Privy Council Appeal No. 1 of 1989

Dr. Elliott Hugh Lanford *Appellant*

v.

The General Medical Council *Respondent*

FROM

THE PROFESSIONAL CONDUCT COMMITTEE
OF THE GENERAL MEDICAL COUNCIL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
26TH JUNE 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD LOWRY

*[Delivered by **Lord Lowry**]*

This appeal by Dr. Elliott Hugh Lanford arises from a hearing on 6th and 7th December 1988 before the Professional Conduct Committee of the General Medical Council ("the Committee") at which the appellant was charged in the following terms:-

"That being registered under the Medical Act,

(a) on 6 August 1987 in the course of a professional consultation with Mrs A at your surgery premises you

(i) used obscene and indecent language and made improper remarks of a sexual nature to Mrs A and

(ii) behaved improperly towards her.

(b) on 12 August 1987 in the course of a professional consultation and examination of Mrs B at your surgery premises you

(i) used obscene and indecent language and made improper remarks of a sexual nature to Mrs B and

(ii) behaved improperly towards her.

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

The Committee found that the facts alleged in the charge had been proved and that the appellant had been guilty of serious professional misconduct, and ordered that his name be erased from the Register of Medical Practitioners and that his registration be suspended forthwith in accordance with section 38 of the Medical Act 1983. Announcing the Committee's decision, the Chairman stated that they had determined that the facts alleged in the charge had been proved to their satisfaction.

Mr. Philip Cox Q.C., who had not been instructed at the original hearing, submitted to their Lordships (1) that the legal assessor had misdirected the Committee on the question of corroboration and (2) that the complaints of Mrs. A and Mrs. B on which the charge of professional misconduct was based ought to have been heard separately. Both submissions involve some discussion of what may be called the similar facts rule of evidence. It is therefore necessary first to summarise the facts alleged (and found to have been proved) regarding each incident and to see what directions the legal assessor gave to the Committee.

Mrs. A, aged 24 and a patient of the appellant since she was 5, was fitted with a coil in 1985. She went to the hospital in 1987 with a vaginal infection and was referred to the appellant who prescribed in July for the infection. On 6th August 1987 she came back, as requested, for him to check the position of the coil. For this purpose she removed her underclothing so far as was necessary and lay on the doctor's couch. The appellant parted her legs saying "This is the best position for a screw". He then used a metal speculum to conduct an internal inspection. Having done this, he took a plastic glove out of a wrapper, described it as a french letter and blew it up. He said, "I cannot get the fucking thing on" and put on another rubber glove. He then put his hand on Mrs. A's vagina "in the clitoris position", as she described it, and his hand moved up and down. Next he said, "I am going to check your pussy" and put his hand into her vagina. He found that the coil was correctly in place and, having done so, said, according to Mrs. A, "and oh, what a lovely pussy it is". According to Mrs. A, the movement of the doctor's hand on her clitoris and the insertion of his hand into the vagina were two separate movements, the first being "a deliberate, repetitive motion", as a member of the Committee put it in a question to Mrs. A. Mr. A was waiting with his car outside. On reaching the car, Mrs. A burst into tears and in answer to her husband's questions explained what had happened. They then drove to a police station and thence to a Citizens' Advice Bureau.

Mrs. B, aged 28, had registered with the appellant in February 1987 and had consulted him a number of times. On 12th August 1987 she went to the appellant's

surgery because she was having trouble with her left big toe which was "weeping". She explained her problem, took off her shoe (she was not wearing stockings or tights) and, as requested, lifted her foot to put it on the front of the swivel-chair of the appellant, who had turned to face her. He said, "Don't put it on my balls, because you will hurt them". He examined Mrs. B's foot and she then took it away. Treatment was discussed (she had a year earlier been to a different doctor who had given her cicatrin powder) and this led to the mention of her registration with the appellant, who asked Mrs. B what her name was and whether she was "Miss" or "Mrs". She said, "Miss, I am getting married in six weeks" and he replied, "So you are going to get screwed, then". When asked what her attitude to that comment was, Mrs. B said, "I wanted to leave the surgery ... I just said 'What do you want me to do about my toe?'". After a further short discussion Mrs. B let the appellant see her toe again, but "I would not lift my foot up, so he leant forward". He put one hand underneath her heel and his right hand was round her ankle and he then slid it up her skirt "about halfway, between my knee and my thigh". In cross-examination Mrs. B refuted the suggestion that the appellant's hand was supporting her leg and said that it was "more at the side because his hand travelled up the side of my leg". At this point the appellant said, according to Mrs. B, "You have got nice feet, nice thighs and a nice pussy". She pulled her skirt down, stood up, put her shoe on and walked out. She walked across the road to a telephone box, "feeling terrible". A friend, Mrs. S, saw Mrs. B from the top of a bus, looking distressed, telephoned her that night to see what was wrong and was then told by Mrs. B what had happened to her. The next day Mrs. B telephoned "the Family Practitioners or the Medical Council, I cannot remember which one first".

