

**GENERAL MEDICAL COUNCIL**

**FITNESS TO PRACTISE PANEL (SERIOUS PROFESSIONAL MISCONDUCT)**

Tuesday, 26 January 2010

Regent's Place, 350 Euston Road, London NW1 3JN

Chairman: Mr Andrew Reid, LLB JP

Panel Members: Ms Joy Julien  
Mrs Pamela Mansell  
Mr William Payne  
Dr Roger Smith

Legal Assessor: Mr Duncan Smith

CASE OF:

**BARTON, Jane Ann**

**(DAY FIFTY-FOUR)**

MR TOM KARK of counsel and MR BEN FITZGERALD of counsel, instructed by Field Fisher Waterhouse, Solicitors, appeared on behalf of the General Medical Council.

MR TIMOTHY LANGDALE QC and MR ALAN JENKINS of counsel, instructed by the Medical Defence Union, appeared on behalf of Dr Barton, who was not present.

(Transcript of the shorthand notes of T A Reed & Co Ltd.  
Tel No: 01992 465900)

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A (STRANGERS HAVING PREVIOUSLY WITHDRAWN, THE PANEL  
CONTINUED TO DELIBERATE IN CAMERA

(STRANGERS HAVING BEEN READMITTED)

B THE CHAIRMAN: Welcome back, everyone. Before we commence with the main item, which is the Panel's request for assistance, I regret that the Panel must also make a necessary correction, this time to the findings of fact set out in the agenda dated 15 January 2010. The agenda currently records that heads 15(a) and 15(b) were found not proved in relation to all 12 patients, whereas of course from a reading of the Panel's determination you will recall that in the case of Mrs Alice Wilkie, Patient D, the Panel did find those heads proved. So the Panel will amend the record on the findings of fact, and I apologise that there was a second typographical error.

C Mr Kark, so far as the second matter is concerned ---

MR KARK: Sir, we are grateful for that correction and I am grateful for the time you have given me. As you know, I am in a slightly difficult position, and I am grateful that you delayed this hearing slightly as a result.

D Sir, we have been advised that the Panel wishes to be advised on the specific question of the time that has elapsed and the events that have occurred since the matters giving rise to the allegation, and the date of this hearing. You were advised that you could take into account the elapsed time, and you have asked what weight is to be allocated and what principles should be applied, and is there any authority on the subject.

E Sir, the position is this, that I spoke to your learned Legal Assessor this morning and gave him my views both orally and in manuscript. Having come out of the other hearing, I have now been provided with a copy of what I think I can properly call a supplemental draft legal advice, which has been put together I suspect with the assistance of Mr Jenkins. I do not entirely agree with it, and I think it would be helpful if really both sides addressed you briefly, and then your learned Legal Assessor, if he wishes to, could have an opportunity of considering what we have both said.

F Obviously it is preferable if we can all come to an agreement, but it may be that in this case, as sometimes happens, we will simply have to address you, you will have to receive your legal advice, and then you will have to, frankly, make of it what you will. I do not know if that is appropriate, or if you want go give us more time to see if we can come to a compromise.

G THE CHAIRMAN: I think all you have said must be right. In the ideal circumstances, a single agreed view would obviously be the easiest for the Panel. If it is the feeling of the three of you that a little more time might enable you to reach that point, then I am sure we would give it; but if the view is that that is unlikely to happen, then we will have to bite on the bullet and recognise, as you say, that we would have to hear from each of you – in fact three of you, because also the Legal Assessor's view – and then decide for ourselves where that left us.

H MR KARK: I hesitate to say this, but I think it may be that we are coming at this – this is still an adversarial system, of course, and we may be coming at this from rather different

A angles, or not wholly different, and it may be important in any event for me on behalf of the GMC to record on the transcript what the GMC's submissions would be. So I would propose to do that, with your leave, in any event.

THE CHAIRMAN: Then I do not see that there is any point in spending further time in attempting to find an agreed version, so we will start with yourself.

B MR KARK: Sir, the answer to your question so far as we are concerned – and you will bear in mind of course that any submissions I make to you are merely submissions by the GMC, of course – the question of time elapsed between the events giving rise to a finding of serious professional misconduct and the hearing itself at which that finding may be made can, we accept, be relevant to the issue of sanction. It is not relevant, we would submit – and have submitted previously, and this was accepted by Mr Langdale on Dr Barton's behalf – it is not relevant to the issue of whether the behaviour as you found it to be in fact amounted to serious professional misconduct.

