Lorraine Patricia Miles v Kenneth Charles Cain

In the Supreme Court of Judicature

Court of Appeal (Civil Division)

On Appeal from the Queen's Bench Division

Chelmsford Crown Court

14 December 1989

1989 WL 649710

The Master of the Rolls Lord Justice Nicholls Lord Justice Butler Sloss

Thursday 14th December 1989

Representation

MR A.F.B. SCRIVENER Q.C. and MR A. SHARPE , instructed by Messrs Jefferies, appeared for the Appellant (Defendant).
THE HON. J. MELVILLE WILLIAMS Q.C. and MR S. ZOLLAER , instructed by Messrs Mitchell, Maudsley & Wright, appeared for the Respondent (Plaintiff).

JUDGMENT (Revised)

THE MASTER OF THE ROLLS:

In this action Miss Lorraine Miles successfully claimed damages for indecent assault, rape and buggery by the defendant. Her claim was heard at Chelmsford by Caulfield J. without a jury and the hearing lasted for nine days in October-November 1988. The judge reserved judgment for two weeks and then gave his decision and reasons. The defendant now appeals on the issue of liability.

In the light of the public interest in Miss Miles' claim, it may be as well, before turning to the facts and the arguments, to advert to some well settled principles which are applicable to this appeal, although none was in issue between the parties.

The burden and standard of proof

In criminal proceedings it is the prosecution which alleges that the accused is guilty of the offence charged and it is therefore the prosecution which must prove that charge. Furthermore it must do so with the degree of certainty required by the criminal standard of proof, namely so that, taking account of all the evidence, the jury is satisfied beyond reasonable doubt, and can say that it is "sure" , that the accused committed the offence. The accused need not prove that he was innocent and rarely does so. Unlike Scotland, we have no verdict of "not proven" and the accused is entitled to a verdict of "not guilty" if the jury is left in doubt whether he was guilty of the offence, even if they are far from satisfied

that he was innocent of it.

In civil proceedings it is the plaintiff who makes the claim and it is therefore the plaintiff who must prove it. The defendant need never prove that he is not liable, the civil equivalent of being innocent. Again there is no verdict of "not proven" and the defendant is entitled to judgment if the judge or jury is left in doubt whether the claim has been established with the degree of certainty required by the civil standard of proof.

The civil standard of proof always requires the facts upon which the claim is based to be established at least on the balance of probabilities, but a somewhat higher degree of certainty is required in some cases. In the present case Caulfield J. said that "the onus is on the plaintiff and the degree of proof necessary to prove a charge as serious as this I take from the case of *Bastable v. Bastable & Sanders [1968] 3 All E.R. 701* ." No-one has been concerned to argue that that was the wrong standard of proof and I therefore refer to that decision which was that of a Court of Appeal consisting of Willmer, Winn and Edmund Davies L.J.J. It was a divorce suit and the issue was one of adultery. Willmer L.J., with the agreement of Winn L.J., approved and applied a dictum of Denning L.J. in Bater v. Bater [1951] P. 36, 37 , where he said:–

> "The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard.
>
> As Best, C.J., and many other great judges have said, 'in proportion as the crime is enormous, so ought the proof to be clear.' So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion."

Edmund Davies L.J. expressed doubt whether "in proportion as the offence is grave, so ought the proof to be clear" was a distinction which could effectively be made by a jury or indeed by many judges and lawyers, but he did not dissent and indeed purported to apply it.

Corroboration

The collective experience, and I hope wisdom, of the courts over centuries has led judges to direct juries that in criminal cases involving allegations of sexual offences against women, they should look for corroboration. This does not reflect male chauvinism. It

applies equally to allegations of sexual offences against men and children of either sex. Rather it reflects the undoubted fact that in some circumstances such allegations are very easily made, but most difficult to refute. By "corroboration" is meant some evidence independent of the complainant which tends to confirm in some material particular that the offence was committed and that the accused committed it. It is for the judge to rule upon what evidence could in law amount to corroboration and for the jury to decide whether or not that evidence does in fact amount to corroboration. Nevertheless juries are advised that they can convict where there is no corroboration, but will need to be particularly cautious before finding the accused guilty of the offence charged.

Caulfield J. said:–

> "In approaching the main issue in this case I have directed myself that there is no evidence capable of corroborating the Plaintiff. This of course is not a fatal flaw to her claim, for there are bound to be cases where there is no possibility of there being any corroborative evidence. But this court, that is myself, has to evaluate the worth of the alleged victim's allegations. This has been my approach. It is an approach of great caution. It is a very grave responsibility indeed which has to be discharged."

The judge may not have been correct in law in saying that there was no evidence capable in law of corroborating the complaint, but it was for him to decide whether such evidence did in fact amount to corroboration and no-one has suggested that this stated approach would be other than correct. The issue, or one of the issues, is whether he followed it in the event.

Consistency of conduct.

Caulfield J. said:

> "If I were directing a jury in a criminal trial on these allegations … I would specifically warn the Jury that the complaints alleged to have been made by the Plaintiff to Dawn Prior and others were not evidence of corroboration. Those complaints, if they were made, would only go to the consistency or otherwise of the alleged victim."

As a self-direction this is impeccable, but again one of the issues is whether the judge fully heeded his own direction. Consistent conduct adds nothing to the credibility of a victim's claim. It is the absence of such conduct when it might be expected and any inconsistent conduct which detracts from its credibility.

The relevance of secondary or peripheral issues

In reaching a conclusion whether the facts alleged have been established to his

satisfaction, any judge will have regard not only to what the witnesses to those facts say about them, but also to the way in which they say it. Indeed the way in which evidence is given is often as telling as what is said, particularly when, as here, the judge is highly experienced. However, to have regard only to this evidence would constitute a charter for every plausible rogue and for every party with a well-developed capacity for self deception. Accordingly judges rightly attach great importance to a consideration of the surrounding circumstances and to resolving conflicts of evidence on secondary or peripheral facts, not because they necessarily matter in themselves, but because they can and often do cast light upon the credibility of the evidence given in relation to the central facts. One of the issues in the present appeal is whether the judge sufficiently undertook this exercise.

The role of the Court of Appeal

There is abundant authority for the proposition that where the crucial issues between the parties are issues of fact, an appellate court should never forget the advantage enjoyed by the trial judge in having seen and heard the witnesses giving evidence and it should hesitate long before rejecting or interfering with his conclusions (see *The S.S. Hontestroom [1927] A.C. 37* and *Benmax v. Austin Motor Co. Ltd [1955] 1 All E.R. 326*).

This I fully and unreservedly accept. So much depends upon the answers to such questions as "did the witness display any hesitation in his answers? Did he appear embarrassed by the question? Did the answer have the ring of reliability? Did he or she carry conviction?" (See Whitehouse v. Jordan [1980] 1 All E.R. 650, 665). These are not questions which an appellate court can answer by however conscientious and detailed a study of the "small print" of a transcript of evidence.

The central allegations

The plaintiff was a patient of Mr Cain who is a physiotherapist. He does not happen to be a member of the Chartered Institute of Physiotherapists, but he is not required to be and no-one has suggested that he is not a skilled professional. She began being treated by him for a shoulder injury in October 1985 and no complaint whatsoever is made of the defendant's conduct until 18th December 1985.

The defendant treats patients in a part of his house which used to consist of a double garage measuring 37'9" (11.5 metres) by 12' (3.65 metres), but has been fully converted for the purposes of his practice. It is divided into a waiting area, into which patients and other visitors enter from outside, and a treatment area further on and divided from it by sliding doors. Both areas run the width of the former garage and are thus 12' wide. The length of the waiting area is 17'1" (5.20 metres) and that of the treatment area 20'8" (6.3 metres). The treatment area itself contained three couches surrounded by curtains. The couches are side by side and each couch is less than 4' from the next.

18th December 1985

This was a Wednesday. I take the essence of the plaintiff's complaint from the judgment:–

> "On the 18th, lying on her back, the Defendant pressed her tummy and asked her whether any hurt resulted. Thereafter she turned over. The heat lamp was applied and hand massage followed." She had been told that she should remove her jeans and had done so. "During the hand massage the Defendant touched Lorraine's inner thighs. Lorraine enquired the reason for the treatment and the Defendant explained with the help of a diagram showing her muscles, using, she said, big words in the explanation" .

The defendant denied any such touching and indeed that it was necessary for the plaintiff to have removed her jeans on that occasion or that she did so.

