Privy Council Appeal No. 21 of 1969

Herman Peter Tarnesby – – – – – – *Appellant*

v.

General Medical Council – – – – – – *Respondent*

FROM

THE DISCIPLINARY COMMITTEE OF THE GENERAL MEDICAL COUNCIL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY 1970

Present at the Hearing:

LORD WILBERFORCE
VISCOUNT DILHORNE
LORD PEARSON

[*Delivered by* LORD PEARSON]

The appellant is a registered medical practitioner. On the 24th July 1969, after a four-day inquiry, the Disciplinary Committee of the General Medical Council found him guilty of infamous conduct in a professional respect and directed that his name be erased from the register. He has appealed both against the finding of guilt and against the direction for erasure. His name remains in the register pending the determination of this appeal.

The general nature of the conduct of which the appellant was found guilty was advertising himself and his practice in connection with the new régime introduced by the Abortion Act 1967. That Act, which came into force on the 27th April 1968, made important changes in the law.

The main provision of the Act is in section 1 subsection (1), which reads as follows:

> "Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith:
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> (*a*) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated: or
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> (*b*) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

After that Act was passed and came into force there was a need for authoritative information to be given to the public through articles in the newspapers and otherwise as to the effect of the Act and what its practical operation might be. Also there was an opportunity for a medical practitioner, by advertising himself and his qualifications, knowledge and skill, to acquire a lucrative practice in the much extended field of lawful termination of pregnancies.

As to the dividing line between properly giving information to the public and wrongful self-advertising, guidance was given in a judgment of their Lordships delivered by Lord Morris of Borth-y-Gest on the 31st May 1961 in an unreported case *Gardiner v. General Medical Council.* Certain passages of that judgment have been set out in successive annual editions of a booklet issued by the General Medical Council and describing their " Functions, Procedure and Disciplinary Jurisdiction." The passages are as follows:

> (1) " The Disciplinary Committee were entitled to have regard to the content of the written material, the form in which it was written, and the selected media for its publication in forming conclusions as to what were the purposes which animated the writer. The Committee were entitled to consider whether a desire to give information about a subject and to direct attention to such subject could have been achieved without directing attention to the personal and unique performances and abilities of the writer.
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> (2) It must be recognised that professional medical men may be amply justified in publishing books and articles and in publishing them in their own names. By their writings they may be making invaluable contributions to medical science and to learning. They may be disseminating useful knowledge. They may be helping their fellow practitioners. They may be advantaging a wider public. It must however be recognised that by their writing they may inevitably and indeed justifiably attract notice. This may redound to their professional and to their pecuniary advantage. It may well be that in some cases a hope that some legitimate meed of personal advancement will result may find its place amongst the motives in writing and may be the spur to command the industry that the task may require. But after this has been said it can definitely be said that within the profession the line between the kind of publication that is unobjectionable and the kind that is objectionable should present no difficulties of recognition for any reasonable practitioner.
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> (3) Examples may be given. On the one side of the line there might be a book or an article which is an exposition of a particular subject either written as a text-book for medical students or practitioners or written impersonally in order to give information to the general public. No exception could be taken to such publication. As an example on the other side of the line there might be a book or an article an essential theme of which is the praise and commendation of the skill and abilities of the writer himself with an express or implied suggestion that his successes in dealing with cases show that potential patients would do well to have recourse to him. That would be ' advertising '."

In the same booklet entitled " Functions, Procedure and Disciplinary Jurisdiction " the offence or misconduct of advertising for the doctor's own professional advantage is put under the general heading of " Improper attempts to profit at the expense of professional colleagues ". The question whether a doctor's conduct amounts to advertising for his own professional advantage and thus to an improper attempt to profit at the expense of professional colleagues is entrusted to the decision of the Disciplinary

Committee, subject to appeal to their Lordships. In a matter of this kind the decision of the Disciplinary Committee, composed of members of the same profession, must carry weight. As Lord Upjohn said in *McCoan v. General Medical Council* [1964] 1 W.L.R. 1107, 1112, (though in relation to misconduct of a different character), "The Medical Acts have always entrusted the supervision of the medical advisers' conduct to a committee of the profession, for they know and appreciate better than anyone else the standards which responsible medical opinion demands of its own profession".

