Threlfall v General Optical Council [2004] APP.L.R. 11/26

Mr Justice Stanley Burnton: QBD. Admin Div. 26th November 2004

1. The Appellant, who is a registered ophthalmic optician, appeals, under section 23 of the Opticians Act 1989, from a decision of the Disciplinary Committee of the General Optical Council ("the GOC"), made on 21 May 2004. The Disciplinary Committee found her guilty of serious professional misconduct and imposed a penalty order of £500. Her principal contention is that the evidence before the Disciplinary Committee did not justify that finding, and that its decision should be quashed.

2. The charge against Mrs Threlfall was as follows:

"The charge is that you have been guilty of serious professional misconduct. The particulars of the charge are that:
1. On 12th July 2002, you failed to examine the right eye of Patient A adequately in that you:
(a) did not dilate the pupil;
(b) did not examine the fundus adequately;
(c) did not carry out a visual field test.
2. On 12th July 2002, you failed to record your examination of Patient A adequately."

3. The hearing before the Disciplinary Committee took place on 20 and 21 May 2004. Both the GOC and Mrs Threlfall were represented. The solicitor for the GOC explained in opening that, in respect of each individual particular in 1(a)(b)(c), the Disciplinary Committee should:
(a) decide whether the respondent did or did not carry out the test;
(b) if so, decide whether the failure to carry out the test made the eye examination inadequate;
(c) if so, decide whether this amounted to serious professional misconduct.

4. The evidence in the transcript of the hearing may be summarised as follows:

(a) On Saturday 6 July the right eye of Patient A suddenly rushed back and forwards involuntarily and he was left with a large translucent object in his central field of vision. He had experienced flashing lights in the eye for about 3 weeks prior to this. Black dots appeared during this weekend.

(b) On Monday 8 July, he went to see his GP. His "primary focus" was a throat problem (acid reflux) which had begun a few weeks previously, and he consulted him about his eye. The doctor advised him that cells do break off in the eye and can take about 6 months to disappear, but that it might be worth seeing an optician. He claimed that the first optician's appointment he could get with Mrs Threlfall was on Saturday 13 July; she stated there were appointments available earlier in the week.

(c) During the week the dots in the eye increased. He tried unsuccessfully to get an earlier appointment with Mrs Threlfall, but did not go to hospital or to another optician. By Friday 12 July, there was a blind patch in his eye blocking 20% of his vision, like an "eclipse". He thought it was a retinal detachment. Initially he was in 'denial'. He was able to go to work, and drive. He rang the eye centre on Friday 12 July and saw Mrs Threlfall at about 2.00 pm that day.

(d) Patient A says he told Mrs Threlfall about all the symptoms listed above. She examined his eye and told him she could see the floater but she could not see anything wrong. He suggested that he night have a retinal detachment, but she could not see any evidence of one. He became anxious. She said she could dilate his eye but was reluctant to do so because she did not want to cause more damage. He said *"I want to be referred. I want to be seen by someone else."* She told him she had got an appointment for him at Wigan Hospital eye unit at 11.00am the next day; no one could see him the same day.

5. Mrs Threlfall disputed Patient A's account of the consultation.

(a) She said the only symptom he described was the sudden appearance of a large floater in his right eye, at the beginning of the week, and that vision was coming and going in his left eye. She checked his visual acuity, his pupils and carried out an ophthalmoscopy. As she looked in his right eye, she could see the central area, the disc, macula and the surrounding area but the floater was getting in the way of her view of the far periphery. Her main concern was the retina because the sudden appearance of a large floater indicates a risk of retinal detachment. She decided to refer him because the floater was large and the far periphery was hard to examine. When she told him she was going to dilate his pupils, and implied that there was something 'more sinister' there, he became "worked up" and "agitated" so she decided not to proceed since she was going to refer him anyway and his pupils would be dilated at the hospital. She did not carry out a visual field test because he was "so worked up", the field examination is a very subjective test and she did not think the results would have been reliable.

(b) She telephoned the Christopher Home Eye Unit at Wigan Hospital, explained his symptoms to the doctor and referred him. The doctor gave him an appointment for 11.00 a.m. the next day. It was local practice to refer urgent cases direct to the Eye Unit. She made an immediate referral; it was for the ophthalmologist at the Eye Unit to decide how quickly he could be seen. A next day appointment was consistent with her previous experience of a retinal detachment case. She advised Patient A that if his vision changed in any way, he should go to casualty.

(c) Mrs Threlfall said it was an oversight that her record card did not refer to retinal detachment, but any practitioner reading that there was a sudden onset of a large floater and he had been referred to hospital would realise that the concern was retinal detachment.

6. Patient A went home and telephoned NHS Direct. The nurse advised him to go to hospital. He went to Warrington Accident and Emergency that day. The blind spot which was about 20 per cent when he saw Mrs Threlfall was "growing by the hour" – it was 50 per cent, possibly more, by the time he saw the A & E doctor on the evening of Friday 12 July. He informed the hospital doctors of all his symptoms. Retinal detachment was diagnosed. An appointment was made for him to have surgery at 1.00 pm the following day at Liverpool Hospital.

7. The decision of the Disciplinary Committee was given at the end of the hearing on 21 May 2004, in the following terms:

***Findings of fact in relation to the charge*:**

"Ms Wilcox (chairman): The Committee found the facts in particulars 1(a) and 1(c) of the charge admitted and proven. The Committee found the facts in particulars 1(b) and 2 of the charge proven.

