Privy Council Appeal No. 11 of 1990

Mohammed Ali Reza *Appellant*

v.

The General Medical Council *Respondent*

FROM

THE PROFESSIONAL CONDUCT COMMITTEE OF THE GENERAL MEDICAL COUNCIL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 6TH FEBRUARY 1991, DELIVERED THE 4TH MARCH 1991

Present at the hearing:-

LORD KEITH OF KINKEL
LORD OLIVER OF AYLMERTON
LORD LOWRY

*[Delivered by **Lord Lowry**]*

This appeal arose from a determination on 12th March 1990 by the Professional Conduct Committee ("the Committee") of the General Medical Council ("the Council") that the appellant Dr. Mohammed Ali Reza was guilty of serious professional misconduct and a direction by the Committee that his name be erased from the Medical Register. The Committee further determined that the appellant's registration be suspended forthwith for the necessary protection of members of the public. On 23rd March 1990 the appellant made application to the High Court under section 38(6) of the Medical Act 1983 to terminate the order for immediate suspension, but that application was dismissed with costs.

By notice of inquiry dated 5th February 1990 the appellant was charged -

"That being registered under the Medical Act,

(1) On numerous occasions between about July, 1986 and about July, 1987, at your surgery premises, you made improper and indecent remarks to your employee, Miss E.L., and you behaved improperly towards her;

(2) On numerous occasions between about February and about June 1987, at your surgery premises, you made improper and indecent remarks to your employee, Miss A.S;

(3) On numerous occasions between about July and about September 1987, at your surgery premises, you made improper and indecent remarks to your employee, Miss L.M, and you behaved improperly towards her;

(4) On numerous occasions between February 1987 and about January 1988, at your surgery premises, you made improper and indecent remarks to your employee Miss C.S. and you behaved improperly towards her;

(5) In about December 1987 you abused your professional position in order to make improper and indecent remarks to Miss P.R., a patient of your practice at the material time;

(6) On a number of occasions between 1983 and about April 1989 you abused your professional position in order to make improper and indecent remarks to Mrs. J.R., a patient of your practice during that period;

(7) (a) On a number of occasions between about 1987 and November 1989 you abused your professional position in order to make improper and indecent remarks to Miss M.K., a patient of your practice at the material times;

(b) On an unknown date in October 1989, when you were asked to make a home visit to Mrs. K.'s daughter Y, you attended Mrs. K.'s flat, but left without examining Y, and without prescribing or arranging any treatment for her.

And that in relation to the facts alleged in each head of the above charge you have been guilty of serious professional misconduct."

The hearing took place on 8th, 9th and 12th March 1990. Miss Foster, for the Council, applied to amend the notice of inquiry by altering the concluding words of the notice to read:-

"And that in relation to the facts alleged in each head both individually and cumulatively you have been guilty of serious professional misconduct."

Her reasonable object was to obviate the danger that, when deciding whether the appellant had been guilty of serious professional misconduct, the Committee might consider the facts found distributively under seven or

eight separate heads, instead of looking at the appellant's proved conduct as a whole. There was, indeed, only one charge - serious professional misconduct -, but the reference to "the above charge" and the use of the phrase "in each head" in the notice of inquiry, combined with the nature of the amendment sought by counsel, seem to have led all concerned to treat the notice as a statement of seven, or more accurately eight, different charges of serious professional misconduct. A difficulty was created for the Committee, the Legal Assessor and counsel by the fact that counsel's submissions were made and considered under the shadow of certain observations appended to the judgment of the Board in *Lanford v. General Medical Council* [1990] A.C. 13 which suggested the application to hearings before the Committee of procedures (potentially helpful to the accused practitioner) which were appropriate only to trial on indictment.

The application to amend was opposed and was refused by the Committee after they had received the advice of the Legal Assessor and considered the point. Thereupon Mr. Coonan, for the appellant, followed up his advantage by applying that each of what had now come to be regarded as the seven charges of serious professional misconduct should be tried separately from the others. (Miss Foster had already accepted, which was a logical response to what had been said in *Lanford*, that the matter alleged under head 7(b), being a wholly different allegation of serious professional misconduct, should be tried separately.) She opposed Mr. Coonan's application and sought the trial of all the "charges" together. Counsel made submissions to the Legal Assessor in the absence of the Committee, who then received advice from the Legal Assessor in the presence of counsel to the effect that charges 1 to 4 ("Group A"), which were concerned with the appellant's conduct towards four receptionists employed by him, might properly be heard together and that charges 6 and 7(a) ("Group B"), which were concerned with his conduct towards two patients, might properly be heard together and that charge 5 (because there was no striking similarity in the evidence) must be heard separately. (In the event the complainant did not appear and charge 5 was not pursued.) The Legal Assessor stated that the question of hearing charges together fell to be determined in accordance with the rule about evidence of similar facts. He also dealt with the question of possible collaboration or concoction, particularly in relation to Group A.

The Committee accepted this advice and heard first the evidence relating to charges 1 to 4. After the complainants had given evidence, Mr. Coonan made a submission under Rule 27(1)(e)(ii) that, looking at the evidence in four isolated compartments, the facts of which evidence had been adduced in relation to the

Group A charges were insufficient to support a finding of serious professional misconduct. The Committee acceded to this submission in relation to charge 1, but not in relation to charges 2, 3 and 4. The appellant gave evidence amounting to a complete denial of any impropriety or indecency and alleged that he was the victim of a conspiracy. After again hearing submissions of counsel and receiving advice from the Legal Assessor, the Committee determined that the facts alleged in charges 2 and 3 had been proved to their satisfaction, but not the facts alleged in charge 4, and proposed to hear charges 6 and 7(a). Mr. Coonan, who had earlier reserved his position, submitted that these charges should be adjourned and heard by a different Committee but, after argument and further advice, the Committee proceeded to hear the charges and reached a determination that the facts alleged therein had been proved to their satisfaction except the words "and indecent" in charge 6. Then, having proceeded in accordance with Rule 28, the Committee announced that they had judged the appellant "to have been guilty of serious professional misconduct in relation to the facts proved against you in the charges" and thereupon directed the appellant's name to be erased from the register and his registration to be suspended forthwith.

