CIVIL STANDARD OF PROOF

The standard of proof for Fitness to Practice Panel hearings by the GMC was changed to the civil standard of proof on 31 May 2008.

This followed the Shipman Report and caused a lot of unrest in the medical profession who were of the opinion this would open the floodgates for the GMC to bring more claims against professionals and it would result in an inconsistency of approach by panels which would lead to more appeals.

It has also been argued that the introduction of the flexible civil standard of proof will enable a lower threshold for findings of impairment to be made, thus enabling regulatory panels to take action more easily on less serious matters.

The practical effect of the application of the flexible civil standard of proof in FTP proceedings may amount to the application of different tests depending on the precise circumstances of any given case. Inconsistency in determinations by regulatory panels may in turn lead to an increased number of legal challenges.

The GMC still has to prove the charges to the satisfaction of a panel and they say they apply the civil standard of proof flexibly.

Three Stage Process for Hearing Evidence

The GMC follows a three stage process after hearing evidence:

- whether the facts alleged have been found proved on balance of probabilities;
- whether, on the basis of the facts found proved, the doctor's fitness to practise is impaired; and
- whether any action should be taken against the doctor's registration.

In **R(N) v Mental Health Review Tribunal (2006) QB 468** Lord Justice Richards (Court of Appeal) *"'Although there is a single standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before the court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of*

probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

Whether or not proved facts amount to impairment of a doctor's fitness to practise is a matter of judgment and not proof: **RHP v GMC & Biswas [2006] EWHC (Admin) 464.**

The GMC provide explicit reference to the standard of proof in their Fitness to Practise Rules

GMC's Fitness to Practise Rules Rule 34(12) provides:

12. The standard of proof applicable in any proceedings—

a. before a FTP Panel where the allegation and the alleged facts are read out by the person acting as secretary in accordance with rule 17(2)(c) on or after 31st May 2008; and

b. before the Investigation Committee where the Presenting Officer begins to outline the allegation and the facts in accordance with rule 11(7) on or after 31st May 2008,

is that applicable to civil proceedings.".

The additional Rule is supported by guidance on applying the civil standard of proof.

The GMC rules state In relation to the first stage, when reaching a decision on whether the facts have been found proved, the panel must have in mind the seriousness of the allegations and the seriousness of the potential consequences if the allegations are found proved.

The decision as to sanction (or consequences for the doctor) will only take place at the third stage of the process once both parties have had an opportunity to make further submissions on the appropriate outcome. Considering the seriousness of the potential consequences for the doctor during the fact finding stage does not mean that panels undertake their consideration about sanction at this earlier point in the process. In this context, the seriousness of the potential consequences is simply a corollary of the seriousness of the allegations presented to the panel.

Kituma v Nursing & Midwifery Council [2009] EWHC 373 (Admin)

This was an appeal against the decision of the Conduct and Competence Committee of the NMC to strike the appellant off the register after finding charges of misconduct proved. The appellant was a midwife who had failed to notice or treat a post-partum haemorrhage, causing physical harm and severe distress to the mother. **One of the grounds of appeal was that the**

Committee had failed to give sufficient weight to the fact that the appellant, who was 44 years old, had had an unblemished career both before and since this one-off incident.

The Court confirmed that **it is not true that a one-off incident can never give rise to a finding of impairment of fitness to practise or a striking off order. In this case the Committee had clearly taken the appellant's otherwise good record into account, but they were entitled to find impairment on the facts of the case and strike the appellant off. The real issue in the case was the appellant's continued failure to accept that she had done anything wrong.** This gave rise to a legitimate concern that she would act the same way in the future if presented with a similar situation, which posed an unacceptable risk to patient safety.

Cheatle v General Medical Council [2009] EWHC 645 (Admin)

In this case the appellant successfully challenged the decisions of a Fitness to Practise Panel that his fitness to practise was impaired and that he should be suspended for a period of ten months.

The **Court reviewed the authorities in a number of key areas**: the appropriate tests on appeal in GMC cases, including appeals brought on the basis of **mistake of fact; the test for impairment; the requirement to give reasons for findings of fact; and the degree to which the consequences of a particular sanction** should be taken into account before a determination as to sanction is made.

Test on appeal

There has previously been something of a perceived conflict between the decisions in Meadow v General Medical Council [2006] EWCA Civ 1390 and Raschid & Fatnani v General Medical Council [2007] EWCA Civ 46. In Meadow the Court of Appeal held that Court must bear in mind and respect the following facts:

1. A Fitness to Practise Panel of the GMC is a specialist body whose specialist knowledge deserves respect

2. Such a Panel will also have had the benefit of seeing and hearing the evidence in person, and is therefore better placed to make findings of fact

3. The findings of fact and the overall value judgment to be made by the Panel are akin to jury questions to which there may reasonably be different answers.

Accordingly, although an appeal is not limited to review, a **Court will not interfere with the decision of a Panel unless it is clearly wrong** (while noting that the word "clearly" may add little).

Raschid was decided shortly after Meadow, but the Court of Appeal in that case did not have available to it the Meadow decision. It held that it was necessary to accord particular respect to the judgment of a **Panel, whose principal purpose was to preserve and maintain public confidence in the profession rather than to administer retributive justice.** The Court would intervene to correct material errors of fact and law and would exercise a firmly secondary judgement as to the correct application of the principles to the particular facts of the case on appeal.

In Cheatle Mr Justice Cranston held that the two cases were "readily reconcilable" (at para 15):

The test on appeal is whether the decision of the Fitness to Practise Panel can be said to be wrong....However, ... the focus must be calibrated to the matters under consideration. **With professional disciplinary tribunals issues of professional judgment may be at the heart of the case**. Raschid was an appeal on sanction and in my view professional judgment is especially important in that type of case. As to findings of fact, however, I cannot see any difference from the Court's role in this as compared with other appellate contexts. As with any appellate body there will be reluctance to characterise findings of facts as wrong....**Decisions on fitness to practise, such as assessing the seriousness of any misconduct, may turn on an exercise of professional judgment.** In this regard respect must be accorded to a professional disciplinary tribunal like a Fitness to Practise Panel. However, the degree of deference will depend on the circumstances. One factor may be the composition of the tribunal.

As to cases brought on the **basis of a mistake of fact**, Cranston J reviewed a number of cases where the Court had been willing to interfere on that basis and said:

Thus the material error of fact, on the part of the Fitness to Practise Panel, which the court will correct, **may be because there is no, or insufficient, evidence to support the finding. Another example if where the Fitness to Practise Panel concludes that there is a failure of a doctor to fulfil an obligation, but there is no such obligation. Yet another instance is where a finding of fact on one matter is irreconcilable with a finding on another**. In all such cases, where the error of fact is material, the court is entitled to intervene, notwithstanding that a Panel is the primary decision-maker on factual matters.

Impairment

As has been described in the recent decisions of R (on the application of Zygmunt) v General Medical Council [2008] EWHC 2643 (Admin) and Azzam v General Medical Council [2008] EWHC 2711 (Admin), Section 35C of the Medical Act 1983 **requires that a Panel engage in a two-step process** (at para 19):

...First, it must decide whether there has been misconduct, deficient professional performance or whether the other circumstances set out in the section are present. Then it must go on to determine whether, as a result, fitness to practise is impaired. Thus it may be that despite a doctor having been guilty of misconduct, for example, a Fitnes to Practise Panel may decide that his or her fitness to practise is not impaired.

Cranston J confirmed that the test for impairment is to be applied in the context of the circumstances at the time and looking forward (at para 22):

...the context of the doctor's behaviour must be examined. In circumstances where there is misconduct at a particular time, the issue becomes whether that misconduct, in the context of the doctor's behaviour both before the misconduct and to the present time, is such as to mean that his or her fitness to practise is impaired. The doctor's misconduct at a particular time may be so egregious that, looking forward, a panel is persuaded that the doctor is simply not fit to practise medicine without restrictions, or maybe at all. On the other hand, the doctor's misconduct may be such that, seen within the context of an otherwise unblemished record, a Fitness to Practise Panel could conclude that, looking forward, his or her fitness to practise is not impaired, despite the misconduct.

Giving Reasons

As a general rule, a Panel does not have to give reasons for their factual findings in the same way as a jury does not have to give reasons for its verdict. However, a Panel is under a common law duty to give reasons in exceptional cases, when fairness demands it. In this case Cranston J considered that reasons should have been given because there were a number of significant and material inconsistencies in the evidence, which were a central plank of the defence. The appellant was entitled to know why his defence had not succeeded.

Sanction

The issue as to sanction was the effect of Section 47 of the Medical Act 1983, and in particular the wording of Section 47(4)(a)(i). Section 47 **provides that no person may hold any appointment as a physician, surgeon or medical officer in any public hospital or other public institution unless they are fully registered.** Should a registered practitioner become less than fully registered, his appointment as such an institution is immediately terminated by operation of law. Section 47(4) provides exceptions for cases where the practitioner has been suspended by an Interim Orders Panel or by a Fitness to Practise Panel following a finding of impairment by reason of deficient professional performance or adverse physical or mental health. In such cases the practitioner's appointment is not terminated by operation of law but he or she is not permitted to practise during the term of the suspension (termination being an issue left to be determined between the practitioner and his employer).

An order for suspension made by a Fitness to Practise Panel following a finding of impairment by reason of misconduct is not included in the list of exceptions. Accordingly the appellant's appointment at an NHS Trust would be immediately terminated by operation of law if he was suspended by the Panel. The appellant submitted that this consequence of suspension should have weighed in favour of a lesser sanction being imposed, as suspension would be a disproportionate response taking into account the consequence of loss of employment.

Cranston J noted that the House of Lords had previously called for legislative change to correct this anomaly (in Tarnesby v Kensington and Chelsea and Westminster Area Health Authority (Teaching) [1981] ICR 615) yet none had occurred. He held that although the impact of a particular sanction on the practitioner was not the primary consideration for a Panel, it could not be ignored given that proportionality was an essential consideration in reaching their decision.

GMC – Consultation on changes to Fitness to Practise Rules

The General Medical Council is consulting on a number of proposed changes to its Fitness to Practise Rules. This is the first of several consultations planned for 2009. In this package the GMC is proposing changes which would allow the Registrar to filter out vexatious complaints at an early stage and which would extend the circumstances in which a decision to conclude a complaint could be reviewed.