations (and so engages in professional misconduct) does not continue to practice uninterrupted, is obviously a measure which provides for the protection of the public. For the same reasons, the Tribunal was also entitled to take into account that although he had to some extent remedied that situation,[25] the appellant had made little attempt to remedy his deficits[26]

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21 *Clyne v NSW Bar Association* (1960) 104 CLR 186

22 *Health Care Complaints Commission v Do* [2014] NSWCA 307

23 Reasons for decision of the Tribunal, above n 1 [60]

24 Ibid [61]

25 Ibid [62]

26 Ibid [64]

and that the extent of his understanding of his ethical obligations was as yet unclear.[27]

[32] Counsel elaborated on this point in oral submissions. He pointed out that at [71] of the decision, the Tribunal had quoted, and placed reliance on, the following passage from the decision of the New South Wales Court of Appeal in *Health Care Complaints Commission v Do:*[28]

> The objective of protecting the health and safety of the public is not confined to protecting the patients or potential patients of a particular practitioner from the continuing risk of his or her malpractice or incompetence. It includes protecting the public from the similar misconduct or incompetence of other practitioners and upholding public confidence in the standards of the profession. That objective is achieved by setting and maintaining those standards and, where appropriate, by cancelling the registration of practitioners who are not competent or otherwise not fit to practise, including those who have been guilty of serious misconduct. Denouncing such misconduct operates both as a deterrent to the individual concerned as well as to the general body of practitioners. It also maintains public confidence by signalling that those whose conduct does not meet the required standards will not be permitted to practise.

[33] Counsel submitted that the court in *Health Care Complaints Commission v Do* had placed great weight on protection of the health and safety of the public as a result of s 3A of the National Law as in force in New South Wales at the date of that decision. That section provides that in the exercise of the functions of making and dealing with complaints, "the protection of the health and safety of the public must be the paramount consideration".

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27 Ibid [63]

28 [2014] NSWCA 307 [35]

[34] Mr Crawley for the appellant pointed out that the National Law as it applied in the Northern Territory at the date of the conduct in question did not contain s 3A. The objects and guiding principles were as set out in s 3. "Providing for the health and safety of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner"[29] is just one of those objectives. Another is "to facilitate access to services provided by health practitioners in accordance with the public interest"[30]. Counsel submitted that reliance on the case of *Health Care Complaints Commission v Do* had led the Tribunal to overemphasise the objective of providing for the health and safety of the community at the expense of the other objectives, in particular that of facilitating access to health care services which would be adversely affected by the appellant's suspension from practice.

[35] In effect, counsel for the appellant invited me to conclude that the Tribunal had elevated the objective of providing for the health and safety of the community from a merely relevant consideration to the most important, or prime consideration. I do not think such a conclusion is warranted. There is nothing in the Tribunal's reasons to indicate that the Tribunal mistakenly assumed that s 3A of the National Law formed part of the law of the Northern Territory at the time of the conduct, or that the Tribunal had elevated the objective of protection of public health and safety to the prime

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29 Section 3(2)(a)

30 Section 3(2)(e)

consideration. The passage from *Health Care Complaints Commission v Do* which the Tribunal quoted says nothing of the kind. It merely explains what is involved in protecting the health and safety of the community.

[36] In my view, no error of principle by the Tribunal has been demonstrated. In the absence of any error of law, it was a matter for the Tribunal to determine what weight should be given to the different objectives in the legislation, to determine whether in all of the circumstances the appellant's conduct amounted to professional misconduct and to determine the appropriate consequences.

[37] The appeal is dismissed.