On appeal Mr. Coonan advanced the following arguments:-

1. The Committee ought to have arranged for a separate hearing of each of the seven charges (which were reduced to six by the elimination of charge 5), instead of arranging for a two-group hearing;
2. (Which is closely connected with the first argument) the Legal Assessor misdirected the Committee on similar fact evidence and mutual corroboration;
3. The Committee had not taken proper account of the possibility of collusion in relation to the Group A charges;
4. The Committee, by proceeding immediately to hear the Group B charges instead of adjourning them to be heard by a different Committee, had prejudiced the fair hearing of the charges against the appellant who, he contended, might well have been dealt with more leniently if the only heads of complaint to be considered in proof of serious professional misconduct had been charges 2 and 3 which related to the appellant's conduct towards receptionists employed by him.

Mr. Coonan's arguments relied on an assumed analogy with a criminal trial, the validity of which, to put it no higher at this stage, was seriously called in question by the decision of the House of Lords in *Gee v. General Medical Council* [1987] 1 W.L.R. 564, and by a number of earlier cases in which the procedure of the

Professional Conduct Committee was discussed. Their Lordships will, however, first review the arguments on the basis on which they were presented.

Under section 4 of the Indictments Act 1915 and rule 9 of the Indictments Rules 1971 charges for any offences may be joined in the same indictment if those charges are founded on the same facts, or form or are part of a series of offences of the same or a similar character. *Ludlow v. Metropolitan Police Commissioner* [1971] A.C. 29 was a case in which counts of attempted larceny and robbery were held to have been properly joined and properly tried together. Section 5(3) of the Act, however, provides *inter alia* that the court may order a separate trial of any count or counts of an indictment if an accused person may be prejudiced or embarrassed in his defence, and, so far as sexual offences are concerned, it seems to have been accepted, at least since *R. v. Sims* [1946] K.B. 531, that an application for a separate trial of different counts ought to be acceded to if the evidence to be adduced on one count is considered unlikely to pass the similar fact test in relation to another count in the same indictment.

Their Lordships are satisfied that, if the criminal analogy is applied, the Committee did at least full justice to the appellant when they adopted the procedure recommended by the Legal Assessor for hearing the complaints in Group A and Group B as they did, since the evidence of improper and indecent conduct and the surrounding circumstances in each of heads 1 to 4 appears to their Lordships to have qualified as similar fact evidence in relation to the other heads in Group A and the same can be said concerning heads 6 and 7(a) within Group B. Their Lordships are equally satisfied with regard to the closely related question whether the evidence under heads 2 and 3 and under heads 6 and 7(a) respectively was similar fact evidence and therefore capable, provided it was found to be credible, of affording mutual corroboration. Their Lordships will presently consider the principle of similar fact evidence, which constituted the main focus of Mr. Coonan's argument.

The Legal Assessor gave sound advice to the Committee on this point. He also warned them, particularly in relation to Group A, of the risk of collaboration or concoction and, in relation to Group B, that, with only two alleged instances of conduct (more accurately, two alleged courses of conduct) before them, they should proceed with great caution before using one account to corroborate the other. Once these warnings had been given, it was for the Committee to apply the principles properly to the facts and there is no sign that they failed to do so.

The complaint that the Committee proceeded immediately from the Group A charges to hear those in Group B involved the assertion that it was a mockery of justice first to divide the charges for good reasons into two groups and then, having found the appellant guilty of two charges in Group A, to go straight to the hearing of those in Group B, thereby undoing the good which had been achieved by segregation of the charges. There are, in the view of their Lordships, two quite separate answers.

The first meets the appellant on his own ground. After Mr. Coonan had submitted that the Committee should not hear the Group B charges, the Legal Assessor, when asked, tendered his advice:-

> "The test which you should apply, in my view, in deciding how next to proceed, is this: you should proceed with the trial on charges 6 and 7 if and only if you are satisfied that the respondent doctor would obtain a fair hearing and would be seen to obtain a fair hearing. That is matter to be decided by you.
>
> For what it is worth I say only this, that in my view it is not to be supposed that a professional Committee, constituted as this Committee is, would be liable to be tainted in the same way as a jury of twelve lay persons who proceeded to hear a second set of charges against the same accused after a first trial."

If any criticism can be made of this advice, it is that the Legal Assessor expressed his confidence that the Committee could safely proceed and thereby encouraged them to do so, but he did put the preliminary point squarely to them for their decision.

