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PUBLICITY, THE MEDIA, AND PROFESSIONAL REGULATORY INQUIRIES

By Patrick Leonard SC

[1] Although it is commonly thought that extensive press reporting of professional regulatory inquiries is a modern phenomenon, research has shown that, at least in the case of doctors, there were public inquiries as long as 80 years ago.[1] Curiously, it is in relatively recent times that restrictions were placed upon the press reporting of such inquiries.

Reporting – an Early Case

[2] The concept of "*infamous conduct*" in a medical practitioner (first introduced by the Medical Act, 1858) was adopted into Irish law by the Medical Practitioners Act, 1927. Under that Act, which established the Medical Registration Council, the relevant provisions were set out in sections 28 – 30 which provided, *inter alia*, as follows:

> *"28.—(1) Whenever a person registered in the register is convicted in Saorstát Eireann of treason or of a felony or a misdemeanour or is convicted outside Saorstát Eireann of a crime or offence which would be a felony or a misdemeanour if committed in Saorstát Eireann, the Council may erase the name of such person from the register.*
>
> *(2) ……*

[1] William Kennedy, Legal Advisor to the Medical Council, has reviewed the minutes of the Medical Council's predecessor body, the Medical Registration Council, and established that both members of the press and the public were often present at inquiries and Council meetings. Reference to the Irish Times Archive shows reporting of inquiries in both England and Ireland.

29.—(1) Whenever a person registered in the register is judged by the Council, after due inquiry by the Council or due consideration by the Council of a report by the General Council of an inquiry held by them, to have been guilty of infamous conduct in a professional respect, the Council may, if it sees fit, erase the name of such practitioner from the register……

30.—(1) The Council may at any time hold …. an inquiry into the conduct of any person registered in the register who is alleged to have been guilty of conduct which is infamous in a professional respect, and the Council or …… shall have power to summon witnesses to attend such inquiry and to examine them on oath and for that purpose to administer an oath to such witnesses and to compel such witnesses to produce any documents in their power or control the production of which the Council or such members or member (as the case may be) considers necessary for the purpose of such inquiry.

……

(3) The person whose conduct is the subject of an inquiry held under this section shall be entitled to be heard and adduce evidence and, if he so desires, to be represented by solicitor and counsel at such inquiry.

[3] It appears to have taken some time for that Act to come into force, and according to the report of the Irish Times of Wednesday, 13 July, 1932:

"At the first session of the Medical Registration of the Free State, yesterday… the first case heard was against Dr. Hyman Levison… who was charged, that on the 16th December, 1931, he was convicted at the Circuit (Criminal) Court for having, in April 1931, aided, abetted and assisted a person unknown in an illegal operation on Bridie Kelly… Dr. Levison was sentenced to three years penal servitude and 12 months imprisonment, to run concurrently.

Dr. Levison was now cited to appear before the Council to answer the charges against him, and as to whether or not they should direct his name to be removed from the Register of Medical Practitioners."

[4] There follows, in the *Irish Times* of that day, a detailed report of the evidence which was given on behalf of Dr. Levison before the Medical Registration Council. Although the report of the case before the Medical Registration Council is not clear as to the nature of the illegal operation said to have been performed on Ms. Kelly, it is clear from the report of the *Irish Times* of December 15, 1931, that Dr. Levison had been convicted of:

"Being what was known in law as a principal in a second degree to using an instrument with a view to procuring a miscarriage."

[5] In any country, such a case would be of great public interest, and perhaps even more so in the Ireland of the 1930's. In that case, the Doctor's counsel[2] suggested to the Medical Registration Council that they ought not accept the conviction on the basis that it had was made only on the uncorroborated evidence of Bridie Kelly, and led evidence of Dr. Levison's good character. All of this took place in public.

[6] At the end of the report, the *Irish Times* notes that:

"The Council having consulted in camera, Dr. Coffey announced their decision that the Council did not see fit to direct the Registrar to erase the name of Dr. Levison from the Register of Medical Practitioners".[3]

[7] This was a consideration by Council as to whether Dr. Levison ought be struck off on grounds of having been convicted of an indictable offence and therefore not, strictly speaking, an inquiry into Dr. Levison's alleged infamous conduct. If such a matter were to have come before a regulatory body in recent years, it is almost certain that it would have been held in private. The power to cancel the registration of a registrant who has been found guilty of an indictable offence was continued into subsequent regulatory schemes. It is understood that a

[2] Mr. Lupton KC
[3] The reporter concludes, in the style of the time, *"Mr. Lupton thanked the Council, and Dr. Levison was congratulated by his friends."*

number of doctors and nurses have been erased from the register pursuant to such provisions but that none of those hearings, before the respective Councils, took place in public.

Closing the Door – the Recent Past

[8] Whereas it is not at all clear why both inquiries and consideration of indictable convictions began to be heard in private, it is clear that by the time the Medical Practitioners Act, 1978, was enacted[4], the presumption was that such inquiries ought be held in private.

[9] Under that Act, section 45(5) provides that:

> *"The findings of the Fitness to Practice Committee on any matter referred to it and the decision of the Council on any report made to it by the Fitness to Practice Committee shall not be made public without the consent of the person who has been the subject of the inquiry before the Fitness to Practice Committee unless such person has been found, as a result of such inquiry to be –*
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> *(a) guilty of professional misconduct, or*
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> *(b) unfit to engage in the practice of medicine because of physical or mental disability,*
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> *as the case may be."*

[10] Perhaps because medical practitioners were content to have inquiries into their alleged professional misconduct heard in private, the meaning or effect of this section did not fall to be considered by the Superior Courts until the late 1990s. In *Barry v. Medical Council,* the Supreme Court held that the Fitness to Practice Committee of the Medical Council had a discretion to conduct its proceedings in private[5]. According to the decision of the Supreme Court (Barrington J.):

> *"The inquiry originated in a number of complaints made against the Applicant by a number of young women, former patients of his. …suffice*

[4] The Solicitors Act, 1954, which established the Solicitors Disciplinary Tribunal, is silent on the issue.
[5] [1998] 3 I.R. 368.

to say that the complaints and the statements of the evidence which these former patients proposed to give to the inquiry contain matter of a most intimate nature concerning the private lives of these women and the doctor/patient relationship…

The first question to decide is whether under the statute itself, leaving aside for the moment all questions of constitutional interpretation, the Fitness to Practice Committee has a discretion or power to conduct its proceedings in private… Earlier in this judgment I have quoted section 45(5) of the Act of 1978 which provides that the findings of the Fitness to Practice Committee and the decision of the Council and any report made to it by the Committee should not be made be public without the consent of the doctor who has been the subject of the inquiry unless such doctor has been found guilty of professional misconduct or unfit to engage in the practice of medicine. Clearly the purpose of this provision is to protect the reputation of practitioners who have not been found guilty of professional misconduct or unfit to engage in the practice of medicine. But such a provision would be pointless if the proceedings before the Fitness to Practice Committee had been held in public. It therefore appears to me that section 45(5) contemplates, but does not necessarily require, that the proceedings before the Fitness to Practice Committee will have been held in private. It is not therefore surprising to hear that the practice of the Committee has been to hold its proceedings in private.

The present case is unusual in that the Applicant, the practitioner against whom the complaints have been made, has demanded that the proceedings be held in public. He has done this, he says, because the case has received so much damaging advance publicity that his reputation as a doctor has been ruined and he would therefore welcome the opportunity to vindicate his character in public.

In these circumstances the only question is not whether the Committee has a right to conduct these proceedings in private but whether it has a discretion to conduct them in public. While the Act contemplates that proceedings before the Fitness to Practice Committee shall be in private it

does not require it. I can see no reason why the Committee should not hold its proceedings in public if all parties were agreed and if the Committee itself thought it was the proper thing to do. While therefore the normal procedure before the Committee is to hold its proceedings in private I see no reason why it should not hold its proceedings in public in a proper case. In other words I think the Committee has a discretion in this matter."

[11] As the Nurses Act, 1985 contained identical provisions, inquiries concerning doctors and nurses continued to be held in private until recent times.[6] The subsequent inquiry against the eponymous Dr. Barry was delayed by reason of an allegation of sexual assault made against him and only came on for hearing (in private) before the Fitness to Practice Committee of the Medical Council in 13 July, 2006. Dr. Barry was found guilty of professional misconduct and the Medical Council decided to erase him from the Register of Medical Practitioners. This decision was the subject of an appeal by Dr. Barry, which came before the High Court (Mr. Justice Charleton)[7].

