Privy Council Appeal No. 5 of 1971

Julius Libman – – – – – – – – *Appellant*

v.

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

FROM

THE DISCIPLINARY COMMITTEE OF THE GENERAL MEDICAL COUNCIL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH OCTOBER 1971

Present at the Hearing:
THE LORD CHANCELLOR
LORD CROSS OF CHELSEA
LORD KILBRANDON
[*Delivered by* THE LORD CHANCELLOR]

This is an appeal from the Disciplinary Committee of the General Medical Council given on 4th March 1971 by which the appellant was found guilty of serious professional misconduct and the Disciplinary Committee directed the suspension of his registration for six months.

The appellant is a consultant physician of hitherto unblemished reputation who had been carrying on practice as a medical practitioner since 1929. The complainants were a married couple referred to hereafter, and respectively, as Mr. and Mrs. Wroe. It was conceded that, at the time of the matters complained of in the charges against the appellant, Mrs. Wroe was the patient of the appellant, having been referred to him as consultant by her general practitioner, Dr. Kay, for advice on an asthmatic condition which may have been partly psychological in origin. There were a number of matters in the complaint which were not sustained. The order of the Disciplinary Committee was based upon two principal findings,—the first that the appellant had sexual intercourse with Mrs. Wroe on 11th March 1970 at his consulting room at No. 28 St. John Street, Manchester; the second that he subsequently made, both personally and through his solicitors, improper attempts, including the offer of money, to persuade Mr. and Mrs. Wroe to refrain from making and pursuing a complaint of his conduct to the General Medical Council.

As regards the latter of the two adverse findings, it was common ground that the appellant had in fact offered sums up to £10,000 to Mr. and Mrs. Wroe as the price of their silence about the matter complained of. The appellant conceded that, in the event of the finding of the Disciplinary Committee on the alleged sexual intercourse of 11th March 1970 being sustained in the course of this appeal, the appeal also failed in relation to this additional adverse finding. It was also conceded by the appellant

that, in the event of the findings being sustained, the penalty inflicted could not be complained of on the ground of undue severity. Before dealing with the merits of the appeal it is appropriate to explain that, at the conclusion of his argument, their Lordships were invited by counsel for the appellant to make some general observations on the nature of the jurisdiction exercised by the Judicial Committee in proceedings of this nature. In fact, in order to give full weight to the appellant's argument, it is necessary to do so.

The discipline of the medical profession is based on the provisions of Part V of the Medical Act 1956 (sections 32–39 inc.) as amended, and in particular as amended by the Medical Act 1969. The appellate jurisdiction of the Board is defined under section 36 of the Principal Act as amended by section 14 of the 1969 Act. The relevant section is sub-section 3 of section 36 of the Principal Act and this reads as follows:

> "(3) At any time within twenty-eight days of the service of a notification under subsection (1) of this section, the person on whom it was served may, in accordance with such rules as Her Majesty in Council may by Order provide for the purposes of this section, appeal to Her Majesty in Council; and the Judicial Committee Act, 1833, shall apply in relation to the Disciplinary Committee as it applies to such courts as are mentioned in section three of that Act (which provides for the reference to the Judicial Committee of the Privy Council of appeals to Her Majesty in Council).
>
> The power conferred by this subsection to make an Order shall include power to vary or revoke the Order by a subsequent Order made in the like manner, and any Order in Council under this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament."