Similar considerations apply to the decision of the further question whether improper conduct in which an accused practitioner is found to have engaged amounts to infamous conduct in a professional respect.

In *Allinson v. General Council of Medical Education and Registration* [1894] 1 Q.B. 750 questions arose as to the meaning of the words "infamous conduct in a professional respect" in section 29 of the Medical Act 1858. Lord Esher said at p. 760-1 "I adopt the definition which my brother Lopes has drawn up of at any rate one kind of conduct amounting to 'infamous conduct in a professional respect' viz.: 'If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency', then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect.' The question is, not merely whether what a medical man has done would be an infamous thing for anyone else to do, but whether it is infamous for a medical man to do. An act done by a medical man may be 'infamous' though the same act done by anyone else would not be infamous; but, on the other hand, an act which is not done 'in a professional respect' does not come within this section. There may be some acts which, although they would not be infamous in any other person, yet if they are done by a medical man in relation to his profession, that is, with regard either to his patients or to his professional brethren, may be fairly considered 'infamous conduct in a professional respect' and such acts would, I think, come within section 29."

In *Felix v. General Dental Council* [1960] A.C. 704 J.C. the question was whether the appellant had been guilty of "infamous or disgraceful conduct in a professional respect" within the meaning of section 25 of the Dentists Act 1957. At p. 720 Lord Jenkins after citing the passage from Lord Esher's judgment set out above, said "Granted that in accordance with Lord Esher's definition of 'infamous' conduct in a professional respect the full derogatory force of the adjectives 'infamous' and 'disgraceful' in section 25 of the Act of 1957 must be qualified by the consideration that what is being judged is the conduct of a dentist in a professional respect, which falls to be judged in relation to the accepted ethical standards of his profession, it appears to their Lordships that these two adjectives nevertheless remain as terms denoting conduct deserving of the strongest reprobation, and indeed so heinous as to merit, when proved, the extreme professional penalty of striking-off."

Although the decision of the Disciplinary Committee on the eminently professional questions involved in this case must carry great weight, and although in relation to questions of credibility the Committee had the advantage of seeing and hearing the appellant as he gave his evidence and so of observing his demeanour, nevertheless the appeal is by way of re-hearing and puts in issue matters of fact as well as matters of law. Lord Radcliffe said in *Fox v. General Medical Council* [1960] 3 A.E.R. 225 J.C. at p. 226 "The appeal in this case lies as of right and by statute—see s. 36 of the Medical Act, 1956. The terms of the statute that confers the right do not limit or qualify the appeal in any way, so that an appellant is

entitled to claim that it is in a general sense nothing less than a re-hearing of his case and a review of the decision. Nevertheless, an appellate court works under certain limitations which are inherent in any appeal that does not take the form, as this does not, of starting the case all over again and hearing the witnesses afresh." In a later passage Lord Radcliffe said "In the case of hearings before the Medical Council, no judgment is, of course, delivered. There is only a finding such as we have here that 'the committee have determined that the facts alleged . . . in the charge have been proved to their satisfaction.' It is not possible to tell, except by inference, what has been the weight given by the committee to various items or aspects of the evidence, or what considerations of fact or law have proved the determining ones that have led the members to arrive at the decision finally come to. Such considerations, which are unavoidable in appeals of this kind, do sometimes require that the Board should take a comprehensive view of the evidence as a whole and endeavour to form its own conclusions whether a proper inquiry was held and a proper finding made on it, having regard to the rules of evidence under which the committee's proceedings are regulated." See also *Felix v. General Medical Council* [1960] A.C. 704 J.C. at pp. 716–7.

It would of course be of advantage for the hearing of an appeal if the Disciplinary Committee were to give some indication, however brief, of their main grounds of decision. This was done in a later case heard on the 26th and 27th November 1969.

At any rate their Lordships have to consider whether a proper inquiry was held and a proper finding made on it. On behalf of the appellant criticism has been directed to certain procedural steps that were taken as well as to the merits of the decision.

