

this period was in any way improper. In August Dr. Barker and his family went on holiday to Spain. He says that while there he met a number of Germans whom he found pleasant people, that he planned to take his next holiday in Germany: and decided to learn some German. Mrs. Kerr is German by birth and on his return to Four Marks Dr. Barker asked her whether she would be prepared to give him German lessons. She agreed to do so. The lessons which started some time in September took place two or three evenings a week in Dr. Barker's house between about 8 and 10.30. Mrs. Barker was sometimes present but sometimes not. Dr. Barker said that his marriage was at this time a very unhappy one. Mr. and Mrs. Kerr differed in their views as to their marriage—Mr. Kerr painting a rosier picture of it than Mrs. Kerr; but it was common ground between them that they had had a happy family holiday in August. About the beginning of October Mrs. Kerr asked Dr. Barker to sign the necessary forms to enable her to transfer from his list of patients to that of Dr. Everett in Alton. The formalities of the transfer were not completed until 20th November but on 14th October when she needed some treatment she received it from a representative of Dr. Everett. She did not tell her husband that she was changing her doctor. When asked why she had made the change she answered "After having worked for Dr. Barker and giving him German lessons I thought I might be embarrassed if I ever had anything else like a sore throat and I thought it was proper to go to somebody else." About the middle of October Dr. Barker invited Mrs. Kerr to have dinner with him one evening in a local restaurant. They both said in evidence that it was not until they had spent that evening together that they realised that they were becoming attached to one another. They admitted that after that evening the relationship of pupil and teacher changed into a relationship of a different character and early in November they began to commit adultery together. Mr. Kerr said that at the outset he did not object to his wife giving Dr. Barker German lessons but that gradually as her absences from home in the evening became longer and he observed that she was out of the house all day on Wednesdays which was Dr. Barker's day off his suspicions were aroused. When he raised the matter with her early in November she admitted that she was in love with another man—though she did not mention Dr. Barker's name. Eventually on 18th December Mr. Kerr left the matrimonial home taking the children with him to another part of the country. In 1969 Mrs. Barker started divorce proceedings against Dr. Barker on the ground of his adultery with Mrs. Kerr. A decree nisi was pronounced on 1st October 1969 which was made absolute on 1st February 1970. Mr. Kerr has started divorce proceedings against Mrs. Kerr but their marriage has not yet been dissolved. In September 1969 Mrs. Kerr moved into Dr. Barker's house. She changed her name to Barker and they have lived as man and wife ever since. They want to marry as soon as they can legally do so. Mr. Kerr and his children remained nominally on the list of Dr. Barker's patients until October 1969; though since December 1968 they had been living away from Four Marks. The charge against Dr. Barker ran as follows:

"That, being registered under the Medical Acts,

(1) In September, 1963, you entered into a professional relationship with Mrs. Carola Alphonsa Maria Kerr then of Sweet Briar, Blackberry Lane, Four Marks, near Alton, Hampshire, and with her husband and son, and you subsequently attended her and members of her family on numerous occasions;

(2) (a) You retained Mrs. Kerr's name on your list until November 20, 1968, when she removed her name from your list without the knowledge of her husband;

(b) You retained the names of Mr. Kerr and his son and daughter on your list until October, 1969;

(3) For some weeks during July and August, 1968, you employed Mrs. Kerr as a receptionist in your practice;

(4) During the period when Mrs. Kerr and her family were your patients, and during the period when you employed Mrs. Kerr as a receptionist, you abused your position as a medical practitioner by forming an improper association with her, and from November, 1968, onwards you frequently committed adultery with her, and since September, 1969 you have cohabited with her;

And that in relation to the facts alleged you have been guilty of serious professional misconduct.”

The Committee found that the facts alleged in the charge had been proved to their satisfaction save in so far as it was alleged that there was an improper association between Dr. Barker and Mrs. Kerr during the time that she was acting as his receptionist.

