Privy Council Appeal No. 14 of 1995

Stephen Alexander Allen *Appellant*

v.

The General Dental Council *Respondent*

FROM

THE PROFESSIONAL CONDUCT COMMITTEE OF THE GENERAL DENTAL COUNCIL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DATED THE 18TH OCTOBER 1995, Delivered the 16th November 1995

Present at the hearing:-

Lord Browne-Wilkinson
Lord Slynn of Hadley
Lord Hoffmann

*[Delivered by **Lord Hoffmann**]*

These are the reasons why their Lordships said at the conclusion of the argument that they would humbly advise Her Majesty that this appeal should be dismissed and directed that Mr. Allen should pay the General Dental Council's costs.

Stephen Allen is a dentist who has practised for many years at Saintfield and Hillsborough in Northern Ireland. On 3rd February 1995 the Professional Conduct Committee of the General Dental Council found that he had been guilty of a number of acts of serious professional misconduct. These acts may be divided into two categories. One category related to dental treatment which he had provided (or in some cases, not provided) to his patients. The Committee found that in three cases he had claimed fees for treatment which had not been provided, in six cases he had failed to carry out treatment necessary for the patient's oral health, in another six cases he had failed to use proper skill and attention and in one case he had given treatment which was not clinically necessary. The second

category was rather more unusual. The Central Services Agency of the National Health Service ("the CSA") monitors the performance of dentists by asking selected patients to attend a referral dental officer for post-treatment examination. In July 1993, some fifty of Mr. Allen's patients were sent letters asking them to attend for such examinations on dates in the first half of August. The allegation against Mr. Allen was that, between 1st August and 5th August 1993, he had attempted to disrupt this monitoring process by telephoning (or in one case, causing or permitting his receptionist to telephone) ten patients and falsely telling them that their appointments with the referral dental officers had been cancelled. The Professional Conduct Committee found six of the charges proved. The Council offered no evidence on a seventh charge and the Committee dismissed the other three.

On a consideration of all the charges in both categories which had been found to be proved, the Professional Conduct Committee directed that Mr. Allen's name should be erased from the Dentists' Register. He appeals to Her Majesty in Council against the findings on all counts and, in the alternative, against the finding that those properly proved were capable of amounting to serious professional misconduct. But Mr. Foskett Q.C., who appeared for Mr. Allen before both the Committee and their Lordships' Board, accepted that if the findings concerning the telephone calls were upheld, the conclusion that Mr. Allen had been guilty of serious professional misconduct and the direction for erasure could not be challenged. Since their Lordships are of the opinion that these findings are unassailable, they propose to say no more about the other category.

Before summarising the evidence about the telephone calls, their Lordships should say something about the wider background, which was explored in some detail at the hearing. There has for some years been a running battle between the Northern Ireland CSA and Mr. Allen. In 1983 the Agency said that he was giving unnecessary treatment and imposed a requirement that for three months any treatment should be subject to its prior approval. On the evidence of requests for approval during this period, the CSA sought and obtained from the Central Dental Committee a finding that Mr. Allen had regularly provided excessive dental treatment and a direction that the requirement of prior approval should be extended for a year. An appeal to a Referee Panel was dismissed in 1986 but the decision was set aside by Lord Lowry C.J. on judicial review in May 1987. The Lord Chief Justice was severely critical of the presentation of the statistical evidence on which the CSA relied for the inference that Mr. Allen had regularly provided excessive treatment. Despite this set-back, the CSA continued to keep a close watch on Mr. Allen's practice and the numbers of his patients requested to attend for examination by referral dental

officers in the years 1988-1993 greatly exceeded the average for dentists in the Province. In 1993 the CSA again brought Mr. Allen before the Central Dental Committee, which imposed a 9 month period of prior approval with effect from January 1994. This direction was also challenged by an application for judicial review, which was withdrawn in June 1994 when the Central Dental Committee agreed to limit the need for prior approval to certain kinds of treatment for juvenile patients and its period for 3 months. Mr. Allen regards himself as the victim of a vendetta by Mr. Brian Douglas, the Chief Dental Adviser to the CSA, and he suspects Mr. Douglas of having somehow tried to frame him in the matter of the telephone calls.

The evidence may be summarised as follows. First, the referral dental officers with whom the appointments had been made gave evidence that the appointments had not been cancelled and that they had not instructed anyone to say so. Then five patients (Mrs. Conway, Mrs. Lyttle, Mrs. Black, Mr. Whisker and Mrs. Stewart), who had received cancellation calls, gave evidence. Mrs. Conway said that a man rang asking to speak to her husband to say that his appointment for the following day had been cancelled. When she said that she also had an appointment, he said that it was also cancelled. She thought that she recognised the voice as that of Mr. Allen but could not be sure. Mrs. Lyttle said that the man who rang identified himself as Mr. Duff, the referral dental officer, saying that the appointment was cancelled because of staff shortages. But she was sure that she recognised the voice of Mr. Allen, whom she had known for a number of years. Mrs. Black said that the caller identified himself as Mr. Allen and said that her husband's appointment had been cancelled because there was "work getting carried on on the site". She had no doubt that the voice was that of Mr. Allen. Mr. Whisker said that he recognised the caller's voice as that of Mr. Allen's receptionist, Mrs. Maureen Mallon. She said that she was ringing on behalf of Mr. Allen. Mrs. Stewart recognised the caller's voice as that of Mr. Allen, whom she had known for several years. In cross-examination she said that she could not be "categorical" but that she was "quite sure" or "nearly sure". Written statements were put in on behalf of the recipients of the calls in three other charges, but none of these statements identified Mr. Allen as the caller. No evidence was offered on the tenth charge.