Before their Lordships Mr. Coonan relied on the principle adopted in *R. v. Liverpool Justices, ex parte Topping* [1983] 1 W.L.R. 119 that the test was not whether [the Committee] would be affected by the knowledge [of the Group A charges] but whether a reasonable and fairminded person, sitting in court and knowing all the relevant facts (which in *Topping's* case were that seven further charges, as the magistrates could see from the court register, were pending), would have a reasonable suspicion that a fair trial for the accused would not be possible. He conceded that the hypothetical "fairminded person" would have to be someone familiar with the procedure of the Committee. He also cited *R. v. Grimsby Quarter Sessions ex parte Fuller* [1956] 1 Q.B. 36 and *R. v. Blythe Valley Juvenile Court* (1987) 151 J.P. 805. In the *Grimsby* case, Fuller, who was appealing against a summary conviction on a charge of being found on enclosed premises for an unlawful purpose, had indeed been found on enclosed premises and the recorder who heard his appeal had before reaching his decision been handed a

police report which contained, as well as the information which the clerk of the court wished to impart, a long list of previous convictions. Lord Goddard C.J., granting an order of certiorari, said at page 41:-

> "What, then, should this court do in the circumstances? It is not for every irregularity in the course of a hearing either in petty or quarter sessions that a certiorari would be granted. In our opinion we ought to apply the same rule as in a case where bias on the part of a justice adjudicating is alleged, which was fully considered by this court in the recent case of *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, where in the result a certiorari was refused. It was there held that there must be a real likelihood of bias and so here we would say a real likelihood of prejudice. We emphasize it is likelihood, not certainty. We applied the judgment of Blackburn J. in *Reg. Rand* (1866) L.R. 1 Q.B. 230, 231, and also adopted the words of Lord O'Brien L.C.J. in *Rex v. Queen's County Justices* [1908] 2 I.R. 285, 294.: 'By "bias" I understand a real likelihood of an operative prejudice, whether conscious or unconscious,' and this, in our opinion, amply justifies us in applying the same test in the present case as would be applied where a motion is brought on the ground of bias."

Perhaps Mr. Coonan's most potent argument (which derived support from *R. v. Sims* [1946] K.B. 531) was that the Committee on the Legal Assessor's advice must have decided to divide the charges on the basis that the evidence relevant to one group was not similar fact evidence for the purposes of the other group but, by virtue of being broadly similar evidence of sexual impropriety, was highly prejudicial. On that foundation he based a further argument that his case that the alleged victims in Group B were motivated against him stood a much poorer chance of acceptance in the circumstances.

On the other hand, in contrast to the cases relied on by Mr. Coonan (where the proceedings, incidentally, were marred by irregularities), this professionally constituted committee reached a deliberate decision to proceed, they had shown and were to show by their decisions in favour of the appellant on charges 1, 4 and 6 the ability to discriminate and, in turning to cases where patients were concerned, they must have been very much aware of their responsibilities. It must also be said, having regard to the transcript of the appellant's evidence and making every allowance for not having seen and heard him give that evidence, that it would have been most surprising if the Committee had not at least made a finding of impropriety on both charges. Accordingly, their Lordships, disregarding for this purpose the question

whether the evidence on all six charges may not have been similar fact evidence, are clear that "there was no real likelihood of an operative prejudice" and that a reasonable and fairminded person who was familiar with the procedure would not have had a reasonable suspicion that a fair trial for the appellant on the Group B charges would not be possible.

The second answer depends mainly on a consideration of the procedure to be followed in hearings before the Committee, a question of general importance which their Lordships find it helpful to consider now before coming back to the instant case. They have for this purpose been considerably assisted by the careful review of the Rules and reported cases undertaken by Mr. Collins, for the Council, and by Mr. Coonan's thoughtful observations in reply.

Counsel drew their Lordships' attention to certain provisions of the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules Order of Council 1988 which came into operation on 15th January 1989. Part V consists of rules 23 to 36 and is entitled "Procedure of the Professional Conduct Committee at the original hearing of any case". The directly relevant Rules are set out in the appendix to this judgment.

The initiating process with regard to criminal convictions is laid down by Rule 5 and the process with regard to professional misconduct starts with the receipt of a complaint or information in writing by the Registrar of the Council, whose duty it is, if it appears to him that a question arises whether conduct of a practitioner constitutes serious professional misconduct, to submit the matter to the President of the Council. The matter is not to proceed further unless the complaint or information has been received from a person acting in a public capacity or unless and until it has been verified by statutory declaration or affidavit. The President may then refer the matter to the Preliminary Proceedings Committee and invite the practitioner to submit any explanation which he may have to offer, (Rule 6). The Preliminary Proceedings Committee may refer any case to the Professional Conduct Committee. Rule 11(2) provides:-

> "When referring a case to the Professional Conduct Committee the Preliminary Proceedings Committee shall indicate the convictions, or the matters which in their opinion appear to raise a question whether the practitioner has committed serious professional misconduct, to be so referred and to form the basis of the charge or charges;
>
> Provided that where the Committee refer any case relating to conduct to the Professional Conduct Committee and the Solicitor (or the complainant) later adduces grounds for further allegations of

> serious professional misconduct of a similar kind, such further allegations may be included in the charge or charges in the case, or the evidence of such grounds for further allegations may be introduced at the inquiry in support of that charge or those charges, notwithstanding that such allegations have not been referred to the Committee or formed part of the subject of a determination by the Committee."

It can be seen that the preferring of one or more charges is contemplated and, by reading the proviso, that further allegations may be included in a charge. There is no indication as to when more than one charge is deemed appropriate.

Rule 14, which still is concerned with the preliminary stages shows that a conviction or complaint which was originally considered unworthy of referral may be brought into account together with a subsequent conviction or complaint when the question of serious professional misconduct is to be considered by the Professional Conduct Committee.

Rule 17(1) provides for the sending to the practitioner of a notice of inquiry, which shall specify, in the form of a charge or charges, the matters into which the inquiry is to be held and Rule 17(2) provides:-

> "In a case relating to conduct, the charge shall include a statement which identifies the alleged facts upon which the charge is based."

Rule 23 describes the procedure where the practitioner does not appear. Rule 24 is concerned with the opening of the inquiry.

Rule 25 deals with "cases relating to conviction" and commences with the words, "(1) In cases relating to conviction, the following order of proceedings shall be observed as respects proof of convictions alleged in the charge or charges:-" (emphasis added).