[12] Although that inquiry, which concerned matters of the most personal and intimate nature for the complainants, took place in private, the hearing of the appeal itself took place in public. The High Court affirmed the decision of the Medical Council and directed the erasure of Dr. Barry's name from the Register.

[13] The history of this case highlights an inconsistency which enures in the present statutory schemes. Under most of the existing statutory schemes, the "*conduct committees*" have a discretion to hold proceedings in private. However, where such decisions are appealed to the High Court, the Constitution requires that such appeals must be heard in public. There may well be cases where registrants have legitimate grounds for asking that an inquiry be heard in private but where the possibility of adverse publicity dissuades them from appealing to the High Court. Similarly, there may well be cases where

[6] It is understood that no public inquiries were ever held under the Medical Practitioners Act, 1978, and that only one inquiry has been held in public under the Nurses Act, 1985.
[7] [2007] IEHC 74.

witnesses have legitimate grounds for seeking to have an inquiry heard in private, but where they may be reluctant to give evidence in a public appeal.

The new regime

[14] Invariably, in the more recent fitness to practice legislation, the statutes provide that the inquiries ought be held in public[8], unless some factor suggests otherwise. By section 58(2) of the Health and Social Care Professionals Act, 2005:

> *"A hearing before a professional conduct committee must be held in public, unless –*
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> *(a) the registrant or the complainant requests the committee to hold all or part of the hearing otherwise than in public, and*
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> *(b) the committee is satisfied that it would be appropriate in the circumstances to hold the hearing or part of the hearing otherwise than in public."*[9]

[15] This section was replicated in the Medical Practitioners Act, 2007, which provides at section 65(2) that:

> *"A hearing before the Fitness to Practice Committee shall be held in public unless –*
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> *(a) following a notification under section 64, the registered medical practitioner or a witness who will be required to give evidence at the inquiry or about whom personal matters may be disclosed at the inquiry requests the Committee to hold or part of the hearing otherwise than in public, and*
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> *(b) the Committee is satisfied that it would be appropriate in the circumstances to hold the hearing or part of the hearing otherwise than in public."*[10]

[8] See the extensive discussion of this issue in Mills, Ryan, McDowell and Burke, Disciplinary Procedures in the Statutory Professions, pp. 148-156.
[9] For some reason, a similar provision is not included in the Veterinary Practice Act, 2005.

[16] We have therefore moved from a position where few, if any, inquiries were held in public, to a position where the default position is that such inquiries take place in public.

[17] Reports of such inquiries routinely appear in the print media and often appear on both television and radio. Those reports are widely disseminated on the Internet. Although there has been some limited reporting of inquiries before the Solicitors Disciplinary Tribunal and the Chartered Accountants Regulatory Board, most of the press interest appears to be in inquiries before the Medical Council, the Nursing and Midwifery Board, and the Pharmaceutical Society of Ireland. This is perhaps unsurprising as the issues which come before those inquiries are not only of great human interest[11] but are matters of real public interest.

[18] However, it is clear that some concerns have been expressed as to the nature and extent of press reporting in such inquiries. In the majority decision in *Corbally v. Medical Council*, the Supreme Court (Hardiman J.) stated:

> *"Specifically, I consider that 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."*

[19] Earlier in the decision, Mr. Justice Hardiman had stated:

> *"I entirely agree with what is said by the Learned President of the High Court at page 11 of his Judgment to the effect that while the sanction is not considered sufficiently serious to entitle him to an appeal on the merits nevertheless:*
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> > *"The gravity of the matter from the perspective of the Applicant could hardly be greater because he was the subject of extensive media coverage in relation to this case, which had it been a trial before a*

[10] See also section 63(3) of the Nurses and Midwives Act, 2011.
[11] As opposed to the more dry matters which come before the Solicitors Disciplinary Tribunal and the Chartered Accountants Regulatory Board (which often involve dry financial cases).

Judge and jury would most certainly have caused the trial to be aborted."

