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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 2210 (Admin)



No. CO/1504/2019

Royal Courts of Justice

Friday, 19 July 2019

Before:

MR JUSTICE NICOL

B E T W E E N:

THE QUEEN ON THE APPLICATION OF
DAVID HUSBAND

Claimant

- and -

GENERAL DENTAL COUNCIL

Respondent

MR M. FINN (instructed by Hempsons) appeared on behalf of the Claimant.

MS E. GREY QC (instructed by General Dental Council) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE NICOL:

- 1 The claimant is a dentist. He is facing disciplinary proceedings before the Professional Conduct Committee ("PCC") of the General Dental Council ("GDC"). The Committee consists of a dentist, a dental practitioner and a lay representative. It has the assistance of a legal advisor. Another dental surgeon, Mr Hewitt, is also subject to these professional disciplinary proceedings.
- 2 The case against both dentists arises out of their dealings with a patient referred to as Patient A. On 22 July 2015 Mr Hewitt saw Patient A who was accompanied by her wife, referred to as Ms B. Mr Hewitt advised Patient A that she needed certain work on her teeth. He offered to provide that work under sedation, with the sedation being administered by the claimant. Patient A returned on 5 August 2015 for an appointment with Mr Hewitt and the claimant for the recommended treatment. The sedation which the claimant administered was in two forms. She was given Diazepam orally. She was given Midazolam via an intravenous drip. During the treatment, Patient A became distressed.
- 3 On 22 January 2016 she made a complaint to the GDC about the treatment provided by Mr Hewitt and the claimant. In broad terms she complained that she had not been advised that the amnesia which she was likely to experience as a result of the treatment might not be complete with the result that she might experience a memory of it. There was another aspect of her complaint which led to charge four, but it is not necessary to elaborate on that part.
- 4 Charges were brought against both Mr Hewitt and the claimant. They were not identical. So far as the claimant was concerned, the charges were as follows:

"That being a registered dentist:

1. On 5 August you provided sedation services to Patient A at the Cambria Dental Practice (the Practice).

Lack of consent.

2. Prior to administering Midazolam, you failed to ensure Patient A had provided informed consent to sedation using Midazolam in that you did not advise her adequately, or at all, that complete amnesia was not guaranteed.

Inappropriate advice.

3. Following the provision of a filling at UR6 and prior to the extraction of the retained route at UR5, Patient A became markedly distressed.

4. You inappropriately discussed sedation options with Patient A in that:

- a) You told her general anaesthesia in a hospital setting was her only option for future management for the extraction of UR5.

- b) You did not wait for her to adequately recover from the effects of Midazolam before discussing future management options

and that by reason of the facts alleged your fitness to practise is impaired by reason of your misconduct."

5 At the hearing Mr Hewitt and the claimant were separately represented. The GDC opened its case and called Patient A and Ms B. They also called an expert witness Professor Rob. The GDC then closed its case. The procedure to be adopted in hearings such as this is governed by the Dentist Act 1984 and the rules made thereunder. Currently, these are the General Dental Council Professional Conduct Committee (Fitness to Practise) Rules Order in Council 2006 SI 2006 No.1663. Rule 19, so far as relevant, provides:

" ...

(3) When the presenter has completed presenting evidence, the respondent or the respondent's representative may open the case for the defence, which may include a submission that there is no case to answer.

(4) Where the respondent or the respondent's representative makes a submission that there is no case to answer, a Practice Committee [by s.2(3) of the Dentist Act 1984 the term 'Practice Committee' includes the PCC] shall adjourn the hearing and deliberate in private for the purpose of determining whether to accept the submission.

(5) The chairman of the committee shall announce whether the submission that there is no case to answer has been accepted.

(6) Where a Practice Committee have accepted the submission they may make such orders as to costs and other matters as they consider necessary.

(7) Where there has been no submission that there is no case to answer, or there has been such a submission but it has been unsuccessful, the respondent or the respondent's representative shall present evidence ..."

