



Privy Council Office Judicial Committee

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Privy Council Appeal No. 33 of 1999

Robert Francis Phipps *Appellant*

v.

Royal Australasian College of Surgeons *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 13th April 2000

Present at the hearing:—

Lord Nicholls of Birkenhead

Lord Clyde

Lord Hutton

Lord Millett

Sir Paul Kennedy

[Delivered by Lord Nicholls of Birkenhead]

The appellant, Mr. Robert Phipps, is a surgeon. He qualified in the United Kingdom, and in 1990 he and his family moved to New Zealand. From October 1990 he was employed as a general surgeon by Otago Area Health Board and, subsequently, Healthcare Otago Ltd. He was a lecturer at the University of Otago medical school. Personal relationships between Mr. Phipps and some members of the department of surgery soon deteriorated. Healthcare Otago became concerned about Mr. Phipps' surgical management of colorectal disease. This represented a very small part of Mr. Phipps' clinical workload. In August and September 1994 Healthcare Otago took three steps. It directed that Mr. Phipps should not carry out further surgical management of colorectal disease at Dunedin Hospital until an external review had been carried out. It set in motion a review by the defendant, Royal Australasian College of Surgeons (the College). Following the institution of the review it suspended Mr. Phipps from his employment.

On 31st October 1994 the College produced a report which was critical of Mr. Phipps' surgical management of colorectal disease. In these proceedings Mr. Phipps seeks an order setting aside the report. The trial judge, Chisholm J., set aside the report on grounds of procedural unfairness. The College appealed. The Court of Appeal (Henry, Keith and McGechan JJ.) allowed the appeal. The court reversed the judge's decision setting aside the report, and substituted a declaration that in three specific respects the College failed in its duty to give Mr. Phipps adequate notice of, and adequate opportunity to reply to, the possibility of findings adverse to him. The judgment of the Court of Appeal is reported at [1999] 3 N.Z.L.R. 1. Mr. Phipps has now appealed to their Lordships' Board. He seeks an order restoring the judge's decision that the report should be set aside. The College does not challenge the reviewability of the report. Nor does the College dispute that it was under a duty to adopt a fair procedure in the preparation of the report.

The review was carried out under the auspices of the College by Mr. P.G. Alley, an Auckland general surgeon, associate professor of surgery and a member of the New Zealand committee of the College, and Mr. M. Stuart, a specialist colorectal surgeon of Sydney. By their terms of reference the reviewers were required: to determine the adequacy and appropriateness of Mr. Phipps' assessment, judgment and management of twenty two identified patients with possible colorectal disease; to consider in particular his ability to assess the clinical problem, the appropriateness of his management plan and surgical procedures, the outcomes achieved, the quality of the records and communications, and the adequacy of supervision of junior staff; and to make recommendations.

In their conclusions the reviewers identified deficiencies in Mr. Phipps' assessment, judgment and management of rectal cancer. They made recommendations for the supervision and re-assessment of Mr. Phipps' work in this field.

At the beginning of November 1994 the report was sent to Healthcare Otago. The response of Healthcare Otago was to take action which went beyond the recommendations. On 28th November its chief executive announced that Healthcare Otago had dismissed Mr. Phipps. That decision was said to be based on the report. Healthcare Otago released to the public the last two sections of the report, sections 25 and 26. Mr. Phipps initiated two sets of proceedings. He brought a claim against Healthcare Otago for unjustified dismissal. Subsequently he received a substantial payment in settlement of his claim. He also brought the present proceedings against the College. Mr. Phipps and his family left New Zealand and returned to the United Kingdom in 1998. He is now a consultant surgeon in Bradford, practising primarily in the field of breast surgery.

The report

The issue arising on this appeal concerns Mr. Phipps' remedy in respect of the procedural unfairness which accompanied the preparation of the report. This issue, and their Lordships' views, cannot be understood without knowing something of the contents of the report. The report extended to 138 pages. It was intense and detailed. Any summary is bound to be imperfect. For present purposes their Lordships must convey the flavour of the criticisms. The report started with an introduction and general comments (sections 1 and 2). This was followed, in sections 3 to 24, by a synopsis of each of the twenty two cases and comment on each case under the particular subheadings set out in the terms of reference. Next, in section 25, was a summary of the cases under review, together with comments. Finally, section 26 comprised recommendations, under three headings: rectal cancer, colonic surgery, and "general matters".

The twenty two cases fell into three groups: seventeen cases of rectal cancer, three cases of colonic disease, and two other cases.

