APEX DELEGATE TRAINING CONFERENCE 2012

"CHALLENGING THE POWERS THAT BE: ARE REGISTRATION BOARDS ABOVE THE RULES OF NATURAL JUSTICE?"

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1. In the movie *Pulp Fiction*, Samuel L Jackson's character is sent by his underworld boss to punish some underlings who have misbehaved. Before carrying out the sentence on them, he says:

> *The path of the righteous man is beset on all sides by the inequities of the selfish, and the tyranny of evil men. Blessed is he who, in the name of charity and good will, shepherds the weak through the valley of darkness, for he is truly his brother's keeper, and the finder of lost children. And I will strike down upon thee with great vengeance and furious anger, those who attempt to poison and destroy my brothers...*

2. Most registration board chairs probably know this by heart. It can certainly seem sometimes that registration boards are a self-righteous and vengeful law unto their own. Happily they are not.

3. This seminar looks at the legal framework in which registration boards do some of their more contentious work. It covers some recent case examples. It concludes with some practical tips for dealing with contentious matters before registration boards.

Legal framework

Statute

4. Registration boards are creatures of statute. They exist pursuant to the Health Practitioners Competence Assurance Act 2003 ("HPCA"). There are presently 15 of them, including the Chiropractic Board, the Dental Council, the Dieticians Board, the Medical Radiation Technologists Board, the Medical Council, the Medical Laboratory Science Board, the Midwifery Board, the Nursing Council, the Occupational Therapy Board, the Optometrists and Dispensing Opticians Board, the Osteopathic Council, the Pharmacy Council, the Podiatrists Board, and the Psychologists Board.

5. This is certainly not a case of leaving the least to last. By itself, the Psychologists Board has probably taken up as much Court time in recent years as the others put together.

6. The principal purpose of the HPCA is to "*protect the health and safety of members of the public by providing the mechanisms to ensure that health practitioners are competent and fit to practise their professions*".

7. The HPCA provides that each registration board, or "Authority" as they are called in the Act, is responsible for: education, registration, annual practicing certificates, establishing scopes of practice, restricted activities, and competence reviews. They must also act on complaints.

8. Legal disputes are most common in relation to complaints. The HPCA framework within which registration boards must deal with complaints is as follows:

   (a) Under s64, whenever a registration board receives a complaint that the practice or conduct of a health practitioner has affected a health consumer, it must forward that complaint to the Health and Disability Commisioner. The HDC can then refer it back to the registration board if it appears from the complaint that the competence of a health practitioner,

or his or her fitness to practice, or the appropriateness of his or her conduct, may be in doubt;

(b) Under s69, registration boards have the power to suspend a practitioner's practicing certificate pending investigation or prosecution. The health practitioner must be given an opportunity to be heard on the issue;

(c) Under s65, a registration board can refer a complaint to a professional conduct committee ("PCC");

(d) PCCs are dealt with under sections 71-83 of the HPCA. The purpose of a PCC is to investigate a complaint and make a recommendation or determination in relation to it. A PCC:

    (i) Must comprise two health practitioners from the relevant profession and one lay person;

    (ii) Can regulate its own procedure, but must ensure that the practitioner who is the subject of the complaint, and the complainant, are kept informed of progress;

    (iii) Is stated to be, at s72(3), subject to the rules of natural justice;

    (iv) Can appoint a legal advisor, receive evidence, and call for information and documents;

    (v) Can recommend a review of the practitioner's competence/fitness/scope of practice. It can recommend that the matter be referred to the police. It can recommend counseling;

    (vi) Can determine that a charge be brought against the practitioner in the Health Practitioners Disciplinary Tribunal. The PCC then formulates and prosecutes the charge. A PCC can also determine that a complaint should be referred to conciliation.

9. Complaints can also affect registration, and renewal of practicing certificates. I note in particular that:

(a) A registration board can refuse to register any person who is not competent, or who is subject to professional disciplinary proceedings or investigation, or who it has reason to believe may endanger the health or safety of the public (ss15-16);

(b) A registration board can decline to renew an annual practicing certificate if the applicant has failed to meet the required standards of competence (s27);

If a registration board is proposing not to register, or not to renew, it must give the practitioner the opportunity to be heard on the issue (ss20, 28).

The common law

10. As you have heard, the HPCA itself proscribes some limits on the powers of the registration boards. Practitioners have a right to be heard on issues that affect them. There is reference to PCCs being subject to the rules of natural justice.

