

Healthcare Briefing

Solicitors

A Fundamental Change in the Standard of Proof at the General Medical Council

For many practitioners, the General Medical Council (GMC) is a daunting place. It is undeniably a stressful environment given that those who come before it face an interference of sorts with their registration.

In the already tense environment of the GMC, the goalposts have again been shifted in that the standard of proof has been reduced.

A change in position

As from 31st May 2008, the GMC changed their standard of proof from that of the criminal standard (beyond reasonable doubt) to the civil standard (balance of probabilities). This has been reflected in the GMC's Fitness to Practice Rules 2004, to which a new provision has been added.

Rule 34(12) of the Fitness to Practice Rules now provides that:

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 key questions for practitioners are:

- 1) What does this change mean?
- 2) What has prompted the change?
- 3) Is this change a wise move?

What does this change mean?

Although the burden of proof has remained on the GMC, the standard has been lowered. This means that it is still incumbent upon the GMC to bring a case against the doctor, and as before, it is not required of the doctor to disprove the allegations against him.

The material change is that the GMC now have to meet a lower threshold before the case against the doctor is met. Whereas before they would need to provide proof that would convince a GMC panel beyond reasonable doubt of the guilt of the practitioner, now it is only necessary to provide that on the balance of probabilities, the practitioner must be guilty of the charges levied against

him/her. This change will only affect the fact-finding part of proceedings. Questions of impairment and sanction will be untouched by this.

What has prompted the change?

The GMC have long discussed a change to the standard of proof, and a consultation was set up between 20th August 2007 and 31st October 2007. During the course of the discussions, the opinions of leading Counsel were taken into consideration. It was thought that the flexibility offered by the civil standard of proof would be advantageous in that the public could be protected by an increased number of dangerous doctors. In addition, from consultation of the GMC website¹, it is clear that the GMC have sought to fall in line with the majority of healthcare tribunals who all make fact-finding decisions on the civil standard. It is also thought that a shift to the civil standard of proof will enable the GMC to deal with conduct cases alongside cases of health or performance whereas previously, the criminal standard was seen as inappropriate for these purposes.

Alongside this internal re-organisation, it is important to note that the government advocates a uniform standard of proof across all healthcare regulatory bodies, namely the civil standard of proof. This is included within their Health and Social Care Bill, which was introduced to Parliament on 15th November 2007. It is arguable that this stance has accelerated what would have otherwise been a natural progression by the GMC, from a criminal standard of proof to a civil standard of proof, especially given that the civil standard is already used before the Investigation Committee and for Registration disputes.

Is this change a wise move?

The advent of a lower standard of proof will inevitably lead to more practitioners being found guilty of the charges they face. Although it could be argued that but for their failings, they would not have come before the

GMC in any event, a degree of proportionality should be observed. It is arguable that a criminal standard befits the GMC given the high degree of responsibility on the shoulders of the medical profession. It is further contended that this degree of responsibility overreaches that of other healthcare practitioners, and for this reason, the old criminal standard of proof was justified.

The shift in position has also to be taken in consideration with the suggested lack of transparency in the GMC, especially when considering how decisions are made.

To draw an analogy, how would a Criminal Court of Law operate where the CPS brought the case before the Crown whilst in a similar breath, sought to provide the judge and jury with guidance as to how the defendant be tried. Imagine still that some of this guidance is not made public. Surely one can see that justice would not be seen to prevail as the CPS in this analogy, would form the role of the judge, jury and sentencer.

In forming a critique of the way in which the GMC operates, one can look towards other professional regulatory bodies. Although funded by it, the Solicitors Disciplinary Tribunal (SDT) is constitutionally independent from the Law Society, and from the Solicitors Regulatory Authority which brings the majority of the prosecutions before the SDT.

Comment

The GMC's functions not only encompass the protection of the public and the upholding of the profession, but a duty to ensure that doctors are appropriately trained and supervised where possible and that the interests of the doctor are considered equally with that of the patient. A lowering of the standard of proof will be seen by many practitioners as a noticeable shift towards the interests of the patients rather than a consideration of the rights on equal footing.

Whilst the GMC must not fail in its duty towards patients, a balance has to be struck so that the rights of its doctors can be safeguarded.

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¹ http://www.gmc-uk.org/concerns/Implementing_the_civil_standard_of_proof/Civil_Standard_of_Proof_FAQ.asp