20th December 1985

Again I take the plaintiff's account from the judgment:–

> "Lorraine's next appointment was Friday evening, 20th December. She was in the middle cubicle. The clinic was really busy. She thought a friend drove her there on this occasion. The treatment, she said, included the lamp, oil and massage to the shoulder and lower back with her knickers lowered to her buttocks and a towel being placed above the upper edge of her knickers. On this occasion Lorraine said the Defendant pushed his fingers up her – I use her words. She was in a state of shock. She could not speak and there were people all around. She could not speak and if she had said anything nobody would believe her, she said. The fingers were in her for a few seconds. She was told to get dressed. The Defendant acted as though nothing had happened. She got dressed and was driven home by a friend."

The plaintiff also alleged that the defendant gave her a further appointment for the evening of Monday 23rd December which she accepted because he said that "I could not do anything about what he had done and [that I had not said anything to him about what he had done"] he would tell everybody. I take this question from the judge's judgment. The words in square brackets do not appear in the transcript of the plaintiff's evidence, but without them the sentence makes little sense. Later that evening, according to the plaintiff, the defendant telephoned her at home and changed the time of the next appointment to 2.30 p.m. on the Monday. His explanation for the change was that "it would be less busy and he could fit me in better then" .

The defendant wholly denied the touching, the threat, the telephone call to the plaintiff at home and the change in the time of the appointment.

23rd December 1985

On this occasion the plaintiff's father drove the car in which she went to the defendant's house for her appointment. The circumstances of this visit were very fully explored and I shall have to consider some aspects of it in more detail hereafter. However the essence of the plaintiff's allegations were that the defendant treated her back with a heat lamp and at a later stage moved it on to her lower body and buttocks and then between her legs. He then switched the machine off and inserted his fingers alternately into her vagina and her rectum. He then raped her and buggered her, at the end of which he pushed her off the couch onto the floor, as a result of which she hit her head on a trolley. The defendant grabbed her by the hair, forced her head back and tried to put his penis into her mouth which she prevented by keeping her teeth clenched.

The defendant's answer was a total denial.

The appeal

The most important task of the judge was to assess the character and credibility of the plaintiff, the defendant and the other witnesses. Insofar as he did so on the basis of seeing them and hearing them, we are in no position to say whether he was right or wrong. But what we can consider, and have to consider, is whether he indeed approached the plaintiff's allegations with the caution which he declared that he would adopt; whether and to what extent he cross-checked his assessment of their credibilities against the probabilities and improbabilities of their evidence on matters such as why the plaintiff was prepared to keep the appointment for Monday 23rd December if she had been indecently assaulted on the previous Friday and the alleged change in the time of Monday's appointment. We also can consider, and have to consider, whether he was so impressed by the plaintiff's credibility, and by that of her friend Dawn Prior, that he was led into the error of thinking that complaints to Dawn Prior could constitute corroboration of the plaintiff's evidence, as contrasted with evidence of consistent conduct, and whether he was further thereby led into requiring the defendant to satisfy him of the falsity of her evidence rather than to raise sufficient doubts as to its accuracy to prevent her satisfying the burden of proof which lay on her.

It is a feature of this case that, as the judge found and was not, I think, seriously in dispute, the plaintiff suffered a personality change at the time of the alleged incidents and that this continued until at least the hearing. The judge put it this way:–

> "I am positive – not merely satisfied – that beginning with approximately December 18th Lorraine Miles wholly changed in her personality and outlook from being a perfectly happy, uninhibited, normal, outgoing young woman into an introspective, dull, inhibited, at times fearful woman developing hysteria due to her continuing symptoms and fears. I am equally positive that some event or events just before Christmas 1985 were the precipitating cause of the change. This finding by no means resolves the main issue, for a person can change as radically as Lorraine did for reasons other than sexual attack. Depressive illnesses, regrettably, are common and can be devastating, even demoralising. Stresses and worries of life and deep unhappiness can be pointers to serious change in health. Lorraine may have had stresses, strains, worries and disappointments which could change her personality. One boyfriend at least was

> lost before Christmas 1985. Her dog was also put down. After these events she was on the evidence her normal self and on her history given by herself and thus I am sure Lorraine believed at or about Christmas 1985 that she had suffered a major shattering event. It should be noted how I have phrased the finding as far as Lorraine was concerned – she believed she had suffered a major shattering event."

Two psychiatrists were called to give evidence who argued that at the time of their examinations the plaintiff suffered from what one of them described as "a severe psychological illness of an hysterical nature" and the other described as "hysterical conversion syndrome" . The issue between them was whether this was caused by sexual assaults in December 1985 or whether the illness caused the plaintiff to believe wrongly that these assaults had occurred. The judge held that, for different reasons, neither doctor's evidence assisted him reaching a decision. This was a conclusion which he was fully entitled to reach.

On this aspect of the case the judge said that "I do not find anything in the diaries or the history of the Plaintiff to persuade me to conclude that she is indulging in fantasy" . This, of course, is not the right approach. The issue was not whether she was indulging in fantasy, but whether she might have been. However, judgments have to be read as a whole and very shortly afterwards the judge said "I know the onus is on the Plaintiff and she has to demolish the contentions of fiction and fantasy. I find she has done so" .

I draw attention to this aspect for a somewhat different reason and that is this. As the judge said, great caution is called for in evaluating a complaint of sexual assault where there is no corroborative evidence. But even greater caution is required if the plaintiff has suffered a change of personality, for whatever reason, whereby at the time of the hearing she is suffering from an illness of an hysterical nature. Nowhere in the judgment does the judge appear to have given consideration to this aspect which is highly relevant when it comes to the way in which he dismissed some aspects of the evidence called by the defendant with a view to showing that on peripheral matters the plaintiff's evidence could not have been true and that, in consequence, there must have been doubt whether her evidence could be sufficiently relied upon in relation to her complaints of sexual assault.

That the judge was impressed by the attractiveness of the plaintiff's personality, as he found it to have been before December 1985, and by that of her friend Dawn Prior, both then and at the hearing, is not in doubt. As he put it:–

> "[The Plaintiff's] friend at college was Dawn Prior, a fellow student of the same age. Dawn found Lorraine to be 'bubbly' – using Dawn's word – and I assess Dawn herself as a bubbly, uninhibited young lady. They would make a good pair. Dawn and Lorraine visited the odd public house for a drink and a chat. They attended at college functions and generally enjoyed themselves as young people. Dawn was a delight as a witness. Psychiatrists would be unemployed if everybody was a Dawn Prior. Her christian name – Dawn – is an accurate choice. She created a fresh glow in the witness box."

On the other hand the judge does not appear to have been critical of the defendant either personally or professionally. He described him as being "a man of excellent character" , who was happily married. His professional records were "impeccably kept" .

As one would expect, a trial of this nature spawned a large number of issues and sub-issues. I do not think it either necessary or profitable to explore all, or indeed many, of them and instead wish only to refer to four such matters.

The first concerns the influence of Dawn Prior's evidence on the judge's mind. The relevant part of the judgment is that in which he is dealing with the alleged incident of 18th December. The judge said this:

> "The event of touching to the thighs is not the major matter when compared with the alleged incidents of December 23rd and if the Plaintiff had remained silent regarding the 18th incident it does not follow that her silence should disprove the alleged assault, but there is evidence which I accept which shows that Lorraine did make a complaint to Dawn Prior in the Leah public house on the night of the 18th. She told Dawn that everything was not all right as regards the physio who had touched her. Dawn in her statement to the police made on the 10th, which she repeated as being her evidence, brings this event, this report to her mind. The passage which I have compared with her evidence is at page 41 of the bundle. There is therefore an immediate complaint. The complaint of course goes only to consistency. The complaint is not evidence of the touching but I see no reason to doubt the Plaintiff's evidence. I accept Dawn's evidence. She impressed me greatly as a witness of truth. I therefore accept the Plaintiff on this third point and reject the Defendant."

As I have already pointed out, evidence of inconsistent conduct undermines credibility, but evidence of consistent conduct adds nothing. Here the judge accepts Dawn Prior's evidence of a complaint. So far so good. But why does he "therefore" accept the plaintiff's evidence and reject that of the defendant. This is to treat it as corroboration. Certainly he was entitled to accept the plaintiff's evidence, but not because he accepted Dawn Prior's evidence.