11. Registration boards are also subject to the common law – or the law made by the Courts. The common law holds that all administrative authorities are bound by the rules of natural justice when they judge others, whether the empowering statute provides for it or not.

12. The rules of natural justice can be summarised as "*a duty lying on every one who decides anything*" to "*act in good faith and fairly listen to both sides*" – *Board of Education v Rice* [1911] AC 179, per Lord Loreburn at p182. They hold that the parties must be given adequate notice and opportunity to be heard, and that the decision maker must be disinterested and unbiased. They can be interpreted more widely to encompass a right to reasonably prompt justice, and even a right cross-examine in certain circumtances – all under the broad ambit of fairness.

13. The rules of natural justice seek to facilitate decisions which are informed and accurate and which instill a sense of fairness to the parties.

14. The rules of natural justice are of ancient provenance. They were applied as early as 1615, in *James Bagg's Case*. Mr Baggs was the chief burgess of Plymouth. He was disenfranchised for insulting conduct towards the mayor. He was accused of having called the mayor a "*cozening knave*" and "*turning the hinder part of his body in an inhuman and uncivil manner…with a loud voice said, "Come and Kiss"*". [a sort of latter-day Dun Mihaka] However, he was reinstated by the Court, because he received neither notice nor a hearing.

15. The rules of natural justice are also enshrined in the UN International Covenant on Civil and Political Rights, and in our own New Zealand Bill of Rights.

16. Like all law, however, there is devil in the detail. The rules of natural justice are applied in a flexible way. More notice and opportunity to be heard may be required for some matters than others. A higher degree of ostensible impartiality may be required of some decision makers (Supreme Court Judges) compared to others (pet show judges).

17. Aside from being subject to the rules of natural justice, registration boards are also subject to other common law-developed principles which are more specific to the field. By way of example:

    (a) The Courts have held that getting it wrong is not always the same as professional misconduct. In *Collie v Nursing Council of New Zealand* [2001] NZAR 74, Justice Gendall stated:

    > "*Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behavior which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, or oversight, or for that matter carelessness*".

    (b) The Courts have also held that not all misconduct merits sanction. In *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47, it was held that:

    > "*…. the test for whether a disciplinary finding is merited is a two stage test based on first, an objective assessment of whether the practitioner departed from acceptable professional standards and*

secondly, whether the departure was significant enough to attract sanction for the purposes of protecting the public".

(c) However, the Courts have also set a high bar for practitioners who want to appeal the decisions of registration boards to the Courts. Whilst the Courts are not bound to accept findings of fact made by registration boards, they will give weight to the "*expressions of opinion of tribunals composed largely of medical men*" – *Ongley v Medical Council of New Zealand* [1984] 4 NZAR 369, at 375. The onus always lies on the practitioner as appellant to satisfy the Court that the registration board was wrong. That can be a tough onus to discharge, and most appeals fail.

Recent cases

18. There have been a number of recent cases which have highlighted some of the issues which can arise in dealing with registration boards.

Hopman v Complaints Assessment Committee HC WTN CIV 2005-485-1023, 4 April 2007, Young J

19. Dr Hopman was a psychologist. She had given evidence to the Employment Authority about the mental state of an employee. Counsel for the employer, and others, complained about the evidence that she gave. It was claimed that she had reached unjustifiable conclusions, and had accused another practitioner of negligence without foundation.

20. A Complaints Assessment Committee ("CAC" - a precursor to the PCC) decided to send those complaints about her to the Psychologists Board for the institution of disciplinary proceedings (under the pre-HPCA regime)

21. Dr Hopman applied for judicial review of that decision.

22. She contended that the CAC had acted unreasonably, and failed to take account of relevant considerations. In particular, she argued that latitude should be given to practitioners giving expert evidence, otherwise they would be discouraged from taking on the role. She further argued that she owed no duty to the complainants, and that what she had done had not harmed the public.

23. The Court rejected these arguments. It held that the complaints were largely about competence issues. If they were merited, they were relevant to the quality of her practice, and in turn relevant to the health and safety of the public.

24. Dr Hopman further argued that the CAC's failure to offer her the opportunity of personally appearing before it was a breach of natural justice.

25. The Court rejected this argument too. It found that, in these circumstances, because the CAC was just undertaking a screening role (deciding whether the matter should be referred to the Board), and because it had a full set of facts before it, including written submissions from Dr Hopman, it would not have made any difference if Dr Hopman had appeared in person. This is an example of the flexible approach the Courts will take to the application of natural justice principles.

