Poor Professional Performance after *Corbally*[1]

This paper considers elements of the Supreme Court judgment in the case of *Corbally,*[2] with particular emphasis on (a) the Court's assessment of what constitutes poor professional performance, a term which appears in various professional regulatory statutes and (b) how a single error falls to be considered in the context of that term.

In the High Court, Kearns P made orders quashing both the finding of poor professional performance and the imposition of a sanction of admonishment on Professor Corbally. The Supreme Court upheld the decision on appeal.

A. Poor Professional Performance in Context

1. Poor Professional Performance (hereafter 'PPP') is a feature of much of the legislation dealing with the regulation of professions, but by no means all. Where it features in a statutory framework, it fulfils two functions (a) it is a ground for complaint and (b) as a corollary, it is a ground for an adverse finding that may be made against a registrant. Lastly, it should be noted that in all the relevant statutes, where there is a finding of PPP a sanction must be imposed.

2. Prior to the introduction of PPP, the Courts had determined that adverse occurrences exemplifying to seriously substandard professional performance could be held to be Professional Misconduct and treated accordingly. Indeed, registrants had been erased from the register of their professions in cases where the conduct in question was wholly a matter of professional incompetence. Seriously poor performance leading to erasure for Professional Misconduct would typically necessitate a number of severe errors or a pattern of behaviour wholly inconsistent with being a safe and competent practitioner. That seriously poor performance can lead to erasure was settled beyond doubt by the court in *Perez*,[3] a case in which O'Donovan J found that a wide range of defects[4] in a nurse's practice, stretching over a period of months (and which defects she seemed disinclined to acknowledge

[1] In preparing this paper, I had the great benefit of discussions with my colleague Nathan Reilly BL. However, any errors of interpretation or assessment in this paper are mine alone.
[2] *Corbally v Medical Council* [2015] IESC 9. Where relevant, aspects of the High Court judgment are also considered: [2013] IEHC 500
[3] *Perez v An Bord Altranais* [2005] IEHC 400; [2005] 4 IR 298.
[4] The court found that the nurse had (i) frequently communicated imprecise and incomplete information to other nurses with regard to the welfare of patients; (ii) failed to follow proper aseptic techniques and hygiene standards particularly in the context of dressings; (iii) given medication to the wrong patient on one occasion; and (iv) placed dirty swabs on a patient's breakfast tray.

or remedy) constituted sufficiently poor performance that (a) she was guilty of professional misconduct and (b) she could be erased from the register of nurses. In *Kudelska*, the High Court held, in erasing a nurse's name from the register, that the nurse was 'lacking the very fundamentals required of a professional nurse.'[5] Both *Kudelska* and *Perez* were decided prior to the availability of PPP as discrete ground of complaint and/or basis for an adverse finding.

Professions to which PPP applies

3. The term poor professional performance features in the following acts (we consider below any differences in terminology):

- Medical Practitioners Act 2007
- Nurses and Midwives Act 2011
- Pharmacy Act 2007
- Health and Social Care Professionals Act
- Building Control Act 2007

4. PPP is absent from the older Professional Regulatory legislation concerned with aspects of health care (Opticians Act 1956 (as amended),[6] Dentists Act 1985) and also from some newer acts, such as the Veterinary Practice Act 2005 and the Teaching Council Act 2001.

Statutory Definitions of PPP

5. For ease of reference, the various definitions of PPP are set out below, although – as will be clear – where there are differences in wording, they are not typically substantial.[7]

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[5] *Kudelska v An Bord Altranais* [2009] IEHC 68, *per* Hedigan J at para. 24. The judge noted too (at para. 25) 'the litany of instances of incompetence on the part of the applicant.'

[6] Although note that the Opticians Acts will be repealed when the Health (Miscellaneous Provisions) Act 2014 is commenced. The profession(s) of optician/optometrist have been "designated" for the purposes of the Health and Social Care Professionals Act 2005 (S.I. No. 39/2015 - Health and Social Care Professionals Act 2005 (Section 28A) (Optical Registration Board) Regulations 2015) and will – following the commencement of the 2014 Act – come under regulation by a Registration Board under the HSCPA 2005.

[7] The one possible exception is the provision, in the Medical Practitioners Act and the Nurses and Midwives Act 2011 that competence is to be regarded a "knowledge **and** skill or the application of knowledge **and** skill or both": on a strict reading, it would appear that PPP under those Acts only arises where the act or omission concerned encompasses a failure of both knowledge **and** skill and not merely one or the other. However, it is submitted that a purposive interpretation of this section is more likely. Note that, in his judgment McKechnie J states (at

Medical Practitioners Act 2007[8]

> "poor professional performance", in relation to a medical practitioner, means a failure by the practitioner to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that can reasonably be expected of medical practitioners practising medicine of the kind practised by the practitioner;

Nurses and Midwives Act 2011[9]

> "poor professional performance", in relation to a nurse or midwife, means a failure by the nurse or midwife to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that can reasonably be expected of a registered nurse or registered midwife, as the case may be, carrying out similar work;

Pharmacy Act 2007[10]

> "poor professional performance", in relation to a registered pharmacist, means any failure of the registered pharmacist to meet the standards of competence that may be reasonably expected of a registered pharmacist;

Health and Social Professionals Act[11]

> "poor professional performance", in relation to a registrant of a designated profession, means any failure of the registrant to meet the standards of competence that may reasonably be expected of registrants practising that profession;

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para 37) that there is "no definition of poor professional performance" in either the Pharmacy Act or the Health and Social Care Professionals Act. *Pace* the learned judge, the defintions are as set out above.

[8] Section 2

[9] Section 2(1)

[10] Section 33

[11] Section 50

Building Control Act 2007[12]

> "poor professional performance", in relation to a registered professional, means any failure of the registered professional to meet the standards of competence that may reasonably be expected of registered professionals practising the profession concerned;

6. The Solicitors Acts do not specifically contain the term "poor professional performance", but there is the arguably cognate principle of 'inadequate professional services' contained in s. 8 of the Solicitors (Amendment) Act 1994, s. 8, which are defined as services which are "inadequate in any material respect and [are] not of a quality that could reasonably be expected of a solicitor or a firm of solicitors."

What is Poor Professional Performance for?

7. We return to this below, but – prior to *Corbally* being decided – one definition was as follows:[13]

> "…the use of the term [PPP] entails different consideration from those applicable to misconduct allegations. Generally, poor professional performance represents a falling short by a professional in the application or practice of the skills associated with her professional calling, but not a falling short capable of amounting to misconduct. The falling short in question therefore must be a significant one, but will typically be less grave than the "serious" falling short, which would rather fall to be determined as a matter of misconduct. There may well, of course, be a dovetailing between poor performance and misconduct: a person's profession performance may be such as to spill into misconduct, or alternatively there may be elements of a person's misconduct that exemplify poor performance: we return below to the distinction that may be drawn between them."

8. In the light of the conclusions in *Corbally*, this can no longer be taken to be the right characterisation, or – at least – it may only be regarded as a correct assessment of how regulators tended to approach PPP prior to *Corbally.* It may not correctly articulate the actual *intention* of PPP.

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[12] Section 2(1)

[13] *Disciplinary Procedures in the Statutory Professions*, Bloomsbury Professional, 2011, para [2.51]

9. It might now be better suggested that poor professional performance is – or was – intended to patrol a somewhat different beat, covering all facets of professional duties falling into the sphere of professional duties *including those exceptional failures of professional standards that were previously (prior to the new legislation) caught within the rubric of professional misconduct* but which should now be treated as PPP. On this analysis, PPP is one of two disciplinary streams into which substandard conduct will flow: where the conduct concerns the application of one's professional abilities, then the alleged failure falls into PPP; where the conduct is outside the application of one's professional abilities (for example, dishonesty or sexual misconduct).

