QUARTERLY BULLETIN
OCTOBER 2004

ARDL
Association of Regulatory & Disciplinary Lawyers

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ADAM COWELL
1ST OCTOBER 1963 - 29TH JULY 2004
ARDL COMMITTEE MEMBER

The sudden death of Adam Cowell on 29th July at the age of 40 marks the loss of one of the profession's leading criminal and regulatory lawyers. In his six years as a Partner in the London office of Irwin Mitchell, Adam had established himself as one of the top lawyers in the country representing defendants in high profile prosecutions by the Serious Fraud Office. Widely respected as a leading business crime lawyer, Adam was also advisor to companies and directors under investigation by the DTI, Inland Revenue, Customs & Excise and in the current FSA investigation into split capital investment trusts.

As a young man, Adam's prowess as a golfer took him to county representative level and he narrowly decided against a career as a professional golfer. But he did not go straight into a legal career either. Instead of going straight to university after leaving sixth form college he worked as a builder. But it was not long before his interests shifted to pursuing a law degree at Brunel University where he gained a prize winning First Class Honours Degree.

After training at Powell Magrath & Spencer in Kilburn, and a short time at Donne Mileham & Haddock in Brighton, Adam spent a longer period at Bindmans, honing his criminal law and advocacy skills. He then founded the London office of Moss & Co which he grew for five years before joining Irwin Mitchell in 1998.

In six short years at Irwin Mitchell his rise to prominence in the firm both as a practitioner and leading figure was meteoric. He soon became recognised nationally and internationally, gaining the admiration of his peers. He was a frequent lecturer, writer and broadcaster on money laundering and white collar crime. With his typical energy he was Secretary of the International Criminal Law Association, committee member of the newly formed Association of Regulatory & Disciplinary Lawyers, Member of the Legal Services Commission Fraud Committee and former secretary of the London Criminal Courts Solicitors Association.

As well as having a keen interest in philosophy and history, Adam's extensive knowledge of wine was demonstrated at one of the last social events he attended when he was overjoyed to lead his team to victory at the Vinopolis Lawyers Wine Challenge.

The shock of his death is contrasted by his physical fitness, measured recently by his completion of the London Marathon in 2002 when he raised money for the Barnardo's charity.

Aside from his legal and many other interests, Adam's main passion was for his family. Whilst his death is a huge loss to his colleagues in the law, the loss to his wife Megan and their daughters Florence, Grace and Scarlett is immeasurable.

CONDUCT: IS IT PERSONAL OR PROFESSIONAL AND WHY DOES IT MATTER?

Regulators may define misconduct in different ways. Some expressly provide in their codes of conduct the right to investigate misconduct outside a professional context. Others investigate only misconduct which is linked to performance of behaviour within a professional context. On occasion, therefore, consideration needs to be given as to whether conduct is professional or merely personal and if it is the latter, what, if anything, a regulator can do about it.

The House of Lords, in Skidmore -v- Dartford and Gravesham NHS Trust [2003] UKHL No. 27 recently helped to clarify the boundary as to whether a doctor's alleged misconduct was personal or professional in nature. Although the case did not involve a professional disciplinary body, the issues discussed may be helpful as to the nature of the distinction.

Background

It was alleged in this case that midway through performing keyhole surgery, the surgeon changed the surgical procedure. Following the operation, the patient and Authority sought an explanation about the change and the need for it. It was said that the consultant gave a version of events which conflicted with the contemporaneous operation notes. Accordingly, a complaint was made to the Authority about this conflict and the Authority commenced an internal disciplinary procedure. Where an allegation of misconduct is raised against an NHS doctor, the disciplinary procedure must be in accordance with Department of Health Circular HC (90) 9. In doing so, it is necessary to determine whether the conduct complained of amounts to personal or professional conduct. That decision impacts upon the nature of the disciplinary procedure to be followed. The result of a determination as to the category into which certain conduct falls, therefore, has wide reaching implications.

Demarcation

The categories are defined as follows:

Personal conduct - "Performance or behaviour of practitioners due to factors other than those in association with the exercise of medical or dental skills."

Professional conduct - "Performance or behaviour of practitioners arising from the exercise of medical or dental skills."

Professional competence - "Adequacy of performance of practitioners related to the exercise of their medical or dental skills and professional judgment."

In Skidmore the Authority considered that the consultant's explanation had been false and that the conduct complained of was personal. Consequently a particular procedure was followed which, the respondent alleged, resulted in his unfair dismissal. In relation to that issue, the House of Lords considered two questions:

- who decides on the categorisation of a case; and
- how is the line between professional and personal conduct to be drawn?

Interpretation of the categories

Difficulties often arise where it is not clear whether the conduct was personal or professional. To compound matters, previous judicial direction on this point conflicted. The House of Lords' decision is important in that it clarifies the approach which an NHS employer should take. However, the clarification has wider importance in that professional regulatory bodies can take notice when having to interpret this question themselves and direct analogy can be drawn. Their Lordships held that a broad and purposive interpretation of professional conduct must be made, allied to common sense considerations, to enable sensible procedural decisions to be made.

In Skidmore, the explanation requested of the surgeon was associated to the performance of the surgery. The conduct would not have taken place *but for* the exercise of medical skills, ie the surgery. Additionally, the explanation requested from the doctor came as part of his professional duty to respond to the complaint and a doctor, in that situation, was acting in the course of fulfilling professional responsibility. Therefore, in determining that the conduct was personal, the Authority had erred and had, as a consequence, adopted the wrong procedure.

Determination - professional or personal?

The conduct itself must be the starting point. Is the conduct complained of due to factors associated with

the exercise of medical or dental skills? Bearing in mind the constraints and applicability of the instant case, and, of course, any legislative definition affecting the particular individual, the criteria could be applied to other professions such as veterinary, teaching or accountancy.

If there is found to be an association between the conduct and the professional skills, then the next question is whether it is a matter of conduct or competence. If the issue is not one of competence and there is no association with the respondent's professional skills then the case will be one which falls into the category of personal conduct.

Whilst the case is important for the determination of the categories for use in 'internal' disciplinary matters which were the subject of the specific case, the opinion given may also find its way into arguments before disciplinary tribunals. Occasionally a defence to a charge of professional misconduct is that the conduct complained of was not performed whilst acting in a professional capacity.

The Skidmore guidance may assist a disciplinary tribunal of those regulatory bodies that do not expressly provide that misconduct may extend to cover the practitioner's personal misconduct. It gives a starting point to help determine the scope of the distinction to be drawn. Nevertheless, it appears on earlier authority there will always be a question of degree. In Roylance -v- GMC [2000] 1 AC 311, the House of Lords stated "serious professional misconduct may arise where the conduct is quite removed from the practice of medicine but is of a sufficiently immoral or outrageous or disgraceful character". Personal misconduct may, depending on the circumstances, amount to conduct that is disgraceful in the sense that it brings the profession into disrepute.

Christopher Alder
Blake Lapthorn Linnell

LEGAL UPDATE

R (Chief Constable of Avon and Somerset Constabulary) v. Police Appeals Tribunal The Times 11th February 2004

The powers of the Police Appeals Tribunal in relation to sentence were not limited to review of a decision. It might look at all matters before it and substitute sanctions which could be imposed by the body from which the appeal was made. A police constable had disobeyed procedural guidelines on dealing with informants in relation to ongoing investigations, and a misconduct tribunal required him to resign. On appeal the Police Appeals Tribunal directed reinstatement of the police constable. The Chief Constable's claim that the test applicable by the appeals tribunal was one of review of the original decision was rejected by Collins J., who stated that where Parliament conferred a right of appeal to a special tribunal, it was inherent in the powers of that tribunal to look at all the matters before it and make its own decision.

The decision is respectfully correct, and follows the approach of the Court of Appeal, Criminal Division in relation to sentencing generally, and the role of the Visitors on appeals in disciplinary matters affecting barristers' misconduct. In *R v. Visitors to the Inns of Court ex parte Calder* [1994] QB 1, at p.42, Sir Donald Nicholls V-C said that an appeal to the Visitors was a re-hearing comparable to an appeal in the Civil Division of the Court of Appeal. Regarding sentence, however, it will be for the Visitors to exercise their own discretion and judgment.

R (on the application of Junttan Oy) v. Bristol Magistrates' Court [2004] 2 All E R 555

The claimant designed and manufactured piling rigs. It supplied a rig to a company. While the company was operating the rig, the hammer was accidentally released, killing one of the company's employees. After the accident the equipment was modified, and the Health & Safety Executive considered that it could bring charges against the claimant either under the Health & Safety At Work etc. Act 1974, or under the Supply of Machinery (Safety) Regulations 1992 which had been made to implement the United Kingdom's obligations under European Directives. A person found guilty of an offence under the 1974 Act was liable on conviction on indictment to an unlimited fine. Charges under the 1992 Regulations were triable summarily and were punishable only by a moderate fine.

The HSE brought charges under the 1974 Act, and the issue was whether such a prosecution should be brought under domestic legislation or under Regulations implementing a European Union Directive. The Divisional Court held that the claimant could only be prosecuted under the 1992 Regulations. However, the House of Lords by a majority of three to two held that it could not have been the purpose of the 1992 Regulations that the worst conceivable failure resulting in death could only be prosecuted

summarily with a penalty that might be derisory. The House of Lords held that the 1974 Act and the 1992 Regulations functioned in parallel at different levels of seriousness, the Regulations being concerned with modifying equipment. Their co-existence did not undermine the purposes of the Directive. Accordingly the HSE were entitled to bring charges against the claimant under 1974 Act.

R (on the application of West) v. Lloyd's of London [2004] 3 All E R 251

Dr Julian West applied for judicial review of four decisions of the Business Conduct Committee of Lloyd's of London. The Court of Appeal directed that the question whether decisions of Lloyd's were amenable to judicial review was to be reserved to the Court of Appeal. The decisions under challenge were concerned with the commercial relationship between Dr West and the relevant managing agents, and were governed by contracts into which he had chosen to enter. The Court of Appeal held that the Business Conduct Committee did not exercise governmental functions, and the fact that Lloyd's corporate arrangements were underpinned by Act of Parliament made it in no way unique and was not dispositive of the matter. It was the Financial Services Authority which exercised governmental functions and it was that body which was answerable for any breaches of the Human Rights Act. Accordingly, Lloyd's was not amenable to judicial review.

Kataria v. Essex Strategic Health Authority [2004] 3 All E R 572

In this case, Stanley Burnton J. considered an appeal pursuant to Section 11 of the Tribunal and Inquiries Act 1982 from the decision of a health authority appeal tribunal dismissing a doctor's application to revoke his national disqualification imposed by the National Health Service Tribunal. In 1996 a national disqualification was imposed on the appellant which precluded him from working within the National Health Service. The National Health Service Act 1977 provided that a Family Health Services Appeal Authority Tribunal, on a subsequent review, might confirm or revoke a national disqualification.

The learned judge held that the statutory power of the Family Health Services Appeal Authority Tribunal was restricted to confirming or revoking the national disqualification as opposed to a reconsideration and rehearing of the original disqualification. The onus was on the practitioner to establish that the disqualification should be revoked since it was he who made the request for a review and but for that request the disqualification would continue to have effect. If he were to put no evidence or material before the appeal tribunal, his request would have to be rejected. However, the Health Authority, as respondent to the review, would bear the onus of proving any facts it asserted since the date of the original disqualification. Whilst the reviewing tribunal could not and should not receive evidence as to the circumstances of the original disqualification, a practitioner might wish to adduce evidence that he had suffered, for example, from depression at the time of the defaults that had led to his disqualification, but had since received treatment and had recovered.

Kenneth Hamer
Henderson Chambers

FORTHCOMING EVENTS

Judicial Review and Regulators: The inside track

5.30pm Monday 15th November, 2004

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

Tickets £15

Followed by drinks reception at 7.30pm

Venue: Davy's Wine Bar, 2 Exchange Square, London EC2A 2EH

Free to all members. Please join us for an early seasonal celebration.

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:

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

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

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