IN BRIEF

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Keep an open mind

Melanie McDonald calls for FTP panels to be more accepting of hearsay evidence

In the context of fitness to practise (FTP) proceedings, the admission of hearsay evidence remains controversial and gives rise to extensive argument before FTP panels. In this article I argue that, notwithstanding the recent decisions in Ogbonna v Nursing and Midwifery Council [2010] EWCA Civ 1216, [2010] All ER (D) 23 (Nov) and R (on the application of Bonhoeffer) v General Medical Council [2011] EWHC 1585 Admin, [2011] All ER (D) 141 (Jun), that FTP panels should be more willing to adopt a similar approach to that of the civil courts when determining the issue of its admissibility.

Learning to be civil

Stepping into the curious world of healthcare professional regulation from an exclusively civil practice at the Bar, I was immediately struck by how deeply rooted in criminal procedure many of its mores were, owing more to antiquated magnates proceedings than a modern civil forum. This is notwithstanding the fact that the civil standard of proof has applied since 2008 and that it is settled law that professional regulation should be properly described as a species of civil proceedings. There was—and among some regulators still exists—a deep rooted suspicion of civil procedure which lacks the more restrictive rules of evidence that apply in criminal cases. The thinking seems to go that there is something inherently lax if not downright irresponsible, about a system which allows pretty much everything to go before its fact finding tribunal.

In the context of a regulatory system firmly focused on public protection, a FTP panel should have the opportunity to see any material that is relevant to the allegations and which does not genuinely compromise the fairness of the proceedings so as to engage Art 6. Far from a less rigorous approach to determining the facts of a given situation, the tribunal in civil proceedings may have access to information from a greater range of sources than its criminal counterpart, but will adopt a more nuanced approach to that evidence. This is because it must consider not only the substance of the evidence it receives, but also the weight that should be attached to it.

This can be seen as a challenging exercise, although it should be no more difficult than evaluating the evidence of witnesses who have given conflicting oral testimony; but it is something which a lay panel needs training to do and calls for a closer examination not only of the evidence in question, but the circumstances under which it came in to existence. It does, in effect, treat the panel members as grown-ups: providing them with all the information that is available, but asking that they proceed more cautiously about accepting everything at face value, and be more discriminating about the quality of some of the evidence they receive.

To some extent the traditionalists received grist to their procedural mill by the decisions of the Court of Appeal in Ogbonna and Stadlen J in Bonhoeffer, where the issue of fairness to the registrant was brought in to play to support the exclusion of statements from witnesses who were not being called to give oral evidence but whose evidence was central to the determination of a factual allegation against the registrant concerned. In each case it was held that denying the registrant the opportunity of cross-examination breached the threshold requirement of fairness which, along with relevance, governs the admissibility of evidence in professional regulatory proceedings.

Fact sensitive decisions

The judgment in each case emphasised the fact sensitive nature of the decision. In Bonhoeffer, Stadlen J noted the unusual fact that the General Medical Council’s (GMC) decision not to call Witness A, who had made serious allegations of sexual abuse against a highly respected paediatric cardiologist, had been made despite Witness A’s stated willingness to give oral evidence. The reason for not calling him was said to be because of the risk he would face in his native Kenya should allegations of his involvement in homosexual activity become known. Stadlen J noted that, among many unsatisfactory features of the case, the FTP panel had made no finding that Witness A would be less at risk if his evidence was received in written form.

In Ogbonna the Nursing and Midwifery Council (NMC) had failed to obtain oral evidence from a witness living in Trinidad, either by bringing her to the UK for the hearing, or setting up a video link. The factors which rendered the admission of her witness statement unfair included the fact that hers was the only evidence to support the allegation in question and evidence that her relationship with the registrant had been a difficult one. Rimmer LJ noted, however, that had it not proved possible to arrange for the witness to give oral evidence despite reasonable efforts by the NMC,
the argument for admitting the witness statement would have been a strong one. This suggests that fairness is to be measured against the conduct of the party seeking to rely on hearsay evidence rather than the extent to which it is possible to mount an effective challenge to it.

