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Case No: HQ04X02769

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9 March 2006

**Before:**

**THE HON. MR JUSTICE GRAY**

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**Between:**

<b>MARION HENRY</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>BRITISH BROADCASTING CORPORATION</b>	<b><u>Defendant</u></b>

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**RICHARD RAMPTON QC and JACOB DEAN**  
(instructed by **Carter Ruck**) for the **Claimant**  
**ANDREW CALDECOTT QC and CATRIN EVANS**  
(instructed by **BBC Litigation**) for the **Defendant**

Hearing dates: 16-20 January & 6-16 February 2006  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**THE HON. MR JUSTICE GRAY**

## Mr Justice Gray:

### Introduction

1. In this action the Claimant, Mrs Marion Henry, seeks damages for libel from the Defendant, the BBC, in respect of a news bulletin called *Points West* which was broadcast on BBC West on the evening of 12 May 2004. The issue which I now have to decide is whether the words of that broadcast are substantially true with the result that the defence of justification advanced by the BBC succeeds. The importance of the case lies in the fact that it is concerned with institutional corruption within a public body which has gone unpunished.
2. This is the third judgment which I have handed down in this case. One of the earlier judgments was concerned with an alternative defence relied on by the BBC, namely qualified privilege (which I rejected). In the course of my judgment on that issue I gave some detail of the background to the case. I will nevertheless in the present judgment set out the relevant circumstantial background, even though that involves a degree of repetition, so as to enable the reader to inform him or herself of the reasons for my decision from a single self-contained judgment.

### NHS Waiting Lists

3. As I will explain in greater detail later on, the nub of Mrs Henry's case is that the *Points West* broadcast bore the defamatory meaning that she had been guilty of the systematic falsification of waiting list figures at the hospital where she worked. It is accordingly necessary to understand the procedures for the management of hospital waiting lists which were in place at the relevant time.
4. In January 1996 the National Health Service ("NHS") Executive issued a document entitled "NHS Waiting Times – Guidelines for Good Administrative Practice". The Guidelines refer to a "Patients' Charter" which had come into effect in April 1995 and which guaranteed 18 months as the maximum In-Patient and Day-Case wait before treatment. According to the Guidelines, the waiting list fulfils two principal functions: firstly, to record the patients identified as needing admission for treatment and, secondly, to quantify at any given point in time the number of patients needing treatment on an In-Patient or day-case basis.
5. The provisions of the Guidelines which are for present purposes material include the following:
  - "A.1 The reputation of a hospital, as perceived by its patients and the public, is partly determined by its success in managing its waiting lists. It is, therefore, vital that decisions made by senior managers about waiting lists are clearly understood by all members of staff and are put into effect in the way that the managers intended. This requires a clear statement of hospital, or unit, policy and organisational arrangements to ensure that policy is implemented.

- A.4 The hospital's waiting list policy document should include clear statements about all major aspects of administering and managing lists...

### **Active Waiting Lists**

- B.5 Consultants should decide, in line with the waiting list policy, whether they wish to sub-divide their active waiting list to assist them with the clinical management of patients. Many consultants find it helpful to have separate lists (or computer listings) for:

- a) in-patients without an admission date;
- b) day-case patients without an admission date;
- c) patients with an admission date

...

- C.1 The waiting list fulfils two principal functions. Firstly, it is a formal record of patients identified as needing admission for treatment. It is used to progress the appropriate procedures of review, selection and admission to ensure that none of those patients become "lost" or inadvertently overlooked.

- C.2 Secondly, it is a statement of known demand for surgical or other treatment which quantifies, at any point in time, the number of patients needing treatment on an in-patient or day-case basis. This can be analysed to provide vital information on the use of, and need for, hospital resources.

- C.9 Whenever possible patients should be given dates for admission at the time when the decision to admit is made. In that way the dates are negotiated with the patients and should cause fewer difficulties later. Surgeons will need to decide how many patients can be booked for each operating session, bearing in mind the incidence of emergencies and the relative proportions of urgent, soon and routine cases.

- D.2 The [waiting] list should be constantly updated, using data received from various sources to ensure that it does not contain patients who no longer need their operations at the hospital. The "active", "suspended" and "planned re-admissions" waiting list records must be kept up to date.

- E.1 Administrative review (or validation) of waiting lists is a hospital-initiated routine check that patients on the waiting lists still need their operations and that their details are correct. It should also serve to identify patients who are approaching Patients' Charter guarantee/standard limits and who may need Personal Treatment Plans.

### **Review Criteria**

- E.5 The waiting list policy document should specify the criteria to be applied in selecting patients for review. It is impractical and unnecessary to review all patients on the waiting list.
- E.6 As a minimum, hospitals should review all patients who have not been reviewed within the past six months and who have
- i) waited for twelve months or more and have not yet been called for admission
  - ii) been "suspended" from the waiting list for more than three months due to some underlying medical condition or due to personal circumstances
  - iii) postponed or deferred their admission on a number of occasions, usually twice, as specified in the waiting list policy.

### **Method of review**

- E.12 Having an annual "blitz" on the whole waiting list creates a substantial amount of extra work over a short period. It also runs the risk of overlooking patients coming up to the maximum wait guaranteed under the Patients' Charter.

### **Clinical Review**

- E.21 Consultants should regularly, at least quarterly, scan their entire lists to check clinical priorities and the appropriateness of patients on them...

### **Glossary of terms**

Active Waiting List: Patients awaiting elective admission for treatment and are currently available to be called for admission.

Self-Deferrals: Patients who, on receipt of a reasonable offer of admission, notify the hospital that they are unable to come in.

Suspended Waiting: A list of patients awaiting elective admission who do not have a date for admission and who, due to some underlying medical condition or a social reason, are not currently available to be called for admission.

TCI (To Come In): Notification of a date for admission to hospital.”

6. It is common ground that the Guidelines reflect public concern about the length of time which members of the public had to wait for treatment at NHS hospitals. The subject of waiting lists was and remains a sensitive political issue. The Guidelines make clear that waiting list information has an important bearing on clinical and resource decisions. At the material times the practice within the NHS was for NHS Trusts to send the Active In-Patient Lists to the relevant Strategic Health Authority on a monthly basis at the end of the month or early in the following month. It is the role of the Strategic Health Authority to monitor funds of NHS Trusts within its boundaries and to secure compliance with Government policies as reflected in the Guidelines. Failure to comply with waiting list targets can affect the “star rating” of an NHS Trust. I have heard some evidence that waiting list achievement is linked to extra payments being made to the hospital concerned.

#### **Weston Area Health NHS Trust – Weston General Hospital (“WGH”)**

7. The hospital which was the subject of the BBC *Points West* programme of which Mrs Henry complains was Weston General Hospital (“WGH”), which is in Weston-Super-Mare. Mrs Henry was employed by WGH in a senior administrative capacity.
8. WGH at the material times fell under the Somerset Health Authority and the Avon Health Authority and subsequently the Avon, Gloucestershire and Wiltshire Strategic Health Authority (“AGW”). These authorities would monitor the WGH In-Patient Active List and the separate Out-Patient List on both a monthly and year-end basis to ensure that targets were being met.
9. At the relevant times WGH provided services mainly for North Somerset Primary Care Trust, which is part of the AGW. WGH then had approximately 360 beds and about 1600 staff. At the times with which this action is principally concerned the Chief Executive was Mr Roger Moyse. The Board of Directors consisted of six executive directors and five non-executive directors. The Director of Finance and Resources was Mr Meredith Collins. The Executive Medical Director was Mr John Saunders. The Director of Nursing, Health and Safety was Ms Joan Timmins. The Director of Human Resources from July 2002 was Mr John Edwards.
10. Senior executives below Board level at WGH included Mrs Marion Henry, who was between 1998 and 2004 the Facilities and Administration Manager at WGH (her title changing to General Manager in 2001). Employees at the next level of seniority at WGH included Mrs Linda Marvin, who was at the material times the Patient Services Manager. With effect from January 1999 the Admissions Co-ordinator at WGH was

Mrs Michele Storey, who later became Mrs Masson (by which name I shall refer to her in this judgment). Initially Mrs Masson was in charge of the In-Patient Waiting List only but in July 2000 she was promoted to the post of Waiting-Times Co-ordinator in which capacity she was in charge of monitoring the Out-Patient Waiting List as well.

11. The role of the Waiting List Office (“the WLO”) was to manage WGH’s In-Patient Waiting Lists and to make arrangements for patients to come in for treatment. Several junior members of staff worked in the WLO, formerly called the Admissions Office, for which Mrs Masson was responsible. The way the system then operated was that, once it had been decided (usually by a consultant) that a patient needed an operation, a medical secretary (or sometimes the consultant himself) would fill out a waiting list card. This card would find its way internally to the WLO, where the patient would be added to the waiting list of the relevant consultant. Data relating to the patient would at that stage be entered on WGH’s computer software system which was called Patient Administration System (“PAS”). There was a waiting list module on the hospital’s PAS system. When the time came for the patient to be admitted, a “To Come In” (“TCI”) letter would be sent to the patient.
12. The WLO was also responsible for the process referred to in the Guidelines as “Validation”. That was a process whereby patients whose presence on the Active List had for one reason or another been suspended (either because they were medically unfit for treatment or for personal reasons unwilling to go ahead with treatment) were reviewed in order to see whether they should be returned to the Active List (because they were now fit and willing to go ahead with treatment) or whether they would be taken off the Active List altogether (because, for example, they have moved out of the area or have decided that they did not want the treatment).
13. The position in regard to out-patients at WGH was different. They were not managed by the WLO but by a separate Out-Patient Department.

#### **The Claimant, Mrs Marion Henry**

14. Mrs Henry started working at WGH in 1979. She started as a part-time Clerical Officer and from there worked her way up through various posts until in April 1988 she was promoted to become Patient Services Manager. Thereafter she was given additional responsibilities and became Support Services Manager in 1994. In December 1998 she was appointed Facilities and Administration Manager. In November 2001 that job title changed, as I have said, to General Manager.
15. In that latter capacity Mrs Henry had line management responsibility for a very wide range of WGH’s activities. They included overall managerial responsibility for the following: a conference centre in Taunton owned by WGH; the PAS computer system; the Sterile Services department; the Estates Department which oversaw the pay-phones; car parking; housekeeping; the Facilities Department which managed catering, portering and mail for the entire hospital and the hospital’s private patient unit (Waterside). The additional area of responsibility which is for present purposes material was Patient Services. That comprised overall responsibility for waiting lists (both in- and out-patients), admissions, medical records, and medical and surgical secretaries.

16. In all eleven heads of department were directly responsible to Mrs Henry. She was indirectly managing approximately 26 members of staff by November 2001.

#### **Other staff at WGH with responsibility for waiting lists**

17. Mrs Marvin was, as I have already said, Patient Services Manager from 1994 until September 2002. Her predecessor in that job was Mrs Sue Lambourne. Mrs Marvin had started in the NHS as a nurse at the age of 17. In 1991 she decided to combine the nursing element of her work with some involvement in management. In her capacity as Patient Services Manager, Mrs Marvin's responsibilities included responsibility for the main WGH Out-Patient's Department; the Medical Records Department; the medical secretaries throughout WGH; the appointments centre; WGH's general office; the switchboard and the stores. Mrs Marvin's area of responsibility which is relevant for the purpose of the present proceedings was her responsibility between 1999 and 2002 for the WLO. The Out-Patients List also came within Mrs Marvin's responsibility.
18. Mrs Marvin was at all times line manager to a large number of WGH staff. One of them was Mrs Masson. Although Mrs Masson had little prior experience of managing waiting lists prior to her appointment as Admissions Co-ordinator in January 1999, she was, according to the evidence, a quick learner. As will be seen, Mrs Masson has a crucial role to play in the case.

#### **Mrs Masson's dossier**

19. As I have already indicated, this case is concerned with the falsification of waiting list data. It is accepted that such falsification did take place at WGH in the period from 1999 to 2002. It will in due course be necessary for me to examine in detail the nature and extent of that falsification; who was complicit in it and who knew about it and at what point in time. At this stage I will describe how and in what circumstances the falsification came to light.
20. It appears that by the late summer of 2002 Mrs Masson had it in mind, for whatever reason, to leave her employment at WGH. At about that time (it will be necessary to examine later precisely when) Mrs Masson approached Mrs Marvin, her line manager. There is an important dispute as to what was said at their meeting to which I will have to return. Putting it for the time being neutrally, what Mrs Masson told Mrs Marvin caused the latter to notify Mrs Henry of their discussion. Some time after Mrs Marvin spoke to her, Mrs Henry contacted the Human Resources Department.
21. Mrs Masson was for part of September 2002 absent from the hospital, having reported sick. Mrs Masson nevertheless agreed to Mrs Henry's request that on her return from sickness she would attend a meeting and at Mrs Masson's request it was held before her scheduled return to work.
22. The meeting duly took place on 23 October 2002. It was attended by Mrs Henry, Mrs Masson and Mr Hodgkinson from WGH's Human Resources Department. I shall have to return later to the question what was said in the course of the meeting but it is common ground that Mrs Henry asked Mrs Masson a number of times what was the information which, according to Mrs Marvin's account of her earlier meeting with

her, Mrs Masson was claiming to have. It is also common ground that Mrs Masson declined to hand over that information to anyone at WGH.