10. That there is ample reason to question the contention that PPP is a "lesser" form of aberrant behaviour was ventilated by Hardiman J:[14]

> By s.71 of the Medical Practitioners Act, 2007 it is provided that:
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> > "Subject to s.57(6)(a) and 72, the Council shall, as soon as is practicable after receiving and considering the report referred to in s.69(1) of the Fitness to Practice Committee in relation to a complaint concerning a registered medical practitioner where s.70(b) is applicable [that is, if any of the allegations are found proved] decide that one or more than one of the following sanctions be imposed upon on the practitioner:
> >
> > (a) an advice or admonishment, or a censure, in writing;
> > (b) a censure in writing and a fine not exceeding €5,000;
> > (c) the attachment of conditions to the practitioner's registration including restrictions on the practice of medicine that may be engaged in by the practitioner;
> > (d) the transfer of the practitioner's registration to another division of the register;
> > (e) the suspension of the practitioner's registration for a specified period;
> > (f) the cancellation of the practitioner's registration; and

[14] At para 17. McKechnie J makes a similar observation (at para 88 of his judgment):

> There is a further view as to the kind of activity which the amendment was to address. It is that the Oireachtas intended to refer to conduct of a type or quality, quite separate and distinct from that, which might constitute professional misconduct: in other words conduct qualitatively different, and not simply that which could be measured in terms of seriousness, by comparison with professional misconduct. Again however, if that was the ambition, the provisions of the Act likewise in my view, failed to reflect it.

(g) a prohibition from applying for a specified period for the restoration of the practitioner's registration."

A significant aspect of the foregoing statutory scheme is that the "sanctions" which are available in the case of a finding of poor professional performance are exactly those available in the case of a finding of professional misconduct. These include "cancellation of a practitioner's registration" i.e. striking off the medical register. *There is, therefore, no sense in which the offence of "poor professional performance" is intrinsically less serious than "professional misconduct". Indeed, it appears to me from a consideration of the relevant Sections of the Act of 2007, there may be some lacuna in the consideration by the drafters of the measure of what precisely is intended to be the difference between the two delicts and whether it is intended, or not, that one be intrinsically less serious than the other.* It is noteworthy that, in the present case, all of the factual allegations against Professor Corbally were alleged to constitute **both** professional misconduct and poor professional performance. However, the Registrar of the Medical Council withdrew the allegations of professional misconduct in their totality, and withdrew four of the allegations of poor professional performance, before the oral hearing got under way. [italics added; bold in original]

11. Whatever the principle at play behind the introduction of PPP to the statutory scheme, the role it came to occupy prior to *Corbally* seemed – in practice – to have three elements:

(a) First, it would only apply where the failing concerned the practice of the relevant discipline (so, a misdiagnosis was capable of amounting to PPP; fraud was typically not);

(b) Secondly, it would come into play – most commonly – where the conduct concerned was not sufficiently inadequate to be characterised as a "serious" falling short of the expected standard sufficient to ground a finding that the conduct amounted to Professional Misconduct.

(c) Very often, given that a risk of overlap is inevitable when the foregoing approach is taken,[15] particular acts or omissions – as in *Corbally*, (noted by

[15] In *Vranicki v Architects Board* [2007] EWHC 506 (Admin) the English High Court observed in a slightly different statutory context:

> The [Architects Act 1997] distinguishes between serious professional incompetence and unacceptable professional conduct. However, as must be obvious, there is a considerable overlap between the two and particular acts or omissions could be charged under either head.

Hardiman J and deprecated by McKechnie J – see below) would be alleged to be PPP or in the alternative Professional Misconduct and the outcome would then depend on the state of the evidence (usually the expert evidence) as to the extent of the falling short and, in particular, whether or not it was a serious falling short.

B. The background facts of *Corbally*

Context

12. Professor Corbally and the Fitness to Practise Committee came into contact in two occasions. In 2010, he and a colleague were the subject of allegations of Professional Misconduct following a case in which a child underwent the removal of the wrong kidney. After four days of evidence and approaching the end of the Inquiry, the Fitness to Practise Committee elected to request an undertaking from the two doctors. The decision was not uncontroversial[16] and attracted a degree of publicity. Note that, in the first Corbally inquiry, PPP was not an element of the case, because the conduct complained of had occurred prior to the commencement of the relevant section of the 2007 Act providing for PPP. The nexus (or otherwise) between the earlier and subsequent Inquiries was touched upon by the High Court (at pp. 11-12):

> 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 judge and jury, would most certainly have caused the trial to be aborted. The media reports stressed and emphasised that there had been a prior inquiry into the applicant's conduct in a case which involved the removal of the wrong kidney from a six year old boy at the same hospital in 2008. That was also a case where the applicant had delegated the operation to a surgical registrar. That particular inquiry was halted as the Medical Council decided that the applicant and another medical colleague did not have a case to answer, although both the applicant and his colleague gave certain undertakings to the respondents at that time in relation to their future conduct. There was no suggestion (that the Court is aware of) and no finding by the FPC that the 2008 incident resulted from an erroneous note prepared by the applicant. While counsel on both sides say that the FPC had no regard to the prior incident, the nature and extent of the publicity surrounding the hearing were highly prejudicial to the applicant in terms of his career. That said, the absence of any adverse finding against the applicant from the 2010 inquiry or any other inquiry

[16] See, *inter alia*, "Doctor criticises 'wrong kidney' probe outcome", http://www.irishhealth.com/article.html?id=17842 (last accessed 18 May 2015)

put this case in quite a different category than if there had been a prior finding of misconduct or poor professional performance made against him.

The facts

13. The facts of the case can be summarized as follows:[17]

- In early 2010, a two and a half year old girl was referred to Professor Corbally with a history that the *frenulum*[18] under her top lip was catching, causing an ulcer under that lip and contributing to a gap in her front teeth.

- Professor Corbally recommended division of her upper frenulum, a straightforward and minor surgical procedure that normally takes less than one minute to complete. In writing up his notes of the examination, the applicant, *who had correctly diagnosed patient X's condition*, wrongly described the procedure.

- Professor Corbally booked the patient in for her procedure and correctly completed an admissions form for the patient, listing her for a "tongue tie (upper frenulum)". When the patient was booked in *by the hospital* and through no fault of Professor Corbally, the reference to “upper frenulum” was not inputted into the hospital system because the system did not allow it.

- The consent form filled in at the time of the operation recorded the correct procedure. During the consent process the child’s mother highlighted the site at which the operation (confusingly described as a “tongue tie”) was to be formed.

- Professor Corbally was called away and unable to do the procedure and asked a Specialist Registrar colleague to do it.

- Notwithstanding that the operation was correctly described the colleague carried out a *lingual* frenulectomy instead of an *upper* frenulectomy. The operation was unnecessary, but no lasting injury was done to the child and the correct operation was thereafter performed.

[17] This summary is a précis of the facts as recorded in the decision of the President in the High Court: [2013] IEHC 500, *pp* 3-6. Not all facts recited by the Court are contained in the summary above.

[18] There are three frenula (congenital folds of tissue) in the mouth: an upper frenulum (a fold of tissue between the inner aspect of the upper lip and the anterior gum margin), a lower frenulum (between the lower lip and the anterior lower gum margin) and a tongue or lingual frenulum (under the anterior surface of the tongue). All three are small folds of tissue found in the midline.

- The parents of the child made a complaint to the Medical Council against Professor Corbally and the Specialist Registrar in question.

