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Presenter Paper

Natural Justice

Stephen Keim SC and Kevin Connor SC discuss the right to natural justice of a medical practitioner on the one hand, and the privacy and confidentiality of witnesses on the other.

Discussion Includes

- Reasonable apprehension of bias
- The right to be heard and to know the case to be answered
- The tension between natural justice and obligations of confidentiality to witnesses
- The need for an accurate record of investigations
- Strategy in administrative actions and the danger in disengaging with administrative processes

On the Nature of Natural Justice Things: The Case of Dr. Vega Vega: Notes for a Continuing Professional Education talk at Ashurst Lawyers' Brisbane Office on 29 July 2015

Introductory

The reasons for judgment of Justice Anne Lyons, in *Vega Vega v Hoyle and Others* [2015] QSC 111 ("Dr. Vega Vega's case") is 48 pages long and, as is the case with all of Her Honour's judicial work, displays the benefit of hard work, clear thinking and conscientious application to duty. It is likely to prove a useful resource for lawyers, generally, and particularly so for lawyers working in the area of public service employment. The case deals with the jurisdictional technicalities associated with seeking statutory judicial review remedies under the *Judicial Review Act 1991* ("the JRA"). It deals with the principles of the right to a hearing aspects of natural justice dichotomy. It also discusses the principles of the other half of the dichotomy: apprehended bias. And these principles arise and are applied in the particular context of certain statutory inquiries for which provision is made in the *Hospital and Health Boards Act 2011* ("the Boards Act").

The experience of being counsel in the case, working with Jonathan King-Christopher and Nicola Kent, both of them excellent lawyers working at Ashurst and the equally assiduous Nicholas Gaffney of Avant, was always going to be an enlightening and satisfying experience. It turned out to be a heap of fun, as well.

As lawyers, we are, of course, taught to be objective. Only by being objective can we hope to be able to provide the advice and assistance our clients need (as opposed to providing them with the things they want and love to hear). As a result, I have tried to cultivate that capacity to be objective.

Nonetheless, I have tended to find that winning a case is usually more fun than losing it. Accordingly, I feel much better standing before you, this morning, having ended up on the right side of the result. If Justice Lyons had, with equal care and application, found that our arguments failed at crucial points, I would still have been happy to discuss with you the academic points that flow from the case. But I would have done so without the necessity, I currently experience, of having, from time to time, to suppress a happy smile from breaking out.

The Hearing Rule[1]

Dr. Vega Vega was the subject of two inquiries under the Boards Act. His performance as a surgeon was subject to a clinical review.[2] Two clinical reviewers were appointed by the Chief Executive[3] to conduct a clinical review and provide expert clinical advice[4] to investigators who

[1] https://en.wikipedia.org/wiki/Audi_alteram_partem: "Audi alteram partem" is a Latin phrase which means "listen to the other side" or "let the other side be heard" (accessed 27 July 2015).
[2] Division 3 of part 6: ss. 124 and 125 and following Boards Act
[3] Boards Act, s. 125
[4] Boards Act, para 124(c): see *Vega Vega v Hoyle and Others* [2015] QSC 111 ("reasons"), [67]

had been appointed to carry out a health service investigation, also, into Dr. Vega Vega's performance as a urological surgeon.

The health service investigators (one of whom was a solicitor) were also appointed pursuant to the Boards Act.[5] The role of an investigator is to investigate and report on any matters relating to the management, administration or delivery of public health services including employment matters.[6]

Both the clinical reviewers and the health service investigators were appointed by documents signed by the Chief Executive of the Department. These letters of appointment made it very clear that it was Dr. Vega Vega (and his actions) who was the focus of the investigatory processes. The appointment documents also made it clear that the processes were to be carried out in accord with the requirements of natural justice.