23. However, there followed a meeting on 31 October 2002 between Mrs Masson and Mr John Edwards, Director of WGH's Human Resources Department. A representative from Deloitte & Touche was in attendance. In the course of the meeting Mrs Masson handed over to Mr Edwards certain documents which she had listed under the heading "Information to be handed over to John Edwards". Those documents have been referred to as Mrs Masson's "dossier". At the meeting Mrs Masson also handed to Mr Edwards, amongst other documents, various lists of the names or hospital numbers of patients who she claimed had been removed from the waiting list and other patients who had been placed on the so-called Deferred List. Mrs Masson also gave Mr Edwards some notebooks which she said recorded on a daily basis the numbers of patients who Mrs Masson claimed she had been instructed by managers at WGH to remove from the waiting lists. According to Mrs Masson, those managers included Mr Moyse, Mr Collins, Mrs Henry and Mrs Marvin.

### **Investigations into the alleged manipulation of data**

24. There followed a series of investigations into what had been going on at WGH in relation to patient waiting lists. The findings of the various investigators are not of course evidence upon which the BBC can rely in support of its defence of justification (save to the limited extent that hearsay notices have been served in respect of information laid before the investigators). I will therefore at this stage do no more than identify the investigations and their dates. As will become apparent, the principal relevance of the investigations to the issue which I have to decide is that they form the backdrop to the BBC's case that employees at WGH, including Mrs Henry, engaged in a cover-up to conceal the fact and extent of the falsification of patient data which had occurred.
25. The investigations were as follows:
- i) a preliminary investigation was undertaken by Ms Terri Green and Mr Ian Chadwell in November 2002. It is common ground that this was a superficial investigation.
  - ii) Mr John Edwards undertook a supplementary investigation into certain unresolved matters between March 2003 and April 2003 when he reported to the Trust Board.
  - iii) Mr John Langran of NHSP, an NHS Trading Agency, commenced an investigation in January 2003 into certain specific areas identified for him by Mr Moyse. His report ("the Langran report") is dated March 2003. In my opinion it falls lamentably short of what one would have expected of an independent investigation into serious managerial malpractice.
  - iv) In February 2004 Mr Michael Taylor was commissioned by the Chief Executive of the AGW Health Authority to carry out an independent investigation into a range of allegations made by Mrs Masson. His report, which runs to 41 pages plus appendices, is dated April 2004. I shall refer to it as "the Taylor report".

### **The involvement of the BBC**

26. In March 2003, that is, shortly after the Langran report was produced, the BBC in the person of its Health Correspondent in the west of England, Mr Matthew Hill, became interested in the story. In due course Mr Hill contacted Mrs Masson and received from her and from other sources a number of documents.
27. The detail of Mr Hill's investigations has no bearing on the issue of justification. It can be found at paragraphs 29-33 and 40-58 of my judgment in relation to the issue of qualified privilege, citation number [2005] EWHC 2797 (QB).
28. A report, compiled by Mr Hill, was broadcast by the BBC on 7 July 2003 as part of a regional current affairs series called *Inside Out*. It included extracts from interviews which Mr Hill had conducted with Mrs Masson and with Mr Edwards of WGH.
29. The entirety of the Taylor report was not made public. However, an Executive Summary was made available to the press. At the time when the Executive Summary was made available, WGH issued a brief press release. Mr Hill interviewed Mrs Masson on film for the purpose of a broadcast which the BBC intended to transmit that same evening on the *Points West* programme.

### **The broadcast complained of**

30. That is the broadcast of which Mrs Henry complains in this action. It was transmitted at or shortly after 6.25pm on 12 May 2004 as part of the early evening news bulletin on *Points West*. The words of which Mrs Henry complains were these:

“Sally Challoner (BBC Points West presenter):

Tonight, hospital waiting lists scandal, senior managers found guilty of fiddling the figures.

...

Chris Vacher (BBC Points West Presenter):

First tonight, senior managers at a major hospital in the West systematically fiddled patient waiting lists.

Challoner:

That's the conclusion of a new independent inquiry into allegations that records were falsified at Weston General in order to win a better star rating for the hospital than it deserved. Two previous inquiries concluded that there had been no wrongdoing and this latest investigation was only carried out after fresh evidence was unearthed by a special Points West report. Our health correspondent Matthew Hill has the full story.

Matthew Hill:

This is the first time Michele Masson's come back to the hospital that got rid of her. She was in charge of waiting lists until 2002, when she took the brave decision to speak out about how staff were being pressured into fiddling the figures. She maintained that patients were simply vanishing from the list without having their treatment. The hospital and two inquiries said she was lying; today a third investigation came up with a very different conclusion and a chance for her to clear her name.

Michele Masson:

I am really glad that after 18 months we're finally going to get to see hopefully an independent report.

Hill:

After making her allegations Ms Masson was forced to resign. She spent the last year working in a Spanish bar, her career and reputation in tatters. It was only after the second inquiry that the BBC in the West uncovered new evidence that supported her case. It prompted today's report that concluded that patients were removed from waiting lists over the period.

Masson:

The first inquiry, which was set up by the former Chief Executive in 2003, was undoubtedly a cover up and clearly laid the blame for any irregularities at my foot, despite evidence to the contrary. As a result, the senior management team including the Finance Director, Meredith Collins, Linda Marvin and Marion Henry Justice of the Peace, were permitted to continue in post.

Hill:

Today the hospital's new boss apologised.

Mark Gritten, Chief Executive Weston Hospital:

I think at the time there was a culture that didn't promote openness, didn't promote staff coming forward and stating their concerns.

Hill:

The scandal happened under the leadership of Roger Moyse. The report says there was a culture of heavy handed pressure and bullying against certain groups of staff. Mr Moyse left the NHS shortly after the new information came to light.

Member of the public:

I am surprised that it's a cover up. We are supplying money into the National Health Service, they should respond by providing the service for which they have been paid.

Member of the public:

Well, it's fiddling innit?

Hill:

Today's report shows that it wasn't just one or two individuals who knew about the fiddling of waiting lists but dozens of people here at Weston. It took years for this to come out and patients may have suffered. Matthew Hill, BBC Points West, Weston-super-Mare.

...

Vacher:

Well, Michele Masson joins me now in the studio for an exclusive interview. Good evening to you. You must feel totally vindicated by what has happened today. What sort of pressure have you been under since you exposed this?

Masson:

It's been horrendous over the last 18 months actually waiting for the inquiry after the first inquiry when the blame was, you know, put at my foot basically and I was publicly maligned through the press and through the media when all the time I knew that, I knew the truth. So it's been a long time in coming in getting this report out now.

Vacher:

And what was this bullying like of you, and other staff presumably, to make sure these figures did what they did?

Masson:

I was basically, whenever I questioned what I was being instructed to do by my senior managers I was always told that basically this is your job, you do it, if you want to get anywhere in this Trust or in this organisation, you have to do as you are instructed.

Vacher:

And do you think others suffered this too?

Masson:

I am sure because other managers worked with me to remove patients from the waiting list.

Vacher:

Do you think patients have suffered because of this?

Masson:

I am not a clinician so I can't really say but all I can say is when I went into post there were several hundred patients that have been either removed from the active waiting list or were not on the waiting list.

Vacher:

So their operations were delayed for instance?

Masson:

Oh absolutely, you know we could be talking by several years.

Vacher:

Because the hospital says there is no evidence of that.

Masson:

No, well when I went into post there were many medical records in the office and I arranged for the hospital numbers to be put into my workbooks which I gave as evidence to the inquiry team, unfortunately those pages have been removed from my books.

Vacher:

Do you think this has been going on at other hospitals, other hospitals have fiddled their waiting lists too?

Masson:

I think there is a strong possibility, everybody was anxious to meet targets.

Vacher:

We must leave it there. Thank you very much. ...”

### **Mrs Henry's claim**

31. On 18 June 2004 Mrs Henry through her solicitors made complaint to the BBC about the *Points West* programme. Her principal complaint was that the broadcast was highly libellous of her, in that it falsely accused her of systematically falsifying WGH waiting lists. The letter of complaint sought a full apology, compensation and costs. There followed correspondence, into which it is not necessary for me to go for the purposes of this judgment, in which the parties' solicitors sought to negotiate the terms of a statement of explanation or contradiction which would be broadcast by the BBC on behalf of Mrs Henry. Those negotiations came to nothing. Accordingly on 1 September 2004 the present action was commenced.
32. The defamatory meanings attributed to the broadcast on behalf of Mrs Henry are as follows:

“In their natural and ordinary and/or inferential meaning the words complained of bore and were understood to bear the following meanings:

- i) the Claimant was guilty of systematically falsifying waiting list figures at [WGH] and had been found to be so by an independent inquiry report;
- ii) the Claimant was guilty of bullying and placing heavy-handed pressure on staff at [WGH] under her management in order to perpetrate the waiting list fraud;
- iii) the Claimant had been complicit in a cover up of the waiting list fraud which allowed her to continue in her post when she should have been dismissed and
- iv) patients are likely to have suffered as a result of the Claimant's role in perpetrating the waiting list fraud”.

Damages, including aggravated damages, were claimed.

### **The Defence of the BBC**

33. The BBC served its Defence on 1 October 2004. The defamatory meanings put on the broadcast by Mrs Henry, quoted above, were denied. The substantive defences relied on were qualified privilege (with which I have already dealt) and justification.
34. As is incumbent upon a defendant in a libel action pleading justification, the Defence sets out the defamatory meanings which the BBC seeks to justify:

“...If and in so far as the [said] words meant and were understood to mean that

- i) the Claimant was part of the senior management team at WGH which was involved in, and pressured staff

into, manipulating patient waiting lists in order to meet targets and

- ii) the Claimant was party to a cover up of waiting list mismanagement and manipulation at WGH,

they are true in substance and in fact”.

35. The Particulars of Justification, which have been amended several times as the action has proceeded, are appropriately detailed and occupy 22 pages. Further Information as to those Particulars has been provided on several occasions.
36. It will serve no useful purpose for me to set out the Particulars *in extenso* in this judgment. But it will, I think, be helpful for me to attempt to summarise the gist of the case advanced against Mrs Henry.
37. The BBC alleges that improper manipulation took place in relation to both In-Patients and Out-Patients Lists. As regards the former, the BBC’s case is that the In-Patient List consisted of an Active List (which was regularly monitored by the AGW on both a monthly and year-end basis) and a Deferred List (which was not so monitored). The Deferred List was supposed to include, and to include only, those patients whose presence on the Active List had been suspended either because they were medically unfit for treatment (who belonged on the Medical Deferred List) or were for personal reasons unwilling to go ahead with treatment (the Patient Deferred List). As a result of a validation process carried out by Mrs Webber by mid-January 1999 (shortly after Mrs Masson joined the WLO at WGH) the Medical Deferred List had about 400 patients on it, all of whom were “long waiters”, as they are often called, and some of whom had been on that List for many years.
38. According to the BBC, what should have happened thereafter was the development within WGH of a policy for bringing in for treatment such of these long waiters languishing on the Deferred List as still needed and wanted treatment. Mrs Masson urgently sought the introduction of such a policy. Mr Collins for no good reason failed to address the problem. It is alleged by the BBC that what happened was that a deliberate and highly unethical policy was introduced at WGH whereby, in order to meet Government waiting list targets, long waiters who were approaching or had already over-run the 18-month target were systematically removed from the In-Patient Active List on PAS and placed on the In-Patient Deferred List instead. As Mr Taylor subsequently found, patients were deferred for managerial reasons and not for medical or personal reasons. The practice started in or about mid-January and continued at least until March 2000. The consequence was that these deferred patients did not appear as breaches of the Patient Charter Guarantee when the lists were audited. This practice generally took place towards the end of a month or at year end, so that the patients concerned would not be included in the count which took place at the end of the month and at the end of the year. The Health Authorities would thereby be kept in ignorance of breaches of the Patient Charter Guarantee. Afterwards the patients or some of them would be returned to the Active List early in the month and would usually be treated before the end of the month.

39. The BBC also alleges that other patients were without proper cause put straight onto the Deferred List instead of the Active List as they should have been. As a result these patients were unavailable for treatment.
40. The BBC contends that as a result, when the AGW reviewed the waiting lists at the end of the month and at the end of the financial year, it appeared that WGH was meeting its targets when it was in fact failing to do so by a considerable margin. Once AGW had carried out its review some of the in-patients would be put back on the In-Patient Active List (and their PAS entries back-dated).
41. Another form of manipulation which the BBC alleges was practised by WGH was the deliberate withholding of patients' TCI cards. These cards are ordinarily generated by or on behalf of the consultant in the Out-Patients department. The card, which may be marked "urgent", "soon" or "routine", goes to the WLO, where it should be entered immediately. Once the TCI card is entered the patient is automatically placed on the Active List. Holding back TCI cards reduces the size of the Active List. This practice was designed to ensure that the patients concerned would not appear on the PAS and so would not be available for scrutiny by AGW.
42. According to the BBC's case, these practices contravened the Guidelines which I have summarised at paragraph 5 above. As a result AGW was dishonestly misled, both as to the number of long waiters on the In-Patient Active List and as to the size of WGH's In-Patient Active List (i.e. the number of patients on it). In consequence extra funds were awarded to WGH when they should not have been and WGH achieved a "star Rating" which it did not deserve.
43. Similarly in the case of out-patients the BBC alleges that, in order to give the appearance that Government targets were being met, patients were removed from the Out-Patient List on the PAS (or the Pending List as it was later called). The principal instance of this type of malpractice relied on by the BBC is the removal from the Out-Patient List in about March 2001 of some 120 patients (known as "the Somerset patients"). Computer print-outs were made of the original Out-Patient List so as to enable data relating to the removed patients to be returned to the List after the AGW had monitored the figures. These print-outs were kept in a folder known to Mrs Masson and to Miss Melanie Cameron, her colleague in the WLO, as "the black folder". As in the case of the in-patients referred to earlier, the AGW was allegedly misled into thinking that targets were being met when in truth they were not.
44. Having identified the types of manipulation which the BBC alleges were practised within WGH, I shall return at a later stage in this judgment to the evidence on which the BBC relies for saying that Mrs Henry was not only aware of the malpractice but also actively participated in it.