The findings of the FTPC

14. The Fitness to Practise Committee determined that three allegations were proven and that (by a majority in the case of the first allegation below)[19] each amounted to PPP on the basis of the expert evidence tendered on behalf of the CEO of the Medical Council:

- That at the initial consultation Professor Corbally had incorrectly described the procedure required.

- That, in delegating the surgical procedure to the Specialist Registrar, Professor Corbally failed to communicate, adequately or at all, the procedure to be performed.

- That Professor Corbally failed to apply the appropriate standards of clinical judgment to be expected from a surgeon with your experience or expertise.

15. Parenthetically, one might note the clear criticism contained in the judgment of McKechnie J to the effect that a number of the allegations were, put simply, unsustainable on the facts or in the alternative were – on the admitted case of the Medical Council – unsustainable as allegations of professional misconduct (at the outset of the inquiry, the allegations faced by Professor Corbally were all framed as both PPP and Professional Misconduct). On this latter point, he observed:[20]

> Quite clearly it is a very significant matter for a member of any profession to have allegations made against him which form the subject matter of disciplinary proceedings. The more serious the allegations obviously, the more concern there will be. Professional misconduct has the highest possible status with the gravest of consequences. Such process is not and should not be equated with a criminal prosecution whereby it is not infrequent to charge an accused with a lesser offence in addition to the more serious one, where the facts might justify a conviction under either. It is also quite distinct from *inter partes* litigation. Whilst I fully understand the role of the Medical Council, it seems to me that in its justifiable pursuit of protecting the public, sight must not be lost of the significant

[19] The Fitness to Practise Committee of the Medical Council sits as a panel of 3, with two non-medical members and one medical member.
[20] At para 34

> stress and anxiety as well as potential consequences which a disciplinary process inherently has for the practitioner in question. By all means, if the circumstances, as known at the time and if capable of being established by available evidence, would justify the most serious of charges, then so be it. But where that is not the case, I deprecate any practice or approach which unnecessarily and unjustifiably increases that concern or anxiety.

16. On reporting to the Medical Council the FTPC then concluded its report by recommending to the Council that it impose the sanction of admonishment or censure on the applicant, offering the following reason for doing so:

> The three findings of poor professional performance reflect a falling below the standards expected of a consultant paediatric surgeon. A sanction is appropriate in these circumstances and the Inquiry team believes admonishment or censure is proportionate to the content of the findings.

Decision of the Medical Council

17. The Council considered the report from the FPC and decided, under the provisions of s. 71 (a) of the Medical Practitioners Act 2007, as amended, to admonish the applicant in relation to his professional performance. Note that, by reason of the sanction of admonishment, Professor Corbally was deprived of a right of appeal that would have been open to him were he subject to a more severe sanction. On this absence of a right of appeal, see the trenchant comments of Kelly J in *Prendeville v Medical Council*.[21] Consideration of this aspect of *Corbally* in any detail lies outside the scope of this paper,[22] however, it may be noteworthy that Hardiman J chose specifically to highlight that, in the context of an admonishment, Professor Corbally was in effect coerced down the avenue of JR:

> "It is very apparent to anyone who reads Professor Corbally's affidavit that he utterly rejects the findings of the Fitness to Practise Committee and finds them inexplicable. Nevertheless, he was obliged to have recourse to the relatively technical remedy of judicial review **because there was no appeal on the merits available to him**. This, in turn, arose from the fact that the sanction imposed on him as a result of the Council's and Committee's findings was solely that of admonishment. That is the least of the sanctions that could have been imposed pursuant to s.71(a) of the Medical Practitioners Act 2007, as amended. If a more

[21] [2008] 3 IR 122 at paras 112-113; [2007] IEHC 427 at pp 49-50.
[22] but see the discussion in *Disciplinary Procedures and the Statutory Professions* at para [9.33]. Challenges to the constitutionality of this want of a right of appeal formed part of the cases of *McManus v Medical Council* and *Corbally*, but were not proceeded with in either case.

serious sanction such as striking off or suspension, or the attachment of conditions to his registration had been imposed, he would have had available to him an appeal on the merits. But, as it is, he had no recourse whatever available to him other than to seek judicial review by way of Certiorari." [Emphasis in original]

C. Issues for determination before the High Court

18. In essence, Professor Corbally's case on Judicial Review to the High Court can be summarized as follows:[23]

(a) The error in the case in writing up consultation notes was not capable of coming within the definition of PPP (for example, it could not – bearing in mind the statutory definition – be said to reflect upon his knowledge and skill).
(b) If that were so, when looking at a single error then the Irish Courts should follow the English Courts (albeit construing a different statutory term[24]) and hold that PPP could only arise in the case of a single error, where that error was "very serious indeed" such as to call the registrant competence into question.
(c) The principal construction of PPP was to look at a registrant's overall competence.[25]
(d) Given that a finding of PPP must – under the legislation[26] – lead to a sanction and given the significance of a sanction, there must be some threshold over which the conduct must pass to ensure that not every error is capable of being sanctioned. To this end, it was submitted that the term "serious" should be implied, when considering PPP.

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[23] The matters at issue were apparently (to judge from the decisions of the Supreme Court) netted down to a great degree on Appeal: *per* Hardiman J:

> "The single legal issue identified by the Medical Council turns on a question of statutory construction

[24] The English legislation refers to "deficient professional performance": Medical Act 1983, s. 36A. See *R (on the application of Calhaem) v. The General Medical Council* [2007] EWHC 2606 (Admin)

[25] Reliance was placed on *Krippendorf v. General Medical Council* [2001] 1 W.L.R. 1054, where the Court was concerned with "seriously deficient performance", and it was observed that the sort of conduct in the contemplation of the term was:

> *"…'[A] departure from good professional practice, whether or not it is covered by a specific GMC guidance, sufficiently serious to call into question a doctor's registration. 'This means that we will question your registration if we believe that you are repeatedly or persistently, not meeting the professional standards appropriate to the work you have been doing - especially if you might be putting patients at risk."*

[26] Under the Medical Practitioners Act 1978, it was not mandatory to impose a sanction: see the facts of *Prendeville v Medical Council* [2008] 3 IR 122

(e) The fact that the error on the part of Professor Corbally was not causative of any damage was a relevant factor weighing against a finding that Professor Corbally was guilty of PPP.
(f) A number of (loosely termed) “fair procedures arguments were also made:
    i. The findings and sanction imposed on the applicant were irrational and disproportionate having regard to the gravity of the case from the applicant's point of view
    ii. The absence of any right of appeal
    iii. Duplicity of findings, where in essence the same allegation was levied in two different ways;
    iv. Failure to provide intelligible, adequate and informative reasons for the particular findings which it did make, including:
        a. why the FPC preferred the evidence of the CEO’s expert.
        b. how the facts as found fitted within the legal concept of "poor professional performance".
    v. In addition, reliance was placed upon fair procedures points, by reference to which it was contended that the applicant was at fault in this case because he knew of weaknesses in the system within the hospital, but it had been no part of the CEO's original case against the applicant.

19. The case of the Medical Council can be summarized as follows:

(a) The only issue for determination was what constituted PPP and the answer to that question was to be found in the definition of poor professional performance set out in the Act.
    - That definition does not require any threshold of seriousness to be met nor does it require that a continuum of behaviour or conduct be established.
(b) There was an admitted error in the case and there was expert evidence to support the finding of PPP.
(c) It could not be said that a single error could never be PPP.
(d) The English authorities relied upon by the applicant arose from a very different statutory framework and it was wrong to rely on them.
(e) Poor professional performance, contained in the 2007 Act, is clearly intended to refer to conduct which does not amount to professional misconduct.
(f) If the applicant’s submission was correct, it would effectively mean that professional misconduct and poor professional performance were one and the

same thing[27] and/or that a single act could only ever be poor professional performance if it was "a very serious" failure by the practitioner to meet the standards of competence reasonably to be expected of medical practitioners practising medicine of the kind practised by the practitioner.

