

Section 40B Case Meeting

15 March 2021

157-197 Buckingham Palace Road, London SW1W 9SP



Members present

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority
Mark Stobbs, Director of Scrutiny and Quality, Professional Standards Authority
Graham Mockler, Assistant director of Scrutiny and Quality (performance),
Professional Standards Authority

In attendance

Fenella Morris QC of counsel 39 Essex Chamber

Observers

Remi Gberbo, Lawyer, Professional Standards Authority
Rebecca Senior, Lawyer, Professional Standards Authority
Dinah Godfrey, Policy Manager, Professional Standards Authority
Daisy Blench, Policy Manager, Professional Standards Authority
Rebecca Moore, Scrutiny Officer, Professional Standards Authority
Esther Akinfenwa, Scrutiny Officer, Professional Standards Authority
Peris Dean, EA to the Chief Executive, Chair and the Board, Professional Standards
Authority
Seun Fagbohun, Data Administrator, Professional Standards Authority
Georgina Devoy, Senior Scrutiny Officer, Professional Standards Authority.

1. Definitions

- 1.1 In this meeting note, standard abbreviations have been used. Definitions of the standard abbreviations used by the Authority, together with any abbreviations used specifically for this case are set out in the table at Annex A.

2. Purpose of this note

- 2.1 This meeting note records a summary of the Members' consideration of the relevant decision about the Registrant made by the regulator's panel, and the Authority's decision whether or not to become a party to the GMC's appeal under Section 40B(2) of the Medical Act.

3. The Authority's power to become a party to the GMC's appeal under Section 40B(2) of the Medical Act

- 3.1 Section 40A of the Medical Act provides the GMC with the power to appeal against a decision of a Medical Practitioners Tribunal of the MPTS. Section 40B of the Medical Act provides the Authority with the power to become a party to such an appeal by the GMC.
- 3.2 The GMC may appeal against a decision of a Medical Practitioners Tribunal of the MPTS if it considers that the relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.
- 3.3 Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:
- to protect the health, safety and well-being of the public
 - to maintain public confidence in the profession concerned, and
 - to maintain proper professional standards and conduct for members of that profession.
- 3.4 This will also involve consideration of whether the Panel's decision was one that a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could not reasonably have reached; or was otherwise manifestly inappropriate having regard to the safety of the public and the reputation of the profession (applying *Ruscillo*¹).

4. Conflicts of interest

- 4.1 The Members did not have any conflicts of interest.

5. Jurisdiction

- 5.1 The Legal Advisor confirmed that the GMC had appealed against the decision by a Medical Practitioners Tribunal of the MPTS concerning the Registrant on 18 January 2021 and therefore the Authority could not refer the case under section 29 of the Act. The Legal Advisor further confirmed that the Authority may become a party to the GMC's appeal by giving notice under section 40B(2) of the Medical Act.

6. The relevant decision

- 6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on [REDACTED].
- 6.2 The Panel's Determination which includes the charges and findings is set out at Annex B.

¹ CRHP v Ruscillo [2004] EWCA Civ 1356

7. Documents before the meeting

7.1 The following documents were available to the Members:

- Determination of the Panel dated [REDACTED]
- Transcripts of the hearing
- The evidence bundles before (a) the panel and (b) the case examiners when they made their two decisions
- Counsel's Note dated 15 March 2021
- The Authority's Detailed Case Review
- The Authority's Case Meeting Manual

7.2 The Authority and the Legal Advisor were provided with a copy of the GMC's Application Notice and Grounds of Appeal.

8. Background

8.1 In [REDACTED] the Registrant was employed by [REDACTED] [REDACTED] ('the Trust') as a [REDACTED] within the [REDACTED] at the [REDACTED]. He also held a position as a [REDACTED] at [REDACTED] and at the time of the events was a [REDACTED] having been appointed in [REDACTED].