C So the first step obviously is to consider whether the facts alleged and found proved give rise to a finding of serious professional misconduct. If you do find Dr Barton guilty of serious professional misconduct, then of course you have to consider what sanction to impose. As you know, you must follow the *Indicative Sanctions Guidance* as a model for consideration of that issue. I will not repeat the actual paragraphs, but as you know, *Indicative Sanctions Guidance* sets out the purposes – and that is what we would invite you to have regard to – of imposing a sanction at paragraphs 18, 19 and 20. You also had of course this learned Legal Assessor's advice at his paragraph 9. Mitigation, of which delay can be a part, is dealt with at paragraph 26. Again, I am not going to read it all out to you, but it ends with this sentence:

E “Features such as these should be considered and balanced carefully against the central aim of sanctions, that is the protection of the public and the maintenance of standards and public confidence in the profession.”

F I would say this: neither side, neither the GMC nor certainly Dr Barton, should, as it were, be punished, if that is the right word, for the delay. You must consider to what extent the delay is important when you consider the fundamental questions posed by *Indicative Sanctions Guidance*. It has been said, of course, that there has been a change in Dr Barton's circumstances in the sense that she has been – and this has been revealed to you already – under IOP orders almost since the time of these events. In fact the IOP orders were imposed later, but Dr Barton was under her own voluntary sanction, as it were, not to prescribe diamorphine.

G There is however, of course, a significant difference, and that is that Dr Barton has now been found to have acted in the way alleged, by you. So despite the delay – and I am not saying you should ignore it – but despite the delay you still have to ask yourselves the same questions: what does the protection of patients in the future require? How can we best maintain public confidence in the profession? And how do we declare and uphold proper standards of conduct and behaviour?

H I am sorry if all of that is obvious, but it does flow from your question. I am not going to repeat my address to you now, but I did in fact, if you recall, deal with the issue of delay and deal with it in terms very much as I have now – that you still have to come back to the fundamental questions that are posed by *Indicative Sanctions Guidance*.

A So there is no law specifically on this, other than the fact that you are allowed to take delay into account. But of course it may be very often more relevant to cases where you are considering an issue of impairment. But I do not mean by saying that to detract from the submission that delay can be a part of mitigation if it affects one of those fundamental principles. That is how I would put it.

B THE CHAIRMAN: Our concern was that if there were an authority on the effluxion of time, we would very much like to have it pointed out to us; but I take it from what you have said that the GMC at least are not aware of a pertinent authority that covers that area.

MR KARK: There are all sorts of authorities about delay, but none specifically, as far as I am aware, on this very point.

C THE CHAIRMAN: We have not been looking at the effluxion of time as delay, as such, but as effluxion of time in which things have happened.

MR KARK: By which I mean the same thing, I accept.

D THE CHAIRMAN: It means that there is not and has not been in our minds at all any criticism of anybody, for that effluxion. It is merely that, it having happened, what significance, what weight should be applied to it, and is there an authority? I understand from your point of view that the view is that we should look no further than the *Indicative Sanctions Guidance* because there is nothing beyond it that is relevant to assist us.

MR KARK: To the specific question that you have asked, that would be my submission. I am sorry if that is not very helpful.

E THE CHAIRMAN: Thank you. Can we get any further help from the other side of the room?

MR JENKINS: Whether it is help is a matter for you, but it is for me to address you briefly. I agree entirely that there is as yet no authority on the question of delay and what weight you should give it in your deliberations. The guiding principle plainly is one of proportionality.

F I have four points to make, if I may. Firstly, as to the question of serious professional misconduct, the Panel must ensure that the GMC guidance and standards that were applicable in 1996-1999 are applied. The delay has given rise to a large number of further documents and items of guidance given by the GMC. Plainly in your training as panellists you will have concentrated on the more recent guidance, but it would be wholly wrong for you to apply that more recent guidance or to appear from your determination to apply any of those more recent standards than those which applied at the time of the events that you have considered.

G I make that point briefly because you have already been addressed by the learned Legal Assessor and properly advised in relation to that.

H The second point I make is that the conditions of working for Dr Barton during the period with which you are concerned, 1996-1999, are very different perhaps from any that a doctor may be asked to work in now. I would suggest that clinical governance has moved on dramatically, as certainly the medical member will be aware. No doctor would be placed

A today in the position that Dr Barton was during the period with which you are concerned. That a job should change rapidly in the way in which it did, that there should be bed blocking of the surgical units and patients being transferred early when not fit properly to be transferred, that would not happen today.

B You need to remind yourselves of the correspondence you have at D6, which is Dr Barton's correspondence about the position she found in January 2000 as almost intolerable, because of the circumstances in which the job had changed. Intolerable for her and the nursing staff. Those are all matters that have changed over time.

Allied to that point, your functions, if you get to looking at sanction, include plainly declaring and upholding standards, maintaining public confidence.