The second concerns the degree of undress called for by the treatment and whether the plaintiff was unnecessarily required by the defendant to remove her brassiere and jeans. The judge said:–

> "I resolve this issue in favour of the Plaintiff. I believe her utterly on those two points. In my experience presiding at trials where allegations of rape have been made and an alleged victim has had to be attacked, I have never heard a woman subjected to so thorough and ferocious cross-examination as this Plaintiff. I add with emphasis that the cross-examination was perfectly proper and perfectly fair. The Plaintiff broke down often but I am satisfied they were genuine breakdowns and not histrionic. She said in the middle of one of these breakdowns, "He did!" in answer to the assertions put to her regarding the removal of her clothes. I believed her then. I believe her now and I disbelieve the Defendant."

Whilst I am mindful of the fact that on more than one occasion the judge reminded himself that the onus of proof lay on the plaintiff and that the judgment has to be construed as a whole, this passage does raise a question in my mind as to whether the judge was not so impressed by the plaintiff's evidence at the time at which she gave it that in practice it then became necessary for the defendant to disprove the plaintiff's allegations, thus reversing the burden of proof. It is against this background that I turn to the other two matters which are inter-related.

It will be remembered that the defendant's treatment room is very small and that it contained three couches which were very close to one another and separated only by curtains. It follows, and this was not disputed, that if the defendant committed the alleged assaults, anyone else in the treatment room must have heard that something untoward was occurring. Accordingly it became of crucial importance to establish if possible whether any other patient was being treated at the same time.

However it went a little further than this, because the allegation that the defendant telephoned to the plaintiff on the Friday evening to change an evening appointment for 23rd December to one at 2.30 p.m. on that day because "it would be less busy" was, according to the plaintiff, coupled with a repetition of the warning that "I could not do anything about what he had done and he would tell everybody that I had not said anything to him about what he had done" . The clear inference was that on the evening of 20th December the defendant was contemplating improper conduct towards the plaintiff on the following Monday and was selecting a time when there would be no other patients. It therefore became important to look at what appointments were made for the Monday afternoon as well as at what patients were in fact there. If this was not an opportunist offence, one would expect a gap in the appointments.

Unlike the judge, we have had the benefit of schedules showing in graphic form what appointments were made and at what times the various patients, all of whom gave evidence, say that they were present. The reconstruction was made more difficult by the fact that the defendant had thrown away his 1985 appointments diary very soon after the beginning of the new year, but the judge expressly found that, whilst this was surprising, he found nothing sinister about it. Nevertheless it is clear that he had eight patients booked and that between them they spanned the whole afternoon. Whilst it is true that this is not conclusive in that he usually booked patients on the footing that they might not need the full allotted hour, it is clear that the bookings were not designed to produce a period during the plaintiff's treatment when she would be alone with him. This point seems wholly to have escaped the judge.

When it came to the times at which the patients attended – some were a little early and some a little late – the judge reviewed their evidence seriatim and concluded that "While the Defendant has called the best evidence that he can on the 23rd December appointments, that evidence does not have the necessary precision for me to find that the Plaintiff is wrong or dishonest or fanciful when she speaks of what happened at the material time." But that is to place upon the defendant the burden of proving that other patients were present. What the judge should have been considering was whether it caused him to have any significant doubts about the plaintiff's evidence.

Curiously enough in his review of this evidence he took no account of the plaintiff's father's evidence. This was that he went into the waiting area with his daughter when they arrived at about 2.10 p.m., according to the plaintiff, and between 2.15 p.m. and 2.20 p.m., according to Mr Miles. The difference in recollections as to this timing is not material. Mr Miles did not see any other patient, but if one had been in the treatment room, he probably would not have seen him because there were sliding doors between the two areas. He then went for a walk which he said lasted between 30 and 40 minutes. When he returned a man was waiting to be let in. Both he and the man were let in by the defendant and the man went into the treatment area. Mr Miles then went for another walk which he said lasted about 20 minutes. When he again returned, the plaintiff's treatment had still not been completed. On entering he saw a man who was not the defendant going through the sliding doors into the treatment area. "I sat down and took a novel out of my pocket to start to read and then eventually Lorraine came out. I do not know how long it was, but seemed ages to me."

Whatever else may be in doubt, the assault, if it took place, must have been at the end of the plaintiff's treatment, since it is inconceivable that she would have got back onto the couch for further treatment. Even allowing her time to recover herself and get dressed, there must be a real question as to whether her father was not in the waiting room a few yards away when all this is said to have been happening. This is something to which the judge plainly should have given thought, but he appears not to have done so.

Furthermore, on the evidence of the other patients, there were at least two who prima facie overlapped the whole of the plaintiff's period of treatment. They were Nicole Simmons, aged 14, who was accompanied by her mother who always sat with her daughter in the treatment room. There was also Alan Green. As to Mr Green, who said that he thought that he arrived at the surgery just before 3 p.m. and that he stayed for an hour, the judge said that "I do not find any precision in his evidence. I think he could have arrived after the Plaintiff left and I am sure that the Plaintiff was at the clinic a substantial time" . But on Mr Green's evidence, taken with that of the plaintiff's father, they must have arrived together – Mr Green for his appointment and Mr Miles at the end of his first walk. If this is not the case, who was the man who was let in with him and whom he saw going into the treatment room when he returned on the second occasion? When it came to Mrs Simmons and her daughter who had an appointment for 2.30 p.m. and who, according to Mrs Simmons, were 10 minutes late and stayed for an hour, the judge simply said "I accept this pair of witnesses did go to the clinic on the 23rd in the afternoon but I cannot make a more precise finding as to the length of time they stayed."

This simply will not do. It was the duty of the judge to say whether he disbelieved these witnesses and, if not, whether in his view the margin of inaccuracy in their evidence was such that he could be satisfied that the plaintiff was alone with the defendant in the treatment room at the time of the alleged assaults.

A feature of this case is that no one seriously suggests that the plaintiff is a liar who has deliberately and wickedly invented her story with a view to damaging the defendant or profiting herself. She was clearly a truthful witness in the sense that she wholly believed what she was saying. Like any other witness, particularly one who has been a victim, over the months awaiting a hearing her recollections may have become more clear-cut and minor exaggerations may have crept in. But fundamentally she was intending to be truthful

and the problem which faced the judge was that of deciding whether he could be satisfied on the balance of probabilities, reminding himself that "in proportion as the offence is grave, so ought the proof to be clear" that she was giving evidence of what actually happened and not of events which were the product of fantasy.

In other circumstances it might have been a not unnatural reaction to think that whilst one incident could have been the product of fantasy, this was not possible with three separate incidents and some degree of contemporaneous complaint to Dawn Prior. But here the judge was faced with a plaintiff who at and after Christmas 1985 had suffered a personality change which had an hysterical base. Accordingly he had clearly to consider whether this change might not have occurred a little earlier than it became apparent to her family and friends and caused her to suffer from hysterical fantasies in respect of the period 18th to 23rd December.

It is against this background that I turn to the appointments card. This, like all such cards, was intended to be kept by the patient to remind him or her of the date and time of the next appointment. It will be remembered that the plaintiff's case was that she originally was given an evening appointment for 23rd December, but that the defendant telephoned her at home on the evening of 20th December, repeated the threat which he had uttered when she was treated by him earlier in the day that "I could not do anything about what he had done and he would tell everybody that I had not said anything to him about what he had done" and changed the appointment to 2.30 p.m. on 23rd December.

This was not a trivial detail, nor could it be dismissed as exaggeration. Either it happened or it did not and if, in this respect, the plaintiff was giving evidence of something which never happened, however truthful she appeared to be and indeed was since she was giving evidence of something which was real to her, it must cast a flood of light on the weight to be attached to her evidence as a whole.

The salient features of the evidence about the appointments card were that it showed an appointment for 2.30 p.m. on 23rd December which, like all the other entries, was in the defendant's handwriting. It showed no entry for the evening of that day. It showed no alteration for 23rd December. The card was certainly in the possession of the plaintiff after the appointment on 23rd December and she had no recollection of not having it in her possession at home on 20th, 21st and 22nd December. The only scenario which fitted the facts was that she gave the card to the defendant on 20th December to enter the evening appointment for 23rd December, that he forgot to do so, that she forgot to take the card with her when she left, that the defendant completed the entry for 2.30 after he had telephoned her and that he gave her the card when she attended on 23rd December.

There was no evidence to support such a scenario, but the matter does not stop there. It would have been understandable if in making statements to the police or to her solicitor the plaintiff had forgotten some minor points which came back to her at a later date. This threatening telephone conversation and change of appointment could not, however, be regarded as a minor point. It led directly to the most serious assault of all on the occasion of the allegedly altered appointment. Yet it was never mentioned to the police or, it would seem, to the plaintiff's solicitor until 14th July 1986.

