

Marinovich v Medical Practitioners Appeal Tribunal [2001] NTSC 59

PARTIES: DR LEONARD MARINOVICH

v

MEDICAL PRACTITIONERS APPEAL
TRIBUNAL

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: APPEAL FROM MEDICAL
PRACTITIONERS APPEAL
TRIBUNAL

FILE NO: LA 10 of 2001 (20005452)

DELIVERED: 18 July 2001

HEARING DATE: 21 June 2001

JUDGMENT OF: BAILEY J

REPRESENTATION:

Counsel:

Appellant: J Lewis
Respondent: D Lawrence

Solicitors:

Appellant: R Jobson
Respondent: Cridlands

Judgment category classification: C

Judgment ID Number: bai0104

Number of pages: 8

bai0104

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Marinovich v Medical Practitioners Appeal Tribunal [2001] NTSC 59
No. LA 10 of 2001 (20005452)

BETWEEN:

DR LEONARD MARINOVICH
Appellant

AND:

MEDICAL PRACTITIONERS APPEAL
TRIBUNAL
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 18 July 2001)

- [1] This is an appeal pursuant to s 48 of the *Medical Act* (“the Act”) against a decision of the Medical Practitioners Appeal Tribunal (“the Appeal Tribunal”).
- [2] Between 30 August 1999 and 10 September 1999, the Medical Board of the Northern Territory (“the Medical Board”) held an inquiry into the conduct of the appellant, a registered medical practitioner. On 14 October 1999, the Medical Board determined that the appellant was guilty of two counts of unprofessional conduct contrary to s 38(1)(h) of the Act. On 2 November 1999, the Medical Board cancelled the appellant’s registration as a medical

practitioner under s 43(1)(g) of the Act and imposed a fine of \$2000 under s 43(1)(f) of the Act.

- [3] On 17 April 2001, the Appeal Tribunal dismissed an appeal against the whole of the decision of the Medical Board.
- [4] On 21 June 2001, after hearing submissions, I dismissed an appeal against the decision of the Appeal Tribunal. I indicated that I would publish my reasons in due course and now seek to do so.
- [5] For the appellant, Mr Lewis, advanced similar submissions to those which he had made to the Appeal Tribunal. In essence, Mr Lewis submitted that the Medical Board was improperly constituted when conducting its inquiry into the appellant's conduct.
- [6] Section 5 of the Act provides:

“(1) The Board shall consist of -

(a) the Chief Health Officer or his or her nominee; and

(b) 5 other members appointed by the Minister by instrument in writing of whom -

(i) 4 shall be persons who are medical practitioners and who have been entitled to practise medicine without restriction in a State or Territory of the Commonwealth for not less than 5 years; and

(ii) one shall be a person who is not a graduate in medicine and who has not, at any time, been registered as being entitled to practise medicine, and shall be appointed to represent the public interest.

(2) The exercise of a power or the performance of a function by the Board is not affected by reason only of there being a vacancy in the membership of the Board.

(3) A nominee of the Chief Health Officer is to be a person who is registered or entitled to be registered.”

[7] Section 8 provides for the Medical Board to elect a Chairman and Deputy Chairman from among the Chief Health Officer and those members appointed under s 5(1)(b)(i).

[8] Section 12 of the Act provides:

“(1) The Chairman shall call such meetings of the Board as are necessary for the exercise of its powers and the performance of its functions.

(2) The Minister may, at any time, direct the Chairman to call a meeting of the Board and the Chairman shall comply with the direction.

(3) At a meeting of the Board -

(a) 3 members constitute a quorum;

(b) the Chairman shall preside at all meetings of the Board at which he or she is present and, in the absence of the Chairman from a meeting, the Deputy Chairman shall preside and, if both the Chairman and Deputy Chairman are not present, the members present may appoint one of their number who is eligible to be elected Chairman or Deputy Chairman under section 8(1) to preside at the meeting and that person shall exercise the powers and perform the functions of the Chairman for the duration of that meeting;

(c) questions arising shall be determined by a majority of the votes of the members present and voting and, in the event of an equality of votes, the Chairman or other member presiding at the meeting shall have, in addition to his or her deliberative vote, a casting vote; and

(d) subject to this Act, the Board shall determine the procedure to be followed at or in connection with the meeting.

(4) The Board shall cause records of its meetings to be kept.”

