

50/88

SUPREME COURT OF VICTORIA

SCAVONE v ARTHRIGUARD AUSTRALIA Pty Ltd

Hampel J

28 June 1988

HEALTH – PRODUCT FOR RELIEF OF ARTHRITIS – PAMPHLET PUBLISHED CONTAINING STATEMENTS OF SATISFIED CUSTOMERS – WHETHER "PUBLISHES FALSE STATEMENTS" – BURDEN OF PROOF: HEALTH ACT 1958, SS249, 299.

AA P/L was charged pursuant to s249(1) of the *Health Act* 1958 in that it published in a pamphlet false statements concerning the effects which have followed the use of a product called "ArthriGuard". The pamphlet contained a number of testimonials to the effect that use of the product was followed by relief from arthritic pain and symptoms. At the hearing, AA P/L called those persons who had given the testimonials and their evidence was to the effect that beneficial results followed from their use of "Arthri-Guard". The Magistrate accepted the evidence of these witnesses and dismissed the charge, holding that the statements made by the users in the pamphlet were correct and that it was not necessary for AA P/L to prove that the product caused relief from the symptoms of arthritis. Upon order nisi to review—

HELD: Order nisi discharged.

1. The offence as charged consisted of the making of false statements not the selling or describing of appliances which the medical profession considered had no physiological or therapeutic effect.

2. Accordingly, in accepting the evidence of those persons who described beneficial results following the use of the product, it was open to the Magistrate to conclude that the statements as published in the pamphlet were correct and to hold that the defendant was not in breach of s249(1) of the *Health Act* 1958.

HAMPEL J: [1] This is the return of an order nisi to review the decision of the Magistrate at Ballarat dismissing an information laid under s249(1) of the *Health Act* 1958 for the publication of false statements. Section 249(1) provides:

"Every person who publishes or causes to be published any statement which—

(a) is intended or apparently intended by such person or any other person to promote the sale of any drug or substance or of any article as a medicine preparation or [2] appliance for the prevention cure or relief of any human ailment or physical defect; and

(b) is false in any material particular relating to the ingredients composition structure nature or operation of the drug substance medicine preparation or appliance or to the effects which have followed or may follow the use thereof—

shall be guilty of an offence against this Part."

The only affidavit in support of the application reveals that the respondent company sold a product called Arthri-Guard, which consisted of two painted plastic sheets bonded together. The allegedly false statements, on which the prosecution relied, were contained in a pamphlet which was published and which in general terms referred to the Arthri-Guard insulation sheet in relation to arthritic and rheumatic pain. It was essentially the collection of testimonials in that context that it was claimed amounted to false statements. The testimonials were to the effect that use of the sheets was followed by relief from arthritic pain and symptoms.

At the hearing evidence was given by a Dr Ebringer that he did not know of any principle of medical science which would lead him to believe that the insulated sheets could have beneficial effects for arthritis sufferers. He said that, in a purely physiological sense, he was 99 per cent certain that the sheets could not have been responsible for relieving the symptoms of arthritis sufferers and any relief which followed would be as a result of a placebo effect.

[3] The defence called a number of witnesses, including those who provided the testimonials

for the pamphlet, who said that, although their testimonials related to the old product in which red lead paint had been used, [4] they had switched to the new product which had an aluminium based paint and found that the same beneficial results followed.

The prosecution relied on s299, which reverses the onus of proof. It provides in effect that the defendant bears the onus of proving the correctness of any statement with respect to the therapeutic effect of the product. The Magistrate accepted the evidence of the defence witnesses as to the relief they obtained after using the sheets. He was unable to say whether such relief was brought about by the sheet or the placebo effect. Although some of the testimonials related to the earlier product, the statements were equally attributable to either product. The Magistrate was satisfied that the defence had proved that the statements made by the users and contained in the pamphlet "were and are correct". He held that that was what the defence had to prove and not that the sheets caused relief of the symptoms of arthritis.

