QUARTERLY BULLETIN
JUNE 2005

ARDL
Association of Regulatory & Disciplinary Lawyers

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FLEISCHMANN - FURTHER SCRUTINY OF SELF-REGULATION

THE FACTS

Alexander Fleischmann, a dentist, was arrested at his home address. A search warrant was executed and his computer and other media were seized. Examination of the computer and zip disks revealed indecent images of children, much of it of a highly explicit nature. In interview Fleischmann described how he had become depressed following various family difficulties including the death of his father, and as a result had become involved in viewing child pornography. He denied gaining any sexual pleasure from doing so.

Fleischmann pleaded guilty to specimen charges at the Magistrates Court and was sent to the Crown Court for sentence. The pre-sentence report described him as at medium risk of committing a similar offence within the next 20 years. A psychiatrist's report concluded that Fleischmann probably posed a low risk of direct harm to children but found it difficult to accept that he had viewed images for anything other than a sexual reason.

Considerable mitigation was placed before the judge, who declined to pass a sentence of imprisonment and instead ordered Fleischmann to complete a Community Rehabilitation Order of 3 years on each of the specimen counts and to remain on the Sex Offenders Register for 5 years. He stated that, in deciding whether a sentence of imprisonment was appropriate, he had been swayed by the ill-health of Fleischmann's mother and mother-in-law and the fact that he was in effect their sole carer.

THE PCC HEARING

As a result of the criminal conviction Fleischmann appeared before the Professional Conduct Committee (**PCC**) of the General Dental Council (**GDC**). Further psychiatric evidence was called which suggested that Mr Fleischmann's offending might have a motive other than sexual interest, such as depression.

The PCC determined that it was sufficient to suspend Fleischmann's registration for a period of 12 months. Other than stating that they accepted that he suffered from a depressive illness the PCC gave no detailed reasons for their decision.

THE ADMINISTRATIVE COURT HEARING

The GDC exercised its powers to refer the case to the High Court under S.29(4) of the National Health Services Reform and Health Care Professions Act 2002. Following the Ruscillo and Truscott decision, Mr Justice Newman (sitting alone) summarised the position on the GDC's appeal as follows:

(1) The appeal involved a review of the merits of the decision and was not confined to the consideration of any point of law.

(2) The issues under appeal concerned the fitness of Fleischmann to practise as a dentist and the penalty imposed in connection with the finding reached by the PCC in that regard.

(3) If the decision was unduly lenient as to the finding of fitness to practise or penalty, or both, the appeal must be allowed and the decision quashed.

(4) The test for whether a penalty is unduly lenient is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could reasonably have imposed. The issue was whether the disciplinary tribunal reached a decision as to penalty that was manifestly inappropriate, having regard to the practitioner's conduct and the interests of the public.

(5) The nature or gravity of the offence and the likelihood that it would bring the profession into disrepute or undermine public confidence in the profession is primarily one for the PCC, but a decision deriving from a conviction is more readily reviewable than a professional misconduct-based decision (see Dad v GDC 2001 1 WLR 1538).

(6) Inadequacy of reasons should not lead to remission if the court could confidently reach its own decision on the merits.

The Court upheld the GDC's appeal and replaced the PCC's penalty with erasure. It seems to have been swayed by the following factors:

1. Fleischmann had been sentenced to a Community Rehabilitation Order for a period of 3 years from December 2003. If he was suspended for 12 months, he would be able to resume his practice before he had completed his sentence.

2. As one of the conditions attached to the order was that he should participate in a Sex Offender's Treatment Programme, he would be able to resume practising before the outcome of the Sex Offender's Treatment Programme was known.

3. Mr Fleischmann would be able to resume practising whilst he remained a registered sex offender (as he was to remain on the register for 5 years).

The Court stated that the PCC had not sufficiently considered the significance of the sentence imposed by the Crown Court. As a general principle, if a practitioner has been convicted of a serious criminal offence he should not be permitted to resume practice until he has satisfactorily completed his sentence. Otherwise, he would have a duty to inform patients of the sentence and the conditions attached to it, which would make his position as a practising dentist untenable and would impact on the good reputation of the profession.

The judge also said that PCC had lost sight of the gravity of Fleischmann's offending because he had not been sent to prison. In the normal course of events his offences would have justified a sentence of imprisonment of between 12 months and 3 years.

As far as risk was concerned, the Court concluded that there was a degree of risk of re-offending. The PCC had been wrong to conclude otherwise and should have stated why they did.

Conclusion

What is interesting about this case is that the judge had no hesitation in going back to the criminal case to undermine the PCC's decision and even less hesitation in substituting his own penalty rather than remitting the matter back to the PCC.

It seems that professionals will have to get used to the idea that any favourable result in the disciplinary arena now runs the risk of a referral and a robust review by the Administrative Court, for which the professional can be ordered to pay all or some of the costs.

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Solicitor for Alexander Fleischmann

DISCIPLINING DOCTORS AFTER SHIPMAN

Dr Harold Frederick Shipman was convicted of the murder of 15 of his patients on 31st January 2000. Dame Janet Smith's public inquiry (the **Inquiry**) later found that he killed 215 of his patients.

Dame Janet Smith has now completed her work and has delivered her Fifth Report (published 9th December 2004; Command Paper CM 6394 of 2004, HMSO) into the events surrounding Shipman's crimes. In that report she deals with the monitoring of GPs such as Shipman, both from the perspective of local regulation by the NHS and national regulation by the General Medical Council (the **GMC**).

The GMC's methods of working have come under criticism from Dame Janet and defects in the GMC's procedures were admitted by the GMC itself in her Inquiry. Dame Janet has set out a number of recommendations to be considered by the GMC and by the Government. Members of the press used this opportunity to yet again demand that something be done to reform the GMC and its disciplinary procedures.

Few journalists noted, however, that running parallel to the Inquiry was a scheme of reform of the GMC which began in October 2000 after the Bristol Inquiry report. These reforms have seen a change to the constitution of the GMC, which now has a 40% lay membership, and also provided for changes to the GMC's fitness to practise procedures (FTP) for disciplining doctors (the **New Procedures**).

On 1st November 2004 those New Procedures came into force and the entire FTP structure of the GMC has been swept away and has been replaced by new rules and new institutions (see The GMC FTP Rules 2004, SI 2608/2004). It is hoped by the GMC that these reforms will go a long way to meeting Dame Janet's criticisms and will also provide a better system for investigating and disciplining 'problem doctors'.

Before November 2004, complaints about doctors were screened by members of the GMC of the GMC and if found to have some merit were referred to the Preliminary Proceedings Committee (**PPC**) if they concerned issues of criminal conviction or conduct. The PPC, another body made up of members of the GMC would either adjourn the case to call for more evidence, close the case or send it on for 'inquiry' by the Professional Conduct Committee (the **PCC**), which until recently was dominated by GMC members. The entire system was thus largely controlled, supervised and staffed by members of the GMC (although with the shrinking of the size of the GMC in 2000 non-council member associates were recruited to sit on the PCC). There was little outside regulation of the GMC and members were able to control which cases were to be dealt with by the GMC and then decide the outcome of those cases. Thus the impression was formed that the GMC was a closed shop, a body of doctors, elected by doctors, prosecuting, judging and sentencing doctors without any objective insight.

In the new realm of open government and accountability, such a system could not continue. As from 1st November 2004 members of the GMC have had nothing more than a supervisory role in the GMC's FTP procedures. Recruited and trained case examiners replace screeners. Case examiners (lay and medical) are backed by investigators and in-house lawyers. The PPC has been abolished. Any case of merit will be passed to an FTP panel (the **Panel**) by the case examiners for adjudication. The tests of serious professional misconduct, seriously impaired health and seriously deficient performance have been abolished and cases will no longer receive separate treatment because they have been determined to only concern the conduct, health or performance of the doctor. All issues of concern surrounding a doctor's fitness to practise will be dealt with by the Panel which will be able to take action on a doctor's registration if they find that the doctor's fitness to practise is impaired. GMC members will not sit on the Panels which will have a mixed medical and lay trained membership.

If a case is not adjudged by the case examiners to be sufficiently serious to be referred to a Panel, then the case examiners have the option of having the medical practitioner issued with a warning.

The quasi-criminal procedure employed by the PCC (the **Rules**) has also been reformed. Case management more akin to the Civil Procedure Rules (the **CPR**) than the Crown Court will be deployed by a leading QC sitting as a case manager. This will, to some extent curtail the present 'trial by ambush' that doctors enjoy before the PCC by requiring disclosure, witness statements (standing as evidence in chief) and expert reports together with time limits. The Rules also provide for a procedure whereby the parties can agree a statement of facts together with admitted allegations to allow the Panel to 'sentence' on the basis of those facts and allegations without the need for a full hearing. Failure to comply with case management directions may lead to inferences being drawn by the Panel.

In short, it is to be considered that the GMC has gone a long way to reform its procedures for dealing with doctors whose conduct falls short of that which the public expects. No longer will only doctors sit in judgement upon doctors and the GMC members will no longer play a part in the process. The GMC's new structures should ensure thorough investigation of every case and will hopefully allow cases to reach the adjudication stage more quickly than at present.

No doubt Dame Janet was right to point to the GMC's historic shortcomings and her recommendations make interesting reading,; however, before yet another round of reforms are urged upon the GMC by commentators and the press, the current changes, which came into force a little over a month prior to the publication of Dame Janet's report, should be given a significant period of time to take effect.

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LEGAL UPDATE

R (Kent Pharmaceuticals Limited) v Serious Fraud Office [2005] 1 WLR 1302

In this case the Court of Appeal held that the Serious Fraud Office (the **SFO**) had not acted contrary to law in disclosing to the Department of Health documents that it had obtained as part of a criminal investigation into allegations that pharmaceutical companies were selling drugs to the National Health Service at artificially sustained prices. The basic facts were not in dispute. Early in 2002 the SFO was investigating allegations that drug companies were selling generic drugs, including penicillin-based antibiotics and warfarin, to the NHS at artificially sustained prices. The investigation was still in progress, but the Claimant, Kent Pharmaceuticals Limited, had not so far been charged with any offence. In April 2002 the SFO obtained search warrants under Section 2(4) of the Criminal Justice Act 1987 and as a result obtained a substantial amount of documentation from the Claimant and others. Acting under Section 3 of the Criminal Justice Act 1987 the SFO disclosed the documentation it had obtained to the Department of Health, being another government department. The key issue was whether such disclosure was in accordance with law and necessary under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the **Convention**).

In dismissing the Claimant's appeal, the Court of Appeal, after an extensive review of European and English authorities, held that the SFO's power to make disclosure to other government bodies was necessarily worded in wide terms and that any attempt to give further guidance as to the circumstances in which the discretion to make disclosure might be exercised would introduce undesirable rigidity; that the discretion had to be exercised reasonably and in good faith; that if there was improper disclosure, the person affected could challenge that disclosure in proceedings for judicial review on public law or proportionality grounds; and that if the material was used against him in criminal or civil proceedings he might also be able to challenge its use in the context of those proceedings; but that, in the instant case, disclosure was clearly appropriate and not contrary to Article 8 of the Convention.

The Court of Appeal went on to give guidance as to the question of giving notice of proposed disclosure. It held that in some cases it may not be appropriate or practicable to give prior notice, and it may appear that prior notice would hamper investigations. The starting point, however, should always be that the owner of the documents is entitled to be kept informed rather than the reverse.

Sritharam v Law Society [2005] EWCA Civ. 476; The Times, May 11th 2005

The Law Society served notice of its intention to exercise its power to intervene in the claimant's solicitor's practice on the ground of suspected dishonesty pursuant to Schedule 1 to the Solicitors Act 1974. The claimant issued proceedings seeking an order directing the Law Society to withdraw its intervention notice, and a linked application for the restoration of the claimant's practising certificate which was otherwise automatically suspended as a result of the intervention notice. The judge at first instance expressed regret that he found it necessary to hold that the choice was between the intervention continuing or being wholly reversed, and he had no power to restore the claimant's solicitor's practising certificate even if the Law Society's intervention remained in place. He indicated that, if he had had the power to do so, he would have wished to fashion a remedy which more satisfactorily addressed the problem in the instant case, but was satisfied that the statutory scheme gave him no such power.

In dismissing the claimant's appeal, the Court of Appeal held that there was no free-standing power to terminate the suspension of a solicitor's practising certificate, which had automatically occurred on the passing of the resolution to intervene. The only power to terminate the suspension of the practising certificate was a power which was ancillary to, and consequential upon, a decision to direct withdrawal of the intervention notice, and in the absence of that course, the applicant had to make a separate statutory application to the Law Society for his practising certificate to be restored.

R (On the application of The Law Society) v Master of the Rolls [2005] 2 All ER 640.

In this case the Law Society applied for judicial review of the decision of Lord Phillips of Worth Matravers MR, who held that the Law Society had no general power to impose conditions on the registration of a foreign lawyer save on the initial making of an entry of the register of foreign lawyers. The interested party, Mr Shuman, was an attorney in Texas and was first registered in 1999 by the Law Society as a foreign lawyer working in London under the Courts and Legal

Services Act 1990. In July 2003, an adjudication panel of the Law Society decided to impose conditions on his registration for the first time.

The narrow issue of construction centred on the meaning of the words: "*Any registration may be made subject to such conditions as the Society seeks fit to impose*". Lord Phillips MR held that the initial making of the registration or entry in the register of a foreign lawyer could be made subject to such conditions as the Law Society sought to impose, but that it had no general power subsequently to impose conditions after initial registration. The Divisional Court agreed and held that it was not intended to give the Law Society an unrestricted power over registered foreign lawyers subsequent to initial registration. Specific provisions applied where a registered foreign lawyer was struck off or suspended from practice, or on re-instatement of a disciplined foreign lawyer, in which case conditions might be imposed.

In the wider context of the regulation of solicitors, the Divisional Court noted that the powers of the Law Society to impose conditions were set out in Sections 12-13A of the Solicitors Act 1974 (the **1974 Act**): for example on the first occasion when a practising certificate is issued, or where a solicitor is asked to give an explanation of a matter relating to his conduct and fails to give one which is considered satisfactory. However, the effect of subjecting a solicitor to conditions once he has begun to practise may be draconian. Parliament had expressly circumscribed the power in relation to solicitors under the 1974 Act, and it could not be inferred that it was intended that there would be an implied unrestricted power under the Courts and Legal Services Act 1990 over registered foreign lawyers subsequent to the initial registration. Any lacuna could be cured by the Law Society making representations to the primary body to which the foreign lawyer was admitted or by Parliament specifying that the particular provisions and regulations made under the 1974 Act should be applicable to the registration of foreign lawyers.

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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:

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