28/7

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 234/90

LOW PRIORITY

UPON The Judicature Amendment Act 1972

IN THE MATTER of The Medical Practitioners' Act 1968

1917

BETWEEN DENNIS GEOFFREY BONHAM of Auckland, registered medical practitioner

Appellant

A N D THE MEDICAL COUNCIL OF NEW ZEALAND a statutory body established by Section 3 of the Medical Practitioners' Act 1968

First Respondent

A N D THE PRELIMINARY PROCEEDINGS COMMITTEE OF THE MEDICAL COUNCIL OF NEW ZEALAND a statutory body established by Section 11 of the Medical Practitioners' Act 1968

Second Respondent

Coram: Casey J (presiding)
Bisson J
Williamson J

Hearing: 25 September 1990

Counsel: J M Morrison with Miss Gaylene Phipps for Appellant
S S Williams for First Respondent
D J White QC with N F McClelland for Second Respondent

Judgment: 26 September 1990

JUDGMENT OF THE COURT DELIVERED BY CASEY J

This is an appeal against the decision of Gallen J of

21 September 1990 refusing an application by Professor Bonham to make an interim order under s 8 of the Judicature Amendment Act 1972 staying disciplinary proceedings against him by the Medical Council of New Zealand under s 56(3) of the Medical Practitioners' Act 1968. He held the Chair of Obstetrics and Gynaecology at the Post Graduate School at National Womens Hospital between 1963 and his retirement in 1988 which is the period covered by the charges.

The proceedings were initiated by a letter from the President of the New Zealand Medical Association on 26 September 1988 following publication of the Report of the Cervical Cancer Enquiry in July 1988 (the Cartwright Report). The letter requested the Preliminary Proceedings Committee of the New Zealand Medical Association to investigate the conduct of Professor Bonham arising from findings and recommendations in the Report and to determine whether there were grounds for charges. The Judge found that the letter could be regarded as a complaint under s 55 of the Act and this was not disputed.

The Committee investigated the matter and on 19 February 1990 forwarded two charges alleging disgraceful conduct on the part of Professor Bonham to him and the Council. One alleged that he failed from 1964 onwards to terminate, intervene or monitor research proposals put forward by Professor Green involving the taking of vaginal swabs from newly born children at National Womens' Hospital between 1963 and 1966.

The second contained allegations in respect of his support of and conduct over proposals put forward by Professor Green with the purpose of proving that carcinoma in situ of the cervix was not a pre-malignant disease. The period involved in this charge was from 1966 to 1988.

There followed discussions between Council, Professor Bonham and his legal advisers, and as a result it was decided in May 1990 that the charges would be heard on 2 October 1990 and formal notification to that effect was given to him on 1 June. This was followed by the Preliminary Proceedings Committee making available to his legal advisers a substantial quantity of evidence. Between 2 August and 19 September, 27 affidavits were forwarded comprising in the main, so we are informed, material which had come forward and been discussed in the Cartwright Report. We were also informed that no point was made that Professor Bonham had been embarrassed in the preparation of his defence as a result of the arrival of that material.

Nor was there any indication of any attack on the propriety of the disciplinary proceedings until a letter was sent to the Council on 7 September by Professor Bonham's legal advisers asking that the proceedings be stayed on the grounds that they were oppressive and an abuse of procedure. That application was heard by the Council on 19 September 1990 and at the hearing it had the assistance of legal advice

from Sir Duncan McMullin who had been asked to be in attendance for that purpose. At that hearing it was submitted on behalf of Professor Bonham first, that the time elapsed since the events forming the subject of the charges would prejudice his defence, with death or ill health preventing evidence being given by key witnesses; and by the inevitable effect of the passage of time on the memories of others he would wish to call. Secondly, that there was an absence of complaint over the whole period from the hospital staff and specialists or from the patients involved; and thirdly, that the proceedings now have no relevance. Professor Bonham has retired and no longer practises and most of what is alleged is past history, especially on procedures carried out on the newly born. It was accordingly contended that to go ahead with the disciplinary proceedings in these circumstances would be contrary to the requirements of natural justice because a fair hearing could not be had, and to do so would be an abuse of the Council's procedure.

