



HENDERSON
CHAMBERS

**THE ROLE OF THE REGULATOR AND PROSECUTING BODY
IN PROFESSIONAL DISCIPLINARY PROCEEDINGS**

*Kenneth Hamer,
Henderson Chambers*

INVESTIGATING THE COMPLAINT

The purpose of disciplinary proceedings

- 1.1 In *Meadow v. General Medical Council* [2007] 1 All ER 1 the Court of Appeal (Sir Anthony Clarke MR, Lord Justice Auld, and Lord Justice Thorpe) reaffirmed the principle that the role of regulatory and disciplinary bodies, and boards set up under the Royal Prerogative, is to investigate the profession or occupation concerned for the benefit of the public. The regulator should not be prevented from using its statutory powers when it judged it to be necessary, and doctors and other professionals have no immunity from action in respect of professional disciplinary proceedings commenced by a regulator.
- 1.2 The case arose out of evidence given by Professor Sir Roy Meadow in the prosecution of the late Sally Clark. In November 1999 Mrs Clark was tried for the murder of her two sons and the Crown relied upon Professor Meadow's evidence to refute the proposition that Mrs Clark's children may have died from sudden infant death syndrome, or cot death. Following her second appeal which was allowed in January 2003 Mrs Clark's father made a complaint to the General Medical Council alleging serious professional misconduct on the part of Professor Meadow which was upheld by a fitness to practise panel. The fitness to practise panel's finding of impairment was quashed by the High Court and the GMC's appeal was dismissed by the Court of Appeal.
- 1.3 At [30] Sir Anthony Clarke MR after considering a number of different regulatory and disciplinary bodies in different areas of modern life stated that:
- “The purpose of all these bodies is to regulate the profession or occupation concerned for the benefit of the public. It has been held that the essential purpose of FTP proceedings is to protect the public and not to punish the practitioner”.*
- 1.4 In *Rashchid v. General Medical Council, Fatmami v. General Medical Council* [2007] 1 WLR 1460 the Court of Appeal again stressed that a principal purpose of the fitness to practise panel was the preservation and maintenance of public confidence in the profession rather than retributive justice.

Overview of the complaint

- 1.5 At the outset of any professional disciplinary or fitness to practise proceedings it is of paramount importance for the regulator and prosecuting body to determine clearly the basis of the complaint. This will involve the secretariat or investigating officers identifying:
- the complainant;
 - the factual basis for the complaint; and
 - the breach of professional code relied on.
- 1.6 This also means identifying what misconduct and impairment of fitness to practise mean. In *Meadow v. GMC* [2007] 1 All ER 1 at [198] Auld LJ said that given the retention in the Medical Act 1983, setting out the main objective of the

GMC “to protect, promote and maintain the health and safety of the public”, it is inconceivable that “misconduct” – now one of the categories of impairment of fitness to practise provided by Section 35C of the 1983 Act – should signify a lower threshold for disciplinary intervention than the previous test of serious professional misconduct. In ***Dr Julie Mallon v. General Medical Council*** [2007] CSIH 17, the Court of Session said that “misconduct” denoted a wrongful or inadequate mode of performance of professional duty, or as Lord Clyde described it in ***Roylance v. General Medical Council (No 2)*** [2000] 1AC 311 at p 331, misconduct is “a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances”.

- 1.7 In ***Zygmunt v. General Medical Council*** [2008] EWHC 2643, Mitting J. approved the summary of potential causes of impairment offered by Dame Janet Smith in the Fifth Shipman Inquiry Report (2004, paragraph 25.50), that is, where the doctor:
- (a) presents a risk to patients;
 - (b) has brought the profession into disrepute;
 - (c) has breached one of the fundamental tenets of the profession; or
 - (d) has acted in such a way that his integrity can no longer be relied upon.
- 1.8 Mitting J. also adopted that part of the judgment of Silber J. in ***Cohen v. General Medical Council*** [2008] EWHC 581 in which it was stated that the FPP should take into account the need to protect the individual patient and the collective need to maintain confidence in the profession as well as declaring and upholding standards of conduct and behaviour. In ***R (Harry) v. GMC*** [2006] EWHC 3050 at para 30, Goldring J. was also clear that the public interest is relevant to the consideration of impairment of fitness to practise.
- 1.9 The three recent cases of ***Cohen v. General Medical Council*** [2008] EWHC 581 (Silber J.); ***Zygmunt v. General Medical Council*** [2008] EWHC 2643 (Mitting J.); and ***Azzam v. General Medical Council*** [2008] EWHC 2711 (McCombe J.) confirm that 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 other relevant factors known to them in answering whether by reason of the doctor’s misconduct, his or her fitness to practise is impaired.

Past behaviour

- 1.10 In ***Meadow***, after an extensive review of the authorities, the Master of the Rolls at [32] said:

“In short, the purpose of FTP proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omission of those who are not fit to practise. The FTP thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past”

And at [33]:

“In FTP proceedings the FPP is concerned to protect the public for the future and not to determine the rights and obligations of the parties in the same way as in a civil

action. This introduces a further public interest which is not present in the ordinary civil suit.”

- 1.11 Accordingly, evidence relating to the practitioner’s current fitness to practise may properly be put before the panel at the misconduct stage rather than at the sanction stage. Evidence of a doctor’s overall ability is relevant to the question of fitness to practise. Thus it may be relevant in determining if a doctor’s fitness to practise is impaired to see whether the matters complained of are easily remediable or are unlikely to be repeated whilst some findings of misconduct may inevitably lead to a finding of impairment: see *Cohen, Zygmund* and *Azzam*.
- 1.12 However, matters of pure “personal mitigation” are exclusively relevant to the question of sanction, and should not be taken into account prior to the sanctions stage: *R (on the application of Campbell) v. General Medical Council* [2005] 1 WLR 3488.

Processing the complaint

- 1.13 Every complaint made to a professional body is likely to start with a complaint. It may come from a former client, patient, a professional organisation such as a hospital trust, a police force or Crown Prosecution Service, the Court Service, or a member of the public.
- 1.14 Sometimes an investigation into the conduct of a member may be triggered by the regulator such as the Bar Standards Board which may raise a complaint itself. Sometimes information is passed from one regulator to another, or information is received by the regulator such as by the contents of a press report.
- 1.15 Many professional bodies make it a requirement of their members to self-report their own misconduct, and require members to report suspected misconduct by other members of the professional body. The Law Society’s *Guide to the Professional Conduct of Solicitors* provides that a solicitor is under a duty to report any serious breach of conduct on the part of another solicitor which the solicitor believes falls short of the proper standards of conduct of the profession. The bye-laws of the Institute of Chartered Accountants in England and Wales, and the Society at Lloyd’s provide for every member to report any facts or matters indicating misconduct or that a member and/or firm may have become liable to disciplinary action. Failure to do so may in itself be an act of misconduct.
- 1.16 It is becoming increasingly recognised that the police have a duty to pass on information to a professional regulatory body investigating allegations against one of its members. Whilst there is a public interest in maintaining confidentiality of information given to the police, it will often be outweighed by the public interest in protecting society; see *Woolgar v. Chief Constable of Sussex Police* [2000] 1 WLR 25; and *Frankson and Others v. Home Office; Johns & Another v. Home Office* [2003] 1 WLR 1952. The court’s approach is to look and see whether there is another public interest which on the facts of the particular case assumes an even greater importance than the need to maintain the confidentiality of those who assist the police in their inquiries.

- 1.17 Both the courts and Parliament have in recent years sought to protect the “whistleblower”, and to encourage employees to make disclosure of a genuine and proper complaint to a regulator. In **Re A Company’s Application** [1989] Ch. 477 Scott J. considered an application by a company to restrain an ex-employee from disclosing confidential information or documents to the Financial Investment Management and Brokers Regulatory Authority. The judge declined to carry out any investigation into the allegations, saying that it was for FIMBRA on receiving whatever information the defendant put before it, to decide whether there was a matter for investigation. The judge specifically exempted from his order reports to FIMBRA and to the Inland Revenue.
- 1.18 An employee complaining to a regulator about his employer’s misconduct is given a degree of protection by the Employment Rights Act 1996, as amended by the Public Interest Disclosure Act 1998. A “protected disclosure” made in good faith to a prescribed person may have protected status where the employee reasonably believes that the matters that he relied on amount to a criminal offence or founded a legal obligation; see **Babula v. Waltham Forest College** The Times April 17th 2007. A prescribed person includes the Financial Services Authority and other financial regulators.
- 1.19 The Bar Council has its own Complaints Rules (Re-issued 1.10.05) for investigating any complaint. The Complaints Rules prescribe the manner in which all complaints about the conduct of or services provided by barristers shall be processed. Any complaint other than a complaint raised by the Bar Council of its own motion is referred to and considered by the Complaints Commissioner. If the complaint discloses a prima facie case it is investigated by the Commissioner and the Secretary to the Conduct Committee. Rule 16 provides that if the complaint might be capable of resolution by the complainant, and it would be appropriate to resolve it in that manner, the Commissioner may invite the parties to attempt to conciliate their differences.
- 1.20 The requirement to keep the complainant informed is a key part of the prosecuting role performed by the Bar Council. Regulation 6 of the Disciplinary Tribunals Regulations 2004 under the heading “*Representation of Complainant’s interests*” provides that the representative of the Conduct Committee

“shall keep the complainant informed of the progress of the complaint and of any further documents and other information to be considered by the panel and shall, so far as practicable, afford the complainant an opportunity to comment in advance of the hearing on any such information or documents.”

The Regulations go on to provide specifically that:

“It shall be the responsibility of the PCC representative and counsel appointed by the PCC representative to represent the interests of the complainant in relation to any charge of inadequate professional service.”

- 1.21 The Chartered Institute of Management Accountants has a procedure whereby a practitioner may agree to a “consent order” for disposal of a complaint before it gets to a disciplinary hearing.

