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WINNER OF THE 2011/2012 MARION SIMMONS QC MEMORIAL ESSAY PRIZE: OLIVIA FRANCES HARRIS, JESUS COLLEGE CAMBRIDGE

DEMOCRACY, FREEDOM OF SPEECH, PRIVACY: HOW SHOULD THE PRESS BE REGULATED IN A DEMOCRATIC SOCIETY?

The ongoing Leveson Inquiry has revealed many of the questionable practices used by tabloid journalists to gather the salacious details which make up a particularly juicy scoop. The problem is not confined to the prevalent use of phone-hacking: journalists have been accused of accessing personal diaries, pursuing a young actress down London streets or simply fabricating stories entirely.¹ With many of the of these actions deemed at best highly circumspect and at worst morally wrong, not to mention illegal, calls for greater regulation of the Press are increasing.

¹ See <http://www.levesoninquiry.org.uk/evidence/>, accessed 06/12/11.

However, the Press is charged with fulfilling an important democratic function: to bring abuses of power and process to light and to ensure that opponents of the government are free to challenge its actions.² It seems, therefore, that any new reforms will need to be highly sensitive to the Press's role as a 'constitutional necessity' and not allow censorship to be brought in by the back door.³

This essay will seek to place freedom of speech and liberty of the Press within their wider democratic context before examining options for the reform of English law.

The importance of free speech and liberty in the press

The famous libertarian John Wilkes stated: 'The liberty of the Press is the birthright of a Briton, and is justly esteemed the firmest bulwark of the liberties of this country.' In a recent speech, Lord Judge used this statement as evidence that the liberty of the Press is a 'constitutional principle.'⁴ Lord Judge referred to the importance of maintaining a principle of free speech for the nation as a whole, a claim which demands closer analysis.

There are numerous arguments in favour of free speech.⁵ Firstly, the right to freedom of speech is closely connected with the importance of discovering truth.⁶ J.S. Mill suggested that citizens cannot be confident that the policies of their government are correct and proportionate, unless they are open to being freely challenged.⁷ However, whilst this argument is useful in enabling political opposition to express their views, it does not seem to be particularly relevant to the dubious activities of the tabloid Press: creating salacious stories about 'celebrities' cannot often be justified as acting for the public good.

Mill's argument is closely linked to the suggestion that there are strong reasons to be suspicious of any

² *Observer and Guardian v UK* (1992) 14 EHRR 153.

³ Lord Judge CJ, 13th Annual Justice Lecture, October 19th 2011, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-annual-justice-lecture-2011.pdf> accessed 07/12/11, 3.

⁴ *Ibid.*

⁵ Barendt, *Freedom of Speech* (OUP, 2005), 6.

⁶ *Ibid.*, 7.

⁷ JS Mill, in Barendt, n2, 8.

attempts by the executive to curtail an absolute right to free speech.⁸ The Press have the function of upholding the right to free speech of the population at large: it is clear that without effective journalism, the Parliamentary expenses scandal and phone-hacking itself would not have been brought to light.

Furthermore, freedom of speech, it is claimed, is 'a right to express beliefs and political attitudes [which] instantiates or reflects what it is to be human.'⁹ This suggests that free speech benefits society as a whole, as its exercise leads to the development of more reflective and mature individuals.¹⁰ Moreover, the important connection between democracy and individuals is emphasised by Dworkin: his 'constitutional conception of democracy' assigns a central role to the duty of political institutions of acknowledging the right of all citizens to be treated with equal respect and concern.¹¹

Thus, the maintenance of free speech is a vital element of Britain's democratic tradition: the delicate balance of our unwritten constitution necessitates a body with the powers of investigation to uncover corruption and to raise issues of concern within the public consciousness. Any recommendations for reform should be viewed within this context and their wider implications considered: any heavy-handedness could have severe future implications of an Orwellian magnitude.

However, this will only be the case if a distinction between the freedom of the Press and freedom of speech is not developed. The traditional approach regarding the connection between freedom of speech and liberty of the Press was established by Dicey: he uses both phrases as interchangeable terms.¹² His view was supported implicitly by Sir John Donaldson MR in *Spycatcher*, who held that the media had a right to know and to publish 'neither more nor less than that of the general public.'¹³ This orthodox approach gives some advantages: it avoids any difficulties in defining 'the Press' and supports the idea of the Press as having an important role in the dissemination of national ideas.¹⁴

⁸ F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge 1982), 80.

