Regulatory/Health & Safety Update

David Adams, Advocate

GMC v M 2022 SLT 600

- Application under s.41A(6) and (7) of the Medical Act 1983 for an interim order of conditions to be further extended for 12 months

- Application was refused:

"In my view it is tolerably clear as a simple matter of language that the test in the petitioners' guidelines has a higher threshold than that which they stated in their pleadings to be appropriate and which, the court must assume, was applied in consideration of the application to extend the period of restriction. The submission on behalf of the respondent was because of that error the petitioners' application "must fail". I agree with that submission" (at [11])

GMC v M 2022 SLT 600

- Had it been necessary to consider the remainder of the application, the court was satisfied that no "*clear and cogent*" reasons for the petitioner's decisions were advanced. There was "*no attempt*" to relate any of the factual material arising out of the respondent's case to the test advanced by the petitioner (which was, in itself the incorrect one). The petitioner's averments amounted to no more than an assertion than an extension of the period of restriction was a necessary and proportionate step to take (at [13])

- However, the court was not satisfised that the respondent's case regarding delay had been made out. COVID-19 and police investigation had played a part in allowing the petitioner to progress their own inquiries (at [14])

SLCC v Murray 2022 SLT 1153

- In the context of investigating a third party services complaint relating to work carried out by solicitors during divorce proceedings, the petitioner applied under section 17 and schedule 2 of the Legal Profession and Legal Aid (Scotland) Act 2007 for the production and delivery of documents which would otherwise be covered by legal professional privilege (LLP)

- The petitioner advanced two main submissions:
  1. whether the order would involve an infringement of LPP; and
  2. whether the statute provided a waiver of LPP by necessary implication

SLCC v Murray 2022 SLT 1153

- The court rejected the suggestion that a "*no infringement expectation*" applies to LPP (at [30])

- In considering the issue of necessary implication, the court opined that "…*consideration of this matter cannot be divorced from the vital nature of LPP as a fundamental right to which the courts have long attached the greatest of importance*" (at [31])

- An implication that LPP is overridden only arises if it flows necessarily from the express terms of the statute construed according to its context and purpose. Privilege may be successfully asserted unless the "*only available inference*" is that Parliament must have intended to set it aside (at [31])

- The principle of legality means that Parliament does not legislate in a vacuum, but according to an understood framework of law. Whilst implied statutory waiver is possible, the more fundamental the right, the less likely that it would be left to implication (at [32])

SLCC v Murray 2022 SLT 1153

- Para 1 of schedule 3 of the 2007 Act provides that a complainer may only pursue their complaint where they wave *any right* to confidentiality on their part. That must include the right to LLP. Thus, LPP is *preserved* by the 2007 Act until waived by the complainer. The petitioner's argument that a person's whose solicitor is the subject of a third party complaint would lose their right to assert LLP by way of inference was not accepted by the court (at [36]).

- The court did not accept the petitioner's suggestion that important aspects of their obligations under the 2007 Act would be thwarted if they could not recover under section 17 documents in the hands of a solicitor where the client asserted LLP. Other material would be available. Correspondence from the solicitor complained of. In litigation complaints, court papers would be available. In transactional matters, contracts (at [38])

SLCC v Murray 2022 SLT 1153

- With respect to the petitioner's contention that section 43 of the 2007 Act provided protections which limited the disclosure of material coming into their possession, the court found that such protection was limited. It took the view that the only basis upon which section 43 could be said to provide protection to a client's interests is if material within the scope of LPP was excluded from the scope of the Act. This was contrary to the petitioner's overarching submission. The petitioner's manual which provided guidelines regarding the redaction of material was "*unlikely to offer any comfort to an individual whose privilege is being assailed*" (at [40])

- Even when the Parliamentary material was considered, this showed that at the debate at stage 3, the Minister recognised the difference between general confidentiality and LLP, and expressed concern that the proposed amendment to section 17 of the 2007 Act impinge on the issue of LPP. Thus, this did not show a clear intention to override a fundamental right (at [41])

The Professional Standards Authority for Health & Social Care v GMC [2022] CSIH 37

- The appellant argued that a doctor's 12 month suspension was insufficient for the protection of the public. Given the doctor's past dishonesty, only erasure was appropriate.

- The respondent's took a neutral position. The doctor initially lodged skeletal answers but withdrew them.

- The case proceeded on written submissions from the appellant alone, there being no formal opposition.

