

PUBLIC RECORD

Dates: 23/07/2018 - 30/07/2018

Medical Practitioner's name: Dr Umar PATEL

GMC reference number: 7017301

Primary medical qualification: MB ChB 2008 University of Manchester

Type of case
New - Misconduct

Outcome on impairment
Not Impaired

Summary of outcome

Case concluded

Tribunal:

Legally Qualified Chair	Mr Jetinder Shergill
Lay Tribunal Member:	Mr Rob McKeon
Medical Tribunal Member:	Dr Ranjana Rani
Tribunal Clerk:	Miss Emma Saunders

Attendance and Representation:

Medical Practitioner:	Present and represented
Medical Practitioner's Representative:	Ms Claire Robinson, Counsel, instructed by DAC Beachcroft LLP
GMC Representative:	Ms Elisabeth Acker, Counsel

Attendance of Press / Public

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

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.

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Determination on Facts - 30/07/2018

Background

1. Dr Patel qualified in 2008 and prior to the events which are the subject of the hearing Dr Patel worked in North Manchester General Hospital before deciding to undertake psychiatry training. Dr Patel worked in Leeds for 18 months, Wakefield for a further 18 months, at the Royal Bolton Hospital for a year and the Nelson Hospital for a year. At the time of the events Dr Patel was practising at ST6 (speciality training) level in Old Age Psychiatry in Blackpool, part of the Lancashire Care NHS Foundation Trust ('the Trust'). Dr Patel has since been undertaking an ST6 post in Old Age Psychiatry in Bolton from June 2017.
2. The allegation that has led to Dr Patel's hearing relates to the events on 2 February 2016, while he was working at the Trust. It is alleged that Dr Patel entered a toilet cubicle and placed a mobile telephone underneath the wall dividing his cubicle from the next door cubicle with the intention to reflect, view or record what was happening in the next door cubicle that was occupied by Dr A. It was alleged that Dr A's trousers, belt and bare legs appeared on the mobile telephone screen. Further, it was alleged that Dr A did not consent to Dr Patel viewing or recording him whilst he was in the toilet cubicle and that Dr Patel's conduct was sexually motivated.
3. The initial concerns were raised with the General Medical Council (GMC) following a police interview/investigation and then a subsequent local Trust investigation which arose from Dr A's complaint that he made to his consultant, Dr B, in the first instance.

The Outcome of Applications Made during the Facts Stage

4. The Tribunal granted Dr Patel's application, made pursuant to Rule 41(1) and (2) of the GMC (Fitness to Practise Rules) 2004 as amended ('the Rules'), for part of the evidence to be heard in private. The Tribunal's full decision on the application is included at Annex A (which is a private determination).
5. The Tribunal granted, in a limited manner, the GMC's application, made pursuant to Rule 34(1) of the Rules, for the admission of further evidence. The Tribunal's full decision on the application is included at Annex B (which is a private determination).
6. The Tribunal granted the GMC's application, made pursuant to Rule 34(13) and (14) of the Rules, for a witness to give evidence by video link. The Tribunal's full decision on the application is included at Annex C. At the case management stage, it was agreed that a further witness would give evidence by video link.
7. The Tribunal refused Dr Patel's application, made pursuant to Rule 17(2)(g) of the Rules, that sufficient evidence had been adduced on which the facts in

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question could be found proved. The Tribunal's full decision on the application is included at Annex D.

The Allegation and the Doctor's Response

8. The Allegation made against Dr Patel is as follows:

1. On 2 February 2016, whilst working for Lancashire Care NHS Foundation Trust, Blackpool, you:

a. entered a toilet cubicle and placed a mobile telephone underneath the wall dividing your cubicle from the next door cubicle;

To be determined

b. positioned the mobile telephone so that the screen faced towards the next door cubicle;

To be determined

c. used the mobile telephone's screen:

i. to reflect;

To be determined

ii. with the intention to view;

To be determined

iii. with the intention to record,

To be determined

what was happening in the next door cubicle, which was occupied by Dr A.

2. Dr A's trousers, belt and bare legs appeared on the mobile telephone screen.

To be determined

3. Dr A did not consent to you viewing or recording him whilst he was in the toilet cubicle.

To be determined

4. Your conduct as described in paragraph 1 was sexually motivated.

To be determined

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Factual Witness Evidence

9. The Tribunal received evidence on behalf of the GMC from the following witnesses:

- Dr A, junior doctor, by video link;
- Dr C, ST1 in Obstetrics and Gynaecology, in person;
- Dr B, Consultant Old Age Psychiatrist, by video link;
- Dr D, Consultant Psychiatrist, Deputy Medical Director and Director of Medical Education for the Trust, in person.

10. The Tribunal also received evidence on behalf of the GMC in the form of witness statements from the following witnesses who were not called to give oral evidence:

- Ms E, Head of Clinical Audit at the Trust;
- Ms F, Security Management Specialist for the Trust.

