

# Remediation and its Relevance to Impairment of Fitness to Practise

## Consideration of...

- The background to the introduction of the impairment regime
- A warning from the past (Dame Janet Smith)
- The problems in practice
- What happened after *Cohen*
- Caselaw following *Cohen*
- The decision in *Grant*
- The effects of the emerging caselaw on decisions to refer and the drafting of allegations of impairment

## Background to the impairment regime

- Extracts from Dame Janet Smith's 5<sup>th</sup> Report of the Shipman Inquiry: "*Safeguarding Patients: Lessons from the Past – Proposals for the Future*"
- Moving away from the "compartmentalised approach"
- "*The advantage of the concept of impairment of fitness to practise is that it is capable of embracing any or all of the types of problem that the GMC habitually encounters...*"
- Impairment to be judged at the date of the hearing (but can look back...)
- What evidence may be considered at the impairment stage (Campbell)
- Judgment not proof

## A Warning from the Past

- *“The disadvantage of the concept (of fitness to practise) is that it is not at all clear what it means... I have said elsewhere in this Report that the expressions “SPM” and “SDP” were difficult to define or even to recognise. I believe that even greater difficulty will be encountered with impairment of fitness to practise unless it is clearly defined”*
- *“It is not easy to define; it means different things in different circumstances and, in some circumstances, it is almost without meaning...”*
- *“I fear that impairment of fitness to practise will be not only difficult to define but also not easy to recognise because... recognising impaired fitness to practise involves making a valued judgement...” [per Dame Janet Smith]*

## Some Guidance offered by Dame Janet Smith

- Impairment may be established for the following reasons.
  - The practitioner presents a risk to patients
  - The practitioner has brought the profession into disrepute
  - The practitioner has breached one of the fundamental tenets of the profession
  - The practitioner's integrity cannot not be relied upon

# The Proposed Adjudication Stage Test

- Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination, show that his or her fitness to practise is impaired in the sense that he:
  - (a) has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm and/or
  - (b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute and/or
  - (c) has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession and/or
  - (d) has in the past acted dishonestly and/or is liable to act dishonestly in the future

## Differentiation between Regulators

- Not all healthcare/medical regulators have a “fitness to practise” test (eg, GOsC)
- Not all regulators have the power to warn in the event that, eg, misconduct is found but not impairment
- Different approaches as to what evidence goes in at what stage
- CHRE harmonisation

## The Problem in Practice

- The time between the acts/omissions complained of and the hearing may be a very long one
- The test for impairment is a current one
- What weight, if any, should Committees give to remediation steps taken by the practitioner
- Was the above relevant to impairment or sanction only?
- Problems for those deciding if to refer (“the reasonable prospect test”)
- Drafting allegations

## ***Cohen v General Medical Council (2008) EWHC 581(Admin)***

***19 March 2008, Silber J***

- A summary of the facts
- The issues
- A finding of misconduct, etc, should not necessarily result in a finding of impairment
- An incorrect approach: “*The Panel concluded that your actions and failings... were inappropriate, unprofessional and of a standard below that expected of a registered medical practitioner. Accordingly, the Panel found that your fitness to practise is impaired*”
- Remediation should be considered at the impairment stage and not just at sanction (paragraph 65)

***Cohen v General Medical Council (2008) EWHC  
581(Admin)***

***19 March 2008, Silber J***

- Silber J's three questions at the impairment stage:

*“It must be highly relevant in determining if a doctor’s fitness to practise is impaired that:*

*First, his or her conduct which led to the charge is easily remediable*

*Second, that it has been remedied and*

*Third, that it is highly unlikely to be repeated.*

*These are matters which the Panel should have considered... but it apparently did not do so.”*

## ***Cohen v General Medical Council (2008) EWHC***

***581(Admin)***

***19 March 2008, Silber J***

- These comments are often relied upon by the defence in fitness to practise hearings but sometimes the Committee's attention is not drawn to the following passage (paragraph 67)

*“... the decision of the Panel that the fitness to practise of the Appellant was impaired was wrong, even after taking account of the need to give substantial weight to the public interest including the protection of patients, the maintenance of public confidence in the profession and upholding proper standards of conduct and behaviour”.*

## ***Cohen v General Medical Council (2008) EWHC***

***581(Admin)***

***19 March 2008, Silber J***

- Furthermore, see paragraph 17:

*“Stage 2 is concerned with the issue of whether in the light of any misconduct proved, the fitness of the doctor to practise has been impaired taking account of the critically important public policy issues”.*

## Post-Cohen

- What was happening in practice?
- Did the pendulum swing too far?
- Reconciling the “public interest” criteria and “remediation” within a current impairment to practise process