6 In this case, following the close of the GDC's case, representatives of both the claimant and Mr Hewitt made submissions of no case to answer ("NCA"). For the claimant the NCA submission was in two parts. First, he wished to argue that even if established by the evidence the charges or some of them were not capable of constituting misconduct. On 14 January 2019 the PCC ruled that Rule 19 allowed an NCA submission to be made only in relation to disputed facts and there was no provision in the rules which would permit the type of argument which the claimant wished to advance in this part.

7 The first ground of challenge in the present judicial review takes issue with that interpretation of Rule 19. I need not spend long on this ground of challenge. The GDC agrees with the claimant that the PCC misinterpreted the rules. The GDC accepts that it should be possible for a dentist to argue that the allegation, even if made out on the evidence, could not constitute misconduct. The GDC agrees, therefore, that this part of the PCC's decision should be quashed and remitted to the PCC for the committee to consider the claimant's case on its merits i.e. that the charges or some of them could not, even if proved, constitute misconduct.

8 On 15 January 2019 the PCC addressed the second part of the claimant's no case submission; namely, that on the evidence there was no case for him to answer in respect of

either charge (2) nor charge (4). The PCC rejected that submission and held that there was a case for the claimant to answer on both of those charges. The Committee directed itself as to the law which it must apply as follows:

"The Committee heard and accepted the advice of the legal advisor in considering the matter. The Committee had regard to the test as set out within *R v Galbraith* [1981] 1 WLR 1039. The Committee has accepted the legal advisor's advice as to the approach it should follow. It was aware that it must consider whether, taking the evidence at its highest, the matter under consideration is capable of being proved to the required standard. The Committee reminded itself that the burden of proof is on the GDC and that the civil standard of proof applies; namely, on the balance of probabilities. The Committee was aware that it was not reaching any findings of fact at this stage."

9 So far as charge (2) was concerned, it said this:

"The committee noted the direct conflict in the evidence in respect of this charge. It took account of the oral evidence of Patient A and Ms B who were adamant that they were not told that complete amnesia was not guaranteed prior to treatment. The Committee also considered the clinical note made by Mr Hewitt that indicated they were told. Considering the charge relates whether Patient A was 'adequately' informed, it is open to the Committee to form a view that despite the conflict in the evidence this charge is able to be found proved. The Committee is, therefore, satisfied, taking the GDC's evidence at its highest, that there is a case to answer on this charge based on whether the advice was given to Patient A and, if it was, whether that advice was adequate. It therefore refuses your application in respect of this charge ".

10 The second ground of challenge to the PCC is that in respect of charge (2) its decision was unlawful and the Committee erred in law in its rejection of the NCA submission in respect of charge (2). It is in essence an allegation that the PCC's decision was *Wednesbury* irrational: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. This ground is disputed by the GDC.

11 Seven days had been allocated for the hearing. 15 January 2019 was the last of those days. The case against Mr Hewitt and the claimant will resume for a further ten days on 9 September 2019. In the meantime, the present claim form was issued on 12 April 2019. Mr Hewitt was not served. It might be thought that he was an interested party for the purposes of CPR Rule 54.7. However, I am told that he was informed of the prospective judicial review proceedings and the claimant's legal team was told that Mr Hewitt did not wish to participate.

12 Ordinarily, there is an advantage in allowing disciplinary proceedings such as these to run their course before an application for judicial review is entertained. After all, if the PCC were to dismiss the charges at the conclusion of the hearing, the issue of whether it should have acceded to an NCA submission would be moot. If the PCC found the charges proved, the claimant would have a right of appeal to this court: see *Dentists Act 1984 s.29*. However, there can be no inflexible rule to this effect: see for instance *Mahfouz v Professional Conduct Committee of the General Medical Council* [2004] EWCA Civ 233 at [44]. I recognise, as Mr Barnes submitted on behalf of the claimant, that the opportunity to make NCA submission is an important one, because it provides a route whereby a charge

with no merit can be stopped at an early stage. On the facts of this case, judicial review proceedings have not disrupted the progress of the case before the PCC. In addition, while there will in any event have to be some further hearing before the PCC, if the present judicial review is successful that further hearing will be much shorter than it would otherwise be. In any case, as I understood Ms Grey QC, it was no part of the GDC's case that the present application should be dismissed or relief should be refused on the grounds that the application was premature or that there was some further alternative avenue of redress open to the claimant.

