

BEFORE HER MAJESTY
QUEEN ELIZABETH THE SECOND
IN COUNCIL

Appeal Number **3 / 2003**

UNDER New Zealand (Appeals to the Privy Council)
Order 1910

AND Judicial Committee (General Appellate Jurisdiction)
Rules 1982

IN THE MATTER OF a decision, numbered CA 174/01, of the 4th March
2002, of the Court of Appeal of New Zealand

BETWEEN MILES ROGER WISLANG
Appellant

AND MEDICAL COUNCIL OF NEW ZEALAND
First Respondent

AND MEDICAL PRACTITIONERS DISCIPLINARY
TRIBUNAL
Second Respondent

AND COMPLAINTS ASSESSMENT COMMITTEE
OF THE MEDICAL COUNCIL OF
NEW ZEALAND
Third Respondent

CASE FOR THE APPELLANT

Dated 17th September 2004

brought by Miles Roger Wislang, appellant-in-person,
whose address and address for service is
38 Glengarry Avenue, Manly, Whangaparaoa,
Auckland, New Zealand

CASE FOR THE APPELLANT

1. This is an appeal from a judgment dated 4 March 2002 of the Court of Appeal of New Zealand (Richardson P, Blanchard and Tipping JJ) dismissing an appeal from a judgment, of Wild J dated 21 June 2001, in the High Court, Wellington which refused the Appellant judicial review of decisions of the Medical Practitioners Disciplinary Tribunal (“the Tribunal”) and of the Medical Council of New Zealand (“the Council”).
Page 119
Page 80
Pages 327, 331
Page 437
2. The issues of this appeal arise from a complaint made to the Council against the Appellant by a patient of his; that in 1996 and 1997 he had treated him incompetently and without informed consent, and without holding a current practising certificate.
10 Page 159
3. Following the consideration, in February and March 1999, of the complaint by a Complainant Assessment Committee (“the CAC”) of the Council, the CAC laid before the Tribunal a charge that the Appellant had, in the course of treating the complainant during 1996 and 1997, practised medicine without holding a current practising certificate; that being [statutorily] professional misconduct. The CAC did not uphold the patient’s complaint concerning incompetence and lack of informed consent.
Page 170
Page 174-179
4. Upon being informed of the charge the Appellant admitted it and asked the Tribunal that he be allowed to make submissions as to penalty.
Page 180
5. The Tribunal accepted the Appellant’s guilty plea and set a date for hearing his submissions as to penalty. However, before the date of hearing, the prosecuting counsel for the CAC amended the charge to one which carried the penalty, inter alia, of being struck off the Medical Register; which the original charge did not.
20 Page 181-182
Page 186-187
6. Prior to the hearing of his submissions as to penalty, the Appellant made no plea to the amended charge.
7. Prior to the hearing, the Appellant inquired specifically of the Tribunal concerning the outcome or the stage reached in the assessment of the complaint against the Appellant’s medical and surgical competence and his case-management of the complainant. In response, the Tribunal informed the Appellant that the charge related only to the matter of the lapse of his practising certificate.
30 Page 183
Page 184
8. The Tribunal’s hearing was adjourned on its first day, 7 October 1999, on which the Tribunal, by an interim order of 8 October 1999, suspended the Appellant’s medical registration.
Page 231
Page 255