It is not surprising that the Chief Executive indicated that natural justice was applicable. One of the more recent High Court treatments on the subject is *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ("Saeed's Case"). In Saeed's Case, the plurality cited and restated the principles expressed in earlier cases. *Annetts v McCann*[7] is authority for the proposition that, when a statute confers a power allowing an adverse impact upon a person's rights or interests, the principles of natural justice regulate the exercise of that power.[8]

Kioa v West[9] is authority that, when a statute does not expressly require that the principles of natural justice be observed, the statute will be construed against common law notions of justice and fairness to supply the omission.[10]

And the principle of legality, the idea that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law without expressing its intention with irresistible clearness, is traceable, inter alia, to Chief Justice Gleeson in *Electrolux Home Products Pty. Ltd. v Australian Workers' Union*.[11]

However, while the almost universal availability of natural justice is clear on the authorities, what is uncertain in every case is the content of natural justice in that case. That makes most natural justice themed litigation quite uncertain.

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[5] Part 9, s. 190 Boards Act
[6] Boards Act, s. 189
[7] (1990) 170 CLR 596
[8] Cited in Saeed's Case at [11]
[9] (1985) 159 CLR 550, 609
[10] Cited in Saeed's Case at [11]
[11] (2004) 221 CLR 309, 329, [21], cited in Cited in Saeed's Case at [15]

It is back to Annetts v McCann that we go for the proposition that the rules of natural justice are not fixed and immutable. They require fairness in the circumstances.[12] Kioa v West provides a difficult to apply proposition that the concept of procedural fairness, in the particular case, depends on "the particular statutory framework".[13] The degree of variability is even greater than that. Kioa is also authority for the proposition that what is appropriate depends not just on the terms of the particular statute but the general circumstances of the case. These include the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting.[14] The concept which the law requires is one of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.[15]

The law requires that the statutory power is exercised fairly in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or permits to be taken into account.[16]

This means that you are never quite sure how far the right to be heard and its ancillary right, the right to know the case against you, will extend. In Dr. Vega Vega's case, the investigators had the benefit of interviews with 58 separate witnesses.[17] These witnesses had been told that their comments would be kept confidential. So the investigators decided that they did not have to provide any more than selectively chosen extracts from the contents of those interviews to Dr. Vega Vega. This was the key point on which it was argued that the principles of procedural fairness had not been followed.

The circumstance that the inquiries were directly targeted at Dr. Vega Vega and his work performance was a factor relied upon to argue that the standards of natural justice in this case should be high. One can appreciate that different standards might apply to a general fact finding inquiry which touches equally on many different actors compared to one which is focussed on whether a particular individual has engaged in misconduct.

A third point of significance was the seriousness of the allegations. It was clear, from the beginning, that the findings of the inquiry had the potential to affect Dr. Vega Vega in his

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[12] *Annetts v McCann* (1990) 170 CLR 596 at 617, per Toohey J. citing Gibbs CJ in *National Companies and Securities Commission v News Corporation Ltd.* (1984) 156 CLR 296 at 312. The question in *Annetts v McCann* was whether the parents of the deceased boy had the right to address the Coroner at the end of an Inquest.
[13] *Kioa v West* (1985) 159 CLR 550, at 584.9, per Mason J. (citing Kitto J. in *Mobil Oil Australia v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 680-2)
[14] *Kioa v West* (1985) 159 CLR 550, at 585-5, per Mason J. citing *R v Commonwealth Conciliation and Arbitration Commission; Ex Parte the Angliss Group* (1969) 122 CLR 546 at 552-3 and *National Companies and Securities Commission v News Corporation Ltd.* (1984) 156 CLR 296 at 311, 319-21
[15] *Kioa v West* (1985) 159 CLR 550, at 585.2, per Mason J.
[16] *Kioa v West* (1985) 159 CLR 550, at 584.4, per Mason J.
[17] *Vega Vega v Hoyle and others* [2015] QSC 111, [113] and [178]

employment and could also lead to referral of the inquiries' findings to the Medical Board. This could lead, in turn, to an inability to work in the profession beyond just the immediate employer who was conducting or commissioning the inquiry. And any adverse findings were likely to impact on his reputation.[18]