Rectal cancer. The reviewers stated that most of the seventeen cases of rectal cancer were notable for their advanced stage and aggressive nature. The reviewers identified six cases, patients 6, 8, 10, 15, 17 and 19, as giving no cause for concern. As to the other eleven cases, Mr. Phipps did not misdiagnose any case of rectal cancer. But he did proceed to major exclusionary surgery on two patients with rectal cancer, patients 1 and 13, without having performed a sigmoidoscopy (an internal examination using a sigmoidoscope). In these two cases he relied solely on radiological evidence, which can be unreliable: a "pre-operative sigmoidoscopy is absolutely essential to confirm the diagnosis and to exclude concomitant disease". In one case, patient 2, Mr. Phipps failed to appreciate the extent of metastatic rectal cancer. He failed to interpret the extent of local spread of rectal cancer in the case of patient 9. There were delays in securing histological proof of a clinical cancer of the rectum in patient 12.

The reviewers were also critical of management plans. In the case of patient 2, a failure to appreciate advanced metastases led to unnecessary therapy: radiotherapy and a second laparotomy (a surgical incision through the abdominal wall). In the case of patient 7, where there was a delay of five months between presentation and surgery, Mr. Phipps as the surgeon in charge should have made more strenuous efforts to accelerate progress. Faulty interpretation of two CT scans resulted in incorrect judgment about the need for surgery in the case of patient 9. Patient 11 was correctly diagnosed as rectal cancer, but Mr. Phipps failed properly to assess the extent of the cancer from the CT scans. This meant that he embarked on a plan which was less than ideal. Mr. Phipps failed to assess patient 13's perineal pain as being due to the recurrence of cancer. Radical excisional surgery should have been carried out more promptly. Mr. Phipps should have proceeded to immediate excisional surgery on patient 20 rather than referring him initially for radiotherapy.

In their assessment of surgical procedures the reviewers observed that "the striking failing" was the lack of any trial dissection to determine operability. This occurred in six patients (patients 2,7,9,12,14 and 20). Mr. Phipps' preferred treatment of obstructing rectal cancer by sigmoid colostomy, while safe, was not a recommended contemporary treatment. In the cases of two patients, patients 9 and 14, colonic diversion was accompanied by closure of the large bowel above the tumour. This technique was risky. The reviewers expressed concern about Mr. Phipps' approach to pre-anal resection of rectal cancer. In some cases, including even recurrent cancer, he was over optimistic: generous biopsies were referred to as local excisions (patients 13 and 11). Mr. Phipps asked much of his colleagues in Radiation Oncology. Cases were referred for radiotherapy when no trial dissection had been done, in the hope that their tumours might be "downstaged" (patients 7 and 9). In two cases (patients 2 and 14) Mr. Phipps opted for surgery, followed by radiotherapy, followed by

more surgery. This sequence is extremely consuming of resources and patients' time. In no case did radiotherapy change the operability of the cancer in the patients concerned. Mr. Phipps had difficulty in defining the level of rectal cancer with any degree of precision. The failure to do trial dissections, coupled with an over-reliance on local surgery supplemented by radiotherapy and an inability to interpret radiology accurately, led the reviewers to conclude that Mr. Phipps' practice in the surgery of rectal cancer was "not acceptable". The failure to assess, manage and perform appropriate surgery had resulted in poor outcomes in several patients. A disturbing feature of Mr. Phipps' practice was communication difficulties with colleagues and the absence of proper records.

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Colonic disease. The three cases of colonic disease concerned patients 4,16 and 22. The reviewers were critical of Mr. Phipps' handling of each of these cases. In ascending order of severity of criticism, in the case of patient 22 Mr. Phipps should have come to the operating theatre to assess the situation and assist his registrar if required. Patient 4 was incorrectly diagnosed as colonic cancer when in fact she was suffering from diverticulitis. She should not have been referred for radiotherapy in the absence of a secure tissue diagnosis of cancer. The operation report was too brief. Mr. Phipps' ability to assess the clinical problem of patient 16 was deficient: he failed to appreciate a large colonic polyp in a family with a strong history of colon cancer, he failed to read the histology report, and he failed to act on the result of the barium enema. The unexplained six months' delay in surgery was unacceptable with radiological evidence of such a large polyp. This was a 'preventable death' from cancer. The operation note was too brief.