[20] Although the standard of proof in a fitness to practice inquiry is the same as at a criminal trial, being beyond reasonable doubt, it is well established that fitness to practice inquiries are different from criminal trials. For example, in *McManus v. Fitness to Practice Committee*, the President of the High Court held that:

> *"It must be remembered that this was, in fact, an inquiry. Although the standard of proof for both processes is that of proof beyond reasonable doubt, it does not follow that the two processes are in all other respects identical. The fact that the Committee rejected a request for a direction at the conclusion of the CEO's case on the basis that they wished to hear the Applicant might transgress the rules of a criminal trial, but in the context of an inquiry does not strike me as being an objectionable course for the Committee to have adopted…"*

[21] In the context of publicity, the fact that a fitness to practice inquiry is not a criminal trial has what are perhaps unintended consequences. As is identified above, the Supreme Court held that the publicity surrounding the inquiry into Professor Corbally was such that had it been a criminal trial, it may have been aborted. According to O'Malley, *The Criminal Process*:

> *"Pre trial publicity may cause problems even if it is not, strictly speaking, prejudicial or adverse. Prolonged and persistent pre trial reporting on the background to a case, repeatedly describing the nature of the alleged offence and its impact on victims may not, on the face of it, be hostile to the accused personally. Yet, such reporting may have a deep impact on the collective consciousness of the community from which the jury is eventually drawn. To this extent, of course, it may be described as adverse. Much more detrimental is publicity with directly or implicitly links the accused with the crime or which, either before or during the trial, paints the accused in an unfavourable light."*[12]

[22] Later, Professor O'Malley states that:

[12] Para. 16.02.

> *"A person who runs a serious and unavoidable risk of not getting a fair trial on account of adverse pre trial publicity should not be put on trial. Likewise, a trial should be discontinued if such a risk arises because of prejudicial media comment during the trial itself. These propositions flow quite easily from the superior status of the right to a fair trial in the constitutional hierarchy… the first issue to be addressed is whether the trial should be prohibited on the ground of adverse publicity or whether it should be allowed to proceed on the understanding that the trial will take all appropriate steps to ensure a fair trial and give appropriate directions to the jury. In Rattigan v. DPP, Hardiman J. notes two kinds of publicity that tend to prejudice a fair trial. The first consists of unproven information or a strong suggestion that the accused is guilty or innocent of the offence charged, thereby making it difficult for the jury to approach its task with an open mind. The second consists of published material which, by repetition or otherwise, "so affects the person about whom it is written as to hamper his ability properly to conduct his defence". Hardiman J. also notes that trial fairness may be hampered by publications which are heavily partisan towards somebody else, such as a victim, directly connected with the case."*[13]

[23] In a criminal case, therefore, adverse publicity may prevent a trial proceeding. Even if the trial it to proceed, courts will often direct that a trial ought not take place for a period of time in order to allow potential jurors' memory of what was published to "*fade*". Similarly, in circumstances where the publication of material calculated to prejudice the due course of justice is a contempt of court, and can be injuncted[14] prior to publication, the law affords a remedy which allows for the protection of the rights of those who come before the criminal courts.

[24] Notwithstanding the serious effect which fitness to practice committee hearings have on those who are the subject of such hearings, it is not at all clear that such

[13] Para. 16.11.
[14] Such issues arose in the recent case of *DPP v. Independent Newspapers* in relation to what have been described as the *"Anglo Tapes"*.

remedies exist in respect of fitness to practice proceedings[15]. Although the most recent edition of Harris on Disciplinary and Regulatory Proceedings (8th ed.) suggests[16] that the common law tests applicable to criminal trials also apply to disciplinary proceedings, no authority is cited in support of this proposition.

The Bristol Royal Infirmary Case

[25] The potential problem presented by the difference between criminal trials and fitness to practice inquiries is neatly identified in an English case, *General Medical Council v. BBC*[17].

[26] The background to that case lies in the scandal which took place in the treatment of babies and young children undergoing cardiac surgery at the Bristol Royal Infirmary[18]. It was alleged that there were serious concerns about mortality in paediatric cardiac surgery at the Bristol Royal Infirmary and a fitness to practice committee conducted a 74 day hearing against three doctors in relation to operations that were carried out between 1990 and 1995.[19]

[27] What had happened at the Bristol Royal Infirmary was undoubtedly a matter of national concern. Understandably, the BBC wished to transmit a current affairs programme concerning the fitness to practice inquiry. The BBC intended transmitting a Panorama programme after conclusion of the evidence as to fact in the inquiry, but prior to evidence being led as to whether such facts as were proven constituted serious professional misconduct or whether there was any mitigating or other evidence of relevance. Prior to a decision by the fitness to practice committee as to whether the facts were proven, the General Medical Council sought an injunction to restrain the BBC from transmission of this programme.