When the evidence concluded and counsel had made their submissions, the legal assessor, at the request of the Chairman, advised the Committee. This is what he said:-

> "The Committee should look for corroboration of the evidence of each complainant in view of the nature of the allegations made by each. I should warn you that it is dangerous to act on the evidence of this nature of allegation if it is uncorroborated, but the Committee can do so if, keeping that warning in mind, the Committee is sure in either case that the complainant was telling the truth.
>
> Corroboration consists of evidence which confirms in some material particular that the matters complained of occurred and that it was Dr Lanford who said and did the things alleged.

Corroborative evidence must come from a source which is independent of the complainant. Evidence of a complaint by a complainant shortly after the alleged events is not capable of being corroboration, neither is it evidence of the facts complained of. It is simply evidence which may show a consistency of conduct by a complainant with the account given by her of her sworn evidence.

The evidence given by Mr. A or Mrs. A's complaints and distress - in particular the distress - the evidence given by Mr. A of the distress immediately after the alleged event and whilst in the close vicinity of the doctor's surgery is capable of amounting to corroboration, but little, if any weight, should in practice be attached to it if the Committee finds that it was only part and parcel of the complaint which she was then making to Mr. A.

The same principles apply to the evidence as to Mrs. B's distress in that such evidence is capable of constituting corroboration in the same circumstances.

Greater weight could be attached to that evidence in her case, if the Committee were to find that it was not part of the complaint being made to another person, the evidence having come from the lady on the bus at a time some hours before the complaint was made to her.

The evidence of each complainant: Mrs. A and Mrs. B, is capable of amounting to corroboration of the other's account if they give independent evidence of separate incidents involving the doctor and the circumstances are such as to exclude any danger of a jointly fabricated account and you find in each account such striking similarity or similarities as to be probative.

However, I should warn you that, as there are only two instances, you should proceed with great caution before finding any evidence of a system and using one account to corroborate the other."

Before coming to the matters in controversy, their Lordships note with satisfaction the legal assessor's introductory direction on corroboration which is strictly in accordance with the authorities. The same can be said of his treatment of the doctrine of recent complaint and his approach to evidence of distress, including his caution with regard to distress which is "part and parcel of the complaint".

Mr. Cox's sole criticism of the legal assessor's advice was directed to the penultimate paragraph:-

"The evidence of each complainant, Mrs. A and Mrs. B, is capable of amounting to corroboration of the

other's account if they give independent evidence of separate incidents involving the doctor and the circumstances are such as to exclude any danger of a jointly fabricated account and you find in each account such striking similarity or similarities as to be probative."

Counsel acknowledged that, as the legal assessor had emphasised, it was important in cases featuring similar fact evidence to exclude the possibility of joint fabrication and also conceded that, as the prosecuting counsel had taken pains to establish in this case, there was no real risk of collusion here. But, while admitting that evidence which requires corroboration can both provide and receive corroboration to and from other evidence which requires corroboration (*D.P.P. v. Kilbourne* [1973] A.C. 729), he argued that the Committee should not have been allowed to treat one incident as corroborating the other, on the ground that there was no striking similarity in what the appellant allegedly did, as distinct from what he said, in each case: the Committee could have been wrongly influenced to find corroboration in the absence of what he described as the necessary similarity or unity between the alleged indecent acts. Therefore, he contended, so far from dwelling on the possibility of finding "in each account such striking similarity or similarities as to be probative", the legal assessor should have warned the Committee against using one incident as corroboration of the other. Counsel's next point, as their Lordships can understand, was the logical consequence of that argument, assuming it to be sound; that the complaints, instead of being dealt with together, ought to have been heard separately by different committees because, unless there was a true similar fact situation, to hear them together would be unfair to the appellant.