#### **Mrs Henry's response to the BBC's case on justification**

45. Although the witness statements of Mrs Henry run to nearly 150 pages, her case is essentially one of denial. In the detailed Reply, she asserts that her managerial responsibility for waiting lists was in practice nominal and that she had little day-to-day involvement in or knowledge of their operation. She was not expected to provide guidance to Mrs Masson concerning waiting list management and did not do so. Indeed she says that she had no regular contact with her.

46. Mrs Henry formally admits the findings of the Taylor report to the effect that in 1999 and 2000 patients approaching the waiting time threshold were deliberately and improperly placed on a Deferred List in order to ensure that WGH would not be in breach of the national target. These placements were improper because deferral was not justified on medical grounds and did not take place at the patient's request. As the Taylor report found and as Mrs Henry further admits, under the PAS system TCI cards could be allocated to a patient on the Deferred List. Mrs Henry accepts that it is a fundamental requirement for all patients accepted and available for treatment to remain on the reported waiting list. According to Mrs Henry, the number of patients involved in the practice of improper deferral was about 15 at or about the year end.
47. However, Mrs Henry denies that she had any knowledge of or involvement in the practice of improperly deferring patients.
48. As to the holding back of TCI cards, it is accepted on behalf of Mrs Henry that between 1999 and 2002 TCI cards were deliberately held back in order to limit the size of the reported waiting list. She also admits that, according to the experts who assisted Mr Taylor to compile his report, this was not accepted practice in the years between 1999 and 2002. Mrs Henry conceded in cross-examination that the practice of holding back TCI cards misleads the GP and the patient into believing that the patient is on the Active List when this is not the case.
49. In regard to the Somerset patients (see paragraph 43 above) Mrs Henry accepts that patients were removed from the Out-Patient List in March 2001 but she denies that she was in any way complicit in their removal or that she was aware at the time that they were being removed. The first she heard of their removal was when Melanie Cameron told her about it in the autumn of 2002. Mrs Henry's account is borne out by the evidence of Mrs Marvin. Mrs Henry's case is that, on being told about the removal of the Somerset patients by Ms Cameron and having thought long and hard whether he was the right person, she reported the matter to Mr Collins within a matter of days. There is an important dispute as to the date when Mrs Henry told Mr Collins what Ms Cameron had told her about the removal of the Somerset patients.
50. Mrs Henry denies having given instructions for or having approved or even known about any form of manipulation of waiting lists whether in relation to in-patients or out-patients. She says that she did not meet Mrs Masson formally or informally to discuss waiting lists. Although she did have regular contact with Mrs Marvin, nothing was said which indicated to her that any falsification of records was taking place.
51. Mrs Henry's case as to the documents relied on by the BBC as evidencing her complicity in or at least knowledge of the manipulation is that she did not have the time or the opportunity to do more than skim-read e-mails copied or sent to her. In any event Mrs Henry disputes the interpretation placed on those documents on behalf of the BBC. As to the few documents addressed to her, Mrs Henry does not recall having read them; in any event her case is that none of them can sensibly be read as implicating her in any impropriety. Such meetings as took place over the relevant period (1999-2001) between Mrs Henry and Mr Collins were invariably concerned with issues other than waiting lists; there was no discussion about falsifying any of the lists or withholding TCIs or removing patients from any lists.

52. Mrs Henry denies having participated in the cover-up which the BBC allege thereafter took place. Mrs Henry's case is that on the contrary she had faith in Mr Collins taking appropriate steps after she had reported to him Ms Cameron's claim about the Somerset patients. It appeared to her that her confidence in Mr Collins pursuing the matter was borne out when she was approached, probably towards the end of September 2002, by Mr Edwards of WGH's Human Resources Department which appeared to her to have taken over the investigation. The meeting between Mrs Henry and Mrs Masson, described in paragraph 22 above, followed shortly afterwards.
53. Mrs Henry denies having participated in any cover-up or suppression of the removal of the Somerset patients or the alleged involvement of Mr Collins in the manipulation of patient data. Having reported the allegation to Mr Collins, Mrs Henry did not feel that it was appropriate for her to take any part in the investigation. She was not involved in the preparation of the statements made by Ms Cameron and Mrs Marvin dated 17 October 2002. Mrs Henry says that she pressed Mrs Masson to make full disclosure of the information which she was claiming to possess about managerial malpractice within WGH. It appeared to her that Mrs Masson was attempting to blackmail WGH. Mrs Henry also felt that Mrs Masson resented and even hated her because she thought (wrongly according to Mrs Henry) that it had been she who had decided to suspend her employment.
54. Mrs Henry accepts that both the Green/Chadwell and the Langran reports (see paragraph 25 above) were woefully inadequate. The evidence of both Mrs Henry and Mrs Marvin was that they became frustrated at what they perceived to be a reluctance to undertake a thorough investigation and particularly at the inexplicable failure to interview Ms Cameron who had relevant evidence to give about the Somerset patients. Mrs Henry's case is that, far from covering up any manipulation on the part of WGH staff or assisting senior management to suppress and misrepresent Mrs Masson's allegations, she and Mrs Marvin were continually pressing for a proper investigation into the allegations of malpractice. According to Mrs Henry it was in part at least due to her that Mr Taylor was appointed to conduct a further and more rigorous investigation.

### **The law as to justification**

55. There is no dispute between the parties as to the law applicable to the defence of justification. Subject to one qualification what the BBC has to prove in order to succeed with its defence of justification (the burden being upon the defendant) is that in their natural and ordinary meanings the defamatory imputations of which Mrs Henry complains are substantially true. What must be proved to be true is the substance of the defamatory imputations conveyed to the viewer of the *Points West* programme. The standard of proof is that it is more probable than not that the words are true. As is clear from *Re H* [1996] AC 563 that standard is unaffected by the seriousness of the allegations sought to be proved, although the gravity of the charges is relevant when considering whether it is likely that they are well-founded.
56. The qualification to which I have referred is that, by virtue of section 5 of the Defamation Act 1952, which provides in effect that, in the case of a publication containing two or more distinct imputations against the claimant, the defence of justification shall not fail if the truth of every imputation is not proved if the

imputation not proved to be true does not materially injure the claimant's reputation having regard to the imputations which have been proved to be true.

57. I have set out in paragraph 32 above what Mrs Henry contends are the meanings borne by the broadcast complained of. I have already made a finding in the context of my judgment on the issue of qualified privilege, that the broadcast did bear meaning (i), (ii) and (iii). I made no finding as to meaning (iv) because it was unnecessary to do so for the purpose of determining the privilege issue. My decision as to meaning (iv) is that the words would have been understood to bear the further defamatory meaning that patients may have suffered as a result of Mrs Henry's role in perpetrating the waiting list fraud. I so conclude because in my judgment the broadcast would have conveyed to viewers that there may have been patients whose health suffered because they were not treated as soon as they should have been. I do not accept that a reasonable viewer would have concluded that this was likely to have resulted from what Mrs Henry did since Mrs Masson is quoted as having said that she could not say if patients' health had suffered and the interviewer makes clear that WGH says there is no evidence of prolonged delay in operations being carried out.
58. It follows that, in order to establish the defence of justification, what the BBC has to prove, subject to section 5, is the substantial truth of the imputations pleaded at (i), (ii) and (iii) and the meaning which I have found in the preceding paragraph.

### **Manipulation of waiting lists within WGH**

59. In due course I will have the difficult task of resolving a number of acute conflicts of evidence as to whether Mrs Henry (and Mrs Marvin) knew about, or were complicit in, any manipulation of waiting lists at WGH and whether Mrs Henry (or Mrs Marvin) participated in a cover-up of the fiddling which had taken place. Before I embark on that course, however, I should summarise the largely uncontentious evidence as to the nature and extent of the waiting list fraud which took place at WGH over the material period, that is, between 1999 and the autumn of 2002.
60. As I have indicated in paragraphs 37 to 43 above the BBC allege that during that period the following forms of manipulation were taking place:
- i. the transfer of in-patients, without medical or personal justification, from the Active In-Patient List to the Deferred List (and on occasions the placing of in-patients directly onto the Deferred List, again without medical or personal justification);
  - ii. the deliberate withholding of in-patients TCI cards with the intended result that the patients concerned would not be on the PAS system and their existence would not be apparent to auditors and
  - iii. the removal of out-patients, notably the Somerset patients, from the PAS system so as to conceal their existence from auditors.
61. Although not formally admitted in the Reply, it is accepted on behalf of Mrs Henry that these forms of manipulation did take place over the material period. It was plainly right for that concession to be made, given that Mr Taylor in his report found that all these forms of manipulation had been going on at WGH.

62. It is also common ground that, to a greater or lesser extent, very senior managers, up to and including executive director level, were implicated in the malpractices. In particular it is accepted on behalf of Mrs Henry that Mr Collins, the Finance Director and Deputy Chief Executive, gave instructions to Mrs Masson that waiting lists should be manipulated. It is accepted also that Mr Andrew Sims, the Business Development Manager, on occasion gave such instructions. The position of Mr Roger Moyse, the Chief Executive, is less clear. No admission is made on behalf of Mrs Henry as to his complicity in the manipulation but the evidence suggests that he too was involved in giving instructions for manipulation to take place. He played a prominent part in the cover-up which followed Mrs Masson's disclosures, making strenuous efforts to conceal the various malpractices.
63. I am conscious that in the preceding paragraph, I have made observations about the role in this affair played by individuals who are not parties; who were not represented and who for whatever reason were not called as witnesses by either side. I have done so because it is a necessary starting point before turning to the question whether Mrs Henry knew of or was complicit in the wrongdoing. As I have said my observations correspond with the findings made by Mr Taylor.

**Evidence relied on by the BBC as to Mrs Henry's complicity in/knowledge of the manipulation**

64. I will now summarise the evidence relied on by the BBC to establish Mrs Henry's knowledge of and complicity in the manipulation. After that I shall describe the nature of the BBC's case that she participated in a cover-up. The BBC suggests that Mrs Henry's participation in a cover-up reinforces its case that she was involved in the manipulation.
65. The case for the BBC is that senior managers, up to and including Board members, were implicated in the manipulation. In particular it is alleged that Mr Meredith Collins, the Deputy Chief Executive and Finance Director of WGH, was directly involved in that it was he who instructed subordinate employees, including in particular Mrs Masson, to engage in manipulating the lists. Other senior executives who, according to the BBC's evidence, were implicated included Mr Moyse, the Chief Executive, and Mr Andrew Sims, WGH's Business Development Manager. There were others but I do not find it necessary to say who they are alleged to have been.
66. In support of its contention that Mrs Henry was also complicit in the wrongdoing the BBC relies in the first instance on what is said to be the abundant evidence that Mrs Marvin was well aware of the manipulation which was taking place. Mr Andrew Caldecott QC for the BBC suggests that it is significant that after it was suggested at a waiting list meeting on 27 January 1999 (shortly after Mrs Masson joined the WLO), there was discussion about holding back TCI cards in order to meet targets. The Notes of that meeting (D1/19) record an instruction by Mr Moyse that all TCI cards were to be held back until the end of the month. That says Mr Caldecott must have been a bombshell for Mrs Masson. Although she had not attended the meeting, a copy of the Notes of the meeting was found by Mr Taylor in Mrs Marvin's files.
67. The BBC's case is that Mrs Marvin was informed orally by Mrs Masson of waiting list malpractices at their regular meetings. Reliance is placed on a number of e-mails

which were sent or copied to Mrs Marvin which would have revealed to her what was going on. It is an important part of the BBC's case (to which I shall of course return) that, when carefully scrutinised, internal WGH documents, such as e-mail traffic, diary entries, workbooks and the like, establish not only the involvement of Mrs Marvin but also that of Mrs Henry.

