*Privy Council Appeal No. 14 of 1979*

**Patrick Joseph McEniff** – – – – – – *Appellant*

*v.*

**The General Dental Council** – – – – – – *Respondent*

FROM

**THE DISCIPLINARY COMMITTEE OF THE GENERAL DENTAL COUNCIL**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE THE PRIVY COUNCIL, DELIVERED THE 27TH NOVEMBER, 1979

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*Present at the Hearing:*

LORD EDMUND-DAVIES

LORD SCARMAN

LORD LANE

[*Delivered by* LORD EDMUND-DAVIES]

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This is an appeal from a determination of the Disciplinary Committee of the General Dental Council, made on May 16th, 1979, by which the appellant, Mr. Patrick Joseph McEniff, a registered dentist, was found to have been guilty of infamous or disgraceful conduct in a professional respect and his name was ordered to be erased from the Register.

The appeal (which is against both finding and sentence) is said to involve the construction of section 25 of the Dentists Act 1957, the relevant parts of which read as follows:—

> "(1) A registered dentist who either before or after registration—
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> . . . . .
>
> (*b*) has been guilty of any infamous or disgraceful conduct in a professional respect,
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> shall be liable to have his name erased from the register.
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> (2) A person's name shall not be erased under this section—
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> . . . . .
>
> (*c*) on account of his adopting or refraining from adopting any particular theory of dentistry."

The appellant was charged in the following terms:

> "That being a registered dentist: Between about 1 October, 1975, and 31 January, 1976, you knowingly enabled persons employed by you who were not registered medical or dental practitioners or enrolled ancillary dental workers to carry out work amounting to the practice of dentistry as defined in section 33 of the Dentists Act 1957.

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

The facts can be shortly stated. The appellant qualified in 1964 and has practised for many years in Northern Ireland. The charge arose from a complaint originally made by Miss Teresa Elizabeth McGrath by a letter which she sent to the Central Services Agency in Northern Ireland. The nature of her complaint was that, in treating Miss McGrath as a patient, on approximately 9 or 10 occasions the appellant had drilled her teeth but the fillings were inserted by unqualified staff. It was said on Mr. McEniff's behalf that he had tried unsuccessfully for two years to recruit qualified staff and had in consequence to manage with a Mrs. Blake, who was a qualified dental surgery assistant, and a Miss Ellis, a receptionist. It was not suggested on his behalf that either of them was an "ancillary dental worker" within the meaning of section 41 of the 1957 Act.

A hearing of Miss McGrath's complaint took place before the Services Committee of the Central Services Agency on October 3rd, 1978, and this led to a report being presented to the Disciplinary Committee by the Department of Health and Social Services.

It was admitted on behalf of the appellant that on four occasions—namely, October 24th, December 11th, December 19th, 1975, and January 23rd, 1976—Miss McGrath attended the appellant's surgery as a patient and was treated by him, and that on each of these occasions either Miss Ellis or Mrs. Blake treated her by inserting the filling after drilling had been completed by the appellant. He claimed that he always inspected the work done before Miss McGrath left the surgery, but accepted that in treating her in this way he was not offering the full services of professional dentistry, and that by allowing unqualified persons to do the packing he was increasing the risk of a filling becoming loose, with resultant pain, discomfort, or waste of the patient's time.

The conviction has been attacked on two grounds:

(1) That the Legal Assessor misdirected the Disciplinary Committee as to what constituted infamous or disgraceful conduct in a professional respect; and

(2) that the appellant's maltreatment of Miss McGrath could not be so stigmatised.

As to (1), reference must first be had to the opening of the case before the Disciplinary Committee by Mr. Hidden, Q.C. Having outlined the facts, he continued:

> "May I pause now only to say one or two words on the law, of which you will be fully familiar, and no doubt you will be advised by your learned Legal Assessor in any event. You will remember that the test of what is infamous conduct in a professional respect was laid down clearly in the case of *Allinson v. General Council of Medical Education and Registration* ([1894] 1 Q.B. 750). Lopes L. J. in fact devised the test, with the assistance of the other judges, and the immortal words are these:
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> > '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".'