The reviewers' overall view was that it was difficult for them to reach any definitive conclusion about Mr. Phipps' colonic surgery as they had been asked to review only three cases. There were matters of concern, but they were not of sufficient magnitude to cause the reviewers to recommend any restriction on Mr. Phipps' practice in this field.

Other cases. The last group comprised a case of appendicitis (patient 5) and a case of ovarian cancer (patient 3). The reviewers found no cause for concern regarding patient 3. Patient 5 was another case where Mr. Phipps displayed poor judgment in not coming to theatre to assist his junior registrar.

Report recommendations

The reviewers considered that the deficiencies in Mr. Phipps' assessment, judgment and management of rectal cancer were of real concern but were such that an attempt should be made to remedy them. The reviewers recommended, in paragraphs 26.1 to 26.3, that Mr. Phipps should be supervised in his practice of rectal cancer surgery for a period of at least eighteen months, initially at a teaching hospital outside Dunedin. In respect of colonic surgery he should be supervised for a period of six months.

The reviewers then turned in paragraph 26.4, under the heading of "General matters", to matters of a general nature about Mr Phipps' practice and involvement in the Department of Surgery. These came to light during their enquiries and were of "real concern". The reviewers' observations covered three pages of the report. Paragraph 26.4.1 stated:—

"It is clear that Mr. Phipps has a very unsatisfactory if no working relationship with any of his consultant surgical colleagues. There appears to be resentment and bitterness on both sides. From Mr. Phipps' point of view he feels as though he has been isolated. He

believes his practice has been restricted."

There followed further observations which included three passages to which Mr. Phipps has taken objection:–

1. Other surgeons hold the view that Mr. Phipps is concentrating on breast surgery to an undue degree and is not contributing either materially or intellectually to the functioning of the Department of Surgery.
2. For at least the last year, Mr. Phipps has been unable to do proper teaching ward rounds with another surgeon and registrar.
3. He has attended audit meetings irregularly.

The reviewers recorded that Mr. Phipps' relationship with other specialist staff was generally cordial. In the Radiation, Oncology and Radiology Departments he appeared to be well regarded as a committed and co-operative specialist colleague. Some nurses could not speak more highly of him. Many of those interviewed commented on Mr. Phipps' enthusiasm for breast surgery. It was clear that Mr. Phipps had the ability to co-operate with colleagues. The report concluded:–

"Unless Mr. Phipps is prepared to make a firm commitment to adhere to and adopt Departmental policies and practices (and he assured us that he would) then there is little point in HealthCare Otago implementing the [supervision] recommendations in paragraphs 26.1 to 26.3 above."

The trial judge's decision

Chisholm J. held that the College was under a duty to act fairly in producing its report, and that a "quality review process" was required. Most of the points on which Mr. Phipps was criticised in the report were put to him in the course of his interviews with the reviewers, but some of them were not. The College declined to show a draft of the report to Mr. Phipps for comment. This meant that, in breach of the duty to act fairly, the College did not give Mr. Phipps an opportunity to comment on some of the points of criticism. The judge identified five significant omissions of this nature:

1. The reviewers did not alert Mr. Phipps to the possibility of a finding that, in respect of patients 1 and 13, no sigmoidoscopy had been performed. This was an extremely serious omission. It was common ground at the trial that a sigmoidoscopy was carried out on patient 1. It was not clear whether this was so in the case of patient 13.

2. The reviewers did not alert Mr. Phipps to the fact that patient 16 was not under his care for five months of the period of delay for which he was criticised.

3. The reviewers did not alert Mr. Phipps to the possibility of a finding that patient 4 was referred for radiotherapy without obtaining a tissue biopsy.

4. Part of the criticism made in respect of patients 11 and 13 concerned the quality of communication and records. Mr. Phipps used the terms "resection" and "local excision" in letters to patient 11's general practitioner for procedures which were little more than biopsies. In relation to patient 13, and in the context of records, the report queried whether Mr. Phipps believed he had contributed materially to the removal of recurrent rectal cancer by doing what must be regarded as little more than a generous biopsy. Mr. Phipps was not alerted to these potential criticisms.

5. The reviewers did not alert Mr. Phipps to the three criticisms, under the heading of "General matters", which have been identified above.