Alongside these main arguments had been a collateral submission that it was incumbent on the legal assessor to specify the similarities on which the Committee might possibly rely. As it appears to their Lordships, the similarities started with the not very striking, yet linking, feature of an examination of two women patients within a short time (six days), both examinations being preceded and accompanied by heartily obscene and sexually suggestive language. What is additionally significant is the use of the words "screw" and "pussy", particularly when it is recalled that, in relation to Mrs. B, these words had no relevance to the medical examination itself. So striking, indeed, was the similarity of the appellant's utterances in this last-mentioned respect, that, both at the hearing by the Committee and before their Lordships, the respective counsel then representing the appellant were constrained to admit the existence of that striking similarity in express terms.

Mr. Cox (rightly, as their Lordships consider) submitted that the onus and standard of proof in these disciplinary proceedings and the relevant legal principles were those applicable to a criminal trial. And his main contention must be viewed in the light of the rules which govern the use of similar fact evidence as corroboration. There is no magic about this word. As was pointed out in *D.P.P. v. Kilbourne supra*, "it means no more than evidence tending to confirm other evidence", per Lord Hailsham of St. Marylebone, L.C. at page 741F; it is "evidence which renders other evidence more probable", per Lord Simon of Glaisdale at page 758F; and, to quote from the speech of Lord Reid at page 750F:-

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

Similar fact evidence has different uses, to establish identity by reference to a distinguishing characteristic, or to rebut a defence of accident or coincidence as in *R. v. Smith* (1916) 11 Cr.App.R. 229, or to add probative force to evidence which directly tends to prove an offence or one of its ingredients (for example, indecent intent, as allegedly in this case). In *D.P.P. v. Boardman* [1975] A.C. 421 Lord Wilberforce said at page 443C:-

> "This is simply a case where evidence of facts similar in character to those forming the subject of the charge is sought to be given in support of the evidence on that charge."

Under this heading similar fact evidence is a branch of corroboration evidence, but with this special feature, that it has to pass a test (in the first place imposed by the judge and ultimately by the jury, if there is one) of striking similarity before it can be admitted and then accepted as such. Also in *Boardman* Lord Wilberforce said at page 444C:-

> "The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s)."

In the same case Lord Morris of Borth-y-Gest said at page 441A:-

> "It is always for a jury to decide what evidence to accept. If told that they may take one incident into consideration when deciding in regard to another it will be entirely for them to decide what parts of the evidence they accept and how far they are assisted by one conclusion in reaching another." (emphasis added) "It will be for the judge in his discretion to rule whether the circumstances are such that evidence directed to one count becomes available and admissible as evidence when consideration is being given to another count."

As their Lordships have already noted, the argument advanced for the appellant was that the admitted similarity in what he allegedly said to Mrs. A and Mrs. B respectively could not properly be relied on by the prosecution when there was no striking similarity in what he allegedly did to them. (For the purpose of considering this argument their Lordships will ignore, as they would have to do in an ordinary criminal case, the fact that what the appellant allegedly said could itself constitute serious professional misconduct, even if less serious than that actually found against him). Their Lordships do not have far to seek for a convincing refutation of the appellant's contention. In the famous case of *R. v. Smith supra* referred to above Lord Reading C.J., delivering the judgment of the Court of Criminal Appeal, said at page 238:-

> "The second point taken is that even assuming that evidence of the death of the other two women was admissible, the prosecution ought only to have been allowed to prove that the women were found dead in their baths. For the reasons already given in dealing with the first point, it is apparent that to cut short the evidence there would have been of no assistance to the case. In our opinion it was open to the prosecution to give, and the judge was right in admitting, evidence of the facts surrounding the deaths of the two women."

The surrounding facts, which did not relate to the manner in which the women met their deaths, included the fact that the accused had recently gone through a form of marriage with each of them in turn and the fact that he had insured their lives and stood to benefit by their deaths. Their Lordships have also noted in *D.P.P. v. Boardman supra* the careful attention paid, in the quest for corroborative evidence, by Lord Morris of Borth-y-Gest at page 442B, by Lord Hailsham of St. Marylebone at pages 447G and 452CD, by Lord Cross of Chelsea at page 461B and by Lord Salmon at page 463E and G to the similarity in the accused's conduct and statements when making the visits to the school dormitories which preceded and led to the offences which he later committed elsewhere. One may

also refer in this connection to the facts of *Makin v. Attorney-General for New South Wales* [1894] A.C. 57, the leading case on similar facts, and to the classic opinion of this Board delivered by Lord Herschell L.C., where he said at page 65:-

> "In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

In that case the similar facts which supported the proof of guilt consisted partly of antecedent circumstances.