Mr Albuery ...the solicitor for the GOC): Madam … can I ask you to confirm that you have found that those particulars in (a), (b) and (c) amount to a failure to examine the eye adequately?

Mr Atkinson (the legal assessor): … the Committee did find that."

Finding of serious professional misconduct:

[Following submissions on behalf of the GOC and Mrs Threlfall on the question of whether the facts found proved amounted to serious professional misconduct and the advice on that question of the legal assessor]

"Mrs Wilcox: …we have found the charge proven."

***Sanction*:**

"Mrs Wilcox: As you know, the Committee had found the charge proven. This Committee is concerned not only with the maintenance of proper standards of behaviour by practitioners but also to maintain public confidence in the profession. We have had regard to your previous good character, the earlier satisfactory relationship with the patient and the fact that a referral was made. Nevertheless, we have determined that a sanction is appropriate and to impose a penalty order of £500 to be paid within 28 days."

The statutory framework

8. The regulatory regime is set out in the Opticians Act 1989. Section 1 provides that the GOC has the general function of promoting high standards of professional education and professional conduct among opticians. Section 5 establishes the Disciplinary Committee of the Council. Section 7 requires the GOC to maintain registers of opticians. Mrs Threlfall is registered as an ophthalmic optician engaged in both the testing of sight and the supply of optical appliances, under section 7(a).

9. Section 17(1) provides:
"If any registered optician –
(a) is convicted by any court in the United Kingdom of any criminal offence; or
(b) is judged by the Disciplinary Committee to have been guilty of serious professional misconduct,
the Committee may make a disciplinary order against him."

10. Section 14 defines a "disciplinary order" as an erasure order, suspension order and a penalty order. A "penalty order" means an order that a registered optician shall pay to the Council a sum specified in that order. By section 16, the maximum penalty order payable is £1,600.

11. Section 23(1) provides that an individual who is notified that a disciplinary order has been made against him under section 17 may appeal against that order to the relevant court before the end of 28 days beginning with the date in which notification of the order was made. The relevant court is the High Court (section 23(1A)).

12. Section 23(1C) provides:
"On an appeal against this section, the court ... may –
(a) dismiss the appeal,
(b) allow the appeal and quash the order or direction appealed against,
(c) substitute for the order or direction appealed against any other order or direction which could have been made by the Disciplinary Committee, or
(d) remit the case to the Disciplinary Committee to dispose of the case in accordance with the directions of the court... and make such order as to costs…as it…thinks fit."

13. The Sight Testing (Examination and Prescription) (No. 2) Regulations 1989 provide in regulation 3:
"3(1) …when a doctor or optician tests the sight of another person, it shall be his duty – "
(a) to perform, for the purpose of detecting signs of injury, disease or abnormality in the eye or elsewhere –
(i) an examination of the external surface of the eye and its immediate vicinity,
(ii) an intra-ocular examination, either by means of an ophthalmoscope or by such other means as the doctor or optician considers appropriate,
(iii) such additional examinations as appear to the doctor or optician to be clinically necessary …"

14. The Rules Relating to Injury of Disease of the Eye 1999 provide:

"2. 'injury of disease' means any abnormality of the eye of an anatomical, pathological or physiological nature,

3. Where it appears to a registered optician that a person consulting him is suffering from an injury or disease of the eye the registered optician shall, subject to rules 5 to 8 below, refer that person to a registered medical practitioner…in testing the sight of such a person…but in such case the optician shall forthwith report to that practitioner any findings of injury or disease of the eye of which the practitioner may be unaware."

The issues in this appeal

15. In opening this appeal, Miss Lang told me that it involved two questions of principle, namely the extent of the duty of an optician who refers her patient to a registered medical practitioner or to a hospital, and whether the Disciplinary Committee is under a duty to give reasons for its decision when it gives it or within a reasonable time thereafter.

16. With regard to the second question, when Mrs Threlfall filed her appeal, the Disciplinary Committee had not given any reasons for its decision. However, the Committee subsequently gave written reasons. They were communicated to Mrs Threlfall by letter dated 13 August 2004. They had been written on 22 July 2004, when the Chairman of the Disciplinary Committee met with the other members of the Committee for that purpose, and exhibited to the Chairman's witness statement of the same date. Neither the legal assessor to the Committee nor the clerk to the Committee was present on 22 July when the Committee drafted its reasons. It is evident that the Committee produced its reasons because of, and for the purposes of, this appeal: the reasons and the witness statement exhibiting them came into existence on the same date.

17. Miss Lang, for understandable reasons, did not wish to pursue this appeal on purely procedural grounds. She did not, therefore, object to the admission of the Committee's reasons. She did not contend that the decision of the Committee should be quashed on grounds of the inadequacy of their reasons. She did contend that the Committee had failed to comply with a duty to give its reasons within a reasonable time of its decision.

18. The written reasons of the Disciplinary Committee were as follows:

"As a result of the hearing, we found all the particulars of the charge proven. We consider that Mrs Threlfall had been guilty of serious professional misconduct.