The proceedings before the Disciplinary Committee are governed by the General Medical Council Disciplinary Committee (Procedure) Rules Order of Council 1970 [S.I. 1970 No. 596] and the proceedings for the hearing of an appeal before the Judicial Committee by the Judicial Committee (Medical Rules) (No. 2) Order 1971 [S.I. 1971 No. 393]. Both these Statutory Instruments are under Parliamentary control and possess the legal force of Acts of Parliament. During the course of argument on the extent and exercise of this jurisdiction their Lordships were referred to *Felix v. General Dental Council* [1960] A.C. 704 at page 716, a decision under the parallel provisions of the Dentists Act; to *Fox v. General Medical Council* [1960] 3 All E.R. 225; to *Sivarajah v. General Medical Council* [1964] 1 All E.R. 504 and to *Bhattacharya v. General Medical Council* [1967] 2 A.C. 259 especially at page 265. Of these authorities, the account of the jurisdiction by Lord Radcliffe in *Fox v. General Medical Council* (*supra*) at pages 226–228 is the fullest and perhaps the best, but their Lordships draw the following general propositions from all four decisions:

(1) The appeal lies of right by the statute and the terms of statute do not limit or qualify the appeal in any way, so that the 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. See per Lord Radcliffe, *Fox v. General Medical Council* [1960] 3 All E.R. at page 226.

(2) Notwithstanding the generality of the above language, the actual exercise of the jurisdiction is severely limited by the circumstances in which it can be invoked. The appeal is not by way of re-hearing in the sense that the witnesses are heard afresh or the evidence gone over again (see per Lord Radcliffe, *ibid*). This, amongst other things, means that there is a heavy burden upon an appellant who wishes to displace a verdict on the grounds that the evidence alone makes the decision unsatisfactory.

(3) Beyond a bare statement of its findings of fact, the Disciplinary Committee does not in general give reasons for its decision as in the case of a trial in the High Court by judge alone from which an appeal by way of re-hearing lies to the Court of Appeal (see per Lord Radcliffe, *ibid*, at pages 227, 229). It follows from this that, the only circumstances in which an Appellate Court can reverse a view of the facts taken by the Disciplinary Committee would be a case where, on examination, it would appear that the Committee had misread the evidence to such an extent that they were not entitled to make a finding in the state of the evidence presented before them.

(4) The legal assessor who assists the Committee at its hearing is not a judge, and his advice to the Committee is not a summing up, and no analogy with a criminal appeal against a conviction before a judge and jury can properly be drawn. The legal assessor simply advises the Committee *in camera* on points of law and reports his advice in open court after he has given it. The Committee under its president are masters both of law and of the facts and what might amount to misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the Committee's decision. Where a criticism is made of the legal adviser's account of his advice the question is whether it can fairly be thought to have been of sufficient significance to the result to invalidate the decision. See *Fox v. General Medical Council* (*supra*) and per Lord Guest in *Sivarajah v. General Medical Council* [1964] 1 All E.R. 504 at page 507.

In the result, although the jurisdiction conferred by the statute is unlimited, the circumstances in which it is exercised in accordance with the rules approved by Parliament are such as to make it difficult for an appellant to displace a finding or order of the Committee unless it can be shown that something was clearly wrong either (i) in the conduct of the trial or (ii) in the legal principles applied or (iii) unless it can be shown that the findings of the Committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread. Or, of course, an appellant can rely cumulatively or in the alternative on any combination of the three. In the present case, for instance, counsel for the appellant relied on criticisms of the assessor's advice to supplement what he alleged was the weakness of the evidence against the appellant.

It is against this background and within this legal framework that the present appeal falls to be considered.

In effect, in the present case their Lordships were invited by the appellant to upset a finding by the Committee of sexual intercourse in a case in which sexual intercourse had been clearly admitted by the appellant to an experienced police officer, where two recorded conversations with the complainant could well be read as confirmation of his guilt, where four sums of £10 were conceded to have been paid in cash to one of the complainants at places of assignation designed for concealment, and in which the appellant had offered up to £10,000 to the complainants as the price of their silence to the General Medical Council. For the reasons which follow their Lordships feel quite unable to accede to this invitation.

At the hearing before the Disciplinary Committee it was established that a relationship of doctor and patient subsisted between the appellant and Mrs. Wroe from January 1970 onwards when she had been referred to him by her general practitioner. The relationship continued to subsist for the greater part of the period material to the principal allegations.