C To the extent that you are declaring and upholding standards, you cannot be looking at the guidance of today; you must be looking at the standards that were applicable back in 1996-1999. You will ask yourselves: "To what extent should we as a Panel be declaring today the standards of 1996-1999?" The clinical situation has changed; again, clinical governance – no one would be put in Dr Barton's position. What I would suggest is that because of the delay and the changing clinical and professional regulatory guidance picture, the burden on you to declare and uphold standards is reduced. If you were looking at conduct let us say ten years later than that which you are looking at, conduct perhaps between 2006 and 2009, then there would be the normal burden on you to declare and uphold standards, because they are the same standards. But that is not the position.

D The third point I make is that Dr Barton should not be at a disadvantage by reason of the passage of time since these events. As you know, there have been a number of significant changes in the medical regulatory picture. Following the case of Dr Shipman clearly there were reports following an inquiry chaired by Dame Janet Smith. As a result of her reports and some reflection, the General Medical Council saw fit to seek new rules, and those are the 2004 rules. Plainly those rules involve looking at the fitness to practise of the doctor as it is at the time of the hearing. Under the old rules that you are looking at in this case, you are looking back. If this were a case, looking at the events again of 2006-2009, you would be looking at "Well, what is the doctor's position today, at the time of the hearing?". It would be forward looking on the question of fitness to practise, and to that extent a panel would be looking at "Well, what should we be doing today with regard to this doctor's registration?"

E They are difficult issues, I agree, on the one hand saying "You are governed by the old rules, and these are the rules you must follow", and yet knowing that the picture has changed. It is clear from the Dame Janet Smith inquiry and the GMC's changing of the rules that the appropriate way of analysing matters is "Let's look forward from today". That was what brought about the change.

F Again, difficult issues for you to look at the two, but you must reflect on the change that has come about, and ensure that Dr Barton is in no way prejudiced by the change in the rules. She should be in no worse position.

G The last point I make, given the effluxion of time, is if you are looking at specific sanctions, plainly you have to consider the question of conditions. When looking at conditions you will have to consider a number of factors, one of which clearly is the issue of whether conditions can be formulated, and whether they are workable. There are other considerations too; but

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A just on the question of whether conditions can be formulated and whether they are workable, you know very well that Dr Barton has adhered to conditions for eight years. Eight years is a significant time – clearly one that you have to reflect on when looking at those questions.

B Sir, I do not add to what I have just said by way of points. Clearly I have had a discussion both with Mr Kark and indeed your learned Legal Assessor, and you will find some of the points that I have just made I think highlighted in the advice that you are just about to receive. Thank you.

THE CHAIRMAN: Thank you very much for that.

Legal Assessor, are you in a position to advise us, in particular in relation to some of the points that have been raised by the defence?

C THE LEGAL ASSESSOR: No, sir, not at the moment, the reason being that when Mr Kark was doing the work, he gave me the document from which he read. With that, and with Mr Jenkins, we put together a document to which he has referred. We did not have the opportunity, the three of us, to discuss it and distil it, and therefore, so as not to offend either side, I would welcome the opportunity of attempting at least to put an advice which will accommodate everybody's views. That may be just a little bit of fine-tuning, or it may be more, but may I suggest that if we meet again after the short adjournment I may be in a position to give some advice. Whether it is in line with what I have had previously proposed or not, I do not know, but if you would give me that facility it would be helpful.

D MR KARK: Sir, may I just raise the issue of timing. I am meant to be back next door at two. We are in the middle of some extremely complex evidence from Professor Compston, an expert witness, and I wonder if we could have time to discuss with the Legal Assessor and sit slightly early to hear his advice.

E THE CHAIRMAN: When we contemplated the potential to return with questions we did fully understand that you were engaged elsewhere, with the obvious difficulties, but I had understood that your junior would be available to assist in the circumstances of your not being ---

F MR KARK: You are absolutely right, and I accept the implied criticism if there is any, but unfortunately Mr Fitzgerald is in the Court of Appeal today, and that does take precedence over even what I want him to do; so he simply cannot be here. I will contact him and, if he is available, no doubt he will be on his way.

G THE CHAIRMAN: Yes. I cannot know what is in the Legal Assessor's mind at the moment, but if I may so, in an effort to say at least where I am, it seems to me that there was not any new issue in your advice; there was not anything that we had not already heard; whereas in the new advice we had from Mr Jenkins there were at least two very interesting points, which I do not think have been ventilated before. I think it is important if, as we had previously agreed, we would have to take on board all of the advices and then decide where they would take us – I do think it is very important that the Legal Assessor has the opportunity to fully consider those new points, and to give us such advice as he is able, in terms of what we should make of those.