Their Lordships will presently refer to Rules 26 to 29, the text of which is given in the Appendix.

Rules 30 and 31 are concerned with the determinations and directions of the Committee after they have found a conviction proved or have judged that a practitioner has been guilty of serious professional misconduct.

Rule 35 provides for cases relating both to conviction and to conduct.

Part VI of the Rules deals with resumed hearings by the Committee. Their Lordships will refer to Rule 37(1).

(It should be explained that Rule 31(5), mentioned in Rule 37(1), empowers the Committee to announce that they will resume consideration of the case with a view to determining whether or not they should direct that the period of suspension or of conditional registration should be extended or the conditions varied or that the name of the practitioner should be erased from the Register.)

Rule 39 deals with new charges.

Rules 40 to 43 provide for the procedure at the resumed hearing and Rule 45 provides for yet further postponement and resumption of the resumed hearing.

Rule 50 deals with evidence. The proviso lays down the criterion for admissibility of evidence, subject to the concluding words, which indicate the duty, to some extent inquisitorial, of the Committee.

There may be more than one charge, but the Rules do not indicate the circumstances in which a plurality of charges is appropriate.

The practitioner may object in law to any charge or part of a charge (rules 24(2) and (3)); proceedings may therefore continue in relation to part of a charge. And the practitioner may also submit in respect of any or all of the facts ... in the charge or charges that no sufficient evidence has been adduced upon which the Committee could find those facts proved (rule 27(1)(e)(i)). Rule 27(2)(i) and (ii) provide for determining "which, if any, of the remaining facts alleged in the charge" have been proved and whether such facts as have been found proved would be insufficient to support a finding of serious professional misconduct. The wording of Rule 27(3) and the reference in Rule 28(1) to "the facts, or some of the facts" may also be noted.

The inference from these provisions is that several facts may be presented as constituting one charge, such that, if some facts fall by the wayside, other facts may remain in relation to which it is open to the Committee to find the practitioner guilty of serious professional misconduct.

The next observation their Lordships would make is that the Rules appear to contemplate an inquiry by one Committee into every matter put before them, whether relating to convictions or conduct or both, including any new charge or charges introduced at a resumed hearing (which is of necessity a hearing by a Committee that has already heard evidence and made findings against the practitioner). By Rule 35 it is provided that, if both convictions and serious professional misconduct are alleged together, the convictions are to be proved first. With regard to

serious professional misconduct, Rules 27 and 28 show that the facts are to be established and then there can be further evidence and submissions before the Committee proceed to determine whether the facts in the charge prove serious professional misconduct. The whole picture is of a Committee which is to be informed of all the facts alleged and all the background which could help them to determine in the interests of the public and the profession what, if anything, is to be done by way of erasure or suspension or the imposition of conditions.

The absence of any provision for the separate hearing of charges or parts of charges is consistent with this philosophy. Indeed it seems to their Lordships that such a provision or practice would march ill with the scheme of the Rules and with sections 36(1) and (8) and 38(1) and (2) of the Medical Act 1983. Not only would segregation impede the objects of Rule 28 and Rule 39, which contemplate that the Committee will fully inform itself before reaching a decision, but, if a practitioner is immediately suspended after the hearing of one matter, while several other matters are pending, there will be no possibility of inquiring into the other matters because the practitioner will have ceased to be registered. A further difficulty is that the Committee, with a view to giving a suitable direction (which might be one of erasure), will not have been able to consider the practitioner's conduct as a whole in the way which is clearly intended. Finally, the procedure is clearly and strictly laid down, so that it would be impossible, and not merely undesirable, to wait until two or more separate Committees had made interim findings and then have a final adjudication.

An important case is *Gee v. General Medical Council* [1987] 1 W.L.R. 564 in which the charge was that the practitioner had abused his position by supplying drugs to "individual patients" in specified circumstances and that in relation to the facts alleged he had been guilty of serious professional misconduct. Dr. Gee requested particulars of the individual patients, an amendment of the charge on the ground that it was duplicitous and further particulars of the charge of improper prescribing. The General Medical Council replied by naming eight patients, including four whose cases had not been considered by the Preliminary Proceedings Committee, but refused to amend the charge or give further particulars. The High Court ([1986] 1 W.L.R. 226) granted Dr. Gee's application for judicial review on the ground that the Professional Conduct Committee should not have considered the four new cases and that the charge was bad for duplicity. The Court of Appeal ([1986] 1 W.L.R. 1247) allowed the appeal of the General Medical Council except in regard to the further particulars. The House of Lords dismissed Dr. Gee's appeal, holding that the rule against duplicity was inapplicable in a case before the Professional Conduct

Committee where a number of allegations relating to serious professional misconduct were set out in one charge provided (a) that the medical practitioner concerned had due notice to prepare a defence against the allegations, and (b) that the Professional Conduct Committee made it plain which of the allegations (if any) were found proved, in time to enable the practitioner to make appropriate submissions and lead any further relevant evidence before it was adjudged whether or not the allegations were made out; that the case for inquiry by the Professional Conduct Committee was the same case of a course of conduct as had been before the Preliminary Proceedings Committee and the addition of four further patients by way of additional particulars made no difference. It was further held that in a case relating to conduct, where two distinct types of misconduct are alleged and where the determination that one type of misconduct was established could not reasonably aggravate the seriousness of the other misconduct,it is preferable and in the interests of clarity for two separate charges to be alleged.

Their Lordships have noted certain passages in the speech of Lord Mackay of Clashfern, who first considered the statutory background, including provisions of the 1980 Rules which, although differently numbered, were to the same effect as the rules applicable to the present case. He then examined the origins of the rule against duplicity. Their Lordships would refer to the observations at pages 569G to 570D.