In reaching that decision, we had regard to:

1. *There was no evidence that Mrs Threlfall had taken an adequate history. We considered that she failed to identify (or alternatively, failed to eliminate) a number of symptoms that were, in our view, either described by the patient or which would have emerged on the careful questioning which we would have expected in the circumstances.*
2. *The examination was inadequate in that although a large floater was identified, Mrs Threlfall did not undertake the additional investigations that we would have expected to have been carried out. For that reason, although Patient A was referred to a hospital eye department, we did not consider that the doctor who received the phone call was provided with the necessary information to allow an informed decision to be made about the urgency with which Patient A should be seen. In our opinion, had an adequate history been taken and an adequate examination been carried out, a more precise and informed referral would have been made. The emerging situation placed a duty on Mrs Threlfall to deploy her professional skills. This she failed to do.*
3. *We considered the record keeping to be inadequate in that in our view, the records maintained would not have provided a subsequent practitioner with sufficient information to establish Patient A's history and condition. Furthermore, there is no evidence of the correspondence regarding the consultation that we would have expected to have seen.*

For all those reasons, we determined that Mrs Threlfall was guilty of serious professional misconduct as charged. In many cases, such a determination would justify erasure from the register but we drew back from that because:

1. *We had no evidence of any previous complaints against Mrs Threlfall.*
2. *Mrs Threlfall's demeanour was such that we were satisfied that she would in future take due care when examining patients.*
3. *She had made a referral to a hospital, even if the circumstances and underlying records and examination were unsatisfactory."*

The scope of this appeal

19. Until the coming into force of section 32 of the National Health Service Reforms and Health Care Professions Act 2002, appeals from the Disciplinary Committee of the GOC went to the Privy Council. The instant appeal is, I believe, the first appeal to come before the High Court since the transfer to it of that appellate jurisdiction. It is not, however, suggested that the practice or approach of this Court on such appeals should differ from that of the Privy Council, and as a result there was little, if any, dispute between the parties as to the scope of this appeal. It is nonetheless necessary to set out the position, since it bears on the issues that are in dispute, and in particular on the degree of scrutiny to be given to the Disciplinary Committee's decision.

20. An appeal under section 22 of the Opticians Act 1989 is not limited to questions of law. It includes questions of fact. CPR Part 52.11(1) provides:

"Every appeal will be limited to a review of the decision of the lower court unless –

(a) a practice direction makes different provision for a particular category of appeal; …"

It would appear from paragraph 52.11(1)(b) that a re-hearing is generally something different from a *"review of the decision of the lower court"*. The Practice Direction to Part 52 does make apparently different provision: paragraph 22.3 (2) provides that appeals under section 23 of the Opticians Act 1989 *"will be by way of re-hearing"*. It is nonetheless clear that a re-hearing in this context is in general a review of the decision of the lower court; c.f. ***Assicurazioni Generali SpA v Arab Insurance Group*** [2002] EWCA Civ 1642, [2003] 1 WLR 577. In other words, the appeal court does not normally hear evidence afresh, but considers the appeal on the basis of the record of the evidence given in the court below.

21. Because it does not itself hear the witnesses give evidence, the Court must take into account that the Disciplinary Committee was in a far better position to assess the reliability of the evidence of live witnesses where it was in issue. In that respect, this Court is in a similar position to the Court of Appeal hearing an appeal from a decision made by a High Court judge following a trial. There is, however, an important difference between an appeal from a High Court judge and an appeal from a Disciplinary Committee. The Disciplinary Committee possesses professional expertise that a High Court judge lacks. In the present case, the Committee comprised, in addition to the Chairman and a member nominated by the Privy Council, a dispensing optician, an optometrist, and an ophthalmologist. This Court appreciates that such a Disciplinary Committee is better qualified to assess evidence relating to professional practice, and the gravity of any shortcomings, and it therefore accords the decision of the Committee an appropriate measure of respect, but no more: see ***Ghosh v General Medical Council*** [2001] UKPC 29, [2001] 1 WLR 1915, at [33] and [34] and ***Preiss v General Dental Council*** [2001] UKPC 36, [2001] 1 WLR 1926 at [26] to [29]. These decisions make it clear that the Court should be more ready to overrule a disciplinary tribunal than previously appeared to be the case. It however remains the position that an appellant must establish an error, of law or fact or of judgment, on the part of the tribunal.

The Appellant's application to put her witness statement in evidence

22. As a preliminary matter, Miss Lang sought to put in evidence a witness statement of Mrs Threlfall containing her account of the events of 12 July 2002. The basis of the application was that Mrs Threlfall had experienced such an abnormal degree of anxiety and panic when she gave her oral evidence to the Disciplinary Committee that she was not able to give a coherent account of events; and that it was not "in the interests of justice for the appeal court to determine the appeal without the Appellant having an opportunity to give her account of events". I refused this application, and stated that I should give my reasons in my judgement on the substantive issues; and I now do so.

23. The general rule is that an appeal court will not receive evidence which was not before the lower court without special grounds justifying doing so: see CPR Rule 52.11(2) and ***Hertfordshire Investments Ltd v Bubb*** [2000] 1 WLR 2318 and ***Hamilton v Al Fayed***, an unreported decision of the Court of Appeal given on 21 December 2000 noted in *Civil Procedure 2004* (the White Book) at paragraph 52.11.2.

24. The witness statement in the present case is not new evidence in the sense of evidence that was unavailable to Mrs Threlfall at the date of the hearing before the Committee. It is her evidence in a new form. To accept a witness statement in place of or in addition to her oral evidence before the lower court would allow a witness to improve her evidence as compared with that before the lower court. In addition, Mrs Threlfall's witness statement would not be the subject of cross-examination, whereas the evidence before the Committee was so subject. Moreover, the appeal court is not in a position to assess the reliability and

credibility of that evidence of the appellant in comparison with that given by Patient A, since it has not heard and would not hear either of them give evidence orally.

