



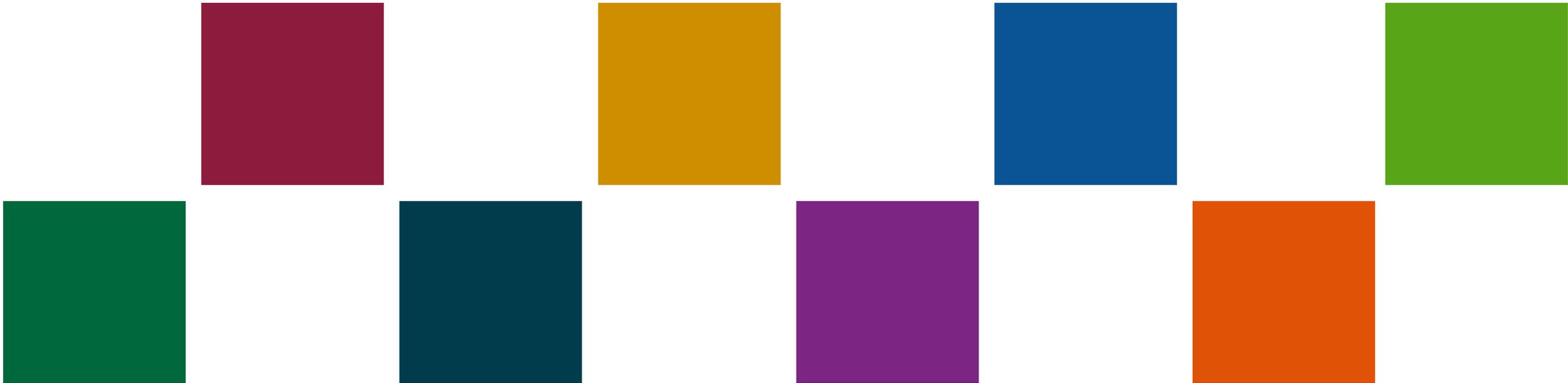
Professional Regulatory & Disciplinary Law: Recent Developments

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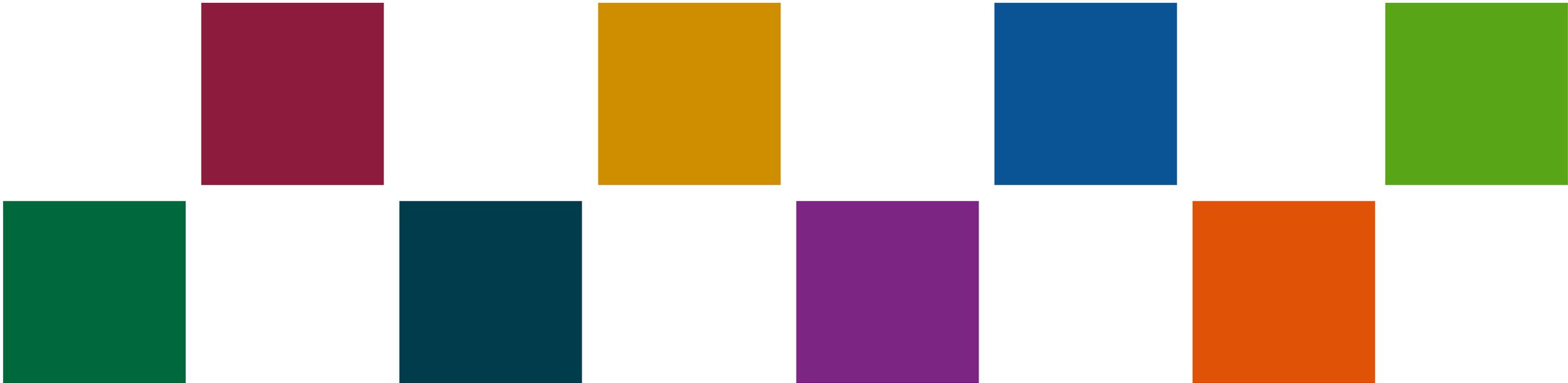
Welcome

Catherine Allen, Partner, Mason Hayes & Curran LLP



Private Life and Workplace Behaviour: Where is the Line for Professional Regulation?

Paul Fitzpatrick, Senior Associate, Mason Hayes & Curran LLP



R (Pitt) v General Pharmaceutical Council (2017) EWHC

- concerned a challenge to new Professional Standards adopted by the General Pharmaceutical Council - expressed as needing to be met **at all times**, not only during working hours.
- Standard 6 – “*Pharmacy professionals must behave in a professional manner*”.
- *The privilege of being a pharmacist or pharmacy technician, and the importance of maintaining confidence in the professions call for **appropriate behaviour at all times.***
- Examples of “appropriate behaviour”:
 - a) polite and considerate
 - b) trustworthy and act with honesty and integrity
 - c) show empathy and compassion
 - d) treat people with respect and safeguard their dignity

Judgement of Singh J

- The Court deemed this interpretation of the Standard was “*simply wrong*” noting that the new Standards:
 - need to be interpreted “*fairly and as a whole...in a way which is **rooted in real life and common sense***”.
 - are “*intended to guide the conduct of pharmacy professionals in a practical way*”
 - merely illustrate what may or may not be unacceptable conduct, and do not dictate that a pharmacist will breach the Standards for **every trivial act** in their personal lives.
 - **legal certainty** - does not require absolute precision
 - occasions outside normal working hours, and perhaps in a context which is **unrelated to the professional work of a pharmacist**, which may be relevant to the safe and effective care which will be provided to patients

SRA v Ryan Beckwith

- Allegation: Mr Beckwith initiated and/or engaged in sexual activity with Person A in circumstances which constituted a breach of the SRA principles
 - **Principle 2** – act with integrity; and
 - **Principle 6** – behave in a way that maintains the trust the public places in you and in the provision of legal services
- **Article 8 rights**
 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be **no interference** by a public authority with the exercise of this right **except such as is in accordance with the law and is necessary in a democratic society** in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

SRA's Article 8 submissions

- Mr Beckwith's right to private and family life was engaged in relation to the allegations, but that right is not unqualified
- Application Provisions – paragraph 5.1 - Principles 1, 2 and 6 apply to activities falling “***outside practice, whether undertaken as a lawyer or in some other business or private capacity***”
- the risks of Principles 2 and 6 being applied to inappropriate sexual conduct was therefore **foreseeable** for the purposes of Article 8(2)
- The inevitable wide drafting of the Principles 2 and 6 did not mean that their application was insufficiently certain, as in the context of professional regulation in the public interest “*any attempt to provide absolute precision would be undesirable*” (Pitt)
- **principle based** regulation

Mr Beckwith's Article 8 submissions

- Article 8 rested upon a reasonable expectation of privacy in one's own life,
- a public body could only interfere where certain preconditions were met including that the law allowing for such an inference be formulated with **sufficient precision**
- absence of clarity and explanation in the SRA's published guidance indicating **when** it might intervene in private matters
- If Person A was consenting then how could it be sufficiently foreseeable that the SRA may choose to police private sexual activity between lawyers?
- not necessary for the maintenance of the reputation of the profession nor was it proportionate to regulate the consensual sexual activity of lawyers

Integrity – limited to professional duties?

- Test for integrity - *Wingate and Evans v SDT*
 - “*integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from the members. Professionals are required to live up to their own professional standards...**integrity connotes adherence to the ethical standards of one’s own profession**”*
 - “*the duty of integrity does not require professional people to be paragons of virtue”*
- Beckwith :
 - Principle 2 was not engaged by his conduct, as integrity should be confined to integrity in professional dealings;
 - SRA’s website “**Personal integrity** is central in your role as the client’s trusted adviser and should characterise all your **professional dealings** with clients, the court, other lawyers and the public”

SDT's decision

- Principles 1, 2 and 6 apply to private life and accepted that these apply to regulated persons in a private capacity
- list in Wingate was not exhaustive
- **Principle 2:** based on the evidence - Mr Beckwith's conduct had fallen below what was expected of him by the public and the profession, and his **conduct lacked integrity**
- **Principle 6:** Mr Beckwith's conduct affected not only his personal reputation but also the reputation of the profession
- His conduct would not be expected of a solicitor by members of the public and it would attract the disapprobation of the public

Lessons to be learned?

- the remit of the SRA and the SDT can extend to actions in a solicitor's private life
- the Wingate interpretation of the concept of integrity is not limited to "*professional*" conduct
- consensual sexual activity between a solicitor and another person is capable of breaching of SRA principles
- a solicitor's acceptance of an internal disciplinary sanction can be considered by a regulator

Approach of Irish Regulators to Private Conduct

- “personal conduct” – different approaches adopted in Codes of Conduct
- **Pharmaceutical Society of Ireland – Code of Conduct**
Principle 2: “...*Make sure that your conduct at all times, both inside and outside your work environment, ensures public trust and confidence in the pharmacy profession*”.
- **Medical Council and NMBI** – no general provision of this nature.
- **Law Society of Ireland** A Guide to Good Professional Conduct for Solicitors
 - “Core Values of the Profession”, namely honesty, independence, confidentiality and the avoidance of situations of conflict of interest
 - a solicitor is required to **at all times** observe and promote these core values of the profession
 - values are related **solely to the provision of legal services**, and not a solicitor’s private life

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- Section 50(1)(c) of the Legal Services Regulation Act 2015 has inserted a new definition of misconduct, which now includes an act or omission:
 - *where occurring otherwise than in connection with the provision of legal services, would justify a finding that the legal practitioner concerned is not a fit and proper person to engage in the provision of legal services*
 - Social Media Use
 - **Medical Council** – Guide to Professional Conduct and Ethics – specific section reminding doctors to adhere, in the context of social media, to the “*professional standards used in other forms of communication*”
 - **NMBI** – published a specific guidance document on social media use
 - **Dental Council** - specific provision into its Code of Practice relating to Professional Behaviour and Ethical Conduct (2012) which warns registrants that: “*[y]our use of social media (such as Facebook, Twitter and so on) should be responsible and discreet. Indiscretion in the use of social media is not acceptable and could leave you liable to fitness to practise proceedings*”

Tentative Conclusions...

- For regulators:
 - a) wide latitude in drafting standards which registrants must adhere to, including in their use of social media
 - b) not ultra vires a regulator's power to extend application of these principles to a registrant's private life
 - c) how far can the reach **reasonably extend?**
- Registrants:
 - a) a private life does not mean acts stay private;
 - b) lack of specific guidance as to what "out of work behaviour" will be policed
- Certain acts are too trivial to warrant intervention
- Closer the link between the conduct and the professional's work activities, the more likely the conduct is to attract regulatory intervention

Obtaining documents and evidence from civil litigation for use in professional regulatory proceedings

Hugh McDowell B.L.

Presentation to Professional Regulatory & Disciplinary Bar Association and Mason Hayes
& Curran

28th May 2020

Introduction

- Right of access to court documents
- Applications by regulatory bodies for court documents
- *In camera* proceedings

A right of access to court documents?

- Article 34.1
- *AIB v. Tracey (No. 2)* [2013] IEHC 242
- Rules of the Superior Courts v. Civil Procedure Rules

A right of access to court documents?

(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of

- (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
- (b) a judgment or order given or made in public (whether made at a hearing or without a hearing), subject to paragraph (1B) [...]

(2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.

Cape Intermediate Holdings Ltd v. Dring [2018] EWCA Civ 1795

1. The extent to which the open justice principle is engaged;
2. Whether the documents are sought in the interests of open justice;
3. Whether there is a legitimate interest in seeking copies of the documents and, if so, whether that is a public or private interest;
4. The reasons for seeking to preserve confidentiality;
5. The harm, if any, which may be caused by access to the documents to the legitimate interests of other parties.

Applications for disclosure by regulatory bodies

- *A County Council v. W* [1997] 1 F.L.R. 574
- Care proceedings – letters to GMC
- Rule 4.23 Family Proceedings Rules 1991

Factors against disclosure

- Disclosure would lead to further inquiries, which would cause family upset;
- Charges brought by GMC could become public;
- GMC could not impose reporting restrictions;
- Child had subsequently denied impropriety;
- Father would not be a risk to children or public at large;
- Adverse decision would impact on family income;
- Potential for breach of confidentiality.

Factors in favour of disclosure

- Risk if father worked with children in a different field;
- Discretion of PCC could deal with denial of child;
- GMC was prepared to co-operate to minimise risk of publicity/leak.

‘In my view in this case there is an overwhelming and overriding public interest that the appropriate GMC Conduct Committee should be in a position to consider whether it should bring charges relating to serious professional misconduct against a practitioner who has been found in civil proceedings to have sexually abused his daughter...’ - Cazolet J.

In camera proceedings in Ireland

- *The People (Director of Public Prosecutions) v. WM* [1995] 1 I.R. 226
- *Eastern Health Board v. Fitness to Practice Committee* [1998] 3 I.R. 399
- *RM v. DM (Practice: in camera)* [2000] 3 I.R. 373

Eastern Health Board v. Fitness to Practice Committee [1998] 3 I.R. 399

‘A statutory imperative that proceedings of a particular nature be held in private...does not imply that there is an absolute embargo on disclosure of evidence in all circumstances. Such an embargo requires specific statutory authority to displace judicial discretion at common law to permit disclosure in appropriate circumstances...A major far-reaching change in the law, which sets aside established practice, could not arise merely by implication derived from a mandatory statutory requirement that certain proceedings shall be held in private but, in my view, would require specific statutory authority.’

