Record of Determinations – Medical Practitioners Tribunal

PUBLIC RECORD

Dates: 03/12/2018 – 21/12/2018
& 18 – 19 March 2019

Medical Practitioner’s name: Mrs Anne MITCHENER

GMC reference number: 3193985

Primary medical qualification: BChir 1986 University of Cambridge

Type of case
New - Misconduct

Outcome on impairment
Not Impaired

Summary of outcome
No Warning

Tribunal:

<table>
<thead>
<tr>
<th>Legally Qualified Chair</th>
<th>Mrs Julia Oakford</th>
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<tr>
<td>Lay Tribunal Member:</td>
<td>Mrs Katriona Crawley</td>
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<td>Medical Tribunal Member:</td>
<td>Dr John Moriarty</td>
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Tribunal Clerk:

- Mr Matt O'Reilly (3 – 21 December 2018)
- Miss Jan Smith (18 – 19 March 2019)

Attendance and Representation:

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<th>Medical Practitioner:</th>
<th>Present and represented</th>
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<tr>
<td>Medical Practitioner’s Representative:</td>
<td>Mr Matthew McDonagh, Counsel, instructed by DWF Solicitors</td>
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<tr>
<td>GMC Representative:</td>
<td>Mr David Birrell, Counsel (3 – 21 December 2018); Ms Susanna Kitzing, Counsel (18 – 19 March 2019)</td>
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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 Facts – 21/12/2018

Background

1. The Tribunal has only included in this section references to the background as it applied to the Allegation as it remained after the Tribunal’s determination on the no case to answer submissions.

2. Mrs Mitchener is a Consultant Neurosurgeon, BSc, PhD, MB BChir, FRCS (RCPSG), RCS (England) and FRCS-SN. Mrs Mitchener qualified in 1987 and went on to complete her specialist training in 2001. At the time of the matters before this Tribunal, between 9 April 2015 and 6 April 2016, Mrs Mitchener held practising privileges at Ashtead Hospital and the London Clinic, both private hospitals. Ashtead Hospital, which is part of Ramsay Health Care UK, is the hospital at which Mrs Mitchener treated Patient A.

Patient A

3. In 2014 Patient A was suffering from lower back pain and was referred to Mrs Mitchener who performed a surgical procedure on Patient A on 8 December 2014, which does not form part of the Allegation. That procedure did not resolve Patient A’s symptoms. On 5 March 2015 Patient A had an MRI scan, following this scan Mrs Mitchener informed Patient A that she had an instability at the L4/5 level of the spine. Mrs Mitchener told Patient A that she required a posterior lumbar interbody fusion procedure at L4/5 of the spinal column, with pedicle screws at L3/4. Mrs Mitchener carried out this operation, ‘Surgery A’, on Patient A at Ashtead Hospital on 9 April 2015.

4. It was alleged that Mrs Mitchener operated at the wrong level of Patient A’s spinal column (at L2/3 and L3/4, as opposed to L4/5). This was fully accepted by Mrs Mitchener. The GMC allege that at the end of ‘Surgery A’ on the 9 April 2015,
Mrs Mitchener failed to perform x-rays to ensure that the correct level of Patient A’s spine had been operated on.

5. On the 22 May 2015 Patient A had a post-operative review appointment with Mrs Mitchener. It was alleged that Mrs Mitchener failed to review the radiologist’s report in conjunction with Patient A’s CT scan images from 27 April 2015 and recognise that she had performed surgery at the wrong level.

6. On 28 September 2015 Patient A attended Ashtead Hospital for steroid injections. After the procedure, Mrs Mitchener spoke to Patient A and told her that she knew exactly why she was in so much pain. Following an MRI scan Mrs Mitchener confirmed that she had operated on the wrong level of the spine. Mrs Mitchener saw Patient A on 5 October 2015. Mrs Mitchener apologised profusely to Patient A who determined to continue with her as her consultant surgeon for the revision surgery although she was offered alternatives.

7. It was alleged that Mrs Mitchener did not report the wrong site surgery to hospital management for a period of approximately 6 months, between October 2015 and April 2016. It was also alleged that at the time of ‘Surgery A’ wrong level spinal surgery was classed by NHS England as a ‘Never Event’.

8. On 6 November 2015 Mrs Mitchener performed revision surgery on Patient A. Following this third operation Patient A made a good recovery.

9. Mrs Mitchener held a post-operative review meeting with Patient A and her husband on 6 April 2016. It was alleged that Mrs Mitchener suggested a figure of £10,000 as compensation for the wrong level surgery.

10. It was alleged that Mrs Mitchener acted dishonestly in attempting to ‘cover up’ the wrong level surgery from hospital management and suggesting ‘paying off’ Patient A during the meeting on 6 April 2016.

A Summary of the Outcomes of Applications Made during the Facts Stage

11. On day 1 of the hearing Mr Birrell made an application on behalf of the GMC to amend paragraph 1 and 4 of the allegation, which the Tribunal granted. The Tribunal’s full decision on the application is included at Annex A.

12. Mr McDonagh made an application for documentary evidence relating to the rules and policies of Ramsay Health Care to be ruled as inadmissible with regards to paragraphs 3 and 4 of the Allegation. The Tribunal rejected the application. The Tribunal’s full decision on the application is included at Annex B.
13. Mr Birrell made an application to amend paragraphs 3 and 4 of the Allegation. The Tribunal rejected the application. The Tribunal’s full decision on the application is included at Annex C.

14. Mr Birrell made an application for paragraph 14 of Mr B’s witness statement to be redacted and excluded from the Tribunal’s consideration in these proceedings as it relates to speculation. Mr McDonagh submitted that this was an agreed position and that he supported the application. The Tribunal determined that paragraph 14 of the witness statement was speculative and granted the application.

15. The Tribunal invited Mr Birrell and Mr McDonagh to make submissions on whether they had any objection to Mr B and Mr C giving their evidence by telephone link. Neither Mr Birrell and Mr McDonagh made any objections to this proposal. The Tribunal agreed to hear their evidence by telephone.

16. At the end of day 8 and the morning of day 9 of these proceedings, Mr McDonagh objected to a question put to Mr I by Mr Birrell. The Tribunal eventually acceded to Mr McDonagh’s application. The Tribunal’s full decision on the application is included at Annex D.

17. On the morning of day 9 of the proceedings, Mr McDonagh made an objection as to how Mr Birrell was putting forward the case for the GMC with regard to his interpretation of paragraph 1 of the Allegation. The Tribunal considered that the Allegation should be read naturally with the stem in conjunction with sub-paragraphs. The Tribunal’s full decision on the application is included at Annex E.

18. On day 9 of the proceedings, prior to Professor J, the defence expert witness providing evidence, Mr Birrell made an application that he should not be able to give evidence-in-chief as oral evidence. The Tribunal granted Mr Birrell’s application pursuant to Rule 34(11) of the Rules. The Tribunal’s full decision on the application is included at Annex F.

19. On day 9 of these proceedings during Mr Birrell’s cross examination of Professor J, Mr McDonagh made an objection to Mr Birrell’s use of the word ‘inappropriate’. The Tribunal determined to grant Mr McDonagh’s application. The Tribunal’s full decision on the application is included at Annex G.

20. The Tribunal invited parties to make any submissions they may have in relation to a proposed amendment to the Allegation regarding references to ‘Surgery A’ being in inverted commas as it did not appear this way throughout the Allegation and was not entirely clear to the reader. Neither Mr Birrell nor Mr McDonagh made any objections to the proposed change. The Tribunal therefore determined to amend the Allegation as it had proposed.
21. On day 10 of the proceedings following the conclusion of the GMC’s case, Mr McDonagh made an application of no case to answer pursuant to Rule 17(2)(g) with regard to all the paragraphs of the Allegation yet to be determined. Mr Birrell opposed the application on all counts save paragraphs 5b, 7a and 7b and 6 as it related to 3b of the Allegation in which he acknowledged concessions made by Mr I and submitted that it is a matter for the Tribunal. The Tribunal upheld the 17(2)(g) application with regard to paragraphs 1a(i),(ii), 5b, 7a and 7b. The Tribunal’s full decision on the application is included at Annex H.

22. The Tribunal accepted that as Mrs Mitchener was a consultant surgeon the Tribunal should refer to her as ‘Mrs’ Mitchener during these proceedings.

The Allegation and the Doctor’s Response

23. The Allegation made against Mrs Mitchener is as follows:

**Patient A**

1. On 9 April 2015 when carrying out spinal surgery (‘Surgery A’) on Patient A you failed to:
   
   a. fully assess Patient A’s radiological imaging in that you did not identify the:
      
      i. L5/S1 level;  
      **Rule 17(2)(g) application upheld**  
      
      ii. proposed operative L4/5 level;  
      **Rule 17(2)(g) application upheld**  

   b. carry out surgery at the correct level, namely L4/5 of Patient A’s spinal column;  
      **Admitted and found proved**  

   c. perform X-rays at the end of ‘Surgery A’ to ensure that the correct operative level had been operated on.  
      **To be determined**

2. At a post-operative review appointment with Patient A on 22 May 2015, you failed to:

   a. review the radiologist’s report in conjunction with Patient A’s CT scan images from 27 April 2015;  
      **To be determined**  

   b. recognise that you had performed ‘Surgery A’ at the incorrect operative level.  
      **To be determined**
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3. Following a review appointment with Patient A on 5 October 2015, you knew that ‘Surgery A’ had occurred at the wrong site. You did not report ‘Surgery A’ to the hospital management as:
   a. wrong site surgery; and/or
      Admitted and found proved
   b. a never event.
      Admitted and found proved

4. You did not inform Ashtead Hospital when you knew that you had carried out the surgery at the wrong level of Patient A’s spinal column for approximately six months.
   Admitted and found proved

5. On 6 April 2016, you discussed ‘Surgery A’ with Patient A and you:
   a. suggested a figure of £10,000.00 as compensation for operating on the wrong site;
      To be determined
   b. failed to record the discussion in Patient A’s records.
      Rule 17(2)(g) application upheld

6. Your actions at paragraphs 3 - 5 were dishonest.
   To be determined

Patient B

7. On 28 March 2017, before Patient B was anaesthetised for spinal surgery (‘Surgery B’), you:
   a. failed to ensure that Patient B’s radiological imaging/scans were readily available;
      Rule 17(2)(g) application upheld
   b. failed to reconcile the radiological imaging/scans with Patient B’s details.
      Rule 17(2)(g) application upheld

Factual Witness Evidence

24. The Tribunal received written and oral evidence on behalf of the GMC from the following witnesses:
   - Patient A, in person;
   - Patient A’s husband, in person;
   - Mr B, Group Medical Director of Ramsay Health Care, by telephone link;
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- Mr C, Head of Clinical Services and matron in charge of all clinical areas and patient care at Ashtead Hospital, by telephone link;
- Mr D, Consultant Neurosurgeon, in person.

25. 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:

- Mr E, Responsible Officer for Ramsay Healthcare UK;

26. Mrs Mitchener provided a witness statement and also gave oral evidence at the hearing. The Tribunal also had her initial (Rule 7) written response to the Allegations.

27. The Tribunal also received numerous written testimonials on behalf of Mrs Mitchener.

Expert Witness Evidence

28. The Tribunal also received evidence from two expert witnesses.

- Mr I, Consultant Neurosurgeon and Spinal Surgeon, provided oral evidence and an expert report dated 17 January 2018, on behalf of the GMC;
- Professor J, Consultant Orthopaedic and Spinal Surgeon provided oral evidence and an expert report, dated 30 November 2018, on behalf of Mrs Mitchener;
- The Tribunal was also provided with a joint expert report from Mr I and Professor J, dated 12 December 2018.

Documentary Evidence

29. The Tribunal had regard to the documentary evidence exhibited by the witnesses and provided by the parties.

The Tribunal’s Approach

30. In reaching its decision on 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. Mrs Mitchener does not need to prove anything.

31. 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. The Tribunal followed what was said by the House of Lord’s in Re Doherty [2008] UKHL 37 as set out in Casey v GMC 2011.
"16... Lord Carswell in Re Doherty makes clear that certain circumstances call for heightened examination of the evidence. Situations which call for heightened examination include the inherent unlikelihood of the occurrence taking place, the seriousness of the allegation to be proved and the serious consequences which could follow an acceptance of the proof...."

32. Further, the Tribunal accepted Lawrence v GMC [2015] EWHC 586 (Admin) that in a case of dishonesty:

"...they should only find dishonesty established if they were satisfied that there was cogent evidence of dishonesty. The civil standard applies, but where dishonesty or particularly a serious offence is alleged the decision makers must be aware of the need for such cogent evidence."

33. The Tribunal was cognisant that Mrs Mitchener was of good character and this was relevant to her propensity to act as alleged and to her credibility as a witness. The Tribunal acknowledged that it was a matter for it to determine how much weight to give this.

The Tribunal’s assessment of witnesses

34. The Tribunal decided, in this case, as some of the remaining heads of charge involved consideration of witness reliability and credibility and in particular in relation to Mrs Mitchener that it would set out its assessment of the witnesses.

Mrs Mitchener

35. The Tribunal gave weight to the fact Mrs Michener was of good character and that she had always accepted her responsibility for the wrong level surgery. She had been open with Patient A and had apologised profusely for her serious error.

36. The Tribunal found the testimonial evidence to be positive in that it attested to her honesty, integrity, standing and competence as a neurosurgeon. It accepted that the testimonials indicated a strong focus on patient care.

37. The Tribunal found Mrs Mitchener to be truthful, reflective and thoughtful in her oral evidence. It found her to be consistent and reliable in her oral evidence and therefore found Mrs Mitchener to have been a credible witness. The Tribunal found that Mrs Mitchener’s evidence at different stages of the process, though not always identical, was not fundamentally inconsistent and did not affect the Tribunal’s view of her credibility or reliability.
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Patient A

38. The Tribunal considered Patient A to have been generally a good and credible witness who did her best to assist it but was mistaken at points. It was in no doubt that Patient A and her family had been adversely affected by the wrong level surgery and the delay in identifying it.

39. The Tribunal gave weight to the fact that Patient A was mistaken about the content of a recorded telephone conversation with Mr C and maintained her mistaken recollection even on listening again during these proceedings to that recording. She thought that a figure of £10,000 had been discussed during that conversation but this was not the case.

Patient A’s husband

40. Patient A’s husband did his best to assist the Tribunal and was broadly credible though not fully reliably in his evidence. There were inconsistencies in relation to his recollection of the conversation with Mrs Mitchener about the detail of compensation. The Tribunal found that he was the person who first raised the issue of compensation.

Mr D

41. The Tribunal found Mr D to be consistent in his written and oral evidence. It found him to be a credible witness.

Mr C

42. The Tribunal found Mr C to be a credible and straightforward witness.

Mr B

43. The tribunal found Mr B to be credible, although he had a tendency to give his own opinions rather than give direct answers to questions in his oral evidence.

Mr I and Professor J

44. The Tribunal acknowledge that both expert witnesses were experienced in the area of spinal surgery and were of assistance to the Tribunal in making its factual decisions.

The Tribunal’s Analysis of the Evidence and Findings

Allegation 1
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1. On 9 April 2015 when carrying out spinal surgery (‘Surgery A’) on Patient A you failed to:
   c. perform X-rays at the end of ‘Surgery A’ to ensure that the correct operative level had been operated on.

   **Found proved**

45. Both experts agreed that it was necessary to take and check x-ray images to confirm that the correct level surgery had been performed. Mr J stated it would not be necessary if satisfactory radiological checks had been done during the operation and Mr I accepted it would not be necessary if the intention was to complete radiological checks the next day. Both experts agreed that it was normal practice at that time not to store every x-ray taken during an operation. Thus the Tribunal did not have access to a complete set of x-rays. The Tribunal considered Mrs Mitchener’s oral evidence in which she stated that she did perform x-rays at the end of ‘Surgery A’. She accepted that it was her responsibility to ensure that the correct operative level had been operated on and that she had not done so. She explained that some combination of coned images and her confidence that she was at the right level may have contributed to this.

46. The Tribunal considered Mr Birrell’s submission that Mrs Mitchener admitted in cross examination that it was her responsibility to perform x-rays and also admitted that any coning down by the radiographer amounts to an explanation, but not a defence. Mr Birrell submitted that it was always open to Mrs Mitchener to ask the radiographer not to cone down the images.

47. The Tribunal considered Mr McDonagh’s submission in which he referred to the expert evidence that x-rays are not necessarily required at the end of this type of spinal surgery. The Tribunal rejected this submission as neither of these points reflected Mrs Mitchener’s evidence and she accepted x-rays had been taken.

48. The Tribunal determined that Mrs Mitchener did perform x-rays at the end of ‘Surgery A’, but considered paragraph 1c of the Allegation to mean she should have not only performed these x-rays, but ensured they were adequate to confirm the correct operative level had been operated on. It considered that she had not done so as she had performed at the wrong level and did not recognise it.

49. For these reasons, the Tribunal finds paragraph 1c of the Allegation proved.

**Allegation 2**

2. At a post-operative review appointment with Patient A on 22 May 2015, you failed to:
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a. review the radiologist’s report in conjunction with Patient A’s CT scan images from 27 April 2015;  
   Found not proved

b. recognise that you had performed ‘Surgery A’ at the incorrect operative level.  
   Found not Proved

50. The Tribunal accepted Mrs Mitchener’s evidence that she did not have the sagittal images at the time of this consultation as they had not downloaded. The Tribunal accepts both experts’ opinions that even if she did not have the sagittal images she was correct to continue with the appointment. Her evidence is supported by a letter from her written in November 2016 referring to problems with the relevant image link.

51. The Tribunal considered the radiologist’s report, dated 30 April 2015, and noted that although it did indicate on one interpretation that wrong level surgery had taken place, this was not made explicit. The report includes the reassuring phrase “No worrying adverse features are seen in relation to the metalwork” and no concern about possible wrong level surgery was directly communicated to Mrs Mitchener by the reporting radiologist. The Tribunal also noted the evidence of Professor J that it was for the surgeon to check core images and not just rely on a report from a radiologist. The radiologist’s report states:

   “Clinical History:
   L3/4 pedicle screws and L4/5 PLIF 2 weeks ago - numbness developed in anterior thighs bilaterally 5 days ago. ? screw position.
   Findings:

   L3 and L4 laminectomies are noted. There are pedicle screws and rods at L2, L3 and L4, and a disc spacer is noted at L3/4.

   No worrying adverse features are seen in relation to the metalwork.
   There is a grade 1 anterior slip of L4 upon L5.”

52. The Tribunal considered the evidence from Mrs Mitchener and both experts that neurosurgeons do not wholly rely on the numbering by radiologists in their reports given different numbering systems.

53. The Tribunal accepted Mrs Mitchener’s oral evidence in which she stated the purpose of taking post-operative images at this time was to check that the metalwork and pedicle screws were well positioned and not primarily to check the level of surgery. She did not have wrong level surgery in mind as a possibility. The Tribunal accepted Patient A’s evidence that Mrs Mitchener had described the images
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available to her as ‘text book surgery’. However, the Tribunal accepted this was in reference to the metalwork and not the level of that metalwork.

54. The Tribunal noted that Mrs Mitchener properly accepts that following this consultation, as indicated by Mr McDonagh’s submission, she should have taken further steps to check the sagittal images. However this does not form part of the Allegation.

55. The Tribunal determined that it follows therefore that paragraphs 2a and 2b of the Allegation are not proved.

Allegation 5

5. On 6 April 2016, you discussed ‘Surgery A’ with Patient A and you:

a. suggested a figure of £10,000.00 as compensation for operating on the wrong site;

    Found not proved

56. The Tribunal has assessed the reliability and credibility of Mrs Mitchener’s evidence earlier in this determination. It accepted Mrs Mitchener’s evidence that she did not offer Patient A an inducement of £10,000 compensation. It accepted from Patient A and Patient A’s husband that there was a discussion about compensation but found that this was initially raised by Patient A’s husband and not by Mrs Mitchener.