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[15] In terms of the remedies available on the civil side, the Courts have been vigilant to protect the rights of freedom of expression. See for example, *Cogley v. RTE* [2005] 4 I.R. 79, *Mahon v. Post Publications Ltd.* [2007] 3 I.R. 338 and *McKillen v. Times Newspapers* [2013] IEHC 150. For a discussion of the *sub judice* rule, see Carolan and O'Neill, Media Law in Ireland, paras. 5.62 and following.

[16] Para. 3.64.

[17] [1998] 3 All E.R. 426.

[18] Described in Glynn and Gomez, The Regulation of Healthcare Professionals, Law, Principle and Process, pp. 33-35.

[19] For details see the decision of the Privy Council in *Roylance v. General Medical Council* [2000] 1 A.C. 311 and the decision of the Court of Appeal in *Meadow v. General Medical Council* [2007] 1 All E.R. 1.

[28] According to the affidavit evidence before the Court, it was clear that the Panorama programme would focus at least on the suggestion that the scope of the inquiry had been too narrowly drawn, would be critical of the manner in which the inquiry had been conducted, would go beyond a factual report of what had happened in the inquiry and would deal with matters that had been deliberately excluded from the inquiry. The GMC said that this would prejudice the integrity of the inquiry.

[29] In the decision of the Court of Appeal, Lord Justice Robert Walker stated that:

> *"At the hearing before the Judge, and on the appeal to this Court, there have been two main issues. (1) Are the proceedings before the PCC legal proceedings before a court for the purposes of the law as to criminal contempt of court? (2) If so, would transmission of the Panorama programme at the present time create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced… so as to make injunctive relief appropriate?*
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> *The Judge held that the PCC was not a court… and that in any event the evidence fell well short of establishing any substantial risk of serious prejudice to the course of justice.*
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> *In this court (the GMC) raised a third issue… that issue is whether the High Court has an inherent jurisdiction, apart from its jurisdiction to prevent or punish contempt of court, to restrain activities which threaten or impede or prejudice the proper functioning of a tribunal (a non curial tribunal) which is not a court of law, but which performs functions of a judicial character the proper functioning of which is a matter of public interest."*

[30] In its decision, the Court of Appeal held that although the PCC exercised a function which was recognisably a judicial function and did so in the public interest, and it had acted in accordance with detailed procedural rules which had close similarities to those followed in courts of law, it was not a part of the judicial system of the State. As a statutory committee of a professional body specially incorporated by statute, the Court of Appeal held that it did not fall

within the meaning of a court for the purpose of the rules of criminal contempt of court.

[31] Given that the law had moved significantly in favour of press and broadcasting freedom, the Court of Appeal held that further widening of the law of contempt ought be left to the legislature.[20]

[32] Although there does not appear to be any Irish authority on this issue, it seems likely that the Irish Courts would follow the logic of the Court of Appeal in *GMC v. BBC* to the effect that the rules of criminal contempt do not apply to proceedings before a profession's "conduct committee".

[33] In relation to the question of an inherent jurisdiction, the GMC submitted that :

> *"It would be a most serious blot on the law if there were no redress against even the most blatant interference with a non curial tribunal which had serious functions of a judicial nature to perform, but was not a court for the purposes of the law of contempt. (The GMC) submitted that the High Court did have jurisdiction to prevent interference with a non curial tribunal, relying on what Lord Salmon said in A-G v. BBC…:*
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> > *"For the reasons I have indicated, the host of modern inferior courts and tribunals do not, in my view, require and do not have any protection against comments which may be made by the press and the like in respect of matters which those courts or tribunals have to decide. On the other hand, it may be that if these courts or tribunals, whilst they were sitting, were prevented by obstruction from performing their duties, they could be protected by the Queen's Bench Divisional Court. This point does not however arise in the present case, and I express no concluded view about it."*
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> *However, this Court was not referred to any authority in which such a jurisdiction has ever been exercised, either at the suit of the Attorney General or at the suit of a private litigant.*

[20] Reference was made to *Pickering v. Liverpool Daily Post* [1990] 1 All E.R. at 335, and *Shell Company of Australia Ltd v. Federal Commissioner of Taxation* [1931] A.C. 275.