8.2 Towards the end of that year it came to light that the Registrant had, on at least two occasions that year used an argon beam coagulator ('ABC') to place his initials '■' on the newly transplanted livers of two patients. The ABC works by directing an electronically charged beam of argon gas onto an organ which burns the surface cells and seals a bleeding area. Medical evidence before the Crown Court indicated that the damage caused by the ABC was superficial and would have resolved without a permanent mark within six to eight weeks and would not have caused any pain or discomfort.

8.3 The first incident which came to light took place on [REDACTED] when the Registrant performed an emergency liver transplant on Patient A. The procedure involved the repeated anastomosis (joining together) of the new donor liver to Patient A's main artery which took three attempts to complete. It is after this part of the procedure that the Registrant used the ABC to inscribe his initials on the surface of the organ, an action he would later claim was done to relieve tension following the difficult operation on which the patient's life depended.

8.4 The transplant proved unsuccessful due to an unrelated cause. A second transplant took place on [REDACTED] by another surgeon at which point the initials were discovered, appearing larger than they may have ordinarily done (4cm long) as the organ was inflamed. A photograph was taken by the surgeon, who did not inform anyone as he believed it to be an isolated incident. He

- reported this subsequently when he heard others suggest that the registrant did this frequently.
- 8.5 The Registrant was interviewed by the Trust and admitted to marking the organ yet denied that he had done so in other cases. He later went on to accept at the Trust disciplinary hearing in [REDACTED] that there had been other occasions, yet he could not recollect the details. This is a position he maintained until [REDACTED] [REDACTED] when he provided a detailed account of the second incident in a letter to the sentencing judge, which he had previously maintained he could not remember.
 - 8.6 Patient A (who happened to be a nurse) learnt of the concerns from this media coverage and was informed by the Trust that she was the patient concerned in [REDACTED]. Patient A was extremely affected by the incident and it would later be accepted by the sentencing judge in the criminal case that the emotional impact on her had been extreme.
 - 8.7 In [REDACTED] a finding of gross misconduct was made by the Trust and the disciplinary panel found that the Registrant had not been completely honest with the investigation team and had been untruthful at times. The hearing noted that the Registrant accepted that the behaviour had occurred on other occasions, something he initially denied.
 - 8.8 The Registrant subsequently resigned. A police investigation followed which took some time to be completed.
 - 8.9 In [REDACTED] put a misconduct allegation before the Case Examiners on [REDACTED]. The allegation centred on the two incidents before this panel. No charges were brought with respect to any allegations of dishonesty or lack of candour. The Case Examiners did not find a realistic prospect of impairment being found by the panel and issued a warning for 5 years.
 - 8.10 In [REDACTED] the Registrant was charged with two counts of ABH. Shortly before the trial in [REDACTED] two alternative counts of assault by beating (battery) were added to the indictment. The Registrant pleaded guilty to both counts of and no evidence was offered on the ABH charges.
 - 8.11 On [REDACTED] the Registrant was sentenced in the Crown Court and the GMC opened a new investigation with regards to the conviction.
 - 8.12 In [REDACTED], the Assistant Registrar referred the conviction allegation directly to the MPT in the interests of fairness to reduce further delay.
 - 8.13 The Registrant sought to set aside the decisions taken by the GMC by way of judicial review in [REDACTED]. The case was heard by the Divisional Court and the challenge was unsuccessful.
 - 8.14 The panel found the Registrant to have seriously breached Good Medical Practice ('GMP') and key tenets of the medical profession yet reasoned that it was unlikely that he would repeat his actions in the future. The panel were satisfied with his level of insight and remorse and found impairment on public interest grounds only.
 - 8.15 The GMC made a sanction bid for erasure. The panel reasoned that the convictions were not fundamentally incompatible with continued registration and imposed a 5-month suspension with review.

9. Consideration of sufficiency

9.1 The Members considered all the documents before them and received legal advice.

9.2 The Members discussed the following concerns about the decision:

Was the sanction imposed by the Panel in [REDACTED] sufficient and was the material not put before the Panel relevant to impairment and sanction.

