Privy Council Appeal No. 46 of 1984

David Jon Rodgers *Appellant*

v.

The General Medical Council *Respondent*

FROM

THE PROFESSIONAL CONDUCT COMMITTEE OF THE GENERAL MEDICAL COUNCIL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH NOVEMBER 1984

Present at the Hearing:

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN

*[Delivered by **Lord Brandon of Oakbrook**]*

In this case the appellant, Dr. Rodgers, a general practitioner, appeals against a decision of the Professional Conduct Committee of the General Medical Council made on 19th July 1984. By that decision the Committee, having judged the appellant to have been guilty of serious professional misconduct, directed that his name should be erased from the register.

The substance of the case against the appellant was that he had failed on two separate occasions to visit young children who were gravely ill and whom his professional duty required him to visit.

The charges against the appellant, which were inquired into by the Committee on the 18th and 19th July 1984, were formulated as follows:-

"That being registered under the Medical Act,

(1) On 4th October 1981 you failed to visit and treat, or prescribe or arrange appropriate treatment for, Miss Malinka Head, who was at that time resident at 33 Whitecross, St. Ives, Cambridgeshire, a patient for whose treatment you were responsible at the material time, when her condition so required;

(2) On 27th May 1982 you failed to visit and treat, or prescribe or arrange appropriate treatment for, the late Miss Charlotte Leggett, at that time resident at 2 Norris Road, St. Ives, Cambridgeshire, a patient for whose treatment you were responsible at the material time, when her condition so required;

(3) By your conduct aforesaid you neglected your professional responsibilities towards the aforementioned patients;

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

Counsel for the appellant did not challenge before their Lordships the Committee's judgment that the appellant had, in respect of the matters charged in (1) and (2) above, been guilty of serious professional misconduct. He contended, however, that the Committee had acted over-harshly in directing that his name should be erased from the register, and that they should instead have directed that his registration in the register should be suspended during such period, not exceeding twelve months, as might be specified in the direction. He accordingly invited their Lordships, in the exercise of their appellate jurisdiction, to set aside the Committee's direction to erase, and to substitute for it a direction to suspend. Counsel for the appellant did not make any express submission to their Lordships with regard to the length of any period of suspension which might be so substituted.

The fact that the appellant does not challenge the Committee's judgment that he had been guilty of serious professional misconduct, but only the severity of the penalty imposed on him following such finding, does not make it any less necessary than it would otherwise have been for their Lordships to review in considerable detail the evidence which was adduced before the Committee in relation to the charges concerned.

The appellant's evidence showed that he held the qualifications of MB, ChB and MRCP (UK), and that he was at all material times in general practice in a partnership of three doctors at St. Ives, Cambridgeshire. It showed further that there was an arrangement between different partnerships of doctors in general practice at St. Ives, under which all the doctors involved shared in an out-of-hours on-call rota. One of the partnerships other than that of which the appellant was a member, with which his own partnership operated this arrangement, was called the Spinney practice, in which a Dr. Smerdon was one of the partners. As a result of this arrangement, the situation on 4th October 1981 was that the appellant was on call for the Spinney practice. One of the

patients of that practice, who was on Dr. Smerdon's list, and therefore normally cared for and treated by him, was a girl, Malinka Head, aged 8½ years, who is the patient referred to in charge (1) above.

Apart from the arrangement between different partnerships just mentioned, there was also an internal arrangement between the three doctors in the appellant's own partnership, under which each in turn deputised for the others when they were off duty. As a result of this further arrangement, the situation on 27th May 1982 was that the appellant was deputising for one of his partners, Dr. Caswell, who was off-duty. One of the patients on Dr. Caswell's list, and therefore normally cared for and treated by him, was Charlotte Leggett, a girl aged 2 years and 8 months, who is the patient referred to in charge (2) above. It was not in dispute that, in the circumstances described, the appellant was responsible for the medical care and treatment as patients, firstly, of Malinka Head on 4th October 1981, and, secondly, of Charlotte Leggett on 27th May 1982.

Mrs. Head, Malinka's mother, gave evidence about the appellant's conduct in relation to charge (1). She said that on the morning of Saturday, 3rd October 1981, Malinka was ill. She vomited very badly after having eaten her breakfast and continued to do so in short spells. Whenever she tried to drink or eat anything, she vomited further. This continued for the rest of that day, and Malinka also complained of chronic pains in her stomach. She was put to bed and nursed and given just fluids and a hot water bottle for her stomach. She did not improve at all. She tried to open her bowels and had a little diarrhoea at first. Later she was given a bowl so that she could vomit without getting in and out of bed. On Sunday morning she looked extremely ill, and she was in agony with stomach pains. Mrs. Head accordingly telephoned Dr. Smerdon's surgery, but received only an answer from a telephone answering machine, stating that the appellant was on emergency call and giving his telephone number for her to ring. She rang the number and spoke to the appellant. She told him explicitly everything that had happened to Malinka since Saturday, and told him (though it is not clear what she meant by this) that she thought that Malinka had ruptured her stomach. She told the appellant repeatedly about Malinka's stomach pains. She said that Malinka was in agony, she had nursed her but could not make her comfortable and she needed medical help. She said that she had been giving Malinka soluble aspirin every four hours, to which the appellant replied that aspirin often irritated the stomach and told her to stop giving it. Mrs. Head then said that there must be something which he could do to stop the pain, to which he replied that there

was nothing which he could do, and that she should treat the matter as if it was a "tummy bug", of which there was a lot about. The appellant told her to let nature take its course, to which Mrs. Head replied that the pains in Malinka's stomach were so severe that it could not just be a "tummy bug". The appellant offered no further advice or help, making it clear to Mrs. Head that there was nothing he could do for her. Mrs. Head did not specifically ask the appellant to visit Malinka, but it was clear to her from his attitude that he had no intention of doing so.

On Monday, 4th October, Malinka was worse. Mrs. Head tried to contact Dr. Smerdon but he was busy and she later saw a Dr. Prince, who was acting as locum. Subsequently Malinka was taken to Huntingdon County Hospital, where she had an abdominal operation which revealed a burst appendix and consequent peritonitis. An appendicectomy was then carried out.

In order to complete the story it is necessary to say that, in the course of or after Malinka's operation, something went wrong in hospital, as a result of which she suffered permanent partial brain damage. It has, however, never been suggested, nor could it fairly be suggested, that the appellant was in any way responsible for this further and quite separate misfortune.

The appellant's evidence with regard to the matters described by Mrs. Head was surprising, to say the least of it. He said, in effect, that he had no recollection at all of any telephone conversation with Mrs. Head about Malinka being ill on the day in question. He had no notes of any such conversation and had no recollection of passing on any report of it to Dr. Smerdon. He later admitted that, if he had received the kind of telephone call spoken to by Mrs. Head, he would certainly have visited Malinka. He did not dispute the truth of Mrs. Head's evidence that she had telephoned him about Malinka, but could only assume that the child's condition, as described to him by Mrs. Head, had sounded less severe than it subsequently turned out to be.

Mrs. Head complained in a letter dated 29th October 1981 to the Family Practitioner Committee for the district about the appellant's conduct on 4th October 1981 in relation to Malinka. That Committee, having inquired into the complaint and found it proved, on 10th March 1982 recommended that the appellant should be warned to comply more closely with his terms of service.

Their Lordships turn now to the evidence on charge (2) concerning Charlotte Leggett. Mrs. Leggett, Charlotte's mother, gave evidence relating to this

charge. She said that on the morning of 27th May 1982 Charlotte woke up at 6.30 a.m. feeling unwell. She had a temperature and was unsteady on her feet. At 8.30 a.m. Mrs. Leggett telephoned Dr. Caswell's surgery, but only received a reply from the answering machine. She then telephoned Dr. Caswell's home, but was told by his wife that he had left for the surgery and that she should telephone the surgery again. Mrs. Leggett did so at about 8.40 a.m. and spoke to the receptionist, to whom she recounted Charlotte's symptoms. The receptionist told Mrs. Leggett that no doctor in the partnership would be available until some time later in the morning, in consequence of which Mrs. Leggett took Charlotte to Huntingdon County Hospital accompanied by her husband. The child's temperature was then 102, she could not walk or crawl and was very distressed. At the hospital Charlotte was examined by two doctors, one from the Casualty Department and the other from the Paediatric Department. They examined her ears and chest over a period of about 20 minutes. They appeared to be puzzled by her symptoms, and, following their examination, they said that Mrs. Leggett should take her home, put her to bed for 24 hours, and give her junior dispirin in order to try to reduce her temperature. They warned her, however, to watch for any signs of stiffening of the child's neck, since this could be an indication of meningitis.

Mrs. Leggett took Charlotte home and put her to bed at about 11.30 a.m. She went to sleep but woke up at about 12.20 p.m. She was then extremely hot and Mrs. Leggett telephoned her sister, Mrs. Harding, and asked her to come over, which she did. They took Charlotte's temperature which was 104, and, on her sister's advice, Mrs Leggett took off the child's pyjamas and began to sponge her down with water. While Mrs. Leggett was so engaged, Mrs. Harding at about 12.30 p.m. telephoned the surgery again. She spoke again to a receptionist, describing Charlotte's symptoms, including her temperature of 104, recounting the visit to the hospital, saying that Mrs. Leggett was sponging the child down with water, and that both she and Mrs. Leggett were very worried.

At 2.00 p.m. the appellant telephoned Mrs. Leggett's number. Mrs. Harding answered the call and Mrs. Leggett then came on the line. She had never met the appellant before and only discovered his name when he told her who he was. He asked how Charlotte was now. Mrs. Leggett replied that she was still the same, that sponging her down had failed to reduce her temperature, that she still could not walk or crawl, and that she could not co-ordinate her movements. Both Mrs. Leggett and Mrs. Harding said that Charlotte looked as if she was on the point of having a convulsion. The appellant then asked why Mrs. Leggett and her husband had taken Charlotte to

Huntingdon County Hospital in the morning instead of waiting for her to be seen in the surgery. Mrs. Leggett replied that they had thought that Charlotte was too ill to wait until 11.00 a.m., and needed medical attention sooner than that. It appeared to Mrs. Leggett, from the way in which the appellant spoke, that he was annoyed with her husband and her for having taken the child to hospital in the way they had done. The appellant then said that Mrs. Leggett should be guided by what the hospital said, and, after a pause, said good-bye and rang off. During this conversation on the telephone with the appellant, Mrs. Leggett never specifically asked him to visit Charlotte. She expected him to do so, however, after all the events of the morning, and especially after she had told him about the hospital doctors' warning with regard to meningitis.

Shortly after the conclusion of the telephone conversation with the appellant, at about 2.10 p.m., Mrs. Leggett was sitting close to Charlotte, when the child suddenly looked at her and started to go into a massive convulsion. She or her sister telephoned for an ambulance to take Charlotte to hospital, but there was a delay of about half an hour before it arrived. It was not in dispute that Charlotte was then taken first to Huntingdon County Hospital and from there to Addenbrooke's Hospital, Cambridge, where she later died without recovering from her initial convulsion. It was further not in dispute that the cause of death was a comparatively rare but usually fatal disease known as Herpes Simplex Encephalitis.

Mrs. Harding also gave evidence, most of which simply corroborated that of Mrs. Leggett. With regard to her telephone call to the receptionist at about 12.30 p.m., Mrs. Harding said that she had told her that Charlotte was very hot, had a very high temperature, seemed to be on the verge of a convulsion, was twitching and looked extremely ill.

Three witnesses were called for the appellant: the appellant himself; Mrs. Abbott, the nurse/receptionist who had taken Mrs. Leggett's telephone call between 8.30 a.m. and 9.00 a.m.; and Miss Smith, the other nurse/receptionist, who had taken the later call from Mrs. Harding.

Mrs. Abbott's evidence added little to that of Mrs. Leggett. Miss Smith's evidence, on the other hand, was of considerable importance. She said that she was a state enrolled nurse employed by the practice in which the appellant was a partner. She remembered the telephone call from Mrs. Harding. That lady had told her about Charlotte's visit to hospital in the morning, and that she had been told to put the child to bed and keep her quiet, and to get in touch if she

and her husband were worried further. Mrs. Leggett said that Charlotte's temperature had since gone up and she wanted a doctor to see her. Miss Smith did not recall Mrs. Harding saying anything about a convulsion, but she did say that Charlotte's limbs were twitching. Miss Smith advised that, if the twitching got worse, the child should be laid with her head to one side on her stomach. Her reason for giving this advice was that, if a child is convulsing, there could be a blocked airway or vomit could be inhaled, and the position which she recommended would stop either of these things from happening. Miss Smith then said that she would inform the doctor as soon as she could find him, after which she rang off.

Following this telephone conversation, Miss Smith fetched Charlotte's medical notes from the file in which they were kept, and about 10 or 15 minutes later telephoned the appellant at his home. She passed on to him the details of Charlotte's condition as previously described to her by Mrs. Harding, including the rise in her temperature and the fact that her limbs were twitching. She told him that those with the child wanted a doctor to see her.

The appellant was examined and cross-examined at length about his conduct in relation to Charlotte, and it is impracticable to recount all his evidence in detail. Attention was focussed particularly on notes on Charlotte's medical card which the appellant said that he had made for the benefit of Dr. Caswell on the evening of 27th May 1982. These read as follows:-

"Phoned at 0820 for appointment because of fever and twitching.
Offered 11.00 a.m. - not soon enough.
Taken to Huntingdon Hospital Casualty.
Could find nothing wrong but asked mother to bring her back if worried.
Warned mother to watch for meningitis!
Phoned surgery at 1.00 p.m. - still has fever and restless, now asleep.
Phoned back at 1.30 p.m."

It is clear that the appellant must have learnt the greater part of what he there recorded either directly or indirectly from Mrs. Abbott and Miss Smith. It is noticeable, however, that the notes contain no record of the contents of the conversation which he had with Mrs. Leggett early in the afternoon. The gist of the appellant's evidence about this conversation was that Mrs. Leggett appeared to be less worried about Charlotte than she had been earlier, and that it was not therefore necessary for him to visit. It was also very clear

from his evidence that he felt resentful towards Mrs. Leggett because of her action in taking Charlotte to Huntingdon County Hospital in the morning instead of waiting for an appointment in the surgery at 11.00 a.m.

It was open to the Professional Conduct Committee, where the appellant's evidence conflicted with that of other witnesses, to prefer the testimony of the latter. Their Lordships infer from the judgment of the Committee, and the severity of the penalty imposed by them, that this is what the Committee must, to a large extent at any rate, have done, and they feel bound to approach the question raised by the appeal upon that basis.

Counsel for the appellant, in support of his case that a lesser penalty should have been imposed, relied on two main matters. The first matter was that, since the alternative penalty of suspension had been introduced by the Medical Act 1969, there had been no previous case in which the penalty of erasure had been imposed on a doctor for serious professional misconduct of the kind concerned in this case, that is to say neglecting to visit a patient when, on the information available to him, his professional duty required him to do so.

The second matter was that, since the imposition of the penalty of erasure in a case of this kind was quite exceptional, the Committee were not entitled to impose it without giving clear reasons for doing so. In support of this latter contention counsel relied on certain observations of Lord Scarman contained in the judgment delivered by him in another medical appeal decided recently, namely *Dasrath Rai v. General Medical Council* (Privy Council Appeal No. 54 of 1983).

Before their Lordships consider what was said by Lord Scarman in the judgment delivered by him in that case, it is important to observe that the appellant was there appealing not just against the penalty of erasure which had been imposed on him but also against the judgment of the Committee, that he had been guilty of serious professional misconduct in relation to the treatment by him of drug addicts. In the context of an appeal of that nature, Lord Scarman said towards the end of the judgment delivered by him:-

> "Further, though no obligation rests upon the Professional Conduct Committee to give reasons, in some cases when an acute conflict of evidence arises or where an important difference of opinion emerges, the Committee may find it helpful to do so. Though there is no obligation, the Committee has the power to give reasons: and their Lordships

suggest that giving reasons can be beneficial, and assist justice:-

(1) in a complex case to enable the doctor to understand the Committee's reasons for finding against him;

(2) where guidance can usefully be provided to the profession, especially in difficult fields of practice such as the treatment of drug addicts; and

(3) because a reasoned finding can improve and strengthen the appeal process."

Their Lordships would not wish to differ in any way from these observations in the context of the particular appeal in which they were made. They would remark, however, that Lord Scarman, in making them, appears to have been referring to the giving of reasons for a finding of serious professional misconduct, and not to reasons for the imposition of a particular penalty following upon such a finding.

It has long been established by decisions of this Board, that, once a finding of serious professional misconduct has been made by the Professional Conduct Committee, it is the members of that Committee who are best equipped to decide which of the penalties available to them it is right to impose, and that the Board would only be justified in substituting a more lenient penalty if it were to appear to them that the penalty imposed was wrong and unwarranted. See *McCoan v. General Medical Council* [1964] 1 W.L.R. 1107; *Bhattacharya v. General Medical Council* [1967] 2 A.C. 259; and *Haggart v. The General Medical Council* (Privy Council Appeal No. 11 of 1975).

So far as the giving of reasons for the imposition of a penalty more serious than that usually imposed in cases of a similar kind is concerned, their Lordships would observe that the reasons why the Committee have thought fit to take such action will, in the event of an appeal, usually be apparent from the transcript of the evidence adduced before the Committee and the submissions addressed to it on either side.

In view of the reliance placed by counsel for the appellant on the circumstances that this was the first case, since the introduction of the alternative penalty of suspension by the Medical Act 1969, in which the penalty of erasure had been imposed on a doctor for serious professional misconduct of the kind here concerned, their Lordships have given long and careful consideration to the possibility of setting aside the penalty of erasure, and substituting for it the penalty of suspension for the maximum period of 12 months. At the end of the day,

however, their Lordships have reached the conclusion that, on the evidence which the Committee had before it, and which has been examined by their Lordships in considerable detail above, there were aspects of the appellant's conduct which make it impossible for their Lordships to say that the imposition by the Committee of the penalty of erasure was wrong or unjustifiable.

These aspects include, but are not limited to, the fact that the appellant's conduct in relation to Charlotte Leggett came only about two months after the warning given to him by the Family Practitioner Committee as a result of his conduct in relation to Malinka Head; and the further fact that his conduct in relation to Charlotte Leggett was clearly influenced by his feeling of resentment at her parents having taken her to hospital instead of waiting till she could be seen in the surgery later in the morning, a feeling which, even if it be understandable, should never have been allowed to operate to the detriment of a gravely sick child for whom her anguished mother was desperately seeking urgent medical help.

It follows that their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs.