



Healthcare Regulation Caselaw Update 2008 **By Sean Larkin, QEB Hollis Whiteman, 2 October 2008**

Contents

Standard of Proof	2
Parallel Proceedings	4
The Jurisdiction of Regulatory bodies	6
The hearing	8
i. Delay	8
ii. Failure to Obtain Evidence	12
iii. Particularity of Charges	13
Proceeding in absence	13
Directions	14
Impairment	16
Sanction	20
Interim Suspension	21
Right to a Reasoned Decision	22
Standard of Review	23
List of cases	26

QEB Hollis Whiteman Barristers

Queen Elizabeth Building, Temple, London EC4Y 9BS

DX LDE 482 Telephone 020 7583 5766 Fax 020 7353 0339

barristers@qebholliswhiteman.co.uk www.qebholliswhiteman.co.uk

The standard of proof

*The civil standard of proof is the balance of probabilities or 'more likely than not';
This does not change, no matter what the seriousness of the allegation;
Serious allegations do not require more persuasive evidence to be proved simply by virtue of their being serious. However, serious allegations are often more unlikely to be true;
The unlikelier an allegation is in the circumstances of the case, the more persuasive the evidence needed to prove it to be true. This is a matter of common sense as opposed to law.*

The new standard of proof will apply to all hearings that start after implementation.

The new standard applies only to findings of fact before a Panel (including reviews and restoration hearings). It does not apply to questions of impairment, as this is a matter of judgment, see *Biswas* (2006) EWHC 464 Admin¹.

You are all aware that the civil standard of proof requires that an allegation be proved 'on the balance of probabilities', or that a fact be 'more likely than not' to have occurred. The complications that have existed in the past have been considered and, hopefully, resolved by the House of Lords in the application of applying that simple test in the recent decisions of the House of Lords in *Doherty* [2008] UKHL 33² and *Re B* [2008] UKHL 35³.

If we may consider those propositions that no are no longer valid. First, it has been argued that where allegations are particularly serious (as those in healthcare tribunals often are), they must be proved to a higher degree of probability. This is sometimes referred to as a 'sliding scale', a phrase that has cropped up repeatedly when considering the standard in such cases. For example, in the Trust, Assurance and Safety White Paper:

... the civil standard of proof can be flexibly applied to take into account the circumstances and gravity of individual cases, with more serious matters requiring a greater degree of probability of the evidence being true.

This view was not without foundation in case law⁴, but is wrong. It is quite clear that the civil standard of proof remains the balance of probabilities (i.e. 50.01%), no matter how serious the allegations. As Lord Hoffmann puts it in *Re B*,

'I think the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.' [para. 13]⁵

Secondly, it has been argued that where allegations are particularly serious the standard of proof

1 cited in GMC Guidance on the application of Rule 34(12), para. 3.

2 (11 June 2008), per Lord Carswell, para. 28, Lord Brown, para. 45-49,

3 (11 June 2008), per Lord Hoffmann and Baroness Hale, para. 72

4 See for example, *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 113-114, Lord Bingham CJ in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 354

5 See also Lord Carswell in *Doherty* [2008], 'the standard itself is finite and unvarying' [para. 28].

may remain the balance of probabilities but the evidence required must be of greater force. This view again has some foundation in case law⁶.

The starting point is that the more inherently unlikely it is that an allegation is true, the more persuasive the evidence needed to show that it is, in fact, what happened. That is simply a matter of common sense as was identified in the Court of Sessions recent consideration of the House of Lords' authorities [*Wilson v Police Appeal Tribunal*].

Frequently, therefore, as Lord Nicholls explained *In re H (Minors)* [1996] AC 563,

'the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.'

However, serious allegations do not *per se* require more persuasive evidence to be proven. Serious allegations will only require more persuasive evidence to be proven where the allegation, because of its seriousness or otherwise, is inherently unlikely, as the House of Lords confirmed in *B and Doherty*. This makes perfect sense. Serious misconduct will not necessarily be unlikely. The misconduct in question might be common in general or is just not unlikely in the circumstances of a particular case. As Baroness Hale explains in *Re B*, at para. 72:

As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

If in a particular case, serious misconduct is not unlikely, then logically it should not require any more persuasive evidence to be proven than any other conduct.

Further, the consequence of a finding is a matter which should not be a factor that affects the requirement of proof. In *R v N*, counsel argued, and the court accepted as follows:

We accept Mr Bowen's submission however, that there will be cases where proof of an allegation *may have serious consequences* even though it cannot be said that the matter alleged is inherently improbable. It seems to us that the same general approach must apply in such cases, even though the rationalisation pour forward in *In re H* does not readily accommodate it. The more serious the *consequences*, the stronger the evidence required in practice to prove the matter on the balance of probabilities [my emphasis].

⁶ For example, in *R (N) v Mental Health Review Tribunal* [2006] QB 468, Richards LJ, at para. 64

In *Doherty*, Lord Brown rejected counsel's submission above⁷, concluding that if the evidence is sufficient then it would be wrong to decide in A's favour to save him from the serious consequences of a finding.

Where does all this leave the standard of proof? The following principles derive from the cases discussed above:

- i the civil standard of proof is the balance of probabilities or 'more likely than not';
- ii this does not change, no matter what the seriousness of the allegation;
- iii serious allegations do not require more persuasive evidence to be proved simply by virtue of their being serious. However, serious allegations are often more unlikely to be true;
- iv the unlikelier an allegation is in the circumstances of the case, the more persuasive the evidence needed to prove it to be true;
- v the consequence of a finding should not be a factor taken into account;
- vi it is all a matter of common sense for the Panel.

The question most frequently asked about the new standard of proof is whether or not it will mean that good registrants are deemed bad when in the past no facts may have been found. The Medical Defence Union (MDU) has made clear its strong opposition to the introduction of the new standard. It has stated that it has 'no confidence in the proposal' which it believes 'is likely to lead to unfair and inconsistent decisions that will not inspire confidence in FTP procedures'.

As a matter of logic, it does certainly seem that 'lowering the bar' by introducing the civil standard would mean that more facts will be found proved, and that the fitness to practice of a greater number of registrants would therefore be found to be impaired. The 'flexible' application of the proof will not change this. For both serious and trivial allegations alike the question remains whether the evidence persuades a Panel that a fact is more likely than not to be true. This must result in a greater number of facts being proved than a test which requires that the Panel be 'sure'. I shall not venture into the debate as to whether this is good or bad policy.

Parallel Proceedings

Concurrent criminal and civil proceedings do not mean that the civil proceedings should be stayed pending the outcome of the criminal.

In the case of *Mote v Secretary of State for Work and Pensions and Another*⁸, the Court of Appeal reviewed the authorities in the area of parallel proceedings by which I mean concurrent criminal and civil/regulatory investigations or prosecutions.

This has been a cause for concern for many years, lest a positive defence before one forum compromise or prejudice a defence in another forum. Most commonly, the request is that the non-criminal case be stayed or postponed pending the outcome of the criminal investigation.

⁷ [para 46]

⁸ [2008] C.P. Rep. 13

It may be of assistance to rehearse the common arguments that have been adopted and to assess the approach of the higher courts. Areas of concern raised have included:

i) The privilege against self-incrimination - the effect on civil proceedings.