⁹ Barendt, n7, 13.

¹⁰ T. Campbell, 'Rationales for Freedom of Communication', in Barendt, n2, 13.

¹¹ R. Dworkin, *Freedom's Law* (New York: OUP, 1996), 15-26.

¹² Dicey, *Introduction to the Study of the Law of the Constitution*, 10th Ed. (1959), ch. VI.

¹³ *A-G v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109, 183, CA.

¹⁴ Barendt, n7, 422.

However, the traditional contention does not give the Press any increased protection in reflection of its vital constitutional position as a 'public watchdog.'¹⁵ Furthermore, and importantly in the context of the present argument, it does not allow for significant regulation of the Press without potentially negative implications for freedom of speech as a whole.

Other jurisdictions have attempted to avoid this problem. The German constitution goes one step further in separating the right to media freedom from freedom of speech: there is a distinct provision for Press freedom (*Pressefreiheit*) and broadcasting freedom (*Rundfunkfreiheit*) in the second sentence of Article 5 of the *Grundgesetz*. This allows Press freedom to be guaranteed, provided that it promotes freedom of speech.¹⁶ The German constitutional court is enabled to temper the right to freedom of the Press in order to protect individuals' privacy without harming the fundamental right of freedom of speech for the population as a whole.¹⁷ Thus, the German position is a useful one and a distinction which may prove useful in English law: it could allow for greater control of the tabloid Press without inhibiting the fundamental rights of all citizens.

However, both States are signatories of the European Convention on Human Rights. This prevents them from significantly inhibiting freedom of speech. Whilst freedom of speech is a right which is capable of some qualification, the ability of the UK to change its scope radically, by adoption of the German measures, should be questioned. The Human Rights Act 1998 might not allow for such a radical development: currently Article 10 and Article 8 rights are 'balanced' against each other, giving significantly heavier weight to either side might not be compatible.¹⁸

In light of the importance of the Press within the British democracy, the options for regulating the Press in England will now be assessed.

The current methods of Press regulation in English law

In English law, freedom of speech is not an absolute right: there are statutory schemes which preclude a range of activities deemed to be undesirable for society at large, such as the incitement of racial hatred.¹⁹ Moreover, many of the unpopular activities of the Press which are being brought to light by the Leveson Inquiry, such as trespass or phone-tapping, are

¹⁵ *Observer and Guardian v UK*, n2, para 59.

¹⁶ First Television case, 12 BVerfGE 205, 206 (1961).

¹⁷ See the Soraya case, 34 BVerfGE 269, 283-4 (1973).

¹⁸ n15, 66, per Glidewell LJ.

¹⁹ See Robertson & Nicol, *Media Law*, 5th Ed. (2007).

prohibited by statute or the common law.²⁰ Private actions may also be brought against specific claims via the tort of defamation. However, this action will only be effective if it can be shown that the allegations are untrue²¹ and tarnish the individual's reputation.²²

The English courts have frequently been asked to rule on the limits of an individual's privacy in the face of Press intrusion. In *Kaye v Robertson*²³, tabloid journalists gained access to a famous actor's hospital bedroom. The applicant sought an interlocutory injunction to prevent the publication of the interview and photographs. He succeeded on the ground of malicious falsehood alone. However, the court felt that the protection of this tort was not proportionate to the 'monstrous' invasion of privacy involved.²⁴

Following *Kaye* and 'a number of striking instances in which sections of the Press had been severely criticised for intruding upon accident victims and other patients in hospital, for using stolen private correspondence or photographs and for publishing scurrilous (and sometimes false) details of individual's private lives,'²⁵ the Calcutt committee on privacy and related matters was set up. Despite the suggestion that *Kaye* was 'a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals,'²⁶ the committee did not recommend a new tort of privacy. Instead, the Press Complaints Commission was established.