9.3 The Members agreed that before considering whether or not to join as in interested party in this appeal, to consider whether or not they felt the sanction of a 5-month suspension order, was sufficient.

9.4 The Members noted that the Registrant's actions were a serious breach of trust, power and position and that his actions could strongly undermine public confidence in the profession.

9.5 The Members also noted that, in their opinion, the Registrant's reflective statements suggested a continuing lack of insight.

9.6 The Members were particularly concerned, however, that the material gathered as part of the Trust investigation in [REDACTED] was not before the panel. The Members agreed that it ought to have been as part of the context of the offending.

9.7 The Members noted that if the MPT had considered such material then it might not have proceeded upon the basis that [REDACTED] conduct had only been inappropriate on two occasions, that he had been open and made admissions from the beginning of investigations, that it was understandable that his recollection was limited and that his conduct arose from specific stressors and did not reveal a deeper personality problem. These issues, had the MPT considered them, could well have influenced the Panel's conclusions as to sanction.

9.8 If the MPT had considered such material, then it might have been less confident in its reliance upon the Registrant's letter to the judge and his reflective statement without having had the opportunity of testing them by hearing oral evidence and questioning. This could have had significant consequences for the MPT's conclusions as to remorse, insight and attitude, and the seriousness of the wrongdoing.


9.9 The Members agreed that without having the Trust investigation documentation before the Panel, that they were unable to conclude whether the sanction imposed was sufficient, as they considered this material could have been important contextually and could have had an impact on the final sanction imposed.

Conclusion on sufficiency

9.10 In light of their concerns, the Members concluded that the GMC's failure to provide the Panel with the Trust investigation from [REDACTED], meant they were unable to determine whether the outcome of the case was insufficient.²

10. Becoming a party to the GMC appeal under section 40B of the Medical Act

- 10.1 Having concluded that the Panel's Determination was insufficient for public protection, the Members considered whether they should exercise the Authority's power under section 40B of the Medical Act and become a party to the GMC's appeal.
- 10.2 The Members considered the GMC's Grounds of Appeal at this point and received advice from Counsel. The Members noted that the Grounds of Appeal they had received included six points that appeared to capture most of their concerns, but noted that these were in a draft form and they were not aware of how the GMC would present the appeal.
- 10.3 The Members noted that the GMC's conduct might be open to criticism in that particular matters might not have been properly put before the panel. This might diminish the chances of its success or might mean that certain aspects might not be properly presented to the court. The Members also considered that the GMC's arguments did not adequately stress the damage to patients and the impact on the public interest of what appeared to be an arrogant abuse of the power. The Members considered that the Authority's perspective might be important here.
- 10.4 The Members considered therefore that it was not clear whether the GMC's Grounds of Appeal raised all of the concerns identified by the Members, and that the Authority might be in a better position to raise some matters before the court. They considered alternative approaches and noted that costs would not be recovered, together with advice on prospects of success.
- 10.5 Given their concerns as noted above, the Members agreed that the Authority would join the GMC's appeal as a party.



Alan Clamp (Chair)

26/03/21

Dated

² *Ruscillo* at [72]

11. Annex A – Definitions

11.1 In this note the following definitions and abbreviations will apply:

The Authority	The Professional Standards Authority for Health and Social Care
The Panel	A Medical Practitioners Tribunal of the MPTS
The Registrant	██████████
The GMC	The General Medical Council
The MPTS	The Medical Practitioners Tribunal Service
The Act	The National Health Service Reform and Health Care Professions Act 2002 as amended
The Medical Act	The Medical Act 1983 as amended
The Members	The Authority as constituted for this Section 40B case meeting
The Determination	The Determination of the Panel sitting on ██████████ ██████
The Court	The High Court of Justice of England and Wales
The SG	Regulator’s Sanctions Guidance in force at sanction stage