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IMPAIRMENT OF FITNESS TO PRACTISE - IS THE CONCEPT UNDERMINING PUBLIC CONFIDENCE IN PROFESSIONAL REGULATION?

'A bungling doctor who failed to spot a dying baby's plummeting heart rate is set to practise again.'

The General Medical Council found Ewa Stasiowska's actions amounted to serious misconduct but her ability to work as a doctor is not impaired...Had she acted quickly at Kings College Hospital in Camberwell, south London, the stillborn girl would have been saved.'

'Mrs Rooke, from Southwark, said she could 'not believe' Dr Stasiowska would be delivering more babies.' Daily Mail/Metro 13 December 2010.

For those who are involved in preparing and presenting cases before regulators whose rules adopt the concept of impairment of fitness to practise, the above situation is not an uncommon one. Many complainants find it difficult to understand why a disciplinary tribunal can

find that a registrant has committed serious professional misconduct, misconduct which may potentially have caused considerable suffering to the complainant or their relatives, and yet no sanction is handed down. Is the concept of impairment of fitness to practise truly in line with the purported objectives of professional regulation? Or is it a concept which is in fact benefiting the contrite practitioner at the expense of the reputation of not only the profession, but the whole concept of self-led regulation?

For the purposes of this short article, the focus will remain on cases of misconduct.

There are essentially two disciplinary models adopted by professional regulators in the UK. The first might be described as the 'guilt-based' model. This model is adopted by regulators such as the General Teaching Council, the General Osteopathic Council and the General Social Care Council. The second is the 'fitness to practise' model which incorporates the concept of impairment, a concept lacking in the guilt-based model. This model is adopted by regulators such as the General Medical Council, the General Dental Council, the Healthcare Professions Council and the General Optical Council.

In the former model there are three stages the Conduct Committee/Panel must navigate. First, it must determine which if any of the charges in the allegation laid by the regulator are proved. Second, it must consider whether the facts proved amount to misconduct. There are a variety of different permutations used by regulators to define misconduct but it is fair to say that they are broadly similar in effect. Finally, should it find the facts to amount to misconduct then it will consider what sanction, if any, to impose.

In the fitness to practise model there is a fourth stage between a finding of misconduct and the imposition of a sanction, which is a finding of impairment of fitness to practise. Whether there is an actual break between the various stages in the two models for judgment to be given and further submissions received is a practice which varies from regulator to regulator, but nevertheless they are the stages which Committees/Panels must in some way, shape or form traverse in their deliberations. It is, however, the

impairment stage which gives a very different emphasis to the proceedings as between the two models.

The concept of impairment of fitness to practise is not a new one; indeed by way of example it was incorporated into the Medical Act 1983 and the Dentists Act 1984. However, notwithstanding that, the general starting point which has been adopted by the courts for the examination of the meaning of the concept of impairment is Dame Janet Smith's Fifth Shipman Report. Dame Janet, whilst recognising the convenience of its very wide ambit, is critical of the ambiguous nature of the concept:

'So, although I can well understand why the GMC has adopted the all-embracing concept of 'impairment of fitness to practise', and although I recognise its major advantage, it does have disadvantages. It is not easy to define; it means different things in different circumstances and, in some circumstances, it is almost without meaning.'¹

Regulators have generally sought to deal with this problem by designing policies and documents to assist Committees/Panels (generally contained for use now in a document invariably called 'Indicative Sanctions Guidance'). However, it has been the courts which have progressively set the limits of the application of the concept and as a result the limits they have imposed have inevitably had to be reproduced in the guidance issued by the regulators.

The courts have accepted that the question of whether fitness to practise is impaired must always be a prospective one, albeit informed by the previous misconduct which has been found, among other factors.² Their approach to cases where the allegations relate primarily or wholly to clinical failings is such that if a practitioner can demonstrate that whilst their actions amounted to misconduct it was nevertheless a one-off incident, that the deficiencies are remediable and indeed have been remedied and that therefore the misconduct is highly unlikely to occur again they should be able to avoid a finding of impairment.³

The courts have, however, been less willing to overturn findings of impairment in respect of misconduct which is not purely clinical. Cases of dishonesty or a serious criminal conviction not only invariably result in a

¹ The Shipman Inquiry, Fifth Report, paragraph 25.46

² *GMC v Meadow and Attorney General* [2006] EWCA Civ 1390 at para 32

³ *Cohen v GMC* [2008] EWHC 581 (Admin) and the subsequent authorities of *Zygmunt v GMC* [2008] EWHC 2643 (Admin), *Azzam v GMC* [2008] EWHC 2711 (Admin) and *Cheatle v GMC* [2009] EWHC 645 (Admin) have fully cemented this principle into the approach to be adopted when considering whether fitness to practise is impaired.

finding of impairment but the imposition of a serious sanction.⁴ Similarly, transgressing the boundaries of sexual propriety with a patient will invariably lead to a finding of impairment.⁵

It is well established that the purpose of sanctions is not to punish the practitioner for his misconduct but to protect the public, uphold the standards of the profession and to maintain the reputation of the profession.⁶ This is also so of a professional body's disciplinary process as a whole. Why, therefore, is there ever a need for an impairment stage at all? Save that it is possible to advance matters of personal mitigation at the sanction stage, since *Cohen* it has been settled law that a practitioner's conduct both before and after the actions which amounted to misconduct are admissible at the impairment stage and thus the distinction between the considerations which the Committee/Panel must have in mind at each stage are becoming progressively harder to distinguish.

In reality, therefore, it is the fact that for all regulators their disciplinary processes are geared towards the Committees/Panels considering what action, if any, to take on a registrant's registration with a prospective mindset that gives rise to the potential for public confidence in the regulatory process being undermined. Lapse of time of itself, if used productively by a respondent, can significantly reduce the possibility of a finding of impairment or the severity of any sanction imposed. Indeed Dame Janet was alive to this possibility and critical of it whilst writing the fifth report.⁷

It may legitimately be argued that there is presently an unsatisfactory tension between the settled purpose of

⁴ See, for example, *Bolton v Law Society* [1994] 1 WLR 512, *Parkinson v NMC* [2010] EWHC 1898 (Admin.), *Butt v SRA* [2010] EWHC 1381 (Admin), *Fleischmann (CHRE) v GDC* [2005] EWHC 87 (Admin), *Chandrasekera v NMC* [2009] EWHC 144 (Admin)

⁵ See, for example, *Giele v GMC* [2005] EWHC 2143 (Admin), *Yeong v GMC* [2009] EWHC 1923 (Admin). It is of particular note that in *Yeong Sales J* commented at paragraph 48 that 'Where an FTTP considers that the case is one where the misconduct consists of violating such a fundamental rule of the professional relationship between medical practitioner and patient and thereby undermining public confidence in the profession...the efforts made by the medical practitioner in question to address his behaviour for the future may carry very much less weight than in a case where the misconduct consists of clinical errors or incompetence.'

⁶ *Bolton v Law Society* (supra) at 517-519; *Gupta v GMC* [2002] 1 WLR 1681 at 1702

⁷ The Shipman Inquiry, Fifth Report, paragraph 25.48: '...It would be most unsatisfactory if a doctor was able, by delaying the hearing of a case, to reduce the risk of a finding that his/her fitness to practise was impaired.'

disciplinary regulation and the general ambit of conduct which will amount to misconduct. It is understandably hard for many members of the public to see how misconduct in particular, which it has long been established must be 'serious', cannot be said to of its very nature undermine the reputation of the profession, whenever it occurred, and that that should be recognised by a sanction of some description. It would be a regressive step to make factors which have generally been held to be relevant at the impairment stage relevant at the misconduct stage as it would result in a failure for there to be at the very least a recognition that the actions of the registrant were unacceptable. Equally, it would be a very dramatic step indeed for regulators to take the view that the future of professional regulation lies in a system which is far more akin to one designed to punish those found guilty of misconduct rather than the present, more holistic approach.

In conclusion, the core of the issue lies not in the concept of impairment per se, but rather the nature of the factors which Committees/Panels are bound to take into account when considering whether misconduct also warrants sanction. How the courts will view the principles set out in the Cohen line of authorities in future is key to this. If, particularly in clinical cases, significant weight at the impairment and/or sanction stage will continue to be attached to factors such as whether the incident was a one-off and whether deficiencies in a practitioner's abilities have been remedied, then the risk of reactions from complainants and other members of the public like the one quoted above will remain. It will remain to be seen if the courts will ever start to feel that the balance they have struck over the past few years is out of kilter with the public's expectations of the sort of action it expects to see regulators taking, such that it can have confidence that the concepts of fitness to practise and self-led regulation are sound ones.

Guy Micklewright,
Blake Lapthorne

**NOTE OF SEMINAR -
THE INTENSITY OF JUDICIAL SCRUTINY IN
DISCIPLINARY APPEALS**

On 6 December 2010 ARDL was delighted to welcome Mr Justice Blake to the first Manchester based seminar.

Around 50 ARDL members attended the event at Field Fisher Waterhouse's offices and, as usual, the seminar audience was a mix of solicitors and barristers, some in house and some in private practice. Most were local to the North of England but the event also attracted a

number of ARDL members who were in the region on business.

Mr Justice Blake had chosen the seminar topic of 'The intensity of judicial scrutiny in disciplinary appeals' and provided an extremely interesting perspective on the subject. His exposition of how statutory disciplinary appeals to the Administrative Court can and do differ from judicial review and from the previous approach of the Privy Council, and the consequences for 'intense scrutiny' was based on four of his own decisions. The audience was very engaged by such a relevant and challenging topic and there were questions and discussion following the talk.

Mr Justice Blake's four cases were *Selvarajan v General Medical Council [2008] EWHC 182 (Admin)*; *Abrahaem v General Medical Council [2008] EWHC 183 (Admin)*; *Chandrasekera v Nursing and Midwifery Council [2008] EWHC 3528 (Admin)* and *Southall v General Medical Council [2009] EWHC 1155 (Admin)*. For the benefit of his audience he recounted some of the factual background to each of these cases and the issues that each case raised for the Court.

In *Selvarajan* the sanction of erasure had been imposed in 2006 by the Fitness to Practise Panel of the GMC in relation to dishonest conduct which occurred in 1994-1996. The appeal against sanction was on the basis that the Panel misdirected itself on the relevance of the passage of time between the conduct admitted and the sanction imposed to the mitigation that he sought to advance. In this complex case Mr Justice Blake had had to wrestle with the issue as to how and whether delay and the passage of time should be relevant to the sanction concluding 'I recognise the distinction in purpose between criminal and disciplinary mitigation but see no reason in logic, policy or common sense why any delay since the conduct was committed or notified to those in authority let alone unreasonable delay in prosecuting charges, should not be capable of mitigating the penalty. This is not to say that it is mandatory that it must do so in every case, or that it necessarily means that a lesser penalty than erasure was appropriate in the present one. Indeed, if delay causing a breach of Article 6 were indeed irrelevant to penalty in disciplinary proceedings, the consequence should be that many more proceedings where there has been delay should be stayed as a breach of the fair trial rights, because disciplinary proceedings would have less capacity to remedy delay by an adjustment of penalty in appropriate cases. This result would be far more contrary to the public interest and the vindication of the reputation of the profession by disciplinary sanction, than reducing the penalty of erasure to one of suspension, or suspension to one of conditional registration.' This was his first example of having to

scrutinise the detail of the case in more detail than a judicial review might have demanded.

Mr Justice Blake referred to the case of *Meadow v General Medical Council [2006] EWCA Civ 1390* and noted how the Court of Appeal had made clear that CPR Part 52 PD52 para.52(2) provided for appeals to the High Court from the panel under the Medical Act 1983 s.40 to be by way of rehearing and that the material test for quashing a decision of the panel was whether it was 'wrong'. He asked us to consider whether the dropping of the previous reference to 'plainly wrong' further intensified the scrutiny that the court should undertake of the Panel's original decision.

When discussing the case of *Abrahaem* Mr Justice Blake demonstrated the scrutiny he had applied in that case and the balance between the court imposing a new sanction and recognising and deferring to the expertise of Fitness to Practise panels. In that case he decided that some of the conditions imposed went beyond those needed to address the impairments that were found to be missing. The case was referred back to the GMC Panel for further consideration of appropriate conditions.

In *Chandrasekera* Mr Justice Blake granted an application to allow a nurse to adduce fresh evidence in her appeal against sanction. Whilst making clear it was not a *de novo* hearing, the court, in the exceptional circumstances of the case, could allow a departure from the normal course. The nurse was allowed to admit medical reports to address one of the reasons given by the panel which was 'emotional volatility' which had been raised without any medical evidence.

Finally Mr Justice Blake outlined the complex case of *Southall* and the 'intense scrutiny' he had given to the evidence in that case. This had included a very detailed and anxious consideration of the transcripts and evidence to enable him to consider for himself whether the Panel had been entitled to reach the conclusions it had reached in relation to some of the evidence. Whilst his judgment has since been overturned by the Court of Appeal, Mr Justice Blake sought to demonstrate, by reference to this and the other cases detailed, the scrutiny that he considers is required by the appellants court in such regulatory cases.

The lecture provoked much discussion including debate as to who might be best placed to judge 'the public interest' and what was the best allocation of resources between the High Court scrutinising in sufficient detail to reach a judgment, and certain matters being remitted to a Panel. The audience was left with a far better appreciation of the intense judicial scrutiny that Mr Justice Blake advocates is now called for in appeal cases and how far the position may have changed since

the Privy Council was asked to consider many of these cases.

The event was a great success and ARDL plans to hold an event in Manchester or the North of England as an annual event. Our sincere thanks go to Mr Justice Blake for speaking at the first Manchester seminar.

Sarah Ellson,
 Field Fisher Waterhouse

GEORGE MARTIN MARRIOTT OBITUARY



George Marriott died suddenly on 12 November 2010 at the tragically early age of 58. He was one of the foremost regulatory lawyers of his generation and his loss will leave a yawning gap amongst the relatively small band of lawyers specialising in the regulation of solicitors, undertaking matters for both the regulator and the regulated community alike.

He was a member of the panel of solicitors maintained by the Solicitors Regulation Authority for regulatory and disciplinary work, and was one of the most respected of that group, as a sound lawyer, first class advocate and a scrupulously fair and balanced prosecutor. His skills enabled many solicitors to have an equally able, forceful and sympathetic champion, as well as advice of the highest order.

George Marriott was educated at King's School, Macclesfield and the University of Hull, graduating in 1973.

After a brief flirtation with accountancy he was called to the Bar by Middle Temple in 1975. He practised for six years as a barrister in Manchester before becoming a solicitor in 1981, joining the firm which later became Gorvins; he became a partner almost immediately and was senior partner from 2001 until he left the firm to join Russell Jones & Walker in February 2010 as an

equity partner and Head of Professional Discipline and Regulation.

He was appointed a recorder in 1997, initially to the Northern Circuit, but latterly sat predominantly at Southwark Crown Court, and also at Middlesex Guildhall before the building was redeveloped as the Supreme Court.

He was a chairman of the Immigration Services Tribunal and had recently been appointed its senior judge or 'Judicial Head'.

In recent years in his practice as a solicitor he specialised exclusively in solicitors' professional regulatory and disciplinary matters, both for the prosecution and defence.

He began acting for what was then the Office for the Supervision of Solicitors in 1998 and continued to act for its successors, appearing on a very regular basis in the Solicitors Disciplinary Tribunal, in the Queen's Bench Divisional Court and before the Master of the Rolls (having obtained higher rights of audience in all courts in 1997). He also appeared in the High Court on judicial reviews of interlocutory decisions of the Tribunal. He appeared for the SRA in the Court of Appeal (with his fellow panel member Geoffrey Williams QC) in *Law Society v Salsbury* [2008] EWCA Civ 1285, the current leading authority on appeals from the Tribunal.

As a member of the Solicitors Assistance Scheme he drew upon his great experience in providing advice on professional negligence, partnership issues, employment law and general matters of dispute resolution, as well as advising and assisting solicitors in their dealings with the SRA, and giving advice on increasingly complex issues of compliance.

Away from work, his loves included skiing, jazz (he was a longstanding member of Ronnie Scott's), France and all things French, hiking and running. In 2009 he climbed Kilimanjaro for charity; he competed in marathons and triathlons and this year was due to run the London Marathon in aid of the charity 'Tusk' (to which any donations in his memory are encouraged). He was also a notable bon viveur, very knowledgeable on fine wines and cuisine, and a joy to be with socially.

It is of some small solace that he died very suddenly, with no warning or prior distress, of natural causes while doing what he loved most, on holiday hiking in Nepal with friends.

He will be sorely missed by all who knew him, as a good friend and as a greatly admired and respected colleague.

Andrew Hopper QC

LEGAL UPDATE

- *Khan v General Teaching Council for England* [2010] EWHC 3404 (Admin)

The Administrative Court (Ouseley J) dismissed the appellant's appeal against the decision of the respondent council's professional conduct committee not to adjourn a hearing into her conduct, finding that, on the facts of the instant case, the committee had not erred in refusing to grant an adjournment. The appellant allegedly used racially and inappropriate language whilst teaching at a school. The appellant's request for an adjournment of the hearing before the respondent's professional conduct committee was refused and the hearing went ahead in her absence. A prohibition order for two years was imposed. The essence of the appellant's case was that the adjournment she sought should have been granted, and that the hearing was unfair because it relied upon the transcribed words of the students concerned whilst she did not see the original statements, nor did the professional conduct committee or the General Teaching Council.

As to the adjournment, Ouseley J said that it was necessary for the appellant to show that the refusal of an adjournment was outside the proper exercise by the PCC of its discretion, that it erred in principle, was based on irrelevant considerations or ignored relevant ones, or was a thoroughly unreasonable or unfair decision. The learned judge held that the committee was right to proceed with the hearing in the absence of the appellant, and even if there was a proper case for an adjournment, the committee did not reach a decision which could in any way be described as wrong in principle or erroneous in the exercise of its discretion. In reality, there simply was no justification for an adjournment. On the merits of the appeal, it was for the appellant to show that the decision on the facts by the professional conduct committee was wrong. If the transcripts were accurate, and there was no reason the committee had to doubt that, especially as the committee knew that the appellant's representatives had had the opportunity to check the accuracy of the statements, sight of the original statements would not reveal whether there had been collusion or not, nor would it reveal whether there had been manipulation or not. That could only be addressed by examining the circumstances in which the statements came to be taken, the period of time between the allegations being made and the statements being taken, and the nature and contents of the statements themselves. The learned judge held that both bases of appeal, namely, wrongful refusal of an adjournment and a wrong decision on the facts, were not made out at all.

- ***Chauhan v General Medical Council [2010] EWHC 2093 (Admin)***

The Administrative Court (King J) allowed the appellant consultant's appeal against findings of dishonesty and impairment on the basis of the GMC's fitness to practise panel's failure to confine itself to the proper ambit of the disciplinary charges and for importing into its conclusions prejudicial factual matters which had not been stated in the notice of hearing. The appellant had applied for the post of consultant in trauma and orthopaedic surgery at an NHS trust. He faced charges of dishonesty in relation to his experience in revision surgery and hip resurfacings and his experience to undertake a technique known as the Birmingham Hip Resurfacing. King J said that insofar as the panel at stage one of its decision process made material findings of fact adverse to the practitioner which could themselves have been the subject of a charge of professional misconduct, but which was not within the charges as formulated, then those findings could not properly or fairly be used by the panel to support its findings and insofar as the panel so used them, then the charges as formulated and found were liable to be vitiated and set aside. In *Cohen v GMC [2008] EWHC 581 (Admin)*, Silber J at para 48 said that findings in relation to any particular charge at stage one 'must be focused solely on the heads of the charge themselves'. King J said there were examples of the panel unfairly introducing into their considerations, in determining whether dishonesty had been established, evidence directed at behaviour that was not the subject matter of any charge. The learned judge rejected a submission by the respondent that it was entitled to introduce such evidence even if strictly outside the ambit of the charges as propensity evidence ie of the appellant's propensity to dishonestly exaggerate the true extent of his medical experience, or that it should have been clear to the appellant during the course of the hearing that the respondent was inviting the panel to make findings wider than those strictly related to his experience.

- ***R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales [2011] 2 WLR 103 SC***

The Supreme Court held that the doctrine of cause of action estoppel applied to successive complaints before a professional disciplinary body; that disciplinary proceedings were civil in nature and, therefore, the principles of res judicata applied and there was no reason why cause of action estoppel should not apply to successive sets of proceedings before the institute's disciplinary committee.

The Supreme Court so held in allowing an appeal by the claimant, Piers Coke-Wallis, a chartered accountant, against the Court of Appeal which had upheld the dismissal of his application for judicial view of the decision by the disciplinary committee of the institute to refuse to dismiss a second complaint based on the same facts of a first complaint that had been dismissed on the merits. The first complaint had been dismissed by a disciplinary committee of the institute in April 2005 on the basis that the claimant's conviction in Jersey of an offence under the Financial Services (Jersey) Law 1998 did not correspond to one which was indictable in England and Wales. The institute then preferred a second complaint in March 2006 based on the facts that gave rise to the original conviction. The Supreme Court held that what had been called 'the conviction complaint' and the 'the conduct complaint' were not accurate descriptions. The dismissal of the first complaint against the claimant was a final decision on the merits and, in all the circumstances, all the constituent elements of cause of action estoppel were established. Since the first and second complaints relied upon the same conduct, once the first complaint was dismissed, it was contrary to the principles of res judicata to allow the institute to proceed with the second complaint.

- ***Brennan v Health Professions Council [2011] EWHC 41 (Admin)***

In this case the appellant, a physiotherapist, appealed against the decision of the Competence and Conduct Committee of the Health Professions Council that he should be struck off its register. He did not appeal against the findings of misconduct, nor against the conclusion that what he did impaired his fitness to practise. The appellant was the head physiotherapist at Harlequins RFC, and appeared before the respondent following a disciplinary investigation instigated by the European Rugby Cup into a fake blood injury and cheating during a rugby match. The appellant admitted that he had participated in the fabrication of the blood injury and gave false evidence at the initial investigation. The appeal committee of the ERC had banned the appellant from participating in all rugby activities for two years.

The Administrative Court (Ouseley J), in quashing the decision of the respondent's competence and conduct committee on sanction, found that the committee's decision to strike off the appellant had been legally inadequate, had failed to deal with the issues raised by the appellant and had not dealt adequately with the reasons to strike him off rather than impose an alternative sanction. The instant case was not one of public safety, the appellant was an excellent physiotherapist, and the dishonesty was not towards a

patient. Ouseley J said that where the purpose of sanction is to deal with issues other than the primary one of maintaining public safety, and is instead to provide deterrence to others, to maintain confidence in the profession's reputation and standards and in its regulatory process, the reasoning is particularly important in showing that the sanction is proportionate to the misconduct and for the individual. In the instant case, the committee has not dealt adequately with the case for Mr Brennan as to why he should not be struck off. Its reasoning did not enable the informed reader to know what view the committee took of the important planks in his case. Whilst the committee went through the various sanctions, noting the comments in the respondent's Indicative Sanctions Policy about them, and the general language of the various sanctions put this case in the area in which strike off had to be considered, the factors which the submissions for the appellant addressed were also very relevant to those sanctions and to how far up the scale he should now be seen. The sanctions cannot be properly addressed without consideration of the factors to which Mr Brennan's evidence was addressed. The court quashed the decision and remitted it to the committee with a direction that it reach a reasoned decision on sanction which addressed the issues to which the judgment referred.

- ***Shah v General Pharmaceutical Council (formerly Royal Pharmaceutical Society of Great Britain) [2011] EWHC 73 (Admin)***

In this case, the Administrative Court (Wyn Williams J) dismissed the appellant's appeal against the decision to direct the respondent's registrar to remove his name from the register. The appellant was the superintendent pharmacist at a pharmacy known as Shah Pharmacy located in Enfield. As a consequence of dispensing errors a complaint was made to the respondent. A visit to the pharmacy by inspectors employed by the respondent revealed further matters of concern about practices in the pharmacy which included the supply and storage of out-of-date medicines. The appellant admitted most of the facts alleged against him. He also admitted that many of his actions had placed him in breach of Key Responsibilities 1 and 3 which provide that pharmacists should act in the interest of patients and seek to provide the best possible health care for the community, and that pharmacists should not bring the profession into disrepute or undermine public confidence in the profession.

By his grounds of appeal the appellant alleged that the statutory committee had failed to have regard to the fact that in previous decisions of the committee there was 'a consistent body of jurisprudence' showing that the reputation of the profession could be vindicated by

decisions to reprimand practitioners for similar offences to those facing the appellant. The appellant relied upon earlier decisions of the statutory committee reported in the Pharmaceutical Journal. Wyn Williams J said there was nothing within the reports of the cases relied upon by the appellant which suggested that they formed part of a coherent body of consistent jurisprudence. There was no suggestion in any of the cases that later cases relied upon the earlier ones, and there was no suggestion in the reports that the sanction of reprimand was imposed because that was some kind of norm in the circumstances revealed in the cases in question.

The learned judge was not persuaded that the earlier cases were anything more than individual decisions essentially related to their own facts, and it seemed to him to be clear that the statutory committee was wholly justified in concluding that the significance of the previous decisions was limited in determining the appropriate sanction in the present case.

- ***Quinn Direct Insurance Limited v Law Society [2011] 1 WLR 308 CA***

The Court of Appeal (Sir Andrew Morritt C, Rimer and Jackson LJJ) held that there was no provision or term to be implied into the statutory scheme for the regulation of solicitors, constituted by the Solicitors Act 1974, subordinate legislation and agreements made thereunder, entitling or obliging the Law Society to produce to a qualifying insurer documents emanating from a firm of solicitors into which it had intervened which were subject to the privilege of a client of the firm. Accordingly, the claimant, an insurer who had issued professional indemnity insurance to a firm of solicitors prior to its intervention, and who had entered into the Qualifying Insurer's Agreement with the Law Society, was not entitled to production of documents, nor was the Law Society obliged to comply with any request in respect of the firm's client's confidential and privileged documents or information.

Following intervention by the Law Society into the firm of S B Solicitors on the grounds of suspected dishonesty on the part of one partner and failure to comply with the Solicitors' Accounts Rules by another partner, the claimant, Quinn Direct Insurance Limited, issued proceedings against the Law Society seeking an order to permit the claimant, as the professional indemnity insurer for the firm, to inspect and take copies of documents for the purposes of considering whether the claimant was obliged to indemnify a partner of the firm, I. A number of claims were made by former clients of the firm and notified to the claimant, who refused to indemnify the first partner on the grounds of his fraud, and was concerned to know

whether it was entitled to decline to indemnify partner I. The claimant's solicitors wrote to the intervention agent requesting access to any files which he might have in respect of a number of specific property transactions. The intervention agent refused on the grounds that the information was confidential, although the Law Society allowed the claimant access to the files relating to transactions where the client had made a claim against the firm which had been notified to the claimant, on the basis that the making of the claim constituted a waiver of client confidentiality and privilege.

The Court of Appeal refused the claimant's application for an order requiring the Law Society to permit it to inspect and take copies of all documents of the firm within the Law Society's power and control on grounds that the privilege of the client was a fundamental human right. If the client consents or his privilege is impliedly waived by a claim against the solicitor the Law Society may produce such documents to the qualifying insurer.

- ***Vaidya v General Medical Council [2010] EWHC 2873***

In this case, the Queen's Bench Division dismissed Dr Vaidya's application to set aside a general civil restraint order made against him. In her judgment Mrs Justice Nicola Davies DBE referred to the background of Dr Vaidya's numerous claims against the General Medical Council and others. In summary, since 2007 Dr Vaidya had issued proceedings in the Queen's Bench Division and the Administrative Court, in county courts and the Employment Tribunal against the GMC, named individuals who had been involved in the GMC disciplinary process against him, NHS Trusts, named doctors employed by those Trusts, the Crown Prosecution Service and Her Majesty's Court Service. The causes of action were many and varied. They included complaints of racial and sexual discrimination and harassment, harassment contrary to the Protection from Harassment Act 1997, breaches of Articles 3 and 6 of the ECHR, claims for professional negligence, libel, malicious falsehood, negligent misstatement, conspiracy to injure and claims pursuant to the Data Protection Act. Damages claimed in some proceedings exceeded £1 million, and it was of note that such damages were claimed in actions against individually named doctors.

The learned judge stated that she was satisfied that Dr Vaidya persists in issuing claims and applications which have been found to be totally without merit. It was clear that he had been warned by judges of the consequences of repeatedly issuing proceedings, but had demonstrated he was not deterred by the threat of

an extended civil restraint order. In her judgment, the learned judge said that, based upon the evidence and given the history of the matter and the continuing conduct of Dr Vaidya, she did not believe that an extended civil restraint order would provide adequate protection to prospective defendants, and that a general civil restraint order was not only justified but was necessary.

- ***R (on the application of Perinpanathan) v City of Westminster Magistrates' Court [2010] 4 All ER 680***

The Court of Appeal (Lord Neuberger of Abbotsbury MR, Maurice Kay and Stanley Burnton LJ) considered the principles applicable to the exercise of magistrates' discretion to award costs following the dismissal of proceedings instituted by the police.

The court held that where regulatory or disciplinary bodies, or the police, carrying out regulatory functions, acted reasonably in opposing the grant of relief or in pursuing a claim it was appropriate that there should not be a presumption that they should pay the other party's costs. In the instant case it was common ground that the police had reasonable grounds to seize and retain the cash, and that when they had commenced the forfeiture proceedings they had reasonable grounds to believe and did believe that the cash was intended for use in unlawful conduct. They should not have been deterred from making the application for forfeiture by concerns as to their liability for the claimant's costs. There was no suggestion that the police had acted unreasonably or irresponsibly once the proceedings had begun; the appellant had succeeded because of the evidence she had called at the hearing of the complaint. There was no suggestion that she had suffered undue financial prejudice. Viewed against the legislative framework of the Proceeds of Crime Act 2002 the magistrates' refusal to order the police to pay the claimant's costs had been justified.

The court considered *Baxendale-Walker v Law Society [2007] 1 WLR 426 CA* in relation to disciplinary proceedings and said that the decision in *Walker v The Royal College of Veterinary Surgeons [2007] UKPC 64*, where the Privy Council awarded costs against the disciplinary body was concerned with the costs of a successful appeal, when different considerations may apply to those applicable at first instance. The Judicial Committee did not question the principle applied in *Baxendale-Walker v Law Society* to decisions at first instance.

Kenneth Hamer
Henderson Chambers

FORTHCOMING EVENTS UPDATE

23 March 2011

CLT and PNLA Conference on Professional Negligence and Liability - London.

24 March 2011

Whitehall and Industry Group Conference on Operating in the New Regulatory Enforcement Regime - assessing the impact of the Regulatory Enforcement and Sanctions Act 2008 and the Tribunals Courts and Enforcement Act 2008, Old Hall, Lincoln's Inn, London.

Go to WIG website or email workshops@wig.co.uk for details/to apply to attend.

19 May 2011

ARDL Annual Dinner, Savoy Hotel, London – sold out, waiting list only.

REQUEST FOR COMMENTS AND CONTRIBUTORS

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact any of the members of the editorial committee with your suggestions. The editorial committee is:

Nicole Curtis Penningtons Solicitors LLP
(nicole.curtis@penningtons.co.uk)

Kenneth Hamer Henderson Chambers
(khamer@hendersonchambers.co.uk)