Justice Lyons, in applying the more general statements of principle from *Kioa v West*, cited the limiting sentiments of the New South Wales Court of Appeal in *Calardu Penrith Pty Ltd v Penrith City Council*[19], namely, that "procedural fairness is not like a potentially endless game of tennis where every submission…hit over the net had to be returned…Nor is procedural fairness to be equated with a duty of unlimited discovery".[20]

Her Honour also cited[21] the more expansive comments of Justices Flick and Foster in the Federal Court decision of *Minister for Immigration v Maman*:[22]

"The obligation to disclose potentially adverse information imposed by the rules of procedural fairness is not discharged by determining that which may ultimately prove to be relevant or significant to the final opinion reached. Although some information may be capable of being put to one side at the outset of the decision making process, other information may be more immediately central to the ultimate conclusions to be reached. Yet other information may be less centrally important but nevertheless not capable of being summarily cast aside. Some information, which may not initially appear to be of central importance, may if disclosed, occasion further factual input and may ultimately assume greater importance to the ultimate conclusion."[23]

Dr. Vega Vega had argued that the whole of the statements should be provided since they may have included both favourable and unfavourable information. Information of each type may have called for input from Dr. Vega Vega to ensure that the investigators were not disposed to act on an unfair or misleading impression of the information they had received.

Justice Lyons, simply, stated her conclusion as that, in the light of the significance of the interviews, it was insufficient, for the purposes of natural justice just to provide selective extracts. Her Honour found a breach of the right to be heard rule of natural justice had occurred.[24]

A Harder Nut to Crack: Reasonable Apprehension of Bias

Dr. Vega Vega had also argued that he should succeed on the other limb of natural justice, namely, that, in the circumstances of the case, a fair-minded lay observer might not bring an

[18] *Ainsworth v The Criminal Justice Commission* (1992) 175 CLR 564
[19] [2010] NSWLEC 50, [180].
[20] *Vega Vega v Hoyle and others* [2015] QSC 111, [176]
[21] *Vega Vega v Hoyle and others* [2015] QSC 111, [176]
[22] [2012] FCAFC 13; (2012) 200 FCR 30, 46 [50].
[23] Any resemblance to Donald Rumsfeld and "unknown unknowns" is purely incidental.
[24] *Vega Vega v Hoyle and others* [2015] QSC 111, [177]

impartial mind to the resolution of the case. The argument concerned the fact that one of the health service investigators was an employee of the firm that had been advising the Department about the steps that might be taken in respect of Dr. Vega Vega. This included setting up the inquiry and assisting in providing material to the police for a police inquiry into Dr. Vega Vega. The person appointed investigator had had some input into this early legal work. That person's employer was one of just two firms on the panel that normally did this kind of legal work for the Department.

As Her Honour pointed out,[25] the leading case on reasonable apprehension of bias is *Ebner v Official Trustee of Bankruptcy* (Ebner's case").[26] While the basic statement of the test, concern with the possible perception of the fair-minded lay observer, suggests that it might be satisfied relatively easily, the subsequent discussion in Ebner's case ensured that the test will, generally, be more difficult to satisfy than the mere statement of the initial formula indicates.

Justice Lyons, correctly, paraphrased the process which must be undertaken as requiring two steps: "The first step is the identification of what it is said might lead the decision-maker to decide a case other than on its legal and factual merits and the second step is that there must be a logical connection between the matter and the feared deviation from the course of deciding the case on its merits."[27]

It is convincing the court of that logical mechanism by which the decision maker's mind is likely to be affected that is the difficult part of establishing a reasonable apprehension of bias.

