
# Coming soon? Adverse inferences

The criminal & civil courts can draw 'adverse inferences'. **Alexandra Felix** & **Tom Orpin-Massey** ask might more regulatory & disciplinary panels do the same?

**IN BRIEF**

- Could regulatory and disciplinary panels be allowed to draw 'adverse inferences' from a professional's non-cooperation?
- Why and how 'adverse inferences' could be introduced.

It is said that with the many advantages of membership of a profession comes the obligation for the registrant to engage with the regulator where concerns have arisen. What, though, when a registrant refuses to engage in the investigatory process and/or does not attend and/or chooses not to give evidence at a regulatory or disciplinary hearing?

This topic has generated significant interest, not least in the High Court, where several judges have commented on the peculiar arrangement whereby the majority of regulators do not recognise the adverse inferences familiar to the criminal and civil courts. For some time now, practitioners in the disciplinary and regulatory fields have wondered whether adverse inferences are on the horizon.

Before 1994 in the criminal courts there was considered to be a 'right to silence' under the common law, with no inferences to be drawn from a suspect or a defendant exercising that right. The Criminal Justice and Public Order Act 1994 (POA 1994) marked a change by introducing adverse inferences. The key provisions are set out between ss 34 and 38 of POA 1994. In short, s 34 allows for 'such inferences as appear proper' to be drawn where a defendant has failed to mention in interview facts he could reasonably be expected to raise and which he later seeks to rely on in his defence. And under s 35, the tribunal of fact may draw the same inference where the defendant chooses not to give evidence.

There are, though, safeguards. For example, before interview a defendant must have a chance to consult with a solicitor and she or he is cautioned as to the consequence should she or he fail to answer questions. And before an adverse inference can be drawn from a failure to give evidence at trial, the defendant must be warned in the presence of the jury what the decision entails. In each case there is a carefully worded direction as to the approach to be taken.

In *Wisniewski v Central Manchester Health* [1998] PIQR P324, the Court of Appeal set out the principles applicable for drawing adverse inferences in civil proceedings:

- in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action;
- if a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness;
- there must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference; in other words, there must be a case to answer on that issue; and
- if the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

In the civil courts, then, an adverse inference may be drawn, in appropriate circumstances, with the inference having the effect of strengthening evidence put forward by one party, and, crucially, weakening any evidence put forward by the other party.

So what has caused those who practise in the regulatory field to begin to expect the introduction of such an inference? Most recently, in the 2016 case of *Kearsey v NMC* [2016] EWHC 1603 (Admin), Ouseley J had this to say: 'I note that the Panel decided not to draw adverse inferences from the registrant's non-attendance. That appears to be a policy for NMC Panels. I am not sure that it is required by law in all cases. The NMC may wish to consider whether it is appropriate, and if so when, to draw adverse inferences where a registrant has refused to engage and to attend, when there are obvious matters calling for an explanation…'

In *Radeke v GDC* [2015] EWHC 778 (Admin), Turner J said: 'During the course of the appeal, I raised the issue as to why Dr Radeke had not, at least,

sought to adduce in evidence a formal witness statement dealing with his response to the charges against him... I could envisage circumstances in which a practitioner unfit to attend a hearing would nevertheless be capable of providing a witness statement. Where such a practitioner fails to produce such a statement, circumstances may arise in which an adverse inference could be drawn in accordance with the approach of the Court of Appeal in *Wisniewski v Central Manchester HA* [1998] Lloyd's Rep. Med. 223.'

The full details of these cases are beyond the scope of this article, but we see in them the different circumstances in which different High Court judges felt that adverse inferences might be appropriate.

- When a registrant had been too poorly to attend a hearing but had not, in any case, provided a statement for the tribunal to consider (*Radeke*).
- When a registrant had not engaged with proceedings at all and had not attended the final hearing (*Kearsey*).

For the *most* part, regulators do not make provision for the drawing of adverse inferences, certainly at the '*facts stage*'. It would seem, then, that most of the regulators are in an anomalous position when compared to the civil and criminal spheres. We emphasise 'facts stage' and 'most' because some regulators do provide for adverse inferences to be drawn, and there already exists the drawing of inferences at later stages, for example the 'impairment stage', particularly with the healthcare regulators.

It has long been recognised that tribunals, when considering current impairment, may take into account all the circumstances of the case, including the registrant's engagement with the case. After all, engagement will often have a direct bearing on what insight, remediation, and remorse the registrant might have shown. In *Nicholas-Pillai v General Medical Council* [2009] EWHC 1048 (Admin) [2009] All ER (D) 67 (Jun) it was observed by Mitting J that 'the attitude of the practitioner to the events which give rise to the specific allegations against him is, in principle, something which can be taken into account either in his favour or against him by the panel, both at the stage when it considers whether his fitness to practise is impaired, and at the stage of determining what sanction should be imposed upon him'.

> *"The majority of regulators do not recognise the adverse inferences familiar to the criminal & civil courts"*

This was echoed in the case of *Kimmance v GMC* [2016] EWHC 1808 (Admin), where Kerr J noted: 'There was indeed no evidence of insight and remediation in this case. I do not much like those jargon words. They do not do much to illuminate the reality, which is that a doctor or other professional who has done wrong has to look at his or her conduct with a self-critical eye, acknowledge fault, say sorry and convince a panel that there is real reason to believe he or she has learned a lesson from the experience. Nine times out of ten, you cannot do that if you do not turn up to the hearing. The panel will want to ask questions.'

It seems, then, that when we talk of introducing adverse inferences in regulatory proceedings what we are actually talking of is their introduction at the facts stage. But can and should they be introduced at this important stage? We began by saying that there are a great many advantages to being a member of a profession, and so too, of course, a responsibility. A responsibility to assist your regulator in upholding standards and maintaining the confidence of the public in the profession is central. And so, it is said, surely that requires registrants to take part fully in the process, and not only in the initial investigation but also at the final hearing. Of course, there may be good reason not to do so, but the argument seems to be that in the absence of such a reason being advanced to the satisfaction of the tribunal of fact it must be right that the tribunal of fact is entitled, it if considers it proper, to infer that there is no good reason and indeed to take that into account in support of the case against the registrant.

So, what might be required to introduce adverse inferences at the facts stage? The vast majority of regulators do not provide for adverse inferences within their rules. Adverse inferences were brought in by statute in the criminal courts and developed through the common law in the civil courts. Could inferences therefore be introduced with a minimum of fuss and ceremony, and simply become part of the regulatory process? We think that unlikely. Their introduction would mark a very significant change in procedure, and while it seems to us that adverse inferences will become a feature of regulatory hearings, their choreography must be carefully managed to avoid procedural unfairness, inconsistency, and a deprivation of the registrant's right to a fair hearing. **NLJ**

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