The judge's overall conclusion was that there had been serious procedural unfairness which had irreparably tarnished the report. He said:—

"The report must be read *as a whole*. It would be unrealistic to think that the criticisms of Mr. Phipps which have now proved to be without foundation can ever be severed from the remainder of the report. The final two sections of the report are in the public arena. It is simply impossible to measure the impact of the unfounded criticisms on Mr. Phipps' reputation. So long as the report is in existence *any part of it*, including any unfounded criticisms, has the potential *in isolation* to adversely influence the minds of people and thereby the professional future of the plaintiff." (The judge's emphasis)

The Court of Appeal's decision

The Court of Appeal considered the five points on which Chisholm J. found there had been a significant failure to put Mr. Phipps on notice of particular potential criticisms. The court agreed that the first of these, relating to the absence of sigmoidoscopy, was a serious omission. The court considered that the second omission, relating to delay in treating patient 16, was a minor one. The alleged delay played a minor part in the reviewers' conclusions regarding this patient. The court disagreed with the judge on the third omission. The judge had misunderstood the evidence. On the fourth omission, the court noted that the substance of the adequacy of the procedures was put to Mr. Phipps. Any failure in respect of his recording of them had to be seen in that context. On the fifth omission, regarding "general matters", the court noted that the passages of which Mr. Phipps complained were "not directly involved with the particular terms of reference":—

"Were the reviewers to have given specific notice that they were to pursue them they might well have strayed well beyond their particular task. ... We do not see the passages as sufficiently related to the particular elements of the terms of reference and the essential role of the reviewers to call for their specifically being put to Mr. Phipps."

The court considered that the criticisms in the report of which the reviewers failed to give Mr. Phipps notice could be severed from the report. The criticisms were very specific. The procedural errors concerned only a limited number of the critical findings in the report and only one of them (regarding the absence of sigmoidoscopy) related to a very serious matter. There was no danger of errors in one area infecting other parts of the report. The "broad professional agreement about the appropriate course to be followed" strongly supported the view that the errors did not detract from the overall force of the report. The court therefore set aside the judge's order and substituted a declaration, as mentioned at the outset of this judgment, regarding items 1, 2 and 4 in the judge's list of five errors.

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The procedural shortcomings

On this appeal Mr. Phipps challenged the conclusion of the Court of Appeal regarding items 3 and 5 on that list. As to item 3 (referral of patient 4 without obtaining a tissue biopsy), their Lordships agree with the Court of Appeal. Before interviewing Mr. Phipps the reviewers prepared notes, to assist in identifying the points they wished to raise with him and as an aide-memoire. These notes did refer to the question of the precipitate referral for radiotherapy without a tissue diagnosis.

Regarding item 5 (the three sentences in the passage on "General matters"), their Lordships have to part company with the Court of Appeal. Their Lordships accept that some of the matters set out in section 26.4 probably went beyond the scope of the reviewers' terms of reference. Mr. Wilson Q.C., appearing for the College, described them as akin to obiter dicta in a judgment. But whether that is so or not is immaterial when considering the requirements of fairness in the present case. The fact is that section 26.4 was included in the report. This section would be read, as it was intended to be read, as part of a report produced under the auspices of the College. It would command respect accordingly. The College was as much under an obligation to act fairly in respect of this part of the report as every other part of the report. The extent to which this part of the report stands apart from issues directly relating to Mr. Phipps' assessment, judgment and management of the twenty two cases is a matter relevant to the question of severance. That is a different question, which arises in the context of what is the appropriate remedy. But, so far as the issue of fairness is concerned, the judge was right to regard this item as a procedural shortcoming in the preparation of the report.

This leaves items 1, 2 and 4. Plainly, item 1 was a serious omission. To proceed to major exclusionary surgery without having performed a sigmoidoscopy would be regarded in the medical world as a cardinal sin. Items 2 and 4 can fairly be characterised, in their context, as comparatively minor omissions.

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The appropriate remedy

A typical case of judicial review is an application to set aside a decision of a person or body exercising statutory powers. Broadly stated, the effect of setting aside the decision is that the decision has no legal effect. It cannot lawfully be acted upon. Similarly with a report where an issue is being determined to another person's prejudice: when the report is set aside, the document cannot be regarded as a report of the reporting person or body. Although the report may not of itself have any legal effect, in practice it may have serious adverse consequences to reputation or future employment prospects or the like. If the report is undermined by a legal flaw, an order setting aside the report may be, if nothing more, a convenient way of making plain the status of the report. A prime instance would be where the person or body was acting

beyond his or its powers in making the report. Then the whole report would lack validity.