And it was the difficulty of satisfying that aspect of the test that caused Dr. Vega Vega not to succeed on this cause of action. Ultimately, on the facts before her, Her Honour was not satisfied to the requisite standard that a finding of reasonable apprehension of bias could be sustained despite what she referred to as her concerns. Her Honour said:

"Whilst I have a sense of unease and disquiet in relation to the association between [the law firm] and the decision-makers, I do not consider that the fact [the law firm was] involved at an early point in time necessarily means that a view had been formed in relation to Dr Vega Vega's actions. Whilst [the law firm] provided advice in relation to the provision of material to the Queensland Police Service about the credentialing process involving Dr Vega Vega, I do not accept that supplying material to the Queensland Police Service in response to a request gives rise to an inference that a view had been formed that Dr Vega Vega had engaged in criminal activity. Similarly, the fact that [the law firm] had assisted in the notification to AHPRA[28] does not

[25] *Vega Vega v Hoyle and others* [2015] QSC 111, [147]
[26] *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337
[27] *Vega Vega v Hoyle and others* [2015] QSC 111, [149]
[28] The agency that administers referrals to the Medical Board of Australia

give rise to an inference that the solicitors … had been engaged to advance a view that had been formed about Dr Vega Vega."[29]

Tactics and Strategy in Natural Justice

When your client is subject to a disciplinary process, there are many variables. You will be unaware of many of these. And many others will be out of your control.

Very few non-court processes set out to deprive your client of natural justice. Very few set out with a mindset that would justify a finding of reasonable apprehension of bias.

Nonetheless, domestic tribunals do not involve the same dispassionate processes as courts. And it is often difficult to sense the direction of those proceedings so as to feel confident of influencing them to take a view of the evidence that your client deserves.

Dr. Vega Vega was invited to an interview with one of the health service investigators and one of the clinical reviewers. More out of instinct than through arguments based on evidence and logic, I felt that such a process would not be favourable to Dr. Vega Vega. I felt that he would be asked questions that tended to reinforce the investigators' own prior reading of the clinical records and that he would not have an effective opportunity in that process to identify any instances where the clinical records had been misunderstood. Nor would he be able to communicate and have understood those aspects of the clinical records that strongly supported a favourable assessment of his performance of his clinical duties.

However, failure to take part in the process laid down allows investigators to reinforce their worst opinions formed about you. In addition, a failure to engage in the process can strip away any proper basis to complain, later, about the fairness of the process.

Dr. Vega Vega had already successfully appealed against immediate action taken against him by the Medical Board who had sought to suspend him from medical practice. As part of that process, which was heard and decided by His Honour, Judge Horneman-Wren, in the Queensland Consumer and Administrative Tribunal ("the QCAT"),[30] Dr. Vega Vega had obtained medical reports from specialist surgeons which strongly supported his clinical performance in respect of those incidents which were the subject of this later investigation and clinical review.

On the one hand, the fact that Judge Horneman-Wren's judgment had not been properly acknowledged either by the Department or the investigators gave me some concern about the purpose and likely course of the investigation. On the other hand, Dr. Vega Vega was able to stay engaged with the investigation by providing the investigators with his statement (which was his

[29] *Vega Vega v Hoyle and others* [2015] QSC 111, [153]
[30] *Vega Vega v Medical Board of Australia* [2014] QCAT 328

evidence in chief in QCAT); the reports of the specialists; and Judge Horneman-Wren's reasons for finding strongly in Dr. Vega Vega's favour.

When the investigators, having missed out on an interview, sought to put a series of written questions to Dr. Vega Vega, his lawyers were able to draw their attention to answers to some of these questions obtainable from the written material that had been provided. The question was raised whether the investigators had even properly read the material with which they had been provided. That is, were they really interested in what Dr. Vega Vega had to say on their matters of concern?

Suffice to say that detailed correspondence went back and forth between Dr. Vega Vega's lawyers and the investigators. In the end, some of this correspondence proved crucial to the result in the Supreme Court. In many types of litigation but, particularly, where the cause of action is a breach of natural justice, the case can be won or lost, several times, well before the first claim and statement of claim is filed.