Lord Salmon did not expand on what he meant by obstruction, but it seems likely that he had in mind the sort of activity which would, in relation to a court of law, constitute contempt of the gravest and most obvious character, such as interference with witnesses… It may well be that grave and obvious interference with proceedings before a non curial tribunal could and would be restrained at the suit of the Attorney General, who has a special historic role, not wholly dependent on statute, as guardian of the public interest… It seems much more doubtful whether a private litigant could obtain such relief.

However, it is not necessary to consider this third issue, since the jurisdiction, if it exists, would become exercisable only in a clear case of grave interference, which this is not. …"

[34] If this represents the law in Ireland, it clearly places a very high hurdle before an application can be made to restrain publication of material which might prejudice the integrity of an inquiry. As I suggest below, this approach may not be in accordance with the constitutional principles of natural justice which would apply in Ireland.

Mahfouz

[35] A further case of interest is *R (on the application of Mahfouz) v. Professional Conduct Committee of the General Medical Council*[21]. Dr. Mahfouz was a Cosmetic Surgeon who practised in London and specialised in laser surgery. During the period of 2000 to 2001, a number of complaints were made about his professional misconduct and a hearing, scheduled to last for eight days, began before the Professional Conduct Committee of the General Medical Council on Monday 9 June, 2003. On the evening of the first day of the hearing, an article appeared in *The Evening Standard* followed by further articles in three newspapers the following day. They were recited in the judgment of the Court of Appeal as follows:

"The first article appeared on the evening of Monday, 9 June, in The Evening Standard (circulating in London). It had a prominent headline,

[21] [2004] EWCA Civ 233.

and included a photograph of Dr. Mahfouz. The headline read: "Harley Street surgeon's "botched operations left women in agony"." There was an account of the first day's hearing and of the charges, to which no objection is taken. It also included the following statement:

> *"(Dr. Mahfouz) ... who has already been struck off once, is facing claims that he sweet-talked patients into signing up for expensive treatment which left their faces covered in burning sores."*

The article concluded:

> *"Dr Mahfouz was struck off in 1987 when working as a GP's assistant and failed to refer a patient he knew to be in a critical condition to hospital. The hearing continues."*

Although the facts of the 1987 "erasure" are not disputed, it is common ground that information about that event would not have been regarded as relevant or admissible at the PCC hearing, and would not otherwise have been referred to in evidence.

Similar statements appeared in two newspapers the following morning. The Metro newspaper, which is available free in the London area, also summarised the hearings. It made a reference to Dr. Mahfouz having been "struck off once before", and contained the following statement:

> *"(Dr. Mahfouz), who claimed to be the only man in Europe able to turn a black person white, was exposed by BBC investigative reporter Paul Kenyon, the General Medical Council was told."*

Dr. Mahfouz strongly denies having made any such claim, and that allegation did not form any part of the GMC case against him (although, as I have said, other aspects of the Kenyon investigation were the subject of the charges). Again, it would not otherwise have come to the attention of the committee.

The other article appeared in the national Independent newspaper. It referred to the hearing, but added the following:

"Dr Abu Mahfouz was struck off the register in 1987 when he was working as a GP's assistant and failed to refer a patient he knew to be in a critical condition to hospital. The GMC accused him of a 'lamentable standard of professional care and attention'. He was reinstated 1992."

Again, the facts of the striking off and subsequent reinstatement are not in dispute, but they would not have been referred to at the hearing.

The application to discharge

When these articles came to the attention of Dr. Mahfouz and his advisers, they made inquiries of the committee through the legal assessor. They were informed that four members of the committee had seen the Evening Standard article; one of those four had also seen the Independent article and another had seen the Metro article. They objected to the committee continuing to hear the case. They indicated that they wished to apply for the committee to discharge itself, so that a new committee could be constituted, which it was anticipated would enable the hearing to be reopened in three to four months' time.