57. Further, Mrs Mitchener, at the end of the discussion, in the presence of Patient A and her husband, attempted to contact Mr F, the General Manager of the hospital in relation to the issue of Patient A and Patient A’s husband seeking compensation. The Tribunal notes that Mr F, who did not give evidence, spoke to Mr C in relation to his conversation with Mrs Mitchener. In his evidence Mr C made no mention of a figure of £10,000. The Tribunal has already set out that they considered Patient A to have a lack of reliability on this issue, the Tribunal having listened to the telephone recording. Mrs Mitchener also telephoned Patient A later that evening to confirm that the Trust were not prepared to pay compensation. The Tribunal found these actions to be totally inconsistent with an allegation that Mrs Mitchener had offered a bribe or inducement of £10,000.

58. The Tribunal determined therefore that paragraph 3a of the Allegation is not proved.

Allegation 6

6. Your actions at paragraphs 3 - 5 were dishonest.

    Found not proved in relation to 3a and 3b
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Found not proved in relation to 4

59. The Tribunal first had regard to the relevant legal principle as set out in Ivey v Genting Casinos (UK) Ltd. (trading as Crockfords Club) [2018] AC 391, which states:

"74 …When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

60. The Tribunal gave weight to Mrs Mitchener’s good character and the supportive testimonials going to her honesty and integrity. The Tribunal was also cognisant that for dishonesty to be proved it must have cogent evidence, although the standard of proof remains on the balance of probabilities.

61. The Tribunal then went on to consider paragraph 3a, 3b and 4 of the Allegation in relation to paragraph 6 of the Allegation.

3. Following a review appointment with Patient A on 5 October 2015, you knew that ‘Surgery A’ had occurred at the wrong site. You did not report ‘Surgery A’ to the hospital management as:

a. wrong site surgery; and/or
   Admitted and found proved

b. a never event.
   Admitted and found proved

4. You did not inform Ashtead Hospital when you knew that you had carried out the surgery at the wrong level of Patient A’s spinal column for approximately six months.
   Admitted and found proved

62. The Tribunal considered the witness statement of Mr D, which states:

"In September or October 2016, I was doing a clinic at Ashtead when Mrs Mitchener came to see me, I recall that she was clearly distressed. She had
just realised she had fused the wrong level of the patient’s spine during previous surgery (‘the incident’) and wanted my help to clarify what had happened. She asked if I would go through the patient’s history and review the images with her to see what could have happened. As I recall, I was doing a clinic and we agreed that I would finish the clinic and would then sit down with her to discuss the case.

... 

If I recall our conversation well, I think Mrs Mitchener asked me if I thought she should inform hospital management about this. I told her that as far as I was concerned, the priority was the patient but that she should probably tell the management about the incident as she had nothing to hide. I am quite certain that Mrs Mitchener said she would inform the general manager...”

63. The Tribunal considered that Mrs Mitchener did not try and conceal or hide the revision surgery. The Tribunal considered Mrs Mitchener’s oral evidence in which she stated she did not recall full details of this conversation with Mr D and Mr Birrell’s submissions in this regard. The Tribunal accepted Mrs Mitchener’s evidence that she did not recall the meeting in any detail because she was extremely distressed about the wrong level surgery and her responsibility for this serious error. Her main focus was on the Patient A and putting ‘it’ right. The outcome of meeting Mr D included Mrs Mitchener arranging the meeting in which she candidly explained the position to Patient A and apologised in respect of the wrong level surgery. Mr D also offered to assist in revision surgery if required. The Tribunal considered the fact that Mrs Mitchener did not report the wrong level surgery did not form any part of a ‘cover up’ and was not dishonest.

64. The Tribunal finds therefore paragraphs 3a, 3b and 4 of the Allegation not proved in relation the paragraph 6 of the Allegation.

The Tribunal’s Overall Determination on the Facts

65. The Tribunal has determined the facts as follows:

Patient A

1. On 9 April 2015 when carrying out spinal surgery (‘Surgery A’) on Patient A you failed to:

   a. fully assess Patient A’s radiological imaging in that you did not identify the:

      i. L5/S1 level;

   Rule 17(2)(g) application upheld
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ii. proposed operative L4/5 level;
   Rule 17(2)(g) application upheld

b. carry out surgery at the correct level, namely L4/5 of Patient A’s
   spinal column;
   Admitted and found proved

c. perform X-rays at the end of ‘Surgery A’ to ensure that the
   correct operative level had been operated on.
   Found proved

2. At a post-operative review appointment with Patient A on 22 May
   2015, you failed to:

a. review the radiologist’s report in conjunction with Patient A’s CT
   scan images from 27 April 2015;
   Found not proved

b. recognise that you had performed ‘Surgery A’ at the incorrect
   operative level.
   Found not proved

3. Following a review appointment with Patient A on 5 October 2015, you
   knew that ‘Surgery A’ had occurred at the wrong site. You did not
   report ‘Surgery A’ to the hospital management as:

a. wrong site surgery; and/or
   Admitted and found proved

b. a never event.
   Admitted and found proved

4. You did not inform Ashtead Hospital when you knew that you had
   carried out the surgery at the wrong level of Patient A’s spinal column
   for approximately six months.
   Admitted and found proved

5. On 6 April 2016, you discussed ‘Surgery A’ with Patient A and you:

a. suggested a figure of £10,000.00 as compensation for operating
   on the wrong site;
   Found not proved

b. failed to record the discussion in Patient A’s records.
   Rule 17(2)(g) application upheld
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6. Your actions at paragraphs 3 - 5 were dishonest.
   Found not proved in relation to 3a and 3b
   Found not proved in relation to 4

Patient B

7. On 28 March 2017, before Patient B was anaesthetised for spinal surgery (‘Surgery B’), you:
   a. failed to ensure that Patient B’s radiological imaging/scans were readily available;
      Rule 17(2)(g) application upheld
   b. failed to reconcile the radiological imaging/scans with Patient B’s details.
      Rule 17(2)(g) application upheld

Determination on Impairment - 19/03/2019

1. The Tribunal now has to decide in accordance with Rule 17(2)(l) of the Rules whether, on the basis of the facts found proved as set out in a previous determination, Mrs Mitchener’s fitness to practise is impaired by reason of her alleged misconduct.

The Evidence

2. The Tribunal has taken into account all the evidence received during the facts stage of the hearing, both oral and documentary, including the testimonial bundle.

3. The Tribunal received further evidence from Ms Kitzing, on behalf of the GMC and from Mr McDonagh, on behalf of Mrs Mitchener which included:

   • A Statement from Dr G, Mrs Mitchener’s Responsible Officer
   • Appraisal documents dated January and November 2018
   • 360 feedback analysis dated April 2018
   • Theatre observations forms
   • ‘Thank you’ letters from patients
   • CPD Certificates
   • Testimonial evidence

Oral Evidence
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4. Mrs Mitchener gave oral evidence under oath at this impairment stage of the hearing. She told the Tribunal that she had experienced difficulties in finding work as a spinal surgeon and that she had applied for such posts in 17 hospitals without success. Mrs Mitchener explained that potential employers are very careful who they employ in this type of work and she had been told that she would not be considered for a post whilst the GMC investigation is ongoing.

5. Mrs Mitchener told the Tribunal that she has however been working in a busy Accident & Emergency Department, although not at consultant level. She said she loved the work and the people she worked with and that she had been asked to give a talk to junior trainee doctors on spinal injuries. Mrs Mitchener expressed her wish to return to the A & E environment and work some shifts in addition to returning to work as a consultant spinal surgeon.

6. She told the Tribunal that she had reflected on her surgical mistake and, as a result, she had tightened up her procedures as much as she could whilst not performing surgery. Mrs Mitchener said that she had been invited to practice at the Schoen Clinic in London, which is noted for its high standards of excellence, but she emphasised that she would not be given practising privileges whilst she remained under investigation by the General Medical Council.

7. Mrs Mitchener told the Tribunal that she had attended multi disciplinary team (MDT) meetings when discussions about subjects such as pain management, anaesthesia management and complex spinal issues took place. She said there were between 15 – 20 people at these meetings including radiologists and consultant neurosurgeons and that her opinion had been sought in each of the cases discussed. She also said that she had attended theatre which meant that she was in the mind-set of someone working in theatre and she has alerted practitioners to potential problems occurring in theatre.

8. Mrs Mitchener told the Tribunal that she has returned to consulting with patients on spinal issues but has been open with them that, should surgical intervention other than injections be required, she would refer the patient on to colleagues. Mrs Mitchener has given careful thought as to how to ensure surgery is undertaken at the correct spinal level and has put together a system for herself in this respect so as to minimise risk.

9. In relation to reporting incidents, Mrs Mitchener said that it is not at the forefront of practitioners’ minds to report incidents to clinical management and that she and her colleagues would approach each other first and discuss what needs to be done. She now fully acknowledges the importance of formal reporting using whatever procedures are required.

10. Mrs Mitchener described all the steps she had taken to maintain her medical skills and knowledge and told the Tribunal that she did not consider that she was de-skilled in
any way. She said that she could still go into theatre and work as usual although it
would be preferable to return to work and ease her way in gently, assisting colleagues,
before doing her own operations. Mrs Mitchener emphasised that she will ensure she
was absolutely up to date before doing so. She told the Tribunal that, in the past year,
there have been enormous changes in working practices and that she is completely up
to speed with all those changes.

Submissions on behalf of the GMC

11. Ms Kitzing submitted, on behalf of the GMC, that Mrs Mitchener’s fitness to
practise is impaired by reason of her misconduct. She referred to Cheatle v GMC
[2009] EWHC 645 (Admin) which includes a reference to the decision of Jackson J in
Calhaem v GMC [2007] EWHC 2606 (Admin) in which he stated:

“(1) Mere negligence does not constitute "misconduct" within the meaning of
section 35C(2)(a) of the Medical Act 1983. Nevertheless, and depending upon
the circumstances, negligent acts or omissions which are particularly serious
may amount to "misconduct".

(2) A single negligent act or omission is less likely to cross the threshold of
"misconduct" than multiple acts or omissions. Nevertheless, and depending
upon the circumstances, a single negligent act or omission, if particularly grave,
could be characterised as "misconduct".”

12. Ms Kitzing submitted that there had been one act of wrong site surgery and
one omission relating to x-rays. She conceded that the matters relating to reporting
could not, as drafted, amount to misconduct. However, Ms Kitzing contended that
the wrong site surgery and the x-ray failure were serious and amounted to
misconduct.

13. In relation to impairment, Ms Kitzing referred to the case of the CHRE v NMC
and Paula Grant [2011] EWHC 927 (Admin) in which Justice Cox quoted Dame
Janet Smith in her Fifth Report from the case of Shipman who set out the following
as an appropriate test for panels considering impairment of a doctor's fitness to
practise:

“a. has in the past acted and/or is liable in the future to act so as to put a
patient or patients at unwarranted risk of harm; and/or

b. has in the past brought and/or is liable in the future to bring the medical
profession into disrepute; and/or

c. has in the past breached and/or is liable in the future to breach one of the
fundamental tenets of the medical profession; and/or
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d. has in the past acted dishonestly and/or is liable to act dishonestly in the future."

It was Ms Kitzing’s contention that (a) and (b) above are engaged in that Mrs Mitchener’s act did put a patient at risk of harm.

14. Ms Kitzing reminded the Tribunal that Mrs Mitchener has not been working in spinal surgery for some time. She submitted that there remains a risk to patients and that public confidence in the GMC as a medical regulator would be damaged if a finding of impairment were not made.

Submissions on behalf of Mrs Mitchener

15. Mr McDonagh submitted that all surgeons make mistakes and those mistakes may have serious consequences. He reminded the Tribunal that Mrs Mitchener is a very experienced surgeon who has made one mistake in almost thirty years of surgical practice when she carried out spinal surgery at the incorrect level. Mr McDonagh submitted that all professionals are liable to make mistakes and thus fall below the standards they set for themselves and he referred to the evidence of the expert witnesses who agreed that mistakes happen to everyone and that this particular mistake was an ‘easy’ one to make.

16. Mr McDonagh reminded the Tribunal that Mrs Mitchener has changed her practice since the events in question and that she has continued to be involved in medicine and in spinal surgery. He stated that although she has limited capacity to work as a surgeon she has nevertheless maintained her techniques and her injection practices and attends MDT meetings, taking part in team discussions. Mr McDonagh submitted that Mrs Mitchener has planned her proposed return to work in spinal surgery until her retirement in about five years time. In the meantime, he reminded the Tribunal, Mrs Mitchener has been working in a busy A & E environment at a lower level than consultant.

17. Mr McDonagh submitted that Mrs Mitchener has been a consultant for more than twenty years and the testimonial letters submitted on her behalf attest to her skills as a neurosurgeon. He stated that to say that to allow her to return to unrestricted practice would be a risk to patient safety is offensive. Mr McDonagh also submitted that the mistakes made by Mrs Mitchener are not sufficient to bring the profession into disrepute.

18. Mr McDonagh submitted that, in all the circumstances of this case, the Tribunal can properly conclude that there is no basis for a finding of impairment of fitness to practise.

Relevant Legal Principles
19. The Tribunal reminded itself that, at this stage of proceedings, there is no burden or standard of proof and the decision of impairment is a matter for the Tribunal’s judgement alone.

20. In reaching its decision, the Tribunal was mindful of the two stage process to be adopted: first, whether the facts found proved amount to misconduct which is serious and then, if so, whether Mrs Mitchener’s fitness to practise is impaired as a result.

21. If serious misconduct is found, the Tribunal must determine whether Mrs Mitchener’s fitness to practise is impaired today, taking into account her conduct at the time of the events and any relevant factors since then, such as whether the matters are remediable, have been remedied and any likelihood of repetition.

22. The Tribunal has also borne in mind the overarching objective of the GMC set out in section 1 of the Medical Act 1983 (as amended) to:

   a. Protect, promote and maintain the health, safety and well-being of the public,
   b. Promote and maintain public confidence in the medical profession, and
   c. Promote and maintain proper professional standards and conduct for members of that profession.

**Tribunal Decision on Impairment**

**Misconduct**

23. The Tribunal first considered whether the facts found proved in Mrs Mitchener’s case, namely paragraphs 1(b) and 1(c), amount to misconduct.

24. The Tribunal considered the specific act of Mrs Mitchener’s failure to operate at the correct level of Patient A’s spinal column and her omission in not performing x-rays at the end of the surgery to ensure it had been operated on at the correct level. It was of the opinion that whilst Mrs Mitchener may have been negligent, she had made one mistake, which other doctors could, and have, made in a career spanning more than thirty years. This was one error in the context of an acknowledged risk in this type of surgery.

25. The Tribunal accepted the oral evidence of the expert witnesses who agreed that whilst Mrs Mitchener’s conduct was below the standards expected of a Consultant Neurosurgeon it was not seriously below those standards.
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26. The Tribunal was satisfied that, whilst her conduct had serious consequences for Patient A, it was of the view, taking into account the expert evidence, that Mrs Mitchener’s conduct would not be considered deplorable by other medical practitioners and was not so serious as to amount to misconduct.

27. Accordingly, the Tribunal has determined that Mrs Mitchener’s actions in respect of paragraphs 1(b) and 1(c) did not amount to serious misconduct. Also, the Tribunal accepted the submissions that paragraphs 3(a), 3(b) and 4 were of a factual nature only and could not amount to misconduct as no failure was alleged.

28. Having determined there is no misconduct, there is nothing on which to base a finding of impairment and therefore Mrs Mitchener’s fitness to practise is not impaired.

29. The Tribunal has determined not to issue a warning in this case.

30. The case has concluded.

Confirmed

Date: 19 March 2019

Mrs Julia Oakford, Chair
ANNEX A – 04/12/2018

Application to amend the Allegation

1. Mr Birrell made an application, under the General Medical Council (Fitness to Practise) Rules Order of Council 2004, ('the Rules') Rule 17(6), to amend paragraphs 1 a, b ,c and 4 of the Allegation, from:

   **Allegation 1**

   1. On 9 April 2015 when carrying out spinal surgery ('Surgery A') on Patient A you:

      a. failed to fully assess Patient A’s radiological imaging in that you did not identify the:
         i. L5/S1 level;
         ii. proposed operative L4/5 level;

      b. incorrectly carried out Surgery A at L3/4 of Patient A’s spinal column;

      c. failed to perform X-rays at the end of Surgery A to ensure that the correct operative level had been operated on.

   **Allegation 4**

   4. You did not inform your then employer, Ashtead Hospital, when you knew that you had carried out the surgery at the wrong level of Patient A’s spinal column for approximately six months.

   to:

   **Allegation 1**

   1. On 9 April 2015 when carrying out spinal surgery ('Surgery A') on Patient A you failed to:

      a. fully assess Patient A’s radiological imaging in that you did not identify the:
         i. L5/S1 level;
         ii. proposed operative L4/5 level;
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b. carry out surgery at the correct level, namely L4/5 of Patient A’s spinal column;

c. perform X-rays at the end of Surgery A to ensure that the correct operative level had been operated on.

Allegation 4

4. You did not inform Ashtead Hospital when you knew that you had carried out the surgery at the wrong level of Patient A’s spinal column for approximately six months.

2. Mr Birrell submitted that the Allegation was in part worded incorrectly and his proposed amendments reflect how it ought to have been drafted.

3. Mr McDonagh did not oppose this application.

The Tribunal’s decision

4. The Tribunal considered that there would be no injustice to Mrs Mitchener in accepting the amendments proposed by Mr Birrell. It also considered that the proposed amendments to the Allegation would not cause injustice. The Tribunal therefore determined to grant to the application to amend the Allegation as proposed.

ANNEX B – 04/12/2018

Application as to the admissibility of evidence

Submissions on behalf of Mrs Mitchener

1. In summary, Mr McDonagh made an application for documentary evidence in relation to the Ramsay Health Care rules and policies to be ruled inadmissible as evidence before this Tribunal. He submitted that it is Mrs Mitchener’s position that she was never made aware of these rules or policies and it is the GMC’s burden to provide evidence to demonstrate she had been aware. He submitted that Mrs Mitchener was unaware that wrong level spinal surgery had been classified as a “never event” only a matter of days before Patient A’s surgery on 9 April 2015.

2. Mr McDonagh submitted that although Mrs Mitchener had admitted paragraphs 3 and 4, these admissions were only factual in nature as there was no duty contained within the allegation. He submitted that the GMC must show that Mrs Mitchener had a duty and had been made aware of her obligation. Mr McDonagh
submitted that the burden of proof remains on the GMC and that dishonesty is denied.

Submissions on behalf of the GMC

3. In summary, Mr Birrell submitted that this application is premature as more evidence can be provided from the relevant witnesses. He submitted that supplementary witness statements could address the point as to whether the rules and policies had been put before Mrs Mitchener, who had practising privileges but was not an employee of Ramsay Healthcare. He referred the Tribunal to the relevant documentation relating to rules and procedures for accredited healthcare professionals; and the reporting of any adverse events in line with the Ramsay Health Care UK Policy RM006 Incident Reporting (as updated or replaced from time to time); Ramsay Health Care UK Group Policies and Procedures, Incident Reporting August 2014; Management of “Never Event” Incidents; and the Being Open Policy. Mr Birrell submitted that on this basis the rules and policies are relevant and these should be before the Tribunal.

4. Mr Birrell submitted that there is evidence before the Tribunal that Mrs Mitchener should have been cognisant of her duties under the policies and he pointed to evidence from Mr B and Mr C.

The Tribunal’s Decision

5. The Tribunal had regard to the overarching objective. It considered the email from Mr B to Mrs Mitchener, dated 26 April 2014, in which he stated:

“...It is your obligation as part of your practice privileges to be cognisant of these rules and hospital policies...”

6. The Tribunal went on to consider the witness statement from Mr C, in which he states:

“...The issue was that she hadn’t picked up on this error until 6 months later and then she didn’t let anyone know, other than Mr D, and she did not let the relevant people at Ashtead know as per her practising requirements. The Facility rules 2013: 240:14 indicate that you should ‘report and adverse events in line with the Ramsay healthcare UK policy RM006 Incident reporting (as updated or replaced from the time to time).’ Nor did she let Dorking Healthcare know, who were the funder for the patient...”