The first point urged on behalf of Dr. Barker was that the Committee could not on the evidence properly find that he had formed an improper association with Mrs. Kerr while she was one of his patients. It is clear from the record that the Committee accepted that though Mrs. Kerr was not formally removed from Dr. Barker's list until 20th November she had applied to be removed from it early in October and that she ought to be considered as no longer a patient of his after that date. It follows that they did not believe Dr. Barker and Mrs. Kerr when they said that it was only after the dinner in the restaurant in the middle of October that their relationship became what they termed a “romantic” one. But although only Dr. Barker and Mrs. Kerr could give direct evidence as to the growth of their affection for one another the Committee was not obliged to accept their evidence on the point and their Lordships think that they were fully justified in declining to accept it. The reason which Mrs. Kerr gave for changing her doctor at the beginning of October without telling her husband that she was doing so was utterly unconvincing and the strong probability is that she made the change because both of them realised that in view of their growing attachment to one another it was best for the relationship of doctor and patient to be ended. Their Lordships would however observe on this aspect of the case that even if it were clearly established that the relationship of doctor and patient was ended before their association became in any way an improper one it would not follow that Dr. Barker was not guilty of serious professional misconduct. Mr. Kerr and his children remained patients of Dr. Barker at all events until they left Four Marks in December and though none of them in fact required medical attention that autumn one or other of them might have done so. The position of Dr. Barker as the doctor of Mr. Kerr and his children and the lover of Mrs. Kerr would have been an impossible one. As Lord Denning said in giving the judgment of the Board in the *De Gregory* case ([1961] A.C. 957) it would have been an abuse of his professional relationship with the husband and father for him to enter upon an improper association with his wife and the mother of the family even though she had herself ceased to be his patient.

The second point taken by counsel for Dr. Barker was that the forming of an improper association with a patient cannot constitute serious professional misconduct unless it is in some way furthered by the existence of the professional relationship. In this case it was said the improper association grew out of the German lessons and was not furthered in any way by the fact that Dr. Barker was Mrs. Kerr's doctor. In support of this argument counsel relied on a passage in the 1971 edition of a Pamphlet on “Professional Discipline” issued by the General Medical Council. In Part II, which is headed “Convictions and Forms of Professional Misconduct which may lead to Disciplinary Proceedings”, there appears the following paragraph: “(V) Abuse of

professional position in order to further an improper association or commit adultery. The Council has always taken a serious view of a doctor who *abuses his professional position* in order to further an improper association or to commit adultery." In the 1970 edition of the pamphlet the corresponding paragraph is headed "(ii) adultery or other improper conduct or association with a patient or member of a patient's family" and reads as follows: "Any doctor who commits adultery or other improper conduct or who maintains an improper association with a person with whom he stands in professional relationship at the material time is liable to disciplinary proceedings." There then follows the following quotation from the judgment of the Board in the *De Gregory* case:

"A doctor gains entry to the home in the trust that he will take care of the physical and mental health of the family. He must not abuse his professional position so as, by act or word, to impair in the least the confidence and security which should subsist between husband and wife. His association with the wife becomes improper when by look, touch, or gesture he shows undue affection for her, when he seeks opportunities of meeting her alone, or does anything else to show that he thinks more of her than he should. Even if she sets her cap at him, he must in no way respond or encourage her. If she seeks opportunities of meeting him, which are not necessary for professional reasons, he must be on his guard. He must shun any association with her altogether, rather than let it become improper. He must be above suspicion.

It was suggested that a doctor, who started as the family doctor, might be in a different position when he became a family friend. His conduct on social occasions was to be regarded differently from his conduct on professional occasions. There must, it was said, be cogent evidence to show that he abused his professional position. It was not enough to show that he abused his social friendship. This looks very like a suggestion that he might do in the drawing-room that which he might not do in the surgery. No such distinction can be permitted. A medical man who gains the entry into the family confidence by virtue of his professional position must maintain the same high standard when he becomes the family friend."

Counsel submitted that the change in the wording between the 1970 and 1971 editions of the pamphlet was significant. He pointed out that in the *De Gregory* case the association developed through the doctor paying frequent and unnecessary visits to the family home at the wife's request when the husband was out supposedly in his capacity as the family doctor. He did not question the correctness of the decision in that case but submitted that if and so far as the passages from the judgment of the Board quoted in the 1970 edition of the pamphlet might be said to cover such a case as this they went too far, and that the change of wording in the 1971 edition shows that the Council recognised that they went too far. Their Lordships cannot accept these submissions. The pamphlet does not profess to be a complete code of professional ethics telling doctors in detail what they can and what they cannot do without being guilty of professional misconduct. It simply records certain kinds of conduct which have in the past led to disciplinary proceedings and it emphasises that the question whether any particular course of conduct amounts to serious professional misconduct falls to be determined by the Disciplinary Committee after considering the evidence in each individual case. Their Lordships think it most unlikely that those responsible for the change in wording on which Counsel relies were meaning to indicate that in their view the forming of an improper association with a patient in circumstances such as existed here ought not to be considered as serious professional misconduct. There is no real distinction to be drawn