- 13 Permission to apply for judicial review was granted by Garnham J on 17 April 2019. He directed that the substantive hearing should be expedited and heard before the end of term, as indeed it has been.
- 14 The concept of there being no case to answer is a familiar one in the criminal context. Where the trial is on indictment, it involves a delicate balance between the functions of the judge who will have the responsibility for ruling on the NCA submission and the jury who, if the matter proceeds, will decide whether the charge is well-founded. In the criminal context, the task of the judge was authoritatively determined by the case of *Galbraith* [1981] 1 WLR 1039. In which Lord Lane Chief Justice said at p.1042:

"How then should the judge approach a submission of 'no case'?"

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

- 15 Frequently cited along with *Galbraith* is the decision of Turner J in *Shippey* [1988] Crim LR 767. This was a decision by him as a trial judge in which he acceded to an NCA submission from three defendants on a charge of rape. It is best known for the comment that "'taking a prosecution case at its highest' did not mean picking out the plums and leaving the duff behind." It has to be remembered, though, that, as a decision of a first-instance judge, it does not have the authority of the Court of Appeal. *Galbraith* remains the authoritative statement of principle. Secondly, as the trial judge, Turner J will have heard all the evidence and would therefore have been in an advantageous position to assess it (the same point was

made by McCombe J in *Tutin v General Medical Council* [2009] EWHC 553 (Admin) at [25]. Nonetheless, I accept that it is incumbent on the decision maker (the judge in a criminal case, the PCC in the present situation) to consider the evidence which has been produced at the stage of the NCA submission to consider that evidence as a whole. Yet in doing so the task is to decide whether the charge could (my emphasis) not whether it would (my emphasis) be made out.

16 Although the concept of an NCA submission derives from criminal procedure, it usefully underlines the limited function of the decision maker at that stage. A case should only be stopped if, on the evidence then before the decision maker, the allegation could not be made out taking "the prosecution case" at its highest.

17 Ms Grey makes additional points regarding the carrying over of the criminal concepts to the present context which I consider to be sound. In criminal cases, the standard of proof is that the jury or magistrate must be sure of guilt. In these disciplinary proceedings, the standard of proof is the lower civil standard, i.e. the balance of probabilities: see Procedure Rules Rule 57.4. Secondly, the same body, the PCC, will adjudicate on the NCA submission and, if that is unsuccessful, the determination of whether the charges have been made out.

18 There is of course a general duty to give reasons for decisions such as those of the PCC: see for instance *Johnson and Maggs v Nursing and Midwifery Council* [2013] EWHC 2140 (Admin) at [36]. That applies with full force if the PCC accedes to the NCA submission. If it rejects the submission, the duty to give reasons is more attenuated. In *Sharaf v General Medical Council* [2013] EWHC 3332 (Admin) Carr J quoted the advice which had been given to the conduct committee by its legal assessor at [38] of her judgment. That advice was as follows:

"There is one final word I should give you. That is this. If you allow this submission you should give detailed reasons for doing so. If, however, you dismiss the application and the case proceeds, it is generally considered better to say as little as possible in case in giving detailed reasons you give some indication as to the way in which you are considering the evidence at this stage and it would be improper for you to do so. That is my advice."

19 It is implicit from [73] of her judgment that Carr J endorsed the legal assessor's advice. I respectfully agree with her endorsement of that advice.

20 On the claimant's behalf, Mr Barnes submits that the decision to reject the NCA's submission was legally flawed for three reasons. His first reason revolves around a note which had been made by Mr Hewitt which was dated 5 August 2015. It said:

"PT (an abbreviation for patient) demanded that she was to have no memory of the procedure. Explained to PT that this is normally the case, but not always ... "

21 Professor Rob had confirmed that if this advice was given he would not be critical of either dentist. In response, the GDC had said that the note was not accurate and that that advice had not been given. The GDC representative said that it would have been superfluous to include an additional charge in relation to the note. In its decision on 15 January the PCC said Patient A and Ms B had been adamant in their evidence that the note was incorrect and there was, nonetheless, a case to answer, despite this conflict of evidence.