Certainly no-one could resist the proposition that a regulatory body bringing disciplinary proceedings against one of its registrants— which may have a devastating effect on his or her career— has an obligation to ensure that the evidence it seeks to rely upon is the best available, and that it should be proactive in meeting the practical difficulties which may arise in obtaining that evidence.

Disappointing

Nevertheless, the judgments are disappointing in that they implicitly reinforce the nervousness with which FTP panels traditionally approach such evidence. Hearsay evidence inevitably deprives the opposing party of the opportunity to cross-examine the maker of the statement. In civil proceedings this unfairness is routinely recognised and addressed by moderating the weight that can be attached to it, which is given statutory expression through the Civil Evidence Act 1995. Yet in neither case was the court willing to accept that the impact of the admission of evidence not tested by cross-examination could properly be tempered by limiting the weight to be attached to it or that that approach, universally adopted in the civil courts, could ameliorate any unfairness sufficient to justify its admission.

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A better analysis would surely have been to accept that the statements were admissible, but that in the absence of a proper explanation for the failure of the witnesses to attend, the weight to be attached to them was minimal, with the result that any charge proved on the basis of that evidence alone would be unsafe. This would have protected the interests of the registrant concerned and achieved the same outcome.

Healthcare regulatory proceedings are peculiarly prone to throw up situations where some of the best evidence available is hearsay. This is first because clinical practice revolves around contemporaneous clinical record-keeping and these can provide an invaluable understanding of what has occurred even where the maker of the record is no longer available.

Second, many allegations of misconduct centre on the ill-treatment or worse of vulnerable patients who are simply not capable of providing evidence in the form of a witness statement, let alone giving oral evidence at a contested hearing. The best evidence may be what they told someone had occurred shortly after the incident. This may not be enough in itself but should certainly form part of the evidence considered by an FTP panel.

Third, many potential witnesses, for example healthcare assistants, may occupy an uncomfortable place in the clinical hierarchy, which makes them reluctant witnesses and, in the absence of being subject to professional regulation themselves, difficult to compel.

Finally, the high number of overseas doctors and nurses working in the NHS who subsequently return to their own country may mean that witnesses who gave evidence at local level disciplinary proceedings are no longer available by the time the FTP hearing takes place. Video link may ameliorate some of the practical difficulties where the whereabouts of an absent witness is known, but will not always be practicable or appropriate.

Fairness requires hearsay

In the context of proceedings where it is often difficult to obtain direct oral evidence as to what occurred, far from excluding it, “fairness” may often require the admission of hearsay evidence, including, as it must do, fairness to the public interest.

GMC: the situation is compounded by the requirement under its procedural rules, which predate the introduction of the civil standard of proof, that where the evidence would not be admissible in criminal proceedings the panel “shall not admit such evidence unless on the advice of the Legal assessor they are satisfied that their duty of making enqiry into the case before them…makes admission desirable” (r 24(2)).

In criminal proceedings, decisions about admissibility of evidence and findings of fact are separately allocated to the judge and jury. In FTP hearings, as in civil cases, when admissibility is called in question, the first issue is whether the tribunal should see the disputed item before making its decision. For a lay panel the trick of being able to avoid the influence of evidence which it has seen, considered, discussed but ultimately decided to exclude may be a difficult one to master.

Tempting to speculate

Equally, where the panel has to take a decision about a document it has not seen or is confronted by a heavily redacted witness statement the temptation to speculate on its contents may be overwhelming but is unlikely to surface in the reasons given for its findings of facts, making any adverse decision more difficult to challenge. The quid pro quo of admitting hearsay evidence is that where it materially affects the outcome of a case, some explanation of the basis upon which it was accepted and the weight that was attached to it will need to feature in the reasons given for the decision. This arguably promotes greater transparency and fairness at the fact finding stage of professional regulatory proceedings.

Seasoned civil practitioners know that tactically it is often better to avoid drawing too much attention to the existence of damaging evidence against your client by spending a couple of hours arguing about its admissibility. Far better to let it in without obvious fuss or discomfort, do any footwork necessary when calling your own evidence, and deal with it by means of a throwaway line or two in closing submissions.

Finally, cross-fertilisation is a two-way process. It remains to be seen whether any attempt is made to import the more restrictive principles adopted in Oghonna and Bowker to mainstream civil proceedings.

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