Privy Council Appeal No. 68 of 1994

Dr. Kenneth Conrad Wickramasinghe *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 26TH JUNE 1995, Delivered the 25th July 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Slynn of Hadley
Lord Nicholls of Birkenhead

*[Delivered by **Lord Slynn of Hadley**]*

The appellant appealed from a decision of the Professional Conduct Committee of the General Medical Council given on 8th December 1994 that he had been guilty of serious professional misconduct and that his name should be erased from the Register of Medical Practitioners. At the conclusion of the hearing on 26th June 1995 their Lordships announced that they would humbly advise Her Majesty that, for reasons to be given later, the appeal would be dismissed with costs to be paid by the appellant.

Three separate charges were made against him of indecent behaviour towards different women to whom he was purporting to offer medical advice and treatment during the course of a professional consultation. At the hearing before the Committee no evidence was brought on one charge; another was dismissed; it was only the third charge which was found to have been proved.

That case concerned a health care assistant employed at a unit of the South Pembrokeshire Hospital which the appellant visited as a psychiatrist one day a week. She related that on 18th June

1992 when the appellant came to the building, where she worked, to visit patients, she was sitting down. She told the appellant that she had considerable pain in her neck. He offered to examine it and asked if a room was available. She took him to one of the patients' bedrooms not then occupied. He then touched parts of her body in ways which, it is accepted by the appellant if it happened would have been seriously improper. She complained immediately to a colleague and her complaint was passed on to a nurse in charge. A few days later that nurse made a report of the incident though the employee in question was initially reluctant to make a formal charge.

The complaints made against the appellant were, however, investigated by the responsible health authority, the appellant being interviewed by their representatives on 7th January 1994. Subsequently disciplinary proceedings were begun but on 6th May 1994 the health authority determined the appellant's contract instead of proceeding with the disciplinary hearing. The complaints were, however, referred to the General Medical Council.

It was accordingly not until 30th August 1994 that the General Medical Council asked the appellant for an explanation. He replied in detail on 14th September 1994.

The appellant has throughout and consistently denied that he ever offered to examine this employee's neck, that he ever did examine her, that he was ever alone with her and that there was any indecent action on his part. The Committee, however, accepted the evidence of the health care assistant and rejected that of the appellant.

His appeal against the Committee's decision was based as to the first ground on the contention that a Mrs. James, who gave evidence that the complainant had spoken to her of the appellant's actions and of the complainant's distress immediately after the incident, was not at the hospital in the morning of 18th June but was on a training course at another institution. It was said accordingly that she had been lying when she gave her evidence to the Committee and in effect that she and the complainant had put their heads together. The foundation for this contention was that Mrs. James was included in the list of those due to undergo training on the morning of 18th June 1992, as also indicated by the letters "E.M." next to her name on the work schedule which meant that she would be on a training programme in the morning. If this was right, she could not have been at the hospital at the time alleged and, on the basis of this entry in the document, the matter called for investigation. Before the hearing by their Lordships of the appeal, however, evidence was produced to show

that Mrs. James did not in fact attend the training course but that after consulting her own doctor in the morning she went to work at the hospital. The appellant accepted this evidence and this ground of appeal was not pursued.

The appellant contends next that he did not receive a fair hearing because he was handicapped by the delay which occurred and particularly by the fact that he was not informed of either the existence or the nature of the complaint until January 1994.

This delay is regrettable since inevitably recollection fades with time especially as to what happened on one of his regular Thursday visits when it may not be easy to recall what happened on one Thursday as opposed to another Thursday. The complaint, however, has to be considered in the light of what actually happened in the course of the investigation by the Committee. The appellant couples with his complaint about delay an allegation that he did not receive a fair hearing because (a) he was denied and (b) his legal representatives failed to seek, disclosure to the fullest extent of medical records necessary for him to establish his movements on the day the alleged incident occurred.

The appellant's solicitors did by letters dated 18th October and 1st November 1994 ask for a duty rota for the unit and a list of all patients resident in bungalow 2 of the unit where the incident was said to have occurred. As the respondent did not have the documents, the appellant's solicitors were told to apply to the hospital. At first the South Pembrokeshire NHS Trust refused to produce the documents but on 30th November 1994 the appellant's legal advisers obtained some records relating to bungalow 2. There is at this stage a conflict of evidence as to what the legal advisers were told was needed. The appellant says that he said that he needed to see the records of all patients at the unit in all of the bungalows so that he could establish his movements on the day in question. It is, however, clear that his solicitors asked only for documents relating to bungalow 2 where the incident was alleged to have happened and these were the only documents supplied at the hearing.

Counsel then representing him at the time of the disciplinary proceedings has sworn an affidavit that the appellant was advised that, in the absence of evidence to support the defence case, he was likely to fail both before the Disciplinary Committee and before the General Medical Council. Two conferences were held with him before the hearing by the General Medical Council on 6th December. The appellant, it is said, did not dispute that the complainant was present on the relevant date. Counsel says that the appellant's legal representatives considered obtaining an order

for the person accompanying the appellant on his round (a Mrs. Ting Waygood whose name was known and who was mentioned subsequently in evidence) to attend the hearing but that the appellant (who denies that he said this) instructed them not to do so "as she could not assist by giving evidence that she was with him throughout the relevant period". At a long conference, the day before the hearing, counsel states that "the appellant instructed us that further notes would not assist" otherwise an adjournment and their production would have been sought. Counsel further states "we were instructed by the appellant that he was present on the day but that the incident did not take place but he did not dispute that the witness members of staff were there".

Mr. Newman Q.C. made it clear that he was not contending that counsel had been guilty of that degree of "flagrant incompetence" which might in itself justify setting aside a decision. He says, however, that the failure to obtain these extra documents and to call Mrs. Waygood inevitably meant that the trial was unfair.

Without seeking to resolve the dispute between the appellant and his counsel as to his instructions, it seems to their Lordships almost inevitable that counsel would have raised with his client the question whether further documents were required and whether the accompanying witness was needed.

As to the documents now produced to the Board it is clear from the nursing notes that Mrs. James not only was not at the training session but that she was actually present at bungalow 2 on 18th June and that the appellant attended the unit and signed clinical notes and prescriptions in bungalows 2, 3 and 4. The documents produced to the appellant at the inquiry do not show the time at which he saw patients in bungalow 2 nor do the records now produced show the time when he saw patients in any of the bungalows.

Counsel had at the time to exercise his judgment as to whether further documents should be sought. If his recollection is right that he was told that they would not assist he was justified in following that instruction. But even if his recollection is assumed to be wrong it seems to their Lordships that he was justified in concluding on the basis of what had been produced that evidence as to the other bungalows was unlikely to be of assistance and that it was not necessary at the beginning of the hearing to apply for an adjournment or to object to the Committee continuing on the basis that there could not be a fair hearing. In any event it seems highly unlikely that if the appellant had said before 6th December that further documents were needed his experienced counsel would have failed to ask for them.

As to Mrs. Waygood, again it seems highly unlikely that counsel would not have called for her to give evidence if he had not been told that she could not help since the core of the defence was that the appellant would have been accompanied and so could not have been alone with the complainant. Leaving that aside their Lordships have seen an affidavit by Mrs. Waygood sworn on 13th June 1995. She confirms what is in the documents namely that the appellant saw patients in bungalows 2, 3 and 4 on 18th June 1992. His practice, was, she says, to go first to bungalow 4:-

> "As the Nurse in charge on 18th June 1992 it would have been my duty to accompany Dr. Wickramasinghe throughout his Ward Round. We would have begun the Ward Round in Bungalow No. 4. From there we would have entered Bungalow 3 and finally Bungalow 2. ... Once the Ward Round started, I would normally remain with Dr. Wickramasinghe until the Ward Rounds had finished unless I happened to be called away for example to attend to an emergency."

Their Lordships accept that it was standard practice for a doctor to be accompanied when visiting one of the patients in the bungalow and that the appellant was so-accompanied when visiting patients. Mrs. Waygood does not in her affidavit (and in common sense would not be expected to) rule out the possibility that there were times when the doctor would be alone as he moved from bungalow to bungalow or in between seeing patients. Accordingly Mrs. Waygood's evidence does not establish that Mrs. James' evidence could not be accepted by the Committee nor does it cast serious doubt on it. It does not seem to their Lordships that had this evidence been given orally to the Committee on the lines set out in the affidavit it would have been likely to have made any difference. The failure to call Mrs. Waygood, whether on the appellant's instructions or not, did not in their Lordships' view mean that the inquiry was unfair.

A suggestion was made that Mrs. Davies, the nurse in charge, might also not have been at the hospital on the morning in question since she too was elsewhere. That however was again based on a misunderstanding of the documents and it is not now suggested that she was not present.

The final point on fairness can be dealt with shortly. It was suggested at the hearing before the Committee that the appellant fabricated a story of bad relationships between him and the staff which would explain why, out of hostility, the complainant had made up the story of the alleged incident. It is said that his counsel should have re-examined the appellant about his complaint of hostility made to the senior consultant in February

1992 and that he should have recalled the consultant who had not been able to give evidence on this point when called on behalf of the appellant. There was, however, evidence that the appellant was liked by staff at the hospital and it does not seem likely that evidence of this initial friction or "frostiness" could really have assisted or influenced the tribunal.

Accordingly in their Lordships' view the criticism which has been levelled against counsel and solicitors as to the conduct of the inquiry is not made out. It seems to their Lordships that counsel exercised his judgment in the light of the information which was given to him and on the basis of his experience in a proper way. There can be no grounds for setting aside the conclusion of the Committee or of remitting the matter for a further hearing.

Finally the appellant contends that the Committee's decision to remove his name from the Register was unduly harsh. Their Lordships accept that this was not amongst the worst cases of its kind and that two charges which were initially brought were not made out. On the other hand the Committee is entitled to take a serious view of the abuse of his position by a doctor in circumstances like the present whether with a patient or with a member of the staff to whom medical advice is proffered. Although it can be said that the penalty in this case is severe it is impossible to say that it was excessive to an extent which would justify their Lordships' Board in advising Her Majesty that another penalty should be substituted.