7. The Tribunal considered that there was evidence in the papers relating to matters of Mrs Mitchener’s obligation and knowledge of rules and policies. It accepted that these matters were relevant to the paragraphs of the Allegation.
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8. In relation to paragraphs 3 and 4 of the Allegation, the bundle of documents contains the Ramsay Health Care rules and policies and the witness evidence set out above. In looking at the issue of fairness, the Tribunal has to look at fairness to both parties and the wider public interest. The Tribunal has decided that it is fair that these matters already raised in the evidential bundle now be properly examined during the course of this hearing. Witnesses can be cross examined on the issues. The Tribunal will in due course consider the weight to be attached to all evidence. The GMC have not taken the supplementary statements referred to by Mr Birrell, from the relevant witnesses and have not been able to provided Mrs Mitchener with any detail as to what enquiries have been previously been made of these witnesses in this respect. The Tribunal is informed that Mrs Mitchener raised the issue as to her lack of knowledge as to the various policies at an early stage. It is obviously desirable that the GMC consider these matters with expedition and prior to the calling of these two witnesses.

9. The Tribunal therefore determined to reject the application.

ANNEX C – 06/12/2018

Application to amend the Allegation

1. Mr Birrell, on behalf of the GMC and Mr McDonagh on behalf of Mrs Mitchener both agreed that the Tribunal could consider this application under Rule 17(6) despite paragraphs 3 and 4 of the Allegation having been admitted and announced proved under Rule 17(e). It was acknowledged that there did not appear to be any authority on this. However, because of the wording “it appears” and “should be amended” in Rule 17(6) they agreed the application could be made.

Submissions of behalf of the GMC

2. In summary Mr Birrell made a further application, under Rule 17(6), to amend paragraphs 3 and 4 of the Allegation, as below:

3. Following a review appointment with Patient A on 5 October 2015, you knew that Surgery A had occurred at the wrong site. You failed to report Surgery A to the hospital management as:

   a. wrong site surgery; and/or

   b. a never event.

4. You failed to inform Ashtead Hospital when you knew that you had carried out the surgery at the wrong level of Patient A’s spinal column for approximately six months.
3. Mr Birrell submitted that there are two tests to be met when considering whether paragraphs 3 and 4 of the Allegation should be amended. Firstly, he submitted, as set out under Rule 17(6)(a), the charges as drafted do not sufficiently particularise the GMC’s case, that they should be amended to state that “you failed” rather than “you did not inform”. He submitted that the charges must clearly identify the case against Mrs Mitchener and currently they do not and so the amendments should be made.

4. Mr Birrell submitted that the second test, as set out under Rule 17(6)(b), is whether the proposed amendment can be made without injustice. He submitted that the goal posts have not been moved and that it has always been the GMC’s case that Mr Mitchener failed to report. He invited the Tribunal to consider why else would they provide the rules and policies within the evidence. He submitted that in her Rule 7 response, Mrs Mitchener addressed her duty to tell the Hospital about the “never event”.

5. Mr Birrell submitted that Mrs Mitchener is not prejudiced as this is the beginning of the case and no evidence has been heard. He submitted that the strength of evidence in relation to Mrs Mitchener’s duty is not particularly relevant at this stage and that this Tribunal has already found that there is some evidence to demonstrate Mrs Mitchener’s knowledge of her duty. Mr Birrell submitted that the proposed amendments should be made as it clearly identifies the case against Mr Mitchener.

6. Mr Birrell contended that if Mrs Mitchener needed time to answer an amended Allegation, it was always open to her to apply to the Tribunal for the case to be adjourned.

7. In closing Mr Birrell accepted that the amendment that he was requesting should have been alleged in the original Allegation.

Submissions of behalf of the Mrs Mitchener

8. In summary, Mr McDonagh submitted that the GMC have always known Mrs Mitchener’s position in regard to the paragraphs 3 and 4 of the Allegation as outlined in the Rule 7 response and further drafted the Allegation having this knowledge.

9. Mr McDonagh submitted that the Allegation as it stands does not reflect the case that the GMC are now suggesting they are taking forward and what Mr Birrell is now asking for is to call evidence that there was a duty to inform and a failure in that duty, which had not previously been charged. He submitted that this is a material change which could have very serious consequences for Mrs Mitchener.

10. Mr McDonagh submitted that the Rules state that any injustice in making the proposed amendments should prevent such an application. He submitted that the
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defence is prepared to answer the factual case that Mrs Mitchener did not report the wrong site surgery, but now the GMC are presenting something materially different which the defence are not prepared for. Mr McDonagh submitted that this case should not be presented with uncertainty and speculation as Mrs Mitchener should know what case she faces. He submitted that if the Allegation had been drafted as the GMC now propose, Mrs Mitchener would have had the opportunity to prepare differently. He submitted that she could then have explored the possibility of emails and correspondence from authorities and various organisations to answer that case, attempt to obtain minutes of meetings and opinions from experts would have been sought.

11. Mr McDonagh submitted that the Rule states that an amendment cannot be made if there is injustice, that it does not quantify that injustice. He submitted that the proposed material change to paragraphs 3 and 4 of the Allegation present a material change that does cause injustice to Mrs Mitchener and therefore opposed the application.

The Tribunal’s approach

12. The Tribunal was cognisant of the fact that paragraphs 3 and 4 of the Allegation had been admitted and announced as found proved under Rule 17(e) which states: “shall announce that such facts have been found proved”. It acknowledged that there could be an argument that paragraphs 3 and 4 of the allegation having been found proved were no longer disputed facts and could no longer be amended.

13. However, the Tribunal has had careful regard to Rule 17(6)(a) and (b), which state:

"(6) Where, at any time, it appears to the Medical Practitioners Tribunal that—

(a) the allegation or the facts upon which it is based and of which the practitioner has been notified under rule 15, should be amended; and

(b) the amendment can be made without injustice, it may, after hearing the parties, amend the allegation in appropriate terms."

It is accepted between parties that “it appears” and “should be amended” means the Tribunal might be able to consider the application. It is on that basis alone that the Tribunal has decided to hear the application. It is aware that should it accede to the application the admissions would no longer be effective. Further, if it did not accede to the application the admissions would remain.
14. Throughout its deliberations the Tribunal has had regard to the statutory overarching objective.

**The Tribunal’s decision**

15. Mr Birrell had already made an application on Day 1 of these proceedings to amend the Allegation which was agreed between the parties and granted. Mrs Mitchener, through Mr McDonagh then made admissions to paragraphs 3 and 4 of the Allegation which were duly found proved.

16. The Tribunal was mindful of the stage that these proceedings have now reached and that Mr Birrell made no applications prior to this in relation to failure and therefore the imposition of the duty on Mrs Mitchener to report to the relevant hospitals/management.

17. The Tribunal found that the Rule 7 response sent by Mrs Mitchener represented a clear position from her. The Tribunal considered that she had always faced the same case, that she did not report, not that she failed to report.

18. The GMC, by asking for an amendment, is trying to allege a failure of duty on Mrs Mitchener which has not been put before. It accepted that material has been served which could be regarded as background information but is not of itself per se evidence that the GMC intended to put its case on the basis of a failure of duty to inform the relevant hospital/management as set out in paragraphs 3 and 4 of the Allegation.

19. The Tribunal therefore, for the reasons set out above, determined that acceding to this application would represent a material change. The Tribunal accepted the submissions of Mr McDonagh and determined that the proposed amendment to paragraphs 3 and 4 of the Allegation should not be made and the amendment cannot be made without injustice.

20. The Tribunal therefore rejects the application.

21. Paragraphs 3 and 4 of the Allegation remain admitted and found proved.

**ANNEX D – 21/12/2018**

**Application to not permit a question in cross examination**

1. On Day 8 of these proceedings, Mr I, the GMC's expert witness, was giving oral evidence under questioning from Mr Birrell. Mr McDonagh objected to a question put to Mr I by Mr Birrell in relation to whether, in his opinion, Mr I thought Rule 240.14 of the Facility Rules for Ramsay Health Care UK was ambiguous.
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Submissions of behalf of Mrs Mitchener

2. Mr McDonagh submitted that Mr I was not an expert in this area and that he would be giving a layman’s opinion. He submitted that Mr I had not seen the Facility Rules previous to this point and that he had not addressed this matter in his witness statement. Mr McDonagh submitted that for these reasons Mr I should not be asked his opinion in relation to the ambiguity of specific rules. He submitted that when he himself cross examined Mr I about the possibility of policies and rules being ambiguous, he did so only in general terms.

Submission on behalf of the GMC

3. Mr Birrell submitted that his question followed on from cross examination by Mr McDonagh and that he wanted to seek further clarification on the response Mr I gave to Mr McDonagh regarding the ambiguity of policies and rules.

The Tribunal’s Decision

4. The Tribunal considered that whilst it accepted Mr McDonagh’s cross examination of Mr I was in general terms, Mr Birrell’s question relating to the ambiguity of policies and rules could be put to Mr I. It determined that it would adduce the weight to be given to the evidence in due course.

Further submissions on behalf of Mrs Mitchener

5. On the morning of day 9 of the proceedings, prior to Mr I returning to conclude his oral evidence following the application at the end of day 8, as set out above, Mr McDonagh made a further application opposing Mr Birrell’s enquiry as to Mr I’s opinion regarding the ambiguity of specific policies or rules regarding Ramsay Health Care UK.

6. In summary Mr McDonagh submitted that the Tribunal can form its own view on the evidence received. He submitted that because Mr I is not an expert in this area it is not appropriate for him to be answering questions as an expert. He submitted that for a Neurosurgeon to comment on matters of policy that he has not seen before, relating to a Hospital where he has never worked, is not fair. He invited the Tribunal to consider how Mr I could assist it with the policies and rules of the hospital more than anyone else.

