

CONTENTS

PAGE 1 **DISCIPLINARY COMMITTEES – WHO SETS THE STANDARD? A COMPARATIVE REFLECTION**
MARION SIMMONS QC AND JOHN STIRLING

PAGE 3 **A REVERSAL OF FORTUNE? REVERSE BURDENS AND THE HUMAN RIGHTS ACT**
SEAN ELSON

PAGE 5 **LEGAL UPDATE**
KENNETH HAMER AND CALUM BURNETT

PAGE 7 **FORTHCOMING EVENTS**

DISCIPLINARY COMMITTEES – WHO SETS THE STANDARD? A COMPARATIVE REFLECTION

Introduction – the function and mechanics of professional discipline

The professions long ago established internal disciplinary committees to maintain the reputation of the profession and to protect the public. Only those members of the profession who were of the highest repute and competence would be appointed to the Disciplinary Committee. The Committee acted to protect the honour of the profession and to maintain the confidence which it is desirable that the public should have in members of the profession. Those who sat on the Disciplinary Committee were members of the profession. As such it was felt that they were peculiarly well qualified to judge their fellows¹. Their experience rendered them qualified:

- (1) to decide the standards to be expected of competent and reputable members of the profession;
- (2) to decide whether a practitioner's failings amounted to serious professional misconduct;

- (3) to determine the measures necessary to maintain professional standards; and

- (4) to provide adequate protection to the public.

The judgment of such Committees was respected by the Courts who would not normally interfere with the Committees' decisions. As Lord President Cooper said in 1949 in *E-v-T, 1949, SLT 411* (a Scottish Solicitor's case):

"I shall not attempt to define professional misconduct. But if the statutory tribunal, composed as it always is of professional men of the highest repute and competence, stigmatise a course of professional conduct as misconduct, it seems to me that only strong grounds would justify this Court in condoning as innocent that which the Committee have condemned as guilty" (page 411)

Since *E -v- T* was decided the European Convention of Human Rights and the Human Rights Act have brought to the law other considerations of fairness including the need for judges to be and to be perceived to be "independent". Where those appointed to the Disciplinary Committee are themselves members of the profession their independence may be challenged. Such a challenge was made in *Le Compte Van Leuven & De Meyere v Belgium (1981) 4 EHRR 1*, a Doctor's discipline case. The challenge failed since the European Court of Human Rights in Strasbourg held at paragraphs 54 – 58 that:

"the presence of judges making up half the membership, including the Chairman with a casting vote, provides a definite assurance of impartiality and the method of election of the medical members cannot suffice to bear out a charge of bias."

Following this decision the professions began appointing lay members to their Disciplinary Committees. Today some Disciplinary Committees contain a majority of lay members, others have one lay member sitting with two professional members,

or two lay members sitting with five professional members. The lay member may be a lawyer, a member of another profession, or may be chosen to represent the public generally.

Convention compliance is important but comes at a cost. Where there are lay members on the Disciplinary Committee the accused is no longer being judged by his peers. The presence of lay members creates a committee on which “the public” also sits. The latter is a good thing. It keeps the professions in touch with public opinion. But it requires a change in established procedure. That change has not yet been consistently recognised in practice.

Judgment by Peers

Today even the professional members of the Committee may not be truly “peers” of the accused. Are they practising in the same specialty? Are they subjected daily to the same pressures and stresses? Do they have the same skills? In today’s world of high specialism can a general practitioner be called “a peer” of a neuro-surgeon? Similarly would a panel of neuro-surgeons be familiar with a general practitioner’s practice? Some professional organisations recognise this failing and ensure that one Disciplinary Committee member practises in the same speciality as the accused. So, for example, the accountants profession would include an insolvency practitioner on the Disciplinary Committee where the subject matter of the complaint involves insolvency. Lord President Cooper’s description of the Tribunal membership is no longer a valid one for most disciplinary bodies.

The presence of the lay member and the presence of the non-specialist means that the specialist knowledge amongst the Committee may be limited. It follows that the Committee is no longer comprised of people who are peculiarly well qualified to judge from their own experience what measures are from time to time required to maintain professional standards.

Where lay members or non-specialists are included on the Disciplinary Committee, that Committee can no longer be recognised as having specialist knowledge. It can not be appropriate for the specialist member “to teach” the other members of the Committee. The accused is not a party to that teaching exercise and so does not know the case which may be made against him by the specialist member. Similarly the professional body is unaware of what is being “taught” to the other members of the Committee and cannot consider whether this coincides with the professional standards which it considers should reason-

ably be imposed. Beyond all that, the process disenfranchises the lay members. They are deprived of the evidence which would allow them to form their own view of the conduct complained of. This flies in the face of the intention to create an impartial tribunal. A tribunal cannot rely on its judicial knowledge when only one or some of its members has it.

A change in the law to reflect increasing specialisation

The rise of specialism and the change from a disciplinary committee comprised of the accused’s peers to a committee of mixed experience was recognised by Lord President Emslie in *Sharp -v- The Council of the Law Society, 1984, SLT 3012 at 3017* (another Scottish Solicitor’s case) in 1984:

“There are certain standards to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct”.

Lord Emslie’s dicta in 1984 contrasts starkly with his predecessor, Lord Cooper’s dicta in 1949. Lord Emslie omits Lord Cooper’s assumption that the Tribunal would be composed “as it always is of professional men of the highest repute and competence” not because it was no longer so composed but because it could no longer be guaranteed that the committee members’ themselves possessed the appropriate experience to judge any specialist conduct being criticised. As a consequence of this Lord Emslie formulates the Tribunal’s task as being to consider what departures from the standards to be expected “would be regarded by competent and reputable solicitors as serious and reprehensible”. This dicta of Lord Emslie was approved in the Privy Council by Lord Hope of Craighead in the Scottish appeal *McLean v Buchanan [2001] 1 WLR 2425* at paragraph 19.

The change in the wording is more than a shift in emphasis. It implicitly recognises that the Tribunal may not itself have the requisite specialist knowledge, in which case it must acquire it from those who do.

The English Courts have not yet expressly considered this change of circumstances in the membership of tribunals. The judgments of the English Courts confuse these two distinct approaches by interchangeably referring to the skill and knowledge of the Tribunal members² and to the conduct which would be reasonably regarded as disgraceful or dishonourable by professional brethren of good repute and competency.³

Comparative law is always illuminating. It throws a point into sharp relief. *Sharpe* recognises policy imperatives that should be met by any modern rules applying to disciplinary proceedings.

When is expert evidence required?

It would be going too far to say that expert evidence from witnesses will always be required. The need for such evidence is dependent on the nature of the conduct impugned. Where the issue involves specialist knowledge and expertise rather than moral or personal conduct, expert evidence as to the specialist professional conduct to be expected of a member should be adduced by the professional body bringing the case and the accused must have an opportunity to challenge that evidence in cross-examination and by calling an equivalent expert. Where the conduct criticised is moral or personal then no such expert evidence is required. Professionals have no monopoly on personal conduct, public morality or ethics.

Where decisions involve ethics, morality or standards of personal conduct to be expected of members of the profession the lay members' contribution is particularly important. Standards acceptable to the public change over time. Personal conduct which the public would not accept from a professional in one era may become totally acceptable in the next and vice versa. Homosexual relationships are an example of this. Expert witnesses can add nothing to the wisdom of the members of the Disciplinary Tribunal as to what are the acceptable and non-acceptable standards of conduct for members of the profession. However decisions involving ethics and morals cannot always be divorced from specialist knowledge. There may be grey areas where specialist knowledge and experience have an impact on ethical decision making. Genetic and organ research are two examples in the field of medical ethics.

Disciplinary Committees which include lay or "non-specialist" members deciding cases concerned with professional expertise are open to criticism under Article 6 of the ECHR if their decisions are founded on the knowledge of a specialist member if that knowledge has not been aired openly and the parties have not had an opportunity to challenge it. The member of the Disciplinary Committee with relevant experience cannot be cross-examined by the parties.

Conclusion

Professional organisations with disciplinary committees are coming to recognise the need to adduce

expert evidence. However the cost of calling such evidence is a factor which understandably means that there is reluctance to obtain such evidence except in the more extreme cases.

Disciplinary cases in the past more often dealt with public morality issues. Today the emphasis is changing so that there are a significant number of cases which involve understanding specialist expertise and the standards to be expected of the specialist professional practising in the defined field. Where the decision in a case requires an analysis of specialist knowledge and experience that knowledge and experience should be provided to the Committee through expert evidence. It should not be privately disseminated by one committee member to the others. It is important that those preparing cases to be heard by Disciplinary Committees should be alert to identifying those cases in which expert evidence should be adduced so as to avoid the mischief of relying on the expert knowledge of one member of the Disciplinary Committee. If they fail to do so the Disciplinary Committee's decision may be open to challenge.

**MARION SIMMONS QC, 3/4 SOUTH SQUARE AND
 JOHN STIRLING, BENNETT & ROBERTSON LLP**

¹ See *Re A Solicitor* [1956] 3 All ER 516; *McCoan -v- General Medical Council* [1964] 1 WLR 1107; *Evans -v- General Medical Council* (unreported) 19 November 1984; *Ghosh -v- General Medical Council* [2001] 1 WLR 1915

² *Roylance v General Medical Council (No 2)* [2000] 1 AC 311 at 330H – 331A

³ *Allinson v General Medical Council* [1894] 1 QB 750 at 760-1

A REVERSAL OF FORTUNE? REVERSE BURDENS AND THE HUMAN RIGHTS ACT

A number of recent decisions have dealt with the issue of the approach to be taken when applying the Human Rights Act 1998 ("HRA") and article 6(2), the right to a fair trial, in those cases where there is a reverse burden of proof for a defendant to discharge.

There are a variety of offences that impose such a burden, however, most will be familiar to those practitioners who deal with the prosecution and defence of regulatory offences.

In those cases where the legislation provides for a statutory defence, there is an issue as to whether the

burden is what has been termed a persuasive, or legal one, or whether it is merely evidential.

In the first situation a defendant must prove the existence of the statutory defence, albeit on the balance of probabilities, whilst if the burden is only evidential, then he need only adduce sufficient evidence to raise the defence. The prosecution then has to disprove the defence beyond reasonable doubt. This is clearly a distinction of some importance.

The case of *R v Lambert [2001] 3 All ER 517* considered the situation after the commencement of the HRA on 2nd October 2000. In that case the Court of Appeal held that the persuasive, or legal burden in relation to the statutory defence in s.28 (3) (b) (i) of the Misuse of Drugs Act 1971 would not be justified under article 6(2). The Court applied s.3(1) of the HRA and read the statutory provision as imposing only an evidential burden.

In the case of *R v Carass [2001] EWCA Crim 2845* this approach was adopted by the Court in relation to a defendant charged with an offence contrary to s.206(1)(a) Insolvency Act 1986 and the defence set out at s.206(4) of that Act.

That provision allows for a defence where a person charged, proves that he had no intention to defraud. In this instance Waller LJ held that if a reverse burden of proof is to be imposed on an accused "it must be justified and in particular it must be demonstrated why a legal, or persuasive, burden rather than an evidential burden is necessary".

This suggested that the Court may be prepared to read the statutory provision as being compatible with the HRA depending on the mischief that the legislation in question sought to address.

In reaching that view the Court referred to *R v DPP Ex.P. Kebilene [1999] 4 All ER 801*, where Lord Hope adopted three questions in pursuing the argument of the nature of the burden. These were:

- What does the prosecution have to prove in order to transfer the burden to the defence?
- What is the burden on the accused, does it relate to something which is likely to be within his knowledge or to which he readily has access?
- What is the nature of the threat faced by society which the provision is designed to combat?"

It is becoming clear that the assessment of these issues is underpinning the Court's recent judgments.

In *R v Daniel [2002] EWCA Crim 959*, again concerning a defendant charged with offences under the Insolvency Act 1986, the Court of Appeal suggested that the balancing exercise involved the Court having to pay close attention to the mischief at which the legislative provision under consideration is aimed and the social damage of not meeting that mischief. This would then provide a "principled and elasticity of approach to what article 6(2) requires in any given statutory context" (Auld LJ).

It appears that a distinction between a "regulatory" offence and those which are "truly criminal" has begun to emerge. In the case of *Davies v Health & Safety Executive [2002] EWCA Crim 2949* the issue concerned was a reverse burden contained within s.40 of the Health & Safety at Work Act 1974. Again assessing the arguments set out in *Kebilene*, and, in particular, the proportionality of imposing a legal burden on a defendant, the Court of Appeal said that the reverse burden takes into account the fact that the people caught by this legislation have chosen to engage in work, or commercial activity, probably for gain and must be taken to have accepted the regulatory controls that go with it. The burden was held to be compatible with the human rights legislation.

The case of *Roger S v London Borough of Havering [2002] EWCA Crim 2558* related to a defendant charged with offences under the Trade Marks Act 1994. In this case the Court drew an important distinction between those types of offence which might be termed "regulatory", where the defence relied upon does not relate to an essential element of the offence, as compared to matters such as those in issue in *Carass*. There dishonesty was said to be the gravamen of the offence.

The Court pointed out that *Carass* itself indicated that "it is necessary to examine each case on its own merits", and then set down a number of reasons for concluding that in the offences charged the defendant was required to discharge a legal burden.

Those reasons included, inter alia, considerations of policy i.e. the purpose of the trade marks legislation and the mischief at which it was aimed (stating that there was a very important element of consumer protection that was a point of significance) and also that the subject matter of the defence was liable to be peculiarly within the knowledge of the accused.

This reasoning was important in two cases of wider application. In *R v Drummond* [2002] EWCA Crim 527 the Court held that the statutory hip-flask defence on a charge of driving with excess alcohol imposed a legal or persuasive burden on the defendant and stated that not all persuasive burdens would be read down to be an evidential burden by virtue of the HRA. The Court felt that the subject matter of the defence, in particular the scientific evidence that was likely to be required to determine the case, was within the knowledge of the accused.

In direct contrast, in the case of *Sheldrake v DPP*, *The Times* 25th February 2003 it was held that the defence under s.5(2) of the Road Traffic Act 1988 to an offence of being drunk in charge was to be read as imposing only an evidential burden on the defendant.

In *Sheldrake*, the Court felt that the burden on the prosecution of proving an intent to drive should be capable of being met on the facts of the majority of such cases.

This issue as to what was within the knowledge of the defendant was also considered in *Davies*. One of the central arguments of that defendant was that the inspectors of the Health & Safety Executive had wide powers and that by the use of these powers they were in a position to acquire all of the information that they need for the purposes of a prosecution. As a consequence the defendant argued that a reverse burden was unnecessary.

This approach was rejected by the Court, which stated that “in reality the defendant will be, and remains, the only person who really knows when and what he has done to avoid the risk in question”. The Court went further, pointing out that this issue is not to be specifically directed as to the state of the prosecutor’s knowledge of the facts in issue, but to whether they will be difficult for the defendant to prove or relate to something within his knowledge.

In *Sheldrake*, Henriques J, in a dissenting judgment, returned to the issue of proportionality of the measure in the statute in relation to the legitimate aim pursued by that legislation. This argument can be seen to be consistent with the judgment in *Drummond* and is a recurring theme in the line of cases addressing the issue of reverse burdens.

Those practitioners dealing with “truly criminal” cases may find some assistance in the *Sheldrake* judgment, whilst those in the regulatory field could easily

conclude that the scope of application of the HRA in matters of reverse burdens is diminishing quickly.

**SEAN ELSON,
 RICHARD NELSON BUSINESS DEFENCE SOLICITORS**

LEGAL UPDATE

Geoffrey Hoodless and Sean Blackwell

The Financial Services and Markets Tribunal recently published its decision in the case of *Geoffrey Hoodless and Sean Blackwell*. The case considered the conduct of Mr Hoodless and Mr Blackwell in connection with a share placing. The applicants were senior executives of the broker to the placing. The case is of interest beyond its particular facts due to the demonstration by the Tribunal of its independence from the FSA, its definition of the tests for honesty and integrity for the purposes of fitness and propriety, its comments on what was required for full co-operation and its views on the reliability of telephone transcripts as evidence.

The Tribunal decided that the FSA was wrong to withdraw Mr Hoodless’ approval to perform the controlled functions and although it upheld the FSA’s decision to withdraw Mr Blackwell’s authorisation it upheld only one of a number of allegations made against him by the FSA. The Tribunal showed its independence of the FSA not only in its decisions but also by some of its comments. The Tribunal stated that its findings “substantially contradict most of the matters relied upon by the FSA” and that “the allegations made in the [FSA] Decision Notices were substantially beyond what was justified by the evidence that we had heard”. The demonstration of its independence by the Tribunal may encourage those who are aggrieved with FSA decisions to refer their matter to it.

In its decision, the Tribunal defined the tests for honesty and integrity for the purposes of the fitness and propriety expected from those performing controlled functions. The Tribunal asserted that an individual is dishonest if his “conduct was dishonest by the ordinary standards of reasonable and honest people and...he himself realised that by those standards his conduct was dishonest”. This is the combined subjective and objective test set out by the House of Lords in the recent ‘accessory liability’ or ‘knowing assistance’ case of *Twinsectra Ltd v Yardley* [2002] 2 All ER 377. The Tribunal said that

“a person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards”.

These tests seem to indicate a relatively high hurdle for the FSA to clear in order to prove dishonesty or a lack of integrity. For example, the Tribunal commented that Mr Hoodless’ readiness “to express speculation as if they were facts” meant that, though he “was thereby not taking proper care to be truthful”, he was not dishonest “in the legal sense”. The Tribunal did not expressly comment on whether this amounted to a lack of integrity, but its finding that Mr Hoodless was fit and proper suggests that it took the view that it did not.

The Tribunal rejected the FSA’s allegation of a general failure to co-operate. In this context it commented that, though “the duty of frankness [by interviewees] remains,...the significance of any lack of frankness must depend on the circumstances”.

Regulatory investigators are relying increasingly on telephone transcripts and they featured strongly in the FSA’s case. The Tribunal expressed considerable caution in relation to such transcripts. It commented:

“It is easy to be misled by such transcripts. Language is often used very loosely on the telephone... Not everything that is said is intended to be taken literally or to be taken seriously...much depends on context, on tone, and the nature of the relationship between the speakers... [We] have sought to distinguish between brokers’ banter and things meant more seriously”.

The Tribunal demonstrated this cautious approach when it considered a transcript of comments by Mr Blackwell which said: “I have basically underwritten you, yeah?...So you’ve bought them and its my obligation to buy them back”. Mr Blackwell’s only explanation was that this was a very poor choice of words. Nevertheless the Tribunal felt unable to draw any adverse conclusions.

Re B and Re M: Costs orders in disciplinary tribunals

In two recent cases, *Re B*, 4th March 2003, and *Re M*, 10th July 2003, the Disciplinary Tribunal of the Bar had to consider whether to order costs against the Bar Council, the unsuccessful prosecutor. In the *B* case, the proceedings collapsed at half time when

the charges against the barrister were dismissed after a submission of no case to answer. In the *M* case, the Professional Conduct and Complaints Committee shortly before trial instructed Counsel to offer no evidence on the charges pursuant to Rule 30 of the Complaints Rules. A feature in each case was that the barrister was represented by Solicitors and Counsel instructed by the Bar Mutual Indemnity Fund Limited (“BMIF”).

There is no requirement at common law that a defendant acquitted in disciplinary proceedings should have the right to apply for costs against an unsuccessful prosecutor; see *Disciplinary and Regulatory Proceedings* third edition, by Brian Harris QC, at p.332. The Council of the Inns of Court along with some other disciplinary bodies provides for recovery of costs in its rules, although a significant number of professional bodies make no provision for costs against an unsuccessful prosecutor at first instance, including the General Medical Council, the General Dental Council, the Architects’ Registration Board, the Police Disciplinary Tribunal, The Royal College of Veterinary Surgeons, The Royal Pharmaceutical Society and the Nursing and Midwifery Council. Only the Bar, the Solicitors’ Disciplinary Tribunal, the Society at Lloyds and the Institute of Chartered Accountants provide for costs against an unsuccessful prosecutor. The accountants profession provides that there is no presumption that costs will follow the event.

In *Bradford City Metropolitan District Council v. Booth*, *The Times*, 10th May 2000, Lord Bingham of Cornhill, Lord Chief Justice, said that costs should not necessarily follow the event in the case of an unsuccessful prosecution by a regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound in the exercise of its public duty. Lord Bingham said:

“Where a complainant had successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in the exercise of its public duty, the Court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs was not made in his favour; and (ii) the need to encourage public authorities to make and stand by

honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision was successfully challenged.”

In the *B* case the Disciplinary Tribunal ordered that the Bar Council should pay such amount of the barrister’s costs as were not covered by the BMIF on a standard basis, the amount of such costs to be determined by a costs judge if not agreed. In *B* the BMIF had agreed to bear 75% of the barrister’s costs, and the Tribunal ordered the Bar Council to pay the excess of 25% that was not covered by the barrister’s professional indemnity insurers.

In the *M* case the barrister’s costs were covered wholly by the BMIF, and his counsel accepted that the test for an award of costs ought to be whether the Bar Council had behaved unreasonably. In making no order for costs the Chairman stated that the Bar Council had an important public duty to fulfil in the proper regulation of the profession, and that by a majority the Tribunal considered the Bar Council had behaved reasonably and properly in investigating the complaint, in pursuing it and in quite rightly offering no evidence at the end of the day.

Any tribunal will no doubt have a great deal of sympathy for a professional person who has had proceedings hanging over his or her head for a considerable period of time, which then end in the charges being dismissed or withdrawn. Nevertheless, most professional disciplinary bodies provide no means of recovery of costs against an unsuccessful prosecutor, and in those cases where regulations permit the tribunal to make an award for costs in favour of the defendant, it appears to be the practice not to do so where in any real sense the defendant is not out of pocket where he or she is covered by insurance. This is the correct approach as insurers are not party to the proceedings, and as the Chairman in *Re B* observed: “(The insurance company) are not a party to this suit. That is what he pays his premiums for.”

**CALUM BURNETT, ALLEN & OVERY AND
KENNETH HAMER, HENDERSON CHAMBERS**

FORTHCOMING EVENTS

25th November 2003 – Seminar Money Laundering: Decisions and Dilemmas for Lawyers

Time: 6pm (Registration and Coffee, 5.30pm)

Venue: Herbert Smith, Exchange House,
Primrose Street, London EC2A 2HS

Ticket Price: £15.00

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 editors with your suggestions. The editors are:

ANGELA HAYES, LAWRENCE GRAHAM
(angela.hayes@lawgram.com)

CALUM BURNETT, ALLEN & OVERY
(calum.burnett@allenoverly.com)

KENNETH HAMER, HENDERSON CHAMBERS
(khamer@hendersonchambers.co.uk)