(g) The imposition of a minor sanction (adopted by the Medical Council) was entirely proportionate in the circumstances of the case and was not irrational or unsupported by evidence or by adequate reasons.[28]

(h) Finally, in relation to the complaint of want of fair procedures, it was urged on behalf of the respondents that nothing new had been added during the course of the hearing. The reference to systems failures simply provided the context in which the findings had been made. However, it could be conceded that the finding in relation to allegation number 8 was repetitious, but the subtending facts had led the FPC to make such a finding and it should not be quashed.

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[27] This proposition derives from the statement in *Calhaem* at para. 39 that a *"single instance of negligent treatment, unless very serious indeed, would be unlikely to constitute 'deficient professional performance'."*

[28] On the question of the obligation to give reasons for departing from the advice of legal assessors, see the decisions of Hardiman J at paras 52-55 and O'Donnell J at para 4. For previous cases on the duty of FTP Committees to give reasons, see *McManus v Medical Council* [2012] IEHC 350 and *Brennan v. An Bord Altranais* [2010] IEHC 193. It is arguable that the *Corbally* decision significantly qualifies the views expressed by Kearns P in *McManus* on the entitlement of the FTPC to depart from the views of the Legal Assessor. This contention appears to follow from the view of Hardiman J that where a FTPC proposes departing from the advice of a legal assessor, the Registrant should have an opportunity to make submissions on that proposal:

> 54. …A subordinate theme in *McManus* was that the legal assessor had strongly…advised the Fitness to Practise Committee that there was no case against the doctor. This advice had been ignored. The High Court did not ground its eventual resolution of the case in favour of a doctor on this ground because it said that the legal assessor's advice was not about law but about the facts of the case, which was wholly within the scope of the Fitness to Practise Committee. This is a thin line: the question of whether the evidence establishes a *prima facie* case is often a mixed question of fact and law.
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> 55. In the present case, however, there was no statement by the Fitness to Practise Committee of "clear and cogent reasons" for departing from the advice of the assessor, which related to matters of law. Accordingly, the representatives of Professor Corbally never had an opportunity to comment on the basis on which the Committee were actually going to approach the question of whether poor professional performance had been made out. It appears to me that, if this ground stood alone, it might be sufficient to quash the decision.

D. Issues for Determination on Appeal to the Supreme Court

20. Hardiman J identified[29] that – on appeal – the essential issues put forward for determination, by each side, could be summarised as follows:

> The Medical Council, indeed, isolated the "central issue for determination in this appeal" as:
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> > "The extent to which once-off errors… can be the subject of a finding of "poor professional performance" within the meaning of the Medical Practitioners Act, 2007".[30]
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> The material quoted immediately above is taken from the Medical Council's written submissions. Having heard the argument on both sides, I think that a corresponding brief statement of the case for Professor Corbally might be expressed as follows:
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> > "The extent to which a once-off error in a handwritten description of a proposed surgical procedure, which was not 'serious' in its nature or effect, which misled no-one and which had no consequences, can be the subject of a finding of 'poor professional performance' within the meaning of the Medical Practitioners Act, 2007."

E. Decisions on the Central Issues

21. In the High Court, the "central and critical questions" were identified to be twofold:

a) What constitutes PPP within the meaning of the Act, and

b) Can a single error constitute PPP? And, if so, what sort of single error.

22. There were other elements to the decision,[31] but for present purposes it is proposed to examine the decision under these two principal themes (while accepting that there must necessarily be some overlap). In the Supreme Court, the leading judgment was

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[29] At para 11

[30] The Medical Council also conceded in the course of argument that if it were necessary, in order to establish "poor professional performance", to prove behaviour on behalf of a doctor which "**seriously** fell short of the standard expected", the Medical Council could not meet this test in the present case. But it denied that the legislation requires any threshold of "seriousness" to be met.

[31] See, for example, that part of the decision of Hardiman which considers the entitlement of the Fitness to Practise Committee to depart from the advice of the Legal Assessor: paras 52-55. See also fn 28 above.

that of Hardiman J (with whom Dunne J and Denham CJ concurred). McKechnie and O'Donnell JJ also concurred, but wrote separate judgments.

What constitutes PPP?

23. It is simpler to start with what does *not* constitute PPP. What is clear from all of the judgments is that the Court was careful to set its face against the idea that non-serious or – *a fortiori* – trivial behaviour falling short of the ideal should not be subject to sanction, unless that were the clear statutory intention. Hardiman J:[32]

> …I would not lightly conclude, in the absence of express language, that the legislature had in fact decided to differentiate sharply between the respective systems of medical regulation [in the UK and Ireland]. The immediate relevance of this discussion is that there is no doubt, on the English authorities, that a threshold of seriousness is attached to "deficient professional performance", in that jurisdiction. In light of this, and of the case law, both Irish and English which is discussed in the immediately following Section of this judgment, *I consider that if it were the wish of the Oireachtas to legislate so as to render sanctionable, either as professional misconduct or as poor professional performance, non-serious failings by a medical practitioner, it would be necessary to use explicit language to bring this about*. [Emphasis added]

24. Similar sentiments were expressed by McKechnie J:[33]

> To agree with the submission of the Medical Council would mean that any lapse or mishap, no matter how trivial, minimal, devoid of effect or consequence, or truly *de minimis* in every respect, would be capable of constituting poor professional performance. If this should be the result of the amendment in 2007, the same resulted in the creation of a harsh or even ruthless regime, making the practice of medicine over one's career almost hazardous to the point of virtual folly: it would indeed be few who could navigate that journey without having to berth at some point at the port of the F.P.C. I cannot believe that such was intended nor do I accept that such would be in the public interest: such would not reflect an appropriate balance between practice and protection. Therefore I would refuse to adopt such an interpretation of the term, unless coerced into so doing.

[32] At para 19
[33] At para 95 of his judgment

25. The Court was, furthermore, satisfied that – in the case of Professional Misconduct – that there was no doubt but that a requirement of seriousness applied.

The relevance of English law?

26. An important part of the case concerned the degree to which it was appropriate to draw an analogy between the statutory scheme in place in England (and the case law amplifying that scheme) and the intention of the legislature in creating PPP in Ireland. The English scheme provides for "deficient professional performance"[34] and in the case of *R. (Calhaem) v. The General Medical Council*,[35] the English High was required to consider the question of whether an isolated failure on the part of a consultant anaesthetist was capable of being considered "deficient" professional performance.

27. **(**Before considering *Calhaem*, it is sensible to observe – as the Supreme Court did – that the range of sanctions in play in *Calhaem* was very different to the range in play in the *Corbally* case. O'Donnell J noted that the parallels drawn with UK case law should be somewhat carefully applied (he spoke in the context of reaching the conclusion that there should be a requirement that any isolated error be "very serious").

> While I agree that the analysis in *R. (Calhaem) v. The General Medical Council* …, is helpful, it must be applied with some caution. In particular, while it may have been permissible in that case to seek to read back from the sanctions capable of being imposed… it is important to bear in mind, that s.35D of the Medical Act of 1983 which was in issue in that case, **only permitted striking out, suspension for up to 12 months, or the making of a registration conditional on compliance with requirements specified by the UK Fitness to Practise Panel.**" [Emphasis added]

28. On the other hand, it may be observed that while there may be a wider range of sanctions in play under the Irish statutory arrangement, the Irish statute nonetheless *includes* the possibility of sanctions that affect registration (erasure, suspension, the attachment of conditions), even if it is not *limited* to such sanctions**).**

29. In *Calhaem* Jackson J. reviewed the authorities comprehensively and – at para 39 - derived five principles applicable to considerations of deficient/poor professional performance.

[34] Medical Act 1983 (as amended) s. 35(c)(2)
[35] [2007] EWHC 2606 (Admin)

"From this review of the authorities, I derive five principles which are relevant to the present case:

1) Mere negligence does not constitute 'misconduct' within the meaning of s.35C(2)(a) of the Medical Act 1983. Nevertheless, and depending on the circumstances, negligent acts or omissions which are particularly serious may amount to 'misconduct'.
2) A single negligent act or omission is less likely to cross the threshold of misconduct than multiple acts or omissions. Nevertheless, and depending on the circumstances, a single negligent act or omission, if particularly grave, could be characterised as 'misconduct'.
3) 'Deficient profession performance' within the meaning of s.35C(2)(b) is conceptually separate both from negligence and from misconduct. It connotes a standard of professional performance which is unacceptably low and which (save in exceptional circumstances) has been **demonstrated by reference to a fair sample of the doctor's work**.
4) **A single instance of negligent treatment, unless very serious indeed, would be unlikely to constitute 'deficient professional performance'**.
5) It is neither necessary nor appropriate to extend the interpretation of 'deficient professional performance' in order to encompass matters which constitute 'misconduct'."

30. Hardiman J focussed – in particular – on principles 4 and 5, but appeared to indicate a wider acceptance of the five principles laid down in Calhaem:

> I…have derived assistance from the learned and persuasive judgment of Jackson J., *not least* as to the circumstances in which, alone, a "once-off" error can constitute poor (or deficient) professional performance. [Emphasis added]

31. From this adoption of *Calhaem*, assuming that it was the intention of the Court to adopt the entirety of the *dictum* of Jackson J, it seems clear that there are two lenses through which PPP can be examined:

a. On the basis that a one-off error has occurred which is below the standard of skill and knowledge to be expected (setting aside for the moment the question of seriousness of the error, to which we return below – see para 45*ff*) is capable of amounting to PPP

b. On the basis that a "fair sample" of the registrant's work demonstrates a low standard of performance capable of being considered PPP. However, see the views expressed by McKechnie J: para 36*ff*.

Criticism of relying on the UK Approach

32. Note that both O'Donnell J and McKechnie J were hesitant about importing from *Calhaem* the approach to be applied in Irish law. O'Donnell J stated:

> While I agree that the analysis in *R. (Calhaem) v. The General Medical Council* [2007] EWHC 2606, is helpful, it must be applied with some caution.

33. McKechnie J was even more hesitant (albeit that his reservations seem directed at whether the reference to a "fair sample of work", however qualified - discussed below at para 36*ff* - should be adopted):

> I am deeply suspicious of referring to the situation in England in the sense of adopting it as the correct basis or appropriate source for determining whether the meaning of "poor professional performance", in s. 2 of the 2007 Act, can only be ascertained by reference to a fair assessment of the practitioners overall work, even if some exception is carved out of such requirement.

Single errors

34. It ultimately appears that there was consensus in both High Court[36] and Supreme Court and between the members of the Supreme Court that the concept of PPP could encompass poor professional performance embodied in a single incident. We consider below the question of whether there is a threshold that must be met in order for that single error – which may be PPP in principle – to amount to PPP in practice.

35. Underpinning the concern of the Court in relation to single error PPP were the consequence for the doctor concerned. As O'Donnell J noted his concern about non-serious matters advancing to inquiry

[36] The President expressly stated:

> Though I am not conflating the concept of poor professional performance with a negligent act or omission, it seems to me that "poor professional performance" **does encompass an isolated** (though very serious) **error**, whether it be in treatment or as in this case, in the taking of notes which may form part of the documentation to be considered by the surgical team.

… given the fact that these hearings are conducted in public, and findings are made public, that even the lowest sanction of admonishment can have devastating consequences for the career and livelihood of the individual concerned.

Fair Sample of Work

36. In the High Court, the President considered a submission on the part of Professor Corbally to the effect that the overall emphasis of professional performance was longitudinal assessment of the registrant's capacities over time:

> The Medical Council has itself developed rules for the assessment of a medical practitioner's knowledge and skill by means of an assessment process introduced by Medical Council – Rules for the Maintenance of Professional Competence (No. 2) S.I. No. 741 of 2011. That assessment process involves an extensive review of the practitioner's performance as an ongoing state of affairs.
>
> Such a duty is expressly imposed on the first named respondent under Part 11 of the Act of 2007 (Maintenance of Professional Competence) where s. 91 (1) provides:-
>
> > "It shall be the duty of the Council to satisfy itself as to the ongoing maintenance of the professional competence of registered medical practitioners."
>
> Subsection (7) of s. 91 then provides:-
>
> > *"Where, arising from the performance of its duty under subs. (1), the Council considers that a medical practitioner registered in the Specialist Division or the Trainee Specialist Division as being given every reasonable opportunity by the Council to improve the practitioner's professional performance but if his professional competence is found by the Council to continue to be below the standards of competence that can reasonably be expected for continued registration in the Specialist Division, or the Trainee Specialist Division, as the case may be, then the Council may make a complaint."*
>
> Thus the provisions of the Act and the rules made by the Medical Council in January, 2011 focus in particular on the "maintenance of professional competence".

It is thus contended on behalf of the applicant that the supposed lapse or failure in any given case must not simply focus on a single lapse but rather must give rise to a question over the competence of the practitioner.

37. The President also cited *Calhaem* (see below), and:

(a) Accepted that "deficient professional performance" was to be construed as meaning the same as poor professional performance, and

(b) Without disapproving the dictum of Jackson J to the effect that:

> *'Deficient professional performance' … is conceptually separate both from negligence and from misconduct. It connotes a standard of professional performance which is unacceptably low and which (save in exceptional circumstances) has been demonstrated by reference to a fair sample of the doctor's work.*

38. Similarly, the Supreme Court decision of Hardiman J appears to have the guidance provided by *Calhaem*, with a permissible inference that "fair sample of work" forms part of the landscape of PPP.

39. The main dissent on the question of the assessment of a fair sample of work could lead – assuming that overall the standard of work was found to be deficient - to a finding of PPP came from McKechnie J, who was firstly critical of the suggestion that the requirement for a particular form of the "fair sample" approach could be derived from the obligation of the Medical Council to maintain competence on an ongoing basis (as cited by the President):[37]

> Accordingly, I do not believe that it is appropriate to draw upon the provisions of Part 11 of the 2007 Act as a sustainable basis for suggesting that, save in exceptional circumstances or where an isolated complaint is a grave one, a fair sample assessment of work or practice is a preliminary requirement to the making of a complaint against a practitioner. I do not believe that such a deduction is appropriate from the relevant provisions outlined or that it is otherwise required for the operation of the disciplinary process. In fact, on the contrary, it would seriously jeopardise the mandatory obligation on the Medical Council to protect the public from sub-standard competence or the performance thereof by those subject to its remit.

[37] *Per* McKechnie J at para 61.

There is a further reason for this view which is this: some of the other statutory schemes where "poor professional performance" is included as a ground of complaint…do not have any provisions comparable to those in Part 11 of the 2007 Act. Accordingly, if the basis for interpreting the term, relied or relied heavily on the obligation to maintain competence, it might be suggested that within those statutory schemes the phrase might have a different meaning which surely is not the case…

40. McKechnie J goes on to set out reasons why the principles in *Calhaem* – with (it appears) a particular reference to the "fair sample of work" element – may not be safely transposed to Irish jurisprudence:

79. In considering whether all or some of the these principles are applicable in this jurisdiction it is essential to point out that the legislative regime in England is at least in some material respects significantly different from that as enacted by the 2007 Act. There are, of course, also similarities, but the differences cannot be discounted.

