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case study

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Medical Board of Western Australia v A Medical Practitioner [2011] WASCA 151

A recent decision of the Supreme Court of Appeal of Western Australia has drastically restricted the power of the State Administrative Tribunal to make non-publication orders regarding the subject matter of vocational regulation hearings. This decision has the potential to affect the privacy of health practitioners who may be involved in disciplinary proceedings.

Relevant Facts

The relevant facts of the case were as follows.

- Between 2005 and 2007, the Medical Board of Western Australia (the Board) commenced 13 actions against a medical practitioner in which it was alleged that he was guilty of professional misconduct in treating his patients and in his dealings with the South African medical regulation authorities. The practitioner failed to inform the South African authorities that proceedings had been brought against him in the State Administrative Tribunal, and submitted a false certificate of good standing to his employment agent in South Africa.
- In the course of all those proceedings, the Tribunal made several orders pursuant to ss61 and 62 of the *State Administrative Tribunal Act* prohibiting the publication of various aspects of the proceedings, including the practitioner's identity, the identities of his patients, and 'the subject matter of the application'. The primary reason for these orders was the potential risk of psychiatric harm to the practitioner if such details were to be disclosed.
- The Board appealed to the Supreme Court of Western Australia regarding these orders on 20 July 2009 and again on 12 March 2010. The second respondent, Nationwide News Pty Ltd, was named as a respondent to both appeals because it had been granted leave to be heard by the State Administrative Tribunal in opposition to the non-publication orders. The Board discontinued the two appeals it had brought, but Nationwide News Pty Ltd pressed its appeal.

Issues considered by the Court

The Court considered three issues

There were three main grounds of appeal in this case. The first ground asserted that the order prohibiting publication of 'the subject matter' of the

application' exceeded the powers conferred by s62 of the Act.

The second ground as originally enunciated challenged the Tribunal's conclusion that the non-publication orders were necessary. This challenge was based on an apparent lack of evidence; on the argument that the protection of the practitioner's identity was sufficient in itself; and on the ground that the Tribunal had erroneously relied on second-hand statements concerning publication of the Sunday Times articles. However, this ground was plainly hopeless because the Tribunal did rely on evidence regarding the likely effect of publication on the practitioner, and because sufficiency of the Tribunal's evidence is not a question of law that can be decided by the Supreme Court.

During the course of the hearing ground two was amended to state that the Tribunal erred in applying ss61 and 62, because it failed to adequately balance the interests of the physical and mental health of the practitioner with the public interest in the maintenance of the open justice principle.

The third ground as originally enunciated challenged the non-publication of the identities of the patients on the basis that the Tribunal had failed to separately assess the impact of the order to the patients, and was only concerned with the protection of the practitioner. This ground would also clearly have failed, because the non-disclosure of patient names had been specifically justified in the 2009 appeal on the basis that the publication of their identities could affect the mental health of the practitioner. There was evidence to support that finding.

During oral argument ground three was therefore amended to state that the prohibition on publication of the identities of the patients fell outside the scope of the powers conferred by s62 of the Act.

Grounds one and three were therefore concerned with the scope of the Tribunal's power to issue non-disclosure orders, whereas ground two was concerned with whether the interest in the practitioner's mental health outweighed the public interest in open justice.

The Court of Appeal's Findings

The Court upheld grounds one and three of the appeal, but dismissed ground two. Therefore, the non-disclosure orders which prevented publication of 'the subject matter of the application' and of the patients' identities were set aside.

The Court of Appeal made the following general comments in relation to the application of s61 and s62 of the Act:

- There are material differences of some significance between the common law 'open justice principles' and the rights and obligations of the Tribunal under the Act. However, despite the common law open justice principles not being directly relevant, the statutory powers of the Tribunal to exclude the public from hearings should be read narrowly.
- The power to make a non-publication order under s62 of the Act is confined to the circumstances in which it can make an order that a hearing be held in private under s61 of the Act. There is no broader power under s62.
- The scope of s62 is not limited to evidence or documents produced at the hearing. A s62 non-disclosure order could be made in relation to other evidence and documents.

In accepting the first ground of appeal, the Court held that s62 non-publication orders were restricted to the three kinds of information referred to in s62 of the Act: namely evidence, documents produced to the Tribunal and identifying information. The order for non-disclosure of the 'subject matter of the application' was too broad, and beyond the power conferred to the Tribunal by the Act. The Court also noted that non-disclosure orders should not be ambiguous with regards to the subject matter they cover. Moreover, the power to make non-publication orders can only be exercised to the extent necessary to avoid one or other of the adverse consequences listed in s61 of the Act. The order that the 'subject matter of the application" should not be published was vague and excessive.

The second ground of appeal was dismissed because it incorrectly assumed that the common law principle of non-disclosure applied to the Tribunal in a statutory context. In any case, in the

2009 appeal, the court explicitly made reference to the public interest.

The third ground of appeal was accepted on the basis that the Tribunal was limited to making non-disclosure orders over matters listed in s62(1). Therefore, an order suppressing the names of patients can only be made if the patient had participated in proceedings before the Tribunal before or at the time that the order was made.

Comment

The decision in *Medical Board of Western Australia v A Medical Practitioner* has greatly clarified the scope of s62 non-disclosure orders which can be made by the Tribunal, and the circumstances in which such orders can be given. However, it has become apparent that the Tribunal's power to protect practitioners from the adverse effects of publication of disciplinary hearings is much more limited than previously thought. Orders cannot be made to suppress the publication of the entire 'subject matter of the proceedings'. Moreover, these orders must only be made to avoid the specific adverse effects set out in s61(4) of the Act.

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