- [9] The inquiry into the appellant’s conduct was conducted pursuant to Division 1 of Part 6 of the Act. Section 41 of the Act provides that, subject to Division 1 of Part 6 and Schedule 1 to the Act “the procedure at an inquiry shall be as determined by the (Medical) Board”. The Act makes no express provision for the composition of the Medical Board for the purpose of conducting an inquiry. This may be contrasted with the express provisions for the composition of other bodies which deal with disciplinary matters – see, the Medical Practitioners Appeal Tribunal (ss 45-48) and the Impaired Practitioners Committee (ss 49-52).
- [10] In the case of the inquiry into the appellant’s inquiry, the Medical Board was constituted by the Chairman of the Board and two medical practitioners appointed pursuant to s 5(1)(b)(i) of the Act.
- [11] The appellant submitted that, for the purposes of conducting an inquiry pursuant to Division 1 of Part 6 of the Act, the Medical Board was required to be constituted by all six members of the Board appointed pursuant to s 5 of the Act (ie the Chief Health Officer, or his or her nominee, four medical practitioners appointed pursuant to s 5(1)(b)(i) and the “lay member” appointed pursuant to s 5(1)(b)(ii)). In the alternative, it was submitted, as a minimum, the lay member of the Medical Board was required to be

included in any quorum for the purposes of conducting an inquiry pursuant to Division 1 of Part 6 of the Act.

[12] The principal submission on behalf of the appellant was that the Act draws a distinction between a ‘meeting’ of the Medical Board (for which s 12(3)(a) makes provision for a quorum of three members) and an ‘inquiry’ carried out under Parts 5 or 6 (as to which the Act makes no express provision for the Medical Board to be constituted by a quorum of less than its entire membership). In Mr Lewis’ submission, meetings and inquiries are distinct and separate functions of the Medical Board. Mr Lewis noted that pursuant to s 12(2), the responsible Minister has a discretion to direct the Chairman to call a meeting of the Board. The Minister also has a discretion pursuant to s 37 to direct the Medical Board to carry out an inquiry to investigate the professional conduct of a medical practitioner. In Mr Lewis’ submission, the Minister’s discretion pursuant to s 37 would be otiose if a meeting and an inquiry were to be equated.

[13] Mr Lewis also emphasised the role of the “lay member” of the Medical Board in representing the public interest and submitted that it could not have been the legislature’s intention that this important safeguard could be avoided or disposed of by reliance on the provision for a three member quorum in s 12(3)(a). In his submission, if s 12(3)(a) had any application to an inquiry conducted under the Act, it would be at least necessary to interpret the provision as requiring the “lay member” to be included in any valid quorum for the conduct of an inquiry.

[14] The fundamental difficulty with the appellant's submissions, as emphasised by Mr Lawrence on behalf of the Appeal Tribunal, is that nothing in the Act lends support to either the proposition that an inquiry can be conducted only by all six members of the Medical Board or that the "lay member" must be included in a (valid) quorum for the conduct of an inquiry.

[15] The appellant's submissions are not strengthened by any alleged duplication of the Minister's discretion to direct that a meeting of the Medical Board be held (s 12(2)) or that the Board conduct an inquiry into the conduct of a medical practitioner (s 37). Section 40(1) of the Act makes it clear that the Minister's discretion to direct that an inquiry be undertaken is limited to situations where the Board is "satisfied that there are grounds for carrying out an inquiry". In other words, the Minister's general discretion to direct the Medical Board to hold a meeting is expressly circumscribed where the purpose of a meeting is to conduct an inquiry into a medical practitioner's conduct.

[16] There is no ambiguity in the provisions of the Act concerning the conduct of an inquiry generally and, in particular, the composition of the Medical Board for such a purpose.

[17] Section 16 of the Act defines the functions of the Medical Board. Such functions are, *inter alia*, to:

“(e) conduct inquiries under this Act”.

[18] Section 3(1) of the Act defines “inquiry” to mean an inquiry carried out by the Medical Board under Parts 5 and 6 of the Act.

[19] Section 12(1) of the Act (set out in full at para [8] above) provides that the Chairman shall call such meetings of the Board as are necessary for “... *the performance of its functions*”. Section 12(3)(a) provides that at a meeting of the Board: “3 members constitute a quorum”. There is no express (or implied) limitation on the selection of any particular members to constitute such a quorum. In short, it is clear that the conduct of an inquiry is a function of the Medical Board; that the Medical Board performs its functions by the holding of meetings; and that (*any*) three members constitute a quorum for the purpose of such meetings. It would have been a simple matter for the legislature to provide that all six members of the Medical Board are required to conduct an inquiry (arguably, a totally impractical proposition) or that the “lay member” is required to be included in any quorum for the purpose of conducting an inquiry. The legislation makes no such provisions and I consider that there is no basis for reading in any such requirements.

[20] Aside from the conduct of inquiries into the conduct of medical practitioners, the Medical Board has other important functions of general concern to the public interest, for example, the registration and issue of licences to medical practitioners. The appellant’s submissions as to the allegedly fundamental role of the “lay member” would be of similar significance in relation to the carrying out of such functions. There is

simply no basis to ignore the clear provisions of the Act for the Medical Board to carry out its functions with a three member quorum in the case of inquiries but not other functions.

[21] For these reasons, I dismissed the appeal against the decision of the Appeal Tribunal and ordered that the appellant pay the respondent's costs of the appeal.