As four members of the committee had seen one or more of the reports, Dr. Mahfouz applied to the committee to discharge itself and to have a new committee empanelled on the ground that the committee had or might be affected by prejudicial press publicity. The committee refused to discharge itself on the grounds that a fair minded or informed observer would conclude that there was no real possibility that the committee would be biased and Dr. Mahfouz sought judicial review."

[36] Perhaps surprisingly, the judicial review was dismissed at first instance and on appeal. In its judgment, the Court of Appeal held that:

"…The committee members in this case included two professionals and three lay members, selected from a panel of persons having experience in public life… They can be assumed to understand the proper approach to issues of law and to be aware of the need to disregard irrelevant material.

… Of particular importance are the experience of the committee and the availability of independent legal advice to ensure that irrelevant matters do not play any part in their deliberations. Other factors of importance, to which the committee expressly referred, were the length of time that had elapsed since the previous finding of serious professional misconduct, the different nature of the previous case, the impact of seeing and hearing witnesses in relation to the present charges. When these points are taken together, I see no grounds for questioning the committee's ability to decide the case fairly on the evidence before it.

These committees had to be looked at by the committee, not just subjectively, but also putting themselves in the shoes of the hypothetical fair minded observer. However, in a case such as the present, where the fairness and impartiality of the committee were not in question, it was difficult to see much practical difference between the two approaches. The factors which lead reasonable committee members to satisfy themselves that subjectively they would be able to try the case fairly, would generally be the same as those which would lead a fair minded observer to the same conclusion. On this issue I have no doubt that the committee came to the right conclusion for the reasons they gave….

At the end of the day, of course, the underlying question is the same, whether the proceedings were fair and seen to be fair. … Knowledge of prejudicial material need not be fatal; its effects must be considered in the context of the proceedings as a whole, including the likely impact of the oral evidence and the legal advice available."[22]

[37] As a matter of practice, the counsel and solicitors presenting evidence to fitness to practice committees in Ireland do not make any reference to previous findings (or indeed inquiries) into misconduct unless it is necessary for the purpose of proving charges in question.[23]

[22] The Court also referred to a previous case, *Subramian v. General Medical Council* [2002] UKPC 64.

[23] Such as a where a registrant has not complied with a condition of registration imposed pursuant to a previous inquiry. Previous findings are referred to when the matter reaches sanction stage.

[38] Practical experience shows that it is not always possible to exclude knowledge of previous inquiries from the committees that hear a case. Some committee members may be aware of previous inquiries from their previous reading of the press. Often, witnesses giving evidence will make reference to previous inquiries and indeed registrants themselves may not fully appreciate that the committee know nothing of previous findings against them. That said, efforts are always made to prevent knowledge of past facts colouring the attitude of a fitness to practice committee into a practitioner.

The approach in Ireland

[39] Having regard to the decision of the Court of Appeal in *Mahfouz*, it cannot be said that reference to previous findings of misconduct in newspaper articles concerning a doctor would constitute a contempt of court. Similarly, if the test in order to invoke the inherent jurisdiction of the Court in Ireland is that identified by the Court of Appeal in the case of *GMC v. BBC*, it seems unlikely that relief would ever be granted to prevent a newspaper publishing details of previous inquiries prior to or during the course of a new inquiry. If *Mahfouz* were applied in Ireland, a fitness to practice inquiry could continue notwithstanding knowledge of previous inquiries, and irrelevant material.

[40] If this is the law in Ireland, it surely does not afford sufficient protection to the parties in or before a professional disciplinary inquiry. One may venture to suggest that an Irish Court, faced with the same facts as those presented to the English High Court in *Mahfouz v. General Medical Council*, would have granted judicial review and required the GMC to constitute a new fitness to practice committee. It is hard to see how a committee would not have been prejudiced, in a very serious way, by the knowledge that the doctor had previously been struck off for other charges. In this way, I suggest that the Irish Courts might not take as strict approach as that taken before the English Courts in relation to similar applications.

[41] As it happens, anecdotal evidence suggests that the type of problem faced by the English Courts in the *Mahfouz* case does not arise on any regular basis in Ireland. Indeed, the press are often careful to respect the privacy of witnesses

giving evidence before the fitness to practice inquiries (particularly children) in circumstances where there is no legal obligation on them so to do, and to refrain from publishing some allegations of a highly prejudicial nature, which may never be substantiated at the conclusion of the hearing. Bearing this all in mind, we may consider what approach the Irish Courts would take to some of these situations.