- 22 Mr Barnes argues as follows. First, an additional charge would not have been superfluous. It would have raised a separate and serious issue. Next, the claimant was entitled to know the case against him, whether it was alleged that the note was made dishonestly or was simply inaccurate. Next, the Committee's reasons did not adequately address this issue. Next, it is not the claimant's case that every inaccuracy in a medical note must be made the subject of a discrete charge, but this was not a matter which arose in the course of the hearing. It would have been obvious from the start that there was a conflict between the note and the statements of Patient A and Ms B. The GDC's position should have been clarified.
- 23 Overall, Mr Barnes submits that since the GDC had not challenged or explained the note, the PCC was he obliged to accept its accuracy and uphold the submission of no case to answer. Mr Barnes' second and third reasons can be taken together. He alleges that the evidence of Patient A and Ms B was hopelessly flawed. There were a number of subpoints to this effect. They included the following. First, in cross-examination they had been questioned about an incident when Ms B had visited another dentist (AJ) on 15 July 2015 and so only a few weeks before the appointment which Ms A had with the claimant and Mr Hewitt in August 2015. Patient A agreed that she was aware that Ms B had had recall of that treatment even though she was supposed to have been sedated. Patient A agreed that as a result of that incident she knew that there was a possibility that something could go wrong or that the sedation would fail. Ms B gave evidence to like effect. Mr Barnes submits that this episode demonstrated that both Patient A and Ms B were well aware that amnesia could not be guaranteed.
- 24 The GDC had tried to separate off the situation where the sedation failed or something went wrong, but, Mr Barnes argues, that will not work. If it is so important for a patient that there should be no chance of recall, it is immaterial whether recall occurs because of a failure of sedation or whether, despite the sedation working as it should, recall still takes place. In any case, the GDC's case had not rested on any such distinction. Rather it had rested on Patient A's evidence that she had never been told that complete amnesia was not guaranteed and her consent to treatment was predicated on her belief that she would definitely not be able to recall the treatment.
- 25 In her first letter of complaint to the claimant on 22 December 2015 Patient A had said the following about the advice which she had received on sedation:
- "Failed to advise properly about sedation. In particular:
- (1) Did not mention any possibility of being aware of treatment while under sedation by Midazolam, despite Patient A being explicit that she wanted to be completely unaware.
 - (2) Did not discuss possibility of sedation failing and possible course of action/treatment alternatives if this happened.
 - (3) Led Patient A to believe an anaesthetist would be employed when this was not the case.
- As a result of the above, failed to provide Patient A with sufficient and appropriate information to give informed consent."
- 26 Mr Barnes comments that this was not a complaint of inadequate advice about the ability to recall treatment after it had occurred. In a letter to Mr Hewitt on 16 February made by

the two of them it had been said that Ms B, who was a lawyer, had made comprehensive and contemporaneous notes, but no such notes had been produced.

27 Next, Professor Rob had confirmed that it was possible that premedication might have affected the patient's recall of events and anxiety may have led to both Patient A and her wife having an incomplete or distorted recall of events. Next, the PCC's decision on charge (2) had failed to explain how the flawed evidence of Patient A and Ms B could stand in the face of Mr Hewitt's note. In short, Mr Barnes submits that, far from being compelling evidence contrary to Mr Hewitt's note, Patient A and Ms B's evidence was inherently weak. This was an example of a case where the GDC's witness's evidence was self-contradictory out of reason and all common sense. The only conclusion reasonably open to the committee was that Patient A and Ms B's evidence was so flawed as to be insufficient to support the charge and the PCC was compelled, therefore, to accede to the NCA submission on charge (2).