80. The following are the most material ones:

(a) As *Krippendorf* makes clear, the test of what constitutes "deficient professional performance" is "performance related", judged by reference to work or practice which the practitioner in question has already completed. It is not a test of competence. Whilst I accept that there is some co-relation between both and that a rigid definitive distinction may not be justified, nonetheless there is a definite and discernible difference between a performance and a competence test.

(b) The phrase "deficient professional performance" has not been statutorily defined in England, whereas the corresponding phrase has been in s. 2 of the 2007 Act. This means that the prominence which a booklet like that of the G.M.C. has in that jurisdiction would not, in respect of the Guidelines of the Medical Council, have the corresponding effect in this jurisdiction.

(c) It is not sufficient in that jurisdiction to simply establish that the practitioner has been guilty of misconduct or of deficient professional performance: unless it is shown that such impairs his fitness to practise, no sanction can be imposed. This additional requirement of the English test is not applicable in this jurisdiction. Therefore findings can be made under the 2007 Act even where the conduct complained of, does not reasonably call into question a doctor's resignation.

(d) The rules made to facilitate the operation of s. 35 of the 1983 Act (as substituted), are particularly detailed regarding evaluation. Lord Walker summarises these in *Sadler* (para. 4 – 11 inclusive). These include an initial screening, the carrying out of an assessment unless no further action is required: with such involving interviewing the complainant, witnesses, the practitioner and up to five persons nominated by him: on completion the report must offer a view as to whether the standard of the practitioner's performance has been seriously deficient and also whether such performance could be improved by remedial action. On its finalisation, several options are open including the immediate referral to the C.P.P. or the drawing up of a "Statement of Requirements", which if the practitioner agrees to and complies with, the matter may go no further. If he disagrees or if the requirements have not been satisfied, there are several other options available; whereas,

(e) The rules under the 2007 Act are not remotely as detailed.

81. It therefore appears to me that in setting out what is described as Principle No. 3, Jackson J. was in effect doing no more than essentially applying the statutory framework as it exists in that country as well as incorporating, what *Sadler*, by way of obiter, seems to have suggested in the context of a single or isolated act. In view of the 2007 Act and the regulations made thereunder, **I strongly doubt whether any reliance can be placed on Point No. 3, at least without it being more fully explained and properly contextualised.**

41. McKechnie J goes on to conclude in his "Summary of Main Findings" (at para 101):

8. A finding of poor professional performance does not depend on an assessment of a representative cross section of a practitioner's work, or as has been put, on the application of a "fair sample" test.

9. Such type of evaluation is appropriate for the purposes of the provisions of Part 11 of the 2007 Act: when invoked and where, despite opportunity having been given, the practitioner's standard of competence remains below the required level, the Medical Council can make a complaint: only at this point does the requirement of fair sample, intersect with, the disciplinary provisions.

10. Subject to such link however, this process is entirely separate and distinct from the making, investigation and adjudication of a complaint made under Parts 7 – 9 of the Act.

42. Accordingly, in the view of the only judge to have set out an express view on the matter, it may be that PPP cannot (absent a fuller explanation and more context) be construed as encompassing an approach that involves taking a fair sample of the registrant's work as being capable of amounting to PPP. Conversely, the majority judgment appears to have adopted the views of Jackson with no express reservations. In the circumstances of the Appeal, where the issue of "fair sample of work" does not appear to have seriously argued, it may be that the comments on "fair sample of work" may well be *obiter* and that the point remains to be decided.

43. It does seem unreasonable – on the face of it – that if a fair sample of a registrant's work were taken (whether by reason of the imposition of conditions or the furnishing of an undertaking in a previous inquiry or by reason of the implementation of professional competence provisions, where extant) and were founding significantly wanting, that it would not be open to the relevant body to make an allegation of poor professional performance because the registrant's want of competence had not led to an incident. Perhaps the judgment of McKechnie J is to be read as saying that a "fair sample" approach would not be impermissible (if properly carried out) as a basis for an allegation of PPP, but is not a necessary requirement for PPP to be alleged against a practitioner? If that is not so, it would appear that there is conflict on this point in the Supreme Court and a "fair sample of work" PPP case might be challenged in the future.

44. However, on the other hand, McKechnie does recognise that an allegation "involving more than one incident or activity" could be regarded as serious. One assumes, therefore, this opens the door to the individual (without the necessity for an assessment of a fair sample of his or her work) facing an allegation of PPP on the basis of an accumulation of aberrant behaviour.

What sort of single error is capable of amounting to PPP?

45. However, where problems arise seems to be in the interpretation of what sort of single error is capable of amounting to poor professional performance. In this aspect of the case, disagreement between the individual judgements may well create attention for the applicability of the test to single errors.

Serious or very *serious*

46. The view of the High Court was that, in order to be PPP, an isolated error must be "grave" or "very serious"

47. The overall tenor of the Supreme Court decision was to move towards the one-word denominator, "seriousness". But it is submitted that there is still some slight uncertainty about the type of mishap that must occur for PPP to apply to a single error.

48. While (as noted above) the judgment of Hardiman J adopted, or at any rate was guided by, the views of Jackson J to the effect that a single incident would need to be "very serious indeed", that was not the only case informing his decision. He also had regard to two, related, matters:

- First, the available sanctions for PPP and Professional Misconduct are the same and that – therefore – the two should be considered as equivalents, not on the basis that one (PPP) is the lesser wrong;

- Secondly, if that is so, then Keane J (as he was then) in *O Laoire* said:

> (5) Conduct which could not properly be characterised as infamous or disgraceful, and which does not involve any degree of moral turpitude, fraud or dishonesty, may still constitute 'professional misconduct' if it is conduct connected with his profession in which the medical practitioner concerned has **seriously** fallen short, by omission or commission, of the standards of conduct expected amongst medical practitioners.

49. Hardiman J, therefore, expresses a view that a single error event needs to reach a threshold of being serious before PPP can be contemplated, notwithstanding his reliance on *Calhaem*, which he adopts without qualifying Jackson J's reference to a single failing needing to be "very serious indeed". However, the overall tenor of Hardiman J's judgment and – in particular – the conclusion of his judgment is that, notwithstanding reliance on *Calhaem*, the intention is to put in place a threshold of seriousness:[38]

> 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 <u>serious</u> nature**. As I have said earlier in this judgment there may be myriad matters which are plainly not **<u>"serious"</u>** in the sense I have explained but which may legitimately aggrieve a patient or his or her relatives. But the statutory

[38] *Per* Hardiman J, at para 50.

authority for the governance of the Medical profession must be capable of saying to such a person that a complaint, perhaps legitimate in itself, will not proceed to the point of an inquiry before a Fitness to Practice Committee unless it is, in its nature, a **serious** act or omission. [Emphases added]

50. While there might be a slight doubt over the test that was being proposed by the majority judgement, it may be of significance that the two other concurring judgments seem to regard themselves as being in agreement with the majority judgment in proposing a "serious" – and not "very serious" – epithet to describe conduct capable of being PPP, *contra* the conclusion that had been reached in the High Court.