In the present case the matter stands differently. In sections 3 to 25 of the report the reviewers made many specific findings. Only a small number of these findings were attended by procedural unfairness. Clearly, the findings which were arrived at unfairly must be expunged from the report. The court should grant relief which makes plain that those findings cannot be regarded as findings which were properly included in the College's report. Whether that limited form of relief is sufficient to achieve a fair result depends primarily upon the extent to which the vitiated findings can fairly be separated from the other findings in the report. If the court is satisfied that the impugned findings are "severable", to use familiar legal terminology, so that the good can be separated from the bad, the good should be allowed to stand. Fairness does not require otherwise. In such a case, there is in principle no reason why the whole report should be regarded as vitiated by the taint of procedural unfairness which, *ex hypothesi*, affected only a severable part or parts of the report. If, however, the good cannot fairly be separated from the bad, the whole report must be regarded as vitiated.

In the present case the reviewers made detailed and separate findings of fact for each patient. There is no good reason for thinking that the vitiated findings infected the reviewers' appraisal of other facts when making their findings. In agreement with the Court of Appeal, their Lordships consider that the other findings of fact, on which Mr. Phipps had opportunity to comment, were duly and fairly made and cannot be regarded as infected by the procedural unfairness affecting a very small number of other, specific facts. It is right, therefore, that they should be allowed to stand. This is so even though one of the impugned findings, concerning the absence of sigmoidoscopy in the case of two patients, was a serious criticism of Mr. Phipps. The seriousness of the vitiated finding calls for the exercise of particular caution in deciding whether severance is possible, but it does not of itself exclude severance.

The position regarding the recommendations (paragraphs 26.1 to 26.3) is different. The recommendations were overall recommendations, based on the totality of the preceding findings. Their Lordships suspect that even if the impugned findings had been omitted from the report the reviewers' recommendations would have been the same. But that is not a satisfactory basis on which to proceed, especially when one of the impugned findings is of a serious nature. Furthermore, their Lordships have in mind that the recommendations were never acted upon. That also is not a sufficient reason for letting them stand. Mr. Phipps' reputation was adversely affected by the report, part of which was the reviewers' recommendations on the need for a further assessment of Mr. Phipps' rectal cancer surgery after a period of supervision. Given that a material part of the factual basis for the recommendations was unsound, Mr. Phipps is entitled to have the recommendations set aside.

At the trial the reviewers gave evidence to the effect that even in the absence of the impugned findings their recommendations would have been the same. Chisholm J. was entitled to reject this as providing no answer. He applied observations of the Court of Appeal in *Chiu v. Minister of Immigration* [1994] 2 N.Z.L.R. 541, 552–553. There the initial decision of the minister to refuse an application for a residence permit was legally flawed and invalid. In the course of judicial review proceedings the successor minister stated that he saw no reason to change the decision. For reasons they gave, the Court of Appeal in *Chiu* did not regard that as a reason for refusing to grant relief to the plaintiff. Their Lordships consider that on matters of this nature each case must ultimately depend on its own facts. The overriding general principle is the need to achieve a fair result in the particular circumstances. But, in general, courts should be slow to conclude that evidence such as that given by the reviewers in the present court proceedings is a sufficient reason for withholding relief. When a decision is flawed by serious procedural irregularity, the person prejudiced is normally entitled to have the matter considered afresh. Justice requires that the decision should be set aside and re-considered unless, in the

particular case, there is a good reason why that should not be so. In the present case Mr. Phipps is not asking the College to undertake a fresh review. But that is not a reason for declining to set aside recommendations which are damaging to him.

One of the matters mentioned by the Court of Appeal was what they described as the broad professional agreement on the course to be followed. Their Lordships consider that was an overstatement. The view of Mr. Phipps' expert witness, Professor Nicholls, was that the recommendations at the end of the report were not justified. The trial judge was entitled to attach little importance to Mr. Phipps' acknowledgement of his own shortcomings made during the course of the review.

As to the concluding passages in the report (paragraphs 26.4 to 26.7), headed "General matters", the impugned three sentences mentioned above cannot stand. It is nothing to the point that these paragraphs also contained material favourable to Mr. Phipps. Further, these sentences are an integral and material part of one consecutive narrative, leading to an overall conclusion in paragraph 26.7. Their Lordships consider that severance of these three sentences and the overall conclusion from the text would produce unsatisfactory truncation and distortion. Accordingly, the entirety of these concluding passages (paragraphs 26.4 to 26.7) must be regarded as vitiated by procedural unfairness.

This means that the parts of the report tainted by procedural unfairness comprise items 1, 2, 4 and 5 in the judge's list, plus the whole of section 26 (recommendations and general matters). Their Lordships have considered whether, standing back, granting relief in respect of, but limited to, these parts of the report is adequate to do justice to Mr. Phipps. They consider that it is. Parts of the report, containing criticisms of Mr. Phipps, were released publicly. Some of this material was tainted with procedural unfairness. In consequence Mr. Phipps' reputation and future prospects may have been damaged, to an extent unjustly so. The trial judge set aside the whole report, but subsequently the Court of Appeal confined the relief to declarations in respect of three particular items. As indicated above, their Lordships consider that the vitiated parts of the report are more extensive than the Court of Appeal found. No doubt, many people who read the report or newspaper accounts of it may not have learned, and may never learn, of the outcome of the successive stages of these protracted proceedings and Mr. Phipps' (limited) vindication in them. That is a misfortune for Mr. Phipps inherent in this situation, whatever the form of the relief granted. The report exists and can be read. The most the court can do, or should do, in these judicial review proceedings is to grant relief which makes plain which parts of the report are to be regarded as expunged. The limitations on the value of such an order, so far as Mr. Phipps' general reputation is concerned, do not point to a need to set aside the whole report as distinct from particular parts of it. One must not lose sight of the fact that most of the factual findings in the report, some of a serious nature, were free from irregularity.

Mr. Phipps feels strongly that some of the findings were plainly wrong. Attached to his written case presented to the Board was an appendix setting out a lengthy list of errors and omissions in the report which it is said the College's witnesses acknowledged when giving evidence. Moreover, it is said, the reviewers unfairly failed to acknowledge that there is a school of thought which supports Mr. Phipps' practice of referring appropriate patients for radiotherapy without performing trial dissections. It must be borne in mind that the responsibility for investigating and deciding and evaluating what happened in the course of treatment of the twenty two patients was a matter entrusted to the reviewers. A challenge to the report on the ground of unreasonable findings was rejected by the trial judge and was not renewed in the Court of Appeal. It is not for their Lordships' Board, in exercise of the court's supervisory jurisdiction, to substitute their own views for those of the reviewers on issues of fact. The College did acknowledge the existence of some errors in the report, mostly minor and inconsequential. A memorandum of corrections was attached to the judgment of the Court of Appeal.

Counsel for Mr. Phipps submitted that there was no ground entitling the Court of Appeal to interfere with the trial judge's exercise of his discretion on what was the appropriate relief in this case. Chisholm J. did not misdirect himself, nor did he reach a conclusion which was plainly wrong. Their Lordships cannot accept this submission. The trial judge exercised his discretion on a factual basis which, as already noted, was erroneous in one respect. More importantly, the principal point on which the trial judge and the Court of Appeal differed was the question of severance. Severance is not a matter for the exercise of discretion by a judge. Rather, in a case such as the present, it is a question of whether the invalid part is inextricably bound up with the valid part. That is a matter of judicial assessment.

As stated above, the relief granted in these proceedings should make plain that the invalid findings cannot be regarded as findings properly included in the report. In this regard their Lordships are doubtful whether the form of declaration made by the Court of Appeal spells out the position in sufficiently clear terms. The declaration made by the Court of Appeal should be expanded to cover items 1, 2, 4 and 5 in the judge's list mentioned above. Their Lordships consider that the declaration should also include further words to the effect that these items, together with the recommendations and general matters set out in paragraphs 26.1 to 26.7, are to be regarded as expunged from the report.

Counsel for the College submitted that the court has no power to set aside this report. The court's jurisdiction to review the report and the process leading to it derives from the provisions in section 4(1) of the Judicature Amendment Act 1972 regarding a "statutory power" as defined in section 3 of the Act: see the decision of the Court of Appeal at [1999] 3 N.Z.L.R. 12, lines 42 to 45. The power to set aside a decision, conferred by section 4(2), is confined to decisions made in the exercise of a "statutory power of decision". The latter term is defined much more narrowly than "statutory power". This point was not addressed in the judgments of the courts below. Nor was it developed further before the Board. Their Lordships can be equally brief. They are satisfied that the relief just mentioned falls within the scope of section 4(1).

Their Lordships' conclusion is that the order made by the Court of Appeal should be varied to the extent indicated. Their Lordships will humbly advise Her Majesty that the appeal should otherwise be dismissed. The appeal having substantially failed, but not wholly so, the appellant must pay one half of the respondent's costs of the appeal to their Lordships' Board.

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