

# GMC: TIME TO RECONSIDER THE CIVIL STANDARD OF PROOF

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**From 2008 the General Medical Council (GMC) fitness to practise (FTP) hearings adopted the civil standard of proof, based on leading counsel's opinion that account would be taken of the seriousness of the allegation. In light of case law from the House of Lords, this almost certainly does not represent the current state of the law with regard to the civil standard of proof.**

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The civil standard of proof is whether a particular set of facts occurred on the 'balance of probabilities', ie were *more likely* to have occurred than not. Prior to adopting the civil standard of proof, the GMC required the criminal standard of proof, namely whether a particular set of facts occurred 'beyond reasonable doubt', ie were *sure* to have occurred.

## Background to the change

In support of the change from a criminal to civil standard of proof in FTP hearings, the GMC noted that the former criminal standard of proof used in hearings 'is essentially a matter of custom and practice and is not specifically provided for in the Medical Act 1983 or the GMC (Fitness to Practise) Rules 2004'.<sup>1</sup> The GMC also noted that the civil standard of proof 'is used by the majority of healthcare professional regulators, as well as employment tribunals and in child protection cases'.<sup>1</sup> In addition, the civil standard of proof is used in police misconduct proceedings.<sup>2</sup>

The GMC had previously been the subject of reform in the 1970s and 1990s.<sup>3,4</sup> The increasing public scrutiny of self-regulation was the subject of a prescient warning in 1994: 'Unless the profession takes care of its problems, others will do it for us'.<sup>5</sup>

In the report into system failures in the case of the gynaecologist Rodney Ledward at the turn of the century, Jean Ritchie QC recommended that the GMC adopt the civil standard of proof.<sup>6</sup> However, it was the murder of hundreds of patients by Harold Shipman that created the environment in which further reform of the GMC was possible.<sup>7</sup>

In July 2006 the Chief Medical Officer directly questioned whether it was appropriate for the GMC to retain the criminal standard of proof at FTP hearings.<sup>8</sup> In support of the proposal to introduce the civil standard of proof, the GMC published advice from leading counsel that stated that it 'is not a rigid criterion by which facts are to be judged. It is essentially flexible and is to be tailored to the facts of any given case. As is often said, the more serious the allegation the more cogent will be the evidence required'.<sup>1</sup>

Reliance was placed on a judgement from the Court of Appeal, the second highest court in England and Wales after the House of Lords. In *R (N) v Mental Health Review Tribunal*, as per Richards LJ: '...the essential point that runs through the authorities is that the civil standard of proof is flexible in its application and enables proper account to be taken of the seriousness of the allegations to be proved and of the consequences of proving them... Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. **In particular, the more serious the allegation, or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities.**'<sup>9</sup> (Emphasis added.)

Leading counsel concluded that the distinction between the criminal and civil standard of proof was, in some circumstances, 'in practice rather more apparent than real' and in cases where the allegations were at the more serious end of the scale the 'application of the civil standard with the flexibility appropriate to

the seriousness of the allegation and of the consequences for the practitioner should lead to the same result as would application of the criminal standard'.<sup>1</sup>

While such advice was no doubt given in good faith, based on the available case law at the time, there had already been warning signs from north of the border regarding the practical difficulties of applying a sliding scale to the civil standard of proof. The concept of variation of the civil standard of proof was rejected in Scotland as long ago as 1993.<sup>10</sup>

After due consideration, the GMC's proposal was accepted. The GMC (FTP) Rules were amended with effect from 31 May 2008<sup>11</sup> after the GMC exercised the powers conferred by the Medical Act 1983.<sup>12</sup> The amendment of the GMC (FTP) Rules through the use of secondary legislation rather than an Act of Parliament enabled this amendment to be adopted without full parliamentary scrutiny. For the first time, the new rule 34(12) made explicit reference to the standard of proof: 'The standard of proof applicable in any proceedings...before an FTP panel...is that applicable to civil proceedings.'<sup>11</sup>

The GMC's approach was mirrored by the Home Office in relation to police misconduct proceedings conducted under the Police (Conduct) Regulations (SI 2008/2864). Published in December 2008, the relevant Home Office guidance states, *inter alia*: 'The more serious the allegation of misconduct that is made or the more serious the consequences for the individual which flow from a finding against them, the more persuasive (cogent) the evidence will need to be in order to meet that standard.'<sup>13</sup>

Both the GMC and the Home Office approaches therefore adopt the implied concept of a sliding scale in relation to the civil standard of proof. Nevertheless, both these approaches to the civil standard of proof are almost certainly wrong.