Lord Mackay adopted the statement by Mann J. of the reason for the rule against duplicity ([1986] 1 W.L.R. at page 238):-

> "A person should know of what it is that he has been found guilty (if guilty he should be found). He cannot know if he has been found guilty on a duplicitous charge whether he has been found guilty of one offence or of many. He should have the opportunity of submitting that there is no case to answer in relation to a particular occasion. That he cannot do if he is confronted with a duplicitous charge. A person cannot make a sensible plea in mitigation unless he knows of the number of his offences. The rule concerning duplicity seems to me to be a rule of elementary fairness which should apply to a charge before the Professional Conduct Committee."

He then gave an exposition of the procedure before the Committee which their Lordships would respectfully adopt and apply to the instant case: see pages 571E to 572A.

Lord Mackay's further analysis of the rules on the next page includes the following important statement (at page 572G):-

> "In view of the arguments in the present case it is however, important to stress that the determination of the committee must clearly find either all the facts alleged proved or if they find some facts proved and some not their determination must clearly identify which facts they hold proved."

Later he observed (at page 573B):-

> "It is also worth noting that the provisions of rule 30(2) clearly envisage that a determination that a practitioner is guilty of serious professional misconduct may be made in respect of a charge although not all the facts alleged in the charge have been proved to the committee's satisfaction. Rules 30 to 32 also envisage that even although the committee do not say of facts proved to their satisfaction in respect of a charge that they are insufficient to support a finding of serious professional conduct the committee may nevertheless determine that the practitioner has not been guilty of serious professional misconduct under that charge. In this connection I should point out that the word 'mitigation' in rule 32 is used in a rather special sense. It includes not only seeking to mitigate the consequences of a determination that the practitioner has been found guilty but includes seeking to persuade the committee that on the facts they have found established a determination of not guilty should be reached."

As in *Gee* (see page 575C), their Lordships are in this case of the opinion that the charge is one which properly construed narrates a course of conduct in relation to the practice carried on by the appellant. They would also apply to this case what Lord Mackay said in *Gee* at page 575F:-

> "In my opinion, there is no unfairness in a procedure in which a number of allegations of fact are set out in one charge and it is alleged against a medical practitioner that these matters of fact, if established, render him guilty of serious professional misconduct provided that he has fair notice in time to prepare his defence of the nature of the evidence to be led in support of these allegations, as provided by rule 20 (post, p.580C-D), and provided the P.C.C. charged to adjudicate upon the matter make plain which of the allegations of fact, if any, they have found proved in time for the practitioner to make appropriate submission and lead any further relevant evidence available to him before a determination is made whether he is guilty of serious professional misconduct. In my opinion, the procedure set out in the rules meets these provisos and provided it is properly followed no unfairness results to Dr. Gee from the fact that a number of distinct administrations of the drugs in question have been charged against him in one charge."

He continued (page 575H):-

> "This does not mean that I accept the view that in a case relating to conduct there can be only one charge. In a case relating to conduct where two distinct types of misconduct are alleged and where the determination that one type of misconduct was established could not reasonably aggravate the seriousness of the other misconduct I should think it would be better and in the interests of clarity for two separate charges to be alleged."

At page 576 Lord Mackay referred to *Duncan v. Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 which, in the context of similar legislation, had adopted the same line as *Gee* on the point there considered. In fact the allegations of misconduct which were combined in one charge in *Duncan* were more disparate than in *Gee* or the present appeal. Cooke J., who presided, said at page 545:-

> "It cannot be right that every complaint, if to be taken further, must be represented by a separate charge. Further, we do not think that there can be any doubt that a charge may combine a series of similar complaints by alleging a course of conduct in the carrying on of a practice and specifying the separate complaints as particulars or instances."

This statement was supported by four reported examples and is now reinforced by *Gee*. Mr. Collins also drew their Lordships' attention to observations in the judgment at page 546, including this one:-

> "A case is conceivable in which over a period a practitioner manifests in a diversity of ways, some more serious than others, such an extensive disregard of his professional responsibilities that, viewed as a whole, his conduct can rightly be described as disgraceful in a professional respect. In substance that is what we understand the Preliminary Proceedings Committee to be alleging here, in addition to a series of separate charges. Whether a broad allegation, or any narrower separate ones, is or are established will depend on the findings of fact reached by the Council and the Council's assessment of gravity, which if adverse will be open to appeal by the practitioner to the High Court. But we can see nothing in the Act or in natural justice to prevent the Committee, after investigating a range of complaints, from regarding a comprehensive charge as appropriate as well as separate ones. Indeed it might be against the public interest to deny the Committee any right to present an all-embracing charge. It may be important that the appropriate professional tribunal should be able to look at the practitioner's whole attitude to practice."

Cooke J. concluded at page 548 with the following statement, with which their Lordships agree:-

> "An alternative would be to insist on four charges, based on the analysis of the different kinds of conduct alleged which we have set out earlier. On any view of the Act and the authorities we would regard that course as permissible. To hold it to be obligatory, however, would be to deny to the Preliminary Proceedings Committee the right to charge a general disregard of professional responsibilities on such a scale as to amount, assessed as a whole, to disgraceful conduct in a professional respect. We do not think that the Act entitles us to withhold that right from the Committee.
>
> Moreover the four-charge procedure would be of little practical advantage to the accused practitioner. Four totally different hearing panels could not be constituted. The charges could be heard consecutively and the Council would not be obliged to give a decision on any before all had been heard. If any findings adverse to the practitioner were arrived at, their combined gravity would be relevant to the disciplinary orders to be made. To that extent the decision of the Privy Council in *Daly v. General Medical Council* must in our opinion remain unquestionably authoritative."