There was criticism of the form of the charge which was the subject of the inquiry. It was in form a single charge, but it was very long, and it was composite, referring to three occasions which were separate though connected in subject-matter. The charge was in these terms:

> "That, being registered under the Medical Acts, with a view to attracting patients and promoting your own financial benefit you contributed or provided written, oral and photographic material, as described in the paragraphs numbered (1), (2) and (3) below, for publication in issues of the magazine Stern, published in Hamburg in the German language; and in particular
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> (1) You made available for publication the following material which was published in the issue of Stern dated May 12, 1968, namely:
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> (*a*) Information indicating that, having been born in Germany, [you had become a distinguished specialist in Gynaecology and Obstetrics in England;]
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> (*b*) Information suggesting that you had received large quantities of letters from Germany inquiring whether it was possible for women from West Germany to obtain abortions legally in the United Kingdom;
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> (*c*) Details of the circumstances in which, having regard to the terms of the Abortion Act, 1967, pregnancies might be terminated lawfully according to the law of the United Kingdom;
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> (*d*) Particulars of the fees chargeable to women from abroad for the provision of the opinion of experts, for the performance of an operation to terminate pregnancy, and for post-operative treatment.

(2) You made available for publication the following material which was published in the issue of 'Stern' dated August 11, 1968, namely:

(*a*) Particulars of cases in which you had successfully performed operations for the termination of pregnancies of women who had come to London from Germany for this purpose;

(*b*) Details of the circumstances in which having regard to the terms of the Abortion Act, 1967, you would be ready to terminate the pregnancies of other women coming from Germany for this purpose;

(*c*) Particulars of the fees chargeable for the performance of such operations;

(*d*) Particulars of other aspects of the procedure and costs involved;

(*e*) Photographs of

(i) Yourself and others in operating gowns in an operating theatre, [with a caption giving in prominent type the cost of the operation for an abortion;]

[(ii) Yourself sitting at a desk;]

(iii) A ten-week old embryo [said to have been aborted by you;]

(3) You wrote a letter, part of which was subsequently published over your signature in the issue of 'Stern' dated September 22, 1968, indicating among other things that the number of German women who wanted to know whether the new British law would help them to avoid the ordeal of an undesired pregnancy was growing daily: that there was, in practice, no prospect of your patients being prosecuted and sentenced on their return to West Germany; and that you wanted to protest against any anxiety in this connection being aroused in your patients whom you were ready to continue to help within the framework of British law;

And that in relation to the facts alleged you have been guilty of infamous conduct in a professional respect."

The facts alleged against the appellant in the charges were found by the Disciplinary Committee to have been proved with the exception of those portions which are shown above enclosed in square brackets.

The main complaint against the form of the charges was that the vital allegation of wrongful intention, contained in the words "with a view to attracting patients and promoting your own financial benefit", was put in an introductory paragraph or passage and the allegations of acts done were put in separate later paragraphs. The alleged acts done would have been innocuous without the alleged intention. The alleged intention might have been clearer and more definite in relation to some of the alleged acts than to others. It would have been more orthodox according to long-established practice in the courts, and more informative for the Disciplinary Committee, and conducive to clarity in the presentation of the case, if the alleged intention had been associated directly with each set of alleged acts done, so as to make it clear from the outset that both the acts done and the intention with which they were done constituted the facts of the case and must both be proved in relation to each matter. This complaint (which is additional to the general disadvantages of a long and complicated charge) has some substance in it and merits consideration in relation to the formulation of charges in future cases. Their Lordships, however, are satisfied that the form of the charges did no appreciable harm in this case. It was fully and clearly explained by counsel on both sides that the Committee must consider both what acts were done and the

intention with which they were done, and that both the acts and the intention were facts of the case to be decided by the Committee. Also the Committee had a highly experienced chairman and a legal assessor, and even without their advice it must have been obvious to all the members of the Committee that the essential question in the case was whether there had been wrongful self-advertising. When the facts had been found, there was separate consideration of the further question (explicitly raised by the last sentence of the charges) whether on the facts found the present appellant had been guilty of infamous conduct in a professional respect. This seems a convenient procedure and fully consistent with the General Medical Council Disciplinary Committee (Procedure) Rules 1958, especially Rule 18 (*d*).