7. Mr McDonagh submitted that his questions to Mr I had been about ambiguity in relation to rules and policies in general. Mr McDonagh submitted that at best this was a breach of contract matter and an employment issue. Mr McDonagh submitted that Mr B was the person to comment on these matters, which he did and so the Tribunal has had that assistance.
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8. Mr McDonagh referred the Tribunal to the relevant legal principles as set out in *Kennedy (Appellant) v Cordia (Services) LLP [2016] UKSC 6*.

9. Mr McDonagh submitted that this is not merely a question of what weight to be attached to evidence.

Further submissions of behalf of the GMC

10. In summary, Mr Birrell submitted that this situation is one of Mr McDonagh’s making as he wants to have his cake and eat it. He submitted that Mr McDonagh asked Mr I about rules in general, and it was fair and relevant that his question be asked.

The Tribunal’s decision

11. The Tribunal considered the relevant legal principles as set out in *Kennedy v Cordia (Services) LLP* referred to them in Mr McDonagh’s submission. It noted that this was a Supreme Court judgment and it was therefore bound by this judgment in determining Mr McDonagh’s application. It states:

“The evidence of skilled witnesses

38 In our view four matters fall to be addressed in the use of expert evidence. They are (i) the admissibility of evidence, (ii) the responsibility of a party’s legal team to make sure that the expert keeps to his or her role of giving the court useful information, (iii) the courts policing of the performance of the expert’s duties, and (iv) economy of litigation...

...  

44. ...a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence:

(i) Whether the proposed skilled evidence will assist the court in its task;

(ii) Whether the witness has the necessary knowledge and experience;

(iii) Whether the witness is impartial in her or her presentation and assessment of the evidence, and

(iv) Whether there is a reliable body of knowledge or experience to underpin the expert’s evidence.”
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12. The Tribunal considered that Mr I’s expertise was as a neurosurgeon and in spinal surgery and considered that he had not seen the policies and rules for Facility Rules for Ramsay Health Care UK. It noted that the GMC did not ask Mr I to comment on this matter in his witness statement, nor provide him with a copy of the rules at any point. Furthermore, the Tribunal did not have before it a copy of Mr I’s curriculum vitae and therefore could not be confident the matter under consideration fell within his area of expertise.

13. The Tribunal considered Mr McDonagh had asked his question of Mr I’s opinion relating to the ambiguity of policies and rules in general terms only. However, the Tribunal was mindful of Mr McDonagh concession that perhaps he should not have asked the question in the first instance.

14. The Tribunal therefore determined that as Mr I could not be considered an expert in relation to policies and rules of the Facility Rules for Ramsay Health Care UK, he should not be asked for his opinion in relation to the ambiguity of specific rules.

15. The Tribunal determined that given Mr I had answered Mr McDonagh in general terms in relation to the ambiguity of policies and rules, it would assess the weight of this evidence in due course.

16. The Tribunal therefore determined to accede to Mr McDonagh’s application.

ANNEX E – 21/12/2018

Application in relation to the interpretation of paragraph 1 of the Allegation

1. On the morning of day 9 of the proceedings, Mr McDonagh made an objection as to how Mr Birrell was putting forward the case for the GMC with regard to his interpretation of paragraph 1 of the Allegation.

Submissions on behalf of Mrs Mitchener

2. In summary, Mr McDonagh submitted that the way the GMC was putting its case forward was not clear to the Defence at all with regards to paragraph 1 of the Allegation. He submitted that the Defence position was that paragraph 1a of the Allegation related to pre-operation imaging and not images during the operation.

Submissions of behalf of the GMC
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3. Mr Birrell submitted that the Allegation is worded such that it relates to 'imaging during' the operation. Mr Birrell submitted that paragraph 1a of the Allegation relates to the intra-operative imaging which he had made clear in his opening.

The Tribunal’s decision

4. The Tribunal determined that the Allegation reads chronologically starting at the beginning of 'Surgery A'. The Tribunal considered that the Allegation should be read naturally with the stem in conjunction with sub-paragraphs.

ANNEX F – 21/12/2018

Application to pursuant to Rule 34(11) of the Rules

1. On day 9 of the proceedings, prior to Professor J, the defence expert witness providing his oral evidence, Mr Birrell informed the Tribunal that Mr McDonagh had indicated to him that he was going to take Professor J’s through his oral evidence as evidence-in-chief rather than relying on his written evidence. Mr Birrell made an application in opposition to this pursuant to Rule 34(11) of the Rules.

Submissions of behalf of the GMC

2. In summary, Mr Birrell referred the Tribunal to Rule 34(11) of the Rules and submitted that the Rules state that a Committee or Tribunal must receive into evidence a signed witness statement containing a statement of truth as the evidence-in-chief of the witness concerned.

3. Mr Birrell submitted that there had been no application for Professor J’s evidence to be heard in any other way and submitted that for Mr McDonagh to provide Professor J’s evidence in this way, he would need to make an application for the Tribunal to receive oral evidence-in-chief.

4. Mr Birrell submitted that with Mr I, the GMC expert witness, there were three areas needing clarification outside of his written witness evidence and he had told Mr McDonagh what they were in advance of the oral evidence. Mr Birrell submitted that there is a full expert report and a joint expert’s report and there is no need to go through Professor J’s report line by line. He submitted that he opposed Mr McDonagh’s approach for fairness and to be consistent.

Submissions on behalf of Mrs Mitchener
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5. Mr McDonagh submitted oral evidence can surely be called in the normal way. He submitted that a witness can give oral evidence in chief. In particular he can deal with issues of different numberings of the spine.

The Tribunal’s decision

6. The Tribunal had regard to Rule 34 (11) of the Rules, which states: 
   "(11) A Committee or Tribunal must receive into evidence a signed witness statement containing a statement of truth as the evidence-in-chief of the witness concerned, unless—

   (a) the parties have agreed;
   (b) a Case Manager has directed; or
   (c) the Committee or Tribunal decides, upon the application of a party or of its own motion, that the witness concerned, including the practitioner, is to give evidence-in-chief by way of oral evidence;"

7. The Tribunal considered that Rule 34(11) sets out that Professor J’s statement must be accepted as his evidence in chief. However, it considered that it can also accept his oral evidence as evidence-in-chief subject to those circumstances as set out above.

8. The Tribunal considered that Professor J is not entitled under the Rules to give oral evidence-in-chief unless it allows such a course. It also considered that there must be a proper reason in order for it to allow this. No such reason was given.

9. The Tribunal determined that it could see no reason as to why it should divert from the Rules. It considered Professor J had provided his statement and supplementary statement and Mr McDonagh can ask further questions if required for further clarification and arising from further cross examination or Tribunal questions. The Tribunal determined that it could see no unfairness to either of the parties in proceeding with Professor J’s written statement as his evidence-in-chief.

10. The Tribunal therefore determined to grant Mr Birrell’s application pursuant to Rule 34(11) of the Rules.

ANNEX G – 21/12/2018

Application to not permit a question in cross examination
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1. On day 9 of these proceedings during Mr Birrell’s cross examination of Professor J, the Defence’s expert witness, Mr McDonagh made an objection to Mr Birrell’s use of the word ‘inappropriate’ when asking about Paragraph 5a of the Allegation.

Submissions of behalf of Mrs Mitchener

2. Mr McDonagh submitted that whilst dishonesty is charged, ‘inappropriate’ is not charged in the Allegation. He submitted that in relation to paragraph 5a of the Allegation there is no charge alleging an inappropriate suggestion of £10,000. He submitted that from Patient A and Patient A’s husband’s witness statements and oral evidence there was a lot of ‘toing and froing’ as to where the suggested figure of £10,000 came from.

3. Mr McDonagh submitted that an expert cannot help with allegations of dishonesty and submitted that why he asked his own question in generic terms. He submitted that although there is criticism at paragraph 5b of the Allegation which states ‘failed to’, there is not criticism in 5a unless it is found to be dishonest.

Submissions of behalf of the GMC

4. Mr Birrell submitted that he agreed with Mr McDonagh that an expert witness could not assist with dishonesty but could assist with discussion about whether compensation is appropriate. He submitted that Mr McDonagh cross examined Mr I regarding what was appropriate and suggested he can therefore do so with the Defence expert witness. He submitted that he can modify his question to bring it in line with the Tribunal’s ruling.

The Tribunal’s decision

5. The Tribunal considered that Mr McDonagh did ask a similar question of Mr I. However, it agrees with Mr McDonagh’s submission that paragraph 5a of the Allegation does not refer to inappropriate conduct and that there is no failure alleged.

6. The Tribunal determined to grant Mr McDonagh’s application.

7. The Tribunal suggested the Mr Birrell could ask Professor J ‘What role does a neurosurgeon have in their discussion of compensation?’

ANNEX H – 18/12/2018

Application pursuant to Rule 17(2)(g)
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1. Following the conclusion of the case by the GMC, Mr McDonagh on behalf of Mrs Mitchener, made an application pursuant to Rule 17(2)(g), which states:

“The practitioner may make submissions as to whether sufficient evidence has been adduced to find some or all of the facts proved and whether the hearing should proceed no further as a result, and the Medical Practitioners Tribunal shall consider any such submissions and announce its decision as to whether they should be upheld.”

Submissions of behalf of Mrs Mitchener

2. In summary, Mr McDonagh referred the Tribunal to the relevant legal principles, with particular reference to; Regina v. Galbraith [1981] 1 WLR 1039, Regina (on the application of El-Baroudy) v GMC [2013] EWHC 2894 (Admin), Strouthos v London Underground Limited, and Ivey v Genting Casinos (UK) Ltd. (trading as Crockfords Club) [2018] AC 391.

3. Mr McDonagh submitted that the GMC must disclose material if that material might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused. He submitted that the GMC had been aware of the existence of the tape recording of the conversation between Mr C, Patient A and Patient A’s husband. He submitted that the tape had been available to the GMC and that it had transpired that the GMC did not even listen to that recording, it was not disclosed and the defence solicitors were told that the GMC did not have it and were therefore led to believe that it did not exist. This non-disclosure could be relevant to the cogency of the evidence in relation to the payment of £10,000 being put forward by Mrs Mitchener to Patient A.