How did the judge deal with this point? He said:–

> "I deal first with the changed appointment from the evening of the 23rd to 2.30

> on the 23rd. The original appointment card was handed to the police on January 10th. There is no changed entry on it and there is no evening entry on it for December 23rd. The evidence is the Plaintiff had this card in her possession and it was marked for further appointment at the end of the session. The Defendant would also mark his diary at the same time so on the card being marked with the appointment so would the diary. By the time the Defendant was arrested his 1985 diary was not available. He cannot with precision say how he came to dispose of the diary. Lorraine's statement to the police on this point at issue was silent on the alleged change of appointment. Her first statement reads on this point: 'My next appointment was for Monday, 23rd at 2.30' . In her second statement of the 11th January at page 8 she says, 'I attended the session on Friday, 20th December as pre-arranged and made an appointment for Monday, 23rd December, 1985. He said, "As you are still off college, would a day-time appointment suit you better – about 2.30 p.m.?" I agreed.' That is not consistent with her sworn testimony. Her statement of the 24th January at page 12 reads: 'My appointment for 23rd December was for 2.30.' Again the silence regarding the changed appointment. The Plaintiff does mention the change of appointment in a statement to her solicitors which I have mentioned as having been made on the 14th July, 1986, a matter of six or seven months after the alleged events. As I pointed out earlier there is however a lacuna in the evidence because the 1985 diary is not available. The Defendant used this diary to record sessions with patients which were given on credit. So the diary had primary accountancy value. I am very surprised the diary was not retained by the Defendant. I am not finding that the Defendant disposed of the diary for a sinister reason. The only time he would have been alerted to any trouble, or any possible trouble, was the telephone call of the brother on December 31st but that call I do not think could have prompted the Defendant to rid himself of the diary. There is no doubt the brother did not disclose his identity in that conversation. Further, the diary would have helped the Defendant to trace with ease those patients who also had appointments for Monday, the 23rd, all of whom have been called for the relevant period.
>
> The Plaintiff in her statement of the 14th July says, 'I did not know the surgery was going to be empty.' Of course the surgery was not empty, certainly at the beginning of the Plaintiff's treatment. Because of the absence of the diary and because the Plaintiff was so adamant that there was a call from the Defendant on the Friday I am not prepared to reject the Plaintiff's evidence that the Defendant did call her on Friday night relative to the appointment on Monday, the 23rd at 2.30. In summary there are reasons for doubting her evidence on this point but I do not do so."

If there were reasons for doubting the plaintiff's evidence on this point, and I should have thought that they were overwhelming, it was for the judge to explain why he did not doubt it. He did not do so. If he should have doubted her evidence on this point, it is difficult to see how he could have found the allegations proved.

I regret to have to say it of so experienced a judge, but I have come to the conclusion that

he allowed his sympathy for the plaintiff, which all would share whether she was the victim of actual or imagined assaults of such gravity, coupled with the very favourable impression which she and her friend Dawn Prior made upon him, to cause him to depart from the cautious approach which he himself had said that he should and would adopt.

In my view his judgment for the plaintiff cannot stand. This leaves the difficult problem of whether we should enter judgment for the defendant or order a new trial. For obvious reasons, neither party sought a new trial, but each would accept such an order if they could not do better.

There is no escaping the conclusion that my criticisms of the judge's approach amount to holding that the parties, and in particular the defendant, did not have a fair hearing. They were entitled to such a hearing and are still so entitled. But it would be wrong to order a re-hearing if the plaintiff could not succeed. Assuming in her favour that she made an equally favourable impression as a witness of truth upon the judge who re-heard her claim, I cannot see how, short of both she and her father giving different evidence, which would itself damage her credibility, she could overcome the problems posed by the alleged change in the time of the appointment for 23rd December and the unlikelihood that she was alone with the defendant at the crucial period at the end of her attendance on that day. And the plaintiff's problems would not stop there, for there is at least one other aspect of her evidence which would require critical analysis. Thus it would strike anyone as strange that she should have attended on 23rd December if she had been seriously assaulted by the defendant on the previous Friday. The plaintiff sought to explain this by saying that her father persuaded her to go, but, as the judge found, "the plaintiff kept the 23rd December appointment without any pressure from her father" .

Taking account of all these matters, I can see no possibility of the plaintiff succeeding upon any re-hearing and accordingly I would enter judgment for the defendant. As, however, my brethren consider that there might be such a possibility, I agree that we should order a re-hearing before a different judge.

LORD JUSTICE NICHOLLS:

The defendant practices as a physiotherapist from an annexe to his home at Benfleet, Essex. The annexe is a converted garage. In autumn 1985 the plaintiff underwent a course of treatment by the defendant. She had hurt her shoulder. On the afternoon of 23rd December 1985 she attended for a further appointment. This was her 27th or 28th visit. Her claim is that, at the end of this treatment session, the defendant raped her, buggered her, tried to force her to have oral sex with him, and indecently assaulted her. The defendant wholly denies all these claims. He says that nothing untoward took place at all, either on that occasion or on any other occasion. The police decided not to prosecute the defendant, but in this action the plaintiff claims damages for assault. Thus, although these are civil proceedings, the issues are of the utmost gravity, to both parties. They are just as serious as they would be if the action were a criminal prosecution.

The central issue, which was one of fact, concerned what happened in the defendant's premises in the middle of the afternoon of 23rd December 1985. Resolution of this issue turned principally on the reliability of the evidence of the plaintiff and of the defendant. No-one else was present, on the plaintiff's account of the assault. Had there been, he or she could not have failed to become aware of something of what went on, so restricted was the

space and so flimsy the partitioning. Likewise with the indecent assaults which the plaintiff alleged took place at two previous treatment sessions, held on the 18th and the 20th December: the issue was, which of the parties was telling the truth?

The judge heard and saw the parties give evidence. He also heard and saw other witnesses who gave evidence on matters which, to a greater or lesser extent, helped in assessing the credibility of the evidence of the two parties. Having done so, the judge strongly preferred the plaintiff's evidence. This was a conclusion which, as he said, he reached by reason of his assessment of her. Under the greatest stress in the witness box, she impressed the judge as basically a truthful woman. He made no express finding that, on the crucial points, he disbelieved the defendant, a happily married and perfectly decent man of excellent character. But clearly, when he said he preferred the plaintiff's evidence, he was rejecting the defendant's evidence as untruthful.

Not having had the advantage of seeing or hearing any of the witnesses, it goes without saying that this court is not in a position to substitute its own assessment of the parties for that of the trial judge. Further, as would be expected, the very experienced trial judge directed himself correctly on where the onus of proof lay, the degree of proof required for such a serious charge, the absence of evidence corroborating the plaintiff's evidence, and the consequent need for great caution in approaching and evaluating the plaintiff's evidence.

In these circumstances the defendant had an uphill task in seeking to persuade this court that, even so, the judge's conclusion was flawed.

I turn to the judgment, the transcript of which runs to approximately 44 pages. From pages 2 to 23 the judge summarised the relevant history and relating evidence. On pages 23 and 24 the judge directed himself on the approach to be adopted in this case. Both parties accepted that his self-direction was sound in law. From pages 24 to 30 the judge dealt with some side issues, which were nonetheless of importance, because their resolution helped in determining the main issue. The judge was wholly satisfied that before December 1985 the plaintiff was perfectly normal and happy as a girl in her youth and as a young woman after leaving school. She had a genuine organic complaint in respect of her shoulder. He found, further, that over the period of treatment of more than two months, with two or three appointments each week up to December, the plaintiff was an ordinary, properly behaved patient: she did not pursue the defendant or harass or embarrass him. The judge further held that the extension of the treatment to the lower back was done by the defendant on his own, professional initiative but not for any improper purpose.

Still on the subsidiary issues, there was some conflict of evidence on the degree of undress of the plaintiff for her treatment. The judge accepted the plaintiff's evidence that on each occasion she was asked to remove her brassiere and did so, and likewise with her jeans on each occasion her lower back was treated. The judge expressed himself strongly on this point. He said that he had never heard a woman subjected to so thorough and ferocious a cross-examination, albeit perfectly proper and fair. He believed her utterly on the two points regarding the state of her clothing. He referred to one occasion in her evidence, and observed "I believed her then. I believe her now, and I disbelieve the Defendant."

Finally on the subsidiary issues, the judge accepted the plaintiff's evidence, and rejected the defendant's evidence, regarding what occurred on Wednesday 18th December.

Likewise, and despite some inconsistencies in the plaintiff's statements made from time to time, he accepted her evidence of an indecent assault at the treatment session held on Friday 20th December.