Questions were raised at the hearing both as to the incidence and as to the weight of the burden of proof. As to the incidence, it was of course for the General Medical Council as the complainant to prove that the present appellant had been guilty of the misconduct alleged. When the case for the complainant was opened, the publication of the relevant articles and letter in the German magazine " Stern " was admitted but there was substantially no other evidence. It was contended on behalf of the complainant that the publication of the articles and the letter raised a sufficient inference and constituted a sufficient *prima facie* case. That may well have been so, but no decision was or is required on this point, because counsel for the present appellant (undoubtedly taking a wise course in the circumstances) did not submit that there was no case to answer and elected to call his client as a witness to give oral evidence. If any misconception as to the incidence of the burden of proof was created (which is unlikely), it was amply removed by counsel on both sides in their final speeches.

As to the weight of the burden of proof, these are not criminal proceedings and the rules as to the burden of proof in criminal proceedings are not applicable. Nevertheless the weight of the burden depends on the gravity of the issues. *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247 *Blyth v. Blyth* [1966] A.C. 643, 676–7. The issues in this case are grave issues.

In *Bhandari v. Advocates Committee* [1956] 1 W.L.R. 1442 J.C., where the appellant had been found guilty of professional misconduct as an advocate, Lord Tucker said at p. 1452 " With regard to the onus of proof the Court of Appeal said ' We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities.' This seems to their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee."

Some passages in the final speech of counsel for the complainant may have tended to minimise unduly the gravity of the burden of proof, but in the end he stated correctly the principle that when an allegation of a serious nature is made there is a serious burden on those presenting the facts, and in any case the experienced chairman and the legal assessor would not be misled or allow the other members to be misled as to the weight of the burden of proof.

So far the main criticisms of the procedure at the hearing have been considered with the exception of the one relating to the questioning of the present appellant by the chairman, and that will be conveniently dealt with at a later stage. The substance of the charges will now be considered.

After the coming into force of the Abortion Act 1967 on the 27th April, 1968, the appellant wrote an article in the form of questions and answers

at the request of the *Sunday Times*, and it was published in that newspaper on the 5th May 1968. No complaint is made about that article.

On or about the following morning, the 6th May, a representative of the magazine "Stern", which is a leading and popular magazine in Germany, telephoned to the appellant, referred to the article in the *Sunday Times*, and asked for some further information. The appellant realised that the information which he gave would or might be used by "Stern" in some article.

On the 12th May 1968 an article appeared in "Stern", and the translation of it is as follows:

"Medicine

English Intervention

A new law is facilitating the termination of pregnancies in Great Britain.

The gynaecologist, Dr. Tarnesby, found it necessary to exchange the scalpel for the pen. For the London Medical Practitioner who originally came from Germany and who has earned many distinctions in England and is famous as an Obstetrician has mountains of correspondence from his earlier homeland to answer. Everybody wants to know from him whether a new British law will also help German women out of their distress.

The law, which came into force a week ago, is the most liberal abortion law in the Western world: it permits every woman to have an undesired pregnancy terminated completely legally if in the opinion of two doctors her life, her physical or mental health or the life or health of her existing children are endangered.

Thus any married woman with several children who has a scanty amount of housekeeping money may easily state convincingly that another mouth might detract from the 'health of her existing children'. Any single girl who is pregnant may assert that the derision of her fellow-citizens would 'endanger her mental health'. In addition the danger to the life of the mother (the so-called 'medical indication') is much more often accepted in England as a reason for termination than in the Federal Republic. Any patient of more than 16 years of age can obtain the desired certificate from the doctors without any consent of the parents, of the husband or of the authorities being necessary.

When a pregnant girl has received the termination certificate signed by both doctors she may undergo the operation in the clinic. Free of charge in fact, for in England the National Health Service pays for all medical treatment.

The fact that, in these circumstances, many German women wish to travel to the British Isles is associated with the strict Paragraph 218 of our Penal Code which basically prohibits abortion. Only if the birth presents a serious danger to the life and limb of the mother may the operation be carried out on the strength of two experts' opinions given by two medical practitioners who have no connection with each other.

Dr. Tarnesby's reply that, of course, every foreign girl may buy a ticket to London in order to have her pregnancy terminated there does however contain one limitation: 'foreigners have to pay cash in England. The costs for the experts' opinion, the clinic, general anaesthetic and post-operative treatment may be estimated at approximately 1,000 to 1,500 Marks in London.'

> Above all, however, a citizeness of the Federal Republic may be punished in Germany for an abortion which was legally carried out abroad. Paragraph 3 of the Penal Code provides that ' German Penal Law applies to the act of a German National irrespective of whether he commits the same at home or abroad '. An exception exists only if the act, according to the particular circumstances at the place where it was committed, is not a punishable offence. Thus the seduction of girls in Asia who are not of full age is not regarded as a punishable offence by the German Courts. On the other hand an abortion in England is punishable."

This article is referred to in paragraph (1) of the charge which has been set out above. The appellant in his evidence said that he did not give to " Stern's " representative information that he had become a distinguished specialist in Gynaecology and Obstetrics in England, and it was admitted by counsel for the complainant that there was no evidence of the appellant having given such information, and accordingly the appellant was acquitted of this part of the charge. The appellant said in his evidence that he did give the information that he had been born in Germany, but this came about because " Stern's " representative had difficulty in speaking English and therefore the appellant in order to help him conversed with him in German. Otherwise it appears that the appellant did substantially give the information referred to in paragraph (1) of the charge. Nothing was said in the telephone conversation as to the use of the appellant's name by " Stern ". According to an affidavit of Herr Maass, head of the " Diese Woche " department of " Stern ", the name of the appellant was used in the article because the mention of a name is in such a case journalistic usage in Germany. The appellant in his evidence said he did not expect that his name would be used because " it was not a personalised interview at all ", but he did not stipulate that it should not be used. The information which he gave was likely, if it was published in " Stern " and the appellant's name was mentioned, to induce German women to come to England for the purpose of taking advantage of the new facilities for legal abortion and to become patients of the appellant. There remains however the question whether he gave the information with a view to attracting patients and promoting his own financial benefit.

The appellant, after consulting a German lawyer, wrote to " Stern " a letter dated the 24th May 1968 in these terms:

> " The number of German women who wish to know whether the new British law can help them out of the ordeal of an undesired pregnancy is growing daily. It is all the more disturbing to have to read in the " STERN " that my patients may be punished in Germany on their return. It is almost inconceivable that these days the Courts of a civilised country would act in this matter. The facts are in fact as follow: Every doctor, whether British or German, is bound by his absolute duty of silence.
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> A condemnation of the patient is practically totally impossible if the doctor who has carried out the lawful termination of the pregnancy in England cannot give evidence; just this duty of silence however forbids this giving of evidence.
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> The German legal position appears to be based on a Supreme Court decision given in 1940—*i.e.*, 28 years ago and—I hope—in times which are quite different from today.
>
> Up to now not a single German woman has been reported, let alone punished in the Federal Republic on account of a legal abortion abroad (for example Sweden or Japan).

Why then are my patients having to be unnecessarily disturbed? I protest against this and state that I am prepared in spite of everything to continue to help them—within the scope of British law.

Dr. H. Peter Tarnesby "

This letter of the 24th May 1968 was initially written and sent for publication in " Stern ". But the appellant's evidence was that the 24th May was a Friday and over the week-end he thought about the letter and had misgivings, because the letter seemed too personalised, there was no need to say " my patients " and the last sentence was open to misinterpretation. Accordingly he telephoned to " Stern " on the Monday, and again on the Tuesday, when he was able to speak to Herr Maass, and they agreed that certain deletions should be made in the letter. Herr Maass's affidavit confirms that such a conversation took place. Later, when it was proposed that there should be a second and longer article in " Stern " on the subject of abortion, it was agreed between the appellant and Herr Maass that the letter would not be required and should be " finished " (erledigt). Herr Maass said in his affidavit " I remember furthermore that Dr. Tarnesby withdrew from publication his reader's letter of the 24th May 1968 ". Eventually, however, on the 22nd September 1968 the letter was published in " Stern " and in its full form without the deletions. This took place without any consent or knowledge of the appellant and Herr Maass's affidavit shows that it was due to an oversight, as he had omitted to demand back a copy of the appellant's letter which was in a different department of " Stern ".

It seems therefore that the appellant was not responsible for the eventual publication of the letter in " Stern " on the 22nd September 1968. But he had initially written it and sent it for publication. This is the subject of paragraph (3) of the charge which has been set out above.

The importance of the letter is that it can be regarded as a revelation—made in an unguarded moment and soon repented, but none the less a revelation—of the appellant's motive and intention in supplying information for publication in " Stern ". A possible, and one might say natural, interpretation of the letter is that he was afraid that the last paragraph of the article in " Stern " of the 12th May 1968, referring to possible punishment under German law of women who had obtained abortions in England under English law, would deter German women from coming to England as his patients and having their pregnancies terminated by him. The letter seems to be designed to reassure the German women and to tell them that they can come to England and become his patients without fear of the German law. If the Disciplinary Committee took that view of the meaning of this letter, they could regard it as throwing light on the appellant's motive and intention not only in writing that letter but also in supplying information for the article which appeared in " Stern " on the 12th May 1968 and for the article which appeared in " Stern " on the 11th August 1968. The appellant himself in his evidence described the letter as unwise, foolish, deplorable and so on.

The letter also has some bearing on another point, which relates to the article of the 12th May. The appellant said that he was upset by the tone and style of the article of the 12th May, which was " personalising " and " sensationalising " what he had told them and contained unwarranted material, and he was also upset by the suggestion that his German patients were breaking the German law and he was aiding and abetting. He did not in the letter of the 24th May or in any other letter to " Stern " make any protest against the " personalising " and " sensationalising " or the

unwarranted material, or refer to the implication that he was aiding and abetting. He said in his evidence that he had been advised by his German lawyer that it would be unwise to make any protest in his letter, as that might be published and so increase the undesired publicity. The appellant also said that he protested by telephone to Herr Maass, though this is not mentioned in Herr Maass's affidavit. It was of course primarily for the Disciplinary Committee, who heard the appellant's explanations on these and other points, to evaluate them, considering whether they did or did not sound convincing.

Then, according to the appellant's evidence, a few days later Herr Maass telephoned and said that the editorial board of " Stern " had decided to arrange a kind of symposium or a very serious coverage of the problem of abortion in which several prominent people could be asked to contribute, and he gave examples of the prominent people. Herr Maass asked the appellant for an interview, and this was agreed, and later a date was fixed and the interview took place at the appellant's auxiliary consulting room on the 22nd June 1968.

The appellant, according to his evidence, repeated at the interview a stipulation, which he had already made on the telephone, that anything that he said would have to be submitted to him in manuscript form for vetting before it could be published. This evidence was supported by Herr Maass's affidavit, except that the stipulation was stated somewhat differently. Herr Maass said in his affidavit " While he was prepared to grant us the interview, he stressed that the publication would have to take place in a form which could not be construed as advertising for his own practice or for any of the clinics with which he worked. We agreed that the passages of the article which referred to Dr. Tarnesby were to be submitted to him again for his approval before publication ".

The interview took place on the 22nd June 1968 and lasted for an hour or two and no doubt much information was given. Then or a few days later the appellant was asked to allow facilities for photographs to be taken of an operating team in an operating theatre. He asked why, and was told by Herr Maass that he wanted to contrast the dismal conditions in the illegal abortion dens of Germany with the proper clinical facilities available now for abortion in England. The appellant agreed to give the facilities. The photographers came on some date in July 1968. They took a photograph of the appellant and the other members of the operating team in their equipment in the operating theatre. They would not be recognisable in the photograph. The appellant said it was understood that as the manuscript was to be submitted to him, so of course were the photographs which were to appear in the article. A photograph was taken of a ten-weeks' embryo resting on a piece of muslin and held in a gloved hand. The appellant said he thought this embryo was one which he had aborted, but he did not tell the photographers or any representatives of " Stern " that he had done so; it was an embryo which had been preserved in a bottle on his desk; he did not hold it in his hand for the photograph. It was an unpleasant and distressing photograph, and not at all likely to attract patients and so not directly relevant to a charge of advertising.

In the event the appellant's stipulation, to which Herr Maass had agreed, was not complied with by " Stern ". It was difficult for them. The Papal Encyclical *" Humanae Vitae "* on birth control and referring to abortion had been issued, and this made Herr Maass's article highly topical and publication of it had to be accelerated. Attempts were made to consult with the appellant, but he was on holiday. The article was set up for printing. When the appellant heard of it from another source, he

telephoned Herr Maass asking to see the article or the passages in it which referred to him, so that he would have the opportunity of approving or disapproving. Herr Maass was unable to help him.

The appellant on the 3rd August 1968 sent to Herr Maass a telegram saying " Please do not print any matter suggesting advertisement of my practice and do not give my address or that of clinics used." Herr Maass replied on the 6th August with a letter, saying " I acknowledge receipt of your telegram of the 3rd August. When it reached me, however, ' Stern ' had already gone to print with its article on Abortions in London. But even without your telegram I would have strictly observed your express wish to avoid advertising references to your practice. Neither in the text nor in the photographs does the exact address of your practice appear, nor those of the private clinics connected with you."

It is to be noted that the appellant's telegram of the 3rd August did not ask for his name to be omitted from the article. If he thought that the article might contain wrongful advertisement of himself, the only effective remedy would be to have his named omitted. The absence of an address would be unimportant, as that could easily be ascertained by anyone who knew his name and professional occupation. It would be for the Disciplinary Committee to consider whether the appellant's object was to refrain from advertising or to confine his advertising within limits which he hoped would not attract the unfavourable attention of the General Medical Council.

The appellant had said in his evidence that in supplying information before the article in " Stern " of the 12th May and in writing the letter of the 24th May 1968 he did not have any view of attracting patients or promoting his own financial benefit. He said the same in relation to the information and facilities for photographs given in June and July 1968. He said that his motive was to contribute to a serious article, giving information to the public on the workings of the Act, as well as the pros and cons of abortion from the medical and psychological point of view.

The appellant wrote a book under the title " Abortion Explained ". It was commissioned by the *Sunday Times* in May, and he began to write it in June and it was published in about December 1968. He said in his evidence with reference to the interview with Herr Maass on the 22nd June 1968, " I was writing at the time this little booklet for the *Sunday Times*, and the manuscript for the book was before me, although it was not completed, but I had started writing at the beginning of June, and some of the points I had already made notes on, and this little book does reflect what I have just said, and I had the manuscript there, and could in fact refer to my notes." Thereupon it was agreed that the chairman and members of the Committee should see the book, and it was put in evidence on behalf of the appellant.

The book became important, because the appellant was in his evidence saying that what he had told Mr. Maass at the interview had been in some respects incorrectly and inadequately reported in the article in " Stern " of the 11th August 1968, and the chairman when he had read the book was able to compare certain passages in the article and in the appellant's evidence with what appeared in the book, and there were certain other points which he had noted in the book. After the appellant had been examined in chief by his own counsel and cross-examined by counsel for the complainant, the chairman put a series of questions on points arising from the book. This was in their Lordships' opinion a completely fair and proper procedure. The chairman was not " descending into the arena " or " having his vision clouded by the dust of the conflict " in the manner described by Lord Greene M.R. in *Yuill v.*

Yuill [1945] p.15 at p.20. He had listened without interruption to the examination-in-chief and cross-examination of the witness, and then put his own questions so as to give to the witness an opportunity of explaining and commenting on the points which the chairman had in mind. This was before the re-examination of the witness by his own counsel, so that any inadequate answers could be put right. All the points put by the chairman to the appellant had a bearing on the credibility of the appellant's evidence, and some of them had a bearing on the intention to advertise.

(1) The article in " Stern " of the 11th August 1968 gave three examples of cases in which abortion was recommended and duly carried out, but gave no examples of abortion being refused. The appellant said in evidence that he had at the interview also cited instances of abortion being refused for good reasons. He said " I was absolutely horrified to see that none of the refusal cases were quoted in ' Stern ', only the three cases which obviously have been quoted to show how allegedly easy it is to have abortions done in England." He said it was his intention to give a balanced picture of the Act, and to give three examples on the one side and three on the other. It appeared however that in the book he gave examples only of abortions being recommended and duly carried out, and he gave no examples of abortions being refused.

(2) The appellant said in evidence that his motive was to contribute to a serious article, giving information to the public on the workings of the Act, as well as the pros and cons of abortion from the medical and psychological point of view. It appeared however that in the book he gave a long list of pros—points in favour of abortion—and he did not set out the cons—points against abortion. The psychological risk was referred to in the book at p.65 in terms that minimised it.

(3) When the letter of the 24th May was published by " Stern " on the 22nd September 1968 it was headed by a caption, " The British Gynaecologist Dr. H. Peter Tarnesby considers a termination of a pregnancy permissible under English law even if the patient does not want the child because she is single ". The appellant said in his evidence that this statement was outrageous and terrible, and he had never said this and had never held that opinion. In the book at page 95 there is the question " Has the new Abortion Act brought us close to abortion on demand? " and the answer " Very close indeed for two reasons ". The first reason was that a woman could go from one doctor to another in search of a favourable opinion. The second was that " whatever Parliament may have intended, the wording of the Act allows for an interpretation which is tantamount to abortion on demand." It should be added that the appellant said at a later stage in his evidence " It is correct that the wording allows it, but it does not mean that I will allow myself to act that way."

(4) In his evidence the appellant said that his average fee as a surgeon for the abortion operation was between £20 and £25. Both in the *Sunday Times* article and in the book he gave £40 as the minimum surgeon's fee for this operation.

There were other points also. It was for the Disciplinary Committee to consider all the points and decide whether the information provided by the appellant to " Stern " had been such as to give a balanced impression of the pros and cons of abortion or whether he was presenting a one-sided impression in favour of abortion with a view to enlarging his practice.

This has not been an easy case and has needed much consideration. Their Lordships have come to the conclusion that there was evidence on which the Committee could properly find the appellant guilty of the

unprofessional conduct with which he was charged and thereby guilty of " infamous conduct in a professional respect ". The decision that he was guilty must be upheld.

The sentence pronounced by the Committee was that the appellant's name should be erased from the register. At the time when that sentence was pronounced, which was on the 24th July 1969, the relevant provision was that contained in Section 33 of the Medical Act 1956—" the Committee may if they think fit direct his name to be erased from the register ". There was power, on an application made not less than eleven months from the date of erasure, to direct that the name be restored to the register. But there was at that time no power to impose a sentence of suspension of the registration for a period.

Since then the law has been changed. The Medical Act 1969 was passed on the 25th July 1969, but under the provisions of section 24 (2) the other provisions of the Act were not to come into force until brought into force by Order in Council. The Order in Council, the Medical Act 1969 (Commencement) Order 1969 (S.I. 1969 No. 1492), brought into force section 23 (2) and schedule 3 (except certain paragraphs not material for this case) on the 27th October 1969, and it brought into force sections 13 and 14 on the 1st April 1970. The material provisions are in paragraph 11 of schedule 3 and in section 14 (2), which introduces a new subsection 5 (*c*) in section 36 of the Medical Act 1965. After hearing arguments as to the construction of these provisions, their Lordships hold that they do by necessary implication confer a power to substitute in this appeal a sentence of suspension of the appellant's registration for the sentence of erasure of his name from the register. Their Lordships bear in mind that as was said in *McCoan v. General Medical Council* [1964] 1 W.L.R. 1107 at p. 1113, " it would require a very strong case to interfere with sentence in such a case, because the Disciplinary Committee are the best possible people for weighing the seriousness of the professional misconduct ". But the special feature of the present case is that there is a new power which has come into existence by a change in the law since the sentence was pronounced. Counsel have explained that there are important differences between the consequences of suspension of the registration and the consequences of erasure of the name from the register even if it is afterwards restored.

There are matters of mitigation in this case. Numerous good testimonials in favour of the appellant were produced at the hearing. The initiative for the interviews which resulted in the publication in " Stern " of the articles of the 12th May and the 11th August 1968 came from " Stern " and not from the appellant. He had a double misfortune in that neither the arrangement that his letter of the 24th May should not be published nor the arrangement that the relevant portions of the article to be published after the interview of the 22nd June should be submitted to him for approval was carried out. It may be not always easy for a practitioner to draw the right dividing line between properly informing the public and improperly advertising himself. A sentence of suspension of the registration for twelve months would be adequate

Accordingly their Lordships will humbly advise Her Majesty that the appeal against the Disciplinary Committee's judgment finding the appellant guilty of infamous conduct in a professional respect should be dismissed, but that the sentence should be altered to one of suspension of registration for twelve months. There will be no order as to costs.

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In the Privy Council

HERMAN PETER TARNESBY

v.

GENERAL MEDICAL COUNCIL

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LORD PEARSON

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