4. In relation to paragraph 1a of the Allegation, Mr McDonagh submitted the charge must be taken as referring to the base line identification of the L5/S1 junction and the proposed operative level L4/5 at the commencement of surgery. He submitted that there is nothing to suggest that the L5/S1 and L4/5 were not identified except the absence of imaging and that there are no saved images at the commencement of surgery, only 5 saved images out of many that would have been taken. Mr McDonagh submitted that correct identification of the L5/S1 and L4/5 at commencement of surgery can be followed by a mistake caused by wrong counting which can occur with coned images during surgery that were not recognised as being coned by the surgeon.

5. In relation to paragraph 1c of the Allegation, Mr McDonagh submitted the criticism in the particulars of this charge is the failure to perform x-rays per se at the end of surgery. He submitted that the charge cannot be read with a “composite approach” as the Tribunal were invited to do in the GMC opening which was the first time that the Defence understood that the charge was being put on this basis. He submitted that there is clear evidence that x-rays were taken at the end of surgery.
and that even if images were not taken at the end of surgery, there is no failing if Mrs Mitchener believed that she had operated at the correct level and believed that she had confirmed that during the surgery.

6. In relation to paragraphs 2a and 2b of the Allegation, Mr McDonagh submitted that Mr I was not critical of Mrs Mitchener’s review appointment on 22 May 2015 of the radiologist’s report with the CT scan’s axial images and without the CT scan’s sagittal images, nor when Mrs Mitchener did not recognise the wrong level surgery at the review appointment on 22 May 2015.

7. In relation to paragraph 5a of the Allegation, Mr McDonagh submitted that it was Patient A who incorrectly remembers a telephone conversation in which £10,000 was mentioned as evidenced by her oral evidence and that there was inconsistency from Patient A about whether Mrs Mitchener suggested the £10,000 or whether the figure came from her husband.

8. In relation to paragraph 5b of the Allegation, Mr McDonagh submitted that Mr I is not critical of the fact that Mrs Mitchener did not record the discussion of compensation in Patient A’s records, that whilst it might have been prudent to do so, there was no duty and a reasonable body of practitioners would not have done so.

9. In relation to paragraph 6 of the Allegation as it applies to paragraph 3a, Mr McDonagh submitted whilst wrong site surgery was actually reported to Hospital Management, the mere fact that it was not reported on 5 October cannot be cogent evidence of dishonesty and that the allegation considered individually cannot amount to dishonesty.

10. In relation to paragraph 6 of the Allegation as it applies to paragraph 3b, Mr McDonagh submitted that there is no evidence that Mrs Mitchener was ever aware that wrong site surgery was a “never event”, that there is no failure or breach of duty alleged and that the this paragraph of the Allegation considered individually cannot amount to dishonesty.

11. In relation to paragraph 6 of the Allegation as it applies to paragraph 4, Mr McDonagh submitted that the mere fact of a delay in reporting the wrong level surgery cannot be cogent evidence of dishonesty and that there is no alleged breach of a duty to report. He submitted that this paragraph of the Allegation considered individually cannot amount to dishonesty at all and certainly not cogent evidence of dishonesty.

12. In relation to paragraph 6 of the Allegation in relation to paragraph 5a, Mr McDonagh submitted that even if it is accepted, taking the evidence at its highest, that there is prima facie evidence of Mrs Mitchener suggesting a figure of £10,000 as compensation for operating on the wrong site surgery, this cannot amount to cogent evidence of dishonesty. He submitted that the quality of evidence surrounding the
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£10,000 and Mrs Mitchener’s intent, if she even did suggest the sum, cannot amount to cogent evidence of dishonesty. Mr McDonagh submitted that the admitted evidence of the candour and the transparent actions of Mrs Mitchener are relevant to the consideration of the submission of no case to answer.

13. In relation to paragraph 6 of the Allegation as it applies to paragraph 5b, Mr McDonagh submitted that Mr I was not critical of the fact that Mrs Mitchener did not record the discussion of compensation in Patient A’s records.

14. In relation to paragraphs 7a and b of the Allegation, Mr McDonagh submitted that in both instances Mr I was not critical of Mrs Mitchener.

Submissions of behalf of the GMC

15. In summary, Mr Birrell referred the Tribunal to the relevant legal principles, in particular; R. v. Galbraith 73 Cr App R 124 CA, R. v. G. and F. [2013] Crim LR 678 CA, and R v Ivey v Genting Casinos UK Ltd [2017] UKSC 67,

16. In relation to paragraph 1a of the Allegation, Mr Birrell submitted that the GMC understands that the Tribunal interprets the charge as meaning ‘at the beginning of surgery’, that the Allegation relates to the intra-operative imaging, as was made clear in the GMC opening. He submitted that it has never been the GMC’s case that Mrs Mitchener failed to assess the imaging prior to surgery and should the Tribunal decide to read the charge in this way then there would be no evidence in support of such an Allegation.

17. Mr Birrell submitted that it is accepted that the saved images do not reflect the totality of the images. Nonetheless, there is evidence upon which the Tribunal can find that Mrs Mitchener failed to fully assess the imaging so as to identify L5/S1 and L4/5, namely: i) Mrs Mitchener’s statement to Ashtead Hospital that “Intra-operative imaging was being coned by radiographer and failed to show sacrum at all times” and, ii) The fact that Mrs Mitchener performed wrong site surgery, from which it can be reasonably inferred that she did not identify the L5/S1 and the proposed operative L4/5 level from the intraoperative images when performing surgery. Mr Birrell submitted that with regard to the submission that there was a “mistake caused by wrong counting”, there is not yet evidence of any such mistake.

18. In relation to paragraph 1c of the Allegation, Mr Birrell invited the Tribunal to give the charge its ordinary natural meaning. He submitted that the Tribunal should interpret the charge as Mrs Mitchener failed to perform x-rays such as would have allowed her to ensure that the correct level had been operated on. Mr Birrell submitted that that the evidence upon which the GMC relies is the fact that Mrs Mitchener did not detect that she had performed wrong level surgery, from which it can be reasonably inferred that she did not perform x-rays at the end of surgery to ensure that the correct operative level had been operated on.
19. In relation to paragraph 2 of the Allegation, Mr Birrell submitted that it is accepted that Mr I made certain concessions in cross examination predicated on the proposition that the axial images were not available to Mrs Mitchener on 22 May 2015. He submitted that the Tribunal has not yet heard any evidence from Mrs Mitchener in support of that proposition and that it remains a live issue.

20. In relation to paragraphs 3 and 4 of the Allegation, Mr Birrell submitted these have been admitted and it is acknowledged that these paragraphs of the Allegation are inter-connected.

21. In relation to paragraph 5a of the Allegation, Mr Birrell submitted the Tribunal heard evidence from Patient A and Patient A’s husband. He submitted that they were fundamentally consistent that it was Mrs Mitchener who suggested a figure of £10,000 as compensation. Mr Birrell invited the Tribunal to consider the relevant legal principles as set out in *Galbraith* when considering criticisms of witness reliability.

22. In relation to paragraph 5b of the Allegation, Mr Birrell acknowledged that Mr I conceded, in cross examination, that a reasonable body of practitioners would not document the conversation.

23. In relation to paragraph 6 of the Allegation, Mr Birrell submitted that dishonesty is a matter for the Tribunal and not the experts. He submitted that dishonesty is a state of mind and as such, direct evidence of dishonesty is exceedingly rare. He submitted that dishonesty is inferred from facts, as either admitted or proved.

24. In relation to dishonesty in respect of paragraphs 3a and 4 of the Allegation, Mr Birrell submitted that a reasonable Tribunal could, on one possible view of the evidence, reject all realistic possibilities consistent with innocence and so infer that there was a cover up. He submitted that should it be suggested that there are other ‘realistic possibilities consistent with innocence’, such as the assertion that Mrs Mitchener was not aware of her duty to report the wrong site surgery, then the GMC submits that there is cogent and clear evidence to contradict that, namely: i) the Ashtead Hospital Rules, which were disseminated to Mrs Mitchener in 2013; and ii) the unchallenged evidence of Mr D, in which he states that he told Mrs Mitchener that, “as far as I was concerned, the priority was the patient but that she should probably tell the management about the incident as there was nothing to hide. I am quite certain that Mrs Mitchener said that she would inform the general manager”.

25. In relation to dishonesty in respect of paragraph 5a of the Allegation, Mr Birrell submitted that should it be found proved that Mrs Mitchener suggested
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£10,000 as compensation, then a reasonable Tribunal could, on one possible view of
the evidence, reject all realistic possibilities consistent with innocence and infer that
this amounted to a tentative inducement or ‘pay off’, which formed part of the
overall cover up. He further submitted that if it were an innocent and honest
attempt to assist the patient, then one might expect the practitioner to readily admit
it. Mr Birrell submitted that Mrs Mitchener’s Rule 7 response was inconsistent with
her case, as it was put to Patient A and her husband in cross examination.

26. In relation to paragraph 5b of the Allegation, Mr Birrell submitted that the
GMC acknowledges Mr I made concessions in cross examination.

27. Mr Birrell submitted that issues of disclosure have no bearing whatsoever
upon applications of insufficient evidence. He submitted that it was open to Mrs
Mitchener to make arguments relating to abuse of process but she chose not to so
do. Mr Birrell submitted that Mr McDonagh had previously criticised the GMC
solicitor for not obtaining the recording. He submitted that Mr McDonagh had been
made aware of the reasons why the recording was not obtained and those reasons
were entirely proper.

The Tribunal’s Approach

28. The Tribunal carefully considered all the written and oral submissions of both
Mr McDonagh, on behalf Mrs Mitchener and Mr Birrell on behalf of the GMC,
although it has only recorded a summary in this determination.

29. In reaching its decision the Tribunal heard and accepted the advice of the
Legally Qualified Chair, who advised it to adopt the approach set out in the case of
R v Galbraith [1981] 1 WLR 1039. The Tribunal acknowledged that whilst this is a
test used in criminal law, it noted that it is the accepted test when considering
regulatory cases. Accordingly, the Tribunal distinguished between its approach to the
evidence at this stage of the proceedings and its approach at the end of the fact
finding stage. It bore in mind that its role at this stage is not to make findings of fact
but to determine whether the evidence heard in the GMC’s case, taken at its highest,
is such that the Tribunal could find an alleged fact proved on the balance of
probabilities. The Tribunal bore in mind that if it finds that there is sufficient
evidence for the hearing to proceed on a particular paragraph, it will have to decide
in the light of all the evidence before it at the end of the fact finding stage, whether
that paragraph has in fact been found proved or not.