It was accepted for present purposes that the Council had jurisdiction and power to order the proceedings to be stayed, although Mr White did not concede this was necessarily the case. The Council declined the application and issued a short statement of its reasons which has just been received as an exhibit to an affidavit filed in this Court. Essentially it said that it had a duty to hear the evidence and it was in the public interest to reach a

decision covering the responsibilities of senior medical personnel to patients in their care. These reasons were not available to Gallen J and it will be noted that they make no reference to Professor Bonham's major complaint that he could not mount a proper defence to the charges. His counsel then sought an adjournment to enable him to take proceedings in the High Court for judicial review of that decision, but this request was also declined and the Council decided that the disciplinary hearing should take place on Monday next 1 October 1990.

We were informed that this will require the attendance of nine Council members and it is expected to last for some two weeks, and that arrangements have been made for witnesses from overseas to travel in order to give evidence. Professor Bonham has now initiated the review proceedings in the High Court and brought the present application under s 8 of the Judicature Amendment Act for stay of the disciplinary hearing on 1 October, until the substantive review application could be disposed of. So this appeal from the refusal by Gallen J to grant that stay comes before us as a matter of urgency. Counsel for Professor Bonham had indicated he could not be ready for at least another week to have the substantive application for review dealt with, a practice that this Court has so often urged in dealing with requests for interim stay of proceedings; but by then counsel submitted it would be too late.

It should be noted, however, that there is provision in the Medical Practitioners' Act for an appeal to the High Court from a decision of the Council, so that Professor Bonham would not be without remedy. Mr White also raised the possibility that these review proceedings, or others of the same kind, could be heard at the same time; but Professor Bonham's counsel pointed out that this is not the same as relieving him at the outset from the stress, anxiety and possible injustice resulting from the proceedings, which he feels he cannot now adequately defend.

Section 8 of the Judicature Amendment Act provides that at any time before final determination of an application for review the Court may make interim orders staying the proceedings, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant. This section was considered by this Court in the The Brewers Association of New Zealand Incorporated v Carlton and United Breweries Limited & Ors. (CA 34/86; 14/3/86). In his judgment the President said :

> "In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief - which must mean reasonably necessary. If that condition is satisfied, as the Chief Justice was entitled to find that it was here, the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief."

He also discussed the threshold test to be attained by an applicant on the prospect of success of his claim for relief, and for the purposes of these proceedings it was accepted by Gallen J - we think, correctly - that Professor Bonham must establish that there is a serious question to be determined at the substantive hearing.

He referred to the judgment of the Court of Appeal of New South Wales in Herron v McGregor (1986) 6 NSWLR 246, which was relied on by the appellant as being very similar to the present situation, dealing with disciplinary charges against doctors arising from events which had occurred many years previously. They involved specific treatment applied to individual patients at a psychiatric hospital. That Court considered the charges to be an abuse of proceedings and was prepared to strike them out. One of the reasons was the long and unjustified delay by the complainants in bringing the charges.

Gallen J saw the present as an entirely different case, referring to a different kind of behaviour and a different kind of responsibility. The allegations against Professor Bonham are of a continuing failure to conform with objective professional standards over the periods involved in the charges. A resumé of the evidence relating to each of their numerous particulars was furnished by the Council, demonstrating that it relies almost exclusively on contemporary records and reports to establish the

circumstances in which the alleged failures occurred; and on professional evidence and publications to establish what was an appropriate standard of conduct at the relevant times.

We were informed that much of this material was brought forward at the Cartwright Enquiry in which Professor Bonham himself was a principal witness. With that background and the subsequent publicity generated by the Report, he could have been under no illusion about the likelihood of disciplinary charges being considered, although counsel pointed out that the Report was concerned with the procedures at National Womens' Hospital itself, rather than with attempting to blame any particular individual.