## ***Zygmunt v General Medical Council***

***(2008) EWHC 2643***

***Mitting J (10 October 2008)***

- A summary of the facts
- The issues
- Taking things into account at the wrong stage, eg  
*“... the evidence of senior professional colleagues given without reservation was that you were a safe doctor... The Panel has not identified any areas of your practice which require remedial training...”*
- But the Court also recognised that *“the concept of fitness to practise is not limited to clinical performance”* and *“... the public interest includes the protection of patients, the maintenance of public confidence in the profession, and the declaring and upholding of proper standards of conduct and behaviour”*

***Zygmunt v General Medical Council***  
***(2008) EWHC 2643***  
***Mitting J (10 October 2008)***

- Did the Committees in the cases of *Cohen* and *Zygmunt* get it wrong or did they simply give inadequate reasons for a decision which would otherwise have been right?

**Other cases which had to consider these points following *Cohen* include:**

- *Azzam v GMC (2008) EWHC 2711 (Admin)*
- *Nicholas-Pillai v GMC (2009) EWHC 1048 (Admin)*
- *Yeong v GMC (2009) EWHC 1293 (Admin)*

## *Yeong v General Medical Council*

- The facts
- The issues
- *“Whilst the conduct which is the subject of these proceedings has not been repeated, the Panel is of the opinion that this is not conduct which is easily remediable...”*
- *Cohen, Meadow* and *Azzam* distinguishable because those cases concerned clinical errors and incompetence and in this case, the Panel was considering misconduct based on an inappropriate sexual relationship with a patient and it was necessary to re-affirm clear standards of professional conduct so as to maintain public confidence in the profession.

## ***Yeong v General Medical Council***

- *“Where an FTPP considers that fitness to practise is impaired for such reasons and that a firm declaration of professional standards so as to promote public confidence in that medical practitioner or the profession generally is required, the efforts made by the practitioner to address his problems and to reduce the risk of recurrence of such misconduct in the future may be of far less significance than in other cases such as those involving clinical errors or incompetence...”*
- But in practice, what difference, if any, did *Yeong* make to Committees’ deliberations on impairment?

***CHRE v NMC, Paula Grant  
(2011) EWHC 927 (Admin)  
Mrs Justice Cox (14 April 2011)***

- The facts
- The issues
- In determining impairment, the Panel “*addressed this question on the basis of Mr Justice Silber’s 3 fold test...*”
- “*The Panel consider that she has addressed this unfortunate poor performance. If it did not, the Panel would have had no hesitation in finding the registrant’s fitness to practise to be impaired today... The behaviour of the registrant was remediable. It has been remedied. The Panel consider that it is most unlikely that the registrant will commit misconduct again...*”

**CHRE v NMC, Paula Grant  
(2011) EWHC 927 (Admin)  
Mrs Justice Cox (14 April 2011)**

- In considering the decision in *Cohen*, Cox J stated: “*It is essential when deciding whether fitness to practise is impaired not to lose sight of the fundamental considerations emphasised at the outset of his (Mr Justice Silber) judgement... namely the need to protect the public and the need to declare and uphold proper standards of conduct and behaviour so as to maintain public confidence in the profession*”.
- “*In determining whether a practitioner’s fitness to practise is impaired... the relevant Panel should generally consider not only whether or not the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances*”.

***CHRE v NMC, Paula Grant  
(2011) EWHC 927 (Admin)***

***Mrs Justice Cox (14 April 2011)***

- Adoption of Dame Janet Smith's questions to be answered by Committees/Panels
- *"In misrepresenting the decision in Cohen as establishing a 3 fold test, rather than identifying relevant factors to be considered, the weight of which would vary from case to case depending on the facts, I agree that the Committee appear to have lost sight of the fundamental, public interest requirements that must be factored in at this stage..."*
- Application to regulators where there is an ability to "warn" (paragraph 75)

## Some cases post-Grant

- *Rice v HPC (2011) EWHC 1649*  
(but Grant not considered)
- Considering *Yeong...* “*How much weight should be given to remedial steps in such a case is for the tribunal to judge in the light of the experience and expertise which it brings to its task. The need to maintain public confidence in the profession concerned may very well be an important factor, if not indeed a crucial one, in such a case*”.

## Some cases post-Grant

- *Hosny v GMC (2011) EWHC 1355 (Admin)*  
(Decided after *Grant* but *Grant* not considered)
- *“This was a case where the findings were of dishonesty. Thus this is one of those cases where the efforts of Dr Hosny to remedy the misconduct were likely to carry less weight than in a case where there had been clinical errors... The Panel did consider whether Dr Hosny had remedied the misconduct... Dr Hosny had violated one of the fundamental tenets of the profession and... her integrity could not be relied upon”.*

Where now?