Mr. Allen and Mrs. Mallon gave evidence denying that they had made any of the calls. Mr. Allen also said that although he had, in accordance with the normal practice, been notified of the appointments of almost all his patients, he had not known of the appointments of Mr. Conway and Mr. Whisker. In support of this denial, he said that he had not received the standard form

of notification in their cases. The forms were absent from his file and in the case of Mr. Conway, the referral dental officer had noted that he had not received from Mr. Allen the standard acknowledgement of the notice of appointment. In the case of Mr. Whisker the position was less clear. But Mr. Allen said that as he had not known of the appointments, he could hardly have rung to say that they were cancelled.

Although the appeal to the Board is by way of rehearing, the scope for intervention in findings of fact based upon oral evidence is in practice very circumscribed. The principles were stated by Lord Hailsham of St. Marylebone L.C. in *Libman v. General Medical Council* [1972] A.C. 217, 220-221. For present purposes it is sufficient to cite the following passages:-

> "...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...The Disciplinary Committee does not in general give reasons for its decision...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...[It is] difficult for an appellant to displace a finding or order of the Committee...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."

Mr. Foskett claimed that in the present case this heavy burden had been discharged by manifest inconsistencies in the reasoning of the Committee. It was, he said, illogical to have found that six charges were proved and that three were not. The charges all stood or fell together. Mr. Allen's acquittal on three charges must therefore mean that there was insufficient evidence to convict him on the others.

Their Lordships think that this argument is fallacious. It is true that, on each of the charges found proved, the Committee were likely to have found the evidence of the witness to that particular telephone call greatly strengthened by the evidence of the other witnesses who identified Mr. Allen as the caller, because while one witness might have been mistaken in his or her identification (and the Legal Assessor warned the Committee of the well-known dangers of identification evidence) it was very unlikely that five of them, each testifying to a telephone call of a very similar nature, would have made the same mistake. The possibility that Mr. Douglas or someone else in the CSA, in

pursuit of its campaign against Mr. Allen, had imitated his voice (and presumably engaged a woman to imitate the voice of his receptionist) must have been rejected as an alternative explanation. On the other hand, the only direct evidence on the other three charges was the untested statements of witnesses who did not even identify Mr. Allen. To have found him guilty on those counts would have been going much further than treating the similar fact evidence as corroborative. It would have been making it bear the whole weight of identifying him as the caller. Their Lordships think that there was no inconsistency in the Committee's findings.

Mr. Foskett drew attention to the fact that Mrs. Conway and Mrs. Stewart had said that although they thought that the voice was that of Mr. Allen, they could not be absolutely sure. He said that this admission of the possibility of error should have led the Committee to dismiss the charges relating to those witnesses and that in turn should have cast doubt upon the other counts. Again, their Lordships disagree. If the evidence of Mrs. Conway or Mrs. Stewart had stood alone, the Committee might well have thought a finding against Mr. Allen would be unsafe. But taken with the identifications by the other witnesses, their Lordships think that it was evidence upon which the Committee could both find those counts proved and the evidence on the other counts corroborated.

Mr. Foskett also made other criticisms of the identification evidence. Mrs. Conway and Mrs. Lyttle had, at the request of the referral dental officer, made short written statements which contained no reference to the caller being Mr. Allen, although both said that they had said so at the time. Their Lordships think that these are matters on which the Committee heard submissions and which they must have taken into account. Then there was Mr. Allen's denial that he knew of the appointments of Mr. Conway and Mr. Whisker. In the case of Mr. Conway, the evidence of Mrs. Conway (who took the call) was that the caller knew of her husband's appointment but not that she also had one. The Committee may have concluded that either Mr. Allen or Mrs. Conway had been muddled about exactly whose appointment was being cancelled. This would not have been inconsistent with accepting Mrs. Conway's evidence that Mr. Allen had made the call. In the case of Mr. Whisker, Mr. Foskett accepted that the evidence to suggest that Mr. Allen or Mrs. Mallon could not have known of the appointment was inconclusive. There is nothing to suggest that the Committee misunderstood the nature or possible significance of the evidence.

Mr. Foskett correctly submitted that it was difficult to find any rational motive for Mr. Allen's conduct. Telephone calls had been made to 10 of the 50 patients summoned for appointments with referral dental officers. There was no evidence that Mr. Allen availed himself of the delay to try to correct poor treatment given to those patients. The whole episode could have been no more than a minor piece of disruption which carried a high risk of discovery. Their Lordships think that this was perhaps Mr. Foskett's strongest point. But people do sometimes behave irrationally and there was in their Lordships' view ample evidence upon which the Committee could find that, however foolish and pointless it mayhave been for Mr. Allen to make false telephone calls to his patients, he had in fact done so.