The PCC is journalism's self-regulating body. Clause 3 of the PCC code deals with privacy, stating that 'editors will be expected to justify intrusions into any individual's private life without consent.'²⁷ However, 'the PCC has no legal power to prevent publication of material, to enforce its rulings or to grant any legal remedy against the newspaper in favour of the victim.'²⁸ This has led some to describe it as 'toothless'.²⁹

In 1993, Sir David Calcutt judged that the PCC had not been effective and recommended that a statutory Press complaints tribunal should be established.³⁰ This was not accepted by the committee, which was unwilling to

adopt measures to protect the privacy which would impact on the Press alone. However, when reviewing Calcutt's findings, the National Heritage Committee of the House of Commons proposed a Protection of Privacy Bill, which would provide protection for all citizens at a high level, combining 'both a new tort of infringement of privacy and criminal offences resulting from unauthorised use of invasive technology and harassment.'³¹ This was intended to protect citizens from objectionable violations of the privacy whilst accepting that 'a free society requires the freedom to say or print things that are inconvenient to those in authority.'³²

Despite the Bill never being passed by Parliament, it can be claimed that a developing right to Privacy has nevertheless developed in the UK. This right stems from Article 8 of the European Convention of Human Rights. Whilst the ECHR was designed primarily to regulate State actions, signatory States also have a duty to ensure that Convention rights are observed. This 'may involve the adoption of measures even in the sphere of relations between individuals.'³³

This has allowed the orthodox position of the common law (that there is no tort of privacy³⁴ but an equitable remedy available where confidential information, received in course of confidential relationship is disclosed to the public with detrimental effects³⁵) to be extended in subsequent case law, to cover a person who had 'a reasonable expectation of privacy'.³⁶ This has prompted the claim that England increasingly has a 'privacy law by the back door'.³⁷

Potential reforms to English law and their consequences

There are several options for reforming the law in England to provide greater protection of privacy by increasing the regulation of the Press.

Lord Judge has proposed increasing the powers of the PCC: 'In short, any new PCC would [be] require[d] to have whatever authority is given to it over the entire newspaper industry, not on a self-selecting number of

²⁰ Eg. s3 of RIPA 2000.

²¹ s5 Defamation Act 1957.

²² *Sim v Stretch* [1936] All ER 1237 (HL), per Lord Atkin.

²³ [1991] FSR 62.

²⁴ *Ibid*, 70, per Bingham LCJ.

²⁵ CM 1102, 1990.

²⁶ n15, 66, per Glidewell LJ.

²⁷ PCC Code, cl3(i).

²⁸ *Spencer v UK* (1998) 25 EHRR CD 105.

²⁹ Judge, n3, 9.

³⁰ Cm 2135, 1993.

³¹ HC 294-I (1992-3).

³² *Ibid*.

³³ *Spencer v UK*, n21, at 112 citing Plattform 'Arzte fur das Leben' v Austria (1988) 13 EHRR 204.

³⁴ *Wainwright v Home Office* [2003] UKHL 53.

³⁵ *35 Coco v A.N. Clark (Engineers) Ltd* [1969] R.P.C. 41, per Megarry J.

³⁶ *Campbell v MGN Ltd* [2002] EWCA Civ 1373, per Lord Nicholls.

³⁷ Paul Dacre, at the Society of Editors Conference 2008, see <http://www.independent.co.uk/news/uk/home-news/judge-is-bringing-in-privacy-law-by-the-back-door-editor-warns-1006621.html>, accessed 09/12/11.

newspapers.³⁸ This could, perhaps, take the form which Sir David Calcutt suggested, with the addition of a statutory Press tribunal to the PCC. Judge's arguments in support of the self-regulation are convincing, especially his analogy with the GMC: 'We do not say that the General Medical Council and self-regulation have failed when, as sometimes happens, a doctor sexually molests one or more of his patients or, like Dr (Harold) Shipman, murders them.'

However, there are considerable problems with this proposal. Firstly, Lord Judge has accepted that any improvements to the PCC would have to be all-inclusive to have the desired effect. Moreover, the concept of determining the scope of the term 'the Press' presents problems in an age in which social media and 'civilian' journalism (such as blogging) is increasingly prevalent: Leveson LJ has already had to take action following the publication of court documents by an internet blogger.³⁹

Furthermore, even if the problems surrounding the scope of the word 'Press' could be overcome, Judge also points out another problem with the PCC: 'the concept of giving what would in effect be censorship and licensing powers over to a body vested with responsibilities for the whole of the Press should set alarm bells ringing.'⁴⁰ But without such powers, the PCC will remain 'toothless'. (This is where the analogy with the GMC fails: the GMC has the power to stop doctors from practicing. Similar measures against journalists would be difficult to enforce without severely curtailing free speech.) Additionally, any violation of privacy is unlikely to be drawn to the attention of the PCC without its publication. This means that victims would have little power to stop hurtful material from being made public.

Another option would be for Parliament to enact a Bill, similar to that proposed by the National Heritage Committee of the House of Commons (detailed above). This could be beneficial in a number of ways. Firstly, it places the ability to exercise the new action in the hands of claimants. This attaches pitches the action against the subject matter rather than the person carrying out the alleged violation and would circumvent the problem of defining 'the Press'.

The implementation by Parliament of a new privacy action is preferred as opposed merely to increasing the weight of Article 8 against Article 10 in existing privacy in case where the rights are balanced against

each other.⁴¹ Parliamentary sanction would give authority to the action which the judiciary are unable to provide: there would be a public debate on the issue and the proposals would be democratically ratified. Recent calls for legislation which would clarify the use of a privacy injunction would be satisfied: any notion that the courts are developing law of their own accord would be nullified.

However, there are remaining concerns with this action. A new privacy action could place too much regulation on already beleaguered Press: recent data suggests that circulation of all broadsheets is continuing to fall. Economic concerns could reduce the independence of the Press even further: there has not been an 'independent' newspaper, which is not part of a larger media group, since the 1970s.⁴²

Furthermore, it must be admitted that this would still amount to some form of government imposed censorship: the judiciary would be carrying out a decisive function over where a privacy violation was justified. The Bill could be more effective at protecting an individual's privacy than an improved PCC: an injunction would be able to be sought before the story was published. However, this has implications for the liberty of the Press: any controversial story which violates another's privacy would be opened up to judicial scrutiny. Whilst invasive material would have to be justified, the potential for stories to be blocked for ulterior motives could all too easily be realised.

However, it would be very hard to design a scheme which protects privacy while also allowing for effective investigative journalism, which requires a high level of creativity. Recent legislation has provided an example of the problems which arise where laws are drawn with too wide a scope: powers under the Terrorism Acts have been condemned for their negative impact on civil liberties generally.⁴³ It is suggested, therefore, that the risk posed by such a statutory scheme would be too high and should be resisted: the dangers of reverting to censorship or otherwise damaging the general right to freedom of speech are all too apparent.⁴⁴

³⁸ Judge, n3, 9.

³⁹ See <http://www.bbc.co.uk/news/uk-15912314>, accessed 09/12/11.

⁴⁰ Judge, n3.

⁴¹ n30.

⁴² Peter Preston, 'Leveson and public interest? 20m tabloid readers can't be wrong', <http://www.guardian.co.uk/media/2011/dec/04/leveson-phonehacking-inquiry-newspaper-circulations> accessed 11/12/2011.

⁴³ Kavanagh, 'Constitutionalism, counterterrorism, and the courts: changes in the British constitutional landscape', I.J.C.L. 2011, 9(1), 172-199.

⁴⁴ See Robertson, *Freedom, the Individual and the Law*, (7th Ed. 1993).

Fundamentally, each case would need to be decided on a case by case basis, with judicial scrutiny aimed at whether publication of the story was in the public interest. These incremental developments could result in a lack of clarity in the law of Press regulation.

Conclusion

It seems that there is no obviously preferred method in which the Press could be regulated further to place increased protection on individuals' privacy. The problem of Press invasion of privacy is a cultural issue: provided the appetite for celebrity gossip continues to grow, there will also be journalists willing to operate outside the law to satisfy it. Thus, questions should be raised as to whether any new measure would be effective at all, without significant cultural or constitutional changes. The Leveson Inquiry continues to inspire hatred towards the immoral tactics used by some tabloid journalists. Despite this, policy makers should continue to remember the pivotal role which the Press play within our democracy before enacting any short-sighted measures aimed simply at satisfying the public's bloodlust.

Olivia Frances Harris
 Jesus College Cambridge

REPORT ON MARION SIMMONS QC MEMORIAL ESSAY PRIZE

We are delighted to publish in this edition of the ARDL Bulletin the 1st prize winning entry in the Marion Simmons QC competition. The winner was Frances Harris, studying at Jesus College, Cambridge University. This year's essay title was "Democracy, freedom of speech, privacy: how should the press be regulated in a democratic society?" The judges included Professor Julia Black of the London School of Economics and Professor Mary Seneviratne of Nottingham Trent University.

The 2nd prize went to Samantha Edwards, studying at Liverpool John Moore University and 3rd prize to Henry Mance of BPP. ARDL extends its congratulations to Frances, Samantha and Henry; and its thanks to judges Mary and Julia.

The prize was set up in memory of Marion Simmons QC, a highly regarded and much-loved member of the Bar who sadly died in May 2008. Marion was a Barrister, Recorder, Arbitrator and latterly Chairman of the Competition Appeal Tribunals. Her areas of practice covered a wide range of financial and commercial law, including competition and regulation. Marion served on the Committee of Association of

Regulatory and Disciplinary Lawyers for two years and was committed in her support of young lawyers.

We are delighted to report that the judges noted that the quality of essays this year was higher than ever. We look forward to launching next year's competition in the autumn.

Nicole Curtis
 Penningtons Solicitors LLP

ARDL SCOTLAND SEMINAR 2012 THE REGULATORY REFORM AGENDA, 15 OCTOBER 2012, AT THE OFFICES OF ANDERSON STRATHERN, EDINBURGH

Following past successful seminars in Scotland, ARDL is organising a seminar on the regulatory reform agenda to be held at the offices of Anderson Strathern in Edinburgh on Monday 15th October 2012. The seminar will be addressed by Niall Dickson, Chief Executive of the General Medical Council.

Regulatory reform is key discussion for professional regulatory and disciplinary bodies, especially at a time when the consultation on healthcare regulatory reform has just concluded and with referrals and complaints to regulatory bodies of all types significantly increasing. One question on the reform agenda is how to ensure the balance between public protection, value for money, proportionality, fairness and transparency? The most recent reforms taking place at the General Medical Council provide a platform for a discussion on the development of new and modern mechanisms for fulfilling the regulatory function. The seminar will hear about what led to the GMC's reforms being developed, what is involved in a significant reform agenda and where the difficulties in undertaking reform lie. One example of the GMC's reforms is acceptance of proposed sanctions without a public hearing where there is no major dispute on the facts. However, how to deal with complainants who are unhappy with such an outcome while at the same time maintaining public confidence is a potentially difficult balance. Regulators of all types, whether healthcare, social care, financial, legal or sport, are all facing the same issues. The aim of this seminar is to bring together a range of representatives across the regulatory spectrum and discuss how the reforms which are taking place at the GMC are relevant to other regulators and how they could, perhaps, play a part in influencing the future of professional regulation.

Catriona Watt
 Anderson Strathern

REPORT ON ANNUAL DINNER

The Savoy Palace was burned to the ground during the Peasant's Revolt of 1381 but the recently restored Savoy Hotel survived its first ARDL dinner last year and, on 14 June, ARDL returned for its annual dinner at this iconic London venue.

Following a drinks reception catching up with colleagues, some 350 ARDL members and their guests descended to the exquisite Lancaster Room, the largest of the Savoy's banqueting rooms, for the dinner itself. As you would expect from the Savoy, the service was fantastic as were the 3 courses. After dinner our Chairman, Timothy Dutton QC, presented the Marion Simmons Essay Prize to its worthy winner Frances Harris, whose essay appears above. Following which, in a passable Geordie accent in homage to how they first met, the Chairman introduced our guest speaker, Lord Falconer.

Lord Falconer of 'Thoroton', which we were told is 'just the right size' of a place for a title, began by sharing a 'regulatory pecking order' gleaned from his fellow dinners. Lord Falconer then treated us to a characteristically expansive, revealing and self-deprecating account of his unique career, ranging from Highbury Corner Magistrates Court to his former flatmate's occupation of 10 Downing Street, taking in a narrow escape from "having to resign because of my excellent handling of the Millennium Dome" before sharing his more sombre thoughts on the regulation of the press and the Leveson Inquiry.

After Lord Falconer's speech, which set the bar for next year, those with sufficient ingenuity and stamina to make it to one of the much sought after cocktail bars continued to see the night through in what is fast becoming somewhat of an ARDL tradition.

Many thanks to those who organised a successful and memorable evening and, in particular, Rosemary Rollason and Irene Rumble, without which the evening would not have happened.

Mark Whiting
 Capsticks Solicitors LLP

LEGAL UPDATE

- ***Walker-Smith v General Medical Council (2012) EWHC 503 (Admin)***

The General Medical Council brought proceedings against Professor W-S, together with two other registrants, Dr W and Professor M. The allegations arose following the publication in the Lancet of a paper

suggesting a link between the Measles, Mumps and Rubella (MMR) vaccine, and autism and bowel disease. The paper had included the results of investigations carried out by W-S regarding children referred to hospital with disintegrative disorder and symptoms of intestinal disease.

At the conclusion of evidence and submissions lasting 149 days, the Panel found W-S and W guilty of serious professional misconduct. It directed that their names be erased from the register. It found M not guilty of professional misconduct. Both W-S and W appealed; W later abandoned his appeal.

Mitting J, hearing W-S's appeal in the Administrative Court, noted that at the heart of the GMC's case had been two propositions: that the investigations undertaken under W-S's authority were part of a research project which required, but did not have, Ethics Committee approval; and that those investigations were clinically inappropriate. W-S's case had been that the investigations amounted to clinically appropriate medical practice which did not require Ethics Committee approval.

The Court noted that the distinction between medical practice and research was an unavoidable and fundamental issue for the panel to address. Both parties had made careful and extensive submissions about the issue to the panel. The GMC's case had been that the question must be an objective one. W-S had argued that it was his intention which was determinative.

The GMC had not invited the panel to determine W-S's intention, nor his truthfulness in his dealings with the Ethics Committee; and it did not do so. Mitting J held that the panel ought to have considered these two issues. He held that the Panel's error in not realising that it was necessary to determine these matters had led to a number of subsequent weaknesses in the panel's determination.

Mitting J held that the panel had to decide what W-S thought he was doing: if he believed he was undertaking research in the guise of clinical investigation and treatment, he deserved the finding that he had been guilty of serious professional misconduct and the sanction of erasure; if not, he did not, unless, perhaps, his actions fell outside the spectrum of that which would have been considered reasonable medical practice by an academic clinician. The panel's failure to address and decide this question was an error which went to the root of its determination.

The Court further held that there were numerous and significant inadequacies and errors in the panel's determination in its findings on the clinical issues in the

individual cases of the children in relation to whom results had been published in the Lancet. It noted that in no individual case in which the panel made a finding adverse to W-S did it address the expert evidence led for him, except to misstate it. It held that the issues to which this evidence went had been of fundamental importance to the case against W-S; and that inadequacies and errors in the panel's determination accordingly went to the heart of the case.

Mitting J concluded that the panel's overall conclusion that W-S was guilty of serious professional misconduct was flawed in two respects: inadequate and superficial reasoning and, in a number of instances, a wrong conclusion. The appeal was allowed.

R (on the application of B) by the Nursing & Midwifery Council (2012) EWHC 1264 (Admin)

B, a registered nurse, applied for judicial review of a decision by the NMC to set aside its previous decision that there was no case to answer in respect of allegations concerning Patient A.

The Investigation Committee (IC) of the NMC had considered allegations concerning B's care of patient A at a nursing home. The consideration followed a police investigation into the care provided at three nursing homes, including the home at which B worked. The IC decided that, although there was evidence of system failures at the care home, there was insufficient evidence to suggest that the deficiencies in the care provided to A were the sole responsibility of B. The IC concluded that B had no case to answer.

The NMC subsequently asked the IC to reconsider the case, together with previously overlooked allegations in respect of another patient.

The IC duly reconsidered the case and set aside its previous decision that B had no case to answer. In its reasons, it referred to the decision in ***R (on the application of Jenkinson) v the NMC [2009] EWHC 1111 (Admin)***, which it stated gave it limited power to set aside previous decisions where there had been a slip or an accidental error. The IC stated that it had carefully considered whether the original decision had been a slip or an accidental error and had concluded that, "the definition of a slip is a 'faulty action' and that the application of the case to answer test by a previous panel represented a faulty action."

B submitted that the NMC's decision was ultra vires as it fell outside the scope of the very narrow power of a professional regulatory body to correct its own mistakes; and that the NMC had acted in breach of her procedural and substantive legitimate expectation.

The NMC submitted that it was entitled to set aside its previous decision, in accordance with Jenkinson; and that although the initial IC decision letter could have given rise to a legitimate expectation, it was proportionate and reasonable for the NMC to resile from the representation previously made.

The Court held that the IC's decision was an exercise of judgment and that, although the exercise of that judgment may have been flawed, it could not properly be characterised as a 'slip'. Slips were "accidental errors which do not substantially affect the rights of the parties or the decision arrived at". The Court distinguished the judgment of Jenkinson, as the circumstances were exceptional and very different (in Jenkinson a finding had been based on a conviction which had subsequently been overturned by the Court of Appeal). Further, in Jenkinson the parties had been in agreement that the earlier decision of the NMC should not stand, as there was no longer any proper basis for it.

The Court further held that in rescinding and reversing the decision of the IC, the NMC had departed from its established and published procedures. In so doing, it had breached B's procedural legitimate expectation, and acted unfairly towards her.

- ***Lawrence v General Medical Council [2012] EWHC 464 (Admin)***

A Fitness to Practise Panel of the General Medical Council found proved a number of allegations against L, a consultant psychiatrist, to the effect that he had acted inappropriately towards a patient, B, including revealing to her his sexual fantasies and attempting to pursue an emotional relationship with her.

On appeal, Stadden J rejected L's argument that the Panel had wrongly allowed B to give evidence by video-link. He held that there was compelling evidence regarding B's health and a real prospect that she would have had a relapse had she had given evidence at the hearing, which would have affected the quality of that evidence.

L further argued that the Panel had been wrong to rely on its own expertise to conclude that a woman with low self-esteem was unlikely to fantasise that she was attractive to another without encouragement; and that erotic transference alone would be unlikely to cause B to believe that L reciprocated her feelings.

The Court held that it had not been open to the Panel to reach this conclusion without giving L notice of the issue or allowing him to submit evidence on the point. It noted that the 'expertise' referred to was that of the Chair of the Panel, who was a psychiatrist but who

admitted that he was not an expert in psychotherapy or erotic transference in the context of psychotherapy.

The Court upheld the established principle that natural justice meant that members of specialist tribunals could not give evidence to themselves which the parties had no opportunity to challenge.

The Court found that the evidence as a whole did not justify a conclusion that the Panel's findings of misconduct were plainly wrong. The Panel had, however, made insufficient reference to various issues and given inadequate reasons. Those flaws contributed to the conclusion that its findings of misconduct should be quashed.

- ***Levinge v Health Professions Council [2012] EWHC 135 (Admin)***

L was employed at a college of further education as music therapy programme leader. She was found guilty by the Conduct and Competence Committee of the Health Professions Council of allegations including the inappropriate use of certain techniques outside a controlled therapeutic setting, ignoring the practice-based observational evidence of other tutors, undermining external personal therapists, discussing personal details of students in group sessions, giving students negative assessments based solely on personal opinion and refusing to acknowledge concerns and criticisms made about her and the course she taught.

The Panel concluded that L's fitness to practise was impaired and imposed conditions of practice, including a condition that she should undergo clinical supervision by a music therapist, who was to submit periodic reports to the HPC confirming that her practice conformed to HPC standards for proficiency and conduct. The panel also imposed the condition that she should cease acting as a clinical supervisor to any therapist or trainee.

L appealed on the basis that the committee should not have found the allegations proved; that they should not have found her fitness to practise impaired as the conduct had taken place many years before and had occurred in an educational rather than clinical environment; and that the sanction was disproportionate, as her clinical ability had never been called into question.

The Administrative Court allowed the appeal in part. L had sought to adduce expert evidence in response to the allegation regarding inappropriate use of techniques. The Court found that the Panel had been wrong to reject this expert evidence simply on the basis that the expert had never visited the College in question. The Court further held that there had been no evidence on which a properly directed committee could have found

proved the allegation that L had ignored the practice-based observational evidence of other tutors. The Court concluded, however, that the Panel had been right to find the other allegations proved.

The Court went on to hold that the panel had been entitled to find that L's fitness to practise had been impaired by reason of misconduct, even though the misconduct related to L's teaching activities rather than her clinical practice. The Court did find, however, that the clinical supervision condition had been unreasonable and disproportionate, given that the Panel had not heard any allegations of misconduct in respect of L's clinical practice. The Court noted that the clinical supervision condition had a direct impact on L as a clinician and also imposed on L a financial burden, the extent of which had never been investigated.

- ***Gurpinar v Solicitors Regulation Authority (2012) EWHC 192***

The Solicitors Regulation Authority brought proceedings against G for professional misconduct with regard to breaches of conditions of his practising certificate and breaches of the Solicitors' Accounts Rules.

G had been unable to attend the originally scheduled hearing, but had instructed counsel to apply for an adjournment on his behalf. The Tribunal agreed to an adjournment and directed that G serve his defence bundle at least a week before the new hearing date. G did not serve a defence bundle; and neither he nor a representative appeared at the re-listed hearing. It was noted that G had not contacted the Tribunal since the last hearing. Enquiries were made of the Chambers of previously instructed counsel, who confirmed that they were without instructions. The Tribunal decided to proceed in G's absence. At the conclusion of the hearing, the Tribunal directed that G be struck off the Roll.

G's appeal was heard by Moore-Bick LJ sitting in the Administrative Court. G produced to the Court several letters and emails addressed to the Tribunal and the SRA's solicitor reporting that he was ill and that he was experiencing difficulties returning to London from Turkey. He also produced an email to his former partner (who had appeared before the Tribunal), asking him to arrange for counsel to attend the hearing to request an adjournment. None of that correspondence had reached its intended recipients. The Court concluded that the only explanation for this was that it had not been sent. The Court further concluded that there was no basis for setting aside the Tribunal's order on the ground that it should not have proceeded in G's absence.

G further argued that that sanction was too harsh. Moore-Bick LJ referred to *Salsbury v Law Society (2008) EWCA Civ 1285*, noting that the Solicitors Disciplinary Tribunal is an expert body made up of members of the profession; and that their assessment of the appropriate penalty in any given case is entitled to considerable respect. He noted the established principle that that the Appeal Court should not interfere with the Tribunal's decision unless it has erred in law or the penalty it has imposed is clearly inappropriate. The Court held that the "regulation of professional men and women in all walks of life is intended to provide protection to members of the public though the maintenance of proper professional standards" Moore-Bick LJ further stated that in his view a person who has demonstrated over a period of time that he is unwilling or unable, for whatever reason, to comply with the legitimate requirements of the SRA had thereby made it clear that he was not fit to practise as a solicitor.

- ***Ramjan v General Dental Council (2012) All ER (D) 109***

Following a complaint by his 71 year old patient of sensitivity in her front lower teeth, R had prepared a treatment plan which involved fitting crowns to eight teeth at a cost of £6,000. R started the preparatory work for the crowns, which was invasive and irreparable. An expert witness stated that R's treatment of his patient had no clinical justification.

The committee ruled that a finding of dishonesty was inescapable; and that R posed an on-going risk to patient safety. The panel found that his fitness to practise was impaired and directed that he should be struck off the register.

On appeal, R submitted that the finding of dishonesty was not fairly open to the Committee. He argued that, on the basis in particular of an expert report that had been in evidence, the treatment of the patient had been fully consistent with misjudgment or incompetence, albeit of a very serious nature, and the Committee did not have a proper basis for concluding to the requisite high degree of proof that Mr R had knowingly mistreated the patient and had acted dishonestly.

Parker J, in the Administrative Court, noted that R had treated a patient in a manner that was wholly unjustified and that had very detrimental consequences. Such was the nature of the treatment that the issue of honesty properly arose; and the Committee, with its expertise and expert experience, was best placed to make that judgment. The Committee had heard R, who had not been able to give an explanation of his actions. The Committee took into account the points made on his behalf on the crucial question but, having regard to the individual and cumulative strength of those points,

concluded that a finding of dishonesty was inescapable. This Court would interfere with a finding made in those circumstances only if the Court was satisfied that the finding had no reasonable basis.

The Court held that the conclusion not only was soundly based but, in truth, it was the only one that the Committee could have reasonably reached in the circumstances.

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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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