There is some assistance equally in the case of *R. v. General Medical Council* ([1930] 1 K.B. 562, 569). Scrutton L. J. said:—

> 'It is a great pity that the word "infamous" is used to describe the conduct of a medical practitioner who advertises. As in the case of the Bar so in the medical profession advertising is *serious* misconduct in a professional respect and that is all that is meant by the phrase "infamous conduct"; it means no more than serious misconduct judged according to the rules written or unwritten governing the profession'.

Your Committee will be aware of the case of *Felix v. General Dental Council*".

At the conclusion of the evidence and speeches of counsel, the Legal Assessor, exercising his indubitable right under Rule 4 of the General Dental Council Disciplinary Committee (Legal Assessor) Rules 1957 to advise the Disciplinary Committee of his own motion where it appears desirable to do so, concluded his short observations by saying:—

> "As far as what constitutes infamous or disgraceful conduct is concerned, to which both advocates have referred, for me the words of Scrutton L. J. of '*serious* misconduct in a professional respect' mean quite plainly that it is for the Committee, applying their own knowledge and experience, to decide what is the appropriate standard each practitioner should adhere to, not a special standard greater than is ordinarily to be expected, but the ordinary standard of the profession.
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> I think I have said very little that is in any way new to any member of the Committee, but having regard to the submissions made to you I thought I ought at least to say what I have said".

These observations have been criticised as wrong in law in that they failed to draw a distinction between mere negligent conduct and infamous or disgraceful conduct. The submission is that there was a misdirection, in that, although in his opening remarks learned counsel for the Disciplinary Committee had made passing reference to *Felix v. General Dental Council* ([1960] A.C. 704), the Legal Assessor failed to remind the Disciplinary Committee of an important passage in the speech of Lord Jenkins, who, in delivering the judgment of this Board in that case, said (at p. 720)

> "Granted that . . . 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." (Emphasis added.)

Although the facts in *Felix* were quite unlike those of the present case, these observations are of compelling significance. For it has respectfully to be said that, although prolonged veneration of the oft-quoted words of Lopes L. J. has clothed them with an authority approaching that of a statute, they are not particularly illuminating. It is for this reason that their Lordships regard Lord Jenkins' exposition as so valuable that, without going as far as to say that his words should invariably be cited in every disciplinary case, they think that to do so would be a commendable course. But, having said that, it has to be added that the Committee in

the instant case were duly reminded of decisions which have long been approved of by this Board as accurately stating the relevant law. And their Lordships have in mind in this context the following observations of Lord Guest in *Sivarajah v. General Medical Council* ([1964] 1 All E.R. 504 at 507G):

> "The Committee are masters both of the law and of the facts. Thus what might amount to a misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the Committee's decision. The question is whether it can 'fairly be thought to have been of sufficient significance to the result to invalidate the Committee's decision'. (per Lord Radcliffe, *Fox v. General Medical Council* [1960] 3 All E.R. 227 at 229)".

In their Lordships' judgment, it cannot be said that the advice tendered by the Legal Assessor in this case contained such a defect, and the first ground of criticism must therefore be rejected.

Little needs to be added regarding the second ground of appeal against finding. Whether the misconduct of the appellant—freely admitted by him with complete candour—was such as to justify his being convicted as charged was essentially for the Committee. Their Lordships desire to say no more than that had a finding of not guilty been pronounced it could well have been greeted by surprise. Indeed, by allowing his unqualified staff to insert fillings, the appellant implicated both himself and them in contravention of section 34 of the 1957 Act and all three of them could have been subjected to summary proceedings in a magistrate's court.