25. As Ms Foster accepted, different considerations might arise if it were shown that Mrs Threlfall had been treated unfairly or oppressively by or before the Committee. In that event, in most cases the appropriate remedy would not be to receive a witness statement as evidence, but to quash the decision of the Committee and to order a rehearing before a differently constituted Committee. However, in the present case, unfairness or oppression is not and could not be suggested. It is apparent from the transcript that during the hearing before the Disciplinary Committee it was appreciated that Mrs Threlfall was having difficulty at times, and that she was given the opportunity of taking a break. Thus, at page 167 of the transcript, she was asked by Mr Albuery whether she wanted a break; he asked her to tell him when she was ready to continue, and she did continue. At page 171, she was again asked by him whether she wanted a break. She said: "*No. Carry on. Just say the question in a different way for me.*" At page 172, the Chairman Ms Wilcox asked her, "Mrs Threlfall, would you like a break? Or at least sit down perhaps?" Mrs Threlfall responded, *"I'm just trying to concentrate very hard."* Ms Wilcox responded, *"It is difficult. We understand that. And if you want to break, that's fine by us."*

26. In my judgment, there is no special reason that could justify the reception of the witness statement, and there are good reasons, to which I have referred above, why it should not be received in evidence.

Reasons for the decision of a Disciplinary Committee

27. Ms Lang submitted that the Disciplinary Committee was under a duty to give adequate reasons for its decision at, or within a reasonable time after, making it. Ms Foster contended that *"the law does not impose … a general duty (to give reasons) in the context of professional regulation … There is no common law obligation upon the Respondents as asserted by the Appellant, nor a statutory duty so to do."* She did, however, accept that it is good practice for a Disciplinary Committee to give adequate reasons for its decisions.

28. There are three possible sources of an obligation to give reasons: statute, the common law and Article 6 of the European Convention on Human Rights.

29. There is no express statutory obligation on a Disciplinary Committee to give reasons for its decisions. It is, I think, unnecessary to decide whether an obligation to give reasons is to be implied from the applicable statutory provisions, since the statutory provisions are to be taken into account in determining whether there is an obligation at common law to give adequate reasons: see ***Stefan v GMC*** [1999] 1 WLR 1293. Given that the right of appeal from its decisions may be rendered illusory if the optician does not know the basis for the decision against her (as to which, see the authorities cited in *Stefan* at 1298g-1299d), and the importance to an optician of a finding of serious professional misconduct, in my judgment a Disciplinary Committee is under a duty at common law to give adequate reasons for such a finding, and to do so in good time for the optician to be able to exercise the right of appeal provided for in section 23. The extent of this obligation is described in the decision of the Privy Council in *Stefan* at 1304b-d. Both the parties and the appellate court must be able to understand why the Committee reached its decision.

30. Late reasons will not necessarily be rejected by the Court, but it will exercise caution about accepting them: see ***Nash v Chelsea College of Art and Design*** [2001] EWHC Admin 538 at [34], in which the earlier authorities are summarised. There should be added to that summary the proposition that reasons that are merely elucidatory of earlier reasons are received and regarded more tolerantly by the Court: see ***Ashworth v H*** [2001] EWHC Admin 901 at [56].

31. There are reasons in addition to the statutory time limit for appeals that require reasons to be given within a reasonable time. There is the risk, referred to in *Nash*, that late reasons will be composed in order retrospectively to address criticisms of the decision and to justify the original decision. That risk is greater if reasons are given after appeal or judicial review proceedings have been issued in which the objections to the decision in question are set out. Leaving such considerations aside, in practice the passage of time may make it difficult for the tribunal to recall and to record its reasons. The present case would seem to be an example of that difficulty. The written reasons given by the Committee are in the most general terms. It is only possible to make real sense of them if they are read together with the transcript and the charge. The Disciplinary Committee's reasons for its decision read as if they were formulated by a Committee who were unable to recall precisely what their findings were. For example, if the Committee had formulated their reasons immediately after the hearing, they should have been able to identify the additional investigations referred to in paragraph 2 that Mrs Threlfall should have carried out.

32. This is not to say that the Disciplinary Committee's reasons are necessarily inadequate as a matter of law. The authorities show that brevity and lack of specificity may be acceptable, and the reasons must be read in conjunction with the transcript. So read, in the present case the Court is able to discern reasons for its decision. Nonetheless, it would be disappointing if the general standard of reasons given by Disciplinary Committees were of the standard of those in the present case. More importantly, the reasons given by the Committee leave undetermined important issues of fact. They are, I suspect, incomplete.