28 On the defendant's behalf, Ms Grey makes the following preliminary points:

(a) It had been indicated in pre-issue correspondence that the GDC concedes that the PCC was wrong in its ruling on 14 January. The case will need to be remitted to the PCC to consider the first ground of the claimant's challenge at the NCA stage. Carr J in *Sharaf* accepted that where a professional disciplinary committee rejected an NCA submission it should be cautious in the detailed reasons it gave. That was good sense. At the conclusion of the proceedings, the PCC would be obliged to give a fully reasoned decision.

(b) The function of the court was to review the decision of the PCC. The claimant relies essentially on the allegation that the PCC reached an irrational decision i.e. one which was *Wednesbury* unreasonable. That is a formidable hurdle at the best of times. It is made the more onerous in the present case (i) because the PCC is an expert body and (ii) because it heard and saw the witnesses give evidence, which is particularly significant when the challenge is that the Committee was bound to conclude that their evidence was not credible.

29 As to the detailed submissions made by Mr Barnes, Ms Grey responds as follows. In response to his first reason, that is Mr Hewitt's note of 5 August 2015, Ms Grey submitted:

(a) The GDC had challenged the accuracy of that note. It had been clear from the statements of Patient A and Ms B that they had been shown Mr Hewitt's note and did not accept its accuracy. They had confirmed their position in their evidence.

(b) At this stage, the PCC had not heard from Mr Hewitt and had no evidence from him confirming the accuracy of the note.

(c) It is not the case that if a regulator alleges that a medical note is inaccurate it must bring a separate charge to that effect or must have been taken to have accepted the note as accurate: see *Shankar v GMC* [2006] EWHC (Admin) at [37] to [40].

30 Next, an allegation of dishonesty against Mr Hewitt had not been made and, in the course of her submissions to me, Ms Grey confirmed that it was not the GDC's case that either dentist had been dishonest. Next, the point was artificial. The note had been made by Mr Hewitt, not the claimant. There was no evidence about what the claimant knew about Mr Hewitt's recordkeeping or its accuracy. Next, Mr Hewitt is not before the court arguing that the PCC had no choice but to accept the version of advice in his note. Next, the note was part of the evidence, but it did not require the case on charge (2) to be stopped at the NCA stage.

31 In response to Mr Barnes' second and third reasons, i.e. the credibility of Patient A and Ms B, Ms Grey responded, first, the assessment of a witness' credibility was for the PCC to judge. Second, that is especially the case where the issue is not the final decision, but whether the witness's evidence is so flawed as to be incapable of belief. The reasons could not be developed at length and this court is applying a *Wednesbury* review. Third, Patient A acknowledged that Ms B had a poor previous experience. She had said this made her more concerned to ensure that she would be adequately sedated. What they acknowledged was that sedation might fail, but that was consistent with their case that there had been a failure to explain adequately, or at all, that complete amnesia was not guaranteed. In responding to the NCA's submission, the PCC properly focused on the nature of the advice given to Patient A by the claimant and whether it was adequate.

My conclusions

32 As I have already said, I respectfully agree with the comments of the legal advisor in the *Sharaf* case and Carr J's endorsement of them. The reasons given by the PCC were succinct, but rightly so. They were sufficient, in the circumstances, to explain why the committee had rejected the NCA submissions.

33 As to Mr Hewitt's note, I agree with Ms Grey that it was not necessary for the GDC to bring a separate charge alleging that the note was inaccurate. The GDC was right. It was implicit in charge (2) that the note was inaccurate. Inaccuracy in note-taking may lead to a discrete charge. As Mr Barnes showed, one of the charges against Mr Hewitt concerned an erroneous date which he had given for his appointment with Patient A in July 2015, but I agree that there is no obligation on the GDC to bring a separate charge where the error is implicit in another charge.

34 It is different if the GDC alleges that a document has been fabricated or made dishonestly. Then, fairness to the note-maker requires the dishonesty to be clearly and specifically pleaded and not left to implication, but this is of no relevance to the present claim for judicial review. That is for two reasons. First, as Ms Grey reiterated in the course of this hearing, it is not the GDC's case that Mr Hewitt dishonestly made his note. Second, had it been otherwise, it would have been Mr Hewitt who would have had cause to complain, not the claimant.

