Judgments

Tariquez-Zaman v General Medical Council

[2019] EWHC 2927 (Admin)

Queen's Bench Division, Administrative Court (London)

Cavanagh J

1 November 2019

Judgment

Matthew McDonagh (instructed by **Advocate (Bar Pro Bono)**) for the **Appellant**

Peter Mant (instructed by **GMC Law**) for the **Respondent**

Hearing date: 22 October 2019

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Approved Judgment

Mr Justice Cavanagh:

Introduction

1. This is an appeal under section 40 of the Medical Act 1983 ("the 1983 Act"). The Appellant appeals against a decision of a Tribunal of the Medical Practitioners Tribunal Service ("the Tribunal") on 28 June 2018, directing that the Appellant's name be erased from the medical register under section 35D of the 1983 Act. The direction followed a finding that the facts found proved by the Tribunal amounted to serious misconduct on the part of the Appellant, and that, as a result of that serious misconduct, the Appellant's fitness to practice was seriously impaired.

2. This appeal is against the findings of fact, rather than against the decision that the facts as found amounted to serious misconduct, or in relation to sanction. The Appellant contends that the key findings by the Tribunal were wrong, that the reasons as to why it accepted the evidence of one of the main complainants, Patient A, over the Appellant, were inadequate, and that there had been procedural failings.

3. The Tribunal hearing took place in December 2017 and June 2018. The hearing was very lengthy, lasting some 34 days. The Appellant was represented by Leading Counsel, Mr Ian Stern QC, at the hearing, apart from the last day of it.

4. This was the second Tribunal hearing into the allegations against the Appellant. A previous hearing had taken place over 16 days in 2014, at the end of which a Fitness to Practise Panel (now renamed as a Medical Practitioners Tribunal) had held that the Appellant's fitness to practice was impaired by reason of his misconduct, and directed that his name should be erased from the Medical Register. The Appellant appealed against these determinations. On 17 April 2015, Gilbart J allowed the Appellant's appeal and quashed the decisions made by the 2014 Fitness to Practise Panel. The reason was that the Panel had been wrong to refuse a late application by the Appellant to call evidence from a witness, Ms D, who is referred to below. The judge directed that the case be remitted to the Registrar for him to refer it to a new Tribunal for rehearing. The hearing in December 2017 and June 2018 was the rehearing of this matter. Ms D gave evidence to the second Tribunal, as did the Appellant and Patient A, amongst other witnesses.

5. The allegations against the Appellant fell into three groups. The first two concerned events on 6 February 2010. First, it was alleged that the Appellant, who was working as a locum house officer in the Accident and Emergency Department of the University College Hospital ("UCLH"), had conducted a vaginal examination on a patient, Patient A, that was sexually motivated and that was not clinically indicated, and had acted towards Patient A in other ways that were sexually motivated. Second, it was alleged that the Appellant acted in a sexually motivated, alternatively inappropriate, manner whilst conducting a consultation with a second female patient, Patient B, again at UCLH A&E Department. Third, it was alleged that, in 2014-15, the Appellant had acted dishonestly in seeking to induce Patient A and her mother, Ms C, to withdraw their complaint against him in return for money.

6. The Appellant was tried at Blackfriars Crown Court in December 2011 for sexual assault of Patient A, and was acquitted. The standard of proof for a criminal court, is, of course, higher than the standard that is required for a finding by a professional regulator, and so the Appellant's acquittal did not preclude the Fitness to Practice Panel or subsequent Tribunal proceedings.

The findings of the Tribunal

Patient A

7. So far as the allegations against Patient A are concerned, the Tribunal found that, on 6 February 2010:

i) Patient A had attended UCLH A&E Department complaining of lower abdominal pain;

ii) The Appellant asked Patient A to undress, failed to provide privacy for her whilst she undressed, and watched her undress;

iii) The Appellant performed a vaginal examination on Patient A which was not clinically indicated in the circumstances;

iv) During the vaginal examination, the Appellant:

a) failed to offer Patient A a chaperone, and pulled down Patient A's knickers to her thighs between her knees and hips;

b) Touched the outside of Patient A's vagina when he was not wearing gloves;

c) Looked at Patient A's face whilst his fingers were inside her vagina, and smirked, laughed when Patient A told him that it made her feel uncomfortable, and referred to Patient A's boyfriend and said “this isn't the first time this has been done to you” or words to that effect;

v) The Appellant failed to record the examination in Patient A's medical notes;

vi) The Appellant asked Patient A for her telephone number, which he wrote down and put in his pocket or elsewhere on his person;

vii) At the end of his shift on 6 February 2010, the Claimant entered Patient A's telephone number into his personal mobile telephone;

viii) The Appellant suggested that Patient A attend his private clinic in Putney without charge, when there was no clinical need for her to do so; and

ix) The Appellant tried to make arrangements to meet Patient A socially, and said that he would call her later to make the arrangements.

8. The Tribunal found that all of these acts were sexually motivated.

9. The Appellant had denied that he had conducted a vaginal examination on Patient A, or that he had done any of the things alleged against him in relation to this incident, save that he admitted that he had taken Patient A's telephone number, and had entered it into his mobile phone. He said that he had done so because he was proposing to explore the possibility of assisting her to obtain a position for her as Health Care Assistant at a private clinic in Putney where he worked.

Patient B

10. The most serious allegations against the Appellant in relation to Patient B were that, during a consultation with Patient B on the same day, 6 February 2010, the Appellant had carried out an inappropriate examination of Patient B with sexual motivation, including sexual touching. The Appellant denied these allegations. These allegations were found not proved.

11. The only allegation in relation to Patient B that was found proved was that the Appellant had obtained Patient B's telephone number after Patient B had refused to give it to him during the consultation. This was done for the Appellant's own personal use, without Patient B's consent, and without any clinical reason for it. The Tribunal found not proved the allegation that these things were done with a sexual motivation.

12. The Appellant admitted that he had obtained Patient B's telephone number, but denied that this had been done without her consent. The Appellant said that the reason for doing so was that he and his wife wanted to purchase a video camera from a store at which Patient B was then the manager.

Ms C

13. As I have said, Ms C is Patient A's mother. The allegations that were found proved in relation to Ms C were the following:

i) Between January and June 2014, the Appellant or, on his general instruction, his representative, spoke to Ms C by telephone and told her that he was ready to give her £3000 and a letter of apology (“the Offer”);

ii) In or around 29 June 2014, the Appellant or, on his general instruction, his representative spoke to Ms C again by telephone and asked whether she agreed to the Offer;

iii) In or around January 2015, the Appellant, or on his general instruction, his representative, spoke to Ms C by telephone and asked her whether she accepted the Offer;

iv) On 29 January 2015, the appellant or, on his general instruction, his representative, sent text messages to Mrs C, providing her with a proposed form of words, including the following," we both therefore have decided in the interests of justice to withdraw our all complaints and all evidence is given during the GMC hearing against Dr M Tariqezzaman." The text continued, "If you agree with this please let me know so that I proceed with further terms and conditions as discussed earlier.";

v) A further six text messages were sent in the period from January to May 2015, in which the appellant or his representative sought to encourage and induce Ms C to settle, and to withdraw patient A's complaint to the GMC.

14. The Tribunal determined that these actions were dishonest.

15. The Appellant denied that he had anything to do with any communications by phone and text with Ms C, apart from three texts that had been sent in February and March 2015 from his personal phone. The Appellant said that he had been approached by a third party who had purported to be acting on behalf of Patient A and Ms C and who had proposed that the Appellant pay a sum of money to settle a potential civil claim that Patient A and Ms C were proposing to bring. He said that his texts were an attempt to negotiate such a settlement. The Appellant denied that he had attempted to induce Patient A and Ms C to withdraw the professional misconduct allegations.