11. Dr Patel provided his own witness statement dated 19 June 2018 and also gave oral evidence at the hearing.

Documentary Evidence

12. The Tribunal had regard to the documentary evidence provided by the parties. This evidence included, but was not limited to, police statements of Dr A, Dr C, Dr B and Dr D; Trust meeting notes for Dr A, Dr C, Dr B and Dr D; the notes of Dr A's initial account; CCTV, timeline and footage of the reception area; police photographs of the toilets in the gent's toilets; floor plan of the hospital unit; and Dr Patel's police interview transcript and a police summary of the WhatsApp messages at the time in question.

Agreed Facts

13. Before hearing submissions on the facts, the parties provided the Tribunal with several agreed facts. The Tribunal has noted the agreed facts but that, in its consideration of events, they were somewhat peripheral.

The Tribunal's Approach

14. In reaching its decision on the facts, the Tribunal has borne in mind that the burden of proof rests on the GMC and it is for the GMC to prove the Allegation. Dr Patel does not need to prove anything. The standard of proof is that applicable to civil proceedings, namely the balance of probabilities, i.e. whether it is more likely than not that the events occurred.

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15. The Tribunal was reminded that it will need to consider all of the evidence that goes to each paragraph of the Allegation and decide if that evidence is: a) credible; b) reliable; and c) relevant. The Legally Qualified Chair (LQC) gave his legal advice in writing and there were no observations from Counsel on it. Ms Robinson had indicated that she would be relying on Dr Patel's good character and the LQC's advice included a paragraph relating to this:

“Relevance of being of ‘good character’ - the doctor is a practitioner with an otherwise unblemished professional history. That is ‘an obvious part of the backdrop of the proceedings in this case’. That is also relevant to issues of general credibility - someone who is of otherwise good character is less likely to lie about something for example. It is part of the picture, but not the whole picture. If the Tribunal decides that the doctor has not told the truth then it would have to be based on cogent evidence as it would, in essence, amount to a finding of dishonesty.”

The Tribunal's Analysis of the Evidence and Findings

16. The Tribunal has considered each outstanding paragraph of the Allegation separately and has evaluated the evidence in order to make its findings on the facts.

Overview

2 February 2016 - the gent's toilets

17. The Tribunal was provided with still photographs of the toilet cubicles, floor plan and CCTV footage that showed that Dr Patel entered the gent's toilets at the Hospital at 9.47am on 2 February 2016. The Tribunal noted that these toilets were used by staff, members of the public and patients. The Tribunal has been provided with WhatsApp messages that Dr Patel sent and received during the ten minutes that he was in the gent's toilets.

18. Dr Patel and Dr A were due to attend a multi-disciplinary team (MDT) meeting at 10am that day in the relevant ward. There is a seven minute period before Dr A enters the gent's toilets at 9.54am, some six minutes before the MDT meeting starts. A further male enters the toilet at 9.55am - leaving one minute later.

19. The alleged events were said to have occurred between 9.54 and 9.56am; and lasted a matter of seconds.

20. Dr A leaves the gent's toilets at 9.56am and waits around the café/corridor area near the gent's toilets to see who came out. Dr Patel leaves the gent's toilets at 9.57am and walks through the reception area. Dr A enters the gent's toilets again at 9.58am and leaves at 10.02am. Both Dr Patel and Dr A attend the MDT meeting where they are a little late, Dr Patel was present before Dr A.

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Dr A's point of view and the alternative explanation

21. The Tribunal wished to stress that it found both Dr A and Dr Patel to be honest and broadly consistent in their evidence. It considered that both were credible witnesses who were recounting truthful evidence as best as they could.

22. From Dr A's point of view, he entered the gent's toilets at 9.54am and enters one of two toilet cubicles. He takes down his trousers and belt to sit on the toilet and, upon leaning right forward, he sees a mobile telephone below the dividing wall between the two cubicles - a gap of some six inches in height - but not crossing the boundary. Dr A takes a closer look and sees an image of his trousers and belt visible on the screen of the telephone. He double takes, checks what he is seeing, shouts out words "*what are you doing?*", pulls up his trousers and belt and leaves the cubicle and then the gent's toilets at 9.56am. Dr A did not hear anyone moving around oddly in the next door cubicle and stated that he was in the cubicle for some 20 seconds, seeing the telephone for some five seconds. He did not see it when he walked in to the cubicle or from a normal position, but only when he 'crouched' forward. He waits around outside the gent's toilets and sees Dr Patel leave at 9.57am. Dr A re-enters the gent's toilets and confirmed that no one else was in there. He goes to the MDT meeting as planned. Dr A discusses his concerns with his colleague, Dr C, over lunch before reporting his concerns officially to Dr B and makes a written account of events. Dr A was encouraged to escalate matters and decided to do so.

23. From Dr Patel's point of view, he provided the Tribunal with an email (timed at 9.22am) that he had sent that morning to other members of staff at the Trust showing that the junior doctors were reduced in number that day due to sickness absence. He went to the gent's toilets at 9.47am, knowing that he had the MDT meeting to attend at 10am where his other colleagues would be, including Dr A and other/senior members of staff. Dr Patel used the toilet and sent a number of WhatsApp messages whilst in the gent's toilets, though there were none sent during the period 9.54am-9.56am. He had some paperwork on the floor as he was due to go to the MDT meeting. He heard a voice from the next cubicle which he thought was unusual as people tend not to speak to each other in the gent's toilets. He did not respond. Dr Patel finished using the toilet and exited the gent's toilets at 9.57am to attend the MDT meeting.

24. Dr A believed that Dr Patel's behaviour that day was overly nice/concerned although Dr Patel disputed there was anything different. Dr Patel was made aware of the allegations at a meeting with Dr D later that day where Dr Patel showed Dr D that there was nothing nefarious on his telephone. Dr Patel has recounted that the events in the gent's toilets were a 'non-event' to him in that he was just going to the toilet. He stated that he was not sure exactly what he was doing on his telephone but that unintentionally, it may have flipped into camera mode. Dr Patel gave an

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account of how he uses the toilet including cleaning himself, addressing the marked religious/cultural differences to what most people would expect.

Conclusion

25. Ultimately the Tribunal determined that the events in the gent's toilets on 2 February 2016 were an unfortunate coincidental chain of events that, on the balance of probabilities, did not occur as alleged with any nefarious purpose.

26. The Tribunal believed that what Dr A saw in a five second time period under the dividing wall to the next cubicle was broadly what he says he saw. Both Dr Patel and Dr A agree that the mobile telephone remained in Dr Patel's cubicle and did not pass over the boundary into the other one. The Tribunal accepted that Dr A saw the telephone when he leaned forward to investigate and that his perception of the events was not unreasonable. Indeed, what he saw must have been concerning, but ultimately it had an innocent explanation.

27. The Tribunal had regard to Dr Patel's rather unusual ablution habits on which he was cross-examined in detail and gave a demonstration before the Tribunal; it found his account to be plausible. It noted that the GMC raised a number of contradictions about Dr Patel's accounts however it determined that Dr Patel was clarifying what had occurred in hindsight and that his account remained plausible, measured and credible. The Tribunal was of the view that Dr Patel's telephone may have accidentally been in the camera mode and that his telephone was, in a somewhat absentminded manner, and given the way he was cleaning himself, held in his hand and close to the floor. This accorded to what Dr A says he saw when leaning forward. The Tribunal decided that the very fact that the phone could only be seen when leaning far forward, as described by Dr A, and the small gap underneath the partition, made it less likely that there was any intention or realistic possibility to be able to view anything untoward in the neighbouring cubicle. The Tribunal considered that Dr A saw something and that this occurred in a very short time frame. It heard that Dr A leaned forward and only then was able to see the mobile telephone, something that was not visible upon him entering until this point. It was an unfortunate coincidental set of events.

28. The Tribunal was conscious that there was obviously some shock and embarrassment and that Dr A, quite rightly, felt obligated to report his concerns. The Tribunal was of the view that Dr A believed his interpretation of the events and that he was honest and fair in that assessment. Despite him thinking hard about alternative explanations, he could not; and indeed he could not have envisaged the circumstances that Dr Patel described to the Tribunal in detail. It was right and in the public interest that Dr Patel has been required to give an account of what went on as it was very unusual and, having heard from him, the Tribunal believed his account. The Tribunal concluded, on balance, that it was likely that Dr Patel's mobile telephone flipped into camera mode whilst it was in his hand and he was busy

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cleaning himself; and that this was unintentional and he did not even notice that it had happened.

29. The Tribunal considered that, whilst somewhat unusual, Dr Patel's accounts were reasonable and he gave credible, measured and consistent evidence throughout. It noted that he could have given a different account to try and bolster his version of events but that he did not. From the first time he became aware of the allegations, Dr Patel voluntarily showed Dr D his mobile telephone to show he had not recorded anything. The GMC acknowledged that Dr Patel has been open and gave full accounts at every stage. The Tribunal considered that the GMC suggestion that the gap in the WhatsApp messages was of relevance was not made out. It considered that the idea that Dr Patel had to be occupied on WhatsApp for this whole period in order to provide an adequate defence did not stand up to closer examination.

30. The Tribunal also did not consider that it was plausible that Dr Patel entered the gent's toilets and that, some 25 minutes after sending an email about pressures on staffing that day; with no idea if anyone would enter the gent's toilets or who would end up in the cubicle next to him; and with six minutes before the MDT meeting, was carrying out a voyeuristic act. It was of the view that the timeline alone made it highly unlikely that he had a nefarious intent. The Tribunal considered that if Dr Patel had an interest in voyeurism or non-consensual images then there were much safer and likely scenarios where this could have happened. Further, the Tribunal did not take issue with the ten minute period that Dr Patel spent in the gent's toilets. It has been provided with a full account of that time, including use of WhatsApp, using the internet and ablutions; all of which the Tribunal accepted. The GMC was critical of what was perceived as a change in Dr Patel's account of only relying on WhatsApp messages to using the internet and viewing news on the phone. The Tribunal was not persuaded there was a material discrepancy because he references using the internet when he met with Dr D on the day the allegations were made. The Tribunal accepted the reliance of the WhatsApp messages was primarily because he could evidence this.

31. The Tribunal noted that much had been made of the angle and position of the mobile telephone. It determined that it stayed on Dr Patel's side of the cubicle, that it was lowered when Dr Patel was bending forward a little and that it just happened to be in his hand when Dr A also happened to lean forward.

32. The Tribunal considered why Dr Patel's mobile telephone moved out of view when Dr A "shouted" in the cubicle which was not unreasonable given that Dr Patel stated he was startled at someone speaking in the gent's toilets and that this caused him to move. The Tribunal found Dr A to be quietly spoken and it was unlikely that him using a raised voice registered as anything other than a 'normal' voice. The Tribunal was satisfied that Dr Patel did not know who was speaking, what it was

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about or to whom it was directed; and that in those circumstances it was reasonable not to reply or engage.

33. With regard to Dr D, he took a number of handwritten notes when speaking to Dr Patel on 2 February 2016 which he typed up the next day. Dr Patel was not asked to agree the typed notes and his legal representative later challenged their contents. The original handwritten notes were not kept and, whilst Dr D stated there had not been “much tidying up”, there was still an element of doubt regarding those notes. Dr Patel wrote up some notes on the evening of 2 February 2016 and explained that he has good recall given the type of work he does where he often likes to use quotes of what patients have said in medical records. It was a serious event for Dr Patel and the Tribunal considered he would remember what had been discussed. There was a material discrepancy between Dr D’s recollection and Dr Patel’s typed notes as to whether the precise nature of the Allegation, was ever disclosed to Dr Patel at that meeting. It appears at the start of Dr Patel’s typed notes and the Tribunal formed the view that Dr D was relatively inexperienced in conducting such meetings at that time. Dr Patel’s note and the wording used as to how this subject was approached was more plausible and the Tribunal preferred this account. It found Dr Patel’s initial account to make more logical sense in that he probably had been told of what the allegations were before he provided any comment on them.

34. There was discussion about Dr Patel’s demeanour during the rest of the day in question. Dr B said that she did not notice anything unusual in Dr Patel’s behaviour at the MDT meeting, but once aware of the allegation, she noted that Dr Patel was in and out of her office on a number of occasions. The Tribunal has not heard anything to suggest that he did not usually go to Dr B’s office and that she had asked him to complete a number of tasks that day such that he had reason to be there. Dr B acknowledged that, being aware of the allegations, she herself may have been biased on this issue.

35. There was a question about Dr Patel seeing Dr A outside the toilets after the alleged incident; and him seeing Dr A and Dr C in a corridor at work later that day with the suggestion that Dr Patel ignored them. The claim that Dr Patel ignored Dr A outside the toilets and hurried past him could not be seen properly on the CCTV, but even taken at its highest it was circumstantial evidence. Dr C told the Tribunal that she could not say that Dr Patel actually did see them at that time. The Tribunal considered that the witnesses who have said that they saw Dr Patel act oddly on 2 February 2016 knew what the allegation was and that, inadvertently, they were primed to view his behaviour as different and it was very much open to interpretation.

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Paragraph 1

Paragraph 1(a)

36. The Tribunal concluded that it was common ground that the mobile telephone never crossed the wall dividing Dr Patel's cubicle from the next door cubicle. However the Tribunal interpreted the wording of this sub-paragraph of the Allegation to also include placing the telephone in order to view the next door cubicle, i.e. lower than the dividing wall.

37. The Tribunal looked to the wording of the Allegation, that Dr Patel 'placed' the mobile telephone which denotes that he put it there with the intention to achieve something. The Tribunal accepted that the mobile telephone was lower down, on Dr Patel's side of the cubicle and visible given the six inch gap in the dividing wall to the floor.

38. Whilst the mobile telephone might have been there, the Tribunal does not take any issue with this as it determined, on the balance of probabilities, that it was an inadvertent act. It rejected the idea presented by the GMC that it was a deliberate act. The Tribunal concluded that even if there had been some 'placement' of the mobile telephone it was the result of innocent actions alone.

39. Accordingly, the Tribunal found this sub-paragraph of the Allegation not proved.

Paragraph 1(b)

40. The Tribunal considered the positioning of the mobile telephone in the same terms. It was of the view that the word 'positioned' implied an intent by Dr Patel. Dr Patel gave a demonstration of how he was likely to have held the mobile telephone while using the toilet and the Tribunal saw that the screen/telephone could have been held in the way alleged. The Tribunal did not accept the GMC suggestion that only Dr Patel's knuckles should have been visible or that it was unlikely that the screen would have been visible unless he twisted his wrist. The Tribunal was satisfied that, whilst somewhat unusual circumstances, Dr Patel's account was plausible and more than likely was what actually happened that day. Accordingly, the Tribunal found this sub-paragraph of the Allegation not proved.

Paragraph 1(c)(i) to (iii)

41. The Tribunal was not satisfied that Dr Patel used the mobile telephone's screen to reflect or with the intention to view/record. It referred to its interpretation that it was likely that any image seen on the screen was accidental and that it had not been Dr Patel's intention to view or record the next door cubicle. The Tribunal was of the view that it was more likely than not that Dr Patel would have been

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unaware of it, especially given the short time that Dr A says that he saw the mobile telephone. It considered that inadvertently opening the camera mode on a telephone is a common experience and likely to have occurred. In conclusion, the Tribunal found these sub-paragraphs of the Allegation not proved.

Paragraph 2

42. The Tribunal acknowledged that Dr A queried whether or not his bare legs were visible. However, regardless of what was on the screen of the mobile telephone, given the above assessment of the evidence, the image seen by Dr A could only have been seen from the rather odd position of leaning forward and it was not done intentionally by Dr Patel. The Tribunal was satisfied that the only person to see what was on the screen on the telephone was Dr A and that Dr Patel had never been aware.

43. The Tribunal considered that the question of whether Dr A's 'bare legs' appeared on the mobile telephone screen. On a strict application of the evidence, the Tribunal determined that this was not proved. However given an overall approach to this paragraph of the Allegation, even if Dr A's trousers and belt were visible on the telephone, the Tribunal attaches no harsh criticism or censure to the events given the full account of what occurred and why. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

Paragraph 3

44. The Tribunal has found that the events did not occur in the manner alleged. It concluded that there was no attempt to view or record the other cubicle in the gent's toilets and therefore consent is not relevant. The Tribunal found this paragraph of the Allegation not proved.

Paragraph 4

45. The Tribunal was not satisfied that the events occurred as alleged by the GMC or as perceived by Dr A. It considered that, on the balance of probabilities, the incident on 2 February 2016 was an unfortunate series of events with no wrong doing on Dr Patel's part. Accordingly, the Tribunal found this paragraph of the Allegation not proved.

The Tribunal's Overall Determination on the Facts

46. The Tribunal has determined the facts as follows:

1. On 2 February 2016, whilst working for Lancashire Care NHS Foundation Trust, Blackpool, you:

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a. entered a toilet cubicle and placed a mobile telephone underneath the wall dividing your cubicle from the next door cubicle;
Not proved

b. positioned the mobile telephone so that the screen faced towards the next door cubicle;
Not proved

c. used the mobile telephone's screen:

i. to reflect;
Not proved

ii. with the intention to view;
Not proved

iii. with the intention to record,
Not proved

what was happening in the next door cubicle, which was occupied by Dr A.

2. Dr A's trousers, belt and bare legs appeared on the mobile telephone screen.
Not proved

3. Dr A did not consent to you viewing or recording him whilst he was in the toilet cubicle.
Not proved

4. Your conduct as described in paragraph 1 was sexually motivated.
Not proved

47. As the Facts have not been found proved it therefore follows that Dr Patel's fitness to practise is not impaired. This case should proceed no further.

Confirmed

Date 30 July 2018

Mr Jetinder Shergill, Chair

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ANNEX A - 23/07/2018 - PRIVATE

XXX

ANNEX B - 23/07/2018 - PRIVATE

XXX

ANNEX C - 25/07/2018

Application for a witness to give evidence by video link

1. Ms Acker made an application for a witness, Dr B, to give evidence via video link.

GMC Submissions

2. Ms Acker stated that Dr B received the first formal complaint in this matter from Dr A/Ms C and she then escalated it. She confirmed that Dr B had been informed of the dates of this hearing and the GMC had checked her availability with her. However, upon contacting her last week she informed the GMC that she was going to be abroad and had not realised or taken a full note that the hearing was this week.

3. Ms Acker stated that Dr B has now confirmed that she can be available by video link at 3pm on Day 2 of the hearing. She will be in her cottage in France, which is the reason for the specific time. Ms Acker stated that a successful test call has already been done with her at that location.

Submissions on Dr Patel's behalf

4. Ms Robinson confirmed that the application was not opposed. She stated that Dr B being available by video link on Day 2 of the hearing was preferable than adjourning her evidence until another day.

Tribunal's Decision

5. The Tribunal took account of Rule 34(13) and (14) of the Rules, as follows:

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"(13) A party may, at any time during a hearing, make an application to the Committee or Tribunal for the oral evidence of a witness to be given by means of a video link or a telephone link.

(14) When considering whether to grant an application by a party under paragraph (13) the Committee or Tribunal must-

- (a) give the other party an opportunity to make representations;*
- (b) have regard to-*
 - (i) any agreement between the parties, or*
 - (ii) in the case of a Tribunal hearing, any relevant direction given by a Case Manager; and*
- (c) only grant the application if the Committee or Tribunal consider that it is in the interests of justice to do so."*

6. The Tribunal was aware that it is usually preferable to hear evidence from witnesses in person at a hearing. However it had regard to the specific circumstances and practical considerations involved in this case. It was also aware that there was agreement between the parties.

7. The Tribunal determined to grant Ms Acker's application for Dr B to give evidence by video link. It concluded that this was fair and considered it to be in the interests of justice to grant this application.

ANNEX D - 26/07/2018

Application under Rule 17(2)(g)

1. At the end of the GMC case, Ms Robinson made an application under Rule 17(2)(g) of the Rules, which states:

"The practitioner may make submissions regarding whether sufficient evidence has been adduced to find some or all of the facts proved, and the MPT shall consider and announce its decision as to whether any such submission should be upheld."

Submissions on Dr Patel's behalf

2. Ms Robinson referred to the case of *R v Galbraith* [1981] 1 WLR 1039. She stated that there were two limbs under the test from this case. Ms Robinson made reference to the first limb, i.e. as to whether there was any evidence in relation to the following paragraphs of the Allegation.

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Paragraph 1(a)

3. Ms Robinson submitted that there was no evidence that the mobile telephone was 'underneath' the dividing cubicle wall. She referred to Dr A's oral evidence to the Tribunal that the mobile telephone was on Dr Patel's side of the dividing wall. Ms Robinson stated that Dr A described, when pressed for an approximate measurement, that the mobile was about 1cm from the dividing line on Dr Patel's side. She noted that Dr A said that he could not see the mobile when he was entering the cubicle. Ms Robinson referred to Dr A saying he had 'crouched' down to see it and that he could see the mobile 'when his head was low enough' as he was leaning forward. She submitted that there was no evidence of the mobile telephone being placed underneath the dividing wall.

Paragraph 2

4. Ms Robinson invited consideration of this paragraph of the Allegation in relation to the description of 'bare legs' appearing on the mobile telephone screen. She stated that the first mention of 'bare legs' was in Dr A's first GMC witness statement dated 14 September 2017. Ms Robinson referred to Dr A's oral evidence where he said that it was possible that bare legs were not visible as his legs were close to the camera. She submitted that, when looking at the evidence, there was no evidence that could be relied on in relation to this paragraph of the Allegation.

5. Ms Robinson referred to the second limb of the test in the case of *Galbraith*, as to whether the evidence is of tenuous character and if there is any inherent weaknesses, vagueness or inconsistencies where, when looking at the evidence as a whole, in part or in full, the Tribunal could not find proved.

Paragraph 1(c)(iii)

6. With regard to this sub-paragraph, Ms Robinson acknowledged that intending to record is different to an actual recording being made. She stated that there is no actual recording in this case and submitted that, in order to find intention, there must be credible evidence such that an inference can be drawn.

7. Ms Robinson invited the Tribunal to consider the evidence as a whole and submitted that, when looking at the evidence, there is nothing to suggest that Dr Patel was moving around or doing anything 'odd' in the cubicle. She stated that, from Dr A's evidence, there was no suggestion that Dr Patel was moving the mobile around or moving his thumb around to press the buttons. Ms Robinson submitted that, taking the evidence at its highest, the evidence is of Dr A leaning right forward and seeing the lower portion of his legs on the mobile when looking under the next door cubicle.

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Paragraph 1(c)(i) and (ii)

8. With regard to 'reflect', Ms Robinson stated that she had interpreted this to be the literal reflection on the mobile telephone screen. She stated that what has been described by Dr A is not a reflection and asked the Tribunal to consider this.

9. Regarding the 'intention to view', Ms Robinson stated that it should consider her submissions as to recording, i.e. whether there is proper and sufficient evidence upon which a proper inference can be drawn in the particular circumstances of this case.

Paragraph 3

10. Ms Robinson submitted that there was no real or cogent evidence that there was any recording going on. She stated that no recording was found and that there was no suggestion of Dr Patel moving around or his thumb moving in order to take a recording. Further, Ms Robinson stated that Dr D viewed the mobile telephone that afternoon and found nothing relevant. She referred to the statements made by Dr A in relation to the police, Trust and GMC investigations and submitted that, at its highest, the evidence is that Dr A was not sure if the mobile telephone was in video mode at all.

Paragraph 4

11. Ms Robinson stated that she appreciated that the decision would depend on what the Tribunal decided in relation to paragraph 1 of the Allegation. She invited the Tribunal to have regard to the comment that there was nothing unusual going on in the next cubicle, that Dr Patel's mobile telephone was completely in his own cubicle, that Dr A could not see the mobile until he bent right down, that it was at an estimated 30-40 degree angle and that Dr A saw part of his legs which were close to the dividing wall. Ms Robinson invited the Tribunal to consider that that there have been no images or recordings found.

Paragraph 1(b)

12. Ms Robinson acknowledged that the description by Dr A was that the mobile telephone screen was facing towards his cubicle. However, she invited the Tribunal to consider the word 'positioned'. She stated that the description was about 3 to 4cm from the ground at a 30-40 degree angle facing slightly towards him.

Conclusion

13. Overall, Ms Robinson invited the Tribunal to consider whether any remaining paragraph could amount to misconduct. She stated that it was very much dependent on the Tribunal's decisions on the other paragraphs of the Allegation.

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GMC Submissions

14. Ms Acker submitted that, when there is a matter of this potential gravity, namely alleged sexually motivated conduct without consent in the public area of a mental health ward, there is a high public interest in those matters being adjudicated on. She submitted that, if there is an issue with the wording of the Allegation, with it being unclear or wrong, the 'mischief' can still be adjudicated on if there is no injustice to Dr Patel, and that a purposive approach to the words in the Allegation is required.

Paragraph 1(a)

15. Ms Acker stated that Dr A has always maintained the location of the mobile telephone in his statements. She stated that she had made it clear in her opening submissions that she only quoted Dr A's statements, highlighting the clarification in his statement to the police. Ms Acker submitted that it was clear from the evidence on what basis the GMC case was advanced and, if there was doubt, then she relied on the clarification in Dr A's evidence.

16. Ms Acker referred to the interpretation of 'underneath' as mere semantics. She referred to Dr A's GMC witness statement dated 14 September 2017 in which he stated:

"I noticed a mobile phone pointed with the screen facing towards me underneath the wall separating the cubicles on my right hand side."

and to the initial meeting notes from Dr D in which it stated:

"He sat down and saw a smart phone beneath the dividing wall."

17. Ms Acker submitted that the interpretation of the word 'underneath' could mean that the mobile telephone was lower than the dividing wall and it was therefore irrelevant which side of that wall that it was. She stated that the current drafting of this sub-paragraph of the Allegation does allow for the Tribunal to find either meaning and suggested that the Tribunal could either clarify the meaning of 'underneath' or make a small amendment to the Allegation, such as "*placed a mobile telephone lower than the wall*".

18. Ms Acker submitted that serious matters had been brought in this case and that the real 'mischief' was that it is alleged that Dr Patel went into a private bathroom to use his mobile to observe what someone else was doing in another cubicle. She submitted that it would be a subversion of this process for the case to fail on a narrow interpretation of the wording of 'underneath'.

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Paragraph 1(c)

19. Ms Acker stated that an 'and/or' was effectively required to be read in after each part of this sub-paragraph of the Allegation, i.e. that Dr Patel used the phone to reflect and/or with the intention to record and/or view what was happening in the next door cubicle. Ms Acker relied on the Oxford English Dictionary definition of 'reflect' of "*to throw back without absorbing it*". She stated that, whether or not a recording was being captured, the mobile was being used to throw back an image of Dr A on the toilet, which was why Dr A saw an image of his trousers on the screen.

20. With regard to the intention to view or record, Ms Acker stated that there was evidence of preparatory steps taken where Dr Patel had been in the bathroom for some time before Dr A entered; and the lowered and angled placement of the mobile. She stated that Dr Patel sent a WhatsApp message at 09:54:10 and did not send another until he left the bathroom.

21. Ms Acker stated that there was no recording but that the intention was there with Dr Patel remaining in the bathroom; and the angle/placement of the mobile telephone. She submitted that there was circumstantial evidence which provided enough for an inference to be drawn as to an intention. She stated that the test is met at this stage and it is now for Dr Patel to answer the concerns.

Paragraph 2

22. Ms Acker noted that the evidence as to 'bare legs' is somewhat weaker. She stated that Dr A was clear and open in his evidence and that he was not sure that his bare legs could be seen in the camera. If they could not, then she stated that the Tribunal might have to take a certain view on this paragraph of the Allegation, either to amend it or lose it. She stated that, even without it, the real 'mischief' in the case could still be found.

Paragraph 1(b)

23. Ms Acker addressed the concerns regarding the word 'positioned' and stated that the Tribunal has heard from Dr A that the mobile was angled and lowered down. She stated that this was a positioning of the mobile. Ms Acker submitted that the GMC had brought sufficient evidence that the mobile was positioned or placed and that, if it was a mistaken position, it was a matter for Dr Patel to explain at the next stage of this process.

Conclusion

24. Overall, Ms Acker submitted that these are serious allegations of a high public interest. She stated that the GMC's case has always been that Dr Patel was attempting to view someone without their consent and that there was little mystery

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as to what is alleged. Ms Acker reiterated that it would be a subversion of the process to end the case now due to an issue with the wording of the Allegation; and it was open to the Tribunal to amend the drafting of the Allegation taking a purposive approach.

Rebuttal by Ms Robinson

25. In response to Ms Acker's rebuttal submissions about these being serious allegations with a high public interest obligation, Ms Robinson stated that the matters are being adjudicated on at this hearing and that this application is part of that.

26. With regard to Ms Acker's rebuttal submissions on paragraph 1(a) of the Allegation, Ms Robinson stated that Dr Patel has always said that the mobile was on his side of the cubicle and that the way that the GMC has chosen to draft it was as 'underneath' the wall. She stated that cross-examination and the way the case had been approached had been on the Allegation as drafted. The final drafting of this which Dr Patel's legal representatives had checked with the GMC in good time.

Tribunal's Approach

27. The Legally Qualified Chair (LQC) of the Tribunal made observations at the close of Ms Robinson's submissions about the different nature of regulatory proceedings requiring the Tribunal to be mindful of the public interest in dealing with the gravity and 'mischief' that the doctor faces. It was observed that the Tribunal has the power to amend allegations under the Rules if the amendments can properly reflect the evidence without enlarging the case or causing unfairness to the doctor. That is particularly so where there are serious charges and where the 'mischief' has been known to the doctor throughout the process.

28. The LQC indicated to both parties that the case law in this area (*Galbraith* and *R v Shippey* [1988] Crim LR 767) is well settled. Much of the legal principle had been set out by Ms Robinson and the Tribunal was well aware that where there was some evidence it had to look at any inherent weakness, vagueness or inconsistencies, taking the evidence at its highest but not "*taking out the plums and leaving the duff behind*". The Tribunal was mindful that it was looking at the case as to whether it could on the balance of probabilities find a charge provided. However, if the matter came down to an assessment of the strengths and weaknesses, between reliability of witness evidence then this was a matter which should proceed to proper consideration after the close of Dr Patel's case, looking at all of the evidence.

Tribunal's Decision

29. The Tribunal considered each paragraph of the Allegation in turn. Submissions relating to paragraph 1(a) and 2 of the Allegation were on the basis

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that there was no evidence supporting the GMC case. The remainder of the paragraphs, it was broadly submitted, fell within the second limb of *Galbraith*. For the reasons set out below, the Tribunal was not persuaded that any of the paragraphs of the Allegation meet the appropriate legal tests set out above, because broadly, the matters come down to an assessment of the witness evidence or a redrafting of the charges.

Paragraph 1(a)

30. The Tribunal determined that this sub-paragraph of the Allegation should remain as drafted. It was of the view that the gravity of the charge has always been known to Dr Patel despite the potential that two meanings could arise from the word 'underneath'. The Tribunal concluded that the meaning of 'underneath' the dividing wall could properly mean directly below the dividing wall without ever passing over the threshold to Dr A's cubicle. That was consistent with Dr A's evidence throughout and if necessary, further submissions can be heard to amend the paragraph of the Allegation of the Tribunal's own volition. It was noted that cross-examination had never been on any other basis than Dr A being a 'mistaken but honest' witness. The evidence did not fall down on either limb of the applicable test.

Paragraph 1(b)

31. The Tribunal was not persuaded there was an issue with the wording of 'positioned'. It concluded that there was sufficient ambiguity as to what took place regarding the position of the mobile telephone for the matter to continue as there was no inherent weakness, vagueness or inconsistency and the Tribunal could properly make a finding of fact on this matter.

Paragraph 1(c)(i)

32. With regard to the use of the word 'reflect' the Tribunal was initially of the view that this is more akin to a mirror type image of something. However, equally, Dr Patel has known that the case brought against him is that he was using his mobile telephone to view something in the next cubicle. The Tribunal was of the view that 'reflect' could be interpreted accordingly or substituted for wording such as "*to portray/display an image on the mobile telephone*". If necessary, the Tribunal will hear further submissions as to whether this sub-paragraph of the Allegation should be amended if there is an issue with appropriate wording. There was no inherent weakness, vagueness or inconsistency in the evidence given the applicable test at this stage. This sub-paragraph of the Allegation could properly be found proved at the close of the facts stage.

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Paragraph 1(c)(ii) and (iii)

33. The Tribunal noted that 'intention' was a matter which the Tribunal has to consider, looking at all of the evidence and making reasonable inferences about that evidence. It determined that the evidence so far was not so tenuous as to prevent reasonable inferences to be drawn about whether there was an intention to view and/or record what was happening in the next door cubicle. There was no inherent weakness, vagueness or inconsistency given the applicable test at this stage and these sub-paragraphs of the Allegation could properly be found proved at the close of the facts stage.

Paragraph 3

34. In order for the Tribunal to properly consider whether there was an intention to view and/or record Dr A, and if findings were made against Dr Patel on this issue, it would be necessary to have concluded that Dr A did not consent to such actions. That was because the substantive charge of 1(c)(ii) and (iii) was not being stopped at this stage for the reasons set out above. Therefore, the Tribunal determined that paragraph 3 of the Allegation should remain and it was not persuaded that it could not, on the balance of probabilities, find the facts proved as alleged.

Paragraph 2

35. The Tribunal noted that there was a question about whether Dr A's bare legs appeared on the mobile telephone or not when he claims he saw the mobile telephone screen. The Tribunal was concerned that the removal of the reference to 'bare legs' might have an unintended consequence of unfairness to Dr Patel in reducing the severity of the Allegation. This paragraph of the Allegation, as drafted, strikes the Tribunal as a cumulative charge including 'bare legs' which reflects the severity of the allegation, with a potential link to some kind of sexual motivation. Whilst Dr A has questioned his recollection of whether his bare legs were visible, the Tribunal concluded that the evidence of an otherwise honest witness should properly be assessed in totality. The Tribunal was concerned that any action it might take to strike out wording in the Allegation as drafted potentially has a detrimental consequence to either party. The Tribunal is prepared to hear further submissions on this particular paragraph of the Allegation at this stage or at a later stage, if required. It determined that this paragraph of the Allegation should remain as alleged because it should properly be considered cumulatively and there is sufficient evidence from Dr A that he saw his trousers and belt at the very least.

Paragraph 4

36. Having determined that paragraphs 1 to 3 of the Allegation should remain, the Tribunal considered paragraph 4 of the Allegation. It was not persuaded that the evidence before it was so tenuous such that the fact of sexual motivation of the

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conduct could not be found proved, on the balance of probabilities. The bare facts of the other paragraphs of the Allegation, if found proved, require the Tribunal to properly consider whether there was any sexual motivation and this can only be achieved by looking at the totality of the evidence at the conclusion of the facts stage. The Tribunal concluded that this matter should proceed.

Conclusion

37. As such, the Tribunal has determined to refuse Ms Robinson's application made under Rule 17(2)(g) of the Rules. It has concluded that sufficient evidence has been adduced on which the facts in question could be found proved. The Tribunal will now continue the hearing process and hear Dr Patel's response to the Allegation.