The Professional Standards Authority for Health & Social Care v GMC [2022] CSIH 37

- The appeal was upheld:

"In short, we consider that Dr Austin's persistent dishonesty was so grave as to be wholly incompatible with her continued registration as a doctor. Honesty lies at the very heart of the profession of doctor. Such repeated dishonesty as occurred in the present case carries with it the potential to undermine completely public confidence in the medical profession. In the circumstances, we are satisfied that erasure was the only sanction that could properly have been imposed" (at [26])

- In light of the repeated nature of Dr Austin's dishonesty, the court "[did] *not consider that she could be said to show any real capacity for insight or remediation"* (at [27])

The Professional Standards Authority for Health & Social Care v GMC [2022] CSIH 37

- The fact that the reviewing tribunal had found in May 2020 that Dr Austin had shown insight into her 2016 dishonesty was of "*no real relevance*" as that decision had been taken in ignorance of her subsequent acts of dishonesty. The sustained nature of her dishonesty, and its gravity, made it "*impossible*" to say there was truly any insight or potential for remediation (at [28])

R v Nestle UK [2022] 2 Cr. App. R (S.) 1

- An application for leave to appeal. The applicant advanced three grounds:

1. Some fault attached to the actions of the applicant's employee. The sentencing judge resolved this without requiring formal evidence. This error was compounded the judge's decision to apply an uplift with respect to actual harm
2. The sentencing judge should not have reduced the credit for the guilty plea from 33% to 20%
3. The sentencing judge failed to have regard to the fact that the applicant had pled guilty to a strict liability offence under s.33(1)(c) of the 1974 Act. The judge's approach to sentence appeared to be based on obligations owed by a defendant under broader health & safety legislation, not by reference to the strict liability offence in this case.

R v Nestle UK [2022] 2 Cr. App. R (S.) 1

The first ground of appeal

- The point raised about the employee's actions only arose during the applicant's mitigation. While it was "*unfortunate*" this rose late in the day, there were two answers to it:
  a. There was no challenge to the judge's finding that a number of the workers were exposed to a risk of harm. Thus, the uplift was always in play (para 32)
  b. The judge was entitled to make an uplift for actual harm. Regardless of the employee's actions, it was the failure to guard the open parts of the machinery that was the significant cause of the harm (para 33).

- The applicant had misread the reference to "*reasonably foreseeable*" in the sentencing guideline. The purpose of this sentence confirms that the employee's actions are generally irrelevant for the purpose of sentencing as it is reasonably foreseeable that employees will be neglectful of their own safety (para 35).

R v Nestle UK [2022] 2 Cr. App. R (S.) 1

The second ground of appeal

- The case had a "*complicated history*". The judge considered that and arrived at the 20% figure. Having done so, it was reasonable for him to reach the figure of 20% (paras 43 to 45)
- The judge was right to call the delay in indicating a guilty plea to the regulatory charge was a "*tactical device on the part of the applicant*"(!). The applicant allowed delay to occur by seeking to find out what would happen with their abuse argument first (para 45)
- The applicant could not say that they pled guilty at the first opportunity. They caused a delay between May and December. Thus, the judge was "*arguably*" wrong to apply a reduction of 20% (para 46)

R v Nestle UK [2022] 2 Cr. App. R (S.) 1

The third ground of appeal

- The appellant's simple argument was that a strict liability office should attract a lesser fine than one imposed for a wider breach of the 1974 Act (para 48)
- This argument did not find favour with the court:

"*In our view, introducing into a sentencing exercise like this questions of strict liability or concepts of foreseeability, is unnecessary and undesirable. The guideline, so it seems to us, deliberately eschews all such complexities. It makes no reference to them at all*" (para 50)

- In any event, where there is a differential to be made for sentencing purposes between strict liability and other offences, this would be relevant in so far as the consideration of culpability. That is the first step in the guideline. Questions of culpability and risk of harm are "*front and centre*" in the sentencing exercise envisaged by the guideline. The guideline ensures greater regard to the specifics of the case, not less (paras 51 to 52).

HMA v The Richmond Fellowship Scotland
Sheriff Principal Turnbull, 26 May 2022

- The accused company operated a supported accommodation complex
- A 59 year old woman in their care and who suffered from severe learning difficulties was able to fill her own bath without supervision. She subsequently drowned
- Convicted following trial
- A "*catalogue of failures*" on the part of the accused caused, or materially contributed, to the death
- Reference was made to the Scottish Sentencing Council 'Sentencing Process' guidelines together with the Sentencing Council for England & Wales Health & Safety guidelines

HMA v The Richmond Fellowship Scotland
Sheriff Principal Turnbull, 26 May 2022

- Harm caused could not have been greater – fatal case
- Culpability assessed as 'medium'
- 'Medium' likelihood of harm and 'Harm Category 2' applied
- Accused regarded as a 'large organisation' due to its turnover
- A mitigating factor taken into account was a wide scale review undertaken by the accused to address the issues that led to the death.
- A sentence of £450k was fair and appropriate (range of £300k to £1.5 million with a starting point of £600k)

HMA v Nordboard Europe Limited
Perth Sheriff Court

- Convicted of two charges following trial on 1 November 2022
- sections 2(1) and 33(1)(a) of the 1974 Act
- The Management of Health and Safety at Work Regulations 1999 Regulation 3(1) and sections 15 & 33(1)(c) of the 1974 Act
- Total fine was £2,150,0000
- George Laird, along with three colleagues, was involved in maintenance work on a wood drier. During this work, a high-pressure hose was used to remove hot ash from within a hot gas duct above a combustion chamber.
- Mr Laird who was in the area below the combustion chamber, was enveloped by hot water, steam and ash and sustained burns over 90 percent of his body. He died from his injuries the next day.
- The Health and Safety Executive investigation found evidence of a catalogue of failings by the company.

Questions?

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