This process requires plenty of thought, even more good instinctive guesswork, and much attention to detail. It is important to remember that being a good litigator is not just what you say when you get up on your feet in court.

And, if you want an example of this process going awry, read the case of *Lawrie v Lawler*.[31] The case concerned an inquiry set up by a newly elected government to inquire into a decision of the previous government formed, of course, by their political opponents. The person most affected by the inquiry was the new Opposition Leader, Ms Lawrie, who had been a minister in the previous government and who had been associated with the decision under investigation. The court, ultimately, held that the natural justice points raised had no weight because Ms Lawrie and her lawyers had made a decision to disengage from the inquiry.

This is an example of how things can go wrong when representing a client in an investigatory process.

Preliminary Points in ADJR Litigation

It is an ironic state of affairs that statutory judicial review remedies which were introduced at both State and Commonwealth level to reduce the technicality of judicial review have, themselves, become the subject of great technicality.

There are several reasons for this. A statutory jurisdiction must be defined by reference to some jurisdictional facts. This means that there will always be a dispute on the edges about the presence or otherwise of those facts.

[31] [2015] NTSC 19

Second, successful liberating legislation will result in a much greater volume of litigation. That means that some of that litigation will be less well considered and some of it will, deliberately and, of necessity, press the boundaries.

Having made those two excuses, I still feel that a love of technicality infuses the application of our statutory judicial remedies. It seems de rigeur, now, that, if you act for a respondent, that your last response is to look at the merits of the decision you are briefed to defend and your first is to bring a strike out application based on either a challenge to jurisdiction or discretionary factors.

One source of technicality concerns the availability of alternative remedies.[32] It makes sense to me that, even if there is a review on the merits available, the courts should be loath to exercise the discretion to dismiss the judicial review application in favour of an alternative remedy. Reviews on the merits take time, generally, involve longer hearings and, frequently, involve a decision on the later evidence available to the review tribunal. While there are many advantages associated with all of those factors, there are occasions when what a litigant wants and needs is the vindication of having the original decision set aside, ab initio, because of flaws in the decision making process.

Most technicality, however, comes from the jurisdictional questions. Section 4 JRA defines "decision to which this Act applies" as "a decision of an administrative character made … under an enactment …"

There has been a history of litigation since the Commonwealth's *Administrative Decisions (Judicial Review) Act 1977* ("the ADJR Act") became law. The principles are now enshrined in *Griffith University v Tang* ("Tang's Case").[33] Essentially, it is not enough that the enactment creates a decision making environment. In Tang's case, the legislation set up a university which then had generic power to make a plethora of decisions including, in the particular case, to confer or not confer degrees. The decision under question was a decision adverse to the student concerning study for a Ph.D. The plurality describes the necessary nexus with an enactment as whether "the decision derive[s] from the enactment the capacity to affect legal rights and obligations".[34] If not, the decision is not "under an enactment" and, therefore, "not a decision to which the [JRA] applies".

Another source of technical argument is whether the decision is final or operative and determinative. The caselaw is best represented by *Australian Broadcasting Tribunal v Bond* ("Bond's Case").[35] The concern is that, where any kind of inquiry has been established pursuant to

[32] Sections 12 and 13, JRA provide for discretionary dismissal where an alternative remedy is available.
[33] (2005) 221 CLR 99
[34] (2005) 221 CLR 99, [79]-[80]
[35] (1990) 170 CLR 321

legislation, every decision along the way on relevance of evidence or order of questioning or anything else might be subject to judicial review.[36]

Bond's case, however, allowed for interim decisions to be reviewable under the ADJR Act if the legislation provided, expressly, for the making of that interim decision.[37] In Bond's case, the interim finding for which the legislation provided was a finding that a would be licence holder was not a fit and proper person to hold a licence.