Eastern Health Board v. Fitness to Practice Committee [1998] 3 I.R. 399

‘There is an established practice at common law recognised in England and in this jurisdiction...that the court in proceedings held in camera has a discretion to permit others on such terms as the judge thinks proper to disseminate (and in appropriate cases to disseminate himself/herself) information derived from such proceedings where the judge believes that it is in the interest of justice so to do, due and proper consideration having been given to the interest of the person or persons intended to be protected by the conduct of the proceedings in camera. In given circumstances the judge may find that a crucial public interest, such as the prosecution of crime or the protection of vulnerable children, takes precedence over the interest of the protected person in non-disclosure of the information in question.’

Section 40(6) of the Civil Liability and Courts Act 2004

‘Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the production of a document prepared for the purposes or in contemplation of such proceedings or given in evidence in such proceedings, to:

(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter...’

Conclusion

- a) A professional regulatory body, as with any member of the public, has a *prima facie* entitlement to apply to court for access to documents which were opened during the course of proceedings.
- b) The statutory functions underpinning regulatory bodies and the public interest protected by them are likely to weigh in favour of such an application being acceded to where it is brought by such a body.
- c) the judge hearing the application has a discretion to make the documents available, notwithstanding the fact that the proceedings are in private and irrespective of whether the private nature of the hearing was on the basis of a statutory provision.

Conclusion

- d) This discretion would allow the court to make only certain material available to the regulator, and/or to make that material available on limited terms or for a specific purpose only.
- e) A court must engage in a weighing exercise between the public interest in the material being disclosed to a regulator, and the private interests of the parties to the litigation.
- f) There is a strong public interest in documents from legal proceedings being disclosed to the appropriate regulatory body upon request, and as such, a strong private interest in the confidentiality of such material being maintained would have to be established for an application of that nature to be refused.

Preliminary Investigation of Complaints

Neasa Bird BL

28 May 2020

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- Principles which can be gleaned from case-law
 - Must be looked at through prism of regulator's statutory framework
 - More litigation?

Law Society v Walker [2007] 3 IR 581

- Medical Negligence proceedings
- Failure to disclose alteration of clinical record in advance of trial
- Solicitor's duty to the Court
- Duty in issue was of such vital importance to the administration of justice and to confidence of the public in the courts and the solicitors' profession and to the well-deserved reputation of the profession for honesty and integrity that it was in the public interest that an inquiry be held

Finnegan P

- Purpose of this stage of the process is to enable complaints which are frivolous, vexatious, misconceived or lacking in substance to be summarily disposed of
- At prima facie stage not acting as fact-finding body
- But can for the purposes of deciding whether a PF case exists make findings of fact where the facts are clear such as where the complaint is made on a clear misapprehension as to the facts or law
- Consider all the material before it and determine whether the application has any real prospect of being established at an inquiry, any doubt being resolved in favour of an inquiry being held
- Standard of proof at inquiry is a factor to which regard can be had

Flynn v Medical Council [2012] 3 IR 236

- Decision not to refer complaint against two consultant radiologists to inquiry
- Failure to identify extremely rare fracture
- Prior complaint against two other radiologists (also not referred)
 - unsuccessful application for JR
- Second set of complaints - abuse of process?
- Adequacy of reasons

Hogan J

- PPC required to form an opinion as to whether the facts disclose a prima facie case to warrant further action being taken in relation to a complaint
- A statutory requirement
- Importing a triple requirement that the decision be *bona fide*, not unreasonable, and factually sustainable.