68. If Mrs Marvin was aware of the misfeasance, so too, according to the BBC, must Mrs Henry have been. Just as the first person to whom Mrs Masson would have turned once suggestions of improper handling of patient lists was mooted was her line manager, Mrs Marvin, so the first person Mrs Marvin would have turned for advice would have been her line manager, Mrs Henry. This is said to have been especially likely given their close relationship at all material times: they shared an office for three-and-a-half years and each agreed that any challenging situation would be discussed with the other. The BBC relies heavily in this connection on the evidence of Mrs Masson whose evidence is that she herself would from time to time pop in to see Mrs Henry to tell her what was going on. Both agree that, when Mrs Marvin was about to go on leave, she would brief Mrs Henry about any issues which were "on the boil". In addition the BBC asserts that there is circumstantial evidence from which her complicity can be inferred.
69. It is emphasised on behalf of the BBC that Mrs Henry had a real interest in waiting lists and in WGH achieving its targets. I was reminded that it was Mrs Henry who had called in Mrs Webber to conduct a major validation exercise into the huge number of patients who had been on the Deferred Waiting List for a long period before Mrs Masson's arrival in the WLO. Another indication of Mrs Henry's concern about waiting lists is her awareness, as she accepted, that Mrs Masson was pressing (unsuccessfully) for the adoption within WGH of a waiting list policy. Mrs Henry accepts that she would have seen at the time a document prepared by Mrs Masson and entitled "Issues for Consideration" (D3/338).
70. The BBC further alleges in the Particulars of Justification that Mrs Henry took part in a cover-up of Mrs Masson's allegations about waiting list mismanagement and manipulation and continued to do so at least until such time as the Langran report was finalised. I am invited to infer from contemporaneous documents, including correspondence, e-mails and diary notes that other senior managers, including Mr Collins, participated in the cover-up over a period of months following Mrs Masson's disclosure of waiting list manipulation. An important question is whether that disclosure took place (as the BBC allege) in August 2002 or (as is alleged on behalf of Mrs Henry) some weeks later. Reliance is placed on what the BBC alleges is the failure on the part of Mrs Henry and others over several months to take any action to investigate Ms Cameron's disclosure that in March 2001 she had been instructed to remove 100 or so Somerset patients from the Out-Patient List. Mrs Masson's evidence is that this removal took place with the knowledge of Mrs Marvin and the approval of Mrs Henry. Mr Caldecott contends that there was what he described as a "volte-face" on the part of Mrs Henry in her evidence as to what happened following Ms Cameron's disclosure of the removal of the Somerset patients. Having initially claimed in her witness statement and in her oral evidence that, after considering whether he was the right person to go to, she informed Mr Collins about Ms Cameron's disclosure about the Somerset patients, Mrs Henry said on Day 8 of the

trial that she would not have told Mr Collins about it because it would have been inappropriate to do so as he had himself been involved.

### **Evidence relied on by Mrs Henry in rebuttal of the BBC's case on justification**

71. I will now summarise Mrs Henry's case in rebuttal. As I have pointed out, it is essentially one of denial on her part of any knowledge of, still less complicity in, waiting list manipulation.
72. Mrs Henry was in the witness box for the better part of three days. She emphasised the wide range of her responsibilities in her capacity as Facilities Administration Manager (later General Manager) which left her little time to devote to waiting list issues. She accepted, however, that Patient Services, within which the WLO Department fell, was within her managerial remit. She says that she possessed little knowledge of the technicalities involved in such matters as the allocation of a TCI date or how to operate the PAS system. She did however know about the Active In-Patient List; the process of validation and the existence of the Medical Deferred List and the Social Deferred List. The Out-Patients Department also fell within Mrs Henry's managerial remit. She understood the procedure whereby such patients would be given appointments.
73. Although Mrs Henry had no involvement in the negotiation of WGH's contract with AGW, Mrs Henry was aware of the targets set by the NHS and of the importance of achieving those targets both in terms of the status of WGH and on financial grounds. It is common ground that, at least at managerial level, targets had by 1999 assumed considerable significance for hospitals like WGH.
74. Mrs Henry denies that, whether before or after Mrs Masson arrived in the WLO, she was involved in the micro-management or monitoring of waiting lists in order to ensure that targets were met. Mrs Henry's evidence is that Mrs Marvin was the Manager responsible for the WLO; she was an extremely trusted colleague and she had absolutely no doubt that Mrs Marvin would come to her if she thought there were problems.
75. Mrs Henry was instrumental in recruiting Mrs Webber to undertake the task of validating the large number of patients who had accumulated over the years on the Deferred List. Once Mrs Masson joined the WLO, Mrs Henry says that she had little to do with the detailed day-to-day running of the office. She denies that she "mentored" Mrs Masson, who appeared to her to have adapted to her new role very quickly. Mrs Henry accepts, however, that she did have some dealings with Mrs Masson throughout her time in the WLO: she chaired "Team Brief" meetings; held occasional Patient Services meetings and prepared a quarterly report for Mr Collins dealing with the full range of issues covered by the Facilities Administration Department. These generally indicated what was happening in the WLO.
76. It appeared to Mrs Henry that Mrs Masson got on extremely well with Mr Collins and Mr Moyse. Mrs Masson frequently attended meetings with Mr Collins at which Mrs Henry said she was not present. Indeed Mrs Henry's evidence is that she hardly ever had meetings with Mrs Masson on a one-to-one basis and rarely even saw her. In most aspects of her work Mrs Masson was not really being managed by Mrs Marvin at all, still less by her.

77. I will have to return in more detail later to the documents on which the BBC relies as evidence of Mrs Henry's participation in and knowledge of waiting list manipulation. Mrs Henry categorically denies any suggestion that she was knowingly involved in any improper conduct in relation to waiting lists between 1999 and 2002 or at any other time. The first time she heard it suggested that there may have been such misconduct was in the autumn of 2002 when she was approached by Mrs Marvin and Ms Cameron. Mrs Henry's case is that she was not briefed by Mrs Masson about improper manipulation of the waiting list data whether at meetings of the Waiting List Group (which Mrs Henry says she rarely attended) or otherwise. Her principal concern at Waiting List Meetings was to ensure that beds and clinical facilities would be available for patients who were going to be admitted. According to Mrs Henry's evidence, it is also untrue to suggest that Mrs Marvin ever so much as hinted to her that anything untoward was being discussed.
78. Both Mrs Henry and Mrs Marvin (who was called to give evidence on behalf of Mrs Henry) gave detailed evidence in the course of their cross examination about the individual documents relied on by the BBC as demonstrating their complicity in waiting list manipulation. I will return to that evidence also hereafter in more detail. It will for present purposes suffice if I say that each of them testified that, to the limited extent that they digested the contents of those documents, the fact of wrong doing was not apparent. Mrs Marvin was more inclined than Mrs Henry to reproach herself for failing to pick up the malpractice which was underway.
79. In regard to the Somerset patients, it is accepted on behalf of Mrs Henry that Mrs Masson, in conjunction with Ms Cameron, did on the instructions of Mr Collins remove from the Out-Patients List a very large number of patients. Mrs Henry said that she was not involved and did not know about this at the time.
80. Other witnesses were called on behalf of Mrs Henry to confirm her limited involvement in waiting list issues. Mrs Marvin was one such witness. Her evidence, to which I will also have to return, was that she too had managerial responsibilities of an unmanageable breadth, so that she had little time to pay attention to such information as she was provided with about In-Patient Waiting Lists. She did not focus on targets for overall numbers on the Waiting List and had little understanding of the detail of the way in which In-Patient Waiting Lists were managed. Mrs Marvin also dealt in detail in the course of her cross examination with the individual documents relied on by the BBC. As regards out-patients, Mrs Marvin accepted that she was more directly involved. However, her evidence was that the first that she knew of the removal of the Somerset patients from the list was when in September 2002 Ms Cameron disclosed what had happened.
81. Another witness called by Mrs Henry was Ms Melanie Cameron who confirmed the removal of the Somerset patients but denies Mrs Masson's claim that in her presence Mrs Masson sought approval from Mrs Marvin or that Mrs Marvin, having consulted Mrs Henry, told her that Mr Collins's instruction to remove the patients would have to be carried out.
82. Ms Rebecca Shaw, who worked in the WLO between March 1999 and January 2001, said that during that time she had little contact with Mrs Henry. However she said she was sure that it would not have been either Mrs Marvin or Mrs Henry who instructed

Mrs Masson about waiting lists and the PAS system because they did not have sufficient understanding to do so.

83. Reliance is also placed on the evidence which Mrs Sue Lambourne and Mrs Webber gave at the trial of the qualified privilege issue. Both had formerly worked in the WLO. Mrs Lambourne denied that either Mrs Henry or Mrs Marvin were the senior managers who had ordered her to carry out improper manipulation prior to 1999. She thought Mrs Henry's involvement in waiting list matters was "minimal". As to Mrs Webber, her evidence was that, so far as she is aware, Mrs Henry was certainly not involved in the improper practices which were taking place. Nor does she think that Mrs Henry was aware of what was going on.
84. Both Mrs Henry and Mrs Marvin were extensively cross-examined about the parts which they played in what the BBC allege was a cover-up of the manipulation. The starting point is the occasion when Mrs Marvin came to Mrs Henry and told her, amongst other things, that Mrs Masson had said that she was in possession of certain information which she would use to her advantage unless she got what she wanted, namely redundancy money. Mrs Henry thinks that Mrs Marvin mentioned that the information had something to do with dishonesty in relation to waiting lists. According to Mrs Henry, this took place during the late summer/early autumn of 2002. Mrs Marvin's evidence was to a similar effect. Her recollection was that within a matter of days of their conversation, Mrs Masson went on sick leave.
85. According to Mrs Henry, on the same day as her meeting with Mrs Marvin or at the most a day or so later, Mrs Henry states that she was asked by Mrs Marvin to join her in a meeting she had been having with Ms Cameron. Ms Cameron then told Mrs Henry that Mrs Masson was very keen to go to live in Spain and wanted to get redundancy. The most alarming thing which Ms Cameron had to say was that Mrs Masson had told her that she was in possession of confidential information to do with the Trust and that she would have no hesitation about making these allegations public. Mrs Henry's evidence was that she was unable to recall the precise details of what Ms Cameron told her: to the best of her recollection she said that Mrs Masson had asked her to help remove a large number of patients from the Out-Patients List towards the end of the financial year. Mrs Marvin gave evidence that she was unable to recall the precise details of what Ms Cameron had said; there was a general reference to Mrs Masson being in possession of sensitive information and mention of an incident concerning the Out-Patient Waiting List. The evidence of Ms Cameron was more specific. She said she explained to Mrs Marvin the incident in March 2001 when she had assisted Mrs Masson to take Somerset patients off the waiting list. According to Ms Cameron her conversation with Mrs Marvin and later with Mrs Henry took place during September 2002 after Mrs Masson had injured her back at work.
86. There is an important issue as to the action which Mrs Henry took after being told by Mrs Marvin of Mrs Masson's allegations. She firmly denied in her evidence the BBC's allegation that she did nothing for several weeks after, in August 2002, Mrs Marvin reported to her what Mrs Masson had said about manipulation of data relating to the Somerset patients. According to Mrs Henry, having given the matter careful thought, she decided to report the matter to her Line Manager, Mr Collins. Mrs Henry's evidence was initially that she told Mr Collins what Ms Cameron had told her. Later in her evidence, however, what Mr Caldecott described as a "volte-face", Mrs Henry said that she did not tell Mr Collins the details of what Ms Cameron had

told her because it would have been inappropriate to do so. It had been Mr Collins who instructed Mrs Masson to remove the Somerset patients from the list. Mrs Henry's account was that she told Mr Hodgkinson, Deputy Director of the Human Resources Department, in greater detail what Ms Cameron had disclosed at a meeting on 26 September 2002.

87. It is Mrs Henry's case, supported by Mrs Marvin's evidence, that thereafter the two of them were "banging on doors", pressing for action to be taken in relation to the manipulation of waiting list data and in particular pressing for Ms Cameron to be interviewed. I shall have to consider the sequence of events in greater detail later. It is sufficient for present purposes to record that Mrs Henry stoutly denies that for some three months she did little or nothing to pursue the question. It is common ground that from about 7 February 2003 onwards Mrs Henry was indeed expressing dissatisfaction with the lack of progress in the investigation into the impropriety.

### **Approach to resolving issues of fact**

88. My task is to resolve the stark conflict of evidence which arises in this case between on the one hand Mrs Masson and on the other Mrs Henry and the various witnesses called in her support, notably Mrs Marvin. The task is not made any easier by the fact that most of the material events took place between four and seven years ago.
89. In his extra-judicial paper entitled "The Judge as Juror: The Judicial Determination of Factual Issues" (Current Legal Problems, vol 38 1985 pp1-27), Lord Bingham provided helpful guidance as to the way in which a judge like myself should approach this task:

"...Faced with a conflict of evidence on an issue substantially effecting [sic] the outcome of an action, often knowing that a decision this way or that will have momentous consequences on the parties' lives or fortunes, how can and should the judge set about his task of resolving it? How is he to resolve which witness is honest and which dishonest, which reliable and which unreliable? ...

The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time. ... To attach importance to matters such as these, which are independent of human recollection, is so obvious and a standard practice, and in some cases so inevitable, that no prolonged discussion is called for. It is nonetheless worth bearing in mind, when vexatious conflicts of oral testimony arise, that these fall to be judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.

...

Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue. There are, no doubt, witnesses who following the guidance of the Good Soldier Svejk that 'The main thing is always to say in court what isn't true', *The Good Soldier Svejk* (Penguin edn. 1983, 382) as a matter of principle, but more often dishonest evidence is likely to be prompted by the hope of gain, the desire to avert blame or criticism, or misplaced loyalty to one or other of the parties. The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case: for this, as for much of the ensuing discussion, I acknowledge my debt to the Hon. Sir Richard Eggleston QC *Evidence, Proof and Probability* (1978), 155.

- (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
- (2) the internal consistency of the witness's evidence;
- (3) consistency with what the witness has said or deposed on other occasions;
- (4) the credit of the witness in relation to matters not germane to the litigation;
- (5) the demeanour of the witness.

The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred, or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility.

...

I have a hunch which I cannot begin to justify, that in days of yore trial judges rather prided themselves on and had considerable confidence in their ability to discern the honesty of a witness from the showing which he made in the witness box. Be that as it may, the current tendency is (I think) on the whole to distrust the demeanour of a witness as a reliable pointer to his honesty. ...

...

The cases which vex a judge are not those in which he is profoundly convinced of a witness's honesty or dishonesty. In those cases, whether his conclusion is right or wrong, the decision for him is easy. The anxious cases are those which arise not infrequently, where two crucial witnesses are in direct conflict in such a way that one must be lying but both appear equally plausible or implausible. In this situation I share the misgivings of those who question the value of demeanour – even of inflexion, or the turn of an eyelid – as a guide. To Mr Justice McKenna's percipient remarks I would simply add three addenda:

First, ability to tell a coherent, plausible and assured story embellished with snippets of circumstantial detail and laced with occasional shots of life-like forgetfulness, is very likely to impress any tribunal of fact. But it is also the hallmark of the confidence trickster down the ages.

Secondly, there is (I think) a tendency for professional lawyers, seeing themselves as the lead players in the forensic drama, to overlook how unnerving an experience the giving of evidence is for a witness who has never testified before. ...

...If too much attention has over the years been paid to the demeanour of the witness in guiding the trial judge to the truth, too little has perhaps been paid to probability. I do not use that word in any mathematical or philosophical sense, but simply as indicating in a general way that one thing may be regarded as more likely to have happened than another, with the result that the judge will reject the evidence in favour of the less likely. I think most judges give weight to this factor in reaching their factual conclusions. ...

...

The tests used by judges to determine whether witnesses although honest are reliable or unreliable are, I think, essentially those used to determine whether they are honest or dishonest: inconsistency, self-contradiction, demeanour, probability and so on. But so long as there is any realistic chance of a witness being honestly mistaken rather than deliberately dishonest a judge will no doubt hold him to be so, not so much out of charity as out of a cautious reluctance to brand anyone a liar (and perjurer) unless he is plainly shown to be such. ...”

90. I was referred in the course of argument to two cases where there are short passages to broadly the same effect as Lord Bingham's essay, namely *Armagas Ltd v Mundogas*

SA (*"The Ocean Frost"*) [1985] 1 Lloyd's Rep 1, 57 and *Nina Naicker Gow v Harker* [2003] EWCA Civ 1160 at paras 54-56.

### Missing documents

91. Before I set out my conclusions, I should mention a feature of this case which has made my task, already difficult, immeasurably more so: a very considerable number of documents, all of them likely to be highly material to the questions I have to resolve, have unaccountably disappeared. These documents include:
- i) Mrs Masson's work diaries for 1999, 2000 and 2002. Mrs Masson gave evidence that she left the diaries in her office. The explanation offered on behalf of WGH for their non-availability is that there was at the time no recognised procedure for the archiving of files.
  - ii) other files and documents, said to be substantial in number, also left by Mrs Masson in her office in October 2002. These documents would have included drafts of the waiting list policy. The explanation for their non-availability is the same as that set out at (i) above.
  - iii) the hard drive of Mrs Masson's computer. My understanding is that this was removed from her office in October 2002. In the transcript of Mr Taylor's interview with Mr Edwards, Mr Edwards is reported as saying that it was he who removed it, but Mr Edwards says that the transcript is inaccurate and that he does not know what happened to the hard drive.
  - iv) the compact disc containing Mrs Marvin's e-mail account for the period from September 1998 to November 2000. WGH is said to have been unable to find this CD.
  - v) compact discs containing the e-mail accounts of Mrs Masson and Mr Sims. Although Mr Edwards obtained these CDs for the purposes of his IT enquiry in March 2003 it is said on behalf of WGH that they now cannot be found.
  - vi) WGH's e-mail data for 1999. It is said on behalf of WGH that for various technical reasons this data is not available (although some back-up tapes of e-mail data were found).
  - vii) Mrs Henry's e-mail data for January-February 2000. With the exception of a few relevant e-mails, this data is also said to be irretrievable.
  - viii) two dossiers provided to Mr Langran by Mr Edwards in January 2003. Although Mr Langran has stated that he was provided with these two dossiers, Mr Edwards asserts that the only dossier he had was Mrs Masson's dossier of 31 October 2002.
  - ix) the tapes and notes of the interviews of a number of the individuals who were interviewed by Mr Taylor for the purpose of his report. Mrs Henry was aware that she could have requested the notes of her interview by Mr Taylor but did not do so. Mr Taylor has confirmed that all documentary evidence and interview tapes were returned to AGW at the conclusion of his investigation.

- x) The notes which (according to Ms Timmins and Mrs Masson) Mrs Henry was in the habit of making on a day to day basis. These notes were typed up for her by her secretary, Ms Julie Fisher.
92. The relevance or at least potential relevance of these documents to the issues which arise for decision in this case is obvious. It seems plain to me that material incriminating documents have been deliberately removed. I am not in a position to make any finding as to identity of those responsible for the disappearance of these documents; to do so would be speculation on my part. Nor is it possible for me to say who are the people who would be incriminated by the missing documents. As a matter of fairness, however, I should record the fact that Mr Caldecott does not suggest that Mrs Henry is responsible for the disappearance of any documents. I make clear that I do not hold it against Mrs Henry that these documents, which plainly once existed, appear to do so no longer. What can be said, however, and is said by Mr Caldecott is that such of the missing documents as were formerly in Mrs Henry's possession were not disclosed in her Schedule of documents. Mrs Henry has not claimed that, if available, her documents would have exonerated her.

## **Findings and conclusions**

### ***Background facts***

93. I will start by setting out a number of background facts which have a bearing on my findings. By the time of the events with which this action is concerned, the target system, which I have described in paragraphs 4 to 6 above, was generally regarded as an important aspect of NHS hospital management. Achieving targets enhanced the prestige of hospitals like WGH, as well as producing additional revenue. Senior managers, including Mrs Henry and Mrs Marvin, would have been well aware of this.
94. Like most NHS hospitals, WGH had a system of line management which is well illustrated by the organisation charts which I have been shown. I have already identified the names and positions of the relevant individuals. It is to be noted that the chain of management responsibility which is for present purposes material was that Mrs Masson was in charge of the WLO; her line manager was Mrs Marvin; Mrs Marvin's line manager was Mrs Henry and her line manager at Board level was Mr Collins. In addition to the executive directors, there were five non-executive directors headed by Dr Post. The evidence of the latter that he operated an "open-door policy", meaning that anyone could come to him with any problem, was unchallenged.
95. I accept that Mrs Marvin had a wide range of responsibilities and that Mrs Henry had an even greater area of responsibility. But, as several witnesses said, Mrs Henry is a highly capable manager. I think she kept a careful supervisory eye on what was happening in the departments for which she was responsible. Although I do not accept the evidence of Mrs Masson that either Mrs Henry or Mrs Marvin played any significant part in instructing her how to manage waiting lists, I think that they were both inclined in their evidence to downplay the extent of their knowledge of how the waiting list system worked.
96. Finally in this part of the judgment, I should record the uncontested fact that over the relevant period, 1999 to 2002 (and indeed before), there was systematic manipulation of waiting list data both in relation to in-patients and out-patients. I have described

above at paragraphs 37 to 43 the various forms of manipulation which went on. It is plain on the evidence that TCI cards were regularly held back; patients were moved from the Active List and placed on the Deferred List and patients were removed from the Out-Patient Waiting List. There was no medical or other legitimate reason for these practices. The purpose was to achieve by dishonest means the targets which had been laid down. I have also identified at paragraph 62 some of the individuals who had knowledge of and were implicated in that misfeasance. Of these the prime mover was Mr Collins. The question for me is not whether there was fiddling of the patient data – it is agreed that there was – but whether Mrs Henry knew of it and was complicit in it.

*The documentary evidence said to implicate Mrs Henry in the manipulation*

97. I think that the appropriate course in this case is to start with the documentary evidence and then turn to the oral evidence. My task is to decide whether such documents as have survived lend support to the case that Mrs Henry participated in the manipulation. The documentation or lack of it will provide an important pointer to where the truth lies. It is necessary to look not only at documents which appear to have been received by Mrs Henry but also those received by Mrs Marvin because it is the BBC's case that the two of them would discuss problems in their shared office. On the BBC's case Mrs Marvin is an important link in the chain which establishes that Mrs Henry, who was Mrs Marvin's line manager, would have been involved as well.
98. The first point to be made on the documents is that there is precious little documentary evidence of the involvement in the manipulation of senior managers at WGH above the level of Mrs Henry. This is unsurprising. They knew what they were doing was dishonest and were adept at covering their tracks. Most of the instructions were given by Mr Collins direct to Mrs Masson. She in her turn instructed her juniors in the WLO to implement what not only Mr Collins but also Mr Sims and Mr Moyse and other senior managers had said should be done. There are many references in Mrs Masson's workbooks and in the only one of her work diaries to survive (for 2001) to meetings between her and Mr Collins. The evidence suggests that, at least in the early days, Mrs Masson for understandable reasons relished her visits to Brent Knoll where the directors had their offices.
99. The documents which lie at the heart of this case are the allegedly compromising memoranda, e-mails and other miscellaneous documents which were sent or copied to Mrs Marvin and/or Mrs Henry over the relevant period. They are best considered one by one and in chronological order:
  - i) Notes made by Mrs Masson of a Waiting List meeting held on 27 January 1999 (D1/19) which record an instruction by Mr Moyse that all Waiting List cards (with the exception of urgent cards) were to be held back until the end of the month. These notes were found by Mr Taylor in Mrs Marvin's files. The inference which I draw is that Mrs Marvin received a copy of the notes and learned from them of Mr Moyse's instruction.
  - ii) An e-mail sent to Mrs Marvin by Mrs Masson on 1 February 1999 about "Long Waiters – TCI dates (Somerset)" (D1/20) in which Mrs Marvin expresses a wish to ensure that "we" are informed to enable "us" to understand

the bigger picture. The significance of this document (and others such as Mrs Marvin's e-mail of 9 June 2000 at D1/137) is that Mrs Marvin played a more active role in relation to waiting lists than her evidence suggested.

- iii) An e-mail dated 3 February 1999 from Mrs Masson to Mr Goodwin, copied to Mr Sims and to Mrs Marvin on the subject of "Long Waiters – over 540 Days" (D1/21). That e-mail details the particulars of four patients, adding at the end:

“As we discussed, I am unaware whether Avon/Somerset are aware of the Deferred List and obviously there will, as the Deferred patients are validated and go back onto the general list, going to be patients who appear as very long waiters (particularly if their operations are subsequently cancelled). PLEASE ENSURE YOU PASS THIS INFORMATION THROUGH ANDREW SIMS BEFORE SENDING TO HEALTH AUTHORITY”.

The quoted words would alert the reader to the fact that WGH was taking care to avoid potentially compromising information reaching AGW.

- iv) On 3 February 1999 Mrs Masson sent to Mrs Marvin an e-mail entitled "Long Waiters etc." (D1/22). This e-mail, the importance of which is described as "High", starts with an apology from Mrs Masson if she is teaching her grandmother to suck eggs. Mrs Masson points out that where a patient cancels an appointment, the waiting time reverts to zero, whereas, if the hospital cancels, the waiting time carries on. Mrs Masson describes that as "another can I have taken the lid off". She seeks clarification from Mrs Marvin. The e-mail concludes: "Ed [Goodwin] has threatened not to let me into the office over there if I dig anything else up!!" It is of some significance that Mrs Masson sent the e-mail to Mrs Marvin; she must have thought that Mrs Marvin needed to be kept informed. It is also significant that Mrs Marvin promptly forwarded the e-mail to Mrs Henry's PA marking its importance as being "High".
- v) On 3 February 1999 Mr Sims sent an e-mail to Mr Goodwin and to Mrs Masson, copied to Mrs Marvin, also entitled "Re: Long Waiters – over 540 Days" (D1/22A). It read:

“We should only be bringing Deferred patients onto the list during the month in which the treatment is to take place. I realise that in the cases that have just occurred, these patients were listed on the last day of the month and it was very difficult to avoid them appearing on the list. However, it may be necessary in future, for example, to list these patients so as to avoid the beginning and ends of the months. The vital point being that at all costs they must not show on any end of month downloads”.

The significance to the reader of the reference to the vital importance of patients not showing at the end of the month would be that the number of patients on the waiting list would be counted at the end of each month.