In *Harris v. D.P.P.* [1952] A.C. 694 Viscount Simon said at page 705:-

> "In my opinion, the principle laid down by Lord Herschell L.C. in *Makin's* case remains the proper principle to apply, and I see no reason for modifying it. *Makin's* case was a decision of the Judicial Committee of the Privy Council, but it was unanimously approved by the House of Lords in *R. v. Ball* [1911] A.C. 47 and has been constantly relied on ever since. It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates: such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried."

The point is clearly made by Lord Hailsham of St. Marylebone in *Boardman* at page 452D where, having adverted to *R. v. Smith supra* and *R. v. Straffen* [1952] 2 Q.B. 911, he continued:-

> "The permutations are almost indefinite. In *Moorov v. H.M. Advocate*, 1930 J.C. 68 coincidence of story as distinct from coincidence in the facts was held

> to be admissible and corroborative, and this, after some fairly agonised appraisals, was what was thought in *Reg. v. Kilbourne* [1973] A.C. 729. The fact is that, although the categories are useful classes of example, they are not closed (see per Viscount Simon in *Harris v. Director of Public Prosecutions* [1952] A.C. 694, 705), and they cannot in fact be closed by categorisation. The rules of logic and common sense are not susceptible of exact codification when applied to the actual facts of life in its infinite variety."

The conclusion from what has been said is that, just as corroboration is found in any evidence which confirms other evidence, so also similar fact evidence, a type of corroboration, appears in an infinite variety of forms. For the evidence to be admitted, its similarities must be either unique, in which event its probative value will approach that of a finger print, or striking, when its probative value will vary depending on how striking the similarity is. But similar fact evidence cannot be defined by a degree of similarity measurable on a scale or by reference to the place or time at which it appears. It follows that, in their Lordships' view, the legal assessor's advice to the Committee was perfectly correct. Ordinarily a doctor may properly make relevant physical contact when examining a patient with the patient's consent. But the evidence of each patient was that the contact was indecent and improper. The evidence of what the appellant said before and after his examination tended, if believed, to prove that the contact was indecent. And the evidence of what the appellant allegedly said in one case (provided a striking similarity was found between the two cases) was capable of corroborating the evidence of indecency in the other. Their Lordships were also interested to note that, there being only two instances, the legal assessor cautioned the Committee with regard to using one account to corroborate the other, following almost word for word the observation of Lord Cross of Chelsea in *Boardman* at page 460D.

The claim that the complaints of Mrs. A and Mrs. B ought to have been tried separately falls to be decided on the same principles as are applicable to the criticism of the legal assessor's direction on corroboration. This point is illustrated by Lord Wilberforce's observations in *Boardman* at page 443CD. And it has been accepted at least since *R. v. Sims* [1946] K.B. 531 that, where two or more charges have been included in one indictment, an application for a separate trial of different counts ought to be acceded to if the evidence to be adduced on one count in the indictment is considered unlikely to pass the similar fact test in relation to another count in the same indictment.

In the present case, so far from suggesting that the complaints of Mrs. A and Mrs. B be heard separately, counsel then representing the appellant appeared to favour a joint hearing. But the important consideration, having regard to their Lordships' expressed view of the similar fact evidence, is that this was a case in which it was eminently proper and in the interests of justice for the two complaints to be heard together.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs before this Board.

Finally, it may provide guidance for the future if their Lordships now state that, where a charge of professional misconduct is founded on two or more separate incidents, those incidents should each be made the subject of a separate charge of professional misconduct instead of being listed as particulars of one offence of professional misconduct, as in the present case. This practice should be followed even when the prosecutor intends, as he may properly in many cases, to have the charges heard together. It will serve as a reminder that the evidence tendered with reference to one aspect of an accused person's alleged misconduct is not necessarily admissible in relation to another aspect, and it will be more convenient in cases where an accused applies successfully for separate hearings.