Against that background, at page 30 of the transcript, the judge turned to the major issue in the case. He listed some of the main attacks made on the plaintiff's evidence. He then proceeded to make his findings. Shortly before Christmas 1985 the plaintiff's personality and outlook changed substantially. She became an introspective, dull, inhibited, and at times fearful young woman, suffering from hysteria. The judge was positive there was some event at that time which precipitated this. He decided that, not only did the plaintiff believe she had suffered a major trauma, but he was sure she did so suffer. The judge next, at page 33, posed the question whether she had proved a major assault upon her amounting to rape and buggery by the defendant on the 23rd.

In considering this question, the judge proceeded to deal with the various attacks made on the plaintiff and her evidence. He considered first the issue which existed on whether the appointment for Monday 23rd was originally fixed for the evening and later changed to 2.30 p.m., as the plaintiff asserted, with the implication that the sexual assaults on the 23rd were premeditated, or the appointment time was never changed, as the defendant asserted. The judge next considered the evidence of the witnesses who also attended the treatment centre on the afternoon of the 23rd. I shall return to both these issues and the judge's findings. The judge then decided that the inconsistencies in statements made by the plaintiff after the 23rd, or the silences, did not disturb his assessment of her as an honest witness. He found that she was not untruthful in her evidence about seeing the defendant in the Miss Selfridge shop on the 4th January: she was mistaken, in that she saw a person whom she thought was the defendant. Likewise, she was mistaken in attributing the 'Fun Run' conversation at the treatment centre on the 23rd to Harry McGregor. He preferred the evidence of Mr Miles to that of his daughter about the absence of pressure from the father to attend on the 23rd. But he found that the plaintiff was utterly petrified of her father learning of the indecent assault on the 20th and in this regard she was very much in fear if she had cancelled the appointment for the 23rd. Her father might have started asking questions. The judge rejected the evidence of the defendant concerning an off-the-record conversation with Police Sergeant Burman, and rejected the evidence of both psychiatrists as unhelpful. The judge expressed his overall conclusion in a passage I should set out in full:

> "I do not find anything in the diaries or the history of the Plaintiff to persuade me to conclude that she is indulging in fantasy. As for fiction, I reject utterly the Doctor's opinion. If the Plaintiff's evidence is fiction, she is shockingly wicked, indeed shockingly wicked is an under-statement considering the allegation she has made against a perfectly decent man of good character. So I have wondered and pondered and thought deeply about my assessment of her. This Plaintiff on the evidence had no malevolence whatsoever towards the Defendant. On the contrary, I think she respected him, certainly until the 20th December, 1985. I do not think she is digging for gold. The compensation she received from the Criminal Injuries Board I would have thought would have been a reasonable dividend for a wicked liar, a gold digger, without bringing upon herself the horrors of this trial, possibly the odium of many people. She cannot hope to attain the status of a heroine. The manner of her giving her evidence revolts

> against the finding of fiction. Under the greatest stress in the witness box she impressed me as basically a truthful woman. I know the onus is on the Plaintiff and she has to demolish the contentions of fiction and fantasy. I find she has done so. She is somewhat scarred on certain matters, as I have earlier found, but basically she has repulsed the main attack.
>
> My basic finding is in the Plaintiff's favour not by reason of any scientific analysis of the evidence, though I have analysed it as best I can, but by reason of my assessment of her and I strongly prefer her."

I turn to consider the points in the judgment which have caused me serious difficulty. I start with the question concerning the plaintiff's evidence of a telephone conversation on the 20th, altering the time for the Monday appointment from the evening to the afternoon. The apparent inconsistency between this evidence and the original appointment card was very important, although not necessarily a critical feature in the case. One possible explanation might be that the plaintiff was mistaken in her recollection of this having been the occasion when the appointment time was changed over the telephone. There might have been some other occasion when a similar change was made over the telephone. Some such explanation would not necessarily be fatal to the plaintiff's case, although this would have brought the plaintiff's reliability into serious question, given that her evidence also was that it was during this telephone conversation on the evening of the 20th that the defendant again threatened her against telling anyone of what had occurred at the treatment session earlier in the day.

That is not the way the judge resolved this issue. He did not decide that she had been mistaken. He was, naturally enough, very surprised that the defendant had disposed of his 1985 appointments diary by the 10th January 1986 when he was first approached by the police and arrested, but the judge did not find that there was anything sinister in this. The judge said (at p.34):

> "Because of the absence of the diary and because the Plaintiff was so adamant that there was a call from the Defendant on the Friday I am not prepared to reject the Plaintiff's evidence that the Defendant did call her on Friday night relative to the appointment on Monday, the 23rd at 2.30. In summary there are reasons for doubting her evidence on this point but I do not do so."

It will be noted that the judge did not expressly find that the time of the appointment was changed over the telephone. He referred only to the plaintiff's evidence that there was a telephone call "relative to the appointment" . But I do not think that in its context this passage can be read other than as a conclusion by the judge that he accepted her evidence regarding the changed appointment, and that he did so despite the fact that it was not until 14th July that any mention of a change in the appointment time was made by the plaintiff in any written statement. He was impressed by the plaintiff's firmness on this.

I have to say that, with every respect to the judge, his handling of this issue leaves me with a profound sense of disquiet. He does not seem to have faced and grappled with the difficulties which existed if the plaintiff's evidence on this were to be accepted. It was

common ground that the handwriting on the appointments card was the defendant's. The original card, showing appointments back to October, was produced at the trial. This card showed no change in the appointment for Monday 23rd December. The plaintiff did not return to the defendant's treatment centre after the 23rd, but she had this card with her in January. Thus if the plaintiff's recollection on this point is correct, the entry for the 23rd must have been written by the defendant on the card sometime after the plaintiff had left the treatment centre on the 20th. Indeed, after the telephone conversation when the changed time was arranged. One way this might have occurred is that the card had remained with the defendant at the end of the session on Friday the 20th, and he had made no entry thereon when the next appointment was arranged for the following Monday evening. Thereafter he entered up the next appointment time sometime after the evening telephone conversation. He then handed the card to the plaintiff on the 23rd. Another possibility is that the entry for the 23rd was not made on the card until the plaintiff attended on that day bringing with her the card which at that time contained no note of any appointment for the 23rd.

Of course, these are possibilities, if a little unlikely. What troubles me is that they were not explored in evidence with the defendant, nor did the judge so much as hint at them or give any indication that he accepted that some such possible happening had indeed occurred. But he had to satisfy himself along lines such as these if he were to accept the plaintiff's evidence. There had to be a credible explanation or explanations, accepted by the judge and consistent with the plaintiff's evidence, before her account could be accepted as correct.

Of course, when accepting a witness's evidence the judge is not obliged, in all cases, to set out how precisely that evidence is to be reconciled with all the other pieces of conflicting evidence. A judgment is a summary of a judge's reasons for reaching his conclusion. He is not to be expected to deal with all the points argued before him. And each case must depend on its own circumstances. Sometimes the explanation of how the judge's conclusion on a point of fact fits in with other evidence will be readily apparent. For example, it may be obvious that the judge must have rejected other, conflicting oral testimony as unreliable. But in this case I have to say that the impression I derive from the judgment is that the judge seems to have overlooked the difficulty of reconciling the plaintiff's evidence with the unchanged appointment card. Far from it appearing that the judge must have had in mind a possible explanation such as I have adumbrated above, such indication as there is points in the opposite direction. The judge (at p.33C) noted that the evidence was that the plaintiff had the appointments card in her possession and that "it was marked for further appointment at the end of the session" . The judge then dealt carefully with the emergence of the changed appointment point in the 14th July statement, and with the disposal of the 1985 diary, but he did not return to explain or comment on the unchanged appointments card.

It is important not to over-react to one discrepancy in a long judgment in a complicated case. But the unchanged appointment card was a point of major importance in this case in assessing the reliability and veracity of the plaintiff's evidence. It was partly because she was so adamant that the judge was not prepared to reject her evidence on this. But it was this very insistence that made it particularly important, if this evidence were accepted, to see that there was a satisfactory explanation of the apparently inconsistent documentary evidence or, if the plaintiff's evidence on this were rejected, to consider carefully how this

affected the overall reliability of her evidence.