51. Thus, O'Donnell J stated:

> I do not however agree that serious should mean "very serious" or that it can be said that only conduct sufficiently serious to call in to question a doctor's registration which means subjecting a doctor to the ultimate professional sanction of being struck off, is sufficient to justify a complaint or finding of poor professional performance under the Medical Practitioners Act of 2007.[39]

52. The position adopted by McKechnie J is also supportive of "seriousness" albeit that - in formulation, at any rate – his approach is *slightly* different and possibly significantly so:

> 96. For the reasons above stated, it follows therefore in my view, that the definition of poor professional performance must be read as if qualified by the word "serious" in the same manner as the phrase "professional misconduct" is.
>
> 97. It is neither desirable nor necessary to try, by some other form of words or expression, to further elaborate on what the word "serious" means. It can however be said that not every error, lapse or mishap will qualify: conduct which can truly be described as trivial, minor or which can be classified as *de minimis* will fall outside its meaning…Tortious acts or contractual breaches may or may not meet the threshold, depending on context and circumstances…
> …
> 99. Having decided on this threshold, I can see no reason or benefit in using additional phrases such as "very serious" or "very grave" to describe what conduct might constitute poor professional performance…

[39] At para 2.

100. I am also of the view that for the purposes of s. 2 of the 2007 Act one does not have to wait, before moving, for "persistent or repeated" substandard events to have occurred: to have to, may lead patients to be unnecessarily compromised. However circumstances and context will be vital in order to assess whether particular conduct meets the threshold of poor professional performance, just as such matters are in order to see whether conduct amounts to professional misconduct. **Secondly, I see no justification within the definition, or necessity arising out of the public interest, to treat any differently, conduct, by act or omission, which has been committed only on a single occasion.** If the threshold for substandard competence or misconduct is met, it would be both illogical and anomalous to increase the threshold or elevate the test simply because such conduct had not taken place previously. Again, context and circumstance will be crucial. [Emphasis added]

53. This *appears* to set out a stall of equitable treatment for the conduct itself both single incident PPP and what one might call 'pattern of conduct' PPP, but it is noteworthy that, in his "Summary of Findings", McKechnie J goes on (at para 101) to observe that:

(3) There is no different and by implication a more serious test, for an isolated incident such as "very serious" or "grave" or words of similar description: such is not justified by the statute nor is it necessitated in the public interest: to require the same would simply add confusion.

(4) Evidently in the normal course of events, it will be more difficult to meet the test if there is but one incident alleged.

54. It seems arguable that one reading these paragraphs is that, in fact, according to para 101 there is a somewhat different test to be applied to any given conduct, depending on whether that conduct occurs in isolation or in the context of other concerning conduct, notwithstanding the opinion expressed in para. 100 to the effect that:

I see no justification within the definition, or necessity arising out of the public interest, to treat any differently, conduct, by act or omission, which has been committed only on a single occasion.

Accordingly, were an event to be complained to the Medical Council, only to not go to Inquiry on the ground that it were not serious, the same incident could, in principle, become serious in the context of another unrelated event.

55. The position as set out in the Summary of Main Findings seems to be the more pragmatic view (and to go close to an acceptance that an overview of practice – akin to, but not necessarily, a fair sample of work – may give rise to a finding of PPP, even though no individual episode of conduct is itself PPP): cumulative poor conduct falls to be considered differently, because it is to be considered on the basis of a twin calculation: the frequency of the aberrant conduct and the seriousness of each event. Either factor in the equation may lead to a conclusion that the cumulative aberrations are serious. This, too, seems to be the conclusion reached by O'Donnell J:[40]

> I also agree with both Mr Justice Hardiman and Mr Justice McKechnie that only a serious error **or a series of errors (which may therefore be serious)** can justify a finding of poor professional performance. [Emphasis added]

Relevance of outcome

56. Although the issue is not teased out fully, it appears that the outcome of the error has an effect on the quality of the error and, in particular, whether it might reach the threshold of seriousness. In his judgment, Hardiman J discussed at length the contention of the Medical Council that there was no need to there to have been an adverse outcome for an error to amount to PPP and juxtaposed that contention with the fact that, as part of its case against Professor Corbally, it had originally argued that there had been an adverse outcome. A the conclusion of the discussion (paras 42-27), the learned judge concludes:[41]

> Accordingly, this is a case where a very distinguished and professional surgeon erroneously described a proposed surgical procedure in his handwritten outpatient note. **It is quite clear on the evidence that neither the respondent, nor anyone else in the case was in any way confused or misled by this very simple error**…
>
> To say this is not to deny that the error made was unfortunate. In an ideal world no-one would make any errors, least of all a person with the responsibilities of Professor Corbally. But we do not live in an ideal world. Errors are made every

[40] At para 1 of his judgment
[41] At para 49

day. **Usually, as in this case, they have no consequence, or certainly no serious or lasting consequence**. It would be a very confrontational, legalistic, and defensive world indeed if a person in any occupation could be put on risk of his livelihood and his irreproachable reputation because it could be proved he had made some error even (if the Medical Council is correct), one which is not serious. Any work environment where that rule prevailed is one whose work would be done very slowly, indeed unnaturally so, and staffing levels would have to be correspondingly greater than at present.

57. McKechnie embraces a similar view when considering whether a matter should be considered as "serious":[42]

> Whilst outcome, adverse consequence or causative effect are not essential, where present, such will be **factors for consideration**.

58. It seems to follow from this that an error with no serious consequence will be harder to characterise as serious.[43]

E. Discussion

59. As things stand, the instructions to regulators who police PPP are clear:[44]

> …the statutory authority for the governance of the Medical profession must be capable of saying to [a person who makes a complaint] that a complaint, perhaps legitimate in itself, will not proceed to the point of an inquiry before a Fitness to Practice Committee **unless it is, in its nature, a serious act or omission**.
>
> There are, both in the 2007 Act, and elsewhere, various private non-accusatorial, non-adversarial strategies available to ensure high professional standards. This reflects the fact that not every shortcoming, and in particular not every "once-off" shortcoming must either be ignored entirely or, if noticed at all, be the subject of a full hearing before a Fitness to Practise Committee.

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[42] At para 97 of his judgment

[43] The President reached a similar conclusion in the High Court:

> It seems to me only sensible that a non-causative lapse must be seen as less serious in character than the one which causes damage, in much the same way as one distinguishes between the failure of a motorist to give an indication to turn which has no harmful consequence and one which leads directly to a massive pile up and loss of life.

[44] *per* Hardiman J at para 50.

60. An event – as noted by McKechnie and O'Donnell JJ – accumulated events, which may not be individually serious, must meet a threshold of seriousness (and undefined term) in order to be capable of being PPP.

Is the problem with the legislation and/or its interpretation?

61. It was certainly a theme of the Supreme Court judgments that the legislation is perhaps not drafted in a way that best aids the regulators in understand the approach to be taken. O'Donnell J observed:[45]

> "It does appear that the 2007 Act in this regard was not perhaps fully thought through, and neither entirely adopts the position in the UK (which might have many practical benefits given the professional exchange between the two jurisdictions) nor establishes a fully coherent and independent scheme of professional supervision and discipline."

62. On this analysis – and bearing in mind the discussion about the *purpose* of PPP (see para **7***ff* above) – it would seem necessary for the legislation to be redrafted to make clear that while Professional Misconduct may – on a particular set of facts – overlap on occasion with PPP, they are primarily to be regarded as different types of behaviour, with PPP being serious aberrant behaviour related to the exercise of one's professional skills, while Professional Misconduct is serious aberrant behaviour exemplifying other characteristics unrelated to the exercise of the skills associated with one's profession. Into the former camp would fall serious misdiagnoses, errors during procedures, poor note-keeping, for example. Into the latter camp would fall theft, fraud and sexual misconduct, for example. Situations where both might be engaged could be situations where there was an element of dangerous recklessness to behaviour, such as practising medicine while under the influence of drugs or alcohol; another example might relate to notes that were both defective *and* tampered with.