- 1.22 Every complaint received by the Actuarial Profession (the collective noun for the Faculty of Actuaries and the Institute of Actuaries) is investigated and goes to an Adjudication Panel. Investigation is carried out by a team of three: a member of staff, a lawyer, and an investigating actuary. The team produces a case report which is an entirely neutral document, setting out the complaint and the evidence in its support, and the actuary's response. The Adjudication Panel may offer the respondent a sanction, and the opportunity to accept that there has been misconduct, and only serious cases are referred to a Disciplinary Tribunal Panel.
- 1.23 Those concerned in the investigation of complaints may be protected from actions for libel by disgruntled parties. In *Kearns & Others v General Council of the Bar* [2003] 2 All ER 534 the Court of Appeal upheld the decision of Eady J who struck out proceedings for defamation in respect of a letter sent by the head of the Bar Council's Professional Standards and Legal Service Department to all heads of chambers and senior clerks on the grounds of privilege. The Court of Appeal held that cases where the communicator and the communicatee were in an existing and established relationship, such as, in the instant case, the Bar Council and the recipients of the letter, were to be distinguished from cases where no such relationship had existed, and the communication was between strangers. Once that distinction was made, the law should attach privilege more readily to communications within an existing relationship than those between strangers. What mattered was that there should be the flow of free and frank communications between a regulatory body and its members in both directions.
- 1.24 In *Jain and Another v. Trent Strategic Health Authority* The Times, January 22nd 2009 (House of Lords) the claimants were the registered proprietors of a nursing home. Their registration was cancelled by a magistrate on an ex parte application by the registration authority, and the home was closed. The claimants alleged that the investigation was inappropriately carried out and that they had suffered financial loss as a result of the authority's breach of duty of care to them at common law. The Court of Appeal [2008] 2WLR 456 held by a majority that the Registered Homes Act 1984 was passed to protect residents of a nursing home, and since any duty of care owed to the claimants as the registered persons could conflict with the statutory duty owed to the residents, it was not fair, just and reasonable to impose a duty of care on the authority in favour of the claimants notwithstanding that there was a relationship of proximity between them. In his dissenting judgment, Jacob LJ said that the public interest in the provision of nursing homes is liable to be affected if the owners had no recompense for the dreadful financial consequences of an unwarranted application to the court such as was made here.
- 1.25 The House of Lords in dismissing the claimants' appeal held that although there was no duty of care in negligence owed by a regulatory authority to the owners of a nursing home, the procedure by the authority which led to the registration of the nursing home being cancelled appeared to be a breach of the owners' rights under the European Convention on Human Rights. Lord Scott of Foscote said that if the events had happened after October 2nd 2000, it seemed to his Lordship that the claimants would have had a sound case for contending for a remedy

under the Human Rights Act 1998. As it was, however, a remedy for breach of their pre-October 2nd 2000 Convention rights could only be obtained from Strasbourg, and after exhausting their domestic remedies.

DRAFTING THE CHARGE

Particulars of the allegation

- 2.1 The need to rigorously but fairly investigate every reported complaint cannot be over-emphasised, and for the charges to be carefully drafted.
- 2.2 Article 6(3)(a) of the European Convention on Human Rights provides that a defendant has a right “*to be informed promptly, and in a language which he understands and in detail, of the nature and cause of the accusation against him*”. This is applicable to professional disciplinary hearings. In ***Albert and Le Compte v. Belgium*** (1983) 5 EHRR 533 the European Court of Human Rights held that the principles in Article 6 are applicable, mutatis mutandis, to disciplinary proceedings, which are civil proceedings, in the same way as in the case of a person charged with a criminal offence.
- 2.3 It is axiomatic that a professional person accused by his or her regulatory body of an allegation or charge is entitled to detailed particulars of the acts which he or she is alleged to have committed. The charge must be adequately particularised and the accusation made clear. For example, rules 17(5) and 18(5) of the Royal Pharmaceutical Society of Great Britain (Fitness to Practise and Disqualification etc) Rules 2007 provide that the Society shall serve on the pharmacist or registrant concerned “*finalised particulars of the allegation, sufficiently particularised to enable the registrant concerned to understand the allegation.*”
- 2.4 The Bar Standards Board is the prosecuting body of the Bar Council, and if a prima facie case of professional misconduct is disclosed, it is customary for Investigation Officers to instruct independent counsel to settle any charge or charges, and to present the case before the Tribunal. The Investigation Officer, or counsel should clearly identify the breach of professional code relied on, and the factual allegations that go to make up the charge of professional misconduct.
- 2.5 A notice of allegation which is made up of a number of particulars of “heads of charge” in the form of a narrative is permissible; see ***Gee v. General Medical Council*** [1987] 1 WLR 564 at 575F-H where Lord MacKay said there was no unfairness in a procedure in which a number of allegations of fact are set out in one charge and it is alleged that the matters, if established, render the practitioner guilty of serious professional misconduct. In ***Gangar v. General Medical Council*** [2003] UKPC 28 the Privy Council said that “*There is nothing wrong with the PCC proceeding on an omnibus charge containing various heads.*”
- 2.6 In ***David Mond v. Association of Chartered Certified Accountants*** [2005] EWHC 1414 findings of misconduct against an accountant were quashed in circumstances where the whole process by which he had been found guilty was *ultra vires*. The charges were drafted without alleging breach of any particular byelaw, merely stating that he had failed to act with due skill, care, diligence and

expedition. In *Nwabueze v. General Medical Council* [2000] 1 WLR 1760 and *Misra v. General Medical Council* [2003] UKPC 7 the Privy Council was critical of unnecessary allegations being included in the charge. In *Nwabueze*, the patient had ceased to be a patient of the practitioner more than a year before the relationship began. In the absence of any explanation as to why it was relevant to the charge of serious professional misconduct, the allegation should have been deleted from the charge. In *Misra* the critical allegation was simply whether the practitioner had or had not been informed of certain telephone calls requesting a home visit to a patient. To cloud the issue in the charges with allegations about the doctor's drinking habits, or whether he was dishonest in maintaining that he had not been informed of one of the telephone calls were not relevant to the main issue.

- 2.7 In *R (Wheeler) v. Assistant Commissioner House of the Metropolitan Police* [2008] EWHC 439 the applicant applied for judicial review of the decision of Assistant Commissioner House to uphold an earlier decision of a disciplinary panel which found him to be in breach of the code of conduct applicable to police officers. In quashing the decision of the Assistant Commissioner on other grounds, Stanley Burnton J. went on to criticise the vagueness of the original charges stating that vagueness is a ground for judicial review if it leads to unfairness in the proceedings. He added that the danger of vague charges is that respondents do not know, with precision, what is alleged against them and are therefore not fully able to address those matters in the course of the hearing. Whilst concluding that the charge was vague, the learned judge did not find that there had been any unfairness on the facts.
- 2.8 In *Ken Livingstone v. The Adjudication Panel for England* [2006] EWHC 2533 (Admin) the Mayor appealed against his four week suspension imposed by a Tribunal following its finding that he had failed to comply with the Code of Conduct of the Greater London Authority. Collins J allowed the appeal on various grounds, illustrating the need for precision in drafting and pursuing particular charges. He held that there was no breach of the Code as it did not extend to conduct in private life, and that whilst the Tribunal was entitled to conclude that what Mr Livingstone had said brought him into disrepute, it was less clear that the office of Mayor was brought into disrepute, and that the Tribunal had failed to recognise this real distinction.

Alleging dishonesty

- 2.9 It is essential that if dishonesty is alleged it must be pleaded. “*It is a fundamental principle of fairness that a charge of dishonesty should be unambiguously formulated and adequately particularised*”: *Salha v. General Medical Council* [2003] UKPC 80. Similarly in *Singleton v. Law Society* [2005] EWHC 2915 the Divisional Court held that the failure to allege or to particularise dishonesty in disciplinary proceedings against a solicitor constituted a serious procedural flaw.
- 2.10 In *R (Council for the Regulation of Healthcare Professionals v. Nursing and Midwifery Council and Kingdom* [2007] EWHC 1806 the Divisional Court held that a failure to charge a nurse with dishonesty who had allegedly forged a letter indicating that she had passed all parts of a course when in fact she had failed one part of it was a serious procedural error on the part of the

prosecuting body. In this case there had been no specific pleading of dishonesty and therefore no finding of misconduct was made; the High Court determined that the case should be remitted to a different Committee to consider an allegation that included dishonesty.

- 2.11 In *Sheill v. General Medical Council* [2008] EWHC 2967, Foskett J. was critical of the phraseology of the head of charge alleging dishonesty. He said that the head of charge was unspecific about the circumstances in which it was alleged that the practitioner had made a false claim. When a false or dishonest claim is made, for example, in a document, it would be usual for the document to be identified in the charge, perhaps by date, but certainly by description which shows clearly the source of the allegation. That was not done in this case and no request for particulars of the charge appears to have been made, either in writing before the hearing or in some application to the Panel at the outset of the hearing.
- 2.12 In *Council for the Regulation of Healthcare Professionals v. General Medical Council, and R* [2005] EWHC 2973 (Admin) the appellant contended that the GMC had “under-charged” the case against a doctor involving an allegation concerning a former patient. The appellant contended that the charge should have alleged that the doctor’s conduct was sexually motivated and/or indecent and not simply incompetent and/or inappropriate. Sullivan J found that on the alleged facts the charge should have included an allegation of indecency and/or sexual motivation on the part of the doctor and that failure to do so was a serious procedural irregularity. He remitted the case back to be heard by a differently constituted panel with a direction to the GMC to amend the charge accordingly.

Challenging the charges

- 2.13 In *R (on the application of Davies and Others) v Financial Services Authority* [2003] 4 All ER 1196 the Court of Appeal upheld the decision of Lightman J. who dismissed the applicant’s application for judicial review of the decision of the Financial Services Authority to issue notices under the Financial Services and Markets Act 2000 warning the applicants of its intention to make prohibition notices precluding them from performing functions. Mummery L.J. made clear that only in the most exceptional cases would the Administrative Court entertain applications for judicial review of the actions and decisions of the Financial Services Authority. The court said that the present application would, if granted, bypass the comprehensive statutory scheme, and an applicant had a right of appeal from the Financial Services and Markets Tribunal on points of law direct to the Court of Appeal. Even if the only point raised was a point of law on the lawfulness of the decision or action of the FSA, that could be dealt with by the Tribunal in the first instance, and it was unnecessary to apply for judicial review except in exceptional circumstances.
- 2.14 In *R (Siborurema) v. Office of The Independent Adjudicator for Higher Education* The Times, January 10th 2008, the Court of Appeal held that the Office of the Independent Adjudicator for Higher Education was entitled to take into account the regulations and procedures of the relevant institution as a starting point and to consider, when assessing a

complaint, whether the institution had complied with its own regulations and procedures. Initially, the regulations could be assumed to be a reliable benchmark. In dismissing the applicant's application for permission to apply for judicial review the Court of Appeal said the appellant had to establish that the Office of the Independent Adjudicator had erred in law in holding that his complaint was not justified. The adjudicator's office was not obliged to conduct a full investigation into the underlying facts: a complainant dissatisfied with the decision of the adjudication office would often have the option of pursuing a civil claim against the university, which might well be an appropriate alternative remedy.

- 2.15 In *R (Heather Moor and Edgecomb Limited) v. Financial Ombudsman Service* [2008] EWCA Civ 642, the Court of Appeal confirmed that the Financial Ombudsman Service is not confined to ordering compensation only in accordance with common law principles of tortious liability and does not have to hold a public hearing in all such cases. The court held that the structure of the Financial Services and Markets Act 2000, which establishes the FOS, was intended to operate with the minimum of formality and conferred broad discretionary powers on the FOS to determine complaints in accordance with what the FOS considered fair and reasonable in all the circumstances. Thus, the FOS is not required to apply a version of the *Bolam* test (*Bolam v. Friern Barnet Hospital Management* [1957] 1 WLR 582) in determining liability to pay compensation for inaccurate financial advice.
- 2.16 In *R v General Council of Bar ex parte Percival* [1991] 1 Q.B. 212 the Divisional Court held that a disappointed complainant had *locus standi* to challenge a decision of a prosecuting authority not to proceed with the investigation of a complaint or the initiation of a prosecution, and that the decision of a prosecuting authority was subject to judicial review. However, in dismissing the application, the court held that the Professional Conduct Committee had acted within its discretion with impartiality and fairness, and that, accordingly, its decision on the facts was not open to challenge.
- 2.17 Rule 9 of the Disciplinary Tribunals Regulations 2005 gives a judge power to strike out any charge brought by the Bar Standards Board. Rule 17 of the General Medical Council (Fitness to Practise) Rules 2004 provides that the FTP panel shall hear and consider any preliminary legal arguments. Similarly, Rule 24 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 states that the chairman shall inquire whether the registrant wishes to make any objections to the charge on a point of law. These provisions frequently give rise to applications to strike out charges as an abuse of process.
- 2.18 A defendant in the Crown Court who seeks to stay criminal proceedings as an abuse of process based on delay or other reasons must generally show that (a) he would not receive a fair trial and/or (b) it would be unfair for him to be tried; see *Archbold Criminal Pleading, Evidence and Practice*, 2007 at para 4-47 and following under the heading Limited Discretionary Power to Prevent Prosecution Proceeding. The House of Lords in *Attorney General's Reference (No 2 of 2001)* [2004] 2AC 72 has authoritatively stated the approach of the criminal courts to applications for a stay on the ground of delay. Only if a fair trial

cannot be held will a matter be stayed; see *Spiers v. Ruddy* [2008] SLT 39; *R v. Bootell* [2006] UKPC 46.