I turn next to another important part of the defendant's case: absence of opportunity. The defendant's evidence was that there were many other patients being treated at the centre on the afternoon of the 23rd, and there was no occasion on which he and the plaintiff were alone. These patients gave evidence. Here also, for the judge to accept the plaintiff's evidence he had to be satisfied of an explanation which in fact gave the defendant a "window of opportunity" for the assaults. But on this the judge left everything very much up in the air. I need to refer only to the evidence of Mr Green and of Mrs Simmons and her daughter. Mr Green's evidence was that he arrived just before 3 p.m. and was there for between 50 to 60 minutes. He occupied the third cubicle, and heard a female voice from the middle cubicle, which was the one occupied by the plaintiff. The middle cubicle was empty when he left. The judge did not find "any precision" in Mr Green's evidence and he found that the plaintiff could well have left before Mr Green arrived. I turn to the evidence of Mrs Simmons and her daughter Nicole. They attended for a 2.30 p.m. appointment. Mrs Simmons remained with Nicole throughout. The Simmons' evidence was that they arrived at about 2.40 p.m. and stayed for about an hour. They used the first cubicle. On their evidence the judge said "I accept this pair of witnesses did go to the clinic on the 23rd in the afternoon, but I cannot make a more precise finding as to the length of time they stayed."

With all respect to the judge, this is not clear or satisfactory. If by this the judge meant that Mrs and Miss Simmons left while the plaintiff was still at the centre, there is a major difficulty: Mrs Simmons' evidence was that when they left there was definitely nobody in the middle cubicle because the curtains were open. Could it be, alternatively, that in their case also, as with Mr Green, the plaintiff had left before they arrived? Here again there are difficulties. The plaintiff arrived somewhere between 2.10 and 2.20 p.m. The evidence of her father was that this appointment lasted longer than usual; he went for a walk for about 30-40 minutes; he returned and found that the plaintiff was still undergoing treatment; another man was let in and went through into the treatment area and was told which cubicle to use; Mr Miles then went away for another walk, and was gone at least 20 minutes; he returned a second time; and he read a novel and waited for "ages" before the plaintiff emerged from the partitioned treatment area. The judge found that Mr Miles was basically telling the truth to the court with his account of what happened on the 23rd. Mr Miles was impatient to get back to work, so he may have thought that he had to wait longer than he really did. But even making a generous allowance for unconscious exaggeration, it is not easy to see how the plaintiff could have left before Mrs and Miss Simmons arrived.

On these points the judge made no findings. According to the plaintiff, the assaults took place at the end of the treatment session. For this to have occurred she would need to have been there alone at that time with the defendant. That is, before Mr Miles re-entered the waiting area and began reading his book and before Mrs and Miss Simmons arrived or after they had left. The judge did not explain how the pieces fitted together in such a way that he was satisfied this was so. Nor did he explain, if the plaintiff had left before Mr Green arrived, who was the man who went through for treatment when Mr Miles returned after his first walk. The judge's conclusion was as follows:

> "While the Defendant has called the best evidence he can on the 23rd December appointments, that evidence does not have the necessary precision for me to find that the Plaintiff is wrong or dishonest or fanciful when she speaks of what

happened at the material time."

I have difficulty with this conclusion, for two reasons. First, I am concerned that the judge gave no indication of how he was satisfied on the answer to the difficulties I have indicated. What that answer may be is far from apparent. Second, and allied to the first reason, in the passage quoted there is a suggestion that the judge's approach was that it was for the defendant to prove that he could not have been alone with the plaintiff. That was not so. The burden lay on the plaintiff to prove that they were alone. For her to succeed, the judge had to be satisfied on this point, viz., he had to be positively satisfied that there was an answer to the timing difficulty.

I turn to a third area of difficulty: why did the plaintiff return on the 23rd, given that (as she said) she had been indecently assaulted on the 20th? Some credible explanation was called for on this. I have already mentioned the plaintiff's fear that her father might have got wind of something if she had stopped attending for treatment. But on the 14th July 1986, when making a statement to her solicitors, the plaintiff asserted for the first time that the defendant had threatened her that, if she told anybody, he would tell her father that she was having an affair with him. The plaintiff had not previously mentioned this to anyone with whom she had discussed the incidents: her friend Dawn, her brother, her boyfriend, a lecturer at her college, a student adviser, or the police. At the trial the plaintiff gave evidence of such threats having been made by the defendant at the end of the treatment session on the 20th, and during the telephone conversation on the evening of the same day. In his judgment the judge referred to the plaintiff's evidence of a threat having been made at the end of the treatment session on the 20th, but he made no mention of the threats over the telephone. Nor did the judge make any finding either way regarding these threats. Once again I am troubled that the judge does not seem fully to have faced questions which had to be faced and answered satisfactorily before the plaintiff's evidence overall could be accepted: were those threats made, although never mentioned until after the police had decided not to prosecute? If not, how reliable was the plaintiff's evidence?

Having regard to these three points taken together, and the general tenor of the judgment, I am in no doubt that what happened at the trial in this case was that the plaintiff made so strong an impression as an honest witness when she gave her evidence, that the judge was led into not appraising adequately all the difficulties which had to be answered satisfactorily if her evidence were to be accepted. Such an appraisal was particularly important in this case, since great caution was called for in evaluating her evidence.

For this reason I do not think that the judge's overall conclusion can stand. The appeal must be allowed.

This is a conclusion to which I have come with the greatest reluctance, because of the consequence which in my view inevitably follows: the need for a new trial. This is an appalling prospect. But in my view there can be no question of giving judgment for the defendant. This is not a case in which this court, which has not seen the witnesses, can safely decide that no judge, hearing the evidence given at the trial, could properly have found for the plaintiff. If the plaintiff wishes to have a retrial, she is entitled to have one. I too would allow the appeal. For my part I would order a retrial before another judge.

LORD JUSTICE BUTLER SLOSS:

This is an appeal from findings by the trial judge of serious sexual abuse including rape and buggery, in a civil claim based on assault and personal injuries by the alleged victim against the alleged perpetrator. The action was heard by Caulfield J. without a jury and judgment given on the 25th November 1988, in which he found for the plaintiff and awarded general damages of £20,000 together with special damages. The defendant appeals on the issue of liability. The appeal raises difficult questions as to the circumstances in which the Court of Appeal should interfere with the decision of the trial judge based upon findings of fact and his assessment of the credibility of crucial witnesses.

The plaintiff, Miss Miles, was 23 at the relevant time, a trainee teacher living at home with her parents. She hurt her shoulder weight-lifting and went for treatment to the appellant who carries on practice as a physiotherapist principally treating footballers and other athletes. He has converted a garage beside his house into a treatment clinic with three curtained cubicles and a waiting area. Three clients were able to be treated at the same time. From October 1985 Miss Miles had numerous appointments, mostly in the evening, all of which were without incident until the last three in December 1985.

The first incident of which she complained was on the 18th December. At this time the defendant was giving her treatment to her lower back as well as the shoulder. While she was lying on her stomach, according to the plaintiff, the defendant touched her inner thighs. She said she was required to remove her jeans for the treatment, which the defendant denied. Meeting a girlfriend, Dawn Prior, that evening they discussed whether it was likely to have been intentional and, according to Miss Prior, they decided to give him the benefit of the doubt. The plaintiff returned on the 20th in the evening. On that occasion after massage of the lower back the plaintiff alleged that the appellant "pushed his fingers up her" . There were other people in the clinic at the time. She did not call out. She was in a state of shock. She again made some complaint to Dawn Prior but to no one else.

An appointment was made for the following Monday 23rd December, the circumstances in which it was made for 2.30 in the afternoon being very much in dispute. She attended on 23rd December, driven there by her father. On that occasion she alleged that there was a time when she and the defendant were alone in the clinic and he committed a serious of serious sexual assaults on her; digital penetration of the vagina and the anus, buggery, rape, oral sex and further digital interference. The defendant at one stage pushed her off the bed. She hit her head on a machine and sufficient noise was made to start dogs in the house nearby barking. She got up and got dressed. Her father returned and she made no complaint to him. She made partial complaints to her brother and to a friend on 31st December. She made further complaints to a lecturer at college on 7th January and to the student adviser on 9th January. She was seen by the police and made in all four statements to them. The defendant was arrested and interviewed by the police. He denied and continues to deny all the allegations. In April 1986 a decision was made not to prosecute the defendant. The plaintiff then issued a writ. She made a further statement to her solicitors on 14th July 1986 of matters not previously disclosed.

One matter which was not in dispute was the change in health and disposition of the plaintiff although the onset and cause of the change has been hotly disputed. According to her family and friends, she was before late December 1985 a normal, outgoing athletic girl, described by Dawn Prior as "bubbly" . The judge found her to be a "very changed person

indeed." She "wholly changed in her personality and outlook from being a perfectly happy, uninhibited, normal, outgoing young woman into an introspective, dull, inhibited, at times fearful woman developing hysteria due to her continuing symptoms and fears" . In January 1987 she was admitted to hospital in a collapsed and hysterical state. She was diagnosed as suffering from Hysterical Conversion Syndrome. Two psychiatrists gave evidence as to her psychological condition and in the event the judge, as he was entitled to do, did not rely on the evidence of either of them.