33. I turn to consider the applicability of Article 6. The authorities establish that the decision by a disciplinary tribunal to suspend or to disqualify a professional person is a determination of his civil rights and obligations within the meaning of Article 6.1: see ***Albert and le Compte v Belgium*** (1983) 5 EHRR 533. On the other hand, there are authorities which establish that the decision of a disciplinary tribunal to admonish a professional person is not such a determination, and suggest that Article 6 did not apply to the tribunal's proceedings, even if the tribunal had power to suspend all to disqualify him: see, e.g., ***X v United Kingdom*** (1983) 6 EHRR 583 (a decision of the Commission). However, it seems to me to be obvious that the applicability of Article 6 must be determined on the basis of the jurisdiction and powers of the tribunal rather than its ultimate decision. The adjectival law applicable to its proceedings must be determined before the proceedings begin rather than after they have been completed. Thus the question whether a person subject to disciplinary proceedings is entitled to a "fair and public hearing … by an independent and impartial tribunal" must be determined before the hearing and before its result is known. In ***Tehrani v United Kingdom Central Council for Nursing,Midwifery & Health Visiting*** [2001] IRLR 208, Lord Mackay of Drumadoon, in the Court of Session, said, in proceedings in which judicial review was sought of disciplinary proceedings before a hearing had taken place, at [33]:

"What remains in dispute, however, is whether the disciplinary proceedings initiated against the petitioner could lead to a 'determination of her civil rights and obligations' within the meaning of Article 6(1). I use the word 'could' advisedly. In my opinion, for the purposes of the present proceedings it is not necessary for the petitioner to establish that, whatever their outcome, the disciplinary proceedings will result in a determination of her civil rights and obligations. In my opinion, if the petitioner can

establish that the disciplinary proceedings could result in a finding that would constitute a determination of her civil rights and obligations, the decision to initiate those disciplinary proceedings is open to challenge as being incompatible with the petitioner's Convention rights."

That passage was cited with approval by the Court of Appeal in ***R (Wayne Thompson) v the Law Society*** [2004] EWCA Civ 167, at [83].

34. The cases in which it has been held that a professional person has no remedy under Article 6 in respect of a decision to reprimand him must, I think, be explained on the basis that his civil rights and obligations have not been affected, and he cannot therefore complain of a breach of Article 6, in the same way that a defendant in criminal proceedings who has been acquitted could not complain of a procedural irregularity in those proceedings. As it was put in ***X v UK***, not having been suspended or disqualified from practice, "he cannot claim to be a victim of a violation of this provision of the Convention".

35. However, it follows from the fact that the disciplinary proceedings in the present case might have resulted in a decision to suspend or to disqualify Mrs Threlfall that Article 6 applied to those proceedings. In addition, a financial penalty imposed by a disciplinary tribunal creates an obligation to pay it, and for this reason there may have been an actual determination of Mrs Threlfall's civil rights and obligations. This point was not argued, and I express no concluded view on it.

36. The proceedings to which Article 6 applies, and which must satisfy its requirements, are not confined to those before the Disciplinary Committee. The whole of the proceedings, including the availability of an appeal to this Court, must be considered in determining whether the requirements of Article 6 are complied with: see ***Ghosh*** at [31] and [32]. Again, however, since the effectiveness of the right of appeal may depend on the giving of reasons by the Disciplinary Committee, in any case in which a decision is made to impose a disciplinary order (as defined in section 14 of the Opticians Act 1989) I think that Article 6 does require adequate reasons to be given by it in good time for the right of appeal to be exercised.

37. Lastly, I mention that there is a further practical reason why Disciplinary Committees should give adequate reasons for their decisions, and that is to enable the Council for the Regulation of Health Care Professionals to consider whether to exercise its powers under section 29 of the 2002 Act.

38. In the present case, given the absence of any objection on the part of Mrs Threlfall, the Committee's late reasons will be accepted. It is not suggested that they are not the reasons the Committee had in mind when it announced its decision. There has been no breach of any mandatory legislative provision. And it is not suggested on behalf of Mrs Threlfall that she has been prejudiced by their late production.

39. It is not to be assumed, however, that in future cases reasons produced after the commencement of an appeal will be accepted by the Court in the absence of good reason for the delay.

The duty of Mrs Threlfall

40. Both sides argued this case on the basis that the duty of Mrs Threlfall when she saw her patient was defined by regulation 3 of the Sight Testing (Examination and Prescription) (No. 2) Regulations 1989 and paragraphs 3 and 4 of the Rules relating to Injury or Disease of the Eye 1999. It was assumed that the 1989 Regulations apply to any examination by an optician of a patient's eye.

41. I do not think that this is necessarily the case. The 1989 Regulations were made under the power conferred on the Secretary of State by section 26 of the 1989 Act, which empower him to make regulations applicable when a registered medical practitioner or registered ophthalmic opticians tests the sight of another person. Section 36 or the Act provides:

"References in this Act to testing sight are references to testing sight with the object of determining whether there is any and, if so what defect of sight and of correcting, remedying or relieving any such defect of an anatomical or physiological nature by means of an optical appliance prescribed on the basis of the determination."

References in the Regulations to testing sight must have the same meaning. The effect of regulation 3 is to require an optician to perform examinations for the purpose of detecting any injury, disease or abnormality even when the patient does not complain of any such condition, and the purpose of his seeing the optician is only for his sight to be tested. On the other hand, if, for example, a patient is seen by an optician complaining of an eye infection, it seems to me that regulation 3 is inapplicable, and rule 3 of the 1999 Rules alone is applicable. In the present case, the patient came to Mrs Threlfall not asking for an eye test, but concerned with his abnormal vision. I do not think that at that stage regulation 3 of the 1989 applied. During the course of her examination of the patient, his sight was tested. I have some doubt whether that brought regulation 3 into effect, since the test may not have had the object of correcting any defect of sight by means of an optical appliance. However, since both sides argued this case on the basis that regulation 3 applied, I shall assume that it did.

42. It is common ground that an optician performing an examination to which regulation 3 applies is not required by it to diagnose injury disease or abnormality of the eye. The purpose of the examination is to detect signs of injury, disease or abnormality. In some cases, the sign and the injury, disease or abnormality will be identical. If the optician sees a scratch on the surface of the eye, he will have detected both an injury and its sign. In other cases they will be different. The injury, disease or abnormality may not be of the eye: it may, for example, be diabetes.