Reasons

- Not required to give a “*discursive judgment*”
- “*...essential rationale of the decision should be evident or, at least, capable of being inferred from terms and content*”
- “*...no reason why the reasons for summarily rejecting a complaint without the necessity for further action could not be pithily and succinctly expressed, quite often in two or three sentences*”

Abuse of process

- *“While I do not at all exclude the possibility that the doctrine arising from cases such as Henderson v Henderson (and other similar rules which might deal with the deliberate and strategic manipulation of the complaints system) might apply by analogy to complaints made under [the Act] in much the same way as they apply to ordinary civil litigation, this was a finding which was never made by the respondent itself”*

Corbally v Medical Council [2015] 2 IR 304

- *“...before a medical practitioner can be subjected to the extremely threatening ordeal of a public hearing before the Medical Council, either for professional misconduct, or for poor professional performance, there must be reason to believe that what can be proved against him is something of a serious nature”*
- *“there is indeed a threshold of "seriousness" to be met before a prima facie case for an inquiry before the Medical Council is made out”*

Podariu v Veterinary Council of Ireland [2017] IECA 272

- Complaint referred to inquiry relating to handling and treatment of small animals and keeping of adequate contemporaneous records
- During FTP inquiry notebooks produced purporting to be contemporaneous records
- NOI amended to allege dishonesty in producing and claiming these to be contemporaneous
- Professional misconduct on this allegation alone

Court of Appeal

- Particular complaint was never considered or examined by PIC
- A new and fresh complaint made in the middle of inquiry
- Complaint must first be considered by PIC
- Preliminary stage of the statutory investigative process must be completed before matter proceeds to full hearing before the FTPC
- *“These statutory requirements cannot be regarded as mere surplusage. Rather, they have been deemed by the Oireachtas to represent core protections for the professional person whose reputation and livelihood may be affected in a far-reaching way by a complaint of this nature”*

- *“These statutory provisions existed fundamentally as protections for the veterinary surgeon...it followed, therefore, that the veterinarian in question was entitled, in principle, at least, to waive these protections...”*

B.M. v Fitness to Practice Committee [2019] IEHC 106

- Complaint by former patient concerning interactions with consultant psychiatrist
- Expert report (Dr C) before PPC identified failings including agreeing to meet outside workplace at a restaurant which he considered a serious failure
- No opinion on whether PPP, PM
- Matter referred forward: consideration of case report and all documentation including expert report
- Change of expert before FTPC (Dr D) - opinion on allegations, not confined to meeting in restaurant, including PM on dishonourable limb
- Applicant contended inquiry could only proceed on basis of allegation of meeting in restaurant and only on expected standards test

Meenan J

- PPC limited to giving initial consideration to complaints so as to identify complaints where there is a PF case to warrant further action being taken
- Before deciding to take further action on a complaint, PPC must be satisfied as to the seriousness of the complaint
- Further action includes formulating allegations that arise out of a complaint, obtaining expert reports, witness statements
- The PPC only considers complaints and not allegations. It is only in respect of an allegation(s) that a finding of professional misconduct and/or poor professional performance can be made
- As the role and function of the PPC is limited, the requirement for fair procedures does not apply to the extent that it does before the respondent

- Opinion of PPC that Dr C's report together with other information disclosed a pf case was fair and reasonable and fit the triple test in *Flynn: bona fide, not unreasonable and factually sustainable*. This was confirmed by FTPC expert report of Dr D.
- Not open to applicant to subject Dr C's report to forensic analysis as had been done
- Allegations at inquiry were supported by Dr D's report
- CEO in formulating allegations not confined to restaurant complaint or expected standards limb of PM

McEvoy v Preliminary Proceedings Committee [2019] IEHC 580

- Challenge to decision not to take further action in respect of complaint
- Complaint against hospital doctors in respect of treatment of stroke patient
- Documentation before PPC included expert report of neurologist – could not find any failings on part of Drs A and B
- Applicants critical of expert report and contended that PPC had failed to consider all relevant evidence

O'Regan J

- For Applicants to tender medical report if they wished PPC to rely on it
- Unsustainable for Applicants to complain all relevant material not considered by PPC when they had, for their own reasons, not furnished the medical report
- Applicants' criticisms of PPC expert not a peer review, no evidence of irrationality or unreasonableness in PPC decision

EG v the Society of Actuaries in Ireland [2017] IEHC 392

- A distinction may be drawn between the standard of fair procedures applicable to an investigation which is in essence 'information gathering' and that applicable to the making of a finding that could lead to the conclusion of a complaint by its dismissal or sending it forward as in this instance to a further stage on a finding of a prima facie case*
- a full panoply of rights including an opportunity to cross-examine witnesses is not required at that stage*
- A person subject to an allegation of misconduct must be informed of an intention to conduct an investigation and the basis upon which it is proposed to do so*
- full and detailed notice of the allegations made and a reasonable opportunity to respond by making such representations and furnishing such documentation in support of his case before the Committee determined whether there was a prima facie case*

Questions?



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