The judge identified the issues as to whether the plaintiff was sexually assaulted on the 20th December and "whether she was raped and buggered and desecrated on December 23rd" . He went on to say "the onus is on the plaintiff and the degree of proof necessary to prove a charge as serious as this I take from the case of *Bastable v. Bastable & Sanders [1968] 3 All E.R. 701* ." In that case this court applied the dicta of Denning LJ in *Bater v. Bater [1951] P 35* at page 37:

> "As Best C.J. and many other great judges have said 'in proportion as the crime is enormous, so ought the proof to be clear.' So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still is does require a degree of probability which is commensurate with the occasion."

There is no criticism of the judge's approach to the standard of proof required. The judge then directed himself that there was no evidence capable of corroborating the complainant and gave himself the warning as to the dangers of finding allegations proved solely upon the word of the complainant. He said:

> "This court, that is to say myself, has to evaluate the worth of the alleged victim's allegations. This has been my approach. It is an approach of great caution. It is a very grave responsibility indeed which has to be discharged."

There has been no criticism of the judge's directions to himself on the approach to this case. The criticism is that having given himself the directions he did not then abide by them in his subsequent approach to the evidence.

Mr Scrivener has criticised the judgment on a considerable number of grounds and has dissected the judgment in great detail. The many individual criticisms that he makes have to be seen in the overall context of the judgment. No judgment is perfect and allowance has to be made for that, even in a reserved judgment. Furthermore they have individually or cumulatively to be very strong to displace the burden upon the Court of Appeal not to interfere on findings of fact and assessment of witnesses.

He makes however a number of points which I for my part find compelling.

The first issue which in my judgment is the most difficult and causes me the most concern

is that surrounding the appointment card.

The plaintiff had an appointment card which was usually filled up with the next appointment and retained by her. After the appointment of the 23rd December it was in her possession and handed by her to the police. The appointment card showed an appointment for Monday 23rd December at 2.30 p.m. It was in the handwriting of the defendant and there was no alteration. Nevertheless the plaintiff's case was that the appointment was originally for 7.30 p.m. and that the defendant telephoned her at home and changed the time to 2.30 which would be less busy and she could be fitted in better then. He also threatened her as he had previously done at the clinic that afternoon that he would say that they were having an affair if she told anyone what had happened. The obvious inference to be drawn was that these very serious sexual assaults on the 23rd December were premeditated and not opportunist.

The change in the appointment, the two allegations of threats and the telephone call on the evening of the 20th December first came to light in the plaintiff's statement of the 14th July 1986, although there was some suggestion of a changed appointment put to the defendant by the police and denied by him. The judge recognised the importance of the changed appointment and set it out at some length, including the lack of reference to the change of time in her statements to the police which were "not consistent with her sworn testimony," but that it was first referred to in her statement to her solicitors in July 1986. The judge then referred to the absence of the defendant's 1985 desk diary which would have been helpful, but appeared to draw no inference adverse to him in its non-production. Nevertheless in the next paragraph the judge said:

> "Because of the absence of the diary and because the Plaintiff was so adamant that there was a call from the Defendant on the Friday (20th) I am not prepared to reject the Plaintiff's evidence that the Defendant did call her on Friday night relative to the appointment on Monday, the 23rd at 2.30. In summary there are reasons for doubting her evidence on this point but I do not do so."

The judge did not go on to explain why he did not do so. There was some evidence from the plaintiff that she might not have had the card in her possession, but that it had been left behind at the clinic. Such an eventuality required the card, which had a number of appointments written on it over a period of time and was generally kept by the plaintiff, not to have been filled for the first appointment fixed at 7.30, to have been retained by the defendant, to have been filled in by him with the changed time but not the original time sometime over the weekend and returned to the plaintiff sometime during the session when she was, according to her, raped. It is clear that she left on the 23rd with the appointment card which she handed to the police. The judge did not refer to the plaintiff's explanation given in her oral evidence. He advanced no theory why he accepted her version and wholly failed to resolve what is for me a crucial issue in this case. He did not refer at all to the telephone call and the threats first being referred to in July 1986.

The second matter which raises difficulties is the opportunity for the sexual assaults to have taken place on the 23rd. According to the plaintiff, she was alone with the defendant throughout the period of the assaults. The defendant called a number of witnesses who had been at the clinic during the afternoon, both clients and in two cases relatives of clients.

The purpose was to support his evidence that there were other clients present throughout the afternoon. The judge took each witness in turn and summed up their evidence as follows:

> "While the Defendant has called the best evidence he can on the 23rd December appointments, that evidence does not have the necessary precision for me to find that the Plaintiff is wrong or dishonest or fanciful when she speaks of what happened at the material time."

The judge made no findings of the time at which the plaintiff and her father arrived at the clinic nor the approximate time when they left. He referred to the evidence of the father about attending the clinic, leaving his daughter there, going away for 30-40 minutes, returning to find a man waiting to be let in, going in himself, going away again for another walk and returning to wait for his daughter in the waiting area. On the second return there was another man he saw inside, to which the judge did not refer. The judge found that the father was "basically telling the truth to the court."

The judge found all the defendant's witnesses to be too imprecise as to their timings. He does not appear to have done any analysis himself of the crucial period when the rape was said to have taken place (on the combined evidence of the plaintiff and her father, the longest period being 2.10 to 3.40 and the shortest period 2.20 to 3.15). On the plaintiff's case the assaults must have occurred towards the end of the session.

In his assessment of the defendant's witnesses and their timings the judge did not refer at all to the relevance of the father's presence from time to time in the waiting area and his evidence of the presence of another person on each occasion. His evidence does not appear to fit in with the evidence of the appellant or other witnesses but they also do not appear to fit in with each other. It can however be said that during that afternoon there were, on the plaintiff's case, other people there at the beginning, in the middle and at the end of the session. The judge did not make any findings at as to the timings and clearly did not take any account of the father's evidence when preferring the evidence of the plaintiff.

Another issue was the psychological condition of the plaintiff. Although the judge was entitled to reject the evidence of the two psychiatrists, there was undisputed evidence as to her subsequent psychological problems, at one time of a severe nature. It was not clear the extent to which she had recovered by the time of the hearing, although obviously markedly improved. The judge found that "the basic change in the plaintiff's personality and life pattern was caused by the unlawful assault by the defendant." He did not however in his assessment as to whether she was indulging in fantasy or fiction, both of which he rejected, appear to consider the relevance of the subsequent psychological illness upon her evidence and recollection. This was an uncorroborated account of very serious sexual assaults which had to be regarded with great caution. The psychological illness from which she undoubtedly suffered ought also to require a cautious approach to the evidence, particularly where in some instances her version of events was unlikely or incorrect.

This caution was of particular importance in respect of the evidence she gave about her return for the appointment on the 23rd December. She said that she was persuaded by her father although she was reluctant to go. The judge found that the father's evidence did not

support his daughter and that she kept the appointment on the 23rd without any pressure from the father. This decision of the plaintiff to return on 23rd December was never subjected to any critical assessment by the judge.

In a number of instances the judge appears, despite his self-direction as to the onus of proof, in fact to have tested the defendant's case against the plaintiff's and found it wanting, as for instance in the approach to the evidence as to timings on the 23rd and not being prepared to doubt her evidence about the changed appointment. He set out the case of the defendant. He found him to be of excellent character, but made no general assessment of the credibility of the defendant nor gave any impression of him as a witness save on the additional interview with the police which he rejected, and the loss of the 1985 diary. On each issue he held that he believed the plaintiff and disbelieved the defendant. In one significant passage in which he referred to the way in which she gave evidence he said "I believed her then. I believe her now and I disbelieve the defendant."

Despite a self-direction on the complaint by the plaintiff on the 18th to Dawn Prior going only as to consistency, the judge then said:

> "The complaint is not evidence of the touching but I see no reason to doubt the Plaintiff's evidence. I accept Dawn's evidence. She impressed me greatly as a witness of truth. I therefore accept the Plaintiff in this third point and reject the Defendant."

This appears to me to have been an incorrect use of the evidence of Miss Prior.

In my view one passage in the judgment encapsulates the approach of the judge.

> "My basic finding is in the Plaintiff's favour not by reason of any scientific analysis of the evidence, though I have analysed it as best I can, but by reason of my assessment of her and I strongly prefer her."

Mr Melville-Williams for the plaintiff in supporting the decision of the judge relied heavily upon the importance of the judge seeing and hearing the witnesses especially in a case such as the present, and the great weight to be given to his findings of fact and assessment of the credibility and reliability of witnesses. He argued that this court should not seek to disturb the findings of fact and conclusions of the judge and invited our attention to the wealth of authority on the subject. It is only necessary to refer to the speech of Lord Sumner in *The SS Hontestroom [1927] A.C. 37* at page 47:

> "What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute…It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has

> failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In The Julia [1860] 14 Moo. P.C. 210, 235 Lord Kingsdown says:
>
> 'They, who require this Board, under such circumstances, to reverse a decision of the Court below upon a point of this description, undertake a task of great and almost insuperable difficulty…We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.'"

That is not a task easily undertaken. Nevertheless I have come to the conclusion that this judgment cannot stand. All the points to which I have already referred lead me reluctantly to the view that this very experienced judge was so impressed by the evidence of the plaintiff and of Miss Prior that he abandoned the cautious approach he had required of himself and thereafter he did not assess the discrepancies in the plaintiff's case nor independently assess the defendant's case. It follows therefore that the defendant did not have a fair hearing to which he is entitled.

The problem arises as to whether we should order a re-hearing or enter judgment for the defendant. Mr Scrivener has sought to persuade us that the decision of the judge was one to which no reasonable court could come and therefore that this court should find for the defendant. I recognise that there are considerable hurdles for the plaintiff to overcome in a re-hearing, such as resolution of the question of the appointment card, but I cannot for my part say that they are insurmountable and therefore that there is no possibility of success. Attractive though it would be to be able to bring this distressing litigation to an end, justice requires to be done to both sides and reluctantly, I, for my part, consider that there should be a retrial.

I would allow the appeal and direct a retrial.

Order: Appeal allowed; order for new trial before a different judge; costs in cause; legal aid taxation both sides.

to which no reasonable court could come and therefore that this court should find for the defendant. I recognise that there are considerable hurdles for the plaintiff to overcome in a re-hearing, such as resolution of the question of the appointment card, but I cannot for my part say that they are insurmountable and therefore that there is no possibility of success. Attractive though it would be to be able to bring this distressing litigation to an end, justice requires to be done to both sides and reluctantly, I, for my part, consider that there should be a retrial.

I would allow the appeal and direct a retrial.

THE MASTER OF THE ROLLS: This appeal will be allowed and a new trial ordered for the reasons set out in the judgments which have already been handed down.

MR SHARPE: My Lord, I would apply for an order for costs in the circumstances. Both sides are legally aided, so I would ask for it in the usual form, not to be enforced without leave of the court, and of course standard legal aid taxation.

MR MELVILLE WILLIAMS: My Lord, I would ask for an order that the costs, both here and below, be reserved to the judge at the new trial, with liberty to both sides to apply to this court.

THE MASTER OF THE ROLLS: The alternative would be, I suppose, costs in the subsequent cause?

MR MELVILLE WILLIAMS: Yes.

THE MASTER OF THE ROLLS: It might save an application.

MR MELVILLE WILLIAMS: It would, but liberty to apply in the event of for some reason there not being a retrial.

MR SHARPE: My Lord, I would seek to address you on that in reply.

THE MASTER OF THE ROLLS: I am sorry, could I just go back. There is always liberty to apply, but you would not actually need a liberty to apply, would you, because in this sort of situation the plaintiff either sets it down for a new trial or she does not. If she does not, the defendant can surely apply to have -

MR MELVILLE WILLIAMS: Have it dismissed for want of prosecution, with a consequential order. Yes, that is right, my Lord.

MR SHARP: My Lord, I of course accept that point. But in relation to these proceedings the appeal has succeeded and I have a duty, as I perceive it, to the legal aid fund, even though both parties are legally-aided, because there are matters I need not go into which may affect the assessments in this case, to have an order that reflects this particular finding of this court. Regardless of what happens in due course and whether the case does proceed further, nonetheless this court has come to certain conclusions in relation to the judgment which has justified the appellant taking the steps he has and having the judgment set aside and therefore, regardless of what happens in the future, I would submit that it would be appropriate to reflect that finding in this court by way of the order for costs at this stage. It is of course a matter for your Lordships' discretion. If the question of discretion were to be argued, I would say it is one of the cases where there are not matters upon which the discretion could be exercised against the successful party, in view of the very firm findings that have been made by your Lordships.

MR MELVILLE WILLIAMS: My Lord, the position is that the error is in fact the error of the learned judge, and it is not something, in my submission, that should fall really, certainly at this stage, on either party. My Lord, thinking about the matter, my learned junior pointed out that in the event of a retrial of course there may be an issue about whose responsibility it is that there has been the necessity for this appeal, and whether there ought to be an order in respect of the costs of this appeal, and whether they ought necessarily to follow the result of the retrial.

THE MASTER OF THE ROLLS: I am not quite clear how that could be right on the background.

MR MELVILLE WILLIAMS: Well, my Lord, the position is this. Supposing there is a retrial and supposing the plaintiff loses the retrial, then she would have to carry the burden of the costs of this appeal, which is not as a result of any failure on her part, and it might be that the court would decide that there ought to be no order in respect of -

THE MASTER OF THE ROLLS: There is obviously force in your submission, without deciding whether you are right, that this has been the fault of neither party. But how does one reflect that?

MR MELVILLE WILLIAMS: Well, my Lord, that is why I originally asked for and perhaps am asking again that the costs should be reserved, so that the whole issue could be considered in the light of the ultimate result.

THE MASTER OF THE ROLLS: Yes. Reserved to whom?

MR MELVILLE WILLIAMS: To the judge at the new trial; and it was in that context that I suggested liberty to apply to this court in the event of there being no new trial.

THE MASTER OF THE ROLLS: There is nothing else you wish to add, is there?

MR SHARPE: No, my Lord, save to say that sometimes costs are accumulated, but in an interlocutory or intermediate stage which could have been perhaps prevented by other reasons, but they all emanate from the original course of action, which was started in due course -

THE MASTER OF THE ROLLS: Are you talking about some accumulated costs other than this appeal?

MR SHARPE: No. My learned friend would appear to be saying that it may well be that, in the event that the plaintiff does not succeed, she should not then be penalised for the costs of the appeal, because it was not her failure which caused the appeal to have to be made, but nonetheless it arises out of the original course of action that she started, and sometimes one does have matters along the way which are not necessarily all the ultimate responsibility—

THE MASTER OF THE ROLLS: By "matters along the way" you are not referring to interlocutory applications? You mean the abortive trial?

MR SHARPE: The abortive trial and the appeal, but they all stem from her cause of action and they are causative from that, directly causative whether the appeal was necessary or not. Therefore the costs should follow the event throughout in those circumstances. The other point of course is that if she decided for whatever reason not to pursue the matter, her liberty to apply to enable the costs to be properly reflected would, I submit, be advisable.

THE MASTER OF THE ROLLS: We will retire to consider this.

MR MELVILLE WILLIAMS: My Lord, there is one other application I wish to make and that is for leave to appeal.

THE MASTER OF THE ROLLS: Yes, we will consider that one too. Are there any reasons for

it?

MR MELVILLE WILLIAMS: Well, my Lord, without analysing your Lordships' judgment and entering into the criticism I would seek to make to a higher court, the reasons are that it is a case that has attracted a lot of attention. That of course is not a reason on its own. It is a case in which your Lordships have taken an unusual step in the light of the way in which the judge dealt with the matter and it is a case which goes therefore to substantial issues about the need for a judge to deal in detail with all the issues which arise which go to credibility when determining or giving his judgment, in which he announces his determination on credibility and there are, in my submission, important issues in relation to those matters, summarised exceedingly briefly.

THE MASTER OF THE ROLLS: Yes. I am much obliged to you.

(Their Lordships retired)

THE MASTER OF THE ROLLS: We think that in the circumstances the appropriate order to make is costs in the cause, but we make it absolutely clear that, whatever court is concerned in the ultimate stages of this litigation, whatever that may be, the judge will have the usual discretion as to how he deals with the costs and of course will be governed by any statutory provisions affecting legally aided litigants, so that he will be able to consider whether he makes football pool orders or what he does. I turn to the question of leave. The answer is we think that you ought to apply to their Lordships' House if so advised.

MR SHARPE: I think legal aid taxation has to be formally applied for.

THE MASTER OF THE ROLLS: If it does, you can certainly have it on both sides.