[42] I suggest that the Irish Courts would not take the strict approach identified by the Court of Appeal in *GMC v. BBC* in relation to the inherent jurisdiction of the courts. It is hard to see how the Irish Courts would not invoke an inherent jurisdiction to intervene in an appropriate case where there was a real risk to the integrity of an inquiry. For example, if it were proposed to publish material which was the subject of a private inquiry under the provisions of the relevant Act, I suggest that the Courts might intervene to prevent the publication or dissemination of such material.

[43] Furthermore, if material was to be published which would genuinely affect the possibility of a registrant obtaining a fair hearing before the tribunal, I suggest that the courts would also be prepared to intervene, not just at the suit of the Attorney General as is suggested in England, but also at the suit of either the regulatory body concerned[24] or the person who is likely to be the subject matter of such an inquiry.

[44] On the other hand there is a line of authority which suggests that publication of matters which are confidential will not be restrained. In that regard, it will be remembered that the Supreme Court (Fennelly J.) refused to restrain publication of confidential matters in relation to the Mahon Tribunal. In that case, the Court held that:

> *"the plaintiffs have, for reasons already mentioned, not demonstrated any legal power to prevent those to whom the tribunal communicates its briefs from communicating their contents. In this context, I would add that, in the*

[24] On grounds of confidentiality, the Bar Council obtained an injunction against the Sunday Business Post to restrain publication of a document from a disciplinary inquiry. See the Judgment of Costello P in *Council of the Bar of Ireland v. Sunday Business Post Ltd.* (Unreported, High Court, 30 March, 1993).

present state of Irish law, and acknowledging that it may develop, it is not established that governmental or other public or statutory bodies have the right to apply for injunctions preventing the disclosure of confidential information".[25]

[45] Finally, it may well be that a more nuanced approach needs to be taken to applications to hold inquiries in private. Since the coming into force of the various statutory regimes which suggest that conduct inquiries shall be held in public, unless the committee decide otherwise, applications to hold inquiries in private have very often been rejected on the basis that the policy of the Act in question is to hold inquiries in public and that in the absence of compelling reasons (normally related to the complainant not the doctor) that the inquiry should be held in public.

[46] When one has regard to the absence of a jurisdiction in contempt of court, and the reality that prejudicial material may be published concerning the registrant during the course of or before the inquiry, it may well be that a more nuanced approach to such applications to hold inquiries in private is required.

[47] It may be, that in considering applications to hold inquiries in private that a number of factors ought to be considered. I venture to suggest that amongst the factors that ought be considered are the following:

1. the public interest in having such matters heard in public,
2. the subject matter of the inquiry,
3. the nature and range of allegations made against the registrant,
4. the consequences of publication of the subject matter of the inquiry if allegations are made, reported on, but dismissed at the conclusion of the inquiry,
5. the wishes of the parties involved,
6. the right of the registrant to a good name,

[25] At page 391 of the report.

7. whether there is a public interest in having the subject matter or the inquiry ventilated in public during the course of the inquiry, as opposed to having a report of the inquiry (and transcripts if required) published after the inquiry,

8. The right of patients or witnesses to privacy,

9. Whether the interests of justice would be advanced by a private inquiry, including whether some witnesses would refuse to give evidence if the inquiry were in public[26].

[48] There are of course, competing interests in relation to this issue. The press (and by extension the general public, including patient support groups) are fearful that private inquiries may result in a failure to hold registrants properly to account. Similarly, some registrants may feel that being held to account in the court of public opinion is worse than being found guilty of professional misconduct. The court of public opinion does not always realise at the conclusion of an inquiry that a practitioner may have been found innocent of all charges.

[49] As these are issues which need to be faced by those statutory bodies which exercise a discretion as to whether inquiries ought be held in public or in private, it would be useful for each of those bodies (together or indeed separately) to engage in a consultation process with those stakeholders in that process with a view to developing guidelines as to when it is or is not appropriate to have inquiries in public or private.

[50] With or without such guidelines, it is of course likely that the courts will be called upon to deliver their judgment on these or similar issues and the results of such cases will be awaited with interest.

PATRICK LEONARD SC

[26] A factor in the *Barry* case. See pages 379-380 of the report.