As Lord Mackay said in *Gee* (page 577G), there is no definition of the word "case" but it appears that it can contain a number of different allegations and result in a number of different charges. It appears to their Lordships from the Rules (particularly Rules 24(2), 27(1)(d), (e)(ii) and (f), 27(2) and 28(1)) that the charge, and not the separate incidents designated by the heads or particulars of the charge, is the unit of accusation and determination. If any of the particulars of a charge survive, serious professional misconduct may be found in respect of the charge of which they are particulars. But if there is a finding of not guilty on one charge, that charge and the conduct relating to it are no longer before the Committee. This leads to the view that separate charges are suitable (reverting to what Lord Mackay said in *Gee* at page 575H) where two distinct types of misconduct are alleged and where the determination that one type of misconduct was established could not reasonably aggravate the seriousness of the other misconduct. The presence of the twofold condition for separation of charges, as stated above, means not only that it was appropriate to make the Group A and the Group B incidents the subject of a single charge (as happened in this case despite later assumptions) but also that the more disparate allegations in *Duncan* should be the subject of one charge, because they were all relevant to the way in which the doctor conducted his practice. By parity of reasoning it was proper to make head 7(b) in the

present case the subject of the same charge as the other accusations.

In *Daly v. General Medical Council* [1952] 2 All E.R. 666 Lord Porter delivered the judgment. This Board held that evidence could be received in regard to the practitioner's previous conduct as a medical practitioner, including evidence of previous complaints and findings about him in considering whether he had been guilty of infamous conduct in a professional respect and deciding what action should be taken against him.

Libman v. General Medical Council [1972] A.C. 217 sets out principles which their Lordships do not require to restate, but the case is a salutary reminder of the proper approach to be made by the Board to a decision of the Professional Conduct Committee.

This somewhat lengthy procedural review brings their Lordships back to the second answer to the appellant's complaint that the Committee were wrong to proceed straight to the hearing of the Group B "charges". It will not be overlooked that in this case, as in *Gee* and *Lanford*, just one charge of serious professional misconduct was preferred (although the picture was blurred by the reference made to "the above charge"). It can now be plainly seen (1) that the division of the charges into two groups by reference to the similar fact doctrine ought to have carried no implication that the groups would be heard <u>separately</u> in the sense in which the word is understood in a criminal context, (2) that the Committee (even if there had been two or more formal charges) were at liberty to hear - indeed ought to have heard - all the evidence relating to the six heads of complaint (as well as the evidence on head 5 (if the complainant had appeared) and on head 7(b) (although it alleged a different kind of misconduct in connection with the practice)) and (3) ought to have gone through the whole rule 27 procedure in relation to <u>all</u> the evidence before passing on to the procedure under rules 28 to 31. It will also be clear that the procedure suggested at page 23C and FG of the report of *Lanford* [1990] A.C. 13 concerning separate trials and separate charges ought not to be adopted.

The inevitable consequence of their Lordships' conclusions about procedure is that in cases like the present, as well as those involving more disparate complaints, all the matters alleged will be heard and considered together. This leaves room for the juxtaposition of allegations which, though not qualifying as similar fact evidence, are like enough in character to cause prejudice. This will necessitate a strict warning to the Committee and also, where appropriate, the identification of similar fact principles when the evidence has been given.

Extracts from some of the principal authorities were cited in *Lanford* and of course the classic modern authority on the subject is *D.P.P. v. Boardman* [1975] A.C. 421. Their Lordships will, however, refer first to *R. v. Scarrott* (1977) 65 C.A.R. 125 in which *Boardman* was applied and the court accepted, "on the authorities as they now stand, that the test of admissibility of similar fact evidence may be described as one of striking similarity or striking similarities". Scarman L.J. stated that, subject to one comment, which went only to choice of language, the court accepted the way in which the principle was put in *Boardman* by Lord Salmon at page 462B-D.

Scarman L.J. in *R. v. Scarrott* said at page 129:-

> "To succeed, therefore, in quashing these convictions Mr. Fallon has to persuade this Court that the judge was wrong to treat the similar fact evidence in this case as strikingly similar. I now come to the one comment which this Court would make on the statement of general principle made by Lord Salmon. Hallowed though by now the phrase 'strikingly similar' is (it was used by the Lord Chief Justice, Lord Goddard, in *Sims'* case ([1946] K.B. 531) and has now received the accolade of use in the House of Lords in *Boardman*) it is no more than a label. Like all labels it can mislead; it is a possible passport to error. It is, we repeat, only a label and it is not to be confused with the substance of the law which it labels. We think that Lord Widgery C.J. had the danger of a label in mind when, in a very different class of case, he made a comment on the passage from Lord Salmon's speech which we have quoted. In *Rance and Herron* (1976) 62 Cr.App.R. 118, the Lord Chief Justice at p. 121 of the report made this comment and the Court is grateful to Mr. Fallon for drawing our attention to it, he said: 'It seems to us that one must be careful not to attach too much importance to Lord Salmon's vivid phrase "uniquely or strikingly similar". The gist of what is being said both by Lord Cross and by Lord Salmon is that evidence is admissible as similar fact evidence if, but only if, it goes beyond showing a tendency to commit crimes of this kind and is positively probative in regard to the crime now charged. That, we think, is the test which we have to apply on the question of the correctness or otherwise of the admission of the similar fact evidence in this case.'
>
> Positive probative value is what the law requires, if similar fact evidence is to be admissible. Such probative value is not provided by the mere repetition of similar facts; there has to be some feature or features in the evidence sought to be adduced which provides a link - an underlying link as it has been called in some of the cases. The existence of such a link is not to be inferred from

mere similarity of facts which are themselves so common place that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration.