43. However, in my judgment regulation 3 is not a comprehensive statement of the professional duty of an optician. It does not qualify the examination referred to in paragraph (1)(a)(i) or (ii), or the quality of the examination referred to in (iii). An optician is under a duty to use reasonable care and skill. The examination referred to in regulation 3(1)(a)(i) must be a reasonable examination, such as would be performed by a reasonably competent optician in the circumstances; so must that referred to in (ii) and those referred to in (iii). Furthermore, an optician will fail in her duty if she does not perform such additional examinations was would appear to any reasonably competent optician to be clinically necessary. And if regulation 3 does not apply to the particular circumstances, the optician must use reasonable skill and care in examining and advising and caring for her patient. Not to have referred patient A to an ophthalmologist would have been a breach of that duty, and, depending on the circumstances, could constitute serious professional misconduct.

44. It follows from the fact that an optician is not required to diagnose illness, disease or abnormality that rule 3 of the 1999 Rules relating to Injury or Disease of the Eye does not require or envisage that the optician will have identified the injury or disease of the eye for which the patient suffers. It is sufficient that the optician concludes that the patient is suffering from some injury or disease of the eye, the diagnosis of which is for the registered medical practitioner to whom the patient is referred.

Curiously, while rule 3 (and section 31(5)) suggest that the optician must have concluded that the patient is suffering from an injury or disease of the eye, rule 4(b) indicates that the reference may have been made where there are only "grounds for thinking that the patient may be suffering" from such an injury or disease. The resolution of this apparent inconsistency may be that rule 3 applies where there are sufficient grounds for thinking that the patient may be so suffering: in such circumstances, it "appears to a registered optician" that he is suffering.

Breach of duty

45. As I have already pointed out, the Disciplinary Committee did not specify the inadequacies in Mrs Threlfall's examination of her patient. It is however clear from the charge, and indeed from the transcript, what additional investigations are referred to in paragraph 2 of their reasons, since the only additional investigations suggested were mentioned in the charge, namely an examination of the interior of the right eye, and in particular the fundus, after dilation, and a visual field test. These were investigations that Mrs Threlfall accepted should normally be performed in the case of a patient presenting with the symptoms described by her.

46. Mrs Threlfall justified her failure to carry out these investigations. She suggested that her patient was too anxious to have his eye dilated or to take a visual field test. The Disciplinary Committee must be taken to have rejected that explanation. Her admission that she told him that dilation would risk making any existing damage worse (a risk which was at variance with the undisputed expert evidence of Dr Harper) would hardly reassure an anxious patient, and according to the patient made him even more anxious. Moreover given that Mrs Threlfall said that she expected her patient to be dilated at the hospital, the excuse she gave him would increase his anxiety if his eye were dilated there.

47. The second justification advanced on behalf of Mrs Threlfall for her omission to dilate the patient's pupil or to carry out a visual field test was that the necessary tests would in any event be performed at the hospital to which the patient was referred. She said that she had telephoned the hospital after she had seen the large floater in the patient's right eye and told the doctor that she thought he could be at risk of a detached retina. He said that she had only telephoned the hospital at his insistence: see page 110 of the transcript. Unfortunately, his cross-examination on this issue was interrupted (see page 130 ff.), but he clearly maintained his account.

48. However, the view taken by the Disciplinary Committee was that it was beside the point that the patient was to be fully examined at a hospital. The duty of the optician was to obtain adequate information so as to be able provide the hospital with the information it required to determine the urgency with which the patient should be seen. Mrs Threlfall did not do so.

49. It seems to me to follow that the Disciplinary Committee concluded that her examination of the patient had been cursory and fell seriously below the requirements of an optician's professional duty.

50. In my judgment, it is irrelevant to the Disciplinary Committee's assessment that Mrs Threlfall failed to fulfil her duty to her patient whether or not regulation 3 of the 1989 regulations applied. If it did, Mrs Threlfall failed to perform an adequate intra-ocular examination, as required by paragraph (a)(ii), or an additional examination, namely a visual field test, that would have appeared to a reasonably competent optician to be clinically necessary. If it did not, Mrs Threlfall's failure was to carry out the investigations that a reasonably competent optician should have carried out. For this reason, I reject the contention that the failure of the Disciplinary Committee in their reasons to refer to regulation 3 was an error of law justifying this court's interference with their decision. For the same reason, I reject the contention that the Committee failed to appreciate the limited duty of an optician who undertakes an examination of the eye of a person with a view to determining whether there is any sign of injury or disease or other abnormality.

Mrs Threlfall's failure to keep adequate records

51. This finding could scarcely be disputed. Mrs Threlfall said that she suspected a detached retina, but did not record this fact. She did not record her reasons for omitting to dilate the retina or to carry out a visual field test. She did not record answers to the questions she said she put, such as whether the patient was seeing lights. She recorded that she had had a poor view of the periphery, but did not give any explanation for that. The Disciplinary Committee understandably found that these matters should have been recorded.

Unfairness: the allegation that Mrs Threlfall had failed to secure an immediate referral

52. The charge against Mrs Threlfall did not include an allegation that she failed to secure or to seek a same-day referral of her patient. By a same-day referral I mean an appointment with an ophthalmologist at a hospital on the same day as she saw the patient, i.e. on 12 July 2002. On the first day of the hearing, during cross-examination, it was put to her that she could have arranged such an appointment. At the beginning of the second day of the hearing, after she had given her evidence, but before her expert evidence had been called, the GOC obtained leave to introduce into the case a document published by the College of Optometrists entitled "Framework for Optometric Referrals". It contained guidance as to the conditions for which emergency (same day) referral was appropriate and those for which urgent referral was appropriate. Retinal detachment was included among the conditions for which emergency referral was appropriate. The document stated that there might also be guidelines issued by the local ophthalmic unit, and indeed Mrs Threlfall claimed to have followed local guidelines in making the referral to the Christopher Homes Eye Unit.

53. If the GOC wished to allege that Mrs Threlfall's failure to make an emergency referral for her patient constituted, or was part of conduct constituting, serious professional misconduct, that failure should have been included in the charge. It was not. However, the Disciplinary Committee did not criticise her for this failure. Its decision was based on her failure to put herself in a position to be able adequately to inform the ophthalmologist of her patient's condition, so as to enable the ophthalmologist to decide whether an emergency was required. In addition, Mrs Threlfall and her experts were able to address the allegation. For these reasons, I do not think that the failure of the GOC to include in the original charge against Mrs Threlfall her failure to make an emergency referral, or the consideration of the desirability of an emergency referral during the hearing, caused any significant unfairness.

Serious professional misconduct

54. I have found the question whether the defaults of Mrs Threlfall constituted serious professional misconduct far from easy. It is a question that this Court must consider itself, while giving due weight to the decision of the Disciplinary Committee.

The direction to the Committee

55. The first issue to addressed under this head is whether the Disciplinary Committee was given a correct and adequate legal direction. Miss Lang submitted that the Committee was incorrectly directed as to what constitutes serious professional misconduct.

56. Having found that the defaults alleged in the charge were proved, the Committee considered separately whether they amounted to serious professional misconduct. It was submitted on behalf of Mrs Threlfall that her actions amounted to an error of judgment, but not to serious professional misconduct. The legal assessor directed the Committee as follows:

"On the basis of the facts that you have found proved, and by way of admission and on the evidence you have heard, you now go on to consider the question of whether this amounts to serious professional misconduct and perhaps the most significant word of those three is the word 'serious'. You have heard from both the representative of the General Optical Council and also the representative of this respondent a little bit about what is meant by serious professional misconduct. At this stage, my advice to you is not to pay regard to the character references – we know already that this lady has never been in any sort of professional difficulties before – but you have to determine whether what you have now found as facts in the particulars amount to this particular offence of serious professional misconduct, which means exactly what it says. It is conduct on the part of a practitioner in connection with their profession which you find to be serious.

Now, misconduct may, but it does not have to, involve behaviour worthy of moral disapprobation or turpitude, but it may also consist of a falling short of the acceptable standards of the profession, as judged by the standards at the time of the events in question and whether this Committee takes the view that that falling short is considered to be serious. You must take into account in respect of this conduct that you find proved what effect it has on the reputation of the profession generally, but only to the extent that you consider that such effect would be serious. While you are the judges of what is or is not serious professional misconduct, you should only find the practitioner guilty of that if you are satisfied so that you are sure that she is guilty on the facts that have been proved, of serious professional misconduct."

57. Miss Lang referred me to the statement of Lord Cooke in ***Preiss*** at [28]:

It is settled that serious professional misconduct does not require moral turpitude. Gross professional negligence can fall within it. Something more is required than a degree of negligence to give rise to civil liability but not calling for the opprobrium that inevitably attaches to the disciplinary offence …

In **Rao v GMC** (PC Appeal no. 21 of 2002), it was held that the legal assessor should have: *"included a reference to the observations…in the case of* ***Preiss*** *… this was a borderline case of serious professional misconduct. It was based on a single incident. There was undoubted negligence but something more was required to constitute serious professional misconduct and to attach the stigma of such a finding to a doctor of some 25 years standing with a hitherto unblemished career. Their lordships are…far from satisfied that if properly advised the PCC would inevitably have arrived at the same conclusion."*

58. The importance of distinguishing between negligence and serious professional misconduct is especially important where what is alleged is an isolated incident. In ***Silver v GMC*** (PC Appeal no. 66 of 2002) the Privy Council said, at [20]:

"In the instant case there can be little doubt that there was negligence and that it was open to the Committee to find that this constituted professional misconduct. However the Committee should have gone on to consider as a separate issue whether this amounted to serious professional misconduct. It is by no means self-evident that if this question had been posed it would have been answered in the affirmative. It was relevant to consider that this was an isolated incident relating to one patient (albeit over a number of days) as compared with a number of patients over a longer period of time."

59. Miss Lang suggested that an express reference by the assessor was required to the guidance in ***Preiss***. I do not accept this. It is sufficient that the substance of the definition is clearly communicated to the Committee. In my judgment, the direction given by the assessor was adequate. He stressed the importance of the misconduct found being serious. It would nonetheless have been better if he had drawn a clearer distinction between ordinary negligence and serious professional misconduct. The words "serious" and "misconduct" must both be given their full weight.

60. The reference to the reputation of the profession was however unfortunate. It is not the damage to the reputation of the profession that is qualified by the word ***"serious";*** it is the misconduct of the optician. However, Miss Lang did not take this point.

61. I suggest that there is much to be said for legal assessors to Disciplinary Committees being provided with a standard direction on professional misconduct, in the same way that standard directions, formulated by the Judicial Studies Board, are available for judges and juries in criminal cases.

The outcome for the patient

62. Miss Lang submitted that the outcome to the patient, which was a successful operation and the saving of his sight, precluded a valid finding of serious professional misconduct. I disagree. The outcome to a patient is a relevant consideration. But it is the risk to the patient, which the optician should have appreciated, that is also significant. Here, the risk to the patient was considerable: without prompt treatment, he might lose the sight of his right eye. It could not preclude a serious failure to make a proper investigation of his condition when he presented to Mrs Threlfall from being regarded as serious misconduct.

63. Miss Lang also relied on the fact that in the end the patient had his operation on the same day as the appointment Mrs Threlfall had arranged. However, as indicated above, there was considerable evidence before the Disciplinary Committee that an emergency, i.e. same-day, appointment was appropriate for a case of suspected retinal detachment. The Disciplinary Committee made the valid point, in its reasons, that by failing to carry out a proper investigation Mrs Threlfall precluded herself from being able to provide the hospital with the information that should have been available for it to decide on the urgency of an appointment.

64. Miss Lang suggested that the condition of patient A must have deteriorated after he saw Mrs Threlfall. I agree. His vision deteriorated between her testing of his visual acuity and his examination at Warrington A&E. His description of his vision also indicated a significant deterioration. Again, however, I do not think that this affects the finding of the Disciplinary Committee. To the contrary, the deterioration of his condition may be seen as illustrative of the risks of delay in the treatment of a retinal detachment.

The misconduct found by the Committee

65. There were conflicting accounts of Patient A's encounter with Mrs Threlfall. The GOC's case was that she conducted a cursory examination of Patient A, gave an untrue excuse for omitting to dilate his eye; that he, and not she, mentioned the possibility of retinal detachment. Her recording of her examination was wholly inadequate, and she did not provide him with a referral letter, as she clearly should have done. Given that Patient A was a young myope, it was common ground that his symptoms indicated an obvious risk of retinal detachment, and an emergency referral could and should have been secured; and there was a real and obvious danger of the loss of the sight of the right eye if no referral was made. Nonetheless, Mrs Threlfall would have sent him away without making a referral if he had not insisted on one; and when making the referral she did not inform the doctor to whom she spoke that there was a serious, or any, risk of retinal detachment.

66. An alternative, but possible, determination of the facts was that Mrs Threlfall's brief examination of Patient A was sufficient for her to appreciate that there was a risk of retinal detachment, and that she did what was appropriate in that event, which was to refer him to the Christopher Home Eye Unit at Wigan Hospital, in accordance with local practice. She failed to dilate the eye, which would have provided additional relevant information, for no good reason, and similarly failed to perform a visual field test. She told the hospital that Patient A might be suffering from retinal detachment, and it was for the hospital to decide how quickly he should be seen. She advised the patient to go to casualty if his vision deteriorated. She omitted to provide a referral letter, or properly to record her examination.

67. In both the scenario described in [65] and that described in [66 above, Mrs Threlfall failed to carry out an adequate examination of her patient's eye as charged. In both scenarios she failed adequately to record her examination. If the Disciplinary Committee found the facts as set out at [65], it was clearly open to it to find that she had been guilty of serious professional misconduct, and I should certainly have upheld such a finding. On the other hand, if it found the facts as set out [66], in my judgment, while there would have been negligence, they would not constitute serious professional misconduct.

68. The difficulty in this case is that the reasons given by the Disciplinary Committee do not permit this Court to determine which if either of these scenarios was found by it to have occurred. Indeed, the reference to "a *more* precise and informed referral" suggests that some information was given to the hospital by Mrs Threlfall beyond the mere request for an appointment for her patient. There was no finding that Mrs Threlfall provided no information to the doctor who received her telephone call.

69. In my judgment, it was crucial to the gravity of her misconduct whether she made the referral at her own instigation, rather than at her patient's insistence, and whether she informed the doctor that Patient A might have a retinal detachment. It is unfortunate that neither of these issues was addressed in the particulars of the charge. They should have been. Although not expressly part of the misconduct charged, they were extensively canvassed at the hearing. Had they addressed in the particulars of the charge, the Disciplinary Committee would have had to make express findings on them.

70. In my judgment, I must interpret the Disciplinary Committee's reasons most favourably to Mrs Threlfall. I should not assume that it made findings against her which it did not record. So doing, the facts found by it, concerning as they do an isolated incident against the background of an otherwise unblemished professional career, do not justify the finding of serious professional misconduct: c.f. the judgment of the Privy Council in ***Rao***.

71. Miss Lang also complained with justification about paragraph 1 of the Disciplinary Committee's reasons, which contains the finding of a failure to take an adequate history. No such failure was charged. The failure to take an adequate history clearly weighed with the Committee in reaching its decision that Mrs Threlfall's conduct amounted to serious professional misconduct. To that extent, its finding was flawed. However, if the facts found by the Committee as to Mrs Threlfall's examination of patient A and the referral been as set out at [65] above, I should have upheld the finding of serious professional misconduct, which would have been justified on those facts alone.

72. For the reasons set out above, the appeal will be allowed and the decision of the Disciplinary Committee will be quashed.

Beverley Lang QC (instructed by Fiona Mitchell, solicitor of the Association of Optometrists) for the Appellant
Alison Foster QC (instructed by Blake Lapthorn Linnell) for the Respondent