

## PUBLIC RECORD

Date: 12/03/2021

Medical Practitioner's name: Dr Marco CAPECE

GMC reference number: 7518099

Primary medical qualification: Laurea 2011 Universita degli Studi di Napoli Federico II

Type of case	Outcome on impairment
Review - Misconduct	Not Impaired

**Summary of outcome**

Suspension to expire

**Tribunal:**

Legally Qualified Chair	Mr Richard Kember
Lay Tribunal Member:	Mrs Ann Bishop
Medical Tribunal Member:	Dr Timothy Oakley
Tribunal Clerk:	Ms Angela Carney

**Attendance and Representation:**

Medical Practitioner:	Present and not represented
Medical Practitioner's Representative:	N/A
GMC Representative:	Mr Michael Blakey, Counsel

**Attendance of Press / Public**

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held in public.

## Overarching Objective

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s1 Medical Act 1983 (the 1983 Act) to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

## Determination on Impairment - 12/03/2021

1. The Tribunal must decide in accordance with Rule 22(1)(f) of the General Medical Council (GMC) (Fitness to Practise) Rules 2004, as amended ('the Rules') whether Dr Capece's fitness to practise is impaired by reason of misconduct and whether the practitioner has failed to comply with any requirement imposed upon him as a condition of registration.

## Background

2. Dr Capece qualified in 2011 from the University of Naples Federico II, Italy and subsequently pursued specialist training in Urology. At the time of the events that were the subject of the substantive hearing in February 2020, he was undertaking a Fellowship at the University College London Hospital (UCLH) in the Andrology Department as part of his specialist training scheme in Italy, which is the equivalent to the specialist register scheme in the UK. Dr Capece completed his training in July 2017 and was appointed as a Specialist Urologist at a hospital in Italy from October 2017 – August 2018. Since April 2019, Dr Capece has been working as a Research Fellow at the University of Naples Federico II, in the Interdepartmental Centre for Research in Robotic Surgery.

3. The Allegation that led to Dr Capece's hearing in February 2020 related to gender reassignment surgery carried out on Patient A on 29 October 2016. Dr Capece did not perform the surgery himself but had been delegated to carry out the consent procedure by another Consultant, Mr B, who was to perform the procedure. Patient A consented to have a hysterectomy and metoidioplasty but had not consented to having his vagina removed (vaginectomy). Mr B, the consultant surgeon, performed the vaginectomy in error. Dr Capece did not perform the surgery himself but was delegated to carry out the consent procedure by Mr B. The cases of Dr Capece and Mr B were heard together.

4. The facts found proved at Dr Capece's hearing, which took place in February 2020 ('the 2020 Tribunal'), can be summarised as follows. On or around 28 October 2016, whilst obtaining consent from Patient A for a vaginectomy procedure, Dr Capece added the words '+vaginectomy' on to the pink copy of Patient A's consent form without the patient's knowledge. The 2020 Tribunal also found proved that Dr Capece had added this information despite Patient A having previously stated he did not want a vaginectomy and despite not having obtained consent for the vaginectomy. The 2020 Tribunal also found proved that

Patient A had not consented to the vaginectomy procedure. It found that Dr Capece's actions were dishonest.

5. The 2020 Tribunal, having found that the Dr Capece's actions amounted to misconduct, went on to consider whether, as a result of that misconduct, his fitness to practise was impaired.

6. The 2020 Tribunal acknowledged that it was a single and isolated incident in Dr Capece's career and there was no evidence of repetition or that he had otherwise acted dishonestly in the past. It was prepared to accept that when Dr Capece made the amendment to the consent form, regardless of the motivation, it was not premeditated and was done in a moment of panic. However, it noted that Dr Capece maintained the false narrative that he had a discussion with Patient A on the morning of 29 October 2016 and that Patient A had changed his mind and consented to a vaginectomy.

7. The 2020 Tribunal acknowledged that Dr Capece had not caused the vaginectomy to be performed. However, it considered that it was likely that Dr Capece contributed to the considerable and lasting emotional harm this has had on Patient A. The 2020 Tribunal noted that Patient A's complaint was initially dismissed as a result of the alteration made by Dr Capece and it was only by good fortune that Patient A was able to produce his carbon copy of the consent form which he signed on 28 October 2016. The carbon copy did not have the words '+vaginectomy' on it and thereby confirmed that Patient A had not signed a consent form with this procedure on it. The 2020 Tribunal also noted that as a result of Dr Capece's false narrative, Patient A had never received an apology or admission of surgical error.

8. The 2020 Tribunal considered that dishonesty was very difficult to remedy and that Dr Capece had not acknowledged the part that he played in undermining Patient A's credibility.

9. The 2020 Tribunal considered that although the consent form was altered after Patient A's surgery had commenced, Dr Capece did put Patient A at harm as a result of his dishonest actions. The 2020 Tribunal considered that it was unlikely Dr Capece would do it again in the future in a similar situation. The 2020 Tribunal considered that Dr Capece probably bitterly regretted his actions and that the proceedings had had a profound impact upon him. Nevertheless, without full insight into his dishonesty, the 2020 Tribunal could not be satisfied that there was no risk of repetition of Dr Capece's misconduct. However it considered this risk to be low. The 2020 Tribunal determined that Dr Capece's actions brought the medical profession into disrepute and that he had breached a fundamental tenet of the medical profession.

10. Despite the risk of repetition being low, the 2020 Tribunal concluded that Dr Capece's misconduct was so serious that a finding of impairment was necessary in order to uphold, promote and maintain public confidence in the medical profession, and promote and maintain proper professional standards and conduct for the members of the profession. It determined that Dr Capece's fitness to practise was impaired by reason of misconduct.

### Aggravating and Mitigating Factors

11. The 2020 Tribunal considered the following factors to be aggravating:
  - Dr Capece’s dishonesty was serious professional dishonesty in a clinical environment;
  - A lack of insight demonstrated by a failure to admit his wrongdoing and then continuing to maintain a narrative he must have known to be false. However, the Tribunal noted in the course of Dr Capece’s oral submissions that he said he had accepted the Tribunal’s findings and that he was at fault. The Tribunal considered that although this was at a late stage, it was evidence of emerging insight and a willingness to acknowledge and face up to his wrongdoing.
  
12. The 2020 Tribunal identified the following mitigating factors:
  - It was a single and isolated incident;
  - Dr Capece was a junior fellow (a trainee) at the time;
  - Dr Capece was not the operating or assisting surgeon but he had been instructed to consent Patient A which he had done so adequately on 28 October 2016;
  - He did not cause the wrong procedure to be performed;
  - The lapse of time since the incident occurred and that there has been no repetition and the risk of repetition is low;
  - The Tribunal was prepared to accept that the alteration of the consent form was done in a moment of panic rather than premeditated. As the Tribunal noted at the facts stage, it appeared that there were two possible motives for Dr Capece amending Patient A’s consent form. Either he knew a vaginectomy should not have been performed but then discovered that a vaginectomy had been performed and he wished to cover up what had happened. Alternatively, he believed that he had been at fault in the consent process and thought he should have consented the patient for vaginectomy as that was what was written on the theatre list. In terms of culpability, the [2020] Tribunal concluded that the former motive would be more serious as he would be seeking to cover up a serious surgical error and the potential for further harm to Patient A would have been foreseeable. The latter motive, although providing no justification for Dr Capece’s actions would be less culpable as in these circumstances, Dr Capece may not have foreseen any potential harm to Patient A.
  
13. The 2020 Tribunal considered that there were no exceptional circumstances in Dr Capece’s case which might justify taking no action and to do so would have been wholly insufficient to mark the gravity of the case.
  
14. The 2020 Tribunal determined that there were no conditions which could have been imposed to properly address the dishonesty identified and that Dr Capece was practising in Italy with no intention of returning to the UK making conditions unworkable. The

2020 Tribunal considered that an order of conditions would be wholly inadequate to address the seriousness of this case.

15. The 2020 Tribunal considered the nature of Dr Capece's dishonesty and that it was a single act of amending the consent form, which was not, strictly speaking, 'covered up'. The 2020 Tribunal found it was significant that, having amended the consent form, Dr Capece did not admit his wrongdoing. This was despite numerous opportunities to do so; subsequent to Patient A's complaint, during the investigation or in the course of the 2020 hearing, and he had maintained what the 2020 Tribunal found to be a false narrative.

16. The 2020 Tribunal considered that in all the circumstances, Dr Capece's misconduct was not fundamentally incompatible with continued registration due to the mitigating factors identified. In particular, the 2020 Tribunal considered that there was no risk to patient safety and that the risk of Dr Capece repeating his actions was low. The 2020 Tribunal found that Dr Capece had some insight into his misconduct, had accepted its findings and acknowledged fault. The 2020 Tribunal found that the whole episode including the proceedings had had a profound impact on Dr Capece and his expressions of remorse appeared genuine.

17. The 2020 Tribunal determined that the public interest would be sufficiently upheld by a sanction of suspension. Nevertheless, given the serious nature of the case, it found that the maximum period of 12 months suspension was necessary in order to promote and maintain public confidence in the medical profession, and promote and maintain proper professional standards and conduct for members of that profession.

18. The 2020 Tribunal noted that paragraph 109 of the Sanctions Guidance (November 2019 edition) did not indicate that erasure *must* follow if any of the factors listed are present, rather that it *may* follow. The 2020 Tribunal decided that erasure was not necessary to maintain public confidence in the medical profession and promote and maintain proper professional standards and conduct for members of that profession.

19. The 2020 Tribunal considered that it was not necessary to direct a review of Dr Capece's case. The 2020 Tribunal noted that there were no clinical concerns in this case and that dishonesty was difficult to remediate. It determined that a review hearing would not serve any useful purpose. The 2020 Tribunal noted that Dr Capece was practising in Italy where his family lived and had indicated that he had no intention of returning to work in the UK. It noted that Dr Capece had only ever worked in the UK as part of his training programme and had never practised permanently in the UK.

20. In a decision of 23 March 2020, an Assistant Registrar decided to refer this case to a Medical Practitioner's Tribunal for a review hearing. The Assistant Registrar noted that '*Dr Capece had only emerging insight*'. The Assistant Registrar's decision stated:

*'...it would be desirable for a tribunal, on review, to be able to assess whether Dr Capece had gained sufficient insight and remediated so as to provide reassurance.*

...

*It therefore may assist the reviewing Tribunal if Dr Capece provided evidence of whether, and if so in what manner, his insight has progressed, in addition to evidence that his knowledge and skills remain up to date. Dr Capece will also be able to provide any other information that he considers will assist.'*

21. Mr Blakey, Counsel, representing the General Medical Council (GMC), told the Tribunal today that Dr Capece had previously requested that his case be reviewed on paper and was asked by the GMC to provide documentation in relation to his remediation. He stated that Dr Capece did not provide any documentary evidence of his remediation and evidence that he has now developed greater insight.

### The Evidence

22. The Tribunal has taken into account all the evidence received, both oral and documentary.

23. The GMC provided the following:

- The 2020 Tribunal's Record of Determination, dated 21 February 2020
- Correspondence between Dr Capece and the GMC between April 2020 and December 2020
- Correspondence between Dr Capece and the MPTS between April 2020 and December 2020

24. Dr Capece provided no documentation to the Tribunal but gave oral evidence, as set out in the following paragraphs.

25. Dr Capece confirmed that he is working full time as a Clinical Researcher at the University of Naples Federico II, in the Interdepartmental Centre for Research into Robotic Surgery. He said that his research work consisted of three areas; the development of an automatic robotic arm to carry out prostate biopsy, the construction of a bio engineering material from the buccal mucosa, for urethral strictures in urological problems and a future project on the development of a patch to resolve penile curvature.

26. Dr Capece informed the Tribunal that since March 2020 approximately 2% - 3% of his work has been clinical, as he has focussed on his research work. In the last two to three months he has undertaken no clinical work at all. He explained that research can take between 4-5 years to complete. He stated that the robotics department in which he works is based at the hospital and as part of his research he has seen some patients.

27. Dr Capece told the Tribunal that he hoped that misconduct of this nature will never happen again. He described this episode as the worst period of his life. He stated that he had always considered himself to be a good doctor and a good person and he has reflected on his misconduct and is still reflecting on it daily. He stated that the misconduct has had a great impact on his practice.

28. Dr Capece said that he discussed his actions that led to his misconduct and has reflected on the mistake he made in amending the documents. He said that the hearing in 2020 helped him understand what had happened.

29. Dr Capece said that currently his clinical work is limited but he now ensures that any notes he makes on consent forms or clinical records are correct. He said that he ensures that all amendments to consent forms or clinical notes are initialled by him and by the patient. He explained that in Italy amendments to notes are not usually initialled, but he has instigated this practice in his own work. He said that when making any clinical notes he is very conscious of his previous misconduct. He said every time he puts his pen to paper in medical notes he feels as if he is doing wrong and needs to check and re-check the notes.

30. Dr Capece accepted that, in amending the consent form for Patient A, his actions were dishonest but he could still not remember doing it.

31. Dr Capece said that he reflects daily on his dishonest conduct and that he is confident, due to the checks he has in place when making notes that it would not happen again. In relation to his dishonesty, Dr Capece told the Tribunal that he has had many discussions with his sister who has a Psychology degree. He said it had not been easy for him to accept that he had been dishonest and he had had to ask his sister for help in understanding this.

32. Dr Capece stated that he enjoyed research and at this time in his career he preferred it to clinical practice. He stated that in Italy a doctor must decide, depending on their career path, what percentage of academic research and clinical work is undertaken. He stated that, at the moment, he is focussed on research but it is possible that he may do more clinical work some years in the future.

33. Dr Capece was referred by Mr Blakey to paragraph 8 of the 2020 Tribunal's sanction determination, which states:

*'8. Dr Capece said the Tribunal's finding has caused him an internal conflict. He had always considered himself to be an honest person and the finding of dishonesty has created problems in his head which are consuming him. He asked that the Tribunal take into account some mitigating factors, in particular his inexperience working in the UK at the time, the lack of supervision and the lapse of time since the incident occurred. He also asked that the Tribunal take into account the testimonials on his behalf and his previous good character.'*

34. Dr Capece confirmed that he accepted the findings of the 2020 Tribunal that his actions were dishonest.

35. Dr Capece stated that since the hearing in 2020 he has consented approximately two or three patients. Dr Capece gave an example of a patient he had consented last year and said that since the hearing in 2020 his practice for taking consent has changed. He takes consent weeks

before any procedure and then takes consent again 24 hours prior to any procedure, because the patient needs time to assess their decision. He explained the consent process in Italy is very different to that in the UK, and there is only one copy of the consent form attached to the Patient's notes. He said that he is then able to compare the two consent forms in order to ensure that nothing has changed. He told the Tribunal that he has adopted the UK procedure of taking consent, making his practice very different to his professional colleagues in Italy.

36. He explained that his research is not formally supervised but all of his work is checked and cross checked by another colleague. Dr Capece said that his integrity at work has never been questioned.

### Submissions

37. On behalf of the GMC, Mr Blakey stated that the issue is whether or not there has been any repetition of dishonesty and whether Dr Capece has developed his insight, has remediated and kept his knowledge and skills up to date. He stated that the only evidence before the Tribunal is Dr Capece's oral evidence given under oath.

38. Mr Blakey submitted that the GMC's position is that, notwithstanding Dr Capece's oral evidence, there is still a risk of repetition of dishonesty, unless he undertakes some type of formal remediation in relation to his insight. He submitted that until this is undertaken, Dr Capece's fitness to practise remains impaired.

39. Dr Capece submitted that there is no risk or repetition. He said that he had not been dishonest before the incident, or since. He stated that he has always been transparent and there have been no issues before or after the events concerning Patient A, but especially after the 2020 hearing. He submitted that his fitness to practise is not impaired.

### The Relevant Legal Principles

40. In relation to misconduct the Tribunal accepts and adopts paragraphs 17-20 of the 2020 Tribunal's finding on misconduct, that Dr Capece's dishonesty was serious and amounted to misconduct. The Tribunal noted the findings on misconduct were made by the 2020 Tribunal at a contested hearing.

41. The Tribunal reminded itself that the decision of impairment is a matter for its judgement alone. This Tribunal is aware that it is for the doctor to adduce some evidence to indicate that he would be safe to return to unrestricted practice.

42. This Tribunal must determine whether Dr Capece's fitness to practise is impaired today, taking into account his conduct at the time of the events and any relevant factors since then such as whether the matters are remediable, have been remediated and any likelihood of repetition.

43. The Tribunal reminded itself that there is no comprehensive or all embracing definition of impairment and it is a matter of judgement. However, it considered the observations of Dame Janet Smith in the 5<sup>th</sup> Shipman report in which she identified four questions that should be considered in determining whether fitness to practise is impaired:

- a. Has the doctor in the past acted and/or is he liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or
- b. Has he in the past brought and/or is he liable in the future to bring the medical profession into disrepute; and/or
- c. has he in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession;
- d. has he in the past and/or is he liable in the future to act dishonestly.

### **The Tribunal's Determination on Impairment**

44. The 2020 Tribunal found that there were no clinical concerns in this case and that dishonesty was difficult to remediate. It determined that a review hearing would not serve any useful purpose. As the 2020 Tribunal did not direct a review it did not indicate what material Dr Capece could provide to assist this Tribunal. Nevertheless, the Tribunal noted that this review hearing was directed by an Assistant Registrar. Although Dr Capece was informed by the GMC in April 2020 of the review, it noted that English is not his first language and that during this hearing the meaning of insight was explained to him.

45. The Tribunal noted that Dr Capece has not provided any documentary evidence of formal processes he has undertaken in relation to developing insight. Dr Capece told the Tribunal that a formal process in relation to insight is not easily available in Italy.

46. The Tribunal was satisfied from Dr Capece's oral evidence, that he has genuinely accepted the finding of dishonesty. In relation to his dishonesty, he told the Tribunal that he has discussed this at length with a family member who has a degree in Psychology. He stated that his misconduct has had an impact on his clinical work and he reflects on it daily. Dr Capece spoke of the impact that the finding of dishonesty has had on him personally. The Tribunal accepted that Dr Capece's expressions of remorse were genuine.

47. The Tribunal noted that Dr Capece has only consented a few patients since the suspension was imposed. He gave a detailed explanation on how he has changed his practice in relation to taking consent and clinical notes.

48. The Tribunal considered the factors to be taken into account when determining Dr Capece's impairment. It noted that Dr Capece is living in Italy doing research work into the development of a robotic arm to undertake prostate surgery in men. Dr Capece's current position does not include any hospital work and he has not undertaken any clinical work in the last three months. Since March 2020 the percentage of Dr Capece's of clinical work has been around 2% - 3%. Dr Capece has been undertaking clinical research since 2001 and intends to work in research for several years.

49. The Tribunal noted that, when speaking to patients, Dr Capece's behaviour has changed. He told the Tribunal that he continually spoke to patients and only writes clinical notes in front of the patient. It noted that Dr Capece has adopted the practice of initialling any amendments and gets the patient to initial the amendments also. He has also adopted a two - stage consent process whereby the consent form is sent to the patient before the patient attends the hospital, when a second consent form is completed. Dr Capece told the Tribunal that the consent process in Italy is different to the UK, in that, there is only one copy of the consent form which is attached to the patient's notes. He said that he introduced a process whereby he makes a second copy of the consent form in order to compare both copies, to ensure that the patient had not changed their minds between the first and second consent. He also stated that he would no longer take the patient's consent on the day of the surgery but 24 hours prior to any procedure, in order for the patient to process their decision. Dr Capece stated that in all areas of his work he checks and re-checks.