Lord Cross put the matter, as we think, in its correct perspective at the end of the day when, in the course of his speech in *Boardman* p. 459, he said: 'The likelihood of such a coincidence obviously becomes less and less the more people there are who make the similar allegations and the more striking are the similarities in the various stories. In the end, as I have said, it is a question of degree.'"

After reviewing the facts, Scarman L.J. observed at page 132:-

"In our view, we are here in that area of judgment upon particular facts from which the criminal law can never depart. Plainly some matters, some circumstances may be so distant in time or place from the commission of an offence as not to be properly considered when deciding whether the subject matter of similar fact evidence displays striking similarities with the offence charged. On the other hand, equally plainly, one cannot isolate, as a sort of laboratory specimen, the bare bones of a criminal offence from its surrounding circumstances and say that it is only within the confines of that specimen, microscopically considered, that admissibility is to be determined. Indeed, in one of the most famous cases of all dealing with similar fact evidence, the Brides in the Bath case: *R. v. Smith* (1916) 11 Cr.App.R. 229 the Court had regard to the facts that the accused man married the women, and that he insured their lives. Some surrounding circumstances have to be considered in order to understand either the offence charged or the nature of the similar fact evidence which it is sought to adduce and in each case it must be a matter of judgment where the line is drawn."

In *R. v. Martin* [1985] N.I. 324, in which the prosecution unsuccessfully relied on the similar facts doctrine in relation to counts charging terrorist offences, the Court, having reviewed a number of authorities, said in its judgment at page 334:-

"Nevertheless the sum of these dicta seems to be that one may choose as the test any one of the phrases 'strikingly similar', 'underlying link' and 'positive probative value'. But,if we may say so with respect, in the choice of one, it is difficult to ignore either of the others or their implications for the full application of the test. If not exactly synonymous, all three seem to be intimately interrelated, if not interdependent. There can hardly be an 'underlying link' if there is no

> 'strikingly similar evidence' to prove it. And the underlying link is not provided by commonplace similarities but by similarities that are 'striking'. Further, evidence becomes the more 'positively probative', the more striking the similarities and the more obvious the underlying link."

Their Lordships have also considered a trilogy of cases decided in Scotland, where corroboration in the circumstances posed is not only desirable but required as a matter of law. In none of the cases were the acts complained of remarkable in the manner of their execution, but in all there was seen a course of conduct or an underlying unity which rendered the evidence on one charge corroborative of the other (in one case, others). In *H.M. Advocate v. McDonald* 1928 J.C. 42 a father was charged with using lewd, indecent and libidinous practices towards his two daughters and with incest with one of them. Lord Blackburn, whose charge to the jury was approved in *Moorov v. H.M. Advocate* 1930 J.C. 68, told the jury that, although only two girls were involved, they could, once satisfied that there was not a concocted story, treat the evidence of the girls as mutually corroborative. *Moorov*, an appeal against conviction, was heard by the full Bench. It was concerned with a number of assaults and indecent assaults by an employer against women employed by him. The Lord Justice-General (Clyde), referring to lewdness practised on children by adults, said (at page 75):-

> "Conduct of this sort differs from that normally produced by human lust or passion ... The peculiar and perverted character of the accused's conduct is an important element in this class of case; ..."

Although the victims in the instant case were adults, he held (page 76), with regard to the indecent assaults, that the similarities as to circumstance took the case out of the category of repeated acts of the same offence and placed it in the category of a chain of connected or related acts. The Lord Justice-Clerk (Alness) was of the view (page 82) that the acts of the appellant disclosed "a systematic course of libidinous conduct". At page 83 he summed up his view, "in the wise words of Lord McLaren in *Gallagher* 1916 S.C. 567, 570:-

> 'I am unable to hold that the law will reject as inadmissible evidence on which everyone would act in the ordinary affairs of life, and which is calculated to produce conviction to any fair minded person who hears it.'"

The Lord Justice-Clerk continued:-

> "The nearest approach to a principle which I can find is that the Court must always inquire whether the case falls within the first or the second of the categories referred to by the Institutional writers, viz., whether the acts under review are independent

or interdependent. That must always and manifestly be a question of degree and of circumstances."

In *H.M. Advocate v. A.E.* 1937 J.C. 96 the panel was charged in two counts with incest with his daughters aged 10 and 8. In charging the jury the Lord Justice-Clerk (Aitchison) said at page 99:-

"Now, it is a well-established rule in our criminal law that you do not prove one crime by proving another or by leading evidence tending to show that another crime has been committed. That is a good general rule. But then, when you are dealing with this class of crime there is some relaxation of the rule, otherwise you might never be able to bring the crime home at all. Let me give you an illustration that is not at all unfamiliar - there are many cases of it, especially in our large cities- you get a degraded man who finds some little girl in the street, and he gives her a penny, and gets her to go up a close, and there he does something immoral with her, and then he sends her away. Nobody sees what he has done; there is only the evidence of the child. And then the same thing happens with another child, and again nobody sees that; and then there is a third child, and the same thing happens again. Well, of course, if you had to have two witnesses to every one of these acts- they are all separate crimes - you would never prove anything at all. But that is not the law. The law is this, that, when you find a man doing the same kind of criminal thing in the same kind of way towards two or more people, you may be entitled to say that the man is pursuing a course of criminal conduct, and you may take the evidence on one charge as evidence on another."

Both *Moorov* and *A.E.* were mentioned with approval in *D.P.P. v. Kilbourne* [1973] A.C. 729, the former by Lord Hailsham of St. Marylebone, Lord Reid and Lord Simon of Glaisdale and the latter by Lord Hailsham.