35 Fairness to the claimant required that the GDC's case against him should be reasonably clear. It was plain that the GDC was saying that the evidence of Patient A and Ms B should be preferred to what appeared to be in Mr Hewitt's note and the GDC's case was that the note was inaccurate. It may be that the lay witnesses would have gone further and accused Mr Hewitt of lying, but that was not the position of the GDC, which said only that the note was incorrect.

36 Ms Grey also made the point, with which I agree, that the medical records were not all one way. When Patient A saw Mr Hewitt on 22 July 2015 she completed a form which was before the PCC. At two places there were entries on the form which were capable of supporting Patient A's evidence as to the importance, for her, of having no memory of the dental treatment that she underwent.

37 Next, the claimant himself made a note of the visit on 15 August. So far as material, this said:

"Patient presented initially for assessment and deemed after discussion fit for IV sedation with Midazolam. Very phobic and need for sedation was high ...

Day of treatment. Patient attended on day with partner. Consent had been obtained at assessment ..."

- 38 So the only reference to consent was to a discussion which had taken place "at assessment." In advance of any evidence from the claimant, it would have been open to the PCC to take that as a reference to the earlier meeting with Mr Hewitt alone on 22 July. There was nothing further in the claimant's note about a discussion which took place regarding consent on 5 August 2015.
- 39 Mr Barnes may well be right that it is common practice when two medical practitioners attend a patient for only one of them to make a note. He also says, rightly, that no charge has been made against the claimant because he did not note the conversation recorded by Mr Hewitt, but the omission of the dentist, who was after all due to be the sedationist, to include in his note of the day's events what is now said to be a critical part of the conversation is something to which the PCC would be entitled to give some weight. Mr Hewitt's note will no doubt feature prominently in future stages of the proceedings before the PCC, but, looked at on its own, I do not regard it as of such compelling weight as to make the PCC's rejection of the NCA submission in relation to charge (2) irrational.
- 40 I turn to Mr Barnes' arguments that the evidence of Patient A and Ms B was fundamentally flawed. Ms Grey is right to submit that the claimant has a formidable hurdle to overcome. Rationality challenges are never easy to make at the best of times. My task is not to ask whether I would have acceded to or dismissed the NCA submission. Statute and the rules give that task to the PCC. Of course the PCC must act lawfully. It will have not have acted lawfully if it made an irrational decision, but over and above the usual challenge which a claimant asserting irrationality faces the claimant in this case must confront two other features.
- 41 The first is that the PCC includes a dentist and dental practitioner. They will have an expertise in relation to the proper professional standards which are to be expected of dentists. Mr Barnes submitted that the composition of the Committee and its expertise are of less importance when the issue is whether the evidence of Patient A and Ms B can withstand logical scrutiny. I am not sure that there is such a sharp distinction as Mr Barnes attempted to draw. After all, in their decision the PCC rightly reminded themselves that they would have to consider whether Patient A was "adequately informed", the PCC's emphasis. In deciding what amounts to "adequate information", the PCC could legitimately draw on their knowledge of appropriate professional standards.
- 42 The second reason why a rationality challenge is particularly difficult in the present context is because the fundamental issue was whether Patient A and Ms A's evidence was capable of belief. At this stage, the PCC was not asking itself whether they did (my emphasis) believe the two witnesses, but whether their evidence was sufficient, taken together with Professor Rob's evidence, to support the charges. The committee had seen and heard the witnesses. On innumerable occasions it has been said that an appellate court must be cautious about deciding that a trial judge's decision is "wrong" (the test on appeal see CPR Rule 52.21(3). If the lower court's decision was not unjust because of a serious procedural or other irregularity). When that decision has been based, at least in part, on oral testimony, that warning has amplified force, especially since my task is not to decide if the PCC was wrong, but whether it was irrational.
- 43 Mr Barnes argues that Patient A knew that amnesia had not been complete when Ms B had been treated earlier in July 2015 by dentist AJ. In the course of their evidence, both Patient A and Ms B were questioned about this. They distinguished between a situation

where the sedation had failed (and that they said was what had happened with Ms B in her treatment by AJ) from a situation where the sedation worked as it should. Mr Barnes argued that the distinction was illogical and Patient A's knowledge of that earlier episode meant that she knew that complete amnesia could not be guaranteed.