- vi) On the same day, 3 February 1999, Mrs Masson replied to Mr Sims's e-mail, copying her reply to Linda Marvin (D/22A), saying that she understood that in the past they had been able to "defer" patients onto another list at the end of the month and then re-list them again at the beginning of the following month. Mrs Masson explained that in order to adhere to the request the patient would have to be taken off the Deferred List and put onto the General List in order to generate the TCI letter and then taken off again until an agreed date and then re-listed. Mrs Masson added that the matter obviously needed to be discussed in more detail and asked if Mr Sims was saying that neither Avon nor Somerset knew about the Deferred List or validation. Mrs Masson describes a practical problem about using the Deferred List at the end of the month. It is, however, clear from later documents that the practice continued.
- vii) An e-mail sent by Ms Jill Allen to Mrs Marvin and others (D1/26) enclosing an update on the waiting list position as at 31.1.1999 for information. Mrs Marvin sent it to Ms Julie Fisher. The e-mail gave a detailed breakdown and indicated that the current projected end of February and March positions were 50 over target and 68 over target respectively.
- viii) A memorandum dated 16 February 1999 from Mrs Masson copied to Mrs Marvin on the subject of Waiting List Procedures (D1/29), stating that "other than in exceptional circumstances" patients should be added to the Waiting List on a daily basis.
- ix) On 18 February 1999 Mrs Masson sent an e-mail to Mrs Marvin about "FW: Waiting List Target for end of February" ((D1/30). It repeated without comment the contents of an e-mail Mrs Masson had received from Jill Allen, which confirmed that she had told Mrs Masson to stop putting any more patients onto the List between then and the end of the month apart from Urgents. I have already explained the significance of patients being on the list at the end of the month. This e-mail is clear evidence of data being manipulated to meet targets.
- x) On 18 February 1999 Mr Sims sent an e-mail to Mrs Masson, copied to Mrs Marvin, on the subject of "18 month waiters (making sure we do not have any)" (D1/31). I accept that the title of the e-mail would have started alarm bells ringing. Mr Sims told Mrs Masson that Mr Moyse and Mr Saunders (then the Executive Medical Director of WGH) had confirmed that four patients identified by AGW as about to become long waiters should be placed on the Deferred List as a temporary expedient and a last resort.
- xi) Later the same day, 18 February 1999, Mrs Masson replied to Mr Sims's e-mail, also copying her reply to Mrs Marvin (D1/33), confirming that two of the patients on AGW's list had been transferred onto the Patient Deferred List and that the other two patients had been put on the Medical Deferred List. Mrs Masson says that she will "do the same" (i.e. place on the Deferred List) for

any patients nearing 18 months. Mrs Masson does not say she will only do this if valid reasons for deferring exist in the case of such patients.

- xii) For completeness I should include in the list of e-mails one which was purportedly sent by Mrs Masson to Mrs Marvin on 1 March 1999 on the subject of “Validated Patients” (D1/36,44). The BBC no longer relies on this e-mail but Mrs Masson continued to regard it as suspicious. In it Mrs Masson refers to a list of ten patients that Mr Gough, a consultant, had decided should be taken off the Deferred List, apparently on the ground that they no longer needed the treatment. Mrs Masson said: “I obviously don’t want to put them on the Active List – are you in agreement that they return to the Deferred List?” There is evidence from Mr Gough that there were valid reasons for taking these patients off the Deferred List. I make clear I attach no significance to this e-mail.
- xiii) On 10 March 1999 Mrs Masson sent an e-mail to Mr Collins, copied to Mrs Marvin (D1/45), saying: “I believe we will be ‘holding’ non-urgents from today – can I continue to list those patients necessary to fill lists?” This is another clear reference to holding back TCI cards. No written response from Mr Collins has survived.
- xiv) On 26 April 1999 Mrs Masson sent another e-mail to Mr Collins, copied to Mrs Marvin (D1/52), on the subject of “Daily Monitoring” informing him that there were currently 101 cards waiting to go on and a total of 75 had been added to the list in the past three days. The end of the month was approaching when this e-mail was sent.
- xv) A memorandum dated 14 May 1999 from Mrs Masson to Mrs Marvin, copied to Mr Collins, on the subject of the WGH Waiting List (D1/53) in which Mrs Masson seeks advice regarding the Waiting List from Mrs Marvin stating her (Mrs Masson’s) belief that it is imperative that there should be a WGH Waiting List Policy and asking whether in the mean time she might place patients who cancel on to the Deferred List. It is evident that Mrs Masson felt it was worthwhile enlisting the support of Mrs Marvin for a Waiting List Policy and that Mrs Marvin would be able to advise her about the use of the Deferred List.
- xvi) On 1 June 1999 Mrs Masson sent direct to Mrs Marvin an e-mail on the subject of “Waiting List Policy” (D1/54). It read:

“At the moment (and within the draft) long waiters (i.e. those on the list who are likely to exceed 18 months) are currently placed onto the Deferred List. I think (maybe) it would be more appropriate to (where absolutely necessary because we are unable to offer a TCI date) that such patients should be placed onto the Planned List rather than the Deferred List – i.e. they are not deferred they are “planned” for a date in the future – we would also need to be in a position to allocate a date. I think this would possibly be more appropriate – what do you think?”

It appears that Mrs Marvin had previously been supplied with a copy of the draft Policy document. Mrs Marvin said that she read this e-mail and discussed it with Mrs Henry.

- xvii) On 8 July 1999 Mr Sims sent an e-mail to Mrs Marvin, Mr Goodwin and Mrs Masson (D1/58) advising them that Mr Bevan would need to be offered cancelled theatre slots so that he could treat the long waiter patients. Mrs Masson replied on the same day (D1/61A) telling Mr Sims that she would go into the system near the end of the month and take off anything that becomes necessary. Mrs Masson said that she could not do this with Mr Bevan who was well aware that he had the long waiters and would not accept such action being taken. That e-mail was also copied to Mrs Marvin. The evidence was that Mr Bevan kept an eye on the listing of his patients and would not tolerate their being de-listed without good reason.
- xviii) An e-mail from Ms Sue Guinn (D1/64) informing several managers of the reinstatement of regular Waiting List meetings. The e-mail states that a meeting had been arranged for the following day and confirmed that it would be attended by amongst others Mrs Henry. The group was thereafter to meet on a weekly basis. Mrs Henry seldom attended these meetings but would do so if, for example, Mrs Marvin was unable to attend.
- xix) An e-mail sent on 29 July 1999 by Mrs Masson to Mrs Henry (Mrs Marvin being on leave) on the subject of "Pending" cards (D1/64A). This is an important document, not least because it is addressed to Mrs Henry. There had been a meeting that morning at 8am between Mrs Henry and Mrs Masson, followed by a meeting at 8.30am at which Elective Admissions were discussed. Both meetings are recorded in Mrs Henry's diary. Mrs Henry thought that the earlier meeting was about a complaint made by Mrs Webber. I think Mrs Henry is probably wrong about that since there is a separate reference in the diary to Mrs Webber on the same day. The e-mail contained information that a total of 108 TCI cards were being "held" of which 23 would "have to be put on as they are marked either urgent/soon". It stated that Mr Goodwin was going to run the list overnight and hopefully it would be available at a meeting the next day. The e-mail conveys to the reader the information that as at 29 July, near the end of the month, there were 85 patients who were not on the list. I do not accept the suggestion that the e-mail was doing no more than stating the number of TCI cards which were physically in the WLO at the time. "Held" in my view means "held back". Nor do I accept that the purpose of the e-mail was simply to tell Mrs Henry about the urgent/soon patients who were being put on the list. If that was its purpose why provide information about patients who were not being listed?
- xx) At 8.30am on 29 July 1999 a meeting took place on the subject of "elective admissions". Mrs Marvin was on leave and so did not attend the meeting (nor was she copied in with Mrs Masson's e-mail to Mrs Henry of the same date) but Mrs Henry, Mrs Masson and others did attend. There was discussion at that meeting about "pending cards" (i.e. TCI cards) being "held". Later that day Mrs Masson sent an e-mail to Mrs Henry, marked "In confidence" and copied to Mrs Marvin (D1/65), bringing her up to date about the meeting.

There is technical evidence from a Mr Earnshaw to the effect that Mrs Henry opened this e-mail. It is another important document. The text included:

“I had the list today of waiting times and the Trust is showing some patients at 18 months (up to 18 months). The majority of these have TCI dates and Ed [Goodwin] would normally say not to worry as Avon are happy to accept this when TCI dates have been allocated. However, Andrew [Sims] has insisted that I take them off the list – i.e. defer. As some of the patients already have TCI dates allocated this requires me to cancel the TCI and for the dates to be manually put on the TCI list (the fact that the patient is coming in will not show on any screen either). I have done as instructed but must say that I feel this is a very risky procedure – the staff have been advised which cases need to be either manually placed onto the list for next week or simply reinstated onto the Active List at the beginning of the month.

As you will be aware Mr Bevan has a great many lap steri’s on his list with little hope of being allocated a TCI date in the near future. They are now beginning to filter into the up to 18 months slot. I have advised Andrew [Sims] that I am not happy to defer these particular patients as Mr Bevan is well aware that they are there and I feel that some other more long-term action is required. Obviously, if I am “instructed” to do so I will defer, however, I have to say that if such action is carried out I believe the balloon will certainly go up if Mr Bevan becomes aware”.

- xxi) On 30 July 1999 a Waiting List Meeting took place. Mrs Marvin did not attend because she was on holiday (Mrs Henry did not attend either). On the day of the meeting Mrs Masson sent an e-mail to Mrs Marvin (copied to Mrs Henry) (D1/67) enclosing a copy of the notes of the meeting made by Jill Allen, to which she added the postscript “WELCOME BACK TO REALITY!!” Ms Allen’s summary recorded that it had been agreed “that must be under target this month. Ed [Goodwin] is running a download today so can see what the current position is. Michele [Masson] will then decide how many cards to add (if any).” Ms Allen provided particulars of an action plan to be costed and approved by Mr Collins and organised by Mrs Masson and Mrs Marvin for consultants to do extra lists to deal amongst other things with long waiters. In my opinion the conclusion is inescapable that the reality to which Mrs Masson was welcoming Mrs Marvin back was the reality of manipulation of patient data.
- xxii) On 24 August 1999 Mrs Masson sent a memorandum to Mr Collins, copied to Mrs Marvin, on the subject of “Long Waiters – End of August 1999 (Action Taken)” (D1/69). A list of long waiters was attached to the memorandum. Mrs Masson wrote:

“I will defer those patients as indicated. These will then be placed into the review diary and reinstated onto the waiting list at the beginning of the month in which they are to be treated, or at a suitable review date, as appropriate. As you will see, I have not deferred Mr Bevan’s Lap Steri’s and I await your advice on these. I am awaiting confirmation of the dates when the additional lists for orthopaedic long-waiters may be undertaken”.

The attached list consisted of particulars of 28 patients most of whom are noted as “Pat Deferred\*”. It is to be noted that the action was to be taken at the end of the month. The list shows that most of the patients were to be treated during the following month of September, so they would not show as long waiters.

- xxiii) There is an entry in Mrs Henry’s diary for Sunday 29 August 1999 which reads:

“Another month ends, all targets met

All systems working

All customers satisfied

All staff equally enthusiastic

All pigs fed and ready to fly”.

Mr Caldecott suggested that this entry supports his case that Mrs Henry was involved in the manipulation. On balance I am not persuaded by that submission.

- xxiv) On 28 September 1999 Mrs Masson sent another memorandum to Mr Collins, also copied to Mrs Marvin (D1/82), again dealing with long waiters but this time at the end of September 1999. It included the following:

“Following receipt of today’s download, I have now deferred all patients (19) showing in excess of 17 months. Of these, only two patients do not have a TCI date (one at patient’s request). All patients will be returned to the active list on the 1<sup>st</sup> October 1999”.

This would be understood by a reader to be a clear case of data manipulation.

- xxv) On 4 October 1999 Mrs Masson sent an e-mail to Mr Collins, Mr Goodwin and Mrs Marvin (D1/84) confirming that she had returned the 19 patients back to the waiting list that were “deferred” at the end of the month. She added that she had discovered a way which looks as though it enabled her to return them to the list “without it looking as if they were ever removed!! I basically have to Correct instead of Transfer. Could help my case in court!!” This is another clear indication of data being manipulated at the end of the month. Mrs

Masson has now devised a way of concealing what she was doing and avoiding detection.

