ARDL SCOTLAND SEMINAR

IN CONVERSATION WITH KENNETH HAMER

28 September 2023

Welcoming guests to ARDL's Scotland Seminar held at The Picture House, The Scotsman Hotel, Edinburgh, Catriona Watt of Anderson Strathern introduced Rosemary Rollason to speak in conversation with Kenneth Hamer about his years of expertise in professional regulation, to look back on significant events and cases and to talk about what the future of regulation and professional conduct proceedings might hold. At the start of the seminar Catriona played a short video of Kenneth being interviewed in 2013 on the publication of the second edition of his *Professional Conduct Casebook*.[1] Amongst the questions asked and the topics discussed in conversation between Rosemary and Kenneth were the following.

Rosemary Rollason: How did it all begin? Where did modern regulation start?

Kenneth Hamer: Firstly, may I say that it is privilege and a personal pleasure for me to be here in Edinburgh this eventing. And I should like to thank Catriona and ARDL for giving me the opportunity to speak at this seminar. The Medical Act 1858 is perhaps the best place to start with the advent of modern regulation in the medical profession. The Act of 1858 brought together representatives from the Colleges of Medicine in England, Scotland and Ireland to form 'The General Council of Medical Education and Registration of the United Kingdom', the predecessor of today's General Medical Council. The list of representatives in Section 4 of the Act included persons from the Colleges of Physicians and Surgeons in Edinburgh and Glasgow, and the Universities of Edinburgh, Glasgow, Aberdeen and St Andrews, together with persons chosen from medical colleges and universities in Ireland. The critical provision so far as professional misconduct is concerned was Section 29. This provided for a medical practitioner's name being 'erased' from the register following a conviction in England or Ireland of a felony or misdemeanour, or in Scotland of any crime or offence, or after 'due inquiry' by the General Council to have been 'guilty of infamous conduct'.

The legal profession started earlier with the Statute of Westminster 1275. It introduced disciplinary control over serjeants and pleaders or those who provided 'deceit or collusion' in the King's Courts.

[1] The video is available here and can be found on the Henderson Chambers website under Kenneth Hamer's profile.

This became known as 'silencing', and was eventually abolished in England in 1948. However, I am not certain it has ever been possible to silence many barristers either in England or in Scotland!

Nowadays all professions and professionals are regulated either by statute, such as the Medical Act 1983, or the Dentists Act 1984 or, here in Scotland, for example, the Solicitors (Scotland) Act 1980; or by Royal Charter and Bye-laws, such as the Institute of Chartered Accountants in England and Wales, or the Royal Institution of Chartered Surveyors.

How did you get involved in professional regulation? And how did the book come about?

In 1993 I moved to 2 Harcourt Buildings in The Temple where Roger Henderson QC (now Roger Henderson KC) was head of chambers. Roger, who is retired from practice, was for a great number of years the leading practitioner in professional regulation. He was involved in such landmark cases as *Roylance v. GMC (2000)* and *Meadow v. GMC (2007),* and was Leading Counsel for the GMC at the *Shipman Inquiry* before Dame Janet Smith. When in practice Roger used to have four full lever arch files of useful case law and when I began as a legal assessor, initially with the NMC and later with the GMC, I would carry around files full of reported and unreported cases. The book was first published in 2013 in the hope of removing the need for such a burden, and be more comprehensive and up to date. Further editions of the book followed in 2015, 2019 and now this year 2023.

The Fourth edition of your book has recently been reviewed, where the reviewer said: *'If I were on a desert island and were permitted only one book on professional conduct, this would be it'.*[2] What would you read on a desert island?

That was very flattering. However, if I were asked to choose eight judgments to take with me to read, they would be as follows:

1. Starting with absence of the practitioner and adjournments, the modern leading case is *GMC v. Adeogba (2016).* It requires the panel to balance the interests of the practitioner against the overarching objective of the regulator.
2. Abuse of Process. The case of *Council for the Regulation of Health Care Professionals v. GMC and Saluja (2006)* starkly asks is the regulator an agent of the State? It is an important case and gives us much to consider.

[2] New Law Journal, 22 September 2023

3. Bias. In *Rasool v. General Pharmaceutical Council (2015)* Carr J, soon to be the first Lady Chief Justice of England and Wales[3], reviewed the cases on bias in professional conduct proceedings, including the important Scottish case of *Helow v. Secretary for the Home Department (2009)* involving Lady Cosgrove.
4. Concurrent proceedings and double jeopardy raise difficult and complex issues. The judgment in *T and I v. Financial Conduct Authority (2021)* dealt with ongoing proceedings in the Commercial Court and their possible outcome having a decisive influence on the regulatory proceedings. In that case the court did grant a stay. The case of *Thomas v. Council of the Law Society of Scotland (2006)* is a good example in explaining the difference in nature between criminal proceedings and disciplinary proceedings. As the Lord Justice Clerk (Gill) said: the criminal proceedings are to obtain a conviction and sentence, the domestic proceedings are to obtain a finding of misconduct and sanction under the Solicitors (Scotland) Act 1980.
5. As that was two cases, I had better move on to number 6 now!
6. Perhaps I should have something on evidence. There are many aspects of evidence in disciplinary proceedings but I think the judgment I would take with me is *Thorneycroft v. NMC (2014),* rather than *Bonhoeffer v. GMC (2011). Thorneycroft* emphasises that whilst hearsay evidence is permitted, we must remember that for a person to be deprived of their professional livelihood based on hearsay evidence, without the opportunity to cross-examine, the evidence must be clear and compelling, and fair to admit it.
7. Findings of Fact. There have been a plethora of recent cases on findings of fact but after a bumpy ride I think the judgment of Mr Justice Warby in *Dutta v. GMC (2020)* must rank as one of the outstanding cases in this field of law. In that case, the judge made the hugely important point that we should always start at the beginning of the story and with any contemporaneous documents, and remember that whatever sympathy you may have with the complainant or victim there must always be due process, and the burden of proof lies firmly on the regulator throughout.
8. Having found the facts proved against the unfortunate registrant, and that his or her fitness to practise is currently impaired, the panel has to decide on the appropriate and proportionate penalty. Here I would take with me on this desert island the case I did with Tom Kark KC in the Supreme Court, on appeal from the Extra Division of the Inner House. The

[3] Sworn in on 2 October 2023 as Dame Sue Carr, Lady Chief Justice of England and Wales

judgment of Lord Wilson JSC in *Khan v. General Pharmaceutical Council (2016)* is a model of clarity, and was followed and applied in *Bawa-Garba* in 2018.

Do you have a key case from this year?

Yes, I do. Catriona mentioned the recent freedom of speech case of the COVID conspiracy doctor that might change the course of regulatory history. That is the case of *Dr Adil v. GMC*, which raises issues under Article 10 of the ECHR and will figure as part of ARDL's Autumn webinar on 2 October. I will look forward to that.

For myself, I think that the judgment of Mr Justice Fordham earlier this year in *Sun v. General Medical Council (20 June 2023)* may have long term implications. At the heart of the case were questions of mental health and dishonesty. The judge held that the tribunal was not wrong in deciding on the sanction of erasure. The key passage in the judgment is where the judge said that Dr Sun's conduct affected by her mental health condition did not extend to any sustainable suggestion that her mental health led her to misappreciate what she was doing. Dr Sun knew what she was doing. The key point was this. Dr Sun's mental health condition did not alter the character of the 'misconduct'. The judgment is not inconsistent with the previous solicitor's case of *SRA v. James and others (2018,)* which considered the weight to be attached to mental health issues, workplace issues and work-related pressures when assessing and evaluating both conduct and sanction. This balance between work and well-being and the conduct of a practitioner also figured largely in *Bawa-Garba,* and only time will tell whether we have got the balance right.

Finally, where do you see the future of professional regulation?

This is a serious question and a good question on which to end. We have travelled a long way from Dame Janet Smith's recommendations in the Shipman Inquiry, practically all of which are now commonplace, to the joint report in 2014 of the Law Commissions of England and Wales, Scotland and Northern Ireland, which recommended a single healthcare statute to be called *The Regulation of Health and Social Care Professions etc Act,* to the Consultation Paper in 2021 of the Department of Health and Social Care entitled *Regulating healthcare professions, protecting the public.*

We know that a Health and Care Bill is expected to be presented to Parliament shortly. It is likely to include reform of the GMC's processes and deal with governance, education and training,

registration, fitness to practise and the role of associates. If enacted the Bill is expected to give a much greater role to Case Examiners. Case Examiners, employed by the regulator, will have the power to conclude cases with and sometimes without the consent of the practitioner. They will have the full range of sanctions available to them, with limited scope to challenge their decisions before a fitness to practise tribunal. There will be just two grounds of impairment for regulatory intervention, namely lack of competence and misconduct. Lack of competence is expected to include lack of knowledge of English or a health condition which affects a registrant's ability to practise safely. To classify a health condition as lack of competence seems to me wrong. 'Misconduct' is to be an all-embracing term to include any form of misconduct deemed to be serious.

A working party of ARDL submitted representations of concern to many of the Department's proposals but tonight is not the time to debate these matters. And we must wait to see what the Bill says when it is published.

However, standing back from any reforms proposed by the government of the healthcare professions, my own and very much personal concerns for the future include the following.

- Firstly, a if not *the* fundamental question is this. Should the professions themselves continue to judge professional conduct? A second question is: what role does the State play and the public have in professional regulation? These are not questions with simple answers.

- Practically all professional bodies, whether operating under statute or by Royal Charter, now have separate investigation and adjudication arms which, on the whole appears to work well. I would leave it to the professions to adjudicate on issues of conduct and competence. Not surprisingly perhaps, I am in favour of the approach of the GMC and the MPTS to largely having a legally qualified chair to oversee hearings. Lord Burnett in the Foreword to my book said that disciplinary panels and tribunals operate now much more like courts than was once the case.

- Secondly, it is important to emphasise that a legally qualified chair although a legal professional is a lay member of the panel. Previously he or she was solely a legal assessor or legal advisor and had no role in the decision-making process. It therefore made sense to have separate lay representation on the tribunal. In my experience there is much to be said for panels to sit with two professional members and a LQC as the lay member. I have

sat many times at the GMC with the panel consisting of two doctor professional members and one lay member, the LQC. The Solicitors Disciplinary Tribunal is made up of two solicitor members, one of whom chairs, and a lay member. In many cases it often helps to have two professional members on a panel, coming from different parts of the profession to give a broader view of what is acceptable and workable in the interests of patients, whose care and well-being lie at the heart of medical practice. An additional lay representative could be retained to increase the strength of the panel, and can be highly useful in some cases. I do not see a problem with an even number, and ultimately it is the quality of judging that is important which ensures public confidence, rather than the appearance or make-up of the tribunal. The Privy Council frequently sits as a tribunal of four, and the Court of Appeal will sometimes have just two judges to decide a case. And one should not overlook that the public interest is protected and represented by the Professional Standards Authority on appeal in healthcare cases, and that judicial review is available by any aggrieved person through the courts.

- Thirdly, however disciplinary hearings are run and whatever the composition of the tribunal concerned, I do seriously think that we should restrict any allegation of misconduct to what the Law Commission recommended, namely, 'disgraceful misconduct'. Misconduct generally denotes behaviour which has been undertaken deliberately or recklessly. It should be limited to cases of truly deplorable or appalling behaviour or actions on the part of a registrant or practitioner. The Law Commission placed particular emphasis in their report on deficient professional performance, or as Dame Janet called it, deficient clinical practice. They argued that it should be given greater prominence in a new legal framework, and might include a single instance of negligence, or breach of duty in failing to provide care to a sufficient standard on one or more occasions, or the breach of an undertaking agreed with a regulatory body. This is in preference to basing deficient professional performance on a sample of the practitioner's work.

- I have always felt that once you allege professional misconduct, a term which carries a stigma, and add to that an allegation of dishonesty, you immediately raise the stakes. Undoubtedly, there are some cases where the facts are such that nothing short of a finding of misconduct and dishonesty and the most severe sanction are called for. The approach of the Bar Standards Board is to have a five-person panel (three professional and two lay members) in more serious cases where an order of disbarment may arise,

leaving cases of less serious misconduct and a lesser sanction to be heard by a three-person panel (two professional and one lay member). And going back to what I said earlier, matters relating to health issues alone are dealt at the bar with by an entirely separate process, interesting called 'Fitness to Practise'.

- Finally, why not impose a financial penalty on any professional found guilty of misconduct? I am not thinking here of an order for costs, which can be made in GMC cases, but the sanction of a fine. Fines against practitioners found guilty of misbehaviour are an everyday occurrence in the accountancy and legal professional worlds and in other regulatory proceedings such as cases involving surveyors. The amount of any financial penalty must be fair and proportionate and within the means of the professional concerned. The General Optical Council I believe is the only healthcare regulator that provides for the imposition of a financial penalty, but it is rarely used. Going back to the Medical Act 1858, section 38 provided for punishment by fine against any registrar guilty of falsification. So perhaps the idea of imposing by way of penalty a fine on a healthcare professional is not such a novel one.

As I say, those are some thoughts and my own personal views and not those of ARDL or any regulator.

I could go on, but perhaps now it is time to hear comments from the audience and their questions. Thank you.