The Tribunal’s decision

30. The Tribunal was cognisant of Mr McDonagh’s submission in relation to non-
disclosure of evidence by the GMC with particular regard to the telephone recording.
However, it considered his application, pursuant to Rule 17(2)(g) of the ‘Rules’, is
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directly related to the sufficiency of evidence at this stage of the proceedings and does not consider this aspect relevant to this decision.

31. The Tribunal had regard to the relevant legal principles. It had particular regard to R. v. Galbraith 73 Cr App R 124 CA, which states:

- "(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty—the judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury”

Allegation 1

Patient A

1. On 9 April 2015 when carrying out spinal surgery (‘Surgery A’) on Patient A you failed to:

a. fully assess Patient A’s radiological imaging in that you did not identify the:

i. L5/S1 level;  
**Rule 17(2)(g) application upheld**

ii. proposed operative L4/5 level;  
**Rule 17(2)(g) application upheld**

c. perform X-rays at the end of ‘Surgery A’ to ensure that the correct operative level had been operated on.  
**To be determined**

32. The Tribunal followed its earlier ruling on this part of the Allegation that the Allegation should be read in chronological order. It considers that 1a referred to the early stages of surgery. While not limited to imaging prior to surgery, it should not be read as imaging throughout surgery.
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33. The Tribunal considered that the overriding evidential factor was that not all the x-ray images had been saved as it only had five images before it. There were numerous images that it appeared were not saved. This can be taken from the numbering and timings of those images that were before the Tribunal and the evidence of Mr I.

34. The Tribunal considered given the absence of a full record of x-rays that the evidence taken at its highest could not be sufficient in due course to find paragraphs 1a (i) and (ii) of the Allegation proved.

35. The Tribunal therefore determined that the 17(2)(g) application in relation to paragraphs 1a (i) and (ii) is upheld.

36. With regard to paragraph 1c of the Allegation, the Tribunal considered that the Allegation should be read naturally with the stem in conjunction with ‘sub-paragraph c’. It considered that Mr McDonagh’s submission did not accurately reflect the natural reading of paragraph 1c of the Allegation.

37. The Tribunal found that there is sufficient evidence that Mrs Mitchener did not detect that she had performed wrong level surgery and it can be ‘on one view’ reasonably inferred that she did not perform x-rays at the end of surgery to ensure that the correct operative level had been operated on.

38. The Tribunal were satisfied that there was sufficient evidence with regard to paragraph 1c of the Allegation and therefore rejected the application under Rule 17(2)(g).

Allegation 2

2. At a post-operative review appointment with Patient A on 22 May 2015, you failed to:

   a. review the radiologist’s report in conjunction with Patient A’s CT scan images from 27 April 2015;
      To be determined

   b. recognise that you had performed ‘Surgery A’ at the incorrect operative level.
      To be determined

39. The Tribunal noted Mr Birrell’s submission that, although Mr I made concessions in cross examination, it he had not yet heard evidence from Mrs Mitchener with respect to the proposition that the sagittal images were never received.
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40. The Tribunal also noted that the issue regarding the absent sagittal images was covered by Mrs Mitchener’s Rule 7 response. However, Mrs Michener’s first statement to the hospital did not refer to this.

41. The Tribunal considered the witness statement of Patient A in which she states:

“I attended a further appointment with Mrs Mitchener at Dorking Hospital on 22 May 2015. My husband came to the appointment with me. I recall that Mrs Mitchener got the scan up on the computer and you could see the rod and the pins on the scan. My husband and I remember the words that she used- she told us that as far as she was concerned it was a ‘textbook’ surgery. She said that the pin and the rod were in the right place and she could show it as textbook back surgery at one of her seminars as everything looked fine and she couldn’t understand why I was in so much pain.”

42. The Tribunal also considered that the witness statement of Patient A provides some evidence with regard to paragraph 2a of the Allegation.

43. The Tribunal also considered the radiologist report of Dr H, dated 30 April 2015, which states:

“Findings:
L3 and L4 laminectomies are noted. There are pedicle screws and rods at L2, L3 and L4, and a disc spacer is noted at L3/4.

No worrying adverse features are seen in relation to the metalwork.

There is a grade 1 anterior slip of L4 upon L5.”

Mr I was clear that this report indicated that wrong level surgery had been undertaken.

44. The Tribunal considered that this report along with Patient A’s witness statement demonstrates sufficient evidence that a case could be made that there was opportunity for Mrs Mitchener to review the radiologist’s report in conjunction with Patient A’s CT scan images from 27 April 2015 or recognise that you had performed ‘Surgery A’ at the incorrect operative level.

and/or recognise she had operated at the wrong site level.

45. For these reasons, the Tribunal were satisfied that there is sufficient evidence to proceed with regard to paragraphs 2a and b of the Allegation and therefore rejected the application under Rule 17(2)(g).
Allegation 5

5. On 6 April 2016, you discussed ‘Surgery A’ with Patient A and you:

a. suggested a figure of £10,000.00 as compensation for operating on the wrong site;  
   **To be determined**

b. failed to record the discussion in Patient A’s records.  
   **Rule 17(2)(g) application upheld**

46. The Tribunal considered the witness statement of Patient A, in which she states:

   “Mrs Mitchener asked us if we had a figure in mind, as to what compensation we were looking at. I think my husband said the costs of the holiday and the wages I had lost at work. She then asked if £10,000 was the sort of thing that we were thinking of. It makes me cringe now thinking about the money. Mrs Mitchener then said that she could speak to someone at Ashtead to see if they were willing to settle to finish this. We said yes, ok and then later that evening I got a telephone call from Mrs Mitchener.”

The Tribunal also considered the witness statement of Patient A’s husband, in which he states:

   “Mrs Mitchener then went on to ask how much we had thought we had lost so far. I noted the wages my wife had lost. I also explained that she could only have either 8 or 10 physio appointments on the NHS, but we had to pay for many more as my wife needed more. These cost around £45 per session. I estimated the amount at around £8,000-£9,000 revenue was lost.

   Mrs Mitchener then stated that she would ask Ashtead Hospital if they would settle for a figure up to £10,000 and would we be happy with this. I said we would see about that and she said she would make the call now to check this. She did this whilst we were there.”

47. The Tribunal will consider the reliability of Patient A and Patient A’s husband in due course. It accepts that one possible view of the evidence is that Mrs Mitchener had suggested the figure of £10,000 as compensation.
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48. For these reasons, the Tribunal was satisfied that there is sufficient evidence to proceed with regard to paragraph 5a of the Allegation and therefore rejected the application under Rule 17(2)(g).

49. In relation to paragraph 5b of the Allegation, the Tribunal also accepted Mr Birrell’s submission regarding Mr I’s oral evidence that a reasonable body of practitioners would not document such a conversation.

50. The Tribunal therefore determined that Mr McDonagh’s application in relation to paragraph 5b of the Allegation is upheld.

Allegation 6

6. Your actions at paragraphs 3 - 5 were dishonest.
   To be determined

51. The Tribunal had regard to the relevant legal principles, in particular, R v Ivey v Genting Casinos UK Ltd [2017] UKSC 67, which states:

   “...When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

52. The Tribunal accepted Mr Birrell and Mr McDonagh’s contention with regard to 3 and 4 of the Allegation amounted to the same alleged mischief, were interconnected and do not form two separate instances of dishonesty.

53. The Tribunal considered the submission of Mr Birrell that there is cogent and clear evidence to contradict Mrs Mitchener’s case, namely that the Ashtead Hospital Rules were disseminated to Mrs Mitchener in 2013, as indicated in evidence of Mr B, and which he described in his oral evidence as “straightforward” and “self-evident”. Further, Mr Birrell’s submission regarding the unchallenged evidence of Mr D, stating:

   “I told her that as far as I was concerned, the priority was the patient but that she should probably tell the management about the incident as there
was nothing to hide. I am quite certain that Mrs Mitchener said that she would inform the general manager”.

54. The Tribunal accepted the submission of Mr Birrell that one view could be that there may have been a cover up, that dishonesty is a matter for the Tribunal to determine and that dishonesty is a state of mind. The Tribunal agreed with his submission that direct evidence of dishonesty is rare and indeed can often be inferred from facts, either admitted or found proved.

55. The Tribunal considered that a doctor could be found to have been dishonest in not reporting a wrong site surgery, in not informing an employer of wrong site surgery or in suggesting a figure of £10,000 in compensation to a patient. The Tribunal determined that there was sufficient cogent evidence that there ‘may’ be dishonesty.

56. The Tribunal considered that having regard to the Ivey test paragraphs 3 - 5 of the Allegation could be regarded as dishonest. The Tribunal accepted the submission of Mr Birrell and Mr McDonagh that Allegation 6 (dishonesty) does not apply to the admitted paragraph 3b.

57. The Tribunal therefore rejects the 17(2)(g) application with regards to paragraph 6 of the Allegation.

Allegation 7

Patient B

7. On 28 March 2017, before Patient B was anaesthetised for spinal surgery (‘Surgery B’), you:

   a. failed to ensure that Patient B’s radiological imaging/scans were readily available;
      Rule 17(2)(g) application upheld

   b. failed to reconcile the radiological imaging/scans with Patient B’s details.
      Rule 17(2)(g) application upheld

58. The Tribunal considered that Mr Birrell relied on the evidence of Mr I. It noted that Mr I was not critical of Mrs Mitchener’s standard of practice.

59. The Tribunal further considered that on its own understanding of the factual evidence before it, no reasonable Tribunal would find paragraphs 7a and b of the Allegation proved.
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60. In the Tribunal’s view, with the extent of concessions by Mr I relating to Patient B, taken in conjunction with the Tribunal’s own consideration of the evidence, Mrs Mitchener could not be criticised in this regard and it determined there is insufficient evidence. The Tribunal therefore determined that the 17(2)(g) application of no case to answer is upheld.