Their Lordships turn accordingly to the appeal against sentence, it being urged that, in all the circumstances of the case, the penalty of erasure was excessive. It has to be said, and not for the first time, that the penalty provisions of the Dentists Act 1957 need to be reconsidered. As recently as this year the matter was raised by Lord Diplock in the unreported case of *Dubois v. General Dental Council* (Privy Council Appeal No. 18 of 1978) in the following words which their Lordships respectfully regard as well worthy to be recorded:

> ". . . under section 25 of the Dentists Act 1957 the *only* punishment for professional misconduct which the Disciplinary Committee has jurisdiction to impose is to erase the dentist's name from the Register. Unlike the corresponding statutory provisions applicable to doctors the Act has not been amended to permit the imposition of the milder penalty of suspension for a period not longer than twelve months in cases involving what may properly be regarded as the less serious breaches of the professional code. In the case of dentists the only way in which the gravity of the offence can be reflected in the punishment he is compelled to undergo by reason of the erasure of his name from the Register, is the length of time that he is made to wait before an application for restoration of his name to the Register under section 30 of the Act, is granted; but the minimum period that must elapse before he can make such application is ten months".

Section 25 provides merely that a registered dentist found guilty under subsection (1)(*b*)

> "shall be *liable* to have his name erased from the Register".

The Committee is therefore free to do no more than deliver a homily in suitable cases, and it appears that this is by no means uncommon. Or it may resort to the device of postponing sentence to a date sufficiently far distant to enable the Committee in due course to judge whether the wrong-

doer has learnt his lesson, and then at the adjourned hearing to do no more than deliver what is again in the nature of an unofficial admonition. But if the Committee does not regard either of these courses as appropriate, it has no alternative but to order erasure from the Register.

In all the mitigating circumstances of the present case, their Lordships would have been in no degree surprised had the Disciplinary Committee elected to postpone sentence, but that course evidently did not commend itself. The only remaining alternative to erasure would therefore be to take no action at all in respect of the section 25 finding, save, in effect, to grant an absolute discharge and accompany it possibly by a homily if such were deemed desirable. Section 29 of the 1957 Act provides that appeals in disciplinary cases lie to this Board, and, in relation to a similar provision contained in section 36 of the Medical Act 1956, it was held in *Fox v. General Medical Council* ([1960 1 W.L.R. 1017) that the Board's position in such appeals is analagous to that of the Court of Appeal hearing an appeal from a judge sitting alone. Their Lordships can see no reason for holding that similar appeals, brought under the Dentists Act 1957, should be regarded any differently. The attitude to be adopted by this Board in these circumstances is well-established by such decisions as *McCoan v. General Medical Council* ([1964] 1 W.L.R. 1107), where Lord Upjohn said (at p. 1112):

> "The powers of the Board to correct the determination of the Committee on the hearing of such an appeal are in terms unlimited, but in principle, where a professional body is entrusted with a discretion as to the imposition of the sentence of erasure their Lordships should be very slow to interfere with the exercise of that discretion . . .
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> Their Lordships are of opinion that Lord Parker C.J may have gone too far in *In re a Solicitor* ([1960] 2 Q.B. 212) when he said that the appellate court would never differ from sentence in cases of professional misconduct, but their Lordships agree with Lord Goddard C.J. in *In re a Solicitor* ([1956] 1 W.L. R. 1312) when he said that 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.
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> No general test can be laid down, for each case must depend entirely on its own particular circumstances. All that can be said is that if it is to be set aside the sentence of erasure must appear to their Lordships to be wrong and unjustified".

Adopting that test and applying it to the proved circumstances of the present case, their Lordships, while adhering to the view earlier expressed regarding the severe sentence of erasure, are unable to say that it was wrong or unjustified.

It follows that, in relation to both finding and sentence, their Lordships must humbly advise Her Majesty that the appeal should be dismissed. There will be no order as to costs.

**The Privy Council Appeal**

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**PATRICK JOSEPH McENIFF**

*v.*

**THE GENERAL DENTAL COUNCIL**

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DELIVERED BY LORD EDMUND-DAVIES

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