2.19 In *Council for the Regulation of Health Care Professionals v. General Medical Council and Saluja* [2006] EWHC 2784 (Admin); [2007] 1 WLR 3094; Goldring J., at [78] – [83] derived the following from a review of the authorities in the case of regulatory and disciplinary proceedings:

- (i) To impose a stay is exceptional.
- (ii) The principle behind a stay is the court’s repugnance in permitting its processes to be used in the face of the executive’s misuse of state power by its agents.
- (iii) Both domestic and European authority make plain that the position as far as misconduct by a non-state agency is concerned is wholly different.
- (iv) In disciplinary proceedings there is no state involvement in the proceedings being brought. These are proceedings brought against a professional person by his regulator in order to protect the public, uphold professional standards and maintain confidence in the profession. Such proceedings are to a significant degree different from those that apply to a criminal prosecution and any alleged misuse of executive powers by the state’s agents.
- (v) Even if the Defendant’s rights under Article 6 or Article 8 have been infringed it is merely a matter to be taken into account when deciding whether there has been an abuse of process; see *R v. P* [2002] 1 AC 146; and *Jones v University of Warwick* [2003] 1 WLR 954.

2.20 In *R (on the application of Gibson) v. General Medical Council* [2004] EWHC 2781 (Admin), Elias J., accepted at [36] that public confidence in the regulation of the medical profession required that a complaint should, in the absence of some special and sufficient reason, be publicly investigated, and that it would undermine that important principle if mere unreasonable delay, absent prejudice, were to require a stay to be granted. At [50] he went on to say that:

“There is both a public interest and the interest of the complainant to consider when determining whether it is fair to stay proceedings and that there should be a very plain case of manifest unfairness in the conduct of the proceedings before a stay comes into play. One can of course sympathise with the position in which Dr Gibson finds himself, facing these serious charges whilst in retirement and so long after the events have occurred. But I cannot say that the Committee was compelled in this case to hold that it would be unfair for these proceedings to continue. In my judgment, they were fully entitled to conclude that there were no sufficiently exceptional circumstances to warrant that very unusual step.”

2.21 In *General Council of the Bar v. L* January 23rd 2007, Warren J., accepted these principles as the correct approach to the law, and was not persuaded on the facts before him that it was not possible for the barrister concerned to have a fair hearing or that the delay was such as to make it unfair to proceed to a hearing.

2.22 Rule 4(5) of the GMC’s Fitness to Practise Rules 2004 provides that where a complaint is made more than 5 years after the event giving rise to an allegation it will not proceed unless the Registrar considers that it is in the public interest in

the exceptional circumstances of the case. In *R (Peacock) v. GMC* [2007] EWHC 585, February 22nd 2007, the complaint was made 7 years after the complainant sustained injuries as a result of taking prescribed medicine. Gibbs J. held in judicial review proceedings that the decision of the GMC to disapply Rule 4(5) had been irrational as there were no exceptional circumstances.

- 2.23 In *R (Gwynn) v. GMC* [2007] EWHC 3145, Sullivan J. said that whilst the rules do not impose a duty to give reasons for a decision to allow, or not to allow, proceedings to continue under rule 4(5), fairness to both the practitioner and the patient requires that reasons are given by the Registrar. The practitioner must be able to identify the “exceptional circumstances of the case”, which has led the Registrar to conclude that it is in the public interest to proceed. In *Haywood v. GMC* [2007] EWHC 2236, Burton J. said that the formulation: “*We have decided to waive the 5 year rule*” was not a sensible one and suggested that it should be avoided.

ASSEMBLING THE EVIDENCE

The Pre-Hearing Stage

- 3.1 Absent its rules, there is no common law duty on a professional body to make disclosure as such to the defendant. Not unnaturally defendants often seek to know the source of a complaint against them, and require the prosecuting body to obtain and disclose information from third parties. In *Parry-Jones v. The Law Society* [1967] 3 All ER 248 Buckley J. held that the Law Society was under no obligation under its rules to give information to the plaintiff as to its reasons for making an investigation.
- 3.2 However, a responsible regulator and prosecuting body ought to undertake to write to a third party inviting it to produce all material held relating to the complaint and/or charges made against the member, and to voluntarily produce such documentation. Some regulators now deal specifically with disclosure in their rules, for example, the Vets, Chiropractors, Pharmacists and the General Social Care Council whilst the Solicitors Disciplinary Tribunal has issued a Practice Direction providing that material should be disclosed which could be seen on a sensible appraisal by the applicant to be relevant or possibly relevant to an issue in the case or which might hold out a real prospect of providing a lead on evidence.
- 3.3 In *Gage v. General Chiropractic Council* [2004] EWHC 2762 (Admin) the court said that the PCC had been wrong to rule that there was no duty of disclosure at the investigation committee stage, but that in the circumstances it had not prevented a fair trial, and there was no procedural irregularity.
- 3.4 Rule 26 of the Bar’s Complaints Rules provides that the complaint shall be sent to the barrister concerned together with a letter requiring him to comment in writing on the complaint and to make any written representation he sees fit as to his conduct or the services he has provided to the complainant. Any relevant documents received by the Commissioner are made available to the barrister on

request. Any answer to the complaint should normally be sent to the complainant, but the Commissioner may at his discretion direct that material be omitted if, for example, it raises issues of privilege or confidentiality that make disclosure inappropriate.

- 3.5 The case of *Wakefield v. Channel 4, Twenty Twenty Productions Limited* [2006] EWC 3289 concerned disclosure of material which had been supplied by the GMC to Dr Wakefield during its investigation and prior to any disciplinary charges being brought against him. In a liable action brought by Dr Wakefield against Channel 4 and Others the defendants sought disclosure of the documents available to him by the GMC as part of its investigation. The GMC had provided assurances to the persons and organisations from whom they obtained the documents that they would only be used for the GMC's statutory purposes and that disclosure would be correspondingly restricted. Eady J. nevertheless ordered disclosure to the defendants on the basis that it could not be appropriate for the GMC to give a blanket assurance that the documents would never be disclosed, and as Lord Hoffman in *Taylor v. Serious Fraud Office* [1999] 2 AC 177 at p210-211 observed, there may be “*overriding policy considerations*”.
- 3.6 In *Henshall v. General Medical Council* [2005] EWCA Civ 1520 the Court of Appeal said that the rules of the GMC's preliminary proceedings committee, set up to screen complaints before they reach the professional conduct committee, should not be interpreted so as to enable a medical practitioner to put in potentially contentious material in response to a complaint and deny sight of it to the complainant. Sedley LJ said that not every document which came to the preliminary proceedings committee required disclosure. But a general inhibition which enabled a practitioner to put in potentially contentious material in response to a complaint and to deny sight of it to the complainant was capable of stifling the individual's right to bring a tenable complaint to the attention of the professional conduct committee.
- 3.7 In *R (Green) v. Police Complaints Authority* [2004] 1 WLR 725 the applicant lodged a complaint alleging that a police officer had deliberately driven a police car at him intending to kill or seriously injure him. The matter was referred for investigation to the Police Complaints Authority, who in the course of its investigation obtained witness statements and documents from the police force. The applicant commenced proceedings for judicial review and sought disclosure of these documents. The House of Lords held that the Police Act 1996, Section 80, contained a general ban on disclosing information received by the Authority, and that the aim of the Authority in carrying out its functions was to satisfy the legitimate interests of both claimants and the wider public that the investigation of complaints against police officers should be, and should be seen to be, independent and thorough. The House of Lords held that without seeing the witness statements the applicant was nonetheless in a position to make an effective contribution to the process of reaching a final decision on the complaint, and his involvement at the start of the investigation through to an invitation to comment on the proposed decision on disciplinary proceedings, showed that his legitimate interests as a complainant were recognised and safeguarded, and that his rights under Articles 1, 2 and 3 were not broken.

- 3.8 In *R (Roberts) v. Parole Board* [2005] 3 WLR 152 the House of Lords decided that the Parole Board was not required to disclose evidence to a prisoner or his legal representatives on grounds to protect the source and identity of an informant.
- 3.9 *Gleadall v. Huddersfield Magistrate's Court* [2005] EWHC 2283 (Admin) may have important implications in disciplinary proceedings. The claimant was charged with an offence of common assault in the magistrates' court. As primary disclosure, the prosecution had informed the defence that none of the five lay witnesses to be called had any previous convictions. Despite this the claimant served a detailed questionnaire asking whether any of the witnesses had ever been the subject of a disciplinary investigation or hearing (regardless of the outcome). Smith LJ and Simon J held that the bad character provisions in section 100 of the Criminal Justice Act 2003 did not enable comprehensive inquiries to be made in every case about the character of every prosecution witness, and the application for judicial review of the CPS's refusal to answer the questionnaire was dismissed. The real question was whether the kind of investigation called for by the applicant was necessary in the interests of justice.
- 3.10 *Gleadall* may affect the extent to which a regulator owes any obligation to make inquiries as to the bad character of a proposed witness. A witness who a regulator intends to call in disciplinary proceedings may have criminal convictions or himself or herself been subject to disciplinary proceedings which could be material to the case and affect the witness's credibility. However, regulators do not have access to the records maintained by the Criminal Records Office or to the Police National Computer.
- 3.11 But suppose a professional person who is subject to disciplinary proceedings has confidential information? In *R (on the application of Morgan Grenfell & Co Limited) v. Special Commissioner of Income Tax* [2002] 3 All ER 1 Lord Hoffmann doubted the dicta of Lord Denning MR and Diplock LJ in *Parry-Jones v. The Law Society* [1968] 1 All ER 177 CA where the Law Society had required a solicitor to produce documents to an appointed investigator. Lord Hoffmann stated that he was not saying that on its facts *Parry-Jones'* case was wrongly decided, but where the information was disclosed by the solicitor and not used by the Law Society for any purpose other than its investigation, such limited disclosure did not breach the clients' legal professional privilege or, to the extent that it technically did, it was authorised by the Law Society's statutory powers. Lord Hoffmann distinguished the position of a body such as the Law Society, where the information was required for a regulatory or disciplinary purpose, and the Inland Revenue in which information was sought for use against the person entitled to the privilege.
- 3.12 In *B and Others v. Auckland District Law Society* [2003] 2 AC 736 the Privy Council confirmed the cardinal principle of English Law, which applies equally to New Zealand, that legal professional privilege was a matter of public interest and fundamental to the administration of justice, which could not be overridden by any balancing or competing public interest. The only exceptions to this rule were (1) where statute had provided expressly or by necessary implication for privilege to be overridden, or (2) things told to a lawyer with a view to forwarding a criminal purpose. The Judicial Committee of the Privy Council allowed the

appeal of an Auckland law firm from the majority decision of the Court of Appeal of New Zealand. The proceedings concerned the disclosure to the Auckland District Law Society of documents for the purposes of an investigation under Part VII of New Zealand's Law Practitioners Act 1982 into complaints against the law firm. The Law Society formally requisitioned documents under Section 101(3) of the 1982 Act, arguing that any privilege was overridden by the statute. Lord Millett, delivering the reserved judgment of the Board, said that legal professional privilege was a good answer to a requisition under the 1982 Act both at the investigative and the disciplinary stages. Lord Millett recognised that privilege did not rest on any balancing exercise, or whether it had been waived: the question was whether it had been lost, which it had not.