between the case of a doctor who asks a patient who is a married woman to give him German lessons and gradually becomes aware that they are falling in love with each other and the case of a doctor who is frequently asked to visit a patient who is a married woman while her husband is out of the house and gradually comes to realise that he is not being sent for because his professional services are needed but because the lady is in love with him. In either case a time must come when the doctor will be guilty of serious professional misconduct if he allows the association to continue. But although the point is not relevant to the decision in this case it is by no means clear to their Lordships that the improper association between Dr. Barker and Mrs. Kerr was not furthered in any way by the fact that he was the Kerr family doctor. Mr. Kerr said that he had the highest respect for Dr. Barker, that he felt indebted to him for the way in which he had treated the children in their illnesses and that he just could not conceive that he would become his wife's lover. The lack of suspicion on Mr. Kerr's side flowing from the fact that Dr. Barker was the family doctor may well have been a factor which contributed in some degree to the development of the improper association.

The third point taken on behalf of Dr. Barker was based on the language used by the Chairman of the Committee in announcing its final decision. After having announced that they found the facts alleged in the charge proved—subject to the qualification mentioned above—the Committee proceeded as required by the rules to hear submissions on behalf of Dr. Barker as to whether the facts proved justified a finding of serious professional misconduct and if so how they should deal with him. At the conclusion of the submissions the Committee deliberated in private and then the Chairman announced its decision in the following terms: "Dr. Barker, in the view of the Committee the evidence which has been adduced shows that you abused your position as the family's medical adviser in order to pursue your association with Mrs. Kerr. They have accordingly judged you to have been guilty of serious professional misconduct in relation to the facts which have been proved against you in the charge, and they have directed the Registrar to suspend your registration for a period of nine months." Counsel submitted that the use of the words "in order to pursue your association with Mrs. Kerr" showed that the Committee took the view—which Dr. Barker's representative had submitted was the right view—that the association could not amount to serious professional misconduct unless it had been furthered by the existence of the professional relationship. But the charge was framed on the footing that the forming of the improper association while Dr. Barker was the family doctor was in itself enough to constitute serious professional misconduct; the case was opened on that footing; and the witnesses questioned on that footing. Therefore, so the argument runs, in holding that Dr. Barker had used his professional position to further the association, a view which the Committee may possibly have formed because it thought that Mr. Kerr had been lulled into a sense of security—the Committee were deciding the case against Dr. Barker on a point which had never been made against him and which he had no opportunity of answering. In their Lordships' view these suggestions are very far fetched. The facts alleged in the charge which the Committee found to have been proved were that Dr. Barker abused his position as the Kerr family doctor by forming an improper association with Mrs. Kerr and it was in relation to those facts that they found him guilty of serious professional misconduct. The inclusion of the words "in order to pursue your association with Mrs. Kerr" in the terms in which the Committee announced its decision was, perhaps, unfortunate but it is, their Lordships think, quite insufficient to justify the inferences which Counsel sought to draw from it.

Their Lordships turn now to the question of penalty. The Committee had before it testimonials from a number of fellow practitioners to the effect that Dr. Barker was a skilful and conscientious doctor and a letter from the Hampshire Executive Council of the National Health Service stating that it would be very difficult to find an equally qualified doctor to replace him if he had to give up his practice. In addition the Board received a petition signed by more than 400 of Dr. Barker's patients. In a case of this sort the tribunal has to consider on the one hand the general public interest in the maintenance of a high standard of professional ethics and on the other the inconvenience which a section of the public may suffer by being deprived for a period of the services of a skilful and conscientious doctor to which they have grown accustomed. The Disciplinary Committee of the General Medical Council is very well qualified to strike a fair balance between these conflicting considerations. It is only in an exceptional case that the Board would differ from them as to the appropriate sentence; and their Lordships see no ground for doing so in this case. Their Lordships have therefore humbly advised Her Majesty that the appeal be dismissed.



In the Privy Council

RICHARD WORDSWORTH BARKER

v.

GENERAL MEDICAL COUNCIL

DELIVERED BY

LORD CROSS OF CHELSEA