Privy Council Appeal No. 7 of 1987

Ann Gwendolen Dally *Appellant*

v.

The General Medical Council *Respondent*

FROM

THE PROFESSIONAL CONDUCT COMMITTEE OF THE GENERAL MEDICAL COUNCIL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH SEPTEMBER 1987

Present at the Hearing:

LORD KEITH OF KINKEL
LORD MACKAY OF CLASHFERN
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Goff of Chieveley**]*

There is before their Lordships an appeal by the appellant, Ann Gwendolen Dally, against a determination by the Professional Conduct Committee of the respondent, the General Medical Council, that she had been guilty of serious professional misconduct in relation to the second of two heads of a charge which had been preferred against her, it being also determined that the first of the two heads of the charge had not been proved. It was directed that, by reason of her misconduct, the appellant's registration in the Register should, for a period of fourteen months, be conditional upon her complying with a requirement that she should not prescribe or possess controlled drugs. The charge preferred against the appellant was as follows:-

"That being registered under the Medical Act,

1. Between February 1985, or earlier, and August 1986, or later, the Appellant abused her position as a medical practitioner by issuing in return for fees, numerous prescriptions for methadone hydrochloride and other drugs in an irresponsible manner, including the prescriptions listed in Schedules marked Schedule A, Schedule B, Schedule C and Schedule D;

2. (a) Between about February 1982 and October 1985, inclusive, the Appellant abused her position as a medical practitioner by issuing to Mr. 'A' in return for fees numerous prescriptions for controlled drugs in an irresponsible manner, and in particular:

(i) without, at the initial consultation, conducting a conscientious and sufficient physical examination of Mr. 'A';

(ii) without adequately monitoring his progress on each occasion when she issued a further prescription to him;

(b) When in about October 1985 the Appellant decided not to issue any further prescriptions to Mr. 'A', she discharged him from her care without making any arrangements for him to receive on-going care and treatment from another medical practitioner;

and that in relation to the facts alleged in each of the above charges she had been guilty of serious professional misconduct."

The Professional Conduct Committee of the respondent council held an inquiry into the charge, the hearing of which extended over eight working days - 9th, 10th and 11th December 1986, and 26th, 27th, 28th, 29th and 30th January 1987. As background to the first head of the charge, it was recognised at the outset of the inquiry that there may be more than one school of thought as to whether it is medically or socially desirable to prescribe long term maintenance doses of controlled drugs to drug addicts, and in particular to long standing or relapsing addicts. Indeed, the medical evidence before the Committee revealed a division of medical opinion on this topic, the appellant belonging to the school of thought which considers that maintenance doses are necessary, particularly for long term addicts, in an effort to keep them off the black market and to prevent them from committing criminal offences. This division of opinion, as their Lordships have noted, formed the background to the present case, which for that reason appears to have attracted considerable attention. But counsel instructed by the solicitors acting for the respondent council, whose duty it was to present the facts to the Committee, went out of his way to deprecate any attempt to turn the inquiry into a so-called "political" debate about the merits or demerits of any such schools of thought. The case

advanced against the appellant was to the effect that, if a practitioner embarks upon a course of long term maintenance prescribing to drug addicts, it behoves the practitioner to take elementary precautions, and this the appellant failed to do. In particular, it was alleged against her (1) that she treated so large a number of addicts that it was beyond her capacity to treat them all conscientiously and properly; (2) that she prescribed privately in return for fees charged to some persons who could not in common sense be expected to have the means to meet such fees and the dispensing charges of the chemists without recourse to crime; (3) that she had prescribed excessively large amounts of methadone on single prescriptions; (4) that she had accepted as patients addicts who lived far away from her surgery and thus incurred travel expenses which imposed an additional financial burden upon them, and some of whom lived in areas where there were National Health treatment facilities; (5) that in the case of the majority of patients listed in certain Schedules placed before the Committee there had been no significant attempt to effect a reduction in the dosage of controlled drugs during the period covered by the schedules; and (6) that she failed to follow guidelines laid down for good clinical practice. The second head of the charge was intended to provide a specific example of irresponsible prescribing, relating as it did to Mr. "A" who was chosen because he was prepared to give evidence before the Committee. As already recorded, it was this second head of the charge alone that was found to be proved, the Committee announcing their determination at the conclusion of the hearing on 30th January 1987.

Before their Lordships, the principal submission advanced by Mr. Gage on behalf of the appellant was that the determination against her on the second head of the charge was inconsistent with determination in her favour on the first head, and was in any event against the weight of the evidence. In addition, Mr. Gage made certain other complaints against the Committee. He submitted that this was a case in which the Committee should have given, but failed to give, reasons for their determination against the appellant. He further submitted that, having regard to certain circumstances (to which their Lordships will refer later) the decision of the Committee was adversely affected by reason of the retirement of four members of the Committee during the hearing. Complaint was also made about advice on the law provided to the Committee by the Legal Assessor towards the close of the hearing; and finally Mr. Gage submitted that the penalty imposed on the appellant was in all the circumstances too severe.

By far the greatest part of Mr. Gage's full and careful argument, for which their Lordships are much

indebted, was directed towards his principal submission that the determination against the appellant on the second head of the charge was inconsistent with, and so could not stand with, the determination in her favour on the first head. Mr. Gage took their Lordships in detail through the evidence relating to the principal allegations made against the appellant in respect of the first head of the charge. In substance, his submissions on these allegations, in the light of the evidence to which he referred their Lordships, were as follows. With regard to the allegation that the appellant treated too many patients, Mr. Gage submitted that the evidence showed that she treated all her patients, including Mr. "A", in a similar way. Next, Mr. Gage took their Lordships through the evidence to the effect that Mr. "A" was unemployed and in receipt of social security benefits during the relevant period, and relating to the extent of the appellant's knowledge of his financial situation. Mr. Gage's submission, in the light of evidence given by certain medical practitioners, was that it is inevitable that there will be some leakage of prescribed drugs onto the black market, and further that, in the light particularly of certain answers given by the appellant during an interview with Mr. McIntosh, an investigator from the Home Office, her conduct in relation to Mr. "A" was in this respect no different from her conduct in relation to other patients of hers; indeed, she had good reason to believe that Mr. "A" was in work. Of the allegation that, in the case of the majority of the specified patients, there had been no or no significant attempt to effect a reduction in dosage, again Mr. Gage took their Lordships through all the relevant evidence, including the evidence relating to the applicable guidelines. In the end, he submitted that the whole case about reduction, as presented to the Committee, amounted to an allegation that the appellant was simply selling prescriptions; the Committee considered that allegation, and did not accept it. As far as the allegation of excessive dosage was concerned, the prescriptions for Mr. "A" fell, Mr. Gage submitted, within the general pattern of prescriptions by the appellant for patients in the same class. In all the circumstances, therefore, there was no rational basis on which the position of Mr. "A" could sensibly be differentiated; and Mr. Gage therefore submitted that the determination against the appellant on the second head of the charge simply could not stand with determination in her favour on the first.

Admirably though Mr. Gage presented this argument, with a wealth of detail, their Lordships are unable to accept it. There is, in their Lordships' opinion, an important distinction to be drawn between the first and second heads of the charge. The first head

of the charge was concerned with a general course of conduct. The case against the appellant under this head, as presented, related to a very substantial number of drug addict patients attending the appellant over a period of many months, concentrating in particular upon 149 long term patients who regularly attended the appellant between March and October 1985. Drug addicts are generally unwilling to give evidence, and it is not surprising that the direct evidence available on this charge was limited. The evidence presented against the appellant, apart from documentary evidence and the evidence of Mr. "A" and his wife, was given by two Home Office investigators; by a lady, Mrs. S, the mother of a drug addict who had been a patient of the appellant; by another lady, Miss B, who had been a drug addict and as such had also been a patient of the appellant; by two doctors who gave expert evidence; and by police officers. It was therefore inevitable that, in respect of the general allegations under the first head of the charge, a statistical approach had to be adopted and the Committee had to be invited to draw inferences from such evidence as was before them. It appears that the Committee was concerned about gaps in the evidence, as is demonstrated by the fact that a question was addressed by the chairman of the Committee to the Legal Assessor on this matter: his advice was that, if there were gaps in the evidence, it was not for the appellant to supply evidence to fill them, and that if the result of there being gaps in the evidence meant that the charge was not proved then that was the effect of the burden of proof. Following the receipt of that advice, the Committee found that the facts alleged on the first head of the charge had not been proved to their satisfaction.

By way of contrast, the second head of the charge was specific, and related only to Mr. "A". Moreover, both Mr. "A" and his wife were prepared to, and did, give evidence before the Committee. In these circumstances, provided that there was material before the Committee which justified a determination against the appellant on the second head of the charge, it was perfectly reasonable that the Committee should so determine while at the same time concluding that there was insufficient evidence to make a determination against her on the more general first head.

It is apparent to their Lordships that this is precisely what happened in the present case. Furthermore there was, in the opinion of their Lordships, ample material before the Committee to justify them, if they so decided, in making a determination against the appellant on the second head of the charge. The evidence showed that Mr. "A" had been a patient of the appellant for over three years, from February 1982 to October 1985. When he

first consulted the appellant, he went to her as an addict who wanted to get off drugs; yet it was apparent, both from the records and from the evidence, that his drugs were not significantly reduced over the greater part of the time when he was a patient of the appellant. Furthermore Mr. "A" gave evidence to the effect that he did not really receive from the appellant anything that could be described as treatment, other than being handed prescriptions for methadone. There was evidence, too, that the appellant's physical examination of Mr. "A" was limited to examination of needle marks on Mr. "A"'s arms and hands, and did not extend elsewhere; and there was medical evidence to the effect that a more thorough physical examination was desirable. So far as Mr. "A"'s finances were concerned, he was receiving unemployment benefit of about £72.00 per fortnight, and at the same time incurring fees to the appellant which, together with prescription charges, substantially exceeded that sum. True, the appellant had reason to believe that Mr. "A" got some work as a roofer; but he was often in debt and making payments to the appellant in arrears. In all the circumstances, having regard to the extent of his expenses in fees and prescription charges, and having regard also to the evidence that leakage of prescribed methadone onto the black market is widespread, there was evidence before the Committee upon which they were entitled to take the view that caution should have been exercised in prescribing controlled drugs on the scale prescribed by the appellant to Mr. "A", and that in all the circumstances insufficient precautions were taken by her in this case. Finally, when the appellant discharged Mr. "A", the evidence was that she did not herself communicate with Mr. "A"'s general practitioner. Having regard to these matters, their Lordships can see no basis for the claim that there was insufficient evidence to justify the determination of the Committee on the second head of the charge; and they accept the submission of Mr. Preston, for the respondent Council, that the fact the Committee were not prepared to extrapolate from the second head of the charge to the first head is not surprising and does not detract from the soundness of their conclusion on the second. It follows that their Lordships are unable to accept the principal submission advanced by Mr. Gage on behalf of the appellant.

Their Lordships turn next to the other submissions of Mr. Gage. He first submitted that the Committee should have given reasons for their conclusion in the present case. He referred their Lordships to the relevant authorities, and in particular to the unreported case of *Dasrath Rai v. The General Medical Council* (14th May 1984) at pp. 10-11, per Lord Scarman; *Peatfield v. The General Medical Council*

[1986] 1 W.L.R. 243, especially at p. 250 per Lord Mackay of Clashfern; and *Gee v. The General Medical Council* [1987] 1 W.L.R. 564, especially at pp. 571-2 per Lord Mackay of Clashfern. Mr. Gage's submission was that where, as here, two charges overlapped, it is much better if the Committee give reasons for their conclusion. However their Lordships see no basis for criticising the Committee for failing to give reasons in the present case. It is apparent that the Committee found the facts alleged under the second head of the charge to have been proved, and the evidential basis for the Committee's decision is plain to see.

Next Mr. Gage complained of the fact that four of the nine members of the Committee at the start of the hearing did not complete the hearing. It appears that the inquiry began on 9th December 1986. Of the ten members of the Committee invited to attend, one was ill and took no part, and another withdrew either at or shortly after the commencement of the hearing for the same reason. When the hearing was resumed in the New Year, on 26th January 1987, two of the members of the Committee who had previously attended had not been re-elected and so had ceased to be members of the Committee; and, of the six who remained, one immediately withdrew in protest against a ruling on an issue relating to confidentiality. The remaining five members completed the hearing, the Committee being quorate throughout the inquiry. There is no suggestion that any member of the Committee who withdrew after the inquiry had begun took any part in the deliberations of the Committee. The only suggestion is that those members of the Committee who made the final decision may have had their minds and opinions affected by views previously expressed by the members who had withdrawn. Their Lordships can however see no substance in this objection.

Likewise their Lordships can see no substance in Mr. Gage's criticism of the advice given by the Legal Assessor. Mr. Gage, in his closing speech before the Committee, had himself referred to *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582. That was a case concerned with civil liability in negligence; and the Legal Assessor, at the close of the hearing, gave advice to the Committee, at the request of the chairman, in which he sought to explain the distinction between negligence in a civil case and irresponsibility in a case in which a doctor is charged before a professional tribunal with acting in an irresponsible manner. It was submitted by Mr. Gage that, in so doing, the Legal Assessor left the Committee with a confused direction. It is enough for their Lordships to say that, in their opinion, the Legal Assessor was justified, in the circumstances, in drawing the distinction which he

sought to draw for the benefit of the Committee; and that they do not consider that the distinction so drawn by the Legal Assessor was confusing - indeed, having regard to the whole manner in which the case was presented and argued before them, their Lordships accept Mr. Preston's submission that it is inconceivable that the Committee ever lost sight of the issues arising in the case. Finally, their Lordships are unable to see any ground upon which they could properly interfere with the penalty imposed upon the appellant, particularly having regard to the fact that on a previous occasion, in July 1983, she had been found guilty of serious professional conduct in relation to the prescribing of drugs, and had on that occasion been admonished.

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