- 44 In my view, this was the kind of matter which it was for the PCC to assess. It was for them to decide whether that episode so undermined the witness's credibility that charge (2) had to be dismissed. The same can be said of the other points which Mr Barnes made as to why the evidence of the two lay witnesses was fundamentally flawed. Thus, for instance, Mr Barnes' contrast between the letter of complaint by Patient A to the claimant on 22 December 2015 and charge (2) was a matter for the PCC to weigh and consider. In my view though it was not an example of the kind of "killer blow" which mandated dismissal of charge (2).
- 45 There had been inconsistent evidence from Patient A and Ms B as to when Ms B had started to take contemporaneous notes. That too was a matter for the PCC to consider, but it is routine for jurors to be instructed that their acceptance or rejection of a witness' evidence is not all or nothing. On the contrary, it is perfectly possible for parts of a witness's evidence to be accepted but not others. Professor Rob gave evidence as to the effect which premedication, the oral Diazepam, and the sedation itself might have on the ability of a patient's recall. That too was a matter for the PCC to consider. I am less sure that it was open to Professor Rob to venture an opinion on the reliability of Ms B's evidence, but if that was an error it was an error in the claimant's favour.
- 46 I have addressed some of the matters relied upon by Mr Barnes individually, but I agree with him that the PCC had also to step back and consider their cumulative effect, but, whether taken individually or together, I am not persuaded that the decision of the PCC that there was a case to answer on charge (2) was irrational. It follows that the challenge to the decision of the PCC of 15 January 2019 fails. In that respect, the application for judicial review is dismissed. It succeeds in relation to the decision of 14 January 2019, as the GDC has already conceded.

MS GREY: My Lord, I am grateful. There are, I think, two consequential matters. One will be the question of any order made by your Lordship and the second is costs. If I could just say briefly on the matter of an order, just really by way of introduction to what I will say next, my Lord may remember that a draft order was first proposed at the pre-action stage and then it is repeated in my skeleton argument at the end at para.28 when we proposed that the court should -- I said I managed to say should grant permission on ground (1). I am sorry. I obviously took that from my earlier skeleton argument wrongly.

MR JUSTICE NICOL: Ms Grey, as far as the order is concerned, can I leave it to you and is it Mr Flinn?

MR FLINN: Yes. Good afternoon, my Lord. Yes, standing in for Mr Barnes.

MR JUSTICE NICOL: Thank you very much for your attendance. I am sorry that I have made you work rather hard in making a note of this judgment, but could I leave it to you, with whatever consultation you want to make of Mr Barnes, and Ms Grey to put together an order that incorporates the matters that I have just dealt with?

MR FLINN: Of course.

MS GREY: My Lord, I am sure we can reach an agreement. On the subject of costs, my learned friend and I had a short discussion prior to coming into court and there was a suggestion made. I think that the most helpful thing, if your Lordship will agree to it, would be to ask you to rise for ten minutes to see whether we could reach agreement on that and, even if not, to shorten any necessary argument. I apologise for asking for the extra time, but it would be helpful.

MR JUSTICE NICOL: That is all right. I will want to summarily assess costs. All right. Good. I will rise.

(Short adjournment)

MR JUSTICE NICOL: Yes, Ms Grey.

MS GREY: My Lord, if your Lordship is content, the parties are content to agree no order as to costs rather than to embark on some sort of judgment involving dividing up issue costs on the sum basis, my Lord.

MR JUSTICE NICOL: Right. I will not intervene. I will desist making any comment.

MS GREY: Thank you very much, my Lord.

MR JUSTICE NICOL: Good. Therefore, can I repeat my request that you and Mr Flinn resolve how the formal order of the court should be drawn.

MS GREY: My Lord, we will send in hopefully an agreed order to your Lordship's clerk if we may.

MR JUSTICE NICOL: Good. Thank you very much.

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This transcript has been approved by the Judge