- 3.13 In *Real Estate Opportunities Limited v. Aberdeen Asset Managers Jersey Limited and Others* [2007] The Times April 6th 2007 the Court of Appeal held that making disclosure to the claimants under Part 31 of the Civil Procedure Rules of documents consisting of transcripts of evidence given by the defendants' employees to the Financial Services Authority as part of a formal investigation, and warning notices given to the defendants under the Financial Services and Markets Act 2000, would not amount to "publication" which was prohibited by section 348 of the 2000 Act. The dissemination would only be for the purposes of the litigation, and the prohibition of the disclosure of confidential information applied only to information that found its way into the FSA's hands and not to documents or other records of communication such as transcripts of evidence containing information which the defendants already had in their possession.

The Hearing

- 3.14 The rules and procedures of the criminal courts are in the main invoked by many professional disciplinary bodies and they provide a useful backdrop because of the serious nature of the proceedings. The cardinal rules of natural justice and the burden and standard of proof, and separate treatment of each allegation lie at the heart of disciplinary tribunal proceedings.
- 3.15 However, disciplinary proceedings are generally inquisitorial, usually under statutory provisions such as the Medical Act 1983, or the Solicitors Act 1974. Historically, the rules relating to evidence before regulatory bodies have therefore provided for evidence to be admitted notwithstanding that it was not admissible in criminal or civil proceedings. Even in cases where the rules provide that the committee or tribunal should only receive oral, documentary or other evidence that would be admissible as such as if the proceedings were criminal proceedings, the rules invariably give the committee or tribunal a discretion to receive evidence of any fact or matter which appears to them relevant to the inquiry and when the reception of such evidence is *desirable*. In *Reza v General Medical Council* [1991] 2 A.C. the Privy Council on commenting on Rule 50 of the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules 1988 said that the criterion for admissibility of evidence indicated the duty, to some extent inquisitorial, of the committee.
- 3.16 Rule 34 of the General Medical Council (Fitness to Practise) Rules 2004 provides that committees of the GMC may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be

admissible in a court of law. Where evidence would not be admissible in criminal proceedings, the committee shall not admit such evidence unless, on the advice of the legal assessor, they are satisfied that their duty of making due inquiry into the case before them makes its admission desirable. Rule 31 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 similarly provides that evidence whether or not admissible in civil proceedings shall be admitted before the fitness to practise committee “*subject only to the requirements of relevance and fairness*”.

- 3.17 In her ***Fifth Shipman Inquiry Report*** of December 2004 Dame Janet Smith, at paragraph 25.30 said: “*I hope that, in the future, FTP panels will be more ready to admit hearsay evidence than they have been in the past.*”
- 3.18 Sections 114 to 141 of the Criminal Justice Act 2003 contain detailed provisions relating to the admissibility of hearsay evidence in criminal proceedings. Section 114 provides that a statement not made in oral evidence in the course of criminal proceedings is admissible and is evidence of any matter stated if any statutory provision or rule of law makes it admissible, or all parties to the proceedings agree to it being admissible, or the court is satisfied that it is in the interests of justice for it to be admissible. In deciding whether a statement not made in oral evidence should be admitted in the interests of justice section 114(2) lays down a list of factors to which the court should have regard.
- 3.19 In ***McNally v. Secretary of State for Education*** [2001] EWCA Civ. 332 the Court of Appeal, in a case arising out of disciplinary proceedings against a teacher who had allegedly inappropriately touched a fifteen year boy at school, said at [12] that whilst there is no rule against hearsay in disciplinary proceedings it is well established law that in a case of suspected misconduct a dismissal will only be fair if the employer, having investigated the matter reasonably and genuinely believes on reasonable grounds in the employee’s guilt; see Halsbury’s Laws of England 4th Edition Re-issue Vol.16 para. 491. In the instant case the Disciplinary Panel was cast in the role of the employer, and had to bear in mind the gravity of the allegations. Where, as here, the evidence was contested the members of the panel could not simply accept the case advanced by the local education authority. They had to evaluate the evidence, and decide for themselves whether they genuinely believed on reasonable grounds in the appellant’s guilt.
- 3.20 In ***Constantinides v. Law Society*** [2006] EWHC 725 the Divisional Court stressed that the Solicitors Disciplinary Tribunal with its lay member was a skilled and expert body well able to reach its own conclusions, uninfluenced, in that case, by irrelevant material or the conclusions reached by others.
- 3.21 Nevertheless in ***Harris v. Appeal Committee of the Institute of Chartered Accountants of Scotland*** [2005] CSOH 57, the Outer House of the Court of Session emphasised the need for regulatory bodies to ensure that irrelevant and prejudicial matters were not included in papers which were submitted to disciplinary tribunals. Included before the disciplinary and appeal committee were “summaries”, which contained detailed narratives of the findings and conclusions of the investigations committee, and a number of affidavits which were prejudicial to the appellant. Lady Smith, in reaching her conclusion to

quash the appeal committee's decision, held that the hearings below did not comply with Article 6, and because the material had been read and considered by at least the chairman and one other member of the appeal committee the possibility of the appeal being influenced by the material could not be ruled out.

- 3.22 Similarly in the earlier case of *Murphy v. General Trading Council for Scotland* [1997] SLT 1152 the Inner House of the Court of Session quashed a decision of the disciplinary committee of the General Teaching Council of Scotland removing a teacher from the teaching register by the fact of the committee having before it documents from the investigating committee relating to an earlier police warning. The earlier police warning was not part of the ground of referral to the disciplinary committee and was not referred to at the hearing, nor was the committee advised by its legal assessor to disregard the reference to the earlier warning. Whilst there was no evidence to suggest that the committee was in fact influenced by the extraneous material, justice had not merely to be done, but had to be seen to be done, which was not the case as the committee had not been told by its legal assessor to ignore the prejudicial material.
- 3.23 The Disciplinary Tribunals Regulations 2005 concerning complaints against barristers provide that proceedings of a disciplinary tribunal shall be governed by the rules of natural justice, subject to which the tribunal may admit any evidence, whether oral or written, whether direct or hearsay, and whether or not the same would be admissible in a court of law.
- 3.24 Although a regulator and prosecuting body must act with complete fairness it has been recently held that the prosecutor need not be independent. In *R (Haase) v. Independent Adjudicator*, The Times, February 11th 2008, Stanley Burnton held, when dismissing an application by John Haase for Judicial Review of a finding of guilt in prison disciplinary proceedings, that prison disciplinary hearings chaired by an independent adjudicator in which the prosecution case was presented by a prison officer who might also be a witness were not incompatible with the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. His Lordship said there was nothing in the Strasbourg authorities to indicate that the prosecutor was required to be independent. Disciplinary proceedings were to be dealt with speedily; prison officers were expected to act fairly and with integrity and their duty to do so was required by the Prison Disciplinary Manual. Fairness, however, did not require an independent prosecutor.
- 3.25 If the rules of natural justice are complied with Article 6 of the European Convention probably does not add anything to the common law requirements of a fair hearing; see *R v. General Medical Council, ex parte Kypros Nicolaidis* [2001] Lloyd's Rep. Med. 525.
- 3.26 How far can a defendant in disciplinary proceedings challenge a conviction against him obtained in criminal proceedings? Regulation 13 of the Disciplinary Tribunals Regulations 2005 provides that the fact that a barrister defendant has been convicted of a criminal offence may be proved by producing a certified copy of the certificate of conviction relating to the offence, and proof of a

conviction shall constitute *prima facie* evidence that the barrister defendant was guilty of the offence the subject thereof.

- 3.27 In *Shepherd v. The Law Society* [1996] EWCA Civ 977 Mr Shepherd was accused before the Solicitors' Disciplinary Tribunal of conduct unbefitting a solicitor in that he had been convicted of 15 offences of dishonesty and sentenced to 3 years imprisonment in respect thereof. He sought an adjournment in order to bring evidence before the Tribunal to establish that he had been wrongly convicted. His application was refused and he was struck of the roll. His appeal was dismissed, the Court of Appeal holding that "*in the absence of some significant fresh evidence of other exceptional circumstances*" it should not be possible to challenge a criminal conviction in disciplinary proceedings. The court noted that Mr Shepherd did not appeal against his conviction preferring instead to establish before the Solicitors' Disciplinary Tribunal that he had been wrongly convicted and perhaps to use this as a lever to seek leave to appeal out of time against his conviction.
- 3.28 In *Stannard v. General Council of the Bar* January 24th 2006, Hart J said that there was no significant difference between the solicitors' disciplinary rules which had a statutory origin and the Bar's disciplinary regulations which did not. In his view precisely the same considerations of policy apply to the approach to be taken by a disciplinary tribunal of the Bar as were held by the Court of Appeal in *Shepherd* to apply in the case of the solicitors' disciplinary tribunal. Accordingly, as a matter of law the tribunal was entitled to refuse to hear evidence which sought to go behind the conviction unless there were exceptional circumstances. Such was the course adopted by the Privy Council in the case of *Jerayetnam v. Law Society of Singapore* [1989] 2 All ER 193.
- 3.29 Rule 34(3) of the General Medical Council (Fitness to Practise) Rules 2004 provides that production of a certified copy of a conviction shall be "*conclusive evidence*" of the offence committed, and by Rule 34(5) the only evidence which may be called by the practitioner in rebuttal of a conviction so certified is evidence for the purposes of proving that he is not the person referred to in the certificate or extract. Likewise, Rule 31(3) of the Nursing & Midwifery Fitness to Practise Rules 2004 provides that the only evidence which may be adduced by the registrant in rebuttal is evidence of proving that he or she is not the person referred to in the certificate or extract.
- 3.30 It would appear to be permissible for a regulator to serve an allegation that relies upon a criminal conviction as evidence of impairment in circumstances where the practitioner was absolutely or conditionally discharged by the Criminal Court for the offence in question. In *R v. Patel (Application under Section 58 Criminal Justice Act 2003)* [2006] EWCA Crim 2689, Hughes LJ said that whilst section 14 of the Powers of Criminal Courts (Sentencing) Act 2000 prevents the court appearance from ranking as a conviction, "*it does not enable any person to assert that they have never committed the offence or for that matter that they have never been found guilty of it. For the ability to contend that the offence has never been committed, the rehabilitated person has to look to the provisions of the Rehabilitation of Offenders Act, in particular section 4(2).*" The Rehabilitation of Offenders Act 1974 does not apply to proceedings in respect of a person's admission to, or disciplinary proceedings against, a member of any of the professions specified in Part 1 of Schedule 1 to the Order. Thus

whilst it is not open to a regulator to proceed in the case of a criminal conviction where the practitioner has been absolutely or conditionally discharged on the footing that the practitioner has been convicted (see *Simpson v. General Medical Council* (1955) *The Times*, 9th November; and *R v. Statutory Committee of Pharmaceutical Society of Great Britain ex parte Pharmaceutical Society of Great Britain* [1981] 2 All ER 805) it is nevertheless permissible to rely upon the conviction as evidence of impairment by reason of misconduct and the practitioner cannot assert that he or she has never committed the offence or for that matter was not found guilty of it. Had Parliament intended that in the case of an absolute or conditional discharge not only the conviction, but the facts underlying the conviction should be disregarded in any future disciplinary proceedings, then the Powers of Criminal Courts (Sentencing) Act 2000 would have said so.

- 3.31 It is well settled that in the case of prior civil proceedings, and where the rules of the regulator provide that findings of any court shall be prima facie evidence of the facts so found, the practitioner is entitled in disciplinary proceedings to challenge the correctness of the conclusion reached by the judge or tribunal, and is to be given a full chance of exculpation and he is entitled to the opportunity of controverting or refuting the prima facie case made from the earlier civil proceedings; see *General Medical Council v. Spackman* [1943] AC 627, per Viscount Simon LC at p635-636 and Lord Atkin at p637-638. Lord Wright at p645 said that the practitioner was entitled to a full and fair opportunity of stating his case before the council. No doubt in the absence of some explanation the regulator would be entitled to rely on the judgment as evidence of the findings of fact made against the practitioner in the earlier proceedings, and it is not required to reprove the whole case by endeavouring to get the previous witnesses or documents that were before the judge.

Interim Orders

- 3.32 In *General Medical Council v. Hiew* [2007] 1 WLR 2007, the Court of Appeal considered the criteria for the exercise by the court of its powers to extend an interim suspension order made by the Interim Orders Panel under Section 41A of the Medical Act 1983. The court held that the proper approach for an extension should be the same as for the making of the original order under Section 41A, namely, the protection of the public, the public interest or the practitioner's own interests. The court (and by implication the Interim Orders Panel when making the original order) should take into account the gravity of the allegations, the nature of the evidence, the seriousness of the risk of harm to patients, and the prejudice to the practitioner if an interim order was granted, or continued. The court on an application for an extension would wish to know why the case had not been concluded and the prejudice to the practitioner if the order were continued. The onus of satisfying the court that the criteria were met fell on the General Medical Council as the applicant for the extension. The standard of proof was on the balance of probabilities. The function of the court was to ascertain whether the allegations made against the practitioner justified the extension of the suspension rather than their truth or falsity, and that if the practitioner contended that the allegations were unfounded, he should challenge by judicial review the original order for suspension.

- 3.33 In *R (Sheikh) v. General Dental Council* [2007] EWHC 2972, the court terminated an interim suspension order made against a dentist convicted of conspiracy to defraud finding no reason on public interest grounds to oppose interim suspension where further wrongdoing was unlikely. The case was unusual in that it involved fraudulent expenses alone. Mr Sheikh posed no direct risk to the safety of the public, and there was also never any challenge at all to his own competence and diligence as a dentist. Many testimonials were put forward with regard to him. The case for making an interim order to suspend Mr Sheikh's registration was on public interest grounds alone, and the court said it was not clear from the reasons of the panel why interim suspension was called for in the particular case. Many of the points that the panel made may well have been apposite at the final hearing as to why a suspension was necessary, but not on an interim basis.
- 3.34 Examples of cases in which interim orders have been upheld by the court are *General Medical Council v. George* [2008] EWHC 1337 and *General Medical Council v. Das* [2008] EWHC
- 3.35 In *Sheikh v. Law Society* [2007] 3 All ER 183 the Court of Appeal, in allowing an appeal by the Law Society, held that a history of complaints against a solicitor was a relevant consideration in deciding the question whether the society should intervene in the solicitor's practice for the protection of the public. The solicitor, a sole practitioner, had applied for withdrawal of an intervention notice and the judge after an 8 day hearing held that there was no evidence that client money was missing and no reason to suspect the solicitor of dishonesty. The Court of Appeal in reversing the judge's decision to set aside the intervention notice said that he had erred in concluding that an established history of complaints against the solicitor should carry little or no weight. The court held that a solicitor's past history was relevant to a consideration of whether it was realistic to think that future compliance could be enforced.
- 3.36 In *R (Malik) v. Waltham Forest Primary Care Trust* [2007] 4 All ER 832 the Court of Appeal in reversing Collins J. held that the personal right of a medical practitioner to practise in the NHS by inclusion on the performer's list was not a "possession" within Article 1, First Protocol of the European Convention of Human Rights. There was accordingly no breach of Article 1 even though the primary care trust had unlawfully suspended the claimant from the performer's list.
- 3.37 In *Moody v. General Osteopathic Council* [2008] 2 All ER 532 the professional conduct committee imposed an interim suspension order under section 24(6) of the Osteopaths Act 1993 following a 4 day hearing at the end of which the committee found the Appellant guilty of professional incompetence and ordered that his name be removed from the register of Osteopaths. M appealed against the finding of professional incompetence and against the sanction imposed, and applied to lift the interim suspension order pending the substantive appeal. Wyn Williams J. held that although it was permissible to look at the merits of the substantive appeal, the court on the application to set aside the interim suspension would not be able to form a definitive view of the merits of the substantive appeal and should be slow to categorise as wrong a decision which had at its heart the protection of the public. In the instant case the court could not reach the conclusion that the substantive appeal was bound to succeed

and accordingly the application to set aside the interim suspension order would be dismissed. However, being conscious that the interim suspension order was capable of causing significant hardship to the appellant, the court, in an attempt to ameliorate that aspect of the case, directed that there should be an expeditious hearing of the substantive appeal.

- 3.38 In ***R (Wright) v. Secretary of State for Health*** [2008] 2 WLR 536 the claimant's care workers sought judicial review of the Secretary of State's decision to include them provisionally in the list of persons considered unsuitable to work with vulnerable adults maintained under section 82 of the Care Standards Act 2000. The Court of Appeal recognising that to include a care worker in such a list without the opportunity to make representations would be a breach of the workers' rights under article 6 of the Convention held that it would require the Secretary of State to give a care worker an opportunity to make representations before being included in the list, unless giving such an opportunity would expose vulnerable adults to the risk of harm.

THE NON-COMPLIANT RESPONDENT

- 4.1 Failure to deal timeously with a complaint may itself be a disciplinary offence. Thus, regulation 905(d) of the Bar's Code of Conduct states that a barrister must:
“... *respond promptly to any requirement from the Bar Council for comments or information on a complaint.*”
- 4.2 But there is nothing to compel a defendant to attend or give evidence. A defendant is entitled to require the prosecuting body to prove its case against him. It follows that a defendant's absence, or decision not to give evidence, cannot possibly go to proving anything against him let alone any disputed fact or matter. On the other hand, the result of the defendant's decision not to attend or give evidence means that there is no oral evidence from the defendant to undermine, contradict or explain the evidence put before the tribunal by the prosecuting body.
- 4.3 Prosecuting counsel in such circumstances will need to take extra care to lead the evidence fully and in a way that does not conceal any weaknesses. There can be no cutting of corners; see ***R v Jones (Anthony)*** [2002] 2 WLR 524.
- 4.4 In ***Tait v. The Royal College of Veterinary Surgeons*** [2003] the Judicial Committee of the Privy Council considered an appeal by Mr Tait, a Veterinary Surgeon, against a finding of disgraceful conduct by the Disciplinary Committee and the removal of his name from the register. Mr Tait contended that the Disciplinary Committee misdirected itself in refusing two adjournment applications on the grounds of his ill health, and deciding to proceed in his absence. The Privy Council followed ***R v Jones (Anthony)*** and considered that the Disciplinary Committee had acted correctly. The Privy Council identified as significant factors in deciding to proceed in Mr Tait's absence: the seriousness of the case against him; the risk of the Tribunal reaching a wrong conclusion about

the reasons for his absence; and the risk of a wrong conclusion on the merits as a result of his not being heard by the Committee.

- 4.5 On the other hand if the respondent is unable to be present through no fault of his or her own, an adjournment will usually have to be granted however inconvenient it may be to the tribunal and to the other parties. In *Teinaz v. London Borough of Wandsworth* [2002] EWCA Civ 1040 the Court of Appeal said that in such circumstances a litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demanded nothing less, but the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment. In *Awan v. The Law Society* [2003] EWCA Civ 1969 Lord Phillips, Master of the Rolls said that having regard to the past history in that case he considered that the Solicitors Disciplinary Tribunal was entitled to proceed on the basis that Mr Awan had failed to demonstrate that his health prevented him from attending the hearing, and his conduct had all the hallmarks of prevarication by a man who wished to avoid the hearing.
- 4.6 In an exceptional case, the tribunal may proceed in the absence of the respondent who has presented a medical certificate in support of his application for an adjournment; see *Janik v. Standards Board for England* [2007] EWHC 835. But this must be exceptional. In *Mahmood v. General Medical Council* [2007] EWHC 474, February 28th 2007, Mitting J. held that the Fitness to Practise Panel had been wrong to proceed in the absence of Dr Mahmood who had that morning been hospitalised. The case was remitted for a fresh hearing.
- 4.7 Where the respondent chooses not to attend and puts forward no defence, the hearing may proceed in his absence. In such circumstances there would be no unfairness and no violation of his or her Article 6 rights because the respondent has chosen not to exercise such rights. The panel would therefore be entitled to refuse a written application for an adjournment based on the unavailability of the doctor's solicitor and chosen counsel, and to continue in the respondent's absence; see *Vaidya v. General Medical Council* [2007] EWHC 1497. If a tribunal proceeds in the absence of the respondent, however, the prosecutor must nevertheless take care to draw the attention of the tribunal to any material favourable to the respondent. Thus in *Vaidya* the decision of the panel as to sanction was quashed because the attention of the panel was not drawn to two testimonials provided by the respondent.
- 4.8 Other recent cases of proceeding in the absence of the practitioner are *Tinsa v. General Medical Council* [2008] EWHC 1284 and *Varma v. General Medical Council* [2008] EWHC 753.
- 4.9 Rule 16 of the GMC's 2004 Rules provides for case management, and says that the case manager shall act independently of the parties and may give directions to secure the just, expeditious and effective running of proceedings before a fitness to practise panel.
- 4.10 Rule 16(8) provides that a fitness to practise panel may draw "such inferences as it considers appropriate in respect of the failure by a party to comply with directions issued by the Case Manager". However, it would be inappropriate to

invite the tribunal to draw an adverse inference from silence. The provisions contained in sections 34 and 35 of the Criminal Justice and Public Order Act 1994 have no application to disciplinary tribunal hearings.

- 4.11 If a witness refuses to attend the hearing to give evidence, and the rules make no express provision for the issue of a subpoena (cf. Section 46(11) of the Solicitors Act 1974), consideration may require to be given to issue a witness summons in aid of an inferior tribunal under CPR 34.4. In *Currie v. Chief Constable of Surrey* [1982] 1 WLR 215 McNeill J. held that a *subpoena ad testificandum* could properly be issued out of the Crown Office under the former RSC Order 38 rule 19 to compel a witness other than a police officer to attend and give evidence at a police disciplinary hearing conducted under the Police (Discipline) Regulations 1977.
- 4.12 If a witness is vulnerable, Rule 36 of the GMC's 2004 Rules provides that subject to the advice of the legal assessor, and upon hearing representations from the parties, the committee or panel may adopt such measures as it considers desirable to enable it to receive evidence from a vulnerable witness.

SOME PRACTICAL AND PROCEDURAL CONSIDERATIONS

Standard of Proof

- 5.1 In *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] 3 WLR 1 and *Re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499 the House of Lords delivered a judgment in these two cases concerning the civil standard of proof. The speeches in the two cases largely reflect the approach set out in *Re H (Minors)* [1996] AC 563 and *R (N) v. Mental Health Review Tribunal* [2006] QB 468. In particular they emphasise that there are only two standards of proof recognised by the common law, proof beyond reasonable doubt and the balance of probabilities; and that the balance of probabilities simply meant that the court or tribunal was satisfied an event had occurred if it considered that, on the evidence, the occurrence of the event was more likely than not.
- 5.2 The decisions endorsed the conventional approach that in general the more serious the allegation the more cogent will be the evidence for which the tribunal will be looking. Thus, in some contexts a court or tribunal might have to look at the facts more critically or anxiously than in others before it can be satisfied to the requisite civil standard of a balance of probabilities, but the standard itself was finite and unvarying. The speeches in these two House of Lords decisions do not endorse the principle that the more serious the consequences for a practitioner the more cogent is the evidence required. However, situations might make heightened examination of the facts necessary, such as the inherent unlikelihood of the event taking place, the seriousness of the allegations to be proved, or the seriousness of the consequences which could follow from acceptance of proof of the relevant fact. Those situations require the application of good sense and appropriately careful consideration on the part of decision-

makers, but they did not require a different standard of proof or a specially cogent standard of evidence before being satisfied of the matter which had to be established.

- 5.3 The standard of proof applies only to decisions relating to disputed facts. It does not apply to the question of whether a practitioner's fitness to practise is impaired, whether he is guilty of misconduct, decisions regarding sanction, or to the decisions of interim orders panels, as these decisions are matters of judgment or assessment, not proof of evidence. In ***Council for the Regulation of Health Care Professionals v. GMC and Biswas*** [2006] EWHC 464 (Admin), Jackson J. held that whilst the criminal (or civil) standard of proof was to be applied by a fitness to practise panel to any findings of fact, the panel should make a judgment as to whether or not those findings constitute misconduct. The judge agreed with the views of Dame Janet Smith at paragraph 21.32 in her ***Fifth Shipman Inquiry Report*** of December 2004 that it was a matter of judgment for a professional conduct committee panel, rather than a matter of proof, whether facts found proved or omitted did or did not amount to serious professional misconduct, and, if so, what sanctions should be imposed.
- 5.4 In ***Mallon v. General Medical Council*** [2007] CSIH 17, the Court of Session said that the decision in every case as to whether the misconduct is serious has to be made by the Fitness to Practise Panel in the exercise of its own skill and judgment on the facts and circumstances and in the light of the evidence (***Roynance v. GMC*** per Lord Clyde at p 330F; ***Preiss v. General Dental Council*** [2001] 1WLR 1926 per Lord Cooke of Thorndon at para 28). Misconduct that the FTP might otherwise consider to be serious may be held not to be in the special circumstances of the case (***R (Campbell) v. GMC*** [2005] 2 All ER 970 per Judge LJ at [19]).
- 5.5 In ***Cohen v. General Medical Council*** [2008] EWHC 581 the appellant consultant anaesthetist appealed against the decision of the GMC's Fitness to Practise Panel's decision to impose conditions on his registration. Silber J. in allowing the appeal held that 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 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 is impaired. It was not intended that every case of misconduct must automatically mean that the practitioner's fitness to practise is impaired. He went on to say that there must always be situations in which a Panel can properly conclude that the act of misconduct was an isolated error on the part of a medical practitioner and that the chance of it being repeated in the future was so remote that his or her fitness to practise had not been impaired.

Proving dishonesty

- 5.6 The two recent cases of ***Donkin v. Law Society*** [2007] EWHC 414 and ***Bryant v. Law Society*** [2009] 1WLR 163 have clarified the meaning of dishonesty and what needs to be proved before a disciplinary tribunal where dishonesty is alleged. The test in regulatory proceedings has been determined unequivocally to be the "two stage test" used for many years in the criminal jurisdiction set out in ***R v. Ghosh*** [1982] QB 1053 and in the civil jurisdiction in the leading case of

Twinsectra Limited v. Yardley [2002] 2 All ER 377. It contains an objective test (whether according to the ordinary standards of reasonable and honest people what was done was dishonest) and a subjective test (must the practitioner himself have realised at the time that what he was doing was by those standards dishonest).

5.7 The head note in *Bryant* [2009] 1 WLR 163 reads:

“The test for dishonesty in the context of solicitors’ disciplinary proceedings should be aligned with that in criminal proceedings where dishonesty was an ingredient of the offence, rather than with the test for civil liability for assisting in a dishonest breach of trust since, although disciplinary proceedings were not themselves criminal in character, the tribunal’s findings of dishonesty against the solicitor was likely to have extremely serious consequences for him both professionally and personally; that, therefore, the tribunal, when deciding the issue of dishonesty, should have asked itself both the objective question whether [the solicitor] had acted dishonestly by the ordinary standards of reasonable and honest people and the subjective question whether he had been aware that by those standards he was acting dishonestly”

5.8 In *Donkin v. Law Society* [2007] EWHC 414, the Divisional Court considered the extent to which evidence of a solicitor’s good character is relevant to an allegation of dishonesty in proceedings before the Solicitors’ Disciplinary Tribunal. The appellant was a solicitor with a high reputation for integrity through almost 30 years of practice. The appellant denied that he had acted dishonestly in misappropriating clients’ funds although he admitted he was guilty of conduct unbecoming a solicitor in that it was remiss of him in not ensuring that the clients in question had resort to independent advice. At the commencement of the disciplinary hearing the solicitor sought to place before the Tribunal a large number of references speaking to his professional and social reputation. The Divisional Court said that the evidence could hardly have been more positive in relation to matters of honesty and integrity, and that whilst it was true that, in some professional disciplinary cases, evidence of character was only relevant as to sanction, there were other cases where it had potential relevance at the earlier fact finding stage.

5.9 In the case of *Donkin*, the issue was dishonesty; and evidence of good character was relevant at the fact-finding stage for the purposes of credibility and propensity just as it would be in a criminal trial. As in a criminal trial, it did not afford a defence in itself and the weight to be attached to it was a matter for the tribunal. In *Donkin* the reasons stated by the tribunal did not disclose that it gave any consideration at all to the evidence of good character when considering the issue of dishonesty as a fact. The Divisional Court found that to be a significant legal error.

5.10 The court said that an example of irrelevance of good character at the fact finding stage would be a case where the alleged misconduct did not require proof of a guilty state of mind; that whilst in its judgment in *R (Campbell) v. General Medical Council* [2005] 1 WLR 348 the Court of Appeal referred to issues of culpability and mitigation as being distinct it did not suggest that material relevant

to the discrete issues was always mutually exclusive; and that the mischief which was the concern of the court in *Campbell* was the situation where personal mitigation might be misused to downgrade what would otherwise amount to serious professional misconduct to some lesser form of misconduct.

- 5.11 In *Bryant* the character references in support of Mr Bryant were equally regarded as cogent evidence of positive good character and were of direct relevance to the issue of dishonesty. The head note reads:

“..character references were cogent evidence of positive good character and of direct relevance to the issue of dishonesty, and the tribunal’s refusal to take that evidence into account when deciding the issue of dishonesty was a significant legal error.”

Filling in the gaps

- 5.12 In *R (on the application of Heath) v. Home Office Policy and Advisory Board for Forensic Pathology* [2005] EWHC 1793 (Admin) the court endorsed the remarks of the chairman of the tribunal that, by being a tribunal, it had intrinsic powers, and the obligation to observe the rules of natural justice and to conduct its proceedings fairly, and to decide procedural matters which were not expressly dealt with in the rules. A tribunal acting fairly can fill in any procedural gaps.

- 5.13 The claimant, Dr Michael Heath, a senior forensic pathologist, sought judicial review to quash the decision of the Home Office Policy and Advisory Board for Forensic Pathology to refer a complaint to a disciplinary tribunal. Newman J. held that the Home Secretary had the power to act to set up the Board, and insofar as it was alleged that there were gaps or defects within the scheme, the learned judge said that the governing principle of law in connection with such procedures is that they should be fair; that it was not a requirement that the procedures of such disciplinary tribunals be elaborate enough to cover every matter which might arise in connection with the process; and that where there were gaps they can be filled in by the relevant body having the responsibility to decide the issues, always having in mind that the process must be one which is capable of achieving justice and fairness between the parties in respect of the matters at issue.

Other proceedings

- 5.14 In *Swanney v. General Medical Council* [2008] SLT 646 the Inner House of the Court of Session rejected that Dr Swanney’s conduct which took place in Canada while he was not registered with the GMC could not be dealt with in proceedings before the GMC. The court determined that the GMC had a locus to pursue disciplinary proceedings against a medical practitioner when the conduct complained of occurred while he was not registered with the GMC, took place outside the United Kingdom and had already been subject to disciplinary proceedings in a different jurisdiction. The approach of the Inner House was to look to the main objective of a professional regulatory body in determining the question of locus, and the whole purpose of the GMC proceedings was to

protect the public in the United Kingdom. “If the contrary view were accepted 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.”

- 5.15 The problem of concurrent criminal or civil proceedings and the prosecuting body pursuing disciplinary proceedings may often arise. In ***R (on the application of Land) v. Executive Council of the Accountants’ Joint Disciplinary Scheme*** (2002) Ernst & Young sought a stay of the investigation by the Accountants’ Joint Disciplinary Scheme into their work as auditors of Equitable Life Assurance Society until after the conclusion of civil proceedings against Ernst & Young in the Commercial Court for claims of up to £2.6 billion. Ernst & Young contended that the JDS investigation gave rise to a real risk of serious prejudice to it which outweighed the public interest in the continuation of the present investigation. Stanley Burnton J rejected the application. Ernst & Young had not established that the continuation of the JDS investigation would significantly prejudice its defence of the Commercial Court proceedings, and held that concurrent proceedings were not inherently unfair. Regulatory investigations perform an important function in society and are frequently likely to operate concurrently with other proceedings, such as claims for damages. Whilst there was always a risk of inconsistent decisions on questions of fact, that was inherent in the system of parallel regulatory and court proceedings.
- 5.16 The issues arising in disciplinary proceedings will often mirror but invariably be different from issues determined in previous criminal or civil proceedings. In ***R (on the application of Redgrave) v. Commissioner of Police for the Metropolis*** [2003] 1 WLR 1136 Mr Redgrave sought judicial review of the decision of the police disciplinary board to instigate disciplinary proceedings against him. A criminal charge against Mr Redgrave of perverting the course of justice had previously been dismissed at the committal stage in the magistrates’ court. The Court of Appeal rejected Mr Redgrave’s submission that Section 104 of the Police & Criminal Evidence Act 1984, which before being repealed, stated that an officer who was convicted or acquitted on a criminal offence was not liable to be charged with a disciplinary offence which was in substance the same, encompassed a common law principle which continued to operate. The Court of Appeal stated that no aspect of the double jeopardy rule had ever applied to tribunal proceedings under common law. Discharge of a defendant in committal proceedings before the magistrates’ court was not equivalent to an acquittal in the context of the double jeopardy rule. However, even had there been a criminal acquittal, the double jeopardy rule had no application save to other courts of competent jurisdiction and there was therefore no bar to the bringing of disciplinary proceedings in respect of the same charge.
- 5.17 In ***Selvarajan v. General Medical Council*** [2008] EWHC 182 the practitioner was acquitted of a charge of conspiracy to defraud arising out of dishonest conduct which resulted in a loss to the primary care trust of some £150,000. The criminal proceedings came to an end when the practitioner was acquitted on a judicial ruling, an earlier jury having failed to agree a verdict. Blake J. observed that the absence of any common law double jeopardy rule in professional misconduct proceedings was specifically noted in ***R v. Statutory Committee of the Pharmaceutical Society of Great Britain*** [1981] 2 All ER 805 where

disciplinary proceedings had been brought in respect of conduct for which there had been an acquittal.

- 5.18 In *Thomas v. Council of the Law Society of Scotland* [2006] SLT 183 the petitioner solicitor was tried but acquitted of charges under section 14(2)(b) of the Criminal Justice (International Co-operation) Act 1990 arising out of charges of smuggling cannabis brought against his client. He was acquitted, the sheriff upholding a submission of no case to answer. The Law Society of Scotland thereafter brought a complaint before the Scottish Solicitors' Disciplinary Tribunal alleging professional misconduct, which relied on the same facts and allegations as relied on by the Crown. The solicitor took a preliminary plea of *res judicata* which was dismissed by the tribunal. The petitioner brought a petition before the Court of Session appealing that decision. The Lord Justice Clerk (Gill) in delivering the opinion of the Court dismissing the petition said that the decision of the sheriff cannot bar disciplinary proceedings before a domestic tribunal arising out of the same circumstances. At [18] he said:

“the subject matter in the two sets of proceedings is not the same. In the criminal proceedings the issue was whether the petitioner was innocent or guilty of the charges. In the present proceedings the issue is whether he is innocent or guilty of professional misconduct. These proceedings will be conducted and determined by different evidential and procedural rules.”

- 5.19 *Floe Telecom Limited v. Office of Communications* [2006] 4 All ER 688 concerned the powers of the Competition Appeal Tribunal and whether the tribunal had power when setting aside the decision of a regulator and remitting the case for reconsideration to impose a timetable on the regulator in relation to the new investigation. The Court of Appeal held that there was nothing in the relevant legislation which conferred upon the tribunal some general supervisory function in relation to the conduct by regulators of any new investigation which regulators were required to make in carrying out their statutory functions. The task of the tribunal was to determine appeals which came to it in accordance with the Competition Act 1998 and the tribunal had fulfilled that task when it set aside the earlier decision of the regulator and remitted the case for reconsideration. The tribunal could not impose time limits for the new regulation because there was no continuing appeal process in relation to which its powers were exercisable.

SANCTION AND COSTS

Sanction

- 6.1 In *Raschid v. General Medical Council, Fatnani v. General Medical Council* [2007] 1 WLR 1460 the GMC appealed to the Court of Appeal against the decision of Collins J. in the High Court allowing appeals by the doctors in respect of sanctions imposed by Fitness to Practise Panels. The Court of Appeal (Chadwick, Laws LJ and Sir Peter Gibson), in allowing the appeals, held that a principal purpose of the Fitness to Practise Panel was the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice, and that it was necessary to accord special

respect to the judgment of the panel. Laws LJ at [19] and [26] referred to the “particular force [to be] given to the need to accord special respect to the judgment of the professional decision-making body in the shape of the panel and to give special place to the judgment of the specialist tribunal.” Accordingly, the High Court, while correcting material errors of fact and law, should exercise a distinctly and firmly secondary judgment, and not embark upon an exercise in re-sentencing.

- 6.2 Thus, where a registered osteopath had pleaded guilty to the possession of indecent photographs of children, his removal from the register was the only sanction which would suffice to maintain public confidence in that profession; **R (Low) v. General Osteopathic Council** [2007] EWHC 2389. Likewise in **Gregory v. Law Society** [2007] EWHC 1724 the decision of the Solicitors’ Disciplinary Tribunal to order that no firm of Solicitors should employ or remunerate the appellant was upheld notwithstanding that there was no finding of dishonesty.
- 6.3 In **Mallon v. GMC** [2007] CSIH 17 at [29] the Court of Session said that the primary considerations on the question of penalty are the maintenance of professional standards and the public interest, which includes not only the protection of the public but also the preservation of public confidence in the medical profession. The appellant was charged before the FTP panel with serious professional misconduct. The charge was of the gravest kind. The panel dismissed much of the charge, including allegations that the appellant’s failure to take appropriate action resulted in the loss of the child’s life and that the appellant gave untruthful evidence before a Fatal Accident Inquiry. But it found proved allegations that the appellant had failed to undertake proper enquiries about the child’s recent condition, failed to carry out a proper examination of the child, failed to keep proper notes of her examination, and had acted inappropriately towards the child and her mother and that her actions were irresponsible. The Lord Justice Clerk, giving the opinion of the Court of Session, said that the findings of irresponsibility (which had been clearly identified in the charge) were amply justified, and that the panel was best placed to make that judgment since the critical findings of fact related to technical questions of the practice of medicine.
- 6.4 In **Bradley v. Jockey Club** [2005] EWCA Civ.1056, The Times, July 12th 2005, the Court of Appeal held that the decision of the Jockey Club (imposed as a professional disciplinary body) to disqualify the Claimant for 5 years for breaches of the rules of racing committed while he was a licensed jockey was not disproportionate, despite it depriving him of the right to continue to earn his living. Lord Philips of Worth Maltravers MR, in dismissing the appeal, said at [20] that professional and trade regulatory and disciplinary bodies were usually far better placed than the Court to evaluate the significance of breaches of the rules and standards of behaviour governing the profession or trade to which they relate. At [24] he added that when an individual took a professional occupation that depended critically upon the observance of certain rules, and then deliberately broke those rules, he could not be heard to contend that he had a vested right to continue to earn his living in that profession or occupation, and the professional body was entitled to decide whether the sanction was proportionate on the facts of the individual case. Likewise in the **Mallon** case

the Court of Session emphasised the experience of the committee in considering the correct penalty in a case essentially involving medical practice.

- 6.5 ***Giele v. General Medical Council*** [2005] 4 All ER 1242 is a case of wide-ranging importance on sanctions, and the starting point for any disciplinary tribunal or panel considering sentence, and the possibility of erasure or striking off. Collins J in quashing the sentence of erasure and substituting a suspension for 12 months drew attention to the *Indicative Sanctions Guidance for the Professional Conduct Committee* issued by the GMC. It cites the observation of Lord Hoffmann in ***Bijl v. GMC*** [2001] UKPC 42 that the panel's concern with public confidence in the profession should not be carried to the extent of feeling it necessary to sacrifice the career of "*an otherwise competent and useful doctor who presents no danger to the public in order to satisfy a demand for blame and punishment.*" It goes on to say that these words should be weighed against the observations of Sir Thomas Bingham MR in ***Bolton v. Law Society*** [1994] 2 All ER 486 as approved by the Privy Council in ***Gupta v. GMC*** [2001] UKPC 61. Those observations were that "*the reputation of the profession is more important than the fortune of any individual member (and) membership of a profession bringing many benefits, but that is part of the price*".
- 6.6 Collins J held that when approaching the question of sanctions the panel had to start with the least severe. It was not a question of deciding whether erasure was wrong, but whether it was right for the misconduct in question after considering any lesser sanction. Furthermore, it was wrong to ask whether there were exceptional circumstances to avoid erasure. Although the maintenance of public confidence in the profession has to outweigh the interests of the individual doctor, that confidence would be maintained by imposing such sanction as was in all the circumstances appropriate, and in considering the maintenance of confidence, the existence of a public interest in not ending the career of a competent doctor would play a part.
- 6.7 In ***Walker v. Royal College of Veterinary Surgeons***, [2008] UKPC 64 in considering Dr Walker's appeal against an order removing his name from the register following a finding of providing false certifications on two separate and similar occasions, the Board reminded itself of the approach indicated by the Privy Council in ***Ghosh v. GMC*** [2001] 1 WLR 1915. Lord Millett said there that, although the Board's jurisdiction is appellate, not supervisory, it is "*incumbent on the appellant to demonstrate some error has occurred in the proceedings before the committee or in its decision, but this is true of most appellate processes*" (para 33); that "*the Board will accord an appropriate measure of respect*" to the judgment of a professional disciplinary committee on inter-alia "*the measures necessary to maintain professional standards and provide adequate protection to the public*"; but that it "*will not defer to the committee's judgment more than is warranted by the circumstances*"; and that it is, on this basis, open to the Board "*to decide whether the sanction of erasure was appropriate or necessary in the public interest or was excessive and disproportionate*" (para 34).
- 6.8 Lord Mance in ***Walker*** said that these principles apply equally to an appeal relating to the Royal College of Veterinary Surgeons. After reminding itself of the guidance given by Sir Thomas Bingham MR in ***Bolton v. Law Society*** [1994] 1 WLR 512, Lord Mance went on to say at [13]: "*The reputation of and confidence in the integrity of the profession of veterinary surgeons is important in a manner which bears an analogy to, even if it is not precisely the same as, that described by Sir Thomas Bingham in*

Bolton v. Law Society but that is not to say that it would be correct to bracket all cases of knowingly inaccurate veterinary certification into a single group and to treat them as equivalently serious. That would not be right when considering either how far an offender needs to be deprived of the opportunity of practice in order to prevent re-offending, or what sanction is necessary to maintain or restore public confidence in the profession. Deterrence is an important consideration, but it must be deterrence in the light of the particular circumstances of the offence to which any deterrent sentence is directed.” The Board went on to criticise the committee’s reasoning and substituted an order for suspension for a period of six months in lieu of an order for removal from the register.

- 6.9 In *Salsbury v. Law Society* [2008] EWCA Civ 1285 the Court of Appeal (Sir Mark Potter P, Arden and Jackson LJ) said that the statements of principle set out by Sir Thomas Bingham MR in *Bolton v. Law Society* [1994] 1 WLR 512 remained good law subject to one qualification. In applying the *Bolton* principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under articles 6 and 8 of the European Convention for the Protection of Human Rights. It was now an overstatement to say that “a very strong case” is required before the court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal. The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. *Absent any error of law*, the High Court must pay considerable respect to the sentencing decisions of the Tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere.
- 6.10 In *Chamba v. Law Society*, 13th January 2009, the Administrative Court held that the Solicitors Disciplinary Tribunal were right to take the view that it would be only in the most exceptional case where a solicitor had been found to be dishonest in the misuse of client monies that it would not impose a striking off order. This was not a statement of legal principle, but merely an expression of a view and was no more than a reflection of previous dicta of the Court of Appeal in *Bolton v. Law Society* [1994] 1 WLR 512; *Weston v. Law Society* The Times July 15th 1998; *Bultitude v. Law Society* [2004] EWCA Civ 1853; and *Law Society v. Salsbury* [2008] EWCA Civ 1285.

Costs

- 6.11 At common law a disciplinary body has no jurisdiction to make an order for costs in favour of a defendant acquitted in disciplinary proceedings. Some tribunals provide for costs in their rules. The Council of the Inns of Court, the Solicitors’ Disciplinary Tribunal, the Society at Lloyds, and the Institute of Chartered Accountants provide for recovery of costs by their rules. A significant number of professional bodies have historically made no provision for costs against an unsuccessful prosecutor before a fitness to practise panel including the General Medical Council, the Nursing & Midwifery Council, the General Dental Council, the Architects Registration Board, the Police Disciplinary Tribunal, the Royal Pharmaceutical Society, and the Royal College of Veterinary Surgeons.

- 6.12 However, the General Optical Council and the Royal Pharmaceutical Society have recently introduced new regulations governing fitness to practise panels which make provision for costs orders.
- 6.13 In ***Baxendale-Walker v. Law Society*** [2006] 3 All ER 675 at [43] Moses LJ said that the principles applicable to an award of costs against a disciplinary body differ from those in relation to private civil litigation. This is because a regulator brings proceedings in the public interest in the exercise of a public function which it is required to perform. Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party has succeeded. In considering an award of costs against a public regulator the court should consider on the one hand the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged.
- 6.14 On 15th March 2007 the Court of Appeal upheld the judgment of Moses LJ; see ***Baxendale-Walker v. Law Society*** [2007] EWCA Civ 233, and said:
- “it is self evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the Tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings. Disciplinary proceedings supervise the proper discharge by solicitors of their professional obligations, and guard the public interest, as the judgment in **Bolton** (*Bolton v. Law Society* [1994] 1 WLR 512) makes clear, by ensuring that high professional standards are maintained, and, when necessary, vindicated. Although, as (Counsel for the Appellant) maintained, it is true that the Law Society is not obliged to bring disciplinary proceedings, if it is to perform these functions and safe-guard standards, the Tribunal is dependant on the Law Society to bring proper justified complaints of professional misconduct to its attention. Accordingly, the Law Society has an independent obligation of its own to ensure that the Tribunal is able to fulfil its statutory responsibilities. The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation – dealing with it very broadly, that properly incurred costs should follow the “event” and be paid by the unsuccessful party – would appear to have no direct application to disciplinary proceedings against a solicitor.”*
- 6.15 The Court of Appeal went on to hold that the authorities relied upon by the Divisional Court confirmed this approach. The Divisional Court in ***Baxendale-Walker v. Law Society*** said that these principles can be derived from a number of cases summarised by Jackson J in ***R (on the Application of Gorlov) v. Institute of Chartered Accountants in England and Wales*** [2001] EWHC 220 (Admin), and principles distilled by Lord Bingham of Cornhill CJ in ***Booth v. Bradford MDC*** [2000] COD 338. Specifically in the ***Baxendale-Walker*** case there was no finding that the allegation was misconceived, without foundation or born of malice or some other improper motive.

- 6.16 In contrast, in *Shrimpton v. General Council of the Bar* [2005] EWHC 2472 the original tribunal which heard the charges lacked jurisdiction and was, in the technical sense, incompetent. Accordingly the Bar Council had failed to ensure a hearing before an independent and impartial tribunal established by law in compliance with Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms, and an order for costs was made. But any award of costs must be proportionate. The Court set aside an order that a solicitor pay the Law Society's costs of £45,000 as being "*manifestly excessive*": *Merrick v. Law Society* [2007] EWHC 2997.
- 6.17 In *Davidson and Tatham v. Financial Services Authority*, Financial Services and Markets Tribunal Decision No. 040 (7th September 2006) *Baxendale-Walker* was distinguished on the grounds that the role of the FSA's Regulatory Decisions Committee is not the same as that of a prosecutor or other regulatory forum. The Regulatory Decisions Committee may issue a warning notice stating the action which it proposes to take and any proposed penalty, and later give a decision notice which is binding unless set aside. A prosecutor makes no decision which is binding on an individual and imposes no penalty but merely decides whether there is enough evidence to proceed before a fitness to practise committee.
- 6.18 In *Financial Ombudsman Service v. Heather Moor & Edgcomb Limited* [2009] 1 All ER 328 the Financial Ombudsman Service (FOS) appealed from the decision of a district judge dismissing its claim against the defendant for standard case fees in relation to 4 complaints against the defendant about endowment mortgage schemes, which in the ultimate were rejected by the FOS. Nevertheless the FOS under its rules sought recovery of standard case fees even though the complaints had been rejected. Under section 234 of the Financial Services and Markets Act 2000 the Financial Services Authority could make rules for the purpose of funding the operation of the ombudsman scheme requiring the payment to it or to the scheme operator of specified amounts by authorised persons. The scheme rules provided for the funding of the FOS from a levy towards the cost of operating its compulsory jurisdiction calculated on the basis of a firms' relevant business each year, from standard case fees and from special case fees. The Court of Appeal held that the rule requiring payment of the standard case fee was reasonable and lawful. The levy was borne alike by both exemplary firms and those which were the subject of well-founded complaints. A system in which firms paid a fee in respect of the services of the Ombudsman in investigating and deciding complaints against them was a rational response to the need to fund the scheme. Furthermore, the standard case fee was not payable if there were no more than two complaints against a firm in a year and wholly unmeritorious complaints did not generate a case fee if they were dismissed.

KENNETH HAMER
Henderson Chambers
2 Harcourt Buildings
Temple, London EC4Y 9DB

February 2009

Kenneth Hamer (1975)

Born 1945

Called Inner Temple 1975 - formerly a solicitor (admitted 1968)

Called Kings Inn, Dublin 1998

Educated at Cheltenham College and

Sidney Sussex College, Cambridge (Evan Lewis-Thomas Law Award)



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Kenneth Hamer has an extensive common law practice. He has wide experience of civil litigation at almost every level, particularly in the fields of professional negligence (including claims against architects, surveyors, valuers, accountants, solicitors and barristers); clinical negligence; personal injury involving issues of liability and quantum; and substantial common law commercial claims. He represents both claimants and defendants. He also has substantial experience of appearing as counsel before a number of professional and regulatory bodies, and also sits as a legal assessor to the disciplinary bodies regulating the medical and nursing professions. In recent years, he has frequently appeared against silks, often leading more junior counsel himself. His principal areas of practice are:

- Professional negligence
- Mediation and Arbitration
- Personal injury including multiple disaster claims
- Clinical negligence
- Contract and business law
- Public Inquiries
- Disciplinary and Regulatory work
- Insurance
- Director's liability
- Judicial review
- Company and commercial fraud

- General Chancery work

He has recently been advising householders and claimants in respect of the Buncefield disaster where fuel escaped from storage at the Buncefield Oil Storage Depot in Hertfordshire in December 2005. In 2008 he appeared in the Court of Appeal for the claimants in respect of the Corby multi-party litigation involving children born with deformities, their mothers having lived or worked close to and been exposed during pregnancy to toxic waste from the former British Steel ironworks quarry at Corby, Northants. The Court held that the claim could properly be brought in public nuisance along with claims in negligence and breach of statutory duty.

In July 2003 Kenneth Hamer was appointed by the Home Secretary to chair a review and report on the current legislative provisions in the Police Act 1996 and non-statutory guidance for appointing independent members to police authorities. The review consisted of Kenneth Hamer as Chairman together with the Chief Executive of the NHS Appointments Commission, and the Chief Executive of Devon and Cornwall Police Authority as specialist advisors. His report, "**Review of the Selection and Appointment Process of Independent Members of Police Authorities**", was presented to Parliament on 4 May 2004, and contained a range of recommendations since accepted by the Government to improve the appointments process of key posts in police authorities, highlighting the need to engage local people and the importance of police authorities continuing to develop effective links with other community groups.

Kenneth Hamer was counsel at the **Southall Rail Accident Inquiry** during 1998 - 1999 for passengers and bereaved families funded by the Health & Safety Commission and Secretary of State for the Environment Transport and the Regions. In 2000 - 2001 he appeared in both Parts 1 and 2 of the **Ladbroke Grove Rail Accident Inquiry** on behalf of passengers. At Part 2 of the Ladbroke Grove Rail Inquiry he represented 150 passengers and was lead counsel on the crucial issues of the regulatory framework for the industry, and the establishment of better safety management systems. He also advised nearly sixty victims in relation to civil claims arising out of the Watford, Southall and Ladbroke Grove rail accidents where representation included consideration of common issues for passenger safety.

He has recently advised in proceedings against the Law Society over the supervision of Solicitors. Recently he has also acted for two directors of a Danish international company in respect of directors' disqualification proceedings, a German multinational tanker company against whom allegations of defective products were made, a claimant in a solicitors' negligence claim concerning the purchase of commercial premises in Spain, and a claim against a Swiss bank for misrepresentation in the giving of a banker's reference.

In 1995, he took part with other members of chambers in an EU aid programme for Ethiopian judges and prominent lawyers involving a series of lectures and mock trials aimed at restoring the administration of justice and rule of law in Ethiopia.

For over two years his professional life was dominated by the **Barlow Clowes** affair. He acted throughout the criminal trial that lasted seven months at the Central Criminal Court and the earlier interlocutory proceedings as well as in the insolvency proceedings and various other civil actions that involved many of the same allegations

as were made in the criminal proceedings.

In 1998 he wrote Security for costs in European litigation, a publication outlining some of the rules affecting security for costs within members states of the European Union.

His appointments include:

- Recorder of the Crown Court since 2000: Assistant Recorder (1992 - 2000)
- Chairman of Home Office Review of the Selection and Appointments Process of Independent Members of Police Authorities (2003 - 2004)
- Lecturer, Holborn College of Law (1970 – 1974)
- Accredited Mediator and Fellow of the Chartered Institute of Arbitrators
- Standing Counsel to prosecute cases for the Conduct Committee of the Bar (and former member of the Disciplinary Tribunal Panel of the Council of the Inns of Court)
- Legal Assessor to the General Medical Council
- Legal Assessor to the Nursing & Midwifery Council
- Chairman of the Appeal Committee of the Chartered Institute of Management Accountants