### Reaction to the proposed change

In its consultation, prior to the civil standard being adopted, the GMC encountered widespread concern from the profession.<sup>1</sup> Approximately 50 individual doctors objected. *Pulse* magazine submitted a petition signed by several hundred respondents, predominantly doctors, opposing the adoption of the civil standard of proof. The British

Medical Association and the entirety of the medical defence organisations also expressed concerns.

The underlying reason for the objections is the dramatic impact for an individual doctor of withdrawal of registration by a GMC FTP panel. Writing with reference to surgeons, Mosley noted: 'The criminal standard of proof has operated in cases before the GMC because the ultimate sanction is withdrawal of registration. Erasure from the medical register has a profound and lasting impact on a surgeon, which will generally result in the end of his or her career and livelihood.'<sup>14</sup>

Martin-Brown noted that the proposals were a recipe for confusion and that regulatory panels had powers to deal with matters falling short of findings of impairment by issuing a formal warning.<sup>15</sup> Such concerns were to prove well founded.

### Case law subsequent to adoption of civil standard of proof

Shortly after the introduction of the civil standard of proof, Paul Philip, the GMC's Director of Standards and Fitness to Practise, stated confidently that the introduction had been unproblematic, although he did add a caveat: 'We would welcome the opportunity for any directive from the High Court to say what should and shouldn't happen.'<sup>16</sup>

Such guidance was indeed forthcoming albeit from a legal source more senior than the High Court. In 2008 the most senior court in the UK, the House of Lords (since renamed the Supreme Court), considered whether there was in fact such a sliding scale with respect to the civil standard of proof. *In re B* concerned whether allegations of sexual assault, by their nature extremely serious, merited a different application of the balance of probabilities test.<sup>17</sup> In a unanimous verdict, their lordships held that there is only one civil standard of proof, as per Lord Hoffmann at [13]: 'I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.'<sup>17</sup> This was echoed by Baroness Hale at [70].

In his speech, Lord Carswell, with reference to the civil standard of proof, agreed with Lord Hoffmann in the last

sentence of [28]: 'They do not require a different standard of proof or a specially cogent standard of evidence, **merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established.**'<sup>17</sup> (Emphasis added.)

The nature of the civil standard of proof has therefore been definitively clarified by the highest court in the UK, in a manner that is incompatible with the basis on which the civil standard of proof was adopted by the GMC.

*R (IPCC) v AC Hayman*, a case arising from police disciplinary procedures in the High Court (a court junior to both the Court of Appeal and the House of Lords), also supports the proposition that there is only one civil standard of proof, as per Mitting J at [20]: 'Of course in disciplinary proceedings the Tribunal must look with the greatest care at accusations which potentially give rise to serious consequences. But in determining whether or not they occurred, it applies a **single unvarying standard**, the balance of probabilities. If satisfied that it is more likely than not that the facts occurred, then it must find them proved and draw appropriate conclusions as to sanction.'<sup>18</sup> (Emphasis added.)

The application of the civil standard of proof has also proved to be problematic in other healthcare professional disciplinary proceedings, which are similar to GMC FTP hearings. In *Alan Hutchinson v General Dental Council*, Blair J in the High Court held that a General Dental Council (GDC) disciplinary committee applying the civil standard of proof fundamentally misdirected itself and upheld charges on vague and inadequate evidence, despite being invited to consider the relevant case law with a copy of the relevant case law to hand.<sup>19</sup> It is quite possible that this misdirection would have been avoided had there been adoption of the criminal standard of proof by the GDC. Not only has the original basis for the GMC's adoption of the civil standard of proof been proven wrong retrospectively, *Alan Hutchinson v General Dental Council* has also shown the very real practical difficulty in adopting the civil standard of proof.

### Conclusions

The sanctions that can be imposed by a GMC FTP hearing, although civil in nature, are potentially of such overwhelming

significance for the individual doctor concerned as to merit the application of a criminal standard of proof. *In re B* explicitly recognised such a category of civil proceedings, as per Baroness Hale at [69]: ‘*There are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof.*’<sup>17</sup>

In light of *In re B*, it may well transpire that a number of decisions made by GMC FTP panels under the civil standard of proof have been rendered unsafe. Any future changes to the GMC’s regulatory regime should place closer heed to views expressed from the profession and other experts during consultation.

The legal basis on which the GMC made its decision to adopt the civil standard of proof has proven, within a very short space of time, to be flawