Neutral Citation Number: [2018] EWHC 3160 (Admin)

Case No: CO/1928/2018

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Swansea Civil Justice Centre
Caravella House
Quay West
Quay Parade
Swansea SA1 1SP

Date: 27/11/2018

**Before** :

**MR JUSTICE MOSTYN**

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**Between :**

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| **MOHAMMED SUHAIB SAIT** | **Appellant** |
| **- and -** | |
| **THE GENERAL MEDICAL COUNCIL** | **Respondent** |

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**Mark Sutton QC** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Appellant**
**Ivan Hare QC** (instructed by **GMC Legal**) for the **Respondent**

Hearing date: 14 November 2018

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# Judgment Approved

**Mr Justice Mostyn:**

1. The appellant qualified as a doctor over 30 years ago. He is a consultant orthopaedic surgeon. He was admitted to the specialist register in 2000 and holds the position of substantive NHS consultant at Darent Valley Hospital in Kent. He also has a private practice. Over more than three decades his career has been unblemished. Mr Sutton QC rightly emphasises the character evidence before the Medical Practitioners Tribunal from patients, consultant colleagues and clinic nurses attesting to his professionalism, probity and dedication to his patients' care.

2. On 20 April 2018, following a seven-day hearing in November 2017, the Tribunal found certain facts proved against the appellant; found that his fitness to practise was impaired by virtue of misconduct; suspended him from practice for a period of three

months; and directed that his case be reviewed shortly before the conclusion of the period of suspension. It was not explained to me what might happen following such a review.

3. The appellant appeals against one finding of fact, namely that he did what he did with sexual motivation. Consequentially, he appeals against the finding that his fitness to practise was impaired by virtue of misconduct. Inferentially, he seeks that the sanction be reversed, although neither the notice of appeal, nor the grounds, spell this out. Alternatively, he asked that the matter be remitted to a differently constituted Tribunal for a rehearing.

4. This is the second such appeal I have heard this year. In *Basson v GMC* [2018] EWHC 505 (Admin) I attempted to set out some of the relevant principles applicable where an appeal is mounted against a finding of sexually motivated misconduct.

5. In the instant case, the proceedings before the Tribunal concerned the appellant's behaviour towards two patients, who were denoted Patient A and Patient B. The allegations in respect of Patient A were serious but were mainly found unproved. One allegation was admitted and three were found proved. However, in relation to those admitted, or proved, allegations the Tribunal was not satisfied that the appellant's actions were done with sexual motivation or that his fitness to practise was impaired by virtue of misconduct. Two of those proved allegations have some tangential relevance to the matters which I have to decide.

6. The appeal to this court concerns the findings made by the Tribunal in respect of the appellant's conduct towards Patient B. The findings were as follows:

   i) Between September 2014 and May 2016 on one or more occasion(s) during consultations with Patient B the appellant told her that she was "pretty", or words to that effect (see para 8 of notice of allegations).

   ii) On 9 May 2016 the appellant telephoned Patient B and asked her to meet him at the Eynsford Plough pub (para 10(a)).

   iii) On that day the appellant met Patient B at that pub and told her that she was "very pretty" (or words to that effect); that she should consider divorcing her husband (or words to that effect); that she should not tell her husband that they had met; that his wife did not know that he was meeting Patient B at the pub; and that he had met other patients outside work and had not told his wife about it (para 10(b)).

   iv) At the end of the meeting the appellant asked Patient B to go with him to his car (para 10(c)).

   v) And that all of the appellant's actions as set out above were sexually motivated.

7. Three allegations concerning Patient B were found not proved namely:

   i) that the appellant on 18 April 2016 said to her that he could telephone her to discuss her marital problems further;

   ii) that, at the pub, the appellant hugged her; and

iii) on that occasion he kissed her on the cheek.

8. The reason that the matter was before the Tribunal was because Patient B had made a complaint. In a statement made on 7 October 2016 she explained that she had seen the appellant at Darent Valley Hospital on several occasions and had developed a good doctor-patient relationship with him. On one occasion, 20 February 2016, her husband had attended with her. She went on to state:

> "During other appointments, when my husband was not present, [the appellant] would review scans with me and I asked for reassurance that he had found no serious health concerns he replied by saying that there was nothing to worry about as I have good bones and skin and was very pretty. I found the reference to my looks strange, in view of my health concerns, but I put it to the back of my mind, assuming he was just being friendly to put me at ease.
>
> During this time I was experiencing problems within my marriage, and I did discuss these with [the appellant]. During my appointments with [the appellant], he would ask about my family situation and I discussed with him some of the issues I was experiencing, in the hope that he will be able to offer, or direct me to some form of assistance or advice.
>
> At my last later appointment on 18 April 2016, [the appellant] suggested that he telephoned me to discuss my problems further. I agreed in the hope that he would be able to help or offer advice.
>
> Then on 9 May 2016, [the appellant] telephoned me on my mobile number at 12:15 PM from an unidentified telephone number. He would have known from our conversations during previous consultations, that I would be working at home that day. He said he had just finished working at Darent Valley Hospital and he was travelling through the area to Fawkham Manor Hospital, where he had to start work at approximately 2:30 PM. He suggested that we meet at the Eynsford Plough public house.
>
> I met [the appellant] at the Eynsford Plough public house. At 12:30 PM, where we had lunch. [The appellant] paid for this. We sat in a garden area outside with many other people present. I showed [the appellant] some of my husband's emails with female and male colleagues/friends that I have been concerned about and that I had printed after finding them on my husband's phone. He seemed very concerned regarding my current family situation and suggested that I should consider divorcing my husband if I was finding our problems too much to bear. [The appellant] also said I was very pretty and I would have no problem finding someone else if I wanted to. I suggested during our conversation that I should mention our lunch meeting to my husband. However, [the appellant] encouraged me not to do this. He said that his wife did not know he was with me and he often

> met other patients outside of work and he had also never told her about this.
>
> At this point I said I should get back to work at my home office. He then suggested we go back to his car. I then started to feel more uncomfortable but I thought that this may be to get a leaflet or maybe some contact details of someone that she (sic) could go to for help or advice. This turned out not to be the case and by that time I was getting increasingly concerned and I insisted that I should go and reminded him that he said he needed to be at Fawkham Manor Hospital by about 2:30 PM. [The appellant] then leaned towards me and gave me a hug and I think he tried to peck me on the cheek. This was the only time he had approached me in this way and I was very much taken aback by this behaviour.
>
> He then drove away and we have not been in contact since."

9. As can be seen, certain parts of this account were accepted by the Tribunal; and certain parts were not.

10. Under the General Medical Council (Fitness to Practise) Rules 2004 when a complaint is made the allegation is first sifted by the Registrar under rule 4. If it is allowed to go forward to a case examiner, then under rule 7 the complaint is supplied to the doctor and he is invited to give written representations within 28 days. The complaint and the response are then considered by case examiners who may refer the allegation for determination by a Tribunal. Under rule 16 the Tribunal, unsurprisingly, has power to issue case management directions to include advance disclosure of documentary evidence, witness statements and skeleton arguments.

11. I have not seen the written response of the appellant, but I assume that it was not materially different from his witness statement dated 11 September 2017.

12. The written response did not persuade the case examiners that the matter should not be referred to a Tribunal and at some point a notice of allegations was formulated, and the matter was set down for a lengthy hearing.

13. The appellant's witness statement was largely devoted to meeting the allegations made against him in respect of Patient A. So far as Patient B was concerned, the appellant did not deal at all with the allegation that he had called her "pretty" during at least one consultation.

14. The appellant's evidence was that on 9 May 2016, following the conclusion of his meeting at Darent Valley hospital, he found out that he had a message from his secretary to say that Patient B had called her (the secretary) earlier and had requested that he speak to Patient B urgently. It is noteworthy that the appellant did not produce a witness statement from his secretary confirming that this call had been received from Patient B.

15. As noted above, the Tribunal rejected the allegation that the appellant on 18 April 2016 said to Patient B that he could telephone her to discuss her marital problems further. Furthermore, the Tribunal must have taken into account Patient B's evidence that she

had gathered up a dossier of emails taken from her husband's telephone and took them with her to the meeting at the pub a mere 15 minutes after the telephone call had been made. Nonetheless, the Tribunal found that the appellant had made the initial approach, rather than the other way around. This was obviously an important finding and I dare say that the absence of corroboration from the appellant's secretary must have been influential. At all events, the appellant does not appeal that factual finding.

16. In his witness statement the appellant continued:

> "I asked her what her call was about to which she replied it was an urgent personal matter unrelated to her health and that she would tell me at a meeting. I agreed to meet her at a mutually arranged place in Eynsford at lunchtime. The pub where we met is approximately 6 – 7 miles and about 10 – 15 minutes by car from the NHS hospital and equidistant to my afternoon clinic but in a different direction. …
>
> I further recollect that when I arrived at Eynsford Patient B was already there. We shook hands and sat in the outside area where there were lots of people as we sat down Patient B began discussing the topic of her marital problems with her husband. I was shocked by the topic of discussion and had not anticipated this meeting to be on such a personal issue. Patient B then presented to me highly personal emails. This made me feel uncomfortable and so I requested her not to show me these messages. I explained to her that this was not a matter that I could professionally or legally give advice on but that she should seek help from family and friends.
>
> During the meal Patient B was not upset, tearful or distressed. I am unable to recall the exact content of the conversation which I believe was highly professional. I sympathised with Patient B and suggested that she speak to her GP and seek legal advice. I also suggested counselling. We finished our lunch and she agreed that I pay for the meal. I advised her that her family would be her best support at this difficult time. No part of our conversation included any inappropriate, sexual or unprofessional content. At no point during the lunch did I discuss with Patient B matters concerning my own work or my wife or that I would often meet patients without the knowledge of my wife. …
>
> On finishing lunch I walked back to the car park with Patient B. We shook hands and I got back in my car and drove off to my afternoon clinic."

17. Therefore, in relation to the events of 9 May 2016 it was agreed that:

    i) There was a meeting at the pub.

ii) Patient B brought a dossier of emails which she had downloaded from her husband's telephone.

iii) The appellant and Patient B discussed her marital problems.

iv) The appellant paid for lunch.

18. The following were not agreed:

i) Who instigated the meeting at the pub. Here, Patient B's account was accepted.

ii) Whether the appellant told her that she was "very pretty" (or words to that effect); that she should consider divorcing her husband (or words to that effect); that she should not tell her husband that they had met; that his wife did not know that he was meeting her at the pub; and that he had met other patients outside work and had not told his wife about it. Again, Patient B's account was accepted.

iii) Whether, at the end of the meeting the appellant asked Patient B to go with him to his car. Again, Patient B's account was accepted.

iv) Whether the appellant hugged or kissed Patient B. Here, the appellant's denial was accepted.

There is no appeal by the appellant against the factual findings made against him.

19. So far as the allegation at para 6(i) above is concerned (i.e. between September 2014 and May 2016 on one or more occasion(s) during consultations with Patient B the appellant told her that she was "pretty", or words to that effect), I have set out above Patient B's written evidence. In her oral evidence-in-chief she confirmed the truth of that written evidence. During her cross-examination she was asked whether in terms of the meeting on 9 May, aside from the alleged kiss, there was nothing inappropriate or unfitting in terms of the issues she wanted to discuss with him. Patient B interpreted this question rather wider than its clear narrow focus. She said:

> "In my care that I was with him, in my time, and his other consultants (sic), it has been fine. But they were obviously a bit like, when I have had my scan or anything done, I guess it is just normal nature. But you do feel – when a doctor is saying to you, like, "Okay. You are healthy, you are this. Your bones are fine. You've (sic) lovely, you are attractive. Your skin feels, you know, you are pretty" and this and that and you just think – that is my appearance or my personality or whichever. But this is about my medical care, you know. A few things. Other than that, it has been fine; it has been fine. There are some things I have gone back and – when you come out of an appointment, you think, "that was not quite right. I felt a bit uncomfortable then". Yes."

20. Mr Sutton QC did not explore this answer in further cross-examination. There was no direct challenge to Patient B that what she was saying about earlier consultations was untrue. This is quite hard to understand, but my surprise is much surpassed by the fact

that the appellant was asked no questions at all about this allegation in his cross-examination beyond the peroration which went as follows:

> "Q: Did it cross your mind whether Patient B was pretty?
>
> A: No
>
> Q: Your actions, were they sexually motivated at all?
>
> A: Not at all; entirely professional."

And that was it.

21. Notwithstanding this evidential deficit the Tribunal found as a fact that what was alleged happened. They said (at paragraph 98 of their reasons):

> "The Tribunal found Patient B to be an overall credible and reliable witness, and noted that she had stated [the appellant] had called her pretty in her two (sic) written statements and during her oral evidence. It determined that, on the balance of probabilities, Patient B had given accurate and consistent accounts of the comments made by [the appellant]. It therefore found paragraph 8 of the allegation proved."

The appellant does not appeal against that factual finding.

22. This appeal challenges the Tribunal's finding that the appellant did what he did with sexual motivation. As Mr Hare QC rightly says, this finding is crucial for without it the (un-appealed) primary facts would not, in all likelihood, have been capable of meeting the standard of impairment of fitness to practise by virtue of misconduct.

23. The advice given by the legal assessor to the Tribunal about sexually motivated conduct was in these terms:

> "There is no particular legal definition that I need to give you about what is sexually-motivated behaviour. I advise you to define it in a common sense, everyday use of ordinary language. Essentially: would a reasonable person consider that whatever its circumstances, or any person's purpose in relation to it, it is, because of its nature, sexual; or, because of its nature, it may be sexual, and because of its circumstances, or the purpose of any person in relation to it, or both, it is sexual."

24. On any view, this is dense stuff, and both counsel acknowledged its impenetrability, as both sought to simplify the test to focus on the indispensable and, in my judgment, exclusive requirement of determining what was the individual's state of mind. Mr Sutton QC rightly, albeit politely, criticised the advice for suggesting that in some circumstances a determination of the individual's "purpose" would not be necessary.

25. During the hearing before me the origin of the advice given by the legal assessor was not known, but subsequent research by Mr Sutton QC has identified the definition of "sexual" in section 78 of the Sexual Offences Act 2003, which says:

> "For the purposes of this Part (except section 71), penetration, touching or any other activity is sexual if a reasonable person would consider that (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual."

26. I can see that as a comprehensive definition of what conduct is, or is not, to be regarded as "sexual", but it says nothing about the key, indispensable ingredient of motivation, which, of course, relates to the individual's state of mind.

27. However, the interventions by both counsel made sure that the Tribunal was on the right path.

28. The Tribunal's findings on this crucial issue were as follows:

> "119. In reaching its decision on whether [the appellant's] conduct was sexually motivated, the Tribunal considered the facts found proved in relation to paragraph 8 and paragraphs 10(a), 10(b)(i)-(v) and 10(c), in their totality.
>
> 120. The Tribunal determined that there was a reasonable inference, based on the facts found proved, of a pattern of behaviour and that [the appellant's] conduct was sexually motivated. In reaching this conclusion the Tribunal took into account:
>
> - [The appellant's] denials in the face of matters now found proved;
> - the nature of [the appellant's] invitation made on 9 May 2016;
> - Patient B's account of events and her own feeling of vulnerability;
> - the lack of an explanation for this meeting which took place outside of a clinical setting and for reasons not connected to his professional role;
> - [The appellant's] repeated reference to Patient B's appearance;
> - [The appellant's] suggestion that Patient B's should consider divorce;
> - [The appellant's] suggestion that she withhold information about the meeting from her husband;

> - [The appellant's] assertion that his wife did not know the meeting and that he often met other patients outside of work;
>
> - [The appellant's] invitation to Patient B to go to his car.
>
> 121 In view of the above, the Tribunal concluded that [the appellant's] conduct was sexually motivated, in that it could be reasonably inferred that he intended to progress his relationship with Patient B with a view to sexual relations.
>
> 122 The Tribunal bore in mind that [the appellant] is of previous good character. However, it determined that this bore less weight given the Tribunal's factual findings and his decision to meet a recent patient outside a clinical setting at a pub. It therefore determined that, even taking account of [the appellant's] previous good behaviour, it could be satisfied that the factual findings demonstrated that [the appellant's] actions were sexually motivated.
>
> 123. Having regard to all of the above, the Tribunal determined that [the appellant's] conduct was sexually motivated"

29. It is noteworthy that these findings apply to both sets of allegations. They apply equally, on the one hand, to the allegation that on one or more occasion(s) in consultation prior to 9 May 2016 the appellant called Patient B "pretty" as they do, on the other hand, to the events of 9 May 2016. Yet the matters relied are virtually entirely concerned with the events of that day. The reasoning says almost nothing about why the Tribunal concluded that in relation to the former event or events the appellant's conduct was sexually motivated. The closest one gets to it is the statement in the fifth indent of para 120: "[The appellant's] repeated reference to Patient B's appearance".

30. This particular finding about the earlier event(s) is highly significant for it constitutes what seems to me to be the principal plank in the reasoning namely that the appellant was guilty of a "pattern" of sexually motivated misconduct.

31. I also note the finding earlier made by the Tribunal at para 109 about the conversation in the pub:

> "[The appellant] denied that he made any of the alleged remarks set out in paragraph 10 of the allegation. His only recollection was that the conversation had been professional at all times, but was unable to recall the content"

32. The appellant appeals on four grounds against the finding of sexual motivation, which I paraphrase as follows:

    i) The Tribunal failed to observe essential standards of procedural fairness in that it was never sufficiently put to the appellant, whether in the course of cross-examination, or in the Tribunal's own questions, that he had conducted himself

in the manner alleged because he intended to progress his relationship with Patient B with a view to sexual relations.

ii) In making the finding that he intended to progress his relationship with Patient B with a view to sexual relations the Tribunal failed to confine itself to the specific allegation that the impugned conduct was itself sexually motivated.

iii) The Tribunal's findings were not supported by the evidence. In particular there was no evidential basis for the finding of a pattern of sexually-motivated behaviour. Moreover, the Tribunal failed to carry out any or any sufficient assessment of the appellant's subjective state of mind.

iv) The finding at paragraph 109 was contrary to the evidence.

33. In the case of *Basson* I had to deal with a similar appeal against a finding of sexually-motivated conduct. At [17] – [18] I said:

> "17. … In *Edgington v Fitzmaurice* (1885) 29 Ch D 459, Bowen LJ famously said that the state of a man's mind is as much a fact as the state of his digestion. Therefore, in civil proceedings that fact, the state of the man's mind, is to be proved in the usual way by the necessary body of evidence on the balance of probabilities. An appellate challenge to a finding of fact is always highly demanding. However, the state of a person's mind is not something that can be proved by direct observation. It can only be proved by inference or deduction from the surrounding evidence. It has been said that the appellate challenge, where the disputed fact has been proved by inference or deduction, is less stringent than where the challenge is to a concrete finding of fact. In other cases, however, it has been said that the standard is the same.
>
> 18. I am prepared to accept that in a regulatory appeal the appellate challenge to a finding of fact derived from inference or deduction is less stringent than a challenge to a concrete finding of fact. Generally speaking, a finding of fact, whether one of a primary concrete nature or one made on the basis of inference or deduction, can only be challenged on appeal where it can be said that the finding is wholly contrary to the weight of the evidence or that there was some fault in the decision-making process that renders the finding unsafe."

34. Counsel accept that this, as far as it goes, is an accurate exposition of the law applicable to this appeal. However, I would add two elementary axioms applicable to a regulatory proceeding of this type. First, where a professional person is accused of a serious misconduct it is essential that the allegation is fully particularised. The accused professional must know exactly what is said against him. Second, in such circumstances an accused professional should, save in rare cases, have the accusations put to him squarely in cross-examination, so that by that time-honoured process their truth, or falsity, can be discovered.

35. I propose to deal first with grounds of appeal (ii) and (iv) as I am not satisfied that they are made out.

36. As noted above, allegation 11 stated: "Your actions as set out at paras 8 -10 above were sexually motivated". In *Basson* exactly the same allegation was made, and I understand this to be standard drafting. In *Basson* at para 14 I said:

> "The Tribunal decided that what the appellant did and said was done with a sexual motive. A sexual motive means that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship. The Tribunal did not, in fact stipulate explicitly what the appellant's sexual motive was; inferentially they found that he behaved in the way that he did for sexual gratification."

37. In court before me we adopted the shorthand "grooming" to describe the second type of sexually-motivated conduct. Ground (ii) essentially complains that the appellant was found guilty of grooming when he never knew he was facing a grooming case, and this was never put to him. The latter part of the complaint is relevant to ground (i) which I will come to.

38. Mr Hare QC says it must have been obvious from the way the facts in issue were pleaded that this was a case of both types, and I agree with that. Moreover, at no stage was the GMC asked by the appellant through his representatives to break down the standard generalised allegation. I think that for the future, however, where sexually-motivated conduct is alleged it should be made clear what type of motive is being alleged.

39. I am not satisfied that ground (ii) is made out.

40. I turn to ground (iv), I agree that the way in which para 109 of the finding is phrased is unfortunate. In his witness statement the appellant said: "I am unable to recall the exact content of the conversation which I believe was highly professional". However, he was certainly able to recall the gist of the conversation, as was set out in his witness statement and in his oral evidence. The way paragraph 109 is phrased suggests that the Tribunal was presented with only one contemporary recollection. However, I think that this is more likely to be poor drafting than a fundamental defect in the reasoning. In any event I am not satisfied that this finding impacted on the main findings as set out above. For these reasons I am not satisfied that ground (iv) is made out.

41. I turn to ground (i). Mr Sutton QC argues that there has been a breach of what is known as the rule in *Browne v Dunn* [1894] 6 R 67. However, it is my view that the rule, as originally expressed, is in fact now obsolete having regard to the advances made in the conduct of civil procedure since the laissez-faire Victorian era in which that case was decided. The case arose from a document issued by Mr Dunn on behalf of others addressed to Mr Browne. The document indicated that the signatories, all residents of The Vale of Health, Hampstead, asked Dunn to apply for an order against Browne to keep the peace. At the subsequent Breach of the Peace hearing, Browne became aware of the document and commenced libel proceedings against all parties. At that libel trial the document was never shown to any of the signatories by Browne during his cross examination of them. During the hearing Browne eventually produced the document

citing it "a sham". The jury found in favour of Browne and ordered damages of 20 shillings. Dunn appealed to the Court of Appeal and the verdict was set aside. Browne then appealed to the House of Lords. During that appeal it was discovered that a number of the signatories were present at the original trial and none of them was asked if the document was anything but genuine.

42. It was in this context that Lord Herschell LC enunciated the classic anti-ambush principle at pp 70-71 where he said:

> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case; but is essential to fair play and fair dealing with witnesses."

43. Lord Halsbury put it even more robustly at pages 76 – 77:

> "To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

44. However, Lord Herschell was clear that if notice of the disputed fact had been given then his strictures would not apply. At page 71 he went on:

> "Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation

> by reason of there having been no suggestion whatever in the course of the case that his story is not accepted"

Lord Morris at page 79 put it this way:

> "My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and with the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that those witnesses are not to be credited. But I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit."

45. In *Williams v Solicitors Regulation Authority* [2017] EWHC 1478 (Admin) Carr J said this about the so-called rule at [73]:

> "The rule is not an absolute or inflexible one: it is always a question of fact and degree in the circumstances of the case so as to achieve fairness between the parties. Civil litigation procedures have of course moved on considerably since the 19th Century. Witnesses now have the full opportunity to give their evidence by way of written statement served in advance, and then verified on oath in the witness box."

46. It is impossible to conceive that the modern system of pleadings, witness statements and skeleton arguments will not give the necessary notice of impeachment of credit. The modern system requires all cards to be put face up on the table and forensic ambushes are basically impossible.

47. An example of the survival of the rule, or at least a variant of it, is *Chen v Ng* [2017] UKPC 27. This was a case about the beneficial ownership of shares in a company. Mrs Chen strongly disputed Mr Ng's story. She won the case, but for reasons given in the judgment that had not been put to Mr Ng in cross-examination. The Privy Council upheld the decision of the Court of Appeal of the Eastern Caribbean that this was procedurally unfair and that a retrial should take place. The Privy Council was clear that they were not laying down an absolute rule and they gave guidance about the degree of unfairness that would need to be shown for a retrial to be ordered.

48. I do not consider that the merit of ground (i) has anything to do with the sort of forensic ambush exemplified by *Browne v Dunn*. Rather it is about the failure in this case to test the key allegation, namely sexual motivation, by any cross-examination.

49. In my own decision of *Carmarthenshire County Council v Y* [2017] EWFC 36 I was confronted with a situation where a father accused of raping his own daughter years earlier was effectively deprived of the right to challenge her allegations in cross-examination. At [8] I referred to the long-established common-law consensus that the best way of assessing the reliability of evidence is by confronting the witness, and I cited the famous decision of *Crawford v Washington* (2004) 541 US 36 at 62 where Scalia J, when discussing the explicit command to afford cross-examination of witnesses in criminal cases contained within the Sixth Amendment to the U.S. Constitution, stated:

> "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better")."

50. In preparing this judgment I have looked up the cited passages from Sir Matthew Hale and Sir William Blackstone. The former stated:

> "That by this course of personal and open examination there is opportunity for all persons concerned, viz the judge or any of the jury or parties or their counsel or attorneys to propound occasional questions which beats and bolts out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated; and on the other side, preparatory limited and formal interrogatories in writing, precludes this way of occasional interrogations and the best method of searching and sifting out the truth is choked and suppressed. Also by this personal appearance and testimony of witnesses there is opportunity of confronting the adverse witnesses, of observing the contradiction of witnesses sometimes of the same side, and by this means great opportunities are gained for the true and clear discovery of the truth"

The latter wrote:

> "The open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in

> writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which she will be ashamed to testify in a public and solemn tribunal. … Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witness on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial."

51. These iconic voices from the past seem to me to express exactly why "testing the evidence in the crucible of cross-examination" is the best way of gaining "the true and clear discovery of the truth"; it is the best method of trial for "sifting out the truth".

52. That was certainly the view of Carr J in *Williams* where a solicitor had been accused of serious dishonesty. At [94] – [95] she stated:

> "94. I fully accept that Mr Williams was on notice that he had a case to answer on the £3.9m representation (even if only as part of the build-up to an overarching case of deceitful misrepresentation as to value), and that he had, and took, the opportunity to deal with it in his witness statement. But he was not cross-examined at all on it. The question is whether that goes far enough in terms of fairness in all the circumstances. This is not in my view a question of the strict application of the rule in *Browne v Dunn* (supra). The situation is more nuanced, in the context of fairness overall.
>
> 95. On careful consideration, I have concluded that it did not. This was the most serious of allegations against a practising solicitor. The case involved multiple allegations, in what was a complex case. This was not a 'single issue' case, where it was obvious that the issue would, or might, end up as a central finding (and the only finding of dishonesty) in the case. There was ambiguity in the pleaded case. In all the circumstances, it was necessary for Mr Williams to be challenged directly on the point so that his evidence could be tested properly before a finding of dishonesty could be made. The Tribunal could not fairly find him to be dishonest without the most careful consideration of what he said in his defence (as it was put by Lewison LJ, in *Clydesdale Bank* (supra) at [52]). He should have had the opportunity to respond to the SRA's allegations against him orally in the witness box, and to be judged on that evidence. I do not accept that the court should speculate in this case that such evidence would have been an *"empty technicality"*. Moreover, Mr Williams could have been re-examined on the point."

53. I do not read these paragraphs to suggest that cross-examination is not generally necessary where the allegation is either simple or single-issue. If the allegation is serious (and an allegation of sexually motivated misconduct against a doctor is about as serious as it gets) then in my judgment the allegation must be fully and squarely put in cross-examination to the accused doctor. The content of the doctor's replies, as well as his demeanour, will equip the Tribunal to decide whether the allegation is, or is not, true.

54. *Chen v Ng* fully supports my view. It was not a particularly complex case and the grounds on which the judge disbelieved Mr Ng were rational and plausible. Yet on the facts of that case it was unfair for judgment to be thus rendered without those grounds having been squarely put to him in cross-examination.

55. In this case there was a remarkable failure to cross-examine the appellant about his alleged sexual motivation beyond the perfunctory couple of questions at the very end of the exercise to which I have referred above. In my judgment this is not good enough. Mr Hare QC argues that it would have been a pointless and futile exercise given the nature of the defence which was to deny in relation to the first allegation that he ever called Patient B "pretty", and in relation to the events of 9 May 2016 to deny that he instigated the meeting or said the things that he was found to have said. It would have been just a pointless mechanistic exercise. I do not agree. The case of sexual motivation should have been put very clearly to him in cross-examination and he should have been given a much fuller opportunity to respond to it. Better that the cross-examination should be unduly long than unfairly short or non-existent, as Lord Herschell explained in *Browne v Dunn* at page 71:

> "Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth …"

56. In my judgment, the failure to cross-examine the appellant comprehensively on the central allegation was procedurally unfair to such a degree that the appeal must be allowed on this ground.

57. I turn to ground (iii). As set out above, a central plank of the finding of sexual motivation was that the appellant had engaged in a "pattern" of such behaviour. This requires examination of the finding of sexual motivation in respect of the earlier consultations where the appellant called Patient B "pretty". It is noteworthy that in relation to Patient A the appellant was found to have called her, as well as her mother, "pretty", albeit in a hospital setting and in the presence of her (Patient A's) partner. The Tribunal dismissed the allegation that this was done with sexual motivation and instead found that it was a clumsy attempt at conversation. The Tribunal does not explain why it reached a different conclusion in relation to the same phrase being used in conversation with Patient B. I have referred above to Patient B's written evidence where she assumed that in using this phrase "he was just being friendly to put me at ease".

58. I have already explained how this aspect was not subject of any cross-examination at all beyond a single question. I have also explained that there is a virtually complete

absence of reasoning as to how the conclusion was reached that at the consultations the use by the appellant of the word "pretty" was with sexual motivation. I have concluded that there was virtually no evidential foundation, nor was there any clear or sufficient reasoning, for the finding that in this respect there was sexual motivation. Even now, notwithstanding the seriousness of the finding made against him, the appellant does not know how many times, or in what context, he is said to have uttered this word with sexual motivation. I recognise that it will be a rare case where a finding of fact is set aside but I am satisfied that in this instance the finding was clearly wrong and must be set aside.

59. In *Arunkalaivanan v General Medical Council* [2014] EWHC 873 (Admin), another sexual-motivation case, Miss Amanda Yip QC (as she then was) at [62] rightly emphasised the need for proper scrutiny of all the evidence in order to determine whether a sexual motivation could be inferred. This emphasis does not covertly elevate the standard of proof in cases of this type. That remains as the simple balance of probabilities. Rather, it reflects the principle that the more serious the allegation, the greater the need for evidential clarity, as to which see *Re H & Ors (minors)* [1995] UKHL 16, [2006] AC 563 at [73] where Lord Nicholls of Birkenhead stated:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

60. Having set aside the earlier sexual motivation finding it follows that there was no "pattern" of sexually motivated actions by the appellant. In my judgment that fatally undermines the reasoning in paragraph 120 of the findings concerning the appellant's state of mind on 9 May 2016.

61. For these reasons ground (iii) succeeds.

62. I am clear that disposal of this appeal requires me to set aside the findings in relation to Patient B and the consequential finding of impairment of fitness to practise by virtue of misconduct and to direct that the allegations in respect of Patient B should be retried. The decision I have reached is largely based on procedural unfairness, and I am not in a position to determine for myself what the result would have been had the process been procedurally fair. Therefore, the matter must be retried.

63. That concludes this judgment.

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