Having made those findings the Magistrate dismissed the information which alleged that "such statements were false in relation to the effects which have followed the use" of the Arthri-Guard sheets. The order nisi was granted on eleven grounds:

- (i) That the Stipendiary Magistrate misdirected himself as to the effect of Section 299 of the *Health Act 1958* in failing to hold that the said Section required the Defendant to prove the correctness of the statements published that the "Arthri-Guard" [5] insulation sheet would cure or relieve the symptoms of Arthritis, and failed to give effect to the said Section.
- (ii) That the Stipendiary Magistrate erred in law in the finding that the Defendant had discharged the onus of proof imposed upon it by Section 299 of the *Health Act 1958*.
- (iii) That the Stipendiary Magistrate erred in law in determining that if persons had made statements about the efficiency of the "Arthri-Guard" insulation sheet which were quoted accurately in statements published by the Defendant, and were sincerely believed by the persons who made them, the Defendant had not published a statement which was false in a material particular where those statements were in fact false.
- (iv) That the Stipendiary Magistrate was wrong in law in failing to determine whether or not the "Arthri-Guard" insulation sheet cured or relieved the symptom of arthritis.
- (v) That the Stipendiary Magistrate erred in law in not determining that the claims in the statements published by the Defendant were statements to the effects which have followed or may follow the use thereof.
- (vi) That the Stipendiary Magistrate had misdirected himself as to the meaning of s249(1) of the *Health Act 1958* in relation to a statement false in a material particular relating to the effects which have followed or may follow the use of an appliance.
- [6] (vii) That the Stipendiary Magistrate was wrong in law in determining that the Defendant had not published statements which were false in material particulars relating to the effects which had followed or might follow the use of the "Arthri-Guard" insulation sheet.
- (viii) That the Stipendiary Magistrate was wrong in law in determining that statements published by the Defendant relating to an insulation sheet different from that which it was offering for sale at the time of such publication were not false in a material particular or particulars.
- (ix) That the Stipendiary Magistrate was wrong in law in determining that statements published about the earlier version of the insulation sheet applied equally to the version offered for sale at the time of such publication.
- (x) That the finding of the Stipendiary Magistrate was against the weight of the evidence.
- (xi) That the Stipendiary Magistrate erred in law in that, having regard to the uncontradicted medical evidence that the "Arthri-Guard" insulation sheet would not cure or relieve arthritis he ought to have convicted the Defendant.

There was discussion before me as to whether some of these grounds overlapped and whether they were sufficient. However, it became clear during argument that the parties were *ad idem* as to what issues were raised and joined between them. It also became clear that the

grounds had to be limited to what was alleged [7] in the information, namely, the "effects which have followed" the use of the sheets and not effects which "may follow".

In my opinion, on the evidence before him, the Magistrate was entitled to come to the conclusion which he reached and I am not able to detect any reviewable error in his approach. Section 249(1) is a penal provision concerned with false statements in a material particular, with a reversal of the onus of proof in s299. Given that there was evidence capable of supporting the offence created by the combination of parts (a) and (b) of s249(1), what the defendant had to establish on the balance of probabilities was the correctness of the statements in the pamphlet with respect to the therapeutic effects which followed the use of the sheets. The Magistrate accepted the evidence that the statements of relief which followed were true and held that the onus had been discharged.

It is not, in my view, appropriate to interpret the provision as requiring the proof of some objective medically-known physiological basis by which it can be demonstrated that those sheets have a curative effect. The offence charged consists of the making of false statements, not of the selling or describing of appliances which the medical profession considers have no physiological therapeutic effect. The statements relied on are to the effect that pain and symptom relief followed the use of these sheets. [8] Those statements were found to be correct and, in my opinion, that finding properly led to the charge being dismissed.

The fact that the testimonials in the pamphlet related to the earlier product, in which a different paint was used, was, in view of the factual findings, not to the point because the section is concerned with falsity in a material particular, as set out in subsection (1)(b). As none of the grounds have, in my view, been made out and for the reasons I have stated, the order nisi must be discharged with costs.

APPEARANCES: For the informant Scavone: Mr R Meehan, counsel. Victorian Government Solicitor. For the respondent Arthriguard Australia: Mr A Cavanough, counsel. Minter Ellison, solicitors.