Is PPP a lesser form of aberrant behaviour than Professional Misconduct?

63. On another analysis, PPP is – in fact – less serious than Professional Misconduct and that would accord with the approach previously taken by the regulator: the operative test is the degree of seriousness of the conduct.

64. As things stand (and as noted above) the Courts have, at a time when they did not have the alternative – if it is an alternative – of PPP, held that lack of competence

[45] At para 3 of his judgment.

can ground a finding of Professional Misconduct where the lack of competence is especially egregious, in *Brennan*, Dunne J observed that

> 'it is [now] accepted that professional misconduct may include issues as to professional competence.'[46]

65. Any attempt to create a hierarchy of wrongs – with PPP below Professional Misconduct – may not be capable of surviving the now-imposed requirement for "seriousness" in allegation of both PPP and Professional Misconduct, unless, for example:

a. The question becomes one of *how* serious the conduct in question is. Accepting that a minimum threshold of seriousness must be met, then some conduct is sufficiently serious to be PPP, but not misconduct, while other conduct will go beyond the pale from PPP to Misconduct. The distinction or discriminating factor, then would be in the finding of Misconduct. In other words, there would be a *particularly opprobrious connotation to being found guilty of misconduct as opposed to PPP*, notwithstanding that the potential sanctions for both are the same. This does not seem a particularly satisfactory way to approach things, precisely because of the notional risk of being subject to identical sanctions for two wrongs expressly acknowledged to differ in their gravity.

b. The alternative approach to treating PPP and Misconduct and wrongs of different egregiousness would – again – seem to be a requirement for Statutory reform setting out that PPP is a lesser finding than Professional Misconduct. Such reform would seem to necessitate, for example, taking the more serious registration-affecting sanctions (namely erasure and suspension) out of play for a finding of PPP. Of course, if this is done, then perhaps the requirement for seriousness before an allegation can be made would need to be revisited (unless dealt with in legislation)

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[46] *Brennan v An Bord Altranais* [2010] IEHC 193, *per* Dunne J at 18. See also *Kudelska v An Bord Altranais* [2009] IEHC 68, *per* Hedigan J at para 23:

> 'It is clear as a matter of law that gross incompetence or negligence may amount to professional misconduct in certain circumstances. In *McCandless v General Medical Council* [1996] 1 WLR 167, the Privy Council held that serious professional misconduct was not restricted to conduct which was morally blameworthy but could include seriously negligent treatment measured by objective professional standards. This conclusion was approved of by this Court, in the specific context of s. 39 of the [Nurses Act 1985], in *Perez v An Bord Altranais* [2005] 4 IR 298.

How to deal with non-serious – but potentially significant – deficits in knowledge or skill

66. If it is the situation that a case comes before the FTPC (or equivalent of a regulatory body) and is found, after a hearing not to be "serious" such that an adverse finding cannot be made and a sanction cannot be imposed, but where nonetheless concerns have emerged about the competence of a registrant, what it to be done? Where Professional Competence Provisions exist (such as Part 11 of the Medical Practitioners Act 2007), then they can be activated, but even where they exist, they are time-consuming processes. If a Regulatory Body is to operate in the public interest, then consideration might be given to restoring a power that still vests in the Dental Council, 1985, namely the power to impose conditions (subject to ratification by the High Court), even where no finding of PPP or Professional Misconduct is made, so long as the conditions fulfil three criteria:

- They arise from matters that were proven to the satisfaction of the Committee[47]
- They are proportionate[48] or not unnecessarily restrictive[49]
- They do not have the unintended consequence of impairing the registrant's ability to practice.[50]

67. The Dentists Act 1985 provides that conditions may be attached to a dentist's registration (in deed under the Dentists Act, the Council may advise, admonish or censure a dentist even where there has been no finding of misconduct, which seems less defensible).[51].

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[47] *Millett-Johnson v The Medical Council*, unreported, High Court, Morris J, 12 January 2001, at p 6-7. See also *O'Connor v Medical Council* [2007] IEHC 304.
[48] *Hermann v Medical Council* [2010] IEHC 414
[49] *Cahill v Dental Council*, unreported, McCracken J, High Court, 15 June 2001.
[50] See the English case of *Holton v General Medical Council* [2006] EWHC 2960 (Admin). In *Holton*, among the conditions imposed was one limiting the geographical area in which the doctor could work. The net effect of the condition was that, because there were only a limited number of jobs in the specialty in which the doctor had elected to work, he would effectively be precluded from working at all unless he were able to apply for jobs in a wider area that that permitted by the imposed condition. The condition was therefore varied to allow him to work anywhere in England.
[51] Dentists Act 1985, ss. 40-41. Note, of course, that this legislation only provides for findings of professional misconduct or unfitness to practise (for reasons of disability or impairment), so that there might be evidence of what would now be termed poor professional performance evident from a report that did not reach the threshold of misconduct but which nonetheless mandates normative intervention from the Council. Similarly, the Veterinary Council may, on receipt of a

68. The question of the lawfulness of a power to take steps against a registrant where an inquiry committee has not found the case against the registrant proven was discussed in the case of *Casey*.[52] In that case,[53] the FTPC of the Medical Council concluded that there was insufficient evidence to find the registrant guilty of professional misconduct, but the FTPC advised that the applicant should avail of continuing medical education and continuing professional development courses in general practice and in its areas of specific interest: that he should keep more comprehensive clinical notes; attend a course in communications; and consider using a chaperone when dealing with certain patients.

69. Following submissions from the registrant, the Medical Council invoked powers under the 1978 Act[54] to attach conditions to the retention of the registrant's name on the register and to offer him advice regarding his practice. The registrant sought a judicial review of the Medical Council's decision, arguing predominantly that the imposition of conditions on his registration was tantamount to a reversal of the finding of the FTPC that there was no evidence of professional misconduct. In rejecting this application, Kelly J made clear that the statute was constructed in such a way as to permit the imposition of conditions and/or the giving of advice even where no finding of misconduct had been reached:[55]

> 'All that is required in order to trigger the entitlement of the Council to utilise [the relevant provisions] is that there should have been an enquiry held and the report made by the committee pursuant to s. 45 of the [1978] Act. Once that is done then, under the express terms of s. 47 [of the 1978 Act] the Council is entitled to attach conditions to the retention of the person on the register and under the express terms of s. 48 [of the 1978 Act] to advise, admonish or censure such person…The argument put forward by [the applicant] would require me to read into both sections words which the legislature has not seen fit to interpose and where…there would be neither a necessity nor entitlement so to do'

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report from an inquiry committee and whether or not that report includes a finding of fitness to practise, decide to advise, warn or censure the registrant or to direct the registrant to make certain financial contributions. Veterinary Practitioners Act 2005, ss. 81-82

[52] *Casey v Medical Council* [1999] 2 IR 534

[53] *Casey* took place in the context of the Medical Practitioners Act 1978, which contained provisions essentially identical to the ss. 40-1 of the Dentists Act 1985 and similar in effect to ss. 81-2 of the Veterinary Practitioners Act 2005.

[54] Medical Practitioners Act 1978, ss. 47 & 48.

[55] *Casey v Medical Council* [1999] 2 IR 534, at 547-8, *per* Kelly J

70. While it is not proposed that revisiting the legislation would introduce a power to impose sanctions of advice or admonishment without an adverse finding, there may be, on the grounds that prompt, proportionate, responsive and normative control of poor – but not seriously poor – behaviour on the part of registrants would be in the public interest.