26. Dr Hopman did have some success. She was also seeking an order that the Psychologists Board consider her application for registration for a further scope of practice. It had put the application "on hold" until the disciplinary process was

complete. She claimed that this too was a breach of natural justice because she was entitled to have the matter dealt with in a timely fashion. She also said it was illegal, because the Board had no power to put such an application "on hold". The Court ruled in her favour in this regard. It held that the Board had no authority to put Dr Hopman's application on hold. It held that the Board was required to consider Dr Hopman's application as soon as reasonably practicable. It ordered the Board to do so.

Geary v The Psychologists Board HC WTN CIV 2005-485-1562, 4 April 2007, Young J

27. Mr Geary was also a psychologist. A client alleged that he had failed to advise her that he had lost ACC accreditation. She also alleged that he had made inappropriate disclosures to her about sexual abuse.

28. This was another case under the pre-HPCA regime. A charge was laid against Mr Geary, and heard by the Psychology Board. The Board found that he had failed to advise the client that he had lost his ACC accreditation, and that he had made inappropriate disclosures to her about sexual abuse. Mr Greary appealed to the High Court.

29. The arguments around the ACC accreditation issue centered on credibility. Mr Geary contended that he had sent out a letter to the client telling her of his loss of accreditation. Whilst he did not have the letter, he had some contemporaneous evidence which supported his claim. The client denied receiving the letter. The Board concluded that Mr Geary had not presented any clear evidence that the letter was sent to and received by the client, and so found the charge against him in this regard to be proved.

30. The High Court found that the Board had placed the onus on Mr Geary to disprove the charge. The Court said this was wrong. The onus was on the prosecution to prove the charge on the balance of probabilities – the civil standard. The Court said that, in its view, the available evidence did not prove the charge. It set the guilty finding aside, and acquitted Mr Geary on this charge.

31. Mr Geary raised various issues in support of his appeal against the finding that he had made inappropriate disclosures to the client about sexual abuse. One of these was a natural justice ground, being that the Board was biased against him. The alleged bias arose out of the fact that three of the five Board members who decided this case had also heard a previous complaint against him, and made findings on his credibility in that case.

32. The Court rejected that argument. Justice Young stated at para 56:

> "*It is vital to the administration of justice that a fact finding tribunal comes to its task with an open mind and with the appearance of an open mind. If it fails to do so there is a real danger that it will bring bias to its decision making. Where the credibility of a litigant is at stake, this aspect is especially important. However, the fact that a Tribunal may have previously made adverse findings against a litigant, including findings of credibility, does not disqualify it on that ground alone from hearing the case against the litigant. There must be other aspects in the facts which would bring a real danger of bias to the decision making.*"

33. The Court also rejected Mr Geary's other arguments in relation to the inappropriate disclosures finding. It upheld the Board's decision in relation to this charge, and the penalty handed down, a fine of $8,000.

IRG v The Psychologists Board HC WTN CIV 2007-485-2558, 8 December 2009, Wild J

34. This was a further chapter in the saga of Mr Geary. Two years had passed, and he was at the centre of further complaints, and competence issues. In this proceeding, he sought to attack five decisions made by the Psychology Board about him, including:

    (a) A decision to undertake a competence review of him;

    (b) A decision to decline his application to renew his practicing certificate;

    (c) A decision to require him to undergo a competence programme;

    (d) A decision to suspend his registration; and

    (e) A decision to refer a further complaint to a PCC.

35. Mr Geary failed on all counts. Of note in the decision were the following:

    (a) Again, Mr Geary sought to attack the Board's decisions on the basis of bias. He claimed that the fact that the Board had found against him before, and the approach it took to him generally, showed that it was not impartial towards him. The Court did not accept this;

    (b) Mr Geary sought to cross-examine Board members in relation to their denials of bias. This issue went as far as the Court of Appeal. Cross-examination was denied. The Court of Appeal held that, in these circumstances, cross-examination was not necessary to do justice between the parties. This is perhaps another example of the natural justice "right to be heard" being fettered somewhat for the purposes of expediency (since a right to cross examine is arguably part of the right to be heard);

    (c) Mr Geary argued that the Board had wrongfully predetermined his application to renew his practicing certificate. He relied, in this regard, on a letter from the chairman of the Board, written some seven weeks before the decision, which said that Mr Geary was clearly not competent to practise. The Court rejected this argument, finding that the chairman's letter was merely expressing a preliminary view; and

    (d) Mr Geary contended that the Board had breached its own guidelines by failing to consult with him on the design of the competence programme. The Court found that the Board had wrongfully breached its own guidelines in this regard, and that the fact that there were difficulties in dealing with Mr Geary was no excuse. However, the Court went on to find that the breach was not material, and would not have affected the end result (being that Mr Geary was ultimately obliged to sit an exam, which he failed).

Stabb v The Preliminary Proceedings Committee of the Nursing Council of New Zealand HC WTN CIV 2006-485-1317, 2 October 2006, Wild J

36. The background to this case is best described in the opening paragraphs of the decision, which read as follows:

"While answering a night-time telephone call to the Mental Health Line, Mr Stabb swore at and threatened a caller, Z. Z was threatening suicide. He also threatened violence to Mr Stabb and his family, and claimed to have a loaded shotgun. Z, who was not known to Mr Stabb, had a long history of mental illness, in particular schizo-affective or bipolar affective disorder. This was aggravated by considerable substance abuse, and a rather anti-authoritarian personality.

Upon becoming aware of Mr Stabb's conduct on the telephone to Z, Mr Stabb's employer investigated, and then dismissed Mr Stabb.

37. Mr Stabb's employer also made a complaint of professional misconduct to the Nursing Council. A professional misconduct charge was ultimately laid against Mr Stabb.

38. This was another pre-HPCA case. After a three day hearing, the Nursing Council found the charge proved. Mr Stabb appealed.

39. The key issue was the propriety of Mr Stabb's actions in swearing at and threatening Z, in the context of the service Mr Stabb was providing, and the threats that Z had made.

40. Mr Stabb claimed that what he did had in fact brought Z back to earth and caused him to start talking more sensibly. He contended that what he did was clinically acceptable. Z's doctor gave evidence that Mr Stabb had acted appropriately. A police Detective with experience in crisis intervention said that he thought that Mr Stabb had done a good job.

41. Two senior nurses had gave evidence to the Council that it was unacceptable in any circumstances for a nurse to swear at and threaten a patient.

42. The Nursing Council chose to prefer the evidence of the two senior nurses. It held that it was not acceptable professional practice for a mental health nurse to threaten a patient, even in a stressful situation.

43. The High Court ruled that the Nursing Council was entitled to prefer the evidence of the two senior nurses. It found that the statutory regime favoured people being judged by their peers. The High Court upheld the decision of the nursing Council.

Practical tips for dealing with contentious matters before registration boards.

44. The following are some practical tips for dealing with matters before registration boards:

    (a) Seek legal advice early. The first skirmish with an erstwhile benevolent registration board can be very important. Key issues can be determined quite early, such as name suppression, and how the right to be heard should be exercised. It is important to get legal input and backing on these issues, and to set a strategy from the outset;

    (b) Facts win cases. Contrary to popular culture no-one, not even Samuel L Jackson, can win a case if they do not have the facts on their side. And not only do you need to have the facts on your side, you need to have

them available to present to the decision maker. This means that it is important to:

(i) Take and obtain comprehensive filenotes, which are as contemporaneous as possible;

(ii) Ensure that evidence is preserved;

(iii) Get expert peer input if necessary;

(c) If a practitioner is offered an opportunity to be heard, it probably means trouble is brewing, so the opportunity should be taken. It can be a tactical decision as to whether or not written submissions will suffice, or a hearing in person should be sought also. Typically, the more serious the matter, the more likely it will be beneficial to have a hearing in person;

(d) Comply with timetabling/directions as to when responses and the like should be in, or ask for extra time if you need it. Never ignore these;

(e) A calm and reasoned approach trumps rhetoric every time; and

(f) In general, and always subject to advice, it is appropriate for practitioners to take responsibility for their actions. Everyone makes mistakes. A recurring aggravating theme in the decisions is a failure by practitioners to accept that they have done anything wrong, or that there is anything they could learn from what has occurred. That is not to say that you have to commit seppuku – a balanced approach is called for.

45. In summary, the rules of natural justice do apply to registration boards, as do other statutory and common law brakes on their power. However, there are "buts", as can be seen from the case examples, with scope for boards to take a flexible approach. The Courts can also be reluctant to interfere with registration boards. It is best, therefore, to approach any contentious dealings with them in a well advised and well prepared way.

Mark Kelly
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