That the similarity need not be precise is illustrated by the observation of Lord Goddard C.J. on *R. v. Southern* (1930) 22 C.A.R. 6, in *R. v. Sims* [1946] K.B. 531, 543:-

"Where an indictment contains counts for indecent offences against both male and female persons, it would not ordinarily be right to try the counts together, but where the persons assaulted are children, the mere fact that one is a small boy and the other a little girl would not in our opinion make it improper to try both cases together because the facts would indicate perverted lust on the part of the prisoner. If the Court in *Southern's* case intended to go the length of saying that because one count related to a little boy and another to a little girl separate trials should have been granted, we are not disposed to follow the decision."

The description "striking similarity" has rightly been called a label. The principle might have been as readily identified by a less emotive phrase such as "significant similarity". The main point, however, is that it is the similarity which must be striking and not necessarily the acts complained of.

The crucial area of decision for the court both at the trial and on appeal is where the evidence tends to prove an offence very similar to that which is charged, particularly if the conduct is of a perverted or addictive nature, when the natural reaction is to conclude that, if the accused is "that sort of person", he is guilty of one offence if guilty of the other and therefore, in mutual corroboration cases, guilty of both or all, as the case may be. Hence the search for similar fact evidence (most frequently in connection with sexual cases) in order to distinguish cases where it is fair to adduce the evidence of other offences from those in which that evidence would create unfair prejudice. The conflict is always between judicial caution in the interests of the accused and the admission of evidence that common sense and logic (which their Lordships believe to be more nearly synonymous than is sometimes admitted) indicate to be relevant. The decision has been rightly called a question of degree.

In the present case their Lordships have had no doubt that within each group each complainant's evidence, if credible and subject to the question of collusion (which was adverted to), was capable of corroborating the evidence of the other complainant or complainants. The appellant, if the evidence was to be believed, pursued a continuous course of sexual harassment of his young employees in his surgery during working hours. A characteristic feature was the way he introduced sex at every turn, even when sex was not, so to speak, on the agenda: his conduct in this regard was distinctly unusual and was at one point during the appeal described as "creepy". The same feature appeared in the patients' evidence. As the Legal Assessor said, when tendering advice:-

> "It seems to me that the only striking similarity which exists in this case - although you might think it an important one - is the assertion in the evidence of each complainant that the doctor asked her questions of a sexual nature on occasions when her medical condition in no sense called for the answering of such questions."

While they do not have to decide the point, their Lordships find much to be said in favour of the view that the similar facts doctrine applied to all the matters considered by the Committee.

Mr. Coonan, however, contended that the principle did not apply even within each group and pointed to the generally commonplace nature of the appellant's

individual breaches of decency and decorum. To look at the matter thus is in their Lordships' view to apply a wrong test. They consider that the appellant's course of conduct and the circumstances in which it was pursued were not at all commonplace and that there was in all he did an underlying unity which gave the evidence probative force as mutual corroboration.

Mr. Coonan relied on the recent unreported case of *R. v. B.* (Judgment delivered 15th June 1990) in which the Court of Appeal Criminal Division quashed the conviction of a man who had been charged with incest, indecent assault and indecency in respect of his three daughters. The youngest refused to testify but he was convicted on four counts involving the others. The court held that the evidence was not mutually admissible and said (per Mustill L.J.):-

> "So we must ask whether the evidence of one girl should have been admitted in relation to the case against the other. We answer this question in the negative for three reasons. First, we are unable to see that the prosecution's case that each available daughter was used for sexual gratification until her time passed and the successor was able to take over is borne out by the facts which the prosecution sought to prove. Second, discarding this supposed similarity there is nothing left except that the offences were alleged to have happened at home and that the daughters submitted and kept silent through fear. Sadly, these are the common coin of evidence in cases of father-daughter incest. There is nothing striking about them. Third, the judge gave no weight in his ruling, although ample in his summing-up, to the very real risk that the two girls had put their heads together to accuse their father of something which he had not done. All of us are satisfied that in such circumstances the only proper course would be to treat the evidence of one daughter as inadmissible in the case of the other. This being so, in a case of this kind, there could be no justification in having the charges tried together. We must allow this appeal and quash all the convictions."

It is the second reason which troubles their Lordships. Supposing that the acts committed and the accompanying circumstances were commonplace in an incestuous relationship, as to which their Lordships express no opinion, two other features were surely far from commonplace, namely, the appellant's preoccupation with young girls as a means of gratifying his desires and the fact that those girls were his daughters. The relevance of this point to the case in hand is that the supposedly unremarkable nature of the acts committed appears to their Lordships to provide an unreliable answer to the question whether in <u>all</u> the circumstances the similar facts doctrine applied so that the evidence would carry conviction in the eyes of a fair minded person: see also the cases of *McDonald* and *A.E. supra.*

The court in *R. v. B.* founded to some extent on *R. v. Inder* (1978) 67 C.A.R. 143, where the Court of Appeal said:-

> "Looking at that list of similarities, it seems to us that there are similarities which represent the stock in trade of the seducer of small boys and were not unique but appear in the vast majority of cases that come before the courts."

Their Lordships do not wish to comment on the decision in *Inder*, which seems to have fallen on the other side of a line separating it from some very similar cases, but the fact that a man has a perverted interest in young boys and gratifies his lust at their expense is scarcely commonplace, however unremarkable his methods.

For all these reasons their Lordships announced, at the conclusion of the hearing, that they would humbly advise Her Majesty that the appeal ought to be dismissed and ordered the appellant to pay the respondent's costs.

Their Lordships wish to add that it is clear from the transcript that the Committee received the greatest assistance not only from the Legal Assessor but from counsel on both sides, just as their Lordships have done on the hearing of the appeal.