H I suppose what I am saying is, of course you would want to hear what he has to say in due

A course; but it may be that the areas where he is going to need to be considering matters are more areas where he might consider discussion with Mr Jenkins, rather than yourself.

MR KARK: Yes.

B THE CHAIRMAN: I think if we do this: we allow him to get on as best he can, and we seek to have any final advice from himself tendered at a time when perhaps there is a natural break in your own proceedings, or when you have the mid-afternoon break.

MR KARK: If you are prepared to wait until then.

C THE CHAIRMAN: I think we should, because we asked for the advice because we felt the need for some assistance. We have been given some advice, and I think it is important that we hear the Legal Assessor's take on that; but you of course must be given the opportunity to see whether that is something on which you would have to comment. Therefore we should hear that at a time when you are available. But it may be that a note can go through to you at some stage with what the proposal is, and then obviously we would then have to wait until you were free to join us. It is unfortunate, but these are too important matters to relax, and I think we should make sure that we do them properly, do them justice.

MR KARK: Certainly.

D THE CHAIRMAN: Very well; we will break now and we will return at a time that will be determined later. Mr Jenkins, I am sorry, that means we need you to be around, and by the sound of things possibly to be available to discuss things further with the Legal Assessor.

MR JENKINS: That is all right; I am not double-booked.

E (The luncheon adjournment)

THE LEGAL ASSESSOR: Thank you, Chairman, for the time. I have discussed over the short adjournment with both Mr Kark and Mr Jenkins the advice, and I think we are largely at one on this, so here is the advice supplemental to that which I gave two days ago.

F During its in-camera discussions the Panel sought further advice as to how it is to take into account the passage of time between the facts giving rise to the allegation of serious professional misconduct and the determination of the issues. To elaborate on the advice I have already given, I would invite the Panel to bear in mind the following matters:

Firstly, the advice given earlier in relation to serious professional misconduct, which I do not repeat here.

G Secondly, the purpose of sanctions which, to repeat, is the protection of patients present and future; the upholding of proper standards of conduct and behaviour; and the maintenance of the reputation of the profession.

Thirdly, can I repeat, have regard to the *Indicative Sanctions Guidance* (2009) amended edition.

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A Fourthly, any message going out to the public and the profession as of today but based on old factors must continue to have a relevance to the aims and objectives of sanctions. Insofar as historical misconduct is found proved, the sanction must accurately reflect contemporary opprobrium lest it runs the risk of being regarded as retributive.

Fifthly, neither party ought to be placed at a disadvantage by the passage of time.

B Sixthly, the extent to which the culture pertaining at the time of the matters complained of has altered during that period of time gives the Panel the opportunity to examine in context document D6 and the sentiments expressed in it by Dr Barton.

Seventhly, the likelihood that, in the future, a doctor would find him- or herself in the position the Panel found Dr Barton to have occupied in terms of clinical governance, is a matter to be borne in mind.

C The passage of time serves the Panel well in that it provides a context in which Dr Barton's attitudes and practices can be viewed and judged. It allows the Panel to judge the efficacy of conditions as a workable sanction, by opening an eight-year window through which to view it.

D Once a finding of serious professional misconduct has been made (if it has) then the discretionary application of a sanction must have a forward-looking purpose.

I disagree with Mr Jenkins' final submission to you before the short adjournment that there is a reduced burden to uphold standards. Those standards are those expected of doctors today, tomorrow and the days which follow.

E I hope that supplemental advice has been of some assistance to you.

THE CHAIRMAN: Thank you, Legal Assessor. Mr Kark, do you have any observations on the advice just tendered?

MR KARK: No, I do not; thank you.

F THE CHAIRMAN: Mr Jenkins, do you have any observations on that advice?

MR JENKINS: Not beyond what I said to the Panel before.

THE CHAIRMAN: Yes, indeed. Thank you very much indeed, everybody. Dr Smith?

G DR SMITH: A clarification, if I may, from the Legal Assessor. He referred to "contemporary opprobrium". Can you please explain what "contemporary" means. Is it contemporary to then or contemporary to now?

THE LEGAL ASSESSOR: To now.

THE CHAIRMAN: Good question. I should say for the purpose of completeness, if either counsel have any observation arising out of that question --- (None indicated.)

H Very well, the Panel will go back into camera to further consider, and we will let you know in

A | due course, but it will be some considerable time still, I would say. Thank you very much,  
both of you.

(STRANGERS THEN, ON DIRECTION FROM THE CHAIR, WITHDREW  
AND THE PANEL DELIBERATED IN CAMERA)

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