The legislation[38] also expressly provides for certain interim decisions to be deemed decisions under an enactment. The JRA provides that, if "provision is made by an enactment for the making of a report or recommendation before a decision is made, the making of the report or recommendation is itself taken, for the purposes of this Act, to be the making of a decision".[39]

The respondent's best argument concerned s.199 of the Boards Act. Subsections 199(1)-(3) provided for the investigators' report to go to the Chief Executive and for the clinical reviewers' report to go to the investigators and then be attached to the report of the investigators. Subsections 199(4)-(6) then provided that the Chief Executive might issue enforceable directions or take other action after receiving the report.

Essentially, the argument was that the reports (which did not affect rights in themselves) were not sufficiently made preconditions for subsequent decision making to get the deeming benefit of s. 6 JRA.[40]

Dr. Vega Vega's riposte was twofold. First, s. 199 created additional powers for the chief executive to that contained in the generic powers bestowed by the Boards Act.[41] That is, without a report, a direction of this specific kind might not be able to be issued. Second, it was argued that s. 6 JRA refers only to a chronological relationship and makes no requirement that the report be a precondition for subsequent action.

Justice Lyons' discussion of these points is very informative.[42] Her Honour, ultimately, disagreed with the respondents in construing s.199 of the Boards Act. She found that a direction under s. 199(5) was predicated on a consideration of the Final Report.[43] Further, Her Honour found that, once initiated, the reviewers' and investigators' reports had to be provided and they were an essential pre-requisite to any s.199 (5) direction and "not mere steps along the way".[44]

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[36] (1990) 170 CLR 321, 337
[37] (1990) 170 CLR 321, 337
[38] JRA and ADJR
[39] JRA, s. 6
[40] The arguments are encapsulated at *Vega Vega v Hoyle and others* [2015] QSC 111, [98]-[101]
[41] See ss. 44F-45 Boards Act.
[42] *Vega Vega v Hoyle and others* [2015] QSC 111, [114]-[117]
[43] *Vega Vega v Hoyle and others* [2015] QSC 111, [118]
[44] *Vega Vega v Hoyle and others* [2015] QSC 111, [119]

Her Honour's discussion and determination of the preliminary point is as useful a resource to lawyers working in the area as her discussion of the principal questions going to the right to be heard and reasonable apprehension rules of natural justice. However, while Her Honour deals sensibly with the technical issues which have arisen in statutory judicial review, a judge at first instance cannot remove that field of technicality. It remains to trap every one of us next time we act for an applicant.

One lesson that arises from this case (and all cases where these technical points arise) is to keep one's options open by looking beyond statutory judicial review. The remedy of declaratory relief has become more accessible (and less technical) in recent decades.[45] Think about seeking a declaration, in the court's non-statutory inherent jurisdiction, that the decision that you are seeking to attack is invalid ab initio for jurisdictional error.[46] Instead of, or as well as, a statutory order of review, also think about statutory prerogative orders and injunctive relief.[47]

Or accept the inevitable and guide your client to merits review in QCAT, the AAT or whatever other tribunals are available.

Do not fall into the trap of seeking an order quashing the decision if jurisdictional or other technical arguments are going to stop your client from getting to first base. Check every option available to your client.

Conclusion

Thank you for the opportunity to speak to you.

I have tried to convey some of the learning embedded in the reasons delivered in Dr. Vega Vega's case.

I have not done that judgment justice. Perhaps, I should have stood here and read it out to you, verbatim, but we would have run out of time.

I do recommend, however, if you are interested in this area of law that you do read the reasons for yourself. You will derive great benefit for future work in the field by doing so.

Stephen Keim
Chambers
24 July 2015

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[45] This is very much traceable to the High Court's decision in *Ainsworth v The Criminal Justice Commission* (1992) 175 CLR 564.
[46] For a primer on jurisdictional error, you will head to *Craig v South Australia* (1995) 184 CLR 163. *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 is also compulsory reading but never as helpful as it should be.
[47] Sections 41-47 JRA