- xxvi) On 25 November 1999 Mrs Masson sent an e-mail to Mrs Marvin (D1/85) attaching the current waiting list position which was that the end of month target was 1,906 and the position as at the end of the previous day was 1,880. Assuming that there would be approximately 70 admissions over the next four days (i.e. 1,810), Mrs Masson suggested that no more than 85 be added between then and the end of the month which would bring WGH in the region of 1,895 and so within the target figure.
- xxvii) On 24 January 2000 Mrs Masson e-mailed Mrs Marvin on the subject of "Waiting List Management" (D1/101), saying that Mr Moyses had indicated that they were doing extremely well with regard to targets and had suggested that they should "ease up on the validating". Mrs Masson said that she had told Mr Moyses that this would create problems because such patients would become long waiters. Mr Moyses had hinted that perhaps Mr Collins would be able to do some "manual adjustment" or in other words manipulation.
- xxviii) Mrs Masson subsequently sent another e-mail to Mrs Marvin on 27 January 2000 entitled "A Funny!" (D1/103) in which she said "would you believe that Meredith [Collins] didn't think it would be right and went to see if Ed [Goodwin] thought there would be a mistake!!!! I think they are getting a little worried – I have taken off more again today. I am not doing anything other than taking off those that shouldn't be on etc. Honest Indian!" In my view anyone reading this document would understand that Mrs Masson was being ironical and that she had taken patients off the list who should have remained on it.
- xxix) An e-mail from Mrs Masson to Mr Collins, copied to Mrs Marvin and sent on 18 April 2002 on the subject of Waiting List Policy (D1/213). In it Mrs Masson asks Mr Collins if they were any further forward, to which Mr Collins responded by e-mail on the same day "ha ha". That would in my view convey to a reader that Mr Collins did not want to be subject to the constraints of a policy document which would have to rule out any improper practices.
- xxx) A document entitled "Issues for consideration together with supporting information – Hospital Waiting Lists" prepared by Mrs Masson which, according to the evidence, was circulated to senior managers including Mrs Henry on or about 2 September 1999 in anticipation of a meeting which in the event did not take place (D3/338). Mrs Henry agreed she would have read this document. It refers to an agreement about the use of Deferred Lists for Long Waiters. Mrs Masson adds that any patient placed on the Deferred List will also be placed into a review diary. Mrs Henry accepted in her evidence that the document appears to refer to managerial, that is, improper deferrals. There are still concerns with regard to Mr Bevan's Long Waiters. It also reiterates Mrs Masson's belief that it is absolutely essential that WGH adopts a Waiting List Policy.
- xxxi) A manuscript note in Mrs Masson's handwriting which was probably prepared for the same meeting as is referred to at (xxx) above (E1/412). It refers to

deferred patients going back on in the following month; to Mr Bevan's Long Waiters and to Waiting List Policy. The note is endorsed "memo to MC [Mr Collins], cc RM/JS/JT/MH [Mrs Henry]/LM [Mrs Marvin]. Sent to 2/9". That suggests that copies of D3/338 were sent to Mrs Henry and Mrs Marvin.

100. Thus far I have been considering only the documents which are said to implicate Mrs Marvin and Mrs Henry in malpractice. All the documents which I have listed in the preceding paragraph concern in-patients. (I will deal with out-patients, including the "Somerset patients" separately). Mr Caldecott argues that, in the light of those communications, it is fanciful to suppose that Mrs Marvin was in ignorance of the waiting list manipulation which was taking place from the early days of Mrs Masson's appointment as Waiting List Coordinator until 2002. Far from being ignorant of the manipulation it is submitted that she was, according to the documents complicit in it. Similarly in the case of Mrs Henry: her complicity is established by the documents which were sent to her, notably those referred to at (xix), (xx) and (xxx) above. The response of Mr Richard Rampton QC for Mrs Henry is that the documents relied on by the BBC, or most of them, are capable of an innocent interpretation and would have been so understood by both Mrs Henry and Mrs Marvin.
101. Going for the moment by the documents alone, I have reached the clear conclusion that the documents which I have listed would have alerted their readers to the fact that targets were being met by WGH because patient data was being systematically manipulated.

#### *Removal from the waiting list of Somerset patients*

102. Before I turn to the oral evidence, I will set out my conclusions in regard to the Somerset patients who were removed from the waiting list. Estimates of the number who were removed range between 70 and 120. It is common ground that it was a very large number of patients and that they were improperly removed in order to assist WGH to achieve its target. The Somerset patients were all out-patients, so they came within Mrs Marvin's area of managerial responsibility. The evidence was that Mrs Marvin would have known the out-patient figures as the year end approached.
103. The evidence in relation to the Somerset patients comes within a narrow compass. There are no surviving contemporaneous documents. The evidence as to what happened comes from Mrs Masson and Ms Cameron. I have briefly summarised the evidence at paragraphs 43 and 49 above. Mrs Masson said the removal took place in the evening towards the end of the financial year in 2001. According to her, Mr Collins telephoned her in the late afternoon and asked what was the current position with the Out-Patient List as against the AGW target. Mrs Masson told him they were over target by about 100 patients. Mrs Masson says that Mr Collins responded that WGH would not receive additional funding if the target was not met. He instructed her to remove 120 patients from the Out-Patient List.
104. Mrs Masson's evidence was that she discussed Mr Collins's request with Ms Cameron. They were both unhappy about physically removing so many patients and decided to speak to their line managers and get their go-ahead. Mrs Masson says she spoke to Mrs Marvin on the telephone in Ms Cameron's presence about Mr Collins's request. Mrs Marvin came down to Mrs Masson's office and told her she would think

about it and that they were to do nothing until she had spoken to Mrs Henry. According to Mrs Masson, half an hour later Mrs Marvin returned and said that Mrs Henry was not happy but had said “we’ve got to do it”. According to Mrs Masson, Ms Cameron was present on both occasions. Mrs Masson and Ms Cameron then printed off the patients’ details for use at a later date and deleted the patients from the PAS system. The print outs were placed in a blue folder (for some reason known as “the black file”) which is one of the many documents which have disappeared.

105. Ms Cameron to an extent bore out the evidence of Mrs Masson about the Somerset patients. Her account was that Mrs Masson told her that Mr Collins had asked her to do some work that evening. Ms Cameron agrees that she assisted Mrs Masson to remove the patients’ details from the PAS system. However, Ms Cameron has absolutely no recollection of Mrs Masson having spoken to Mrs Marvin that evening. She could not remember Mrs Masson telephoning or seeing Mrs Marvin that night. Her evidence was that Mrs Masson did not tell her that she had drawn the matter to the attention of either Mrs Marvin or Mrs Henry.
106. I have to decide whether or not I accept the evidence of Mrs Masson that she obtained the approval of Mrs Henry, reluctant as it is said to have been, to the removal of the Somerset patients. Mrs Henry, Mrs Marvin and Ms Cameron all deny that this happened. The comment is fairly made by Mr Rampton that Ms Cameron has nothing to gain by giving false evidence on the point. Her evidence has been consistent, although vague as to when the removal took place. Reliance is also placed on the efforts which Mrs Henry made much later in 2003 to ensure that Ms Cameron was interviewed by Mr Langran. Why would Mrs Henry do that if Ms Cameron was in a position to implicate her in the removal of the Somerset patients?
107. I recognise the force of these points. I will consider later the credibility of Mrs Henry and Mrs Marvin; for the moment I want to concentrate on the evidence given by Ms Cameron. I have decided that I cannot accept her recollection that Mrs Masson did not seek and obtain approval to the patients’ removal from Mrs Henry. It is important to bear in mind that Ms Cameron had not been involved in manipulation previously. Her evidence was that she did not realise at the time that what she and Mrs Masson were doing was wrong. There is no particular reason why Ms Cameron should remember a telephone call between Mrs Masson and Mrs Marvin that evening or the meetings which subsequently took place between them. She would not have been asked about these matters until long afterwards. My finding is that the conversations did take place and that Ms Cameron has forgotten it.

***Oral evidence bearing on the question of Mrs Henry’s involvement in manipulation: impression of the principal protagonists***

108. Having earlier (see paragraph 101 above) concluded that on the documentary evidence, considered in isolation, it is likely that Mrs Henry was aware of and complicit in the manipulation (as was Mrs Marvin), I now turn to the question whether the oral evidence displaces that conclusion. The oral evidence which is material comes principally from Mrs Henry, Mrs Marvin and Mrs Masson. I make clear, however, that I bear in mind the evidence of witnesses (such as Ms Cameron, Mrs Oxley and Mrs Lambourne) who speak in general terms of Mrs Henry’s integrity.

109. It is at this point appropriate for me to set out, by way of preliminary to my conclusions about the oral evidence, my impression of the principal protagonists, keeping in my mind the cautionary words of Lord Bingham quoted at paragraph 89 above.
110. I start with Mrs Masson. She is clearly an intelligent woman. At least in her early years in post as the Admissions Coordinator at WGH she was, as is clear from her work-books (which have survived), exceedingly conscientious, hard-working and, I believe, ambitious. She had throughout concerns as to the implications of what she had been instructed to do for the health and well-being of WGH patients. To begin with she was intent on ensuring that waiting list procedures were correctly carried out. On her own account within weeks of starting in the WLO she became a prime mover in the malpractices which went on at WGH between 1999 and 2002. What she did was on any view wrong but I do not think it would be fair to be unduly censorious: she was in 1999 a relatively junior manager and new to the WLO. She was appropriately described at one stage of the trial as having been corrupted by her seniors, in particular Mr Meredith Collins, who appears to have been the principal architect of the manipulation. It is to her credit that it was she who was responsible for revealing (albeit belatedly) the systemic misfeasance within WGH. Whatever may have been her motives for producing her dossier (to which question I will come later), the consequences for her of having done so have been dire. Mr Rampton described the treatment of Mrs Masson by senior management at WGH (not including Mrs Henry) as “atrocious”. In my opinion that is, if anything, an under-statement. Mrs Masson has paid an exceedingly high price for what she did.
111. Mrs Henry was in some respects a remarkable witness. She struck me as being an intelligent, shrewd, quick-witted and highly capable woman. In my opinion she is made of sterner stuff than Mrs Marvin. She was and no doubt remains totally committed to her job at WGH. She is, I think, someone who is well able to cope with the burden of her numerous managerial and administrative responsibilities in a competent and effective manner. The evidence suggests that, despite the wide range of her responsibilities, Mrs Henry was able to keep a close eye on the detail of what went on in her departments. Mrs Masson described her as “controlling”. Despite a vigorous, penetrating (and highly skilled) cross-examination by Mr Andrew Caldecott QC, Mrs Henry remained throughout controlled, unruffled and self-possessed.
112. The only other witness upon whose evidence I should comment at this stage is Mrs Marvin, who is also alleged by the BBC to have known about and been complicit in the manipulation of the waiting lists. She appeared to me to be a decent, hard-working woman who is principally concerned with the welfare of patients (as her nursing background would suggest). I think she is a very different personality from Mrs Henry. She is obviously capable but she does not appear to me to be as business-like and astute an administrator as I believe Mrs Henry to be. I think Mrs Marvin’s natural inclination is to avoid confrontation. It is greatly to Mrs Marvin’s credit that she was ready to concede in hindsight that, if she had digested them at the time, several of the e-mails which were sent or copied to her should have alerted her to the malpractices which were going on. One of the vital questions which I shall have to decide in relation to Mrs Marvin’s evidence is whether she genuinely did not realise or understand what was going on, or whether she did realise and felt that it would be pointless and/or inadvisable for her to protest.

*Findings as to the effect of the oral testimony*

113. I will start with Mrs Marvin because, on the BBC's case, she is an important link in the chain by which it is sought to establish Mrs Henry's complicity in the wrongdoing. As is apparent from the list at paragraph 99 above, the number of compromising communications to and from Mrs Marvin, especially in 1999 when the pattern of the manipulation was being worked out, is considerable. The terms of many of them are unambiguous. Mrs Marvin does not dispute that the documents addressed or copied to her were received in her office, although she says that most of the time she would do no more than skim-read e-mails which dealt with the fine print of in-patient waiting lists. She accepts that waiting lists generally came within her area of managerial responsibility but says that she knew little of the procedures in regard to in-patients or the way PAS worked. Mrs Marvin agreed that she attended the meetings of the Waiting List Group which began to be held weekly once Mr Collins became involved. She accepted that the main focus of the meetings was finding out how well WGH was doing in meeting its waiting list targets. Mrs Marvin's evidence is in effect that she left Mrs Masson and the members of the WLO to get on with it. Mrs Marvin does recognise in hindsight that it should have been obvious to her from some at least of the allegedly incriminating documents that patient data was being manipulated. She appeared at times in her evidence to have been puzzled why she did not realise what was happening at the time. She accepted that she should have scrutinised Mrs Mason's activities more closely.
114. I find myself unable to accept that Mrs Marvin can have been unaware of the manipulation which was taking place on a major scale within WGH over a prolonged period. I accept the evidence of Mrs Masson that, at least in the early days, she raised the issue of manipulation with Mrs Marvin. That is in my judgment borne out by some of the documents listed at paragraph 99 above. Those documents also indicate that Mrs Marvin's knowledge or understanding of the way in-patient waiting lists were managed was greater than she was prepared to accept in cross-examination. Even if, as she said, Mrs Marvin was not present at the meetings between Mr Collins and Mrs Masson, I think she would have been told by Mrs Masson of Mr Collins's instructions to fiddle the data. I think it likely that Mrs Marvin did not like it but probably felt that, since the falsification of patient data had been approved at Board level, there was little she could do about it. No doubt Mrs Marvin would have preferred that the patients be treated (by arranging extra clinics or treating them privately) rather than that they be deferred or removed from the waiting lists. My finding is that Mrs Marvin felt that she had no alternative but to go along with what she knew Mrs Masson was doing and that she acquiesced in the manipulation.
115. I come to Mrs Henry. As I have already said, it is accepted on behalf of Mrs Henry that manipulation of both in- and out-patient data was taking place at WGH between 1999 (or earlier) and 2002 broadly in the manner and on the scale alleged by the BBC. I have summarised Mrs Henry's evidence at paragraph 72-79 above. She said that she was not complicit in any manipulation of data and did not know that it was taking place. She doubts if she would have read all the documents which were sent to her; the pressures on her time were too great. Mrs Henry went so far as to claim in her evidence that she did not know of the existence of any size targets. However, both Ms Cameron and Mrs Oxley accepted in their evidence that a person in Mrs Henry's managerial position would have been aware of the targets WGH had to meet. Mrs

Masson's evidence on the other hand was that Mrs Henry would sometimes be present at meetings where instructions to manipulate data were discussed and that on several occasions she, like Mrs Marvin, would confirm instructions by others, principally by Mr Collins, to manipulate the lists.

