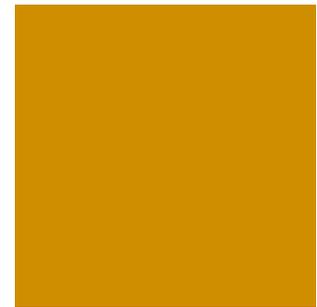
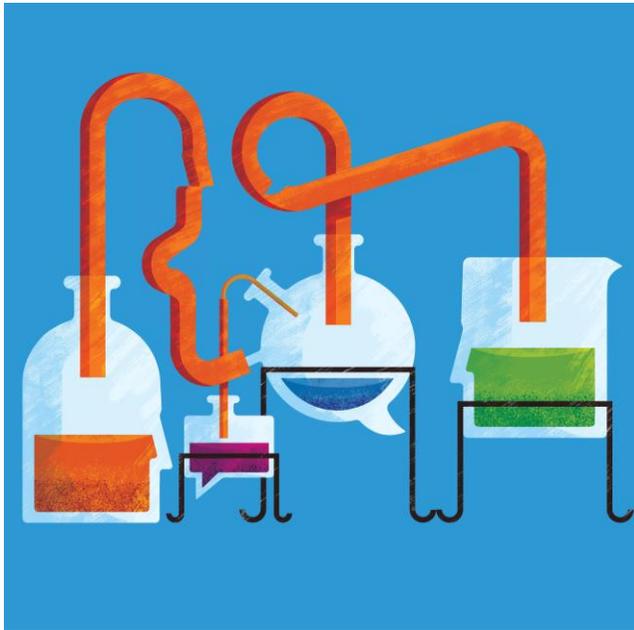


Professional Regulatory and Disciplinary Law: Recent Developments

Thursday 14 February 2019



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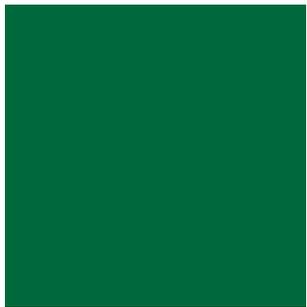
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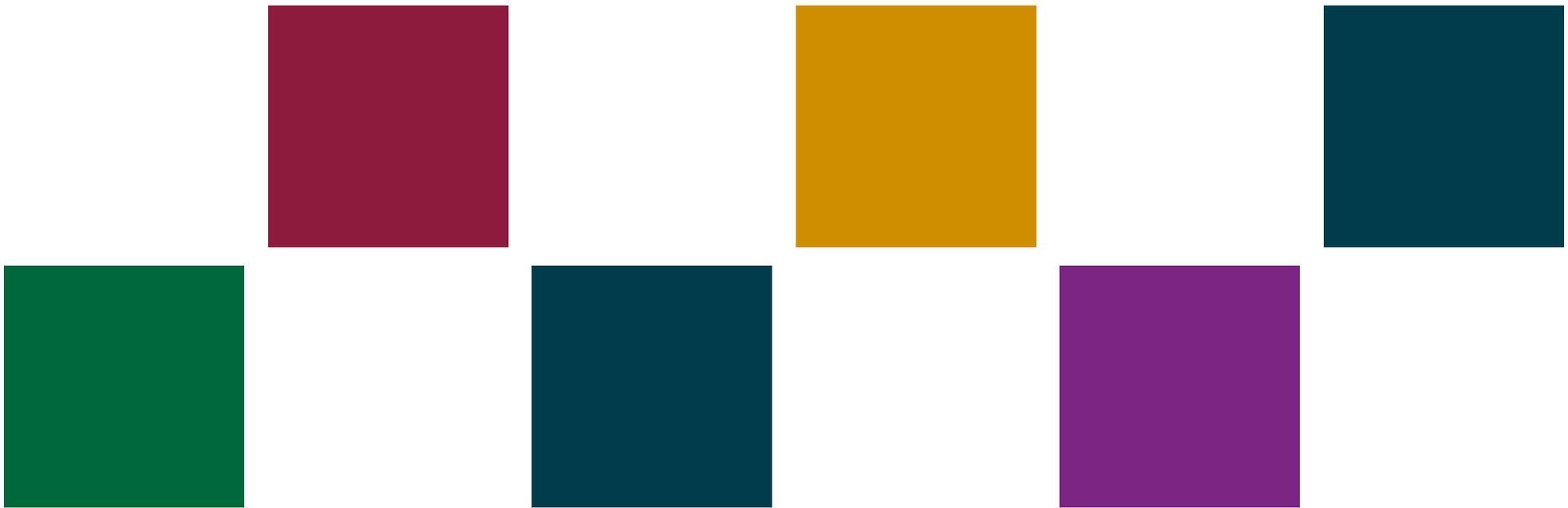
Welcome and GDPR Update

Catherine Allen, Partner, Public, Regulatory & Investigations Team, Mason Hayes & Curran



The Jurisdiction of the High Court

Paul Fitzpatrick, Senior Associate, Public, Regulatory
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Section 76 of the Medical Practitioners Act 2007

Provides that where a registered medical practitioner does not appeal to the Court against a decision on sanction, the Council shall make an application to the Court for the confirmation of the decision, and that:

*“The Court shall, on the hearing of an application ... confirm the decision ...
unless the Court sees good reason not to do so”*

Identical language used in section 74 of the Nurses and Midwives Act 2011

Section 44(5) of the Teaching Council Acts 2001-2015

Provides that where a registered teacher does not appeal to the Court against a decision on sanction, the Council shall make an application to the Court for the confirmation of the decision, and that:

*“the Court, on the hearing of the application shall, **unless it sees good reason to the contrary**, confirm the decision or may give such other directions to the Council as the Court considers appropriate ...”*

Section 75 of the Medical Practitioners Act 2007

- Provides that a medical practitioner can appeal against the Council's decision on sanction
- On hearing an appeal, the court may either:
 - (i) **confirm** the decision; or
 - (ii) **cancel that decision and replace it** with such other decision as the Court considers appropriate, which may be a decision—
 - (I) to **impose a different sanction** on the practitioner, or
 - (II) to **impose no sanction** on the practitioner
- Broader jurisdiction when dealing with an appeal on the merits

The Medical Council v M.A.G.A

- Section 76(3) – provides a mechanism to depart from Medical Council’s decision if:
 - 1) there was a substantial procedural irregularity; or
 - 2) a failure to comply with the norms of natural and constitutional justice; or
 - 3) or if the court were to conclude that no reasonable medical council could come to the conclusion which it did.
- **Section 6 -**

“The object of the Council is to protect the public by promoting and better ensuring high standards of professional conduct and professional education, training and competence among registered medical practitioners.”

The Nursing and Midwifery Board of Ireland v O.C.M

- “ *that after due reconsideration the Board believes that notwithstanding the admitted dishonesty, forgery and professional misconduct on your part that public confidence can be maintained in the integrity of the profession of nursing by the imposition of the recommended sanctions in particular the conditions imposed above.*”
- Exceptional mitigating factors:
 - allegations involved isolated incidents which occurred in the context of the ongoing acute distress
 - prior unblemished record
 - acknowledgment of wrongdoing
 - the lack of evidence of harm caused to patients.
- Key question: Has the Board here discharged its functions as identified in the Act and reached a conclusion which is reasonable, albeit not necessarily a conclusion which the Court might have reached?

Summary

- the Court cannot act as a form of court of appeal on the merits of a decision of a professional regulator.
- whether the Court takes a different view on the appropriate sanction is not a relevant consideration.
- the Court may refuse to confirm the decision of a professional regulator only where:
 - (a) it is satisfied there has been a substantial procedural irregularity in how the regulator has conducted itself; or
 - (b) the norms of natural and constitutional justice have not been applied; or
 - (c) it is satisfied that no reasonable regulator could have come to such a conclusion on sanction.

The Medical Council v Lohan-Mannion

Relevant conditions:

- notify a number of parties that her registration is subject to conditions including *“any organisation or person employing or contracting with her to undertake medical work”*
- attend and successfully complete an appropriate course within 12 months and such course be a multi-disciplinary interactive crisis programme
- that she work with a nominated person to formulate a professional development plan designed to address deficiencies in practice in relation to management of anaesthesia and record keeping
- that she meet with her nominated person on a regular basis to achieve the aims set out in the Professional Development Plan

The Medical Council v Lohan-Mannion

Three issues to be addressed:

- a) the adequacy of the Medical Council's decision;
- b) assuming the recommended sanction is adequate, is the protection of the public appropriately addressed by the doctor being able to continue to practise whilst conditions were attached to her registration that remain unfulfilled? and
- c) is the notification of the imposition of these conditions in the limited way intended by the Medical Council adequate, since individual patients coming into contact privately with the doctor would not be notified by her of those conditions?

Conclusion

- The threshold required to demonstrate unreasonableness is similar to that required to quash the decision of an administrative body on judicial review.
- That is a high threshold and it has not been met in this case.
- The Court's view as to adequacy of the sanction is not relevant.
- Although the sanction may be considered to be lenient or one which does not address the public interest and provide protection to the public as comprehensively as it might, it cannot be regarded as so lacking in that regard as to warrant refusal.

Teaching Council v S.R.

- Court considered two questions:

1) can it be said that there was any question of procedural impropriety or lack of natural or constitutional justice?

2) is the decision of the Council so unreasonable as to warrant refusal?

- Section 7(3)(d) of the Teaching Council Acts 2001 – 2015:

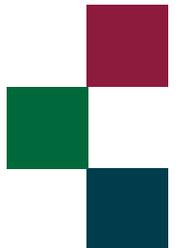
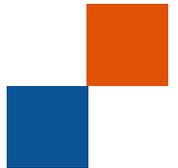
“The Council in the performance of its functions shall have regard to the need to protect children and vulnerable persons”.

Conclusion

- Courts will afford regulatory bodies a high degree of curial deference
- Court will not interfere with a decision unless:
 - a) it is satisfied there has been a substantial procedural irregularity in how a regulator has conducted itself;
 - (b) the norms of natural and constitutional justice have not been applied;
 - (c) it is satisfied that no reasonable regulator could have come to such a conclusion on sanction.
- High threshold to be met to establish unreasonableness

What are the learnings for regulators?

- Regulators will need to be in a position to:
 - a) evidence the decision making process followed in determining the appropriate sanction; and
 - b) outline the factors taken into account in determining sanction
- It is important for a regulatory body to be able to:
 - a) show that it considered the relevant guidance documents on sanction; and
 - b) point to why it considered the relevant sanction appropriate in the circumstances of the case



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Expert Evidence in Professional Regulatory Proceedings

Ciara McGoldrick, Law Library of Ireland



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Context

- Expert evidence can be called where:
 - Relevant and necessary and
 - Expert has appropriate qualifications and/or experience
- Lay majorities
- Not appropriate that professional member of panel with particular expertise give opinion to other committee members – Southall v GMC [2010] EWCA 407, para 67
- Have regard to grounds for complaint and nature of allegations
 - Eg McManus v Fitness to Practise Committee of the Medical Council [2012] IEHC 350
- May be relevant in assessing seriousness of alleged breach

Duties of expert witness

- Order 39 Rule 57 Superior Court Rules
- National Justice Compania Naviera SA v Prudential Assurance Co Ltd [1993] 2 Lloyds Rep 68, 81- 82 (Ikarian Reefer)
- Kennedy v Cordia (Services) LLP [2016] UKSC 6
- Law Reform Commission Report: Consolidation and reform of aspects of the law of evidence
- Keneally v DePuy International Limited [2016] IEHC 728
- Professional Codes of conduct eg - GMC Guidance: Acting as a witness in legal proceedings 2013
- Medical Council Guide to Professional Conduct and Ethics – medical reports - para 40

Duties of expert witness

- Superior Court Rules - Order 39 Rule 57 [SI 254 of 2016 Rules of Superior Courts (Conduct of Trials) 2016]
- It is the duty of an expert to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert.
- Every report of an expert delivered pursuant to these Rules or to any order or direction of the Court shall:
 - (a) Contain a statement acknowledging the duty mentioned in sub rule (1);
 - (b) Disclose any financial or economic interest of the expert, or of any person connected with the expert, in any business or economic activity of the party retaining that expert, including any sponsorship of or contribution to any research of the expert or of any university, institution or other body with which the expert was, is or will be connected, other than any fee agreed for the preparation by the expert of the report provided or to be provided in the proceedings concerned and any fee and expenses due in connection with the participation of the expert in the proceedings concerned.

Duties of expert witness

- Overriding duty is to the hearing committee and not to instructing party. Duty to instructing party to act with reasonable care
- Give a well balanced, well reasoned, unbiased and honestly held opinion
- Avoid conflicts of interest and where conflict exists the expert must declare
 - Keneally v De Puy p501 – principles in relation to exclusion of evidence and weight of evidence
 - EXP v Barker [2017] EWCA CIV 63 – failure to disclose relationship with Defendant
- Keep opinion within scope of his or her expertise and within scope of instructions – state when a particular question or issue falls outside their expertise.
 - Pool v GMC [2014] EWHC 3791
- State the facts and assumptions upon which his or her opinion is based. Should not omit to consider material facts which could detract from his or her opinion. If there is a range of opinion on a particular matter should set that out and say why holds own opinion
 - Waliszewski v McArthur and Company Limited [2015] IEHC 264 – failed to include relevant information in report – referred by Judge to Medical Council
- Be prepared to change view and disclose without delay

Instructing expert

- Confirm that has appropriate experience and expertise
- Set out allegations in respect of which expert evidence is required
- Advise of the appropriate legal standard/test - provide with relevant guidance and legislation,
- Provide all relevant material
- Confirm whether any conflict of interest
- Confirm overriding duty is to hearing committee
- Advise in relation to structure of report
- Terms of appointment should be agreed at the outset
- Maintain record of instructions and consultations
- Request draft report in first instance
- Guidance for Instruction of Experts in civil claims – Civil Justice Council August 2014 - UK

Content of Report

- Details of expertise, qualifications and experience
- Declaration regarding duties and statement of truth
- Set out instructions - written and oral
- Set out materials provided and considered and the documents, statements, evidence, information or assumptions upon which opinion based
- Set out factual background to opinion
- Address each allegation individually stating in respect of each allegation whether, if fact proven, would amount to professional misconduct etc and give reasons in respect of each
- Set out relevant information that might not support his or her view

Regulatory accountability of expert witnesses

- MP v AP [1996] 1 IR 144 Laffoy J – considered whether immunity from civil proceedings extended to disciplinary proceedings

“ ... having regard to the public policy considerations which underlie the immunity from civil proceedings - that witnesses should give their evidence fearlessly and that a multiplicity of actions in which the value or truth of their evidence would be tried over again should be avoided - in my view, such a witness or potential witness must be immune from such disciplinary proceedings or investigation.”

Distinguished by Barr J in EHB v Medical Council (3 April 1998)

- Had not sought permission of court to provide information to regulator
- Immunity not in issue before court – not satisfied that Laffoy J intended to say embargo on disciplinary proceedings

Complaints against experts

- **GMC v Meadow [2007] 1 All ER 1**

“... although the need for fearlessness and the avoidance of a multiplicity of actions has been held to outweigh the private interest in civil redress, hence the immunity from civil suit, those public policy benefits do not and cannot (or at least should not) override the public interest in the protection of the public’s health and safety enshrined in the GMC’s statutory duty to bring FTP proceedings where a registered medical practitioner’s fitness to practise is impaired ... Such immunity would ... be inconsistent or potentially inconsistent with the principle that only those who are fit to practise should be permitted to do so.”

- **Waliszewski v McArthur Steel Co [2015] IEHC 264**
- Personal injuries action. Medical expert failed to disclose subsequent relevant injury.

Complaints against experts

- **Pool v GMC [2014] EWHC 3791 (Admin)**
- Psychiatrist instructed to give expert evidence at FTP proceedings before HPC about paramedic and prepared report. Objection to status as expert upheld. Paramedic complained to GMC. Grounds included – failed to restrict opinion to areas of which he had expert knowledge gave evidence on matters outside his professional competence, failed to give adequate reasons, displayed an inadequate understanding of the role and responsibilities of expert witness (described as significant failure). Upheld by court. Sanction of 3m suspension overturned and replaced with condition that not to take instructions to act as expert for 3 months. Even though once off – drastic consequences for paramedic.
- FTP committee stated “ the panel considers that to put oneself forward as an expert witness requires more than clinical experience and knowledge. It also requires the ability to produce an adequate report and to give oral evidence in an authoritative and convincing manner.”

Complaints against experts

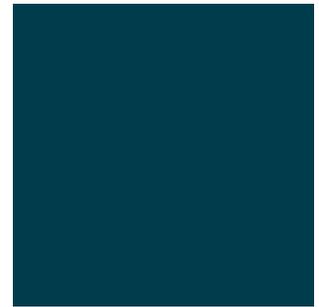
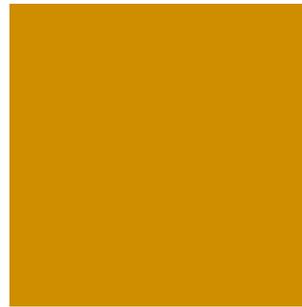
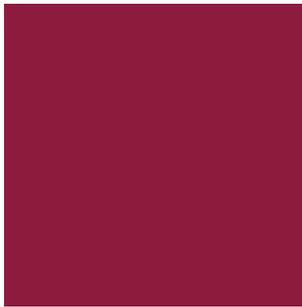
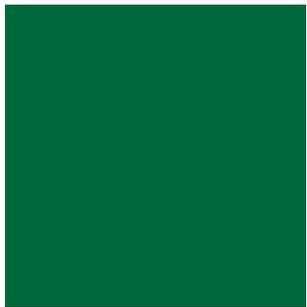
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McManus v Medical Council [2012] IEHC 350

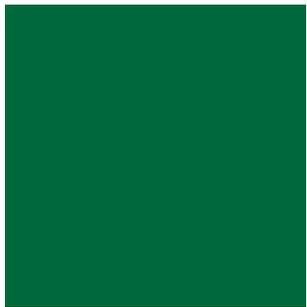
- Alteration of medical records – not necessary to call expert evidence
- Committee must accept consequence of witness not swearing up
- Used complainant doctor as witness to fact and committee elevated her to opinion – no op to cross examine
- Committee must give reasons if not going to rely on expert evidence

Medical Council v TM

Elaine Finneran BL, Law Library of Ireland



Q&A



Thank You

Questions?



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