Between the first occasion when he examined Mrs. Wroe in January 1970 and the crucial incident on 11th March 1970, there were a number of complaints made by Mrs. Wroe in relation to the appellant's conduct towards her. These included a complaint that on 8th March 1970 the appellant made a most improper remark to her indicating that he found her sexually attractive. None of these complaints were found proved by the Committee and, though counsel for the appellant relied upon the acquittal of the appellant in these respects as indicating that the Committee had found Mrs. Wroe an unreliable witness and contended that the Committee should have paused long before accepting any part of her account of the crucial incident, in their Lordships' view the attitude displayed by the Committee in these matters is equally consistent with a careful and discriminating approach to the evidence.

The charge of sexual intercourse which was found proved by the Committee, related to an occasion when Mrs. Wroe attended at the appellant's professional consulting room on 11th March 1970. The time was approximately 5.15 p.m. The whole incident appears to have occupied a very small space of time, perhaps as little as about twenty minutes.

Mrs. Wroe was admitted to the appellant's consulting room by a receptionist who remained outside until, before Mrs. Wroe emerged, she left the premises altogether. The appellant examined Mrs. Wroe alone. Her husband was not present, nor was any nurse, and the receptionist was not invited to be present in the consulting room, although it may be assumed that she was within earshot. There was a dispute as to whether the door was locked or unlocked. Although she was reluctant to accept the term, from beginning to end Mrs. Wroe's account of the incident amounted to an allegation of rape, in as much as she claimed that what took place was without her consent. She said that she was partly unclothed and lying on the couch when, in the course of the examination, the appellant emerged from behind a screen partly unclad, pulled her down to the edge of the couch, penetrated her completely, but withdrew before ejaculation and ejaculated on the carpet. This was the only act of sexual intercourse of which there was any evidence from beginning to end, and the whole evidence was such as to indicate beyond any real doubt that it was highly unlikely that any other intercourse in fact occurred between Mrs. Wroe and the appellant. Mrs. Wroe apparently put up no resistance nor cried for help. She explained this absence of resistance or protest on her part by saying that the sexual approach of the appellant coincided with, or perhaps provoked, a distressing and acute attack of her asthma and that this prevented her calling out or from resisting in any way. It is fair to Mrs. Wroe to repeat that she has persisted in this account of the matter from beginning to end and gave evidence to this effect before the Committee. It is safe to say however that in all the circumstances of the case the Committee obviously found it difficult to credit her account so far as it constituted an allegation of an assault to which she in no sense consented, and not unnaturally counsel for the appellant made a good deal of this in pressing the appeal before the Board. Indeed it is not too much to say that his principal contention, sometimes put as a matter of law, and sometimes as a matter of inference, was, that, once the allegation of rape was rejected, the whole case against the appellant fell to the ground, and he was entitled to an acquittal. It is this contention that their Lordships feel themselves wholly unable to accept. Although counsel before the Committee briefed at the expense of the General Medical Council represents the complainant, who remains to this extent *dominus litis*, the duty of the Disciplinary Committee is to the public and to the medical profession and it is altogether contrary to common sense to argue that if they find facts amounting to voluntary sexual intercourse with a patient, the Committee should wholly acquit a

doctor simply because the patient gives an account saying that wnat took place was without consent.

In his evidence to the Committee the appellant denied any sexual intercourse with Mrs. Wroe whatever. He did not, however, confine himself to a denial that anything unusual had occurred. He said, that, at the crucial meeting and in the course of his examination, Mrs. Wroe had made a sexual approach to him coupled with the clearest possible actions and words of invitation to sexual intercourse, the whole episode amounting in his own words to what he described as " the most embarrassing moment of my life ". He claimed, however, that he did not respond to Mrs. Wroe's invitation, but pushed her away, told her not to be stupid and advised her to get dressed and sit down. It is evident that the Disciplinary Committee found this account of what took place on 11th March as incredible as Mrs. Wroe's account of rape. From their Lordships' examination of the evidence, which they undertook on the invitation of the appellant's counsel, it is clear, in their view, that the Committee were fully entitled to come to this conclusion on the admitted facts of the case.