116. If, as I have found, Mrs Marvin was aware of the manipulation, I find it impossible to accept that Mrs Henry was not also aware. I further accept that Mrs Henry permitted the manipulation to take place. It is in my view likely that, when she first became aware that patient data was being manipulated, Mrs Marvin would have discussed it with her line manager, Mrs Henry. They shared an office and were, according to both their evidence, in the habit of discussing problems as they arose from time to time. I accept the contention of the BBC which I have set out at paragraph 68 above. I also think it more probable than not that at some of her fairly regular one-to-one meetings with Mr Collins Mrs Henry would have discussed targets with him and the improper means by which WGH was meeting them. I accept that the documents which indicate that Mrs Henry was complicit in the manipulation are few in number. The fact is, however, as Mr Caldecott emphasised, such documents do exist. My assessment of the oral evidence and the overall likelihood is that Mrs Henry was aware of and on occasion complicit in the manipulation of data which senior members of the Board had instructed should take place.
117. In short the conclusion which I drew from the documents as to the involvement of Mrs Marvin and Mrs Henry is not displaced by their oral evidence.

*The events from the summer of 2002 onwards*

118. I have summarised at paragraphs 20-25 above the circumstances under which Mrs Masson's employment at WGH came to an end and the various investigations which thereafter took place into her allegations. The relevance of these events from the summer of 2002 onwards to the questions which I have to decide is this: the case for the BBC is that, as Mrs Masson said in evidence, there came a time when she felt that she could not go along with the waiting list malpractice any longer. In the circumstances which I will describe, she ultimately decided to become a "whistle-blower". In due course that led to the succession of investigations listed in paragraph 25 above. The BBC contends that over a period of about three months Mrs Henry, in conjunction with Mrs Marvin and others, attempted to conceal or cover up the manipulation which had been taking place. Two distinct cover-ups are alleged: the first is the concealment from August 2002 until about 25 September 2002 of Mrs Masson's initial claim of waiting list manipulation; the second is the concealment of the removal of the Somerset patients from about 23 September 2002 until February 2003 (when Mrs Henry discovered that the removal of the Somerset patients had been included in Mrs Masson's dossier). The BBC says that this conduct provides further evidence of their complicity in the wrongdoing.
119. The case advanced by Mr Rampton on behalf of Mrs Henry is that, far from concealing malpractice, Mrs Henry and Mrs Marvin throughout sought energetically to ensure that Mrs Masson's allegations were properly investigated. It is inconceivable, submits Mr Rampton, that they would have done so if they had been involved in the manipulations of data. It is further contended on behalf of Mrs Henry that the events from the summer of 2002 onwards explain why it was that Mrs Masson came to make false and malicious charges against Mrs Henry and Mrs

Marvin that they were implicated in the manipulation. It is said that Mrs Masson was motivated firstly by her resentment at what she perceived to be the mistreatment of her by senior managers (including in particular Mrs Henry and Mrs Marvin) in connection with her request for a financial package which would enable her to leave WGH so that she could go to live in Spain with her new partner. Mrs Masson was also resentful about the role which she perceived that Mrs Henry had played in suspending her employment after accusing her of attempting to blackmail WGH.

120. I deal first with the claim that Mrs Henry took no action upon Mrs Masson's disclosure of waiting list manipulation over a period of several weeks prior to 25 September when, as is common ground, Mrs Henry had a meeting with Mr Collins and appears to have told him in general terms about Mrs Masson's claims. In her witness statement Mrs Henry said that she learned from Mrs Marvin in the late summer/early autumn of 2002 that Mrs Masson was claiming to be in possession of certain information which she would use to her advantage if she did not get from WGH the redundancy payment she was seeking. She thinks that Mrs Marvin mentioned dishonesty in relation to waiting lists. According to Mrs Henry's statement, it was "some time" later that she was told by Ms Cameron in the presence of Mrs Marvin about the removal of the Somerset patients from the waiting list. According to Mrs Henry, Ms Cameron told her that Mr Collins "may have been involved in this incident but she had no real evidence". Having thought long and hard about it, Mrs Henry said that she decided it would be appropriate to raise the matter with Mr Collins. She thinks that her meeting with Mr Collins took place on 25 September.
121. The question I have to decide is whether Mrs Henry is right when she says that her meeting with Mr Collins took place a few days after Mrs Marvin told her about Mrs Masson's claim made to Mrs Marvin to have information perhaps involving dishonesty in connection with waiting lists. I note that Mrs Marvin says that she cannot recall the precise date of her conversation with Mrs Masson but thinks it was in the late summer/early autumn.
122. Mrs Masson's evidence is that she told Mrs Marvin about the waiting list malpractice in mid-late August (see paragraph 20.17 of her statement). I am in no doubt that the evidence on this point of Mrs Masson is to be preferred to that of Mrs Henry. The evidence is that Mrs Masson was on sick leave with gastro-enteritis from August 22-29 and that she was on holiday in Austria from 11-17 September. Ms Julie Fisher says she witnessed the immediate aftermath of the conversation between Mrs Masson and Mrs Marvin; there is no reason to doubt her evidence. Ms Fisher was on holiday from 2-18 September. It follows that if, as Mrs Henry claims, Mrs Masson told Mrs Marvin about her information about waiting list dishonesty a few days before 25 September, it must have either been before 11 September or after 18 September. It is striking that in an e-mail sent by Mrs Masson to Mrs Marvin on 21 September there is no reference to a meeting between them having taken place a day or two before. Nor is there any such reference in Mrs Marvin's reply. Moreover it appears from paragraph 121 of Mrs Marvin's witness statement that it was early on in Mrs Masson's period of sickness after her meeting with Mrs Marvin that she went on holiday to Austria. As I have said, that holiday was from 11-17 September. If Miss Fisher witnessed Mrs Marvin's shocked state after her meeting with Mrs Masson, the meeting must have taken place before 2 September. I reject Mrs Henry's claim to

have gone to Mr Collins a few days after Mrs Marvin told her of Mrs Masson's information; it was at least three weeks afterwards and probably in mid-August at about the time when Mrs Masson asked to be taken off the duty rota. As Mrs Henry conceded, it would have been wholly inappropriate to have sat on an allegation of dishonest waiting list manipulation by senior managers.

123. The second matter said by the BBC to have been covered up by Mrs Henry relates to the Somerset patients. It is agreed that Ms Cameron told Mrs Marvin and Mrs Henry on 23 September 2002 that the Somerset patients had been removed from the list on the instructions of Mr Collins. In the Reply it is pleaded that Mrs Henry reported what Ms Cameron had disclosed to Mr Collins. In her witness statements Mrs Henry stated that, having thought long and hard about it she decided it would be appropriate to raise the matter with Mr Collins and she confirmed that she told him (at their meeting on 25 September) what Ms Cameron and Mrs Marvin had told her two days before. She said the same in her evidence on Days 5 and 7. I am bound to observe that I find it remarkable that someone in Mrs Henry's position should have thought it remotely appropriate to report so serious an allegation of misconduct to the very individual who Ms Cameron had told her gave instructions for it to take place.
124. On Day 8 Mrs Henry gave what I am satisfied is an altogether different account of her encounter with Mr Collins on 25 September. She said that two members of staff had come to her with serious allegations which needed investigation but she said that she did not give him an account of the Somerset incident (see the transcript at pages 5-7). The reason she then gave for not doing so was that it would have been inappropriate (whereas previously she had said she thought it was appropriate). Mrs Henry now said that the person to whom she reported Ms Cameron's disclosure of the Somerset incident at a meeting on 26 September was Mr Hodgkinson. If that be right, it is remarkable that no written record appears to have been made by Mr Hodgkinson of a meeting at which he was told of gross impropriety on the part of the Deputy Chief Executive.
125. I have no hesitation in rejecting the account of events given by Mrs Henry on Day 8. I find that she did go to Mr Collins on 25 September and told him about the Somerset disclosure knowing that he had been personally implicated in the wrongdoing. The obvious person for Mrs Henry to have gone to was the non-executive Chairman of WGH, Dr Post. I believe that Mrs Henry hoped that, with the assistance of Mr Collins, she would be able to conceal what had happened. That was why Mrs Henry met Mr Collins again on 30 September, as her diary suggests. I reject the claim that this meeting did not take place. These findings support and reinforce my earlier conclusion that Mrs Henry was implicated in the waiting list manipulation.
126. It is unnecessary for me to record in detail the events which followed between October 2002 and the end of the year. I have given an outline of what happened at paragraphs 20-24 above. The events of this period are well documented. I will therefore confine myself to making such findings of fact as are necessary to resolve disputed issues.
127. In my judgment the evidence demonstrates that Mrs Henry's primary concern over this period was to resolve the question of Mrs Masson's continued employment by the Trust without any disclosure by her of waiting list malpractice. Her meetings with

Mrs Masson were directed to that end, as were her frequent dealings with Mr Edwards and Mr Hodgkinson of the Human Resources department.

128. I accept the evidence of Mrs Masson that she became concerned about the security of her job at WGH because of the restructuring which, as is common ground, was going on at the time. That was the reason why she approached Mr Collins about a redundancy payment in the event that she were to be made redundant. Whatever may have been the perception of others at WGH at the time or in the light of later developments, I do not accept that Mrs Masson decided during this period to resign from WGH and to move to Spain. She needed the money for her relatively well-paid job at the hospital and had no job to go to in Spain.
129. However, Mrs Masson is in my view open to serious criticism for indicating to WGH, as she did at the meeting on 23 October 2002 and subsequently, that she would hand over the information about manipulation in exchange for a financial package. That led to Mrs Masson's suspension. I think it is likely that Mrs Masson did resent the way WGH and Mrs Henry treated her. I do not accept that her resentment led to Mrs Masson making false charges against Mrs Henry and Mrs Marvin.
130. I am further satisfied that WGH failed to investigate the Somerset incident in the way that was plainly called for. As Dr Post's e-mail of 15 November makes clear such investigation as was taking place related to the manipulation alleged to have taken place in 1999. It is true that statements were taken from Ms Cameron and Mrs Marvin but they contained no information about the removal of the Somerset patients. Both statements are damaging to Mrs Masson's credibility. No effort was at that stage made to interview them or seek further information. Teri Green carried out an investigation but her report did not mention Somerset, no doubt because she had been given no information about that incident apart from what she could glean from Mrs Masson's dossier. The contemporaneous documents do not in my judgment bear out Mrs Henry's claim that in the last three months of 2002 she was "banging on doors" to get Somerset investigated.
131. I do, however, accept that from about the first week in February 2003 Mrs Henry, supported by Mrs Marvin, was continually critical of the inadequacy of Mr Langran's investigation and pressing on many occasions for Ms Cameron to be interviewed. In his closing submission Mr Rampton referred me to a series of documents, including documents numbered D2/14A, 26, 32A, 34, 91, 99-100 (Mrs Henry's manuscript notes), 109, 125, 130-131 and 169 in bundle D2. Mr Rampton made the powerful point that it would have been utter folly on Mrs Henry's part to press for a further more thorough investigation to take place if indeed she had been complicit in the manipulation.
132. Although it is at first sight a powerful point, I think there is an answer to it. As Mr Caldecott submitted and I have accepted, it is clear that Mrs Henry was doing nothing to press for an investigation into Somerset in the closing months of 2002. At that time she was unaware of the fact that Mrs Masson had included Somerset in her dossier. Once Mrs Henry realised that the dossier did refer to Somerset, it would have been apparent to her that it was hopeless to continue to try to conceal what had happened to the Somerset patients. I accept that it was this that caused Mrs Henry to alter her position and to call for a thorough investigation.

## Conclusion

133. For the above reasons I have come to the conclusion that in the meanings pleaded at paragraph 4.1 and 4.3 of the Particulars of Claim (set out at paragraph 32 above) the words of the *Points West* broadcast are substantially true. Notwithstanding the absence of evidence of the health of any particular patient having suffered by reason of the waiting list fraud, that is in my opinion likely to have been the result in the cases of some of those whose treatment was delayed. Accordingly I am satisfied that the words were substantially true in the meaning which I have found in paragraph 57. Although I find that the behaviour of Mrs Henry towards Mrs Masson was to an extent overbearing at times during the autumn of 2002, I am not satisfied that the meaning pleaded at paragraph 4.2 (quoted at paragraph 32 above) has been proved to be substantially true. I nevertheless take the view that the fact that this imputation has not been proved to be true does not materially injure Mrs Henry's reputation having regard to the imputations which have been proved to be true (see section 5 of the Defamation Act, 1952, summarised at paragraph 56 above).
134. It must follow that the defence of justification succeeds.