50. The Tribunal found it noteworthy that Dr Capece developed this process of his own volition and without any guidance.

51. The 2020 Tribunal accepted that it was very difficult to demonstrate that dishonesty had been remediated. This Tribunal focussed on the likelihood of Dr Capece acting dishonestly in the future. It considered whether or not Dr Capece's insight now, and the risk of repetition, is the same as it was in February 2020.

52. The Tribunal took account of paragraphs 21-29 of the 2020 Tribunal's finding on impairment. Paragraph 26, in particular, states:

*'26. The Tribunal considered that although the consent form was altered after Patient A's surgery was commenced, Dr Capece did put Patient A at harm as a result of his dishonest actions, but it considered that it is unlikely he would do it again in the future in a similar situation. The Tribunal considered that Dr Capece probably bitterly regrets his actions and that these proceedings have had a profound impact upon him. Nevertheless, without full insight into his dishonesty, the Tribunal could not be satisfied that there is no risk of repetition of Dr Capece's misconduct, however it considered this risk to be low.'*

53. The Tribunal also considered paragraphs 16 and 17 of the 2020 Tribunal's determination on sanction in relation to aggravating and mitigating factors.

54. The 2020 Tribunal found that Dr Capece was developing insight and that the risk of repetition misconduct of this nature was low. This Tribunal considered that whilst Dr Capece did not provide any documentary evidence of formal remediation, it was apparent from his oral evidence that he has gained much greater insight into his misconduct. The Tribunal is mindful that it can never be said that there is no risk of repetition, but is satisfied in this case, that the risk of repetition is so low, as to be negligible.

55. The Tribunal was satisfied that Dr Capece has now developed sufficient insight into his misconduct. Dr Capece demonstrated that he has reflected and continues to reflect daily on his dishonest conduct. Dr Capece has introduced safeguards into his own practice when consenting patients and taken steps to ensure there is no repetition of his misconduct in the future.

56. The Tribunal noted that there is no evidence before it of any reports of similar behaviour since the original misconduct.

57. The Tribunal noted that doctors are required to demonstrate that they have kept their skills and knowledge up to date, with relevance to their particular role. Dr Capece has been working in the field of clinical research since 2001 and continues to do so. The Tribunal considered that Dr Capece has kept his knowledge and skills up to date.

58. The Tribunal was satisfied that Dr Capece has fully addressed the concerns raised by the 2020 Tribunal. It concluded that his misconduct was now highly unlikely to be repeated and that the risk of repetition of similar misconduct was negligible. The Tribunal was satisfied that Dr Capece fully understands the gravity of his misconduct, has not repeated it, and has maintained his skills and knowledge during the period of his suspension. As such, the Tribunal was satisfied that patients will not be placed at risk if Dr Capece returns to unrestricted practice.

59. The Tribunal noted the 2020 Tribunal decision to impose a 12-month suspension on Dr Capece's registration under limbs (b) and (c) of the Over-arching Objective. Paragraphs 50 and 51 of that determination state:

*'Further, the Tribunal was in no doubt that Dr Capece's actions have brought the medical profession into disrepute and that he has breached a fundamental tenet of the medical profession.'*

*Despite the risk of repetition being low, the Tribunal concluded that Dr Capece's misconduct was so serious that a finding of impairment was necessary in order to uphold, promote and maintain public confidence in the medical profession, and promote and maintain proper professional standards and conduct for the members of the profession.'*

60. The Tribunal is of the opinion that limbs (b) and (c) of the Over-arching Objective have been satisfied by Dr Capece's 12-month suspension. The Tribunal therefore concluded that Dr Capece's fitness to practise is no longer impaired by reason of his misconduct.

### **Revocation of current order**

61. The Tribunal is aware that the 2020 Tribunal issued a sanction of suspension to last a period of 12 months, to mark the seriousness of Dr Capece's misconduct. The Tribunal noted that the suspension will end on 30 March 2021.

62. The Tribunal decided that the order should remain in place until 30 March 2021, to mark the seriousness of Dr Capece’s misconduct.

63. That concludes this case.

**Confirmed**

**Date** 12 March 2021

Mr Richard Kember, Chair