The grounds of appeal

16. There are five grounds of appeal in the Notice of Appeal. In summary, they are as follows:

(1) The Tribunal's finding of fact that there was a vaginal examination on Patient A was wrong and the Tribunal failed to analyse/assess the credibility of, or deal adequately with the evidence of Ms D. Ms D was a Health Care Assistant (HCA) who had entered the examination room on two occasions during the period when it was occupied by the Appellant and Patient A;

(2) The Tribunal's analysis of Patient A's credibility was wrong, and the Tribunal's reasons for why it accepted Patient A's evidence in preference to the Appellant's were inadequate;

(3) The Tribunal's finding of dishonesty in relation to Ms C was wrong and unjust;

(4) There were serious procedural failings in that

(a) the Tribunal should not have permitted the GMC's counsel to make a further submission after the Appellant's counsel had made his submission. This prejudiced the Appellant and was contrary to common law;

(b) The GMC had failed to disclose documents that were shown to witnesses (both Patients A and B and the latter's husband, Mr E) both before the hearing, by email with attachments, and during the course of the hearing. This had been brought to the attention of the Tribunal during the hearing, but no action was taken. The Appellant contends that this was "contamination" and that it prejudiced him in relation to the evidence that he adduced; and

(c) The Tribunal should not have admitted in evidence a hand written note from a police officer who had not provided a statement or been called to give evidence. The Appellant contends that this was wrong and contrary to natural justice; and

(5) The Tribunal's analysis and reasoning was based on erroneous findings and factors that were not available to the Tribunal, and it was “extraordinary, unjust and wrong” to base the determination of impairment on facts and an allegation that had previously been dropped by the GMC.

17. At the appeal hearing before me, the Appellant was represented by Mr Matthew McDonagh of counsel. Mr McDonagh was acting pro bono, having been instructed through the Bar Council's Advocate scheme (formerly the Pro Bono Unit). The Respondent (“the GMC”) was represented by Mr Peter Mant of Counsel. I am grateful to them both for their very helpful submissions. In particular, I am grateful to Mr McDonagh both for acting pro bono and for assisting his client and the Court by concentrating his oral submissions on what he rightly regarded as his client's best points. Mr McDonagh said all that could have been said on behalf of the Appellant.

18. Mr McDonagh indicated at the outset of his submissions that, with his client's consent, he was intending to focus his oral submissions on the second limb of Ground 1, namely that the Tribunal failed to analyse/assess the credibility of, or deal adequately with the evidence of Ms D. Mr McDonagh frankly acknowledged that the high hurdle which faces an Appellant who is challenging the findings of fact by a Medical Practitioners Tribunal, means that he faced difficulties with the other grounds of appeal. However, he said that the way in which the Tribunal had dealt with the evidence of Ms D in its findings of fact was plainly wrong and was perverse.

19. Mr McDonagh did not formally withdraw the other grounds of appeal and I will deal with them briefly below, but I will focus on the challenges relating to Ms D, as did both counsel in their submissions. Mr McDonagh said that if the Court accepted his submission to the effect that the findings of fact in relation to Patient A cannot stand in light of the Tribunal's failure to take adequate account of the evidence of Ms D, then the finding of dishonesty in relation to the communications with Ms C could not stand either. This would leave the limited findings in relation to Patient B, which Mr McDonagh said could not possibly, on their own, justify a finding of impairment or a decision to erase the Appellant from the medical register. Accordingly, if the appeal succeeds, he invites the Court to quash the decision of the Tribunal and to order that no further proceedings be taken against the Appellant in relation to the three matters that were the subject-matter of the Tribunal hearing.

20. Mr Mant, for the GMC, did not accept that, if the Appellant succeeded in his challenge to the findings of fact in relation to Patient A, the findings of dishonesty in relation to the calls and texts to Ms C must be set aside. He preferred to refrain from making submissions about consequential orders until judgment was handed down on the main issues.

The structure of this judgment

21. I will first summarise the guidance in the case-law about the correct approach to appeals such as this. I will then summarise the Tribunal's reasons for making its findings of fact in relation to Patient A, and deal with the Appellant's main argument, relating to the evidence of Ms D. I will then deal with the other issues that arise in this appeal.

The correct approach to appeals such as this

22. The correct approach in appeals under s40 of the 1983 Act is now very well-established. It is not in dispute. Nonetheless, it is worth setting out in this judgment. It was helpfully summarised by Julian Knowles J in **Collen Nkomo v GMC** [2019] EWHC 2625 (Admin), at paragraphs 21-24, as follows:

“21. Section 40 of the [1983 Act] provides a right of appeal to the High Court against a sanction imposed by the Tribunal:

“(1) The following decisions are appealable decisions for the purposes of this section, that is to say—

(a) a decision of a Medical Practitioners Tribunal under section 35D above giving a direction for erasure, for suspension or for conditional registration or varying the conditions imposed by a direction for conditional registration;

…

(7) On an appeal under this section from a Medical Practitioners Tribunal, the court may—

(a) dismiss the appeal;

(b) allow the appeal and quash the direction or variation appealed against;

(c) substitute for the direction or variation appealed against any other direction or variation which could have been given or made by a Medical Practitioners Tribunal; or

(d) remit the case to the Tribunals for them to arrange for a Medical Practitioners Tribunal to dispose of the case in accordance with the directions of the court,

and may make such order as to costs (or, in Scotland, expenses) as it thinks fit."

22. The over-arching objective of the GMC in exercising its functions is the protection of the public (s 1(1A)). The pursuit by the GMC of its over-arching objective consists of the following aims:

a. to protect, promote and maintain the health, safety and well-being of the public;

b. to promote and maintain public confidence in the medical profession, and

c. to promote and maintain proper professional standards and conduct for members of that profession.

23. By virtue of CPR PD52D, [19.1], appeals under s 40 are by way of re-hearing. However, such an appeal 'is a re-hearing without hearing again the evidence': see **Fish v General Medical Council** [2012] EWHC (Admin) 1269, [28]. Applying CPR r 52.21, the Court must allow the appeal if the decision of the Tribunal was wrong or unjust because of serious procedural or other irregularity.

24. In **Yassin v the General Medical Council** [2015] EWHC 2955 (Admin), [32], Cranston J considered the scope of an appeal under s 40 in the following terms:

"Appeals under section 40 of the Medical Act 1983 are by way of re-hearing (CPR PD52D) so that the court can only allow an appeal where the Panel's decision was wrong or unjust because of a serious procedural or other irregularity in its proceedings: CPR 52.11. The authorities establish the following propositions:

i) The Panel's decision is correct unless and until the contrary is shown: **Siddiqui v. General Medical Council** [2015] EWHC 1966 (Admin), per Hickinbottom J, citing Laws LJ in **Subesh v. Secretary of State for the Home Department** [2004] EWCA Civ 56 at [44];

ii) The court must have in mind and must give such weight as appropriate in that the Panel is a specialist Tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserves respect: **Gosalakkal v. General Medical Council** [2015] EWHC 2445 (Admin);

iii) The Panel has the benefit of hearing and seeing the witnesses on both sides, which the [appellate court] does not;

iv) The questions of primary and secondary facts and the over-all value judgment made by the Panel, especially the last, are akin to jury questions to which there may reasonably be different answers: **Meadows v. General Medical Council** [197], per Auld LJ;

v) The test for deciding whether a finding of fact is against the evidence is whether that finding exceeds the generous ambit within which reasonable disagreement about the conclusions to be drawn from the evidence is possible: **Assucurazioni Generali SpA v. Arab Insurance Group** [2003] 1 WLR 577 , [197], per Ward LJ;

vi) Findings of primary fact, particularly founded upon an assessment of the credibility of witnesses, will be virtually unassailable: **Southall v. General Medical Council** [2010] EWCA Civ 407, [47] per Leveson LJ with whom Waller and Dyson LJJ agreed;

vii) If the court is asked to draw an inference, or question any secondary finding of fact, it will give significant deference to the decision of the Panel, and will only find it to be wrong if there are objective grounds for that conclusion: **Siddiqui**, paragraph [30](iii).

viii) Reasons in straightforward cases will generally be sufficient in setting out the facts to be proved and finding them proved or not; with exceptional cases, while a lengthy judgment is not required, the reasons will need to contain a few sentences dealing with the salient issues: **Southall v. General Medical Council** [2010] EWCA Civ 407 , [55]-[56].

ix) A principal purpose of the Panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the medical profession so particular force is given to the need to accord special respect to its judgment: **Fatnani and Raschid v. General Medical Council** [2007] EWCA Civ 46 , [19], per Laws LJ.

x) An expert Tribunal is afforded a wide margin of discretion and the court will only interfere where the decision of the Tribunal is wrong: see **R(Fatnani) v General Medical Council** [2007] EWCA Civ 46."

23. In **Gupta (Prabha) v General Medical Council** [2002] 1 WLR 1691 (PC), Lord Rodger said, at para 10:

“[Previous Privy Council judgments] also draw attention to the obvious fact that the appeals are conducted on the basis of the transcript of the hearing and that, unless exceptionally, witnesses are not recalled. In this respect these appeals are similar to many other appeals in both civil and criminal cases from a judge, jury or other body who has seen and heard the witnesses. In all such cases the appeal court readily acknowledges that the first instance body enjoys an advantage which the appeal court does not have, precisely because that body is in a better position to judge the credibility and reliability of the evidence given by the witnesses. In some appeals that advantage may not be significant since the witnesses' credibility and reliability are not in issue. But in many cases the advantage is very significant and the appeal court recognises that it should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body. This reluctance to interfere is not due to any lack of jurisdiction to do so. Rather, in exercising its full jurisdiction, the appeal court acknowledges that, if the first instance body has observed the witnesses and weighed their evidence, its decision on such matters is more likely to be correct than any decision of a court which cannot deploy those factors when assessing the position. In considering appeals on matters of fact from the various professional conduct committees, the Board must inevitably follow the same general approach. Which means that, where acute issues arise as to the credibility or reliability of the evidence given before such a committee, the Board, duly exercising its appellate function, will tend to be unable properly to differ from the decisions as to fact reached by the committee except in the kinds of situation described by Lord Thankerton in the well-known passage in **Thomas v Thomas** [1947] AC 487, 487-8.”

24. The passage in **Thomas v Thomas** to which Lord Rodger was referring is the following:

"I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

25. In the **Southall** case, as Cranston J pointed out in **Yassin,** Leveson LJ said that it is very well established that findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, are virtually unassailable. He added that, more recently, the test has been put than appellant must establish that the fact-finder was plainly wrong, and that the Court should only reverse a finding on the facts if it can be shown that the findings were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread.

26. As for the requirement to give reasons, rule 17(1) of the General Medical Council (Fitness to Practice) Rules 2004, as amended, provide that a Tribunal must give reasons for its findings of fact. As Cranston J made clear at paragraph 32(iv) of the summary of the relevant law in **Yassin,** above, whilst the reasons must be adequate to enable the losing party to know why he or she lost, they do not need to be lengthy and they do not have to address every submission or point of detail in the evidence. This is also made clear in **Barakat v GMC** [2013] EWHC 3427, at paragraphs 14 and 19, and in **Southall,** at paras 50-55. In **Casey v GMC** [2011] NIQB 95**,** Girvan LJ said at paragraph 6(c) that:

"As to the adequacy of reasons given, in most cases, particularly those concerned with comparatively simple conflicts of factual evidence, it will be obvious whose evidence has been rejected and why, thus satisfying the duty to make clear to the losing party why he has lost. Where the issue is not straightforward the practitioner is entitled to know why his evidence in the case has been rejected. A few sentences dealing with salient issues may be essential. While a finding of fact based on the assessment of witnesses will only be interfered with if it can be regarded as plainly wrong or so out of tune with the evidence properly read as to be unreasonable, the relevant issues must have been properly addressed (see Leveson LJ in **Southall v GMC** [2010] EWCA 407….. In **Southall v GMC** Leveson LJ concluded that in straightforward cases setting out the facts to be proved and finding them proved or not proved will generally be sufficient to demonstrate why the party won or lost and to explain the facts found. When the case is not straightforward and can properly be described as exceptional the position is and will be different. In such cases at least a few sentences dealing with the salient issue is essential. In that case, having regard to the rejection of the doctor's evidence and her defence, she, the doctor, was entitled to know why, even if only by reference to demeanour, attitude or approach to the specific questions posed to the doctor. In that case it was nothing to do with not being wholly convincing it was about honesty and integrity and if the panel were impugning her in those regards it should have said so."

27. In **Bakarat,** at paragraph 14, HHJ Stephen Davies, sitting as a Deputy High Court Judge, referred to the following four key points about reasons which had been set out by Stadlen J in **Lawrence v GMC** [2012] EWHC 464 (Admin):

i) The two essential requirements are that it must be apparent to the parties why one has won and the other has lost, and that the judgment must enable an appellate court to understand why the judge reached the decision;

ii) The adequacy of reasons depends on the nature of the case;

iii) There is no duty to give reasons to deal with every argument presented by the parties in support of their respective cases; and

iv) The issues, the resolution of which are vital to the judge's conclusion, should be identified and the manner in which the judge resolves them explained.

The reasons given by the Tribunal for its findings of fact in relation to Patient A

28. The findings are set out at paragraphs 7 and 8, above. In essence the Tribunal decided on the balance of probabilities to prefer Patient A's version of events to the Appellant's. The Tribunal set out reasons for its findings at paragraphs 22-71 of its Record of Determinations ("the Record").

29. The starting point is that there was undisputed CCTV evidence which, to a great extent, fixed the timings for the incident involving Patient A. The Tribunal decided that it could rely on this evidence (see Record, para 25). Both parties before me accepted that the timings established by the CCTV evidence could be relied upon.

30. The examination of Patient A took place in the early evening 6 February 2010, not long before the Appellant's shift was due to end, at 7pm. The examination took place in an examination room. Needless to say, there was no CCTV in the examination room itself, but there was a CCTV camera in the corridor outside, at a spot that had to be passed if a person was entering or leaving the examination room. It was located on the way from the examination room to the nurses' station. The CCTV in the corridor means that it is possible to fix timings for the coming and goings during the examination.

31. The other evidence available to the Tribunal could be evaluated together with, and tested against, the timings from the CCTV evidence.

32. The CCTV evidence shows that the periods when the Appellant was in the Examination Room with Patient A can be broken down into the following stages:

i) The first was a 19-minute period, from the first arrival of the Appellant and Patient A at the examination room until the Appellant left the room and walked towards the nursing station. During this period, the Appellant and Patient A were alone together.

ii) About 35 seconds after the Appellant left the examination room at the end of the 19 minute period, the Appellant and Ms D walked back to the examination room together. 13 seconds later, Ms D reappeared on the CCTV from the direction of the examination room. She must, therefore, have only spent a very little time in the examination room on this occasion. She had been called in to collect a sample for a urine test and she was seen to be carrying a container which was accepted to be the sample. The evidence before the Tribunal was that Ms D went to the nearby sluice room, where she carried out a "dip" test on the urine sample, which would have shown whether Patient A was pregnant or had an infection.

iii) Then there was a further period of two minutes and 15 seconds during which the Appellant and Patient A were, again, alone in the examination room.

iv) At the end of this period, Mrs D is seen on the corridor CCTV walking back in the direction of the examination room. She was returning with a piece of paper containing the results of the urine test.

It was not in dispute that the results were negative. Shortly thereafter, she reappeared on the corridor CCTV from the direction of the examination room. The gap was a period of 23 seconds. It follows that, once again, she spent only a short time in the examination room.

v) Finally, there was a period of one minute and four seconds between the point at which Ms D was shown on the CCTV coming from the direction of the examination room and the point at which Patient A left the examination room.

33. The periods that the Appellant spent in the examination room, therefore, fall into two parts. First, he spent 19 minutes there before going out to summon the HCA, Ms D. When he returned with Ms D, he was in the room for a further 3 minutes and 55 seconds before Patient A left it. These timings were agreed on the basis of the CCTV evidence. During this second period, there was a second visit from Ms D.

34. The Tribunal recognised that there was a stark contrast between the evidence of the Appellant, on the one hand, and Patients A and B, and Ms C, on the other. The Tribunal directed itself that the burden of proving the allegations rested with the GMC, to the standard of the balance of probabilities (Record, para 23). There is no complaint that the Tribunal misdirected itself in law on the approach to be taken to the evidence.

35. It was Patient A's evidence that the inappropriate examination had taken place in the period before Ms D, the HCA, first entered the room, and that Ms D was called in because Patient A had informed the Appellant that she had brought in a urine sample for testing. By the time Ms D arrived, according to Patient A, the inappropriate examination had already taken place.

36. The Appellant, on the other hand, gave evidence to the effect that the whole of the 19-minute period was taken up with taking Patient A's history. The Appellant said that he was deliberately dragging it out because he wanted to leave promptly at the end of his shift, at 19.00, and did not want to be given another patient after Patient A. The Appellant said that the examination had taken place in the period, totalling 3 minutes and 55 seconds, from the time of Ms D's first visit to the time when Patient A left the examination room. He said that, during this period, he conducted an examination on Patient A's abdomen, provided a diagnosis (of constipation) and had further discussion with her, including about safety-netting and the need for fluids and a high-fibre diet. He said that he also had a discussion about taking Patient A's telephone number for her possible recruitment as a part-time HCA at the Putney Clinic. He also said that there was a stage during this period in which Patient A was “hanging back” ie had been reluctant to leave.

37. The Tribunal decided, on the balance of probabilities, that the CCTV footage was more consistent with Patient A's evidence than with the Appellant's evidence. Patient A, who had never seen the CCTV footage, had said in her ABE (Achieving Best Evidence) interview, a couple of days after the incident, that she had been with the Appellant for some 10-15 minutes. The Tribunal thought that it was less than probable that the history-taking had taken 19 minutes, and that everything else had taken less than 4 minutes (Record, para 31).

38. The Tribunal was shown an expert DNA analysis report, which showed that swabs that were taken of Patient A's vagina and vulva area within 12 hours of the incident did not contain traces of the Appellant's DNA, even though the allegation was that the Appellant had touched Patient A's body, outside her vagina, with his bare hand. The Tribunal concluded that the report was evidentially neutral, because Patient A had wiped her genital area with tissue before the DNA swab was taken, and so any traces of another person's DNA would have been removed.

39. The Tribunal noted that Mr Stern QC, counsel for the Appellant, had pointed out inconsistencies in the Appellant's evidence. He submitted that there were differences in the accounts that she had given to her boyfriend and then her mother on the telephone immediately after the incident, and to the police. Mr Stern QC also pointed out that Patient A had said that the Appellant had been wearing

white clothing when the CCTV showed that his clothing was dark, and that he had been wearing white gloves when it was now accepted that the only gloves in the examination room were blue. Mr Stern also pointed out that Patient A's boyfriend had said that Patient A had told him that the nurse had been in the room before the examination and had been asked by the Appellant to leave before the examination began. This was not consistent with Patient A's own evidence to the Tribunal.

40.†The Tribunal accepted that there were inconsistencies in Patient A's evidence. So far as there were variations of detail in the accounts given to various different people, and errors in relation to clothing and gloves, the Tribunal said that these were matters of peripheral detail which did not relate to the “central core” of the allegation. (Record, para 47). In the ABE interview, Patient A had said that she could not remember what clothes the doctor was using or anything about gloves. She said that she had felt uncomfortable during the examination and had her eyes closed for part of it. The Tribunal said that this was credible and had the ring of truth, and so the errors about clothing and gloves did not detract from the rest of Patient's A's evidence (Record, para 47).

41. The Tribunal looked at the various accounts that the Appellant gave of the incident in chronological order. Immediately after leaving the hospital, she spoke to her boyfriend, Mr NA. She told him that the doctor had “gone too far”, had made her take off her trousers and pants and touched her “down there” and “started making comments.” (Record, para 39). She then spoke to her mother, Ms C, in a Ghanaian language called Twi. Patient A's mother said that Patient A had touched her “down below” and had used the Twi word “doda”, meaning vaginal area. She said that she had been examined externally without gloves and internally with gloves, and that the doctor had said that she had a nice body Immediately after this call, Ms C called the police, informing them that the doctor was touching Patient A, pushing his hand down into her, with no chaperone, had made comments to her, and had asked for her telephone number. (Record, para 40).

42. Patient A spoke to two police officers later that evening, just after 9pm, and gave more details. These included details about the inappropriate examination and things that the doctor had said to her. She gave a still more detailed statement to a specialist police officer on the morning of 7 February 2010. There followed an ABE interview on 11 February 2010, lasting an hour, in which Patient A gave a very detailed account of the circumstances of the incident on 6 February.

43. The Tribunal determined that it was understandable that the level of detail given by Patient A in an account to a family member or loved one would differ from that given to the police, and the Tribunal determined that the ABE interview was the most reliable, having been given to specialist officers. The Tribunal also took account of Patient A's oral evidence to the Tribunal, in which Patient A had said that she had withheld some details from her boyfriend, because he had become very angry. The Tribunal regarded this as being understandable. The Tribunal took the view that the evidence given by Patient A in the ABE interview was more reliable than her boyfriend's recollection of their telephone conversation (in which the boyfriend said that Patient A had told him that the HCA had been present and then departed before the examination took place).

44. In light of all of the above, the Tribunal determined that the inconsistencies identified did not prove fatal to Patient A's credibility and reliability as a witness. The Tribunal determined that she had given plausible explanations during her oral evidence to the Tribunal and had been broadly consistent on the essential elements of the incidents across all of her accounts (Record, para 48).

45. At paragraphs 50-53 of the Record, the Tribunal dealt with Ms D's evidence. As most of the submissions before me were concerned with this passage in the Record, I will set it out in full:

“50. The key features of Ms D's evidence were that she entered the examination room where an examination was already underway. Patient A had also returned to UCLH later in the evening of 6 February 2010. If accepted, this could undermine the credibility of Patient A's evidence, which makes no mention in any of her accounts that she returned to UCLH.

51. The Tribunal found Ms D to be a witness who was trying to do her best to assist the Tribunal with its inquiries. She was forthright in her statement before the Tribunal that when she gave oral evidence to the Tribunal in November 2017, over seven years after the incident, she had no independent recollection of event[s]. She told the Tribunal that her memory could be impaired as a result of a health condition from which she currently suffered. When she gave her evidence, she told the Tribunal that she had not taken her prescribed medication since the previous evening. The Tribunal felt that the reliability of her evidence was significantly undermined by these points and, most importantly, the CCTV footage. The footage showed Dr Zaman and Ms D entering the consultation area together and thus she could not have witnessed Dr Zaman conducting an examination on Patient A when she first walked into the room, as she had asserted. Furthermore, Ms D's first statement in respect of Patient A was obtained on 6 December 2011, 22 months after the alleged events took place. In her evidence to the Crown Court in December 2011, Ms D stated that she could have "false memories" of the events.

With respect to Ms D's assertion that Patient A returned to UCLH following her consultation, Patient A denied this. Patient A is showed leaving the corridor outside the examination room at 18.42.15. Ms C telephoned the police at 19.26. Between those times, Patient A had lengthy telephone calls with Mr NA and Ms C. It is less likely that she also had time to return to UCLH and speak to Ms D. The Tribunal determined that it was more likely than not that Ms D had identified the wrong patient and therefore her evidence did not undermine Patient A's evidence. In the light of all the above factors, the Tribunal determined that it could attach limited weight to Ms D's evidence as it related to Patient A."

46. The next section of the Record, from paragraph 53 to 71, is taken up with the Tribunal looking at each individual part of the allegations in relation to Patient A and setting out its conclusions, with reasons. It is not necessary to summarise them for the purposes of this judgment.

The grounds of appeal relating to Ms D

47. Ms D was plainly an important witness. Gilbart J recognised this, as he quashed the first hearing because Ms D had not been called. (An application had been made to the Fitness to Practise Panel to call Ms D, but the Panel ruled that the application was too late: Gilbart J held that this ruling was in error.) Ms D was a defence witness at the Crown Court trial. Ms D was called as a witness at the second hearing before the Tribunal. She was called as a witness by the GMC. She was not examined in chief, but was proffered for questioning by the Appellant's counsel. This meant that Mr Stern QC was able to cross-examine her on behalf of the Appellant. She was then re-examined by Ms Barbour, counsel for the GMC, who was given greater latitude to ask questions than would ordinarily be the case, because Ms D was not really the GMC's witness. Quite rightly, Mr McDonagh raises no objection to this.

48. I have seen the transcript of Ms D's witness statement. The section of the transcript dealing with Ms D's evidence is 36 pages long.

49. Mr McDonagh points out that Ms D was not a partisan witness. This is plainly correct: she was not a friend or acquaintance or regular work colleague of the Appellant, and had no reason to lie or change her evidence to support him. Her evidence was very important, because if it had been taken at face value and accepted by the Tribunal, it would have provided very strong support for the Appellant's defence. On the face of it, Ms D's evidence provided corroboration for the Appellant's contention that the examination had not taken place in the 19 minutes before Ms D first arrived in the examination room. Also, Ms D said that she had seen the Appellant carrying out an examination on Patient A's abdomen (not her genital area), and that Patient A had been wearing trousers whilst this examination was taking place.

50. There was one particular difference between Ms D's evidence and Patient A's. This was that Ms D said that Patient A returned to the nursing station about 30-40 minutes after the examination had

ended, asking to speak to the doctor. Ms D said that, on her return, Patient A did not complain about sexual assault, but complained about the diagnosis of constipation and the advice that she could deal with it by taking fluids and a high fibre diet.

51. The Tribunal had a copy of a written witness statement which had been provided to the Appellant's then solicitors for the purposes of the criminal trial, and had been signed on 6 December 2011, exactly 22 months after the incident. Mr McDonagh submitted, however, that this evidence, or the gist of it, was provided to the Appellant's solicitors many months before, sometime in late 2011. The Tribunal also had a transcript of Patient A's evidence at the Crown Court trial in December 2011. In addition, the Tribunal had before it a copy of a witness statement that had been provided to police by Ms D a few days after the incident, on 10 February 2010. It was common ground, however, that, unfortunately, this near-contemporaneous witness statement was of no use because, in it, Ms D was describing her recollection about a different patient altogether. This meant that there was no statement from Ms D which had been provided very shortly after the incident had happened.

52. Mr McDonagh submitted that the Tribunal recognised that unless it could find some way round Ms D's evidence, it would have to find the main allegations in relation to Patient A "not proved" and that this affected the way in which the Tribunal analysed the witness's evidence. Mr McDonagh says that the Tribunal approached Ms D's evidence by looking for weaknesses in it and compounded this by disregarding important points of her evidence. Mr McDonagh said that the way in which the Tribunal dealt with Ms D's evidence in its Record was perverse and wrong.

53. Mr McDonagh identified seven main alleged errors in the Tribunal's analysis of Ms D's evidence. I will look at each one in turn, and then I will consider their cumulative effect.

(1) **The Tribunal was wrong to decide that Ms D had no independent recollection when she gave evidence to the Tribunal in December 2017**

54. At paragraph 51 of the Record, the Tribunal said that Ms D was forthright in her statement before the Tribunal that when she gave oral evidence to the Tribunal in December 2017, over seven years after the incident, she had no independent recollection of events.

55. Mr McDonagh submitted that this did not fairly reflect the evidence that Ms D gave to the Tribunal, and that she gave a good account of events to the Tribunal.

56. As I have said, I have seen the transcript. During cross-examination by Mr Stern QC, for the Appellant, Ms D was asked, "Do you remember anything of what took place that you wrote the statement about." She said, "Yes I can remember that day, because of the statement." Mr McDonagh says that this was ambiguous. It might mean that it was only because of having previously made a statement that she was able to give evidence of what had happened seven years previously. This was the interpretation that the Tribunal placed on it. Mr McDonagh says that it might equally well mean that she was confident that she still had a clear recollection of the incident, because she had previously been able to make a statement about it.

57. Mr McDonagh also points out that Ms D gave a good account of the incident and was able to add details in the Tribunal hearing that do not appear in her statement of 6 December 2011. In particular, she told the Tribunal that when she went into the examination room, the patient was already sat on the bed, fully clothed but with the gown on. Ms D said that she said to the patient, "You are going to need to take your lower end off.", and the doctor then said, "No, I am not doing an internal examination." She also said that when she went into the room for the second time, Patient A had her leg dangling off the trolley with her trousers on and the gown on as well.

58. During questioning by counsel for the GMC, Ms D gave the following answers:

"Q. The memories you have – I am not criticising you because it was a long time ago – that you have told us about today, when my learned friend asked you questions like, "Do you have a memory of that", are those entirely accurate?

A. I honestly don't know.

Q. Have you ever had false memories about this case?

A. About the case, no.

Q. On a previous occasion you were asked when you and been in and out of the room with Patient A. You said, "I cannot remember because when I, I have seen the CCTV and it contradicts what I was thinking because I thought that I was in there for the whole examination.

A. Yes.

Q. "The CCTV showed that I was not all that length of time so I have got some false memory from that on the timings."

Q. What you say about that?

A. Yes. I agree with whatever I said.

Q. How reliable would you say your memories are in respect of this matter?

A. What sort of question is that? I do not know. I do not have any short-term memory now. I always did have a good long-term memory so I do not know. I do not know how reliable I am now."

59. In my judgment, in light of the evidence before it, it cannot be said that the Tribunal was plainly wrong in saying that Ms D had no independent recollection of the incident on 6 February 2010 by the time she gave evidence to the Tribunal in November 2017. It was open to the Tribunal to interpret Ms D's answer to the effect that she could remember what happened that day "because of the statement." to mean that it was only because she was able to read the statement that she had signed in 2011 that she was able to say anything about what happened back in February 2010. I remind myself that the Tribunal had the benefit of seeing Ms D give evidence, which I did not, and this would have helped the Tribunal to understand what she really meant by that comment. Moreover, the passage that I have set out in the preceding paragraph, taken as a whole, supports the conclusion that the impression that Ms D was giving to the Tribunal was that she had no independent recollection of the events of 6 February 2010. She agreed that she had "false memory" on the timings, and said that she did not know how reliable she was at the time when she was giving evidence. She was

accepting that, in light of the CCTV evidence which contradicted her original evidence – to the effect that she had been in the examination room at the time of the start of the consultation – her recollection could not be relied upon.

60. There are other parts of the transcript of Ms D's evidence which support the impression that she had no independent recollection by the time of the Tribunal hearing. She was asked a question about how long the dip test would take. It was put to her by Mr Stern QC that it would take two to three minutes, and she was reminded that this is what she had said at the Crown Court. Ms D's answer was, "I cannot remember. I am sorry, I cannot remember specific –". A short while later, Mr Stern QC point out something that Ms D had written in her witness statement – that Patient A had been the last patient of the day -and asked, "Do you recall that now?", Ms D's answer was, "If that is what I wrote then that is what I would have recalled at the time, yes."

61. It is true that, at other places in her evidence to the Tribunal, Ms D said some things that went further than the contents of her original statement. However, in my judgment this did not mean that the Tribunal was obliged to disregard the statements made by Ms D to the effect that she did not have a clear recollection of the events. As Mr Mant put it, taking the transcript in the round, it is clear that Ms D was not setting out a current recollection.

62. It is also significant that at least one of the further details that Ms D gave during her evidence to the Tribunal was undoubtedly wrong. This was her statement that the urine sample had not been in the examination room, but was in the sluice room. She said that somebody else had taken it off Patient A and left it in the sluice. It is clear that this was not the case, because the CCTV showed the Appellant calling Ms D into the examination room and then, a few seconds later, Ms D leaving with something which is plainly the sample container.

(2) **Ms D's health condition**

63. The next part of the Tribunal's summary at paragraph 51 of the Record with which Mr McDonagh takes issue is the observation that Ms D told the Tribunal that her memory could be impaired as a result of a health condition from which she currently suffered.

64. In my judgment, the Tribunal was plainly entitled to take the view that Ms D's evidence was unreliable because of her health condition. Mr Stern QC pointed out to her that she walked with a stick and asked if her health had suffered more over the last few years. Ms D said, "It is getting worse each year, yes.". Ms D also told the Tribunal that:

"I forgot to take my medication before I came out today and I will be coming up for my third lot of medication now. I am not 100% because I did not take any medication this morning before I came out, I forgot, and I fort to bring it so teatime would have been like my third lot of medications today, and that is Tramadol, Gavapentin and Diazepam, so I am not 100%"

65. Ms D therefore told the Tribunal that she was not 100%, and even a non-medical person would recognise the names of at least two of the medications as being strong medications. In the passage quoted at paragraph 59 above, Ms D said that because of her memory problems, "I don't know how reliable I am now." It is true that she said specifically that she did not have a short-term memory any

more, and that she used to have a good long-term memory, but this is a far cry from saying that she had a good long-term memory as at December 2017 of events in February 2010.

66. In these circumstances, I reject Mr McDonagh's submission that there was no evidence before the Tribunal to the effect that Ms D's failure to take her medication would affect her memory of events seven years before. In any event, that is not quite what the Tribunal said in the Record. Rather, the Tribunals said that Ms D told the Tribunal that her memory could be impaired as a result of a health condition from which she currently suffered. In my judgment, there was ample material before the Tribunal to justify that statement and to permit the Tribunal to take the view that the reliability of Ms D's evidence was significantly undermined by her health problems.

67. I remind myself once again that the Tribunal had the benefit of seeing Ms D give evidence, which I have not had, and that the Tribunal was therefore better placed that I am to form a view about the reliability of Ms D's evidence in light of her demeanour and her state of health.

(3) **The CCTV evidence**

68. At paragraph 51 of the Record, the Tribunal said that the most important factor which significantly undermined the reliability of Ms D's evidence was the CCTV evidence. In particular, the footage showed the Appellant and Ms D entering the consultation area together and thus she could not have witnessed Dr Zaman conducting an examination on Patient A when she first walked into the room, as she had asserted.

69. Mr McDonagh submitted that this overlooked the possibility that Ms D could have been referring to her second visit to the examination room, not the first. However, in my judgment, this would not work as a way of reconciling Ms D's evidence with the CCTV evidence. First, there was no suggestion by Ms D that it was on her second visit to the examination room that she had seen the examination taking place. Indeed, this was contradicted by her evidence. In her witness statement dated 6 December 2011, Ms D said that when she returned for her second visit, “the patient still had the gown on and was sat on the trolley with her legs dangling down.” In other words, the examination was over. She confirmed this in her evidence to the Tribunal. She also said in her statement that, at the time of her second visit, the Appellant had his back to the patient and was writing up his notes. Second, the CCTV timings show that there was only a period of one minute and four seconds between Ms D being shown coming away from the examination room and Patient A's departure. It is unlikely that this would leave enough time for the Appellant to complete the examination, provide the diagnosis, give advice about taking fluids and a high-fibre diet, and safety-netting advice (ie advising her, if the problem got worse, to go back to her GP, or return to A&E). In cross-examination before the Tribunal, he accepted that all of these things happened after the examination was completed. Also, the Appellant said that, towards the end of her time in the examination room, the Patient A was “hanging back”.

70. It is true that the Tribunal did not specifically consider the possibility that Ms D might have been talking about her second visit to the examination rom, but this had never been suggested to the Tribunal by the Appellant's counsel as a possible explanation. In any event, the case-law makes clear that it is not necessary for a Tribunal to address every aspect of the evidence in its Record.

71. Accordingly, even on the basis of Ms D's own evidence, the examination was not still underway at the time of her second visit.

(4) **The witness statement**

72. In paragraph 51 of the Record, the Tribunal said that another reason why the reliability of Patient A's evidence was significantly undermined was because the first witness statement from Ms D in respect of Patient A was not obtained until 6 December 2011, exactly 22 months after the incident took place.

73. Mr McDonagh said that this was just wrong. It was accepted that the first statement that was given to police by Ms D a few days after the incident referred to a different patient. It was also accepted that the witness statement that was provided by Ms D to the Appellant's solicitors, for the purposes of the criminal trial, was signed by Ms D on 22 December 2011. However, Mr McDonagh said that the statement had actually been prepared at least a year earlier, some time in late 2010, and so it was wrong to say that it had been "obtained" on 6 December 2011.

74. In my judgment, there is no basis for finding that the findings of fact made by the Tribunal were plainly wrong as a result of its treatment of this issue. The written witness statement dated 6 December 2011 was before the Tribunal. Paragraphs 3-4 give a description of the circumstances in which the statement came to be provided. Ms D said there that she became aware that the Appellant wished her to be involved in the proceedings when in approximately December 2010 he appeared in the A&E Department. He asked Ms D if she was prepared to give a statement and she said she was. She said that "I was intending to come to Dr Zaman's solicitors' office in Westminster earlier this year". The reference to "this year" can only be a reference to 2011. There was then a delay, because Ms D's manager overhead what she was intending to do and there was then some to-ing and fro-ing until another manager confirmed that Ms D could speak to the Appellant's solicitor if she wished. It is clear from the statement that some further period of time passed before Ms D eventually provided her statement. The statement refers to the fact that the Appellant had to "chase" Ms D two more times before she provided her statement. The statement does not say exactly when the statement was actually taken from Ms D, though I note that at paragraph 1 she refers to her marriage in April 2011, and so it must have been some time after that.

75. In all the circumstances, therefore, it is clear that the statement was given, at the very least, more than a year after the incident, and probably a considerable time later. It is clear also that the statement was finalised and signed by Ms D to confirm its accuracy on 6 December 2011. In my view, the Tribunal was entitled to say that the statement was "obtained" on 6 December 2011. That was the day on which it was finalised and on which the witness verified its contents.

76. It follows that it is fair to say that there was a considerable delay between the incident and Ms D's statement being prepared, or at least finalised. It follows in turn, in my judgment, that the Tribunal was entitled to take into account, as one of the reasons for doubting the reliability of Ms D's evidence, that there had been such a delay. It is clear from paragraph 51 of the Record that this was not the key reason for the Tribunal's doubts.

(5) **False memory**

77. The next reason given by the Tribunal for having concerns about the reliability of Ms D's evidence was that in her evidence to the Crown Court in December 2011, Ms D stated that she could have "false memories" of the events.

78. Mr McDonagh did not dispute that Ms D stated that she could have false memories, but said that it was clear that she was only saying that she had false memories about the timings, not about the main part of her evidence. He said that she was not accepting that her memory was false about the events that she witnessed, or about which patient was in the examination room at the relevant time.

79. In my judgment, it is clear that there was ample material before the Tribunal which justified its reference to the statement by Ms D that she could have false memories of the events.

80. The transcript of Ms D's cross-examination in the Crown Court contains the following:

"Q. So you went in there (would this be right so far as your recollection goes) after Dr Zaman had started his examination of her, when he called you in?

A. I can't remember, because when I – I've seen the CC – CCTV and it contradicts what I was thinking, because I thought I had been there for the whole examination, but the CCTV shows that I wasn't there all that length of time, so I've got some false memory from that in the timings. "

81. She then said that she had thought that she had been in the room before the 19-minute point, at which the Appellant is shown coming out to her get her, but the CCTV did not seem to show her in there. Later in her cross-examination in the Crown Court Ms D said that she was still adamant that she was there for the examination and said that, "The only thing I can think of, I was in the room with Dr Zaman before the cameras started, before you've got me on camera, before the 18.37." Ms D was asked about this during the Tribunal hearing. At first she denied that she had ever had false memories about the case. Then, when she was reminded by Ms Barbour of what she had said about false memory in the Crown Court (set out in the preceding paragraph), she was asked, "What do you say about that, please", and she replied, "Yes, I agree with whatever I said."

82. Against that background, in my judgment, the Tribunal was plainly entitled to take account of the fact that Ms D recognised that her statement might be false, in the sense of mistaken, because her recollection did not accord with the CCTV evidence. In my view, Mr Mant is right to submit that this goes beyond mere "timings" and means that Ms D's own recollection at the Crown Court of what had happened in terms of the events that took place does not fit with the CCTV evidence. In particular, and contrary to her recollection, she was not there throughout the examination. This casts doubt on her evidence about the form that the examination took.

83. Accordingly, in my judgment, the Tribunal was not plainly wrong to take account, as one of a number of reasons why the Tribunal decided not to rely on Ms D's evidence, that Ms D had herself acknowledged that her own recollection could not be reconciled with the CCTV evidence.

(6) **Ms D's recollection that Patient A returned to the A&E Department after the examination was over**

84. Ms D's evidence was that Patient A returned to UCLH following the consultation. She told the Tribunal that Ms D had returned a good 30-40 minutes later (it is not clear to me as to whether this was meant to mean 30-40 minutes after the examination finished, which was at 18.42, or after the shift finished, which was at 19.00). Ms D said that Patient A came to the nurses' station and said that she wanted to see the doctor. Ms D said that she said that she thought he had gone but she could get another doctor. She asked what the problem was and Patient A "just went on about constipation and the recommendation for a high fibre diet."

85. If accepted by the Tribunal, this evidence would have been of assistance to the Appellant, because he could argue that if Patient A had really been subjected to an inappropriate examination, it would be surprising that she would return to the scene at all, and, if she did so, it would be surprising if she complained of the diagnosis rather than the sexually motivated examination.

86. However, the Tribunal made clear at paragraph 52 of the Record that it did not accept this evidence. The Tribunal found that it was unlikely that Patient A had returned to A&E, as she had been engaged in two lengthy telephone calls, with her boyfriend and mother, immediately after leaving A&E, and her mother had telephoned the police at 19.26. This is 44 minutes after the end of the examination and so, the Tribunal decided, it was unlikely that it left time for Patient A to return and speak to Ms D. The Tribunal was entitled to come to this conclusion. In any event, this was just one of a number of reasons why the Tribunal decided not to accept Ms D's evidence.

(7) **Mistaken identity**

87. At paragraph 52 of the Record, the Tribunal concluded that it was more likely than not that Ms D had identified the wrong patient and therefore her evidence did not undermine Patient A's evidence. The Tribunal determined that it could attach limited weight to Ms D's evidence about the incident with Patient A.

88. In my judgment, this was not plainly wrong. It was a conclusion that the Tribunal was entitled to come to on the basis of the various factors referred to above. As I have said already, in addition to these matters, the Tribunal had the benefit of seeing Ms D give evidence and of forming a view based on the way in which she gave her evidence as regards how reliable her evidence was. It is true that Ms D told the Tribunal that she knew that the person she was talking about was Patient A, but the Tribunal was not bound to accept Ms D's evidence about this, in the face of contrary evidence from another witness (Patient A).

(8) **The cumulative effect of the criticisms**

89. Mr McDonagh submitted, quite rightly, that I should not just examine the criticisms that the Appellant makes of the reasoning of the Tribunal on an individual basis, but I should also look at them cumulatively and holistically, to decide whether, taken as a whole, the findings of fact were so plainly wrong that they cannot stand.

90. I have done so. In my judgment, whether taken individually or taken together, the matters relied upon by the Appellant in criticism of the Tribunal's finding of fact do not lead to the conclusion that the findings should be set aside.

91. It is true that there was some evidence before the Tribunal which lent support to the Appellant's denial that anything untoward had happened. For example, there was circumstantial evidence, such as that the area outside the examination room was busy and it was close to the nurses' station; there were a lot of people around; and the Appellant had taken a call from his wife during the period that he and Patient A were in the examination room – the Appellant said that it was unlikely that he would behaving sexually towards a patient immediately after speaking to his wife. There were also a number of inconsistencies in Patient A's evidence. However, the Tribunal was aware of the inconsistencies and took them into account, and still reached the conclusion that, on the main issues, Patient A's evidence was reliable. This is a paradigm issue in respect of which the finders of fact, who saw and heard the witnesses, are better placed than an appellate court to form a view. As Lord Rodger said in **Gupta,** the first instance body is in a better position to judge the credibility and reliability of the evidence given by the witnesses. This was a case in which reliability and credibility was of central importance.

92. It could not be said, in my judgment, that the conclusion reached by the Tribunal was plainly wrong, or that it was so out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread. The Tribunal took account of the evidence of Patient A, and the Appellant, and gave reasons why it rejected the evidence of Patient D. The Tribunal was entitled to take the view that the CCTV timings supported Patient A's version of events. In particular, it was unlikely that it would have taken a full 19 minutes to take a history, especially as the expert evidence

on behalf of the GMC was to the effect that the history that was taken was inadequate. Furthermore, the Tribunal was entitled to take the view that it was unlikely that the physical examination, diagnosis, and discussion with the patient would have been crammed into the last few minutes of the period in the examination room.

Other grounds of appeal

93. A number of other grounds of appeal, which were not developed orally, were set out in the Notice of Appeal, and were dealt with in the Appellant's skeleton argument. I will deal with them relatively briefly.

Adequacy of reasons

94. The Notice of Appeal said that the Tribunal had failed to analyse the credibility of, or deal adequately with, the evidence of Ms D. The Notice of Appeal further contended that the Tribunal's reasons why it accepted Patient A's evidence in preference to the Appellant's were inadequate.

95. In my judgment, these criticisms are unjustified.

96. The Tribunal has given detailed reasons for its conclusions. It is not necessary for a Tribunal to deal with every matter of evidence that was placed before it, so long as the salient issues are dealt with and the parties know why they have won or lost, and appellate court is able to understand why the Tribunal reached its decision. This has been done by the Tribunal in the present case and, indeed, in oral argument, the Appellant's counsel was able to conduct a detailed analysis and criticism of the Tribunal's reasoning. In my judgment, the reasons given by the Tribunal were amply sufficient to deal with the salient points and explain why the parties won or lost.

97. The Tribunal carefully considered the question whether the inconsistencies in Patient A's evidence that had been pointed out meant that her evidence was not reliable. This was done in paragraphs 33-49 of the Record. The Tribunal traced the various accounts that had been given by Patient A in chronological order. The Tribunal concluded that the inconsistencies related to matters of peripheral detail and not to the central core of the allegation, that Patient A's evidence had been broadly consistent, and that she had given plausible explanations during her oral evidence.

98. As for the Tribunal's conclusions about the evidence of Ms D, I have already dealt with them in detail in this judgment. The reasons why the Tribunal did not feel it could rely on Ms D's evidence were set out in detail in paragraphs 50-52 of the Record. It is clear that this explanation enabled the Appellant to understand why he had lost, because he was able to deal one-by-one with the reasons given by the Tribunal for its rejection of Ms D's evidence in this appeal.

The Tribunal's finding of dishonesty in relation to Ms C was unjust

99. The only argument advanced in oral argument before me on this issue was that if the Tribunal had been wrong to find against the Appellant in relation to Patient A, this infected the Tribunal's reasoning in relation to the allegations concerning Ms C, and so this part of the ruling should be quashed also. As I have rejected the criticisms of the decision in relation to Patient A, this does not arise. However, I was not persuaded that if I was prepared to allow the appeal in relation to the allegations concerning Patient A, it should automatically follow that I should also allow the appeal in relation to the allegations concerning Ms C. They were two separate sets of allegations, that would need to be considered separately.

100. The Appellant's skeleton argument sets out free-standing challenges to the Tribunal's conclusions in relation to Ms C. It will be recalled that the essence of the complaint against the Appellant was that he had contacted Ms C, and/or arranged for her to be contacted, in order to persuade her to accept £3,000 in return for her and Patient A dropping their professional conduct

complaint against the Appellant. The Appellant's defence was that, apart from three text messages that had been sent from his telephone to Ms C in February/March 2015, he had nothing to do with the communications with her. He said that he had been approached by someone purporting to act for Ms C, who proposed that the Appellant pay her a sum of money in order to settle a threatened civil claim. The Appellant said that the proposed transaction had nothing to do with the professional conduct proceedings before the Tribunal, and so he had not attempted to block the professional conduct proceedings. The Appellant pointed out that there was no direct evidence to link him with the two telephones, apart from his own, which were used to contact Ms C.