Gallen J discussed the evidential aspects of both charges. In the first, relating to new-born babies, he felt that while there might be problems for Professor Bonham in disproving the allegations against him, the real difficulty would be in proving the charges themselves. We think this is a realistic view and do not regard it as a failure by the Judge to appreciate the onus of proof, as Mr Morrison submitted. It is in effect a finding that Professor Bonham is unlikely to be prejudiced by the delay with that particular charge.

The Judge accepted that there were questions of fact on the second charge, and after observing there was no time limit under the Medical Practitioners' Act he said at p 18 of the judgment :

> "I accept that there may well be circumstances where the lapse of time of itself would be such that there would be an abuse of process if the matter were to proceed but I note in this case that there is evidence other than the evidence which Mr Collins suggests may now be suspect and I think that it is a matter for the appropriate Tribunal to assess in a medical context rather than a Court dealing with the matter in this context."

He noted that it was not alleged that Professor Bonham had responsibilities for the treatment to individual patients, but that the charges related only to areas of obligation for treatment and concluded - "That is not so clear to me that I think the proceedings should be regarded as an abuse of process". Mr Morrison submitted that in this passage he overstepped the mark and attempted to resolve the issue in the substantive review proceedings. That submission takes the words out of their context in a judgment in which it is plain Gallen J was concerned to see whether Professor Bonham had established that there was a serious question about the existence of prejudice and the other matters said to constitute an abuse of proceedings, warranting the interim stay of the disciplinary charges. He found he had not.

From the summary of the evidential material put before us by counsel and mentioned earlier in this judgment, we are satisfied that Gallen J reached the right conclusion about the effects of the delay on the evidence. He also found there was nothing of substance in the absence of complaints

over so many years. It was not until the Cartwright Report in 1988 that the full facts became known to those who were the subject of the activities at the hospital, while there is a plausible explanation for the reluctance of others involved to make complaints about the action of the senior professionals at the top of this area in that institution.

Nor do we think it relevant that an adverse finding on the charges will have no practical effect so far as he is concerned in his profession, as he is no longer practising. The fact is that the charges are brought at the instigation of the responsible body concerned, the New Zealand Medical Association, and accordingly it would not be appropriate to read into these proceedings the overtones of a witchhunt or of an attempt to find a scapegoat that appear to have been present in the case of Herron in New South Wales. In this field, as in others involving professionals in their dealings with the public, the fact that charges are brought and prosecuted to a conclusion is a salutory reminder of the need to maintain appropriate standards of conduct, and is an important matter of public interest.

A matter which was not canvassed to any extent before Gallen J, but which is of concern to us, is the delay in bringing the application for a stay to the Medical Council. As noted above, right up to 7 September 1990 Professor Bonham and his counsel had made no complaint about prejudice

or abuse of proceedings, and there had been mutual co-operation in arranging a hearing in October, and in the way the evidence should be dealt with there. His counsel explained that it was only when the affidavits with details of the evidence arrived at the beginning of August that the problems about answering the charges were realised. However, much of this material had been canvassed at the Cartwright Enquiry and the charges themselves contained extensive particulars. Professor Bonham and his advisers must have been aware for many months of the problems it is now alleged he faces.

As we have already noted, no adjournment was sought on the grounds that he was taken by surprise or had insufficient time to prepare a defence in the light of the evidentiary material recently supplied. It is difficult to escape the conclusion from this eleventh-hour application that the prospect of a miscarriage of justice may not be as real as we are now asked to accept. In spite of Mr Morrison's careful submissions in support of this appeal, we are satisfied that Gallen J took an overall view of the reality of the situation, and reached a correct conclusion in a matter that was essentially one for the exercise of his discretion. We see no grounds to interfere with it and the appeal must be dismissed.

There will be an order for costs for $1,500 in favour of the second respondent together with disbursements and expenses to be fixed by the Registrar.

Solicitors:

Rainey Collins, Wellington, for Appellant
Kensington Swan, Wellington, for First and Second Respondents