The privilege against self-incrimination applies only when one might incriminate oneself in a criminal offence and there is the fear of consequent prosecution. The Court of Appeal have repeatedly stated that the exercise of that right in civil disputes is likely to mean that the defendant will lose the civil case as they will have not presented any defence. In the absence of statutory exceptions or undertakings by the prosecution not to so rely, material in the civil proceedings is admissible in the criminal. A stark example was the case of *V and C*, in which little sympathy was shown to *V* who was told that if he did not provide a substantive defence in his civil case he should not be surprised that he lost it⁹.

ii) The privilege against self-incrimination - the use of documents obtained in civil proceedings in the criminal trial

The Court of Appeal has shown equally scant concern for this problem. In *C PLC v P & Attorney-General (Intervenor)*¹⁰ the Court of Appeal decided that the privilege against self-incrimination cannot be relied upon to hold back incriminating material found in the course of a civil search order – in this case child pornography found on a hard drive. The court stated that the privilege against self-incrimination does not apply in respect of material that exists independently of any compulsory questioning. The Court of Appeal also made clear that it was possible for the incriminating material to then be used in criminal proceedings.

iii) Adverse publicity

Theoretically, the fear that the publicity of civil proceedings would be of such a nature that the criminal trial would have to be postponed or stayed as an abuse might result in a court postponing the civil proceedings is very remote when one considers the cases of *Harold Shipman*, *Fred West*, *Roy Meadow* etc.

iv) Double jeopardy

Double jeopardy is the situation where criminal proceedings against a defendant are unfair because the defendant has previously been tried for essentially the same offence. This has now been limited to previous consideration by the criminal courts.

v) Rehearsal of Evidence

It is no ground to stay civil proceedings because they provide an opportunity for a rehearsal of the criminal trial. In the course of *Mote*, counsel for the defence argued that as the parties to the civil proceedings were the same as the parties to the criminal proceedings, they would have the opportunity to study the appellant's reaction and to assess what questions to ask in the criminal trial. He emphasised that this was a prejudice

9 [2001] EWCA Civ 1509

10 [2007] EWCA Civ 493

to the appellant which could not realistically be the subject of an abuse of process application in the criminal proceedings. There was no effective remedy for it apart from postponing the hearing of the appeals pending the conclusion of the criminal trial. The Court of Appeal rejected this argument entirely, concluding that the point had no merit.

vi) Burden of conducting concurrent litigation

Unlike many of the other factors above, the burden of conducting concurrent litigation has been found to be a factor that could lead to a stay [postponement] but only in exceptional circumstances¹¹.

In *Mote*, the Court of Appeal reviewed the authorities on concurrent civil and criminal proceedings. They found that not only does a civil court enjoy a 'real discretion' to decide whether or not to adjourn the civil proceedings but also that civil proceedings could frequently proceed while safeguarding the defendant's rights in the criminal trial. The court noted the power of the criminal courts to stay proceedings for abuse of process or to limit evidence admitted at trial, and stated that there is no prejudice caused to the defendant by the fact that he may disclose his defence to the criminal charges in the civil proceedings. The court pointed out that a defendant is now anyway required to disclose his defence to criminal charges at an early stage.

The Court went as far as to state:

R v L the most recent of the authorities cited to us, strongly supports the existence of a discretion - indeed, a discretion generally to be exercised in that particular context in favour of bringing on the parallel proceedings without waiting for the conclusion of the criminal proceedings.

The Jurisdiction of Regulatory bodies

The GMC has jurisdiction over conduct occurring:

- (i) during a period for which a defendant was not a registered practitioner;
- (ii) outside of the UK.

It is no bar to the GMC's jurisdiction that a disciplinary body in another jurisdiction has previously brought disciplinary proceedings against the defendant in relation to the same matters.

Swanney 2008 S.L.T. 646, is a Scottish case decided in the Court of Session (Inner House), illustrates both of these principles above. Dr Swanney had dual registration in the UK and British Columbia. In 2003, Dr Swanney admitted a number of disciplinary charges brought in Canada relating to misconduct occurring from 1999-2000, at which time he was not registered in the UK. In April 2007, the GMC successfully brought its own charges in relation to the same misconduct.

Dr Swanney appealed, arguing that the GMC had no jurisdiction as:

- (i) the misconduct occurred during a period for he was neither registered nor practising in the UK and

¹¹ *R v Institute of Chartered Accountants in England ex p Brindle*, [1994] BCC 297

- (ii) the misconduct occurred outside of the UK.

The Court of Session disagreed. The court noted that the Medical Act 1983, s. 36(1) (b) authorises the GMC to take action against professional misconduct, 'whether while so registered or not'. They held:

'the appearance of these words... make it completely clear that the committee was being given authority by Parliament to explore an issue of serious professional misconduct in relation to actions which may have occurred while the subject of the inquiry was not a registered person in the United Kingdom'.

The court stated that while 'the statute is silent' [in fact it is not silent - see more below] on whether the GMC has jurisdiction over conduct occurring outside of the UK, to hold otherwise would be 'highly undesirable', as:

it would mean that a practitioner whose conduct could be regarded as serious professional misconduct in some other jurisdiction could come to the United Kingdom and practice medicine here with impunity, it might be to the danger of the public... The whole purpose of the proceedings before the panel was the protection of the public in the United Kingdom; the fact that the conduct inquired into may have taken place in some other state does not detract from the acknowledged purpose of the legislation.

The court also rejected Dr Swanney's argument that for the GMC to bring disciplinary proceedings in the UK against him when he had already been subject to similar proceedings in British Columbia would be a breach of the 'double jeopardy' principle. The court held that the purpose of the disciplinary proceedings in each jurisdiction was to determine whether Dr Swanney's practice should be made subject to conditions in that jurisdiction. Given that the purpose of the two proceedings was therefore different, there was no breach of the double jeopardy principles.

Mohammed v GMC [2007] EWHC 2728 discussed similar issues. Dr Mohammed was the subject of disciplinary proceedings by the Irish Medical Council and was suspended for 6 months. The GMC brought proceedings relating to the same misconduct and Dr Mohammed was suspended for 3 months. He appealed; arguing that a three-month suspension in addition to the suspension imposed in Ireland infringed the principle of double jeopardy.

The High Court based their decision on the Medical Act 1983, which states:

s. 35C (2)

A person's fitness to practise shall be regarded as 'impaired' for the purposes of this Act by reason only of—

- (e) a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that his fitness to practise as a member of that profession is impaired, or a determination by a regulatory body elsewhere to the same effect [emphasis added].

s. 35C (3)

A finding of impairment is not prevented from applying because the allegation is based on a matter alleged to have occurred –

- (a) outside the United Kingdom;
- or (b) at a time when the person was not registered.

Rejecting Dr Mohammed's appeal on both grounds, the court stated that:

'the fact that a panel is compelled to find that a doctor's fitness to practise is impaired if there has been a finding to that effect by a relevant regulatory body strongly suggests that Parliament intended that it would also have power to take action in respect of that impairment if it thought it appropriate'.

The hearing

Delay

While Article 6 confers the right to a hearing within a reasonable time, delay, unreasonable or otherwise, is no ground for stopping proceedings so long as a fair trial is still possible and there is no other compelling reason why it would be unfair to proceed.

A breach of the rules of regulator in relation to expeditious prosecution will not result in a stay unless it causes such prejudice to make the proceedings unfair. However, it may be significant mitigation.

Failure to Obtain Evidence

There was therefore no free-standing positive duty on those bringing disciplinary proceedings to gather evidence, but provided the defendant was not at any disadvantage in the responsibility being on him to obtain the documents.

Particularity of Charges

In determining an application for a stay on the basis of a lack of particularity, the issues are twofold.

First, whether the charges provide sufficient information to enable the defendant to know, with reasonable clarity, the case they had to meet, and whether they knew enough about the charges to enable them to prepare their defences.

Second, if the first stage was not satisfied, whether the only remedy was a stay of proceedings - a stay is an exceptional remedy, only to be used where it was clear that a fair trial was impossible.

Delay

In *Williams v General Medical Council* [2007] EWHC 2603 (Admin), Dr Williams, a pathologist, appealed against a decision of the Fitness to Practise Panel that he was guilty of serious professional misconduct. The hearing began some 15 months after the case had first been referred

to the GMC, was adjourned on three occasions and did not conclude until four months after it had started. Dr Williams appealed arguing that the case should have been dismissed because the panel had failed expeditiously served the notice of inquiring on him, as required by the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules 1988 r.17.

Rejecting Dr Williams' appeal on this point, the court made clear that there might be some distinction between what constitutes an 'unreasonable' delay and a breach of r. 17. However, in any case, a stay or dismissal requires 'exceptional' circumstances. A breach of r. 17 will be of 'no practical significance' unless sufficient material prejudice is occasioned to justify a stay.

In *Sushant Varma v The General Medical Council* [2008] EWHC 753 (Admin), proceedings before a Fitness to Practice Panel resulted in Dr Varma's name being erased from the medical register. Dr Varma had resigned as a house officer following allegations of misconduct in June 2002. The GMC informed him of their intention to bring disciplinary action in April 2003 but a hearing before the Fitness to Practice Panel did not begin until May 2006. The GMC accepted that there had been unacceptable delays in the proceedings on their part.

At the hearing before the Panel, Dr Varma had claimed that he could not attend the hearing because of ill health, caused partly by the delay in proceedings. He argued that the proceedings should be indefinitely stayed until he was able to attend. The GMC refused a stay because the medical evidence indicated that Dr Varma was able to understand and participate in proceedings and his absence was therefore voluntary.

At the close of the proceedings, Dr Varma appealed. He argued, amongst other things, that the panel had been wrong to refuse a stay. Forbes J emphasised that no stay should be granted in cases of delay **in the absence of serious prejudice to the defence such that no fair trial can be held**. He accepted the Panel's decision as to whether to grant a stay was 'an exercise in judicial assessment rather than on any conclusion as to facts based on evidence', *R v S* (2006) EWCA Crim 77. This meant that 'the Court should be slow to interfere with an exercise of judgment by the specialist Panel which turned to a large extent on its assessment of written and oral medical evidence'.

In this case, there was no such prejudice. Dr Varma did have some health problems, but Forbes J noted that the Panel 'had to balance V's private rights against the public interest in having serious investigations properly investigated and adjudicated upon'. He referred to *R v West London Youth Court* (2005) EWHC 2583, when it was said that, 'a trial should not be abandoned before all practical steps to overcome the difficulties have been exhausted'. In this case, the Panel had arranged for Dr Varma to receive daily transcripts of the proceedings by email. He was also allowed to communicate directly with the Panel by email and was granted a number of adjournments to facilitate his preparation of the case. This was sufficient to guarantee the fairness of the proceedings.

However, *Selvarajan v General Medical Council* [2008] EWHC 182 (Admin) confirms that delay may be a useful source of mitigation. Dr Selvarajan's name was erased from the medical register after

he admitted defrauding £150,000 from the local authority between March 1994 and November 1996. After an unsuccessful interlocutory appeal, Dr Selvarajan admitted the charges and was erased. The Fitness to Practice Panel rejected Dr Selvarajan's submission that the substantial and unreasonable delay in the proceedings was valid mitigation.

Dr Selvarajan appealed, arguing that unreasonable delay was relevant to mitigation. Forbes J had 'no hesitation' in concluding that unreasonable delay is valid mitigation, both 'as a matter of common sense, past practice, fair trial case law and indeed the GMC's own guidance in the Indicative Sanctions Guidance booklet' (April 2004, para. 15). He stated:

the longer the threat of erasure has been hanging over the head of a professional person terminating their ability to practise their vocation, and with it the extinction of their means of earning a living livelihood and the deprivation of their practice, the more severe the sanction will be and the more punitive it will appear to be to the recipient, even if in disciplinary proceedings the purpose of the sanction is not intended to be punitive [at para. 28].

Forbes J noted that the effect of delay would be particularly severe where the defendant has been subject to interim suspension or conditions. This may be of importance when one comes to consider the effect of interim conditions and/or suspension when considering sanction. In Dr Selvarajan's case, however, even with delay as mitigation, the sanction of erasure was appropriate given the seriousness of the misconduct involved.

R. (on the application of Gwynn) v General Medical Council [2007] EWHC 3145 (Admin) raised some interesting issues connected to delay. The case concerned General Medical Council (Fitness to Practise) Rules Order of Council 2004 r.4(5). This states:

- 5) No allegation shall proceed further if, at the time it is first made or first comes to the attention of the General Council, more than five years have elapsed since the most recent events giving rise to the allegation, unless the Registrar considers that it is in the public interest, in the exceptional circumstances of the case, for it to proceed.

The GMC alleged Dr Gwynn's fitness to practise was impaired due to deficient professional performance of breast surgery on 10 patients and misconduct in relation to a further patient. Four of the complaints arose from procedures that Dr Gwynn had carried out more than five years earlier. Dr Gwynn applied for the proceedings to be stayed on the basis that the case had no exceptional circumstances, within the meaning of r. 4(5), to justify these complaints being litigated.

Sullivan J found that, in deciding whether to pursue cases that were more than 5 years old, the GMC were bound to have regard to r. 4(5). He found that for each complaint made against Dr Gwynn relating to conduct more than five years old, a Registrar had referred the allegations to the Case Examiners without considering whether it was 'in the public interest, in the exceptional circumstances of the case for it to proceed' under r. 4(5). It was striking that all the complaints had been considered by GMC Registrars on separate occasions and, on each occasion, the Registrar

had failed to have regard to r. 4(5). The GMC attempted to rectify these irregularities by asking a Registrar to consider whether there were 'exceptional circumstances' as required by r. 4(5) after the complaints had been sent to the Case Examiners. For some complaints, this decision was made even after the Case Examiners had referred the cases to the Fitness to Practice Panel.

Sullivan J held that for each of the four complaints the GMC had failed to properly consider whether there were 'exceptional circumstances' within the meaning of r. 4.5. He noted the effect that the unsatisfactory timing of the decisions taken by Registrar might have had on the outcome of their decision in Dr Gwynn's case. For one complaint, for example, the Registrar was asked to make her decision late in the afternoon of the very last working day before the Panel hearing opened. Her decision was made within half an hour. Sullivan J stated:

In these circumstances it would be very difficult for any decision-taker to exclude from his or her consideration the impact of the decision on the hearing that was due to commence after the weekend. Absent any identification of the exceptional circumstances of the case, and any express application of the rule 4(5) test, there is the very real possibility that undue weight was given to the imminence of the hearing, and the obvious 'public interest' in ensuring that it should not be disrupted by a last minute inability to consider the case of one of the complainants.

Sullivan J's reasoning also contained useful guidance on r. 4.5:

- i Exceptional circumstances must be clearly identified in the registrar's decision. Otherwise, where delay in litigating the complaint resulted from the GMC's own errors, there will be doubt as to whether the decision results from a 'corporate desire on the part of the GMC to avoid the inconvenient or embarrassing consequences of its own procedural errors';
- ii Exceptional circumstances may, but need not necessarily, relate to the lapse of time;
- iii That the allegation raises serious concerns about fitness to practise, does **not**, of itself, constitute an exceptional circumstance, since a case will not come before a Fitness to Practise Panel unless there are serious concerns about the practitioner's fitness to practise;
- iv It will not be an exceptional circumstance, where there are similarities between complaints made against a practitioner, that the Panel should be able to hear all the available evidence available against a practitioner at the same time. Sullivan J felt this is more akin to a case-management consideration whereas r. 4(5) is designed to consider only whether one particular allegation should proceed further. There must, however, be occasions where the need to have complaints heard together arises not through 'case-management' factors, but because the only way to realistically challenge fitness to practice (and so to protect the public) is through 'similar-fact-evidence'. Such a consideration must, if it is submitted, be capable of being an exceptional circumstance within the meaning of r. 4(5).

Gwynn raises another interesting issue. Another complaint brought against Dr Gwynn had previously been considered by a caseworker in 2002. The caseworker had rejected it on the basis that it did not disclose professional misconduct or impairment of fitness to practise. Dr Gwynn argued that the GMC could not re-open a complaint that it had previously rejected, and even if had such power, it was unfair and/or unreasonable to re-open it in 2007, four-and-a-half years after the complaint was made. Sullivan J agreed, stating that the only way the GMC could re-open a case that been put into 'cold-storage' would be if the complainant asked the GMC to re-consider their decision.

Failure to Obtain Evidence

In *R. (on the application of Johnson) v Professional Conduct Committee of the Nursing and Midwifery Council* [2008] EWHC 885, Johnson applied for judicial review of a decision of Professional Conduct Committee of the Council to refuse to stay certain heads of charge in disciplinary proceedings against him. The stay had been sought on grounds that included that the Council had failed to obtain relevant documents and evidential material and that the charges disclosed a lack of particularity on the basis that he had not been given dates and times as to when particular charges had occurred. The Panel refused a stay and Johnson sought judicial review. The application was refused. In respect of the Council's responsibility to gather evidence, Beatson J held that the right to have adequate facilities to prepare a defence under Article 6(1) and equality of arms were fact specific, and the latter depended on there being a fair balance between the parties. There was therefore no free-standing positive duty on those bringing disciplinary proceedings to gather evidence, but provided the defendant was not at any disadvantage in the responsibility being on him to obtain the documents. In this case, there was no such disadvantage.

It has long been the practise to follow the criminal rules of disclosure which are governed by the Criminal Procedure and Investigations Act 1996. The Code for Investigators created by the Act does place a burden upon investigators:

- 3.5 In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide which material on the computer it is reasonable to inquire into, and in what manner.

It will be interesting to see to what extent, if any, clear distinctions are drawn between the criminal and regulatory approach.

A similar note was struck in *R (on the application of Philips) v Nursing and Midwifery Council* [2008] EWHC 1698. Philips appealed on the basis of a failure to call witnesses [in particular the patient who was the subject-matter of the charge] and a psychiatrist. Mr Justice Lloyd Jones found that it would have been open to Philips to take steps to obtain evidence and call witnesses and therefore there was no valid basis to challenge the decision of the Committee.

Particularity of Charges

In *Johnson v NMC* [above], Beatson J emphasised that the rule against duplicity does not apply to disciplinary proceedings, as persons subject to the latter got a reasoned decision and a finding on each charge¹². The test to be applied is therefore two-fold. First, whether the charges provide sufficient information to enable the defendant to know, with reasonable clarity, the case they had to meet, and whether they knew enough about the charges to enable them to prepare their defences. Secondly, if the first stage was not satisfied, whether the only remedy was a stay of proceedings - a stay is an exceptional remedy, only to be used where it was clear that a fair trial was impossible¹³. In this case, Johnson was being prosecuted due to a continuous failure to reach the required standard. The approach of the Council in trying to group Johnson's conduct by reference to the types of breach of duty alleged was adequate.

If the Indictment Rules did apply, it should be noted that Rule 14.2(2) of the Criminal Procedure Rules 2005 allows a single count to allege more than one incident of the commission of an offence in certain circumstances. Each incident must be of the same offence and examples include the same victim, a marked degree of repetition in the method employed, although if what is in issue differs between different incidents, a single 'multiple incidents' count will not be appropriate, though it may be appropriate to use two or more such counts according to the circumstances and to the issues raised by the defence.

In *Cohen v GMC* [see more below] Silber J found that a Head of Charge which was framed as a 'wrap-up' charge, which referred to more than one head of charge, was simply a convenient way of avoiding having to repeat the same allegations of inappropriate or negligent conduct after each individual factual allegation.

Proceeding in absence of registrant

Notwithstanding the relatively high benchmark set in *R v Jones* [2003] 1 A.C. 1, for proceeding in absence, Panels are proceeding in absence and are being supported by the higher courts. In *Vaidya v GMC* [2007] EWCA Civ 997, Dr Vaidya was aware of the date but stated that it was inconvenient for him. The Court of Appeal held that:

The need for an early hearing was underlined. I do not find that surprising, that clearly there is a public interest in matters like this being resolved. Witnesses were to be called, and their memories would not be likely to be as good the longer the adjournment..... In my judgment, the Panel were entitled to proceed. They had allowed one adjournment previously. Considerable notice had been given of the hearing date. I have referred to the public interest in the matter proceeding. They had the advantage of their own legal assessor to ensure that proceedings were conducted fairly¹⁴.

Of interest is the introduction of a statutory assumption for proceeding in the absence of a

¹² Cf , *Gee v General Medical Council* [1987] 1 W.L.R. 564 HL

¹³ *Attorney General's Reference (No.2 of 2001)*, Re [2003] UKHL 68, [2004] 2 A.C. 72

¹⁴ Para 10-11

defendant in the Magistrates Court. It will be of note to see if that has any impact on decisions by Panels¹⁵.

Role of Chairman

At my talk last year, I discussed vulnerable witnesses and the uncertainty as to who should intervene into any unnecessary or distressing cross-examination. In their Clear Sexual Boundaries Guidance for Fitness to Practise Panels (Jan 2008), CHRE have stated that Panel chairs need to halt a line or style of questioning which they feel is inappropriate or improper.

More controversially, it is the recommendation for training which would include research findings as to the experience of persons abused and tactics of 'abusers'. A particular point identified is the demeanour of victims of abuse when speaking of the incident. Such information will not be evidence to be adduced at hearings but information to form part of the knowledge of the Panel when considering such cases.

Directions

The position of a legal assessor in proceedings before a Fitness to Practice Panel is not analogous to a judge directing a jury in a criminal trial. The Panel does take legal advice from the assessor but they are not bound to follow it. The legal assessor does not sum up the evidence to the Panel.

What might amount to misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the committee's decision. Where a criticism is made of legal advice the question is whether it can fairly be thought to have been of sufficient significance to the result to invalidate the decision¹⁶.

It might be possible for a Panel to consider the Court of Appeal's criticisms of a practitioner as evidence, provided that the Panel was aware that fact finding was their tasks and theirs alone¹⁷.

In *Gopakumar v The General Medical Council* [2008] EWCA Civ 309, Dr Gopakumar appealed against his erasure from the register of practitioners for inappropriate touching of female patient. The legal assessor had given a character direction to the panel, following a request from Dr Gopakumar's counsel. The legal assessor gave the character direction used in criminal proceedings¹⁸, including as to Dr Gopakumar's credibility and propensity. He added, however, that 'all witness were of good character unless the panel heard to the contrary, and that both the witnesses and Dr Gopakumar were of good character'.

15 54 (1) Section 11 of the Magistrates' Courts Act 1980 (non-appearance of accused) is amended as follows.

(2) In subsection (1), for 'the court may proceed in his absence' substitute '— (a) if the accused is under 18 years of age, the court may proceed in his absence; and (b) if the accused has attained the age of 18 years, the court shall proceed in his absence unless it appears to the court to be contrary to the interests of justice to do so.

(3) After subsection (2) insert — '(2A) The court shall not proceed in the absence of the accused if it considers that there is an acceptable reason for his failure to appear.'

16 *Gopakumar v The General Medical Council* [2008] EWCA Civ 309

17 *Williams v GMC* [2007] EWHC 2603

18 *R v Aziz* [1996] 1 AC 41 at 50, 51

Dr Gopakumar appealed. He argued, amongst other things, that in commenting on the good character of witnesses, the legal assessor had undermined the good character direction. He pointed out that such a direction would not have been given in a criminal trial, and in fact there was no evidence before the Panel the witnesses were of good character – indeed the complainant was not.

The High Court judge rejected Dr Gopakumar's appeal, and he appealed to the Court of Appeal. The Court of Appeal held that the position of a legal assessor in proceedings before a Fitness to Practice Panel is not analogous to a judge directing a jury in a criminal trial. The Panel does take legal advice from the assessor but they are not bound to follow it. The legal assessor does not sum up the evidence to the Panel. They relied on the following comment from Lord Halisham in the Privy Council in *Libman v GMC* [1972] AC 217, p. 221, adopted in *R (Campbell) v GMC* [2005] EWCA Civ. 250:

the committee under its president are masters both of law and of the facts and what might amount to misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the committee's decision. Where a criticism is made of the legal adviser's ... advice the question is whether it can fairly be thought to have been of sufficient significance to the result to invalidate the decision.

In this case, the Court of Appeal felt that no unfairness had been caused. The court stated that the legal assessor could not be criticised for directing that all witnesses are of good character as the Panel had not heard evidence to the contrary. This meant, the court said, there was no reason why the Panel should not simply have assumed all witnesses as of good character. In any case, the vast majority of the direction had been directed towards considering only Dr Gopakumar's character.

Williams v GMC [2007] EWHC 2603 (Admin) concerned Dr Williams, the pathologist in the prosecution of Sally Clark over the death of her two young sons, Christopher and Harry. Dr Williams had undertaken post-mortem examinations on the two boys and had given evidence in their mother's trial as a pathologist. His evidence had that these two boys had both died of unnatural causes. Sally Clark was convicted of murder. Some years later, the Court of Appeal overturned this conviction and made a number of criticisms of Dr Williams including a failure to disclose material to the defence. In particular, Dr Williams had, in the course of his examination of Christopher and Harry become aware of certain microbiological and biochemical information which had the potential to support the conclusion that the children died from natural causes. The Court of Appeal said 'he had fallen a long way short of' the standards expected of an expert on whom the court was going to rely.

Dr Williams argued that the Legal Assessor had given the panel incorrect guidance in determining how they should approach the criticisms made of Dr Williams by the Court of Appeal. The Legal Assessor had instructed the Panel to pay 'due regard' to the criticisms of the Court of Appeal but had emphasised that it was for the Panel to reach its own conclusions as to whether the conclusions were justified. Dr Williams argued that the phrase 'due regard' encouraged the Panel to place some weight on the Court of Appeal's criticisms – a course they were not entitled to take. The GMC argued the Panel was entitled to rely on the criticisms by virtue of Conduct Rules, r 50(1), which allows the Panel to rely on evidence of any 'matter' which is relevant to the inquiry provided, if that evidence would not be admissible in criminal proceedings, 'their duty of making due inquiry

into the case' makes admitting the evidence desirable.

Mr Justice Davies found that it was quite proper for the Court of Appeal's judgment to be before the court, given that it explains the background facts of the case and also the legal requirements and forensic significance of disclosure. He would have, were it to have been necessary to decide the case, have admitted the evidence under s. 50(1). However he decided the case on the limited basis that, when the Legal Assessor's judgment was viewed in its entirety, it had been made entirely clear to the Panel that the decision as to whether Dr Williams had behaved properly was a matter only for them.

Factors relevant to the issue of impairment and/or sanction

Failure to undertake a full analysis of each stage will invalidate the Panel's decision.

The nature and purpose of each stage will determine the considerations that can be properly taken into account¹⁹. Question, for example, whether matters concerning personal mitigation, such as the practitioner's conduct after the alleged misconduct, can be considered in determining impairment²⁰.

Delay should be taken into account as mitigation.

The case of *Cohen v GMC* [2008] EWHC 581 (Admin), has raised the issue of what material can be used as part of the assessment of impairment. Dr Cohen was an anaesthetist. The Fitness to Practise Panel found he had failed in a number aspects of pre-operative and post-operative care in respect of a particular patient. There was no suggestion Dr Cohen had acted improperly in his central function – that is, the administering and monitoring of the anaesthetic during the operation. Dr Cohen was, however, made subject to conditional registration. Dr Cohen appealed.

Cohen was a new-rules GMC case. Thus, the Panel had to consider three stages which Silber J identified in the course of *Cohen*:

- i) consider whether the charges are proved, as a jury does in considering each count of an indictment. At this stage the Panel are not considering any other aspect of the case, such as whether the doctor has a good record or whether the doctor performed any other aspect of the patient with the required level of skill;
- ii) whether, in the light of any misconduct proved, the fitness of the doctor to practise has been impaired taking account of the crucially important public policy issues doctor's fitness to practice is impaired;
- iii) sanction.

Dr Cohen challenged the Panel's finding of impairment. Silber J found that the Panel did not consider any other factors before finding impairment and apparently considered that it followed from the finding of facts. He stated that:

¹⁹ See, for example, *Cohen v GMC* [2008] EWHC 581 (Admin).

²⁰ *Campbell v GMC* [2005] 1 WLR 3488

Any approach to the issue of whether a doctor's fitness to practise should be regarded as 'impaired' must take account of 'the need to protect the individual patient, and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour of doctors....In my view, at Stage 2 when fitness to practise is being considered, the task of the Panel is to take account of the misconduct of the practitioner and then to consider it in the light of all the relevant factors known to them in answering whether by reason of the doctor's misconduct, his or her fitness to practise has been impaired.

Silber J identified factors that he found of relevance:

- i) The act was an isolated error;
- ii) The errors were easily remediable, has been remedied and unlikely to be repeated was highly relevant to impairment;
- iii) That the appellant would be aware that the conduct was unacceptable and that the grave consequences must have been a salutary lesson.

Accordingly, the finding of impairment was quashed.

Silber J, after he had published his draft judgment, was referred to *Campbell v GMC* [2005] 1 WLR 3488. It was argued by the GMC that, on the basis of *Campbell*, factors relevant to personal mitigation should only be considered at stage 3 (sanction) and not in considering stage 2 (impairment). *Campbell* was an old-rules case i.e. two stages: first, whether there was serious professional misconduct and, second, what sanctions were appropriate.

It may be of use to consider the key elements of *Campbell*:

- i) It is the decision of the Court of Appeal;
- ii) The old-rules were sequential namely consider serious professional misconduct first and then consider 'mitigation' which is shorthand for a plea in mitigation;
- iii) Evidence and mitigation may be relevant to the issue of serious professional misconduct e.g. professional history may reveal identical errors or the error may have been committed by a dedicated professional working in isolation and under huge pressure;
- iv) Evidence of personal mitigation would not be relevant to the issue of serious professional misconduct;
- v) Weight was attached to Dame Janet Smith's report '*Safeguarding Patients, Lessons from the Past – Proposals for the Future*', in which she acknowledged that some mitigation could be relevant to serious professional misconduct but that testimonials as to general abilities and character were irrelevant.

In his draft judgement, Silber J had said that the Panel could consider all the evidence relating to how the appellant had carried out his professional obligations both before and perhaps more importantly after the acts of misconduct complained of.

Silber J did not fully consider *Campbell*. He assumed that *Campbell* precluded consideration of good

character and conduct before and after Patient B was his patient at impairment stage. He did say that there were powerful arguments that *Campbell* does not preclude the Panel from considering these matters at Stage 2 as *Campbell* related to a two-stage process. Further, his preliminary view was that *Campbell* does not preclude the Panel from considering at Stage 2 how the doctor has behaved after especially in relation to the matters which led to the finding of misconduct.

Cohen is not being appealed by the GMC. There are likely to be other cases in the pipeline that may allow clarification of the scope of *Campbell* in the three-stage world. In the meantime there are these conflicting arguments.

The defence argument may be distilled as follows:

- i) The Panel should account of the misconduct in the light of all other relevant factors;
- ii) Those factors may include, but are not confined to, the public interest element;
- iii) The Panel can consider the general excellence of the practitioner [as opposed to purely personal mitigation] both before and after the incident;
- iv) The Panel can consider any steps taken to remedy the misconduct and whether it has been remedied.

The prosecution arguments may be put as follows:

- i) The Panel should consider the misconduct;
- ii) Other factors should be considered in the light of the public interest element;
- iii) The Panel should not admit any evidence at Stage 2 save for that which is relevant to the issue of impairment;
- iv) The fact that any error is remediable and has been remedied may be taken into account;
- v) Evidence of the practitioner's general abilities, save for that which related to the subject of the charge, should not be taken into account;
- vi) The misconduct may be of such a nature that a practitioner's fitness to practise is impaired notwithstanding remedy.

Delay as mitigation

For the reasons set out in *Selvarajan* above, delay can be used in mitigation.

In *R. (on the application of Calhaem) v General Medical Council* [2007] EWHC 2606, Jackson J gave useful guidance on this section.

Dr Calhaem was an anaesthetist. In the course of his treatment of a patient, he made a number of mistakes that resulted in that patient being taken to intensive care, though she eventually made a full recovery. Proceedings were brought against Dr Calhaem before a Fitness to Practice Panel. The Panel found that his actions did amount to misconduct and deficient professional performance such that his fitness to practice was impaired. Dr Calhaem was suspended from practice for three months. He appealed.

In considering the appeal, Jackson J gave the following guidance:

- i 'Misconduct' does not mean any breach of the duty owed by a doctor to his patient. It connotes a serious breach which indicates that the doctor's fitness to practise is impaired;
 - i. Mere negligence does not constitute 'misconduct'...depending upon the circumstances, negligent acts or omissions which are particularly serious may amount to 'misconduct';
 - ii. A single negligent act or omission is less likely to cross the threshold of 'misconduct' than multiple acts or omissions. Nevertheless, and depending upon the circumstances, a single negligent act or omission, if particularly grave, could be characterised as 'misconduct'.
- ii 'Deficient professional performance' does not mean any instance of sub-standard work. It connotes a level of professional performance which indicates that the doctor's fitness to practise is impaired.
 - i. 'Deficient professional performance'...is conceptually separate both from negligence and from misconduct. It connotes a standard of professional performance which is unacceptably low and which (save in exceptional circumstances) has been demonstrated by reference to a fair sample of the doctor's work.
 - ii. A single instance of negligent treatment, unless very serious indeed, would be unlikely to constitute 'deficient professional performance';
 - iii. It is neither necessary nor appropriate to extend the interpretation of 'deficient professional performance' in order to encompass matters which constitute 'misconduct'.

In Dr Calhaem's case, Jackson J held that although his mistakes all related to one patient, the series of mistakes made crossed the dividing line from negligence to misconduct. However, in respect of deficient professional performance, Jackson J noted that the legal assessor had failed to advise the panel that this would only result from one episode of treatment in 'exceptional circumstances'. Jackson J therefore quashed the finding of deficient professional performance. The resulting sanction was downgraded, with the finding of impairment found to itself be sufficient.

Williams v GMC [2007] EWHC 2603 (Admin), discussed above, is an example of a doctor being made subject to disciplinary sanction on the basis of negligent conduct. One of his grounds of appeal was that this did not justify a serious professional misconduct (the equivalent of impairment under the applicable regime) because he had not acted in bad faith, his failure to disclose the relevant material being based on an honestly held belief that the material had no forensic value.

Davies J dismissed this appeal. He noted that gross or culpable negligence can constitute serious professional misconduct, citing *Preiss v General Dental Council* [2001] 1WLR 1926 at p.1936 (per Lord Cooke of Thorndon). He stated the Panel was entitled to consider that Dr Williams had accepted the 'highest level of forensic pathological responsibility and had put himself in a position where he might have a pivotal role in a criminal trial', and to note the serious consequences of his conduct. Given a catalogue of 'uncorrected' and 'formidable' errors of observation and judgment over a three year period, a finding of serious professional misconduct was justified.

Sanction

See the guidance on sanctions in *Dr S v General Medical Council* [2007] EWHC 3257 (Admin) below.

Interim orders

An interim suspension must be 'necessary' either for the protection of the public or for the public interest.

- It will be a relatively rare case where a suspension order will be made on an interim basis on the ground that it is in the public interest.
- Where a Panel is making an interim suspension order that carries at least the implication that a suspension order is very likely to be made at the final hearing.

In *Dr S v General Medical Council* [2007] EWHC 3257 (Admin), Dr S appealed his erasure from the medical register. The charges proved related partly to performance and partly to misconduct, including harassment of a former patient. Both were heavily linked to alcoholism. S appealed his sanction. Sullivan J, giving judgment, summarized usefully the relevant principles affecting sanction at paragraphs 13-18:

Sanctions are not a punishment. They are imposed in order to protect patients and to ensure that doctors who are not properly capable of acting as such, and treating patients competently, should not be able to do so. If a doctor has been guilty of misconduct, whether or not directly connected with his activities as a doctor (for example, he has been convicted of a criminal offence, which is not directly related to his practice as a doctor) that can inevitably reduce public confidence in the profession. It is also a breach of the proper standards of conduct and behaviour to be expected of a doctor, thus a sanction of lesser or greater seriousness, depending on the nature of the misconduct, can be imposed.

In imposing sanctions the Panel must apply the principle of proportionality weighing the public interest against the interest of the practitioner. If a practitioner can, through treatment or training, or the imposition of conditions of one sort or another, be brought back to be trusted as a competent doctor, or if guilty of a form of misconduct, but a highly competent practitioner, the public interest may indicate that in such a case it would be wrong to deprive the public of his services for any longer than is strictly necessary.

Suspension is intended to send out a signal that the behaviour is regarded as unacceptable, but is not so serious as to justify erasure. That may rise not only because of the nature of the conduct in question, but also where there has been an acknowledgment of fault and where the Panel is satisfied that there is unlikely to be any repetition.

So far as erasure is concerned, it is to be noted that there is a distinction drawn, which has always been drawn, albeit now they are dealt with by the same Fitness to Practise Panel, between cases which are regarded as health cases and cases regarded as conduct

cases. There used, until recently, to be a division between the two, but it must be borne in mind that the division cannot necessarily be strictly applied because health issues may be material where there has been misconduct. However, the misconduct may be so serious that notwithstanding that it was caused by what might be regarded as health problems, it has to result in erasure, particularly if it appears to the Panel that there is a lack of insight and so a real risk of repetition of such sort of conduct.

In setting out the factors which are material in deciding upon suspension, as opposed to erasure, the guidance notes that no evidence of repetition is a factor. The Panel may be satisfied that the doctor has insight and does not pose a significant risk of repeating and, in cases where the only issue relates to the doctor's health, there is a risk to the patient's safety if the doctor is allowed to continue to practise even under conditions. That means that in a pure health case it may well be appropriate to impose suspension rather than merely conditions.

Erasure is likely to be appropriate where there is a serious departure from professional standards, where serious harm is done to others, where there is a continuing risk and where there is a persistent lack of insight into the seriousness of actions or their consequences. It is noted that erasure is not available in cases where the only issue relates to the doctor's health. That then is the guidance that the Panel has to apply and in this case they clearly considered the guidance and took it properly into account.

In S's case, Sullivan J decided that the sanction of erasure was appropriate, largely because, although S's alcoholism was, in one sense, a health problem and so should be subject to suspension, the Panel had decided S was significantly to blame for those health problems. S had persistently failed to make any attempt to address his problems.

Interim Suspensions

The Dentists Act 1984 s. 32(4), as amended, allows the GDC to impose an interim suspension if 'that it is necessary for the protection of the public or is otherwise in the public interest, or is in the interests of the person concerned'. S. 32(4) is in identical terms to relevant provisions of the Medical Act 1983, at s. 41A. S. 32(12) confers on the High Court the power to terminate an interim suspension order.

R. (on the application of Sheikh) v General Dental Council [2007] EWHC 2972 (Admin) considered s. 32(4). Shiekh was the head of a large dental practice. He pleaded guilty to conspiracy to defraud, as he had failed to supervise inflated expense claims by dentists in his dental practice. He was sentenced to a 12-month suspended prison sentence, the trial judge considering it unlikely that Shiekh would make dishonest claims in the future. The GDC brought disciplinary proceedings as a result of the conviction and, in an interim hearing, imposed an 18-month interim suspension.

Shiekh appealed and argued that, given that it was accepted by all parties that he no longer posed a risk to the public the suspension could not be justified by the public interest. The GMC argued that public confidence in the profession required an interim suspension.

Davies J held that any suspension had to be 'necessary' in the public interest, even though s. 32(4) does not apply the word 'necessary' to the phrase 'or is otherwise in the public interest'. Furthermore, he stated, at paragraph 16:

It is a very serious thing indeed for a dentist or a doctor to be suspended. It is serious in many cases just because of the impact on that person's right to earn a living. It is serious in all cases because of the detriment to him in reputational terms. Accordingly, it is, in my view, likely to be a relatively rare case where a suspension order will be made on an interim basis on the ground that it is in the public interest.

He also agreed with Shiekh's contention that, where a Panel is making an interim suspension order, that carries at least the implication that a suspension order is very likely to be made at the final hearing.

In Shiekh's case, Davies J felt that the interim suspension was unnecessary. He stated that, if the justification was that of public perception and confidence, that could be reflected by an appropriate decision at the final hearing, when all the facts had been fully explored and all the mitigation advanced.

Right to a Reasoned Decision

The GMC must give sufficient reasons to enable its decision to be clear.

Where an assessor makes a recommendation as to sanction, the GMC should explain its reasoning for departing from that recommendation.

In *R. (on the application of Gupta) v General Medical Council* [2007] EWHC 2918 (Admin) Dr Gupta appealed against the suspension of his registration, following a finding of impairment through deficient professional performance. During the Panel hearing, the assessors recommended Dr Gupta undertake remedial training and that his registration be made conditional. The specialist adviser also recommended remedial training. However, the GMC opted for a 12 month suspension, stating that conditional registration would be unworkable. Dr Gupta argued that the GMC gave inadequate reasons for reaching this conclusion, particularly given the opinion of the assessors.

Burton J held that, although a panel is not a court of law, but it must give sufficient reasons or reason to enable its decision to be clear. It could differ from the views of the assessors just as, from time to time, a High Court judge is permitted to differ from the views of experts giving evidence before him. However, reasons should be given so as to identify why the Panel disagrees with the assessors. In this case, sufficient reasons had been given.

Standard of Review

In reviewing the decisions of the regulatory tribunals, the High Court should correct material errors of fact and of course of law but should exercise a distinctly and firmly a secondary judgment as to the application of the principles to the facts of the case, Raschid v GMC [2007] EWCA 46, per Laws LJ

Note, however, the potential for conflict between this test and that of Auld LJ in General Medical Council v Meadow [2006] EWCA Civ. 1390, as considered in Williams (above), 'ultimately, if the appellate court is of the view that a decision of a Fitness to Practise Panel is wrong (or, as the case may be, unjust) then it should not shrink from saying so'.

See Rumbold v The General Medical Council [2007] EWHC 2569 on this conflict.

Appeals from the decisions of healthcare tribunals are made to the High Court under Medical Act 1983, s. 40. According to Criminal Procedure Rules Practice Direction CPR. 52.11 and its Practice Direction, appeals from a decision of health care regulatory bodies, including the GMC, are 'to be by way of re-hearing'. It is well established, however, that the High Court will not simply re-make the decision of the GMC. The appropriate standard of review can be discussed in relation to two cases that appear to give slightly differing standards of review.

The first case, *Raschid v GMC* [2007] EWCA 46, was the first occasion in which the Court of Appeal had considered the jurisdiction of the High Court to review the sanctions imposed on doctors. Prior to April 1, 2003, appeals from such regulatory bodies had been to the Privy Council. The Court of Appeal concluded that the standard of review applied by Privy Council was equally applicable to review by the High Court.

Laws LJ derived a number of principles from the Privy Council case law, (and I borrow heavily from Vikram in this regard). Two particular factors had to be considered concerning the High Court's jurisdiction:

- i The panel has a special expertise;
- ii The principal purpose of the jurisdiction of the panel in relation to sanctions, is the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice, so particular force is given to the need to accord special respect to the judgement of the professional decision-making body in the shape of the panel.

This meant, Laws LJ stated, that:

'in reviewing the decisions of the regulatory tribunals, the High Court should correct material errors of fact and of course of law...[but] should exercise a distinctly and firmly a secondary judgment as to the application of the principles to the facts of the case'.

In the second case, *General Medical Council v Meadow* [2006] EWCA Civ. 1390, Auld LJ considered the standard of review under s. 40. In the High Court, Collins J had allowed an appeal by Professor

Sir Roy Meadow against a finding of serious professional misconduct. The GMC appealed on the basis that the High Court had applied the incorrect standard of review. Collins J had said that an appeal under section 40 was not limited to a review but concluded that a court would not interfere with the decision of the Fitness to Practise Panel unless persuaded that the decision in question was 'clearly wrong'.

In discussing Collins J formulation, Auld LJ appeared to set the bar somewhat lower than Laws LJ in *Raschid*. He stated, 'I can see no basis for faulting Collins J's simple expression of the test, save that I doubt whether the adverbial emphasis of 'clearly' adds anything logically or legally to an appellate court's characterisation of the decision below as 'wrong' [para. 125]. He repeatedly emphasised that the question for the court in an appeal was simply whether the regulator's decision was 'wrong'. This emphasis is shown in the way in which his decision has been considered by later courts.

For example, in *Williams* (above), Davies J used Auld LJ's reasoning to support the proposition that, 'ultimately, if the appellate court is of the view that a decision of a Fitness to Practise Panel is wrong (or, as the case may be, unjust) then it should not shrink from saying so'. In *Rumbold v The General Medical Council* [2007] EWHC 2569, counsel for Mr Rumbold argued that Auld LJ's statement meant there was no principle that 'special respect' should be paid to the Panel's finding or that the High Court was exercising a 'distinctly and firmly a secondary judgment', as *Raschid* had suggested.

The hearing in *Raschid* took place shortly after the decision in *Meadow* had been given. However *Meadow* was not cited to the Court in *Raschid*.

Williams J, giving judgement in *Rumbold*, went some way to resolving the supposed conflict. He noted that Auld LJ's comments had to be read in conjunction with a later paragraph of his judgment, at paragraph 197, when he rehearsed many of the principles considered in *Raschid* and had stated, 'the questions of primary and secondary facts and the overall value judgment to be made by a tribunal, especially the last, are akin to jury questions to which there may reasonably be different answers'. Nevertheless, Williams J admitted it is 'possible, at least, to discern a difference of emphasis' between Auld LJ in *Meadow* and Laws LJ in *Raschid*. He felt in most cases the result will be the same whichever formulation is adopted, but 'he could envisage cases on the margins, however, where that may not be the case'. Williams J declined to finally resolve this conflict, stating that the result in *Rumbold* would have been the same under either test. He adopted the same evasive tactics when the issue arose in *Mohammed* (above). Silber J adopted the same approach in *Cohen v GMC* [2008] EWHC 581 (Admin) (below).

In my opinion, Auld LJ's reasoning is completely compatible with that of Laws LJ in *Raschid*. In *Meadow*, counsel for the GMC had contended that the nature of High Court review as a rehearing was now 'otiose', due to the deference conferred to regulatory tribunals. When Auld LJ stated that the question was whether the panel's decision was 'wrong', he was simply disagreeing with this contention. He held that the review was still by way of rehearing, as there was no way of that the language of the CPR r. 52 Practice Direction could be ignored. He did, however, emphasise, that the difference between 'review' and 'rehearing', is often purely semantic. The High Court, in

QEB

HOLLIS WHITEMAN

determining how to approach the task of deciding a decision is 'wrong', will consider the nature of the disciplinary tribunal, the issues determined by it under challenge and the evidence upon which it relied. Under this analysis, given the specialist nature of the GMC and its purpose in protecting the reputation of the medical profession (acknowledged by Auld LJ at his paragraph 197) the High Court will give exactly the deference required by *Raschid*.

Case index

Re B [2008] UKHL 35	Standard of Proof
Doherty [2008] UKHL 33	
	Parallel Proceedings
Swanney 2008 S.L.T. 646	The Jurisdiction of Regulatory bodies
Mohammed v GMC [2007] EWHC 2728	
	Stays of Proceedings
Williams v General Medical Council [2007] EWHC 2603	i. Delay
Sushant Varma v The General Medical Council [2008] EWHC 753 (Admin)	
Selvarajan v General Medical Council [2008] EWHC 182	
R. (on the application of Gwynn) v General Medical Council [2007] EWHC 3145 (Admin)	
Rutter v General Teaching Council [2008] EWHC 133	
R. (on the application of Johnson) v Professional Conduct Committee of the Nursing and Midwifery Council, [2008] EWHC 885 (Admin)	ii. Failure to Obtain Evidence
As above.	iii. Particularity of Charges
Gopakumar v The General Medical Council, [2008] EWCA Civ 309.	Directions
Williams v GMC [2007] EWHC 2603	
Cohen v GMC [2008] EWHC 581 (Admin)	Impairment
R. (on the application of Calhaem) v General Medical Council [2007] EWHC 2606 (Admin)	
Dr S v General Medical Council [2007] EWHC 3257 (Admin) below.	Sanction
R. (on the application of Shiekh) v General Dental Council [2007] EWHC 2972 (Admin)	Interim Suspension
R. (on the application of Gupta) v General Medical Council [2007] EWHC 2918 (Admin)	Right to a Reasoned Decision
Raschid v GMC [2007] EWCA 46	Standard of Review
General Medical Council v Meadow [2006] EWCA Civ. 1390	
Rumbold v The General Medical Council [2007] EWHC 2569	
Akpata v GMC [2007] EWHC 2713	Proceeding in absence

	MISCELLANEOUS CASES
Ali v GMC [2008] EWHC 1630 GMC v Plavelli [2008] EWHC 1337	An IOP sd not make a determination on the allegations but are bound to take into account the nature of the allegations when considering whether in the public interest [in this case although other factors apply generally]to suspend [para 35 -39; 46] following GMC v Hiew
Sathnathan v GMC [2008] EWHC 872	An interim suspension proportionate and necessary to protect the public [increased from interim conditions]
Arora v GMC [2008] EWHC 1596	Appeal against conduct/performance – failure to take steps to ensure accuracy of a statement is not the same as dishonesty
Tinsa v GMC [2008] EWHC 1284	Subsequent evidence failed to establish that appellant not able to properly defend himself
Chyc v GMC [2008] EWHC 1025	Panel entitled to make a finding on the facts even where inconsistent with a witness. As there are potentially serious consequences arising from any finding re competence and criminal standard of proof it is necessary to adopt a restrictive interpretation to the formulation of charges [para 70].
Otote v GMC [2008] EWHC 998	Variety of complaints by Dr in person [ranging from forgery by GMC to intimidation] rejected
Arzhanghi v GMC [2008] EWHC 815	Suspension for sexual assault upheld
Farah v GMC [2008] EWHC 731	Erasure for stealing and forging prescription forms upheld to obtain drugs for own benefit – ‘Panel entitled to view that where a doctor had engaged in deliberate dishonesty and abused his position as a doctor...persistent lack of insight into that conduct he simply could not continue in the medical profession....sanction was inevitable.’
Balsubramanian v GMC [2008] EWHC 639	Erasure for poor clinical performance on one occasion appropriate, bearing in mind serious departure from professional standards and lack of insight
Abrahaem v GMC [2008] EWHC 183	Appeal against decision to impose conditions. Conditions restricting work removed and remitted for consideration by GMC

Dr S v GMC [2007] EWHC 3257	Erasure upheld where serious misconduct because although health issues [alcohol dependency] contributed to his actions he failed to act on advice to abstain.
Smith v General teaching Council [2007] EWHC 1675	Appeal against a decision of prohibition order for dishonesty refused notwithstanding lesser sanctions by different committee
Philips v NMC [2008] EWHC 1698	Appeal against finding and sanction refused inter alia complaint that NMV failed to call the patient about whom the nurse was said to have had an unprofessional relationship, as patient was available to be called by nurse
Low v GOstC [2007] EWHC 2839	Sanction of erasure for possessing 848 indecent photos [for which fined] upheld ‘...no less a sanction would have sufficed to maintain public confidence in the profession’