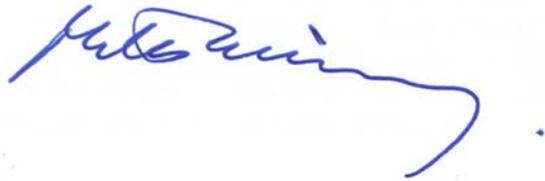
9. During the first day's hearing the Appellant inquired of the Tribunal whether his medical competence in respect of safety was at issue. He was informed by the Tribunal chairperson that it was not. Page 227, Lines 14-21
10. During the three week adjournment, the Appellant made extensive written representations to the Tribunal that the amended charge, by reason of its added part, was an invalid one and that it ought to be withdrawn. On the advice of senior counsel as its legal assessor, the Tribunal eventually withdrew the amended charge and reinstated the original one. Page 260-269 Page 285 Pages 271, 295
- 10 11. The resumed hearing took place on 11 November 1999. On 16 November 1999 the Tribunal gave its Interim Decision that: Pages 308-322 Pages 327-328
1. The Appellant's registration be suspended for two months;
 2. The Appellant be censured;
 3. He pay a fine of \$8,500;
 4. He pay 35% of the total costs of the proceedings of the Complaints Assessment Committee and the Tribunal.
12. The Tribunal's reasons for the interim decision were given in writing on 10 December 1999 as its "Supplementary Decision" which also quantified the final costs award of \$26,801 against the Appellant. Pages 331-351
- 20 13. The Appellant had applied in August 1999 to the Council for a new practising certificate for the current year. On 2 March 2000 the Council communicated to the Appellant its intention to issue a certificate to him, but with certain conditions on it. Page 217, Line 11 Page 404
14. The Appellant was dissatisfied with the proposed conditions and asked, by letter of 29 March 2000, to be heard by the Council as to why the conditions should not be imposed on his practising certificate. Pages 407-411
- 30 15. The Council heard the Appellant in person and through counsel on 10 August 2000. By letter of 20 September 2000 to the Appellant, the Council confirmed its decision to impose the conditions on his practising certificate. In the same letter it confirmed the finding of the Tribunal that the Appellant lacked insight and judgment. But, in its letter, the Council additionally claimed to have found by its own hearing of the Appellant that he suffered from a deficiency of "knowledge" and "skills of procedures" and that his "communication" and "attitudes and judgment" "were not of an acceptable level". Pages 430-436 Pages 437-439 Page 439
16. Despite the Appellant having offered to undergo a review of his competence provided for by the statute, the Council omitted to require or conduct a review of his competence. Thereupon, the Appellant declined to accept the proposed practising certificate.

17. In early February 2001 the Appellant applied to the Wellington High Court for judicial review of the decisions of the Tribunal and the Council. Pages 1-38
Pages 51-69
18. In respect of the Tribunal, the Appellant claimed that its first reviewable decision was the subject of reviewable errors of law inasmuch as it was based on an invalid charge and other unsustainable propositions; and that its second and third reviewable decisions which alleged lack of insight and judgment, and upon which the costs award against him depended in part, were also subject to errors of law including a misunderstanding of the term “competence” for the purposes of section 54(1) of the Act.
- 10 19. The Appellant’s application for judicial review was heard by Wild J on 7 and 8 June 2001 and was dismissed by his reserved judgment of 21 June 2001. Page 80
20. On 19 July 2001 the Appellant appealed to the Court of Appeal. The appeal was heard on 19 and 20 February 2002 by Richardson P, Blanchard and Tipping JJ, but was dismissed, per judgment of Blanchard J, dated 4 March 2002, with costs of \$10,000 being awarded against the Appellant. Page 113
Page 119
21. On 21 March 2002 the Appellant applied for conditional leave to appeal to Her Majesty in Council. The application was heard by Richardson P, Blanchard and Keith JJ on 24 April 2002. Leave was granted, subject to the usual conditions, by judgment of the court on 29 April 2002. Page 137
Page 147
- 20 22. Upon fulfillment of the conditions, final leave was granted on 18 October 2002. Page 153a
23. The Appellant contends that the Court of Appeal erred in not taking proper account of the inflating effect on the costs award of the Tribunal’s unwarranted and wide-ranging entertainment of the amended charge on the first day of its hearing; ostensibly of the Appellant’s submissions as to penalty.
24. The Appellant further contends that the Court of Appeal erred in failing to grant review, on the ground of irrationality, that the decision of the Tribunal that the Appellant’s insight and judgment were critically deficient was based on errors of fact and law including the taking into account irrelevant factors, generated principally by the Tribunal’s entertainment of the invalid amended charge.
- 30 25. The Appellant additionally contends that the Court of Appeal erred in failing to distinguish “competence” from “fitness to practise” as these terms are to be practically construed from the Act; and erred further in considering that a practitioner’s administrative and clerical activities in his practise were properly assessable as elements of medical competence.
26. The appellant respectfully submits that the judgment of the Court of Appeal of New Zealand was wrong and ought to be reversed, and that this appeal ought to be allowed with costs for the following (amongst other)

REASONS

1. Because the costs award against the applicant were unjustifiably inflated as a result of the Tribunal's wrongful entertainment of the invalid amended charge.
2. Because the finding of the Tribunal that the Appellant's insight and judgment were deficient, and the finding of the Council that the Appellant's knowledge, skills of procedures, communication and attitudes and judgment were not of an acceptable level, took into account irrelevant factors, were based on evidence of no probative value, and were not supported by the facts.
3. Because the Council failed to properly assess and or review according to the statutory formula, the competence of the Appellant which it claimed was critically in question.

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MILES WISLANG, Appellant

17 September 2004