Immediately after the embarrassment of Mrs. Wroe's sexual approach, according to the appellant the telephone rang in the consulting room. It was the receptionist, asking to be allowed to leave, as the hour, she said, was past 5.30 p.m. and the appellant thereupon let her go without demur four or five minutes before Mrs. Wroe herself left. The appellant also subsequently made a note of the professional consultation of 11th March. This note contains no reference to anything unusual having occurred and in particular no reference whatever to Mrs. Wroe's alleged sexual invitation. The appellant's written report to the general practitioner, Dr. Kay, was equally silent as to anything unusual having happened on this occasion and he made no oral communication to supplement the written report. The appellant continued to act in the relationship of doctor to patient with Mrs. Wroe for weeks or months afterwards. In cross-examination at the hearing, the appellant admitted that, with hind-sight, it would have been more prudent had he informed Dr. Kay of what had occurred on his account between the patient and himself, since he was clearly of the opinion that what had occurred was a sign or symptom that Mrs. Wroe was psychologically unbalanced and that this might have a bearing on her medical condition.

It was disputed at exactly what moment of time Mr. Wroe was first aware that his wife was complaining of rape or of any other improper conduct by the appellant. He said that the admission had to be wrung out of her after a most unhappy week. Mrs. Wroe, on the other hand, said that she had told her husband during the course of a most unhappy night between 11th/12th March. The appellant said that Mr. Wroe rang him up on 18th March which coincides in this respect with Mr. Wroe's account. The appellant said that Mr. Wroe had said that he wished to speak to the appellant and that, at a later conversation, Mr. Wroe made it plain that his wife was claiming that the appellant had had sexual intercourse with her. According to the appellant, Mr. Wroe neither used the word rape nor indicated that what had taken place was without his wife's consent. The appellant claimed to have told Mr. Wroe on that occasion that what Mrs. Wroe had said was the purest fantasy.

Despite his evidence to the contrary at the hearing, it is clear that Mr. Wroe himself was from the first disposed to doubt his wife's account of the matter. He cut off her housekeeping money and deprived her of her motor car and threatened divorce on the ground of adultery with the appellant. This threat, we were told, has since become an actuality. Even more strangely, Mr. Wroe seems to have paid by cheque dated 20th March 1970 the bill for professional services rendered by the appellant which included his charge for his professional services on 11th

March. Mrs. Wroe constantly saw the appellant during the weeks following 18th March and met him at various places of worship all belonging to denominations at which neither of them were likely to be recognized. It was accepted that these places of assignation were chosen for this reason and that the meetings were not of a professional character. During the course of this series of meetings it was admitted that the appellant gave Mrs. Wroe several sums of money. His own account was that he had given her four sums of £10 in cash and his explanation for this was that he was being blackmailed, though exactly what the evidence of blackmail was at this stage he was unable very adequately to explain. Mrs. Wroe claimed that these gifts were the result of her informing the appellant of her husband's attitude towards her, and the small sums involved entitled the Committee to the view that they were rather sums designed to meet her immediate needs than the response by the appellant to rapacious demands.