101. In my judgment, there was ample evidence before the Tribunal to justify the inference that the approaches that were made to Ms C in 2014 and early 2015 were made by or on behalf of the Appellant, even though the phone used cannot be traced to him. The timing of the first approach was significant: it was just after the first Fitness to Practice decision. The Tribunal was entitled to conclude that Ms C was telling the truth when she said that the caller identified himself as the Dr Tariqez-Zaman's lawyer. It was a permissible inference that such a caller would have been instructed to make contact by the Appellant, if he was not the Appellant himself. Perhaps most significantly, the Appellant followed up this approach by calling Ms C himself in early 2015. The Appellant accepted that he had made these calls. The Appellant said that he did so because he was approached by someone who gave the name of “Raman” but who did not provide the Appellant with a telephone number or any contact details. This caller said that he was acting as a mediator and put forward an offer on behalf of Ms C. The Tribunal did not believe this evidence. The Appellant had experience of litigation in other matters over a number of years and, as such, it was unlikely that he would be willing to engage in negotiations through a mediator when he did not have even the most basic contact details for him. Once again, the Tribunal was entitled to reach this conclusion.

102. The Tribunal's conclusion that the Appellant was behind the earlier approach to Ms C provided the context in which the Tribunal considered the messages that the Appellant sent to Ms C. These were sent in early 2015, after the Appellant had tried and failed to contact Ms C by telephone. In January 2015, the Appellant or his representative telephoned Ms C and asked if she was prepared to accept the offer of £3,000 and a letter of apology. Then, on 29 January 2015, the following two texts were sent to Ms C from an unidentified telephone:

> “Please see draft: “We never discussed this matter before because of emotional and sensitive issues relating to this matter. Following the issues raised during our evidence at the hearing and following MTPS's decision we have now discussed all matters in details. To be continued in next texts”
>
> and
>
> “We both therefore have decided in the interest of justice to withdraw our all complaints and evidence given during the GMC hearing against Dr M Tariqezzeman” The above is a neutral draft to resolve amicably. If you agree with this please let me know so that I proceed with further terms and conditions as discussed earlier.”

103. The Appellant accepted that, on 6 February 2015, he sent a text message to Ms C which stated,

“Draft let was sent to U. If U need any changes or amendment please let me know soon. There is some time limit with this matter. Early response much appreciated.”

104. In my judgment, the Tribunal was fully entitled to conclude, as it did, that the reference to the draft letter was a reference to the two texts of 29 January 2015 and that (a) this meant that the Appellant was behind the offer to settle and (b) the offer to settle was an attempt to bring an end to the Tribunal proceedings, not an attempt to settle some unspecified future civil claim. Still further, the Tribunal was plainly entitled to conclude that the offer of a financial inducement to withdraw a complaint before a regulator was dishonest, by the objective standards of ordinary decent people.

105. Accordingly, this ground of appeal is dismissed.

Procedural failings

106. The Amended Notice of Appeal refers to three alleged procedural failings. None of these was developed in oral argument.

The Tribunal should not have permitted the GMC's counsel to make a further submission after the Appellant's counsel had made his submission

107. In my judgment, this ground is hopeless. The transcript shows that after Mr Stern QC had made his closing submissions, the Tribunal asked Ms Barbour, counsel for the GMC, if she had anything more to say. This was done on the basis of some unidentified "guidance" to Tribunals to the effect that GMC representatives should be invited to comment after the closing submissions on behalf of the doctor. Understandably, Mr Stern QC intervened to say that this is not how things are usually done in litigation, and that normally the "prosecution" counsel's further comments would be limited to responding on the law and correcting any mistakes of fact in the "defence" closing. Ms Barbour did not dispute that this was the normal practice and confined her further submissions to some observations on the law and some clarifications on the facts. Mr Stern QC was then given the opportunity to have the final word and to respond to Ms Barbour's submissions.

108. In my judgment, there was no procedural irregularity. Ms Barbour's response did not go beyond the boundaries of what is permissible and, in any event, any potential unfairness was cured by the fact that Mr Stern QC was given the opportunity have the last word. Even if, contrary to my view, there was, technically, a procedural irregularity, it was trivial and had no effect on the outcome of the hearing.

The GMC had "contaminated" the evidence by disclosing documents to witnesses

109. Once again, this ground is hopeless. There was no irregularity as regards Patient A. She was sent copies of her three GMC witness statements in advance of the Tribunal hearing, and was then given a copy of the hearing bundle whilst waiting to give oral evidence and was encouraged by the GMC's solicitor to re-read her statements. This was entirely proper, and I would have been surprised if it had not happened. Documents in the bundle that related to Patient B were removed from the bundle given to Patient A, so there was no cross-contamination.

110. As for Patient B, she was inadvertently sent a copy of an expert report which made reference to Patient A. Patient B was already aware of Patient A. The Tribunal and the Appellant were informed of this disclosure by the GMC's counsel at the outset of Patient B's evidence. Counsel for the Appellant did not subsequently submit that this invalidated the evidence of Patient B, or that this meant that the complaints relating to Patient B could not proceed.

111. In my judgment, this was just an unfortunate oversight, of the type that happens frequently in litigation. There was no basis for regarding it as being of sufficient seriousness that it meant that Patient B's evidence could not be relied upon, let alone that the complaints relating to Patient B had to be abandoned. In any event, none of more serious allegations against Patient B which depended on Patient B's evidence was found to be proved by the Tribunal. The only allegations regarding Patient B which were found proved were those relating to the Appellant obtaining and retaining Patient B's telephone number.

The Tribunal should not have admitted in evidence a hand written note from a police officer who had not provided a statement or been called to give evidence

112. This was not developed orally, and neither the Notice of Appeal nor the Appellant's written skeleton argument gives any more details. I do not know what hand-written note this refers to. Accordingly, there is no basis upon which I can find that this amounted to a procedural irregularity. Anyway, it is clear from the Tribunal's Record that its findings of fact did not depend to any significant extent upon any such handwritten note.

The Tribunal's analysis and reasoning was based on erroneous findings and factors that were not available to the Tribunal, and it was "extraordinary, unjust and wrong" to base the determination of impairment on facts and an allegation that had previously been dropped by the GMC

113. Once again, this final ground was not developed orally on behalf of the Appellant. In so far as it is a repetition of the submission that the findings of fact made by the Tribunal were plainly wrong, and were not open to the Tribunal, I have already dealt with it above.

114. So far as there is reference to reliance upon an allegation that had previously been dropped by the GMC, I understand this to be a reference to the allegations concerning the retention by the Appellant of Patient B's telephone number. It is not the case that the Tribunal found against the Appellant in relation to an allegation that had been dropped. Certain allegations about contact between the Appellant and Patient B were removed, by amendment, at a preliminary hearing on 31 August 2017, but these did not include the allegations relating to Patient B's telephone number that were dealt with by the Tribunal.

115. The Appellant complains that the Tribunal mistakenly took the view that the Appellant's misconduct in relation to Patient B's telephone number was compounded because he had kept it in his phone for some five years. This was not correct, because, whilst it is true that the Appellant called Patient B on her telephone some years after the incident, this was not because he had retained her number in the intervening period. Rather, a record had been made of her number after a download analysis had been carried out on the Appellant's phone by the police, and he had retrieved the number from the record with a view to calling Patient B to check that her number was still in use. The Appellant said that this was on the advice of his legal team. The Tribunal's misunderstanding was corrected by Mr Stern QC at the sanction stage, and so the Tribunal took account of the true position when it reached its decision on sanction. The Appellant said in his skeleton argument that this was too late because "the Tribunal's mind was already poisoned." I do not accept this. There is no reason to think that the Tribunal was unable to take account of the correction that had been made.

116. In any event, the findings relating to Patient B were minor in comparison to the findings relating to Patient A and the dishonesty findings relating to Ms C. In my judgment, it is clear that the decisions relating to impairment and erasure would have been made by the Tribunal even if there had been no adverse findings in relation to Patient B at all. The Tribunal had found that the behaviour towards Patient B was not predatory.

Conclusion

117. For the reasons set out in this judgment, this appeal is dismissed.