On or shortly before 14th May, that is, over two months after the episode of 11th March, Mr. and Mrs. Wroe made a somewhat belated complaint of rape to the police. As a consequence the appellant was interviewed by a police officer, D.I. Francis William Taylor, whose evidence was virtually undisputed. After an earlier denial of impropriety, the appellant gave to Inspector Taylor a circumstantial account of a single act of sexual intercourse between himself and Mrs. Wroe, but claimed that she consented to what took place. His explanation of this categorical admission of sexual intercourse on 11th March was that he was afraid of being charged with rape which he realised involved absence of consent. According to his explanation, therefore, he made a false and untruthful admission of a serious act of professional misconduct in order to avoid proceedings in open court. In cross-examination he said that, as between criminal proceedings and the General Medical Council he chose the lesser of the two evils. In their Lordships' view, the Committee were entitled to form the conclusion that this explanation, that in order to avoid a charge of something he had not done, he admitted a seriously improper action of which he was equally innocent, was wholly inadequate to explain the admitted facts of his conduct. In fact, on the suggestion of the police, a telephone conversation had been engineered between Mrs. Wroe and the appellant, of which a tape-recording was made and the transcript of this tape-recording was read at the hearing before the Committee. The transcript of this conversation runs into 15 foolscap pages and was strongly relied on by the complainants. Whilst the Committee may well have considered that the conversation provided no ground whatever for suspecting rape, it is fair to say that they were also fully entitled to the view, on reading the whole transcript, that it was explicable only on the supposition that at least one act of sexual intercourse had taken place between the appellant and Mrs. Wroe and that the appellant was frantically endeavouring to make her tell the police either that what she had alleged was a fantasy or at least that she had consented to what was done. The transcript and the interview with the appellant naturally ended the police interest in the case since they formed the view that there was no possibility of a criminal charge succeeding. But from this moment onward Mr. and Mrs. Wroe were evidently contemplating seriously a complaint to the General Medical Council.

Only two more matters need really to be referred to before considering the result of the appeal. It was conceded that after the termination of the police enquiries but, as both Mr. and Mrs. Libman claimed, at the instance of Mrs. Libman, a firm of solicitors instructed by the appellant offered various substantial sums to Mr. and Mrs. Wroe as the price of their silence so far as concerned any complaint to the General Medical Council. The Libmans' offer went up progressively from £2,000 to £7,500 and then to £10,000 which they claimed was all they could afford. Mr. Wroe

finished the negotiation by asking for £30,000 which he claimed was only " to shut them up ", a view which he found it rather difficult to reconcile with his admission that this sum of £30,000 was demanded through his solicitors and was to be split as between himself and Mrs. Wroe in the proportion of £10,000 to £20,000. However that may be, the complaint did not actually go forward until September, although no money passed.

The second matter which needs to be referred to was a strange meeting between Mr. and Mrs. Wroe and the same firm of solicitors on 29th September 1970 by which time both Mr. and Mrs. Wroe had sworn the statutory declarations which ultimately led to these proceedings. This meeting was preceded by two telephone conversations of which one took place between Mr. Wroe and the appellant and was overheard and recorded by the solicitor, and the other which made an appointment for the 29th, was between the solicitor and Mr. Wroe. The contemporaneous record by the solicitor of the first conversation was in evidence before the Committee.

Again, whilst the first conversation did not contain an explicit admission of adultery by the appellant, the Committee were well entitled to take the view that it was more consistent with the appellant's guilt of the charge relating to 11th March than with his innocence. In the course of the conversation Mr. Wroe said that he was divorcing his wife. The appellant asked, " on what ground ", and received the reply, " adultery ", to which the appellant seems to have replied, " Have I got to be punished all my life for it? " Nevertheless, for what ever reason, it was common ground between the parties that, at the meeting of 29th September, Mr. and Mrs. Wroe attended without legal advisers of their own at the offices of the solicitors acting for the appellant and, before a Commissioner for Oaths, signed two statutory declarations prepared by the solicitors purporting to retract their former declarations and withdrawing the charges against the appellant. In addition Mr. Wroe wrote out and signed a covering letter to the same effect. But this was not the end of the meeting.

It was also common ground between the parties that, before the interview had ended, Mr. and Mrs. Wroe were demanding these new documents back, and became so violent in their behaviour when the request was refused, that it was thought by the solicitors necessary to send for the police before they could be persuaded to leave. Their own account of the matter was that they had been, as they said " bamboozled " into believing amongst other things that Dr. Libman would be present at the interview, as they put it " to apologise for his conduct ". According to the solicitors, they demanded their documents back because, after they had signed and had thus abandoned any negotiating weapon, they began asking for sums of money commencing with £10,000. It may well be that the Committee rejected both accounts of the matter. What is certain is that the meeting ended in such confusion that the police had to be sent for with a view to persuading Mr. and Mrs. Wroe to withdraw, and that the documents remained in the hands of the appellant's solicitor despite the demand by the Wroes for their return. Mr. and Mrs. Wroe subsequently withdrew their retraction and pursued their allegations to the hearing before the Committee.

The only other point which needs specific mention is that, as the allegations were originally framed, the episode on 11th March was referred to as a " sexual assault ". But, by the time the effective hearing took place, the charge had been amended to one of " sexual intercourse ", and it was in this form that the Committee found the charge proved. In the result, the Disciplinary Committee found that " sexual intercourse " was established and made the order appealed from suspending the registration of the appellant for six months.

For the appellant a number of reasons were put forward in order to challenge the finding of the Disciplinary Committee. One of these took the form of submissions of law, but these were not very seriously persisted in as such. They were used more powerfully to add weight to the criticisms of the findings of fact. The appellant's fundamental complaint was that the findings of the Disciplinary Committee were in fact wrong and were unsafe and unsatisfactory. In addition to a heavy attack on the reliability of Mr. and Mrs. Wroe, whose conduct was obviously open to criticism and whose evidence betrayed a number of inconsistencies, three criticisms were directed against the advice of the legal assessor. The first was a passage in which he described the burden of proof. But since this contained the clear advice, that the complainant's version should only be accepted if the Committee was sure upon the evidence, that it had been established, their Lordships find themselves unable to endorse this criticism. The second related to his advice on the subject of corroborative evidence. But as this substantially reproduces the law as defined in *Baskerville's* case [1916] 2 K.B. 658 their Lordships find this criticism equally without foundation. The third criticism of the legal assessor's conduct of the matter relates to an episode which took place after the announcement of the findings of the Committee, when, in view of a possible appeal, counsel for the appellant invited the Committee to state positively whether they found the appellant guilty of rape or consensual sexual intercourse. The legal assessor seems to have advised the Committee that as the charge was one of sexual intercourse *simpliciter* it was not really open to them to consider the question of rape and they had not in fact done so. It is apparent from the actual findings of the Committee that in fact they found sexual intercourse only and the nature of their order proves beyond doubt that no question of rape was seriously in their minds. Since what took place after the findings had been announced could not have affected the course of the proceedings or the result there can be nothing in this complaint.

The appellant's fundamental objection to the finding of the Committee really resides in the fact that Mrs. Wroe had said from start to finish that what had taken place on 11th March took place without her consent and that the Committee had evidently rejected that part of her evidence which related to the absence of consent on her part. Such a rejection was obviously justifiable in the circumstances outlined above but there was clearly ample evidence upon which the Committee were entitled to find that despite her denial of consent, sexual intercourse had in fact taken place. The evidence of the conduct of the appellant after 11th March was quite enough to provide corroboration of Mrs. Wroe on this aspect of the matter. Reference need only be made to the appellant's unequivocal admission to the police officer, to the two recorded conversations, to the four payments of £10 which the appellant admitted, and to the offers successively of £2,000, £7,500, £10,000 made on his behalf by a firm of solicitors as the price of the silence of Mr. and Mrs. Wroe, to indicate that there was ample evidence upon which the Disciplinary Committee could properly find that sexual intercourse had in fact taken place.

Since their Lordships did not themselves see the witnesses and since, as they were told, divorce proceedings at the suit of Mr. Wroe against Mrs. Wroe to which the appellant is a party are still pending, it is clearly not desirable that more should be said on this topic. But the result must be that the appeal fails, being basically an appeal against the findings of a Committee on the matter of fact on which there was ample evidence to entitle them to come to the conclusion they did. In the result their Lordships have humbly advised Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

JULIUS LIBMAN

v.

THE GENERAL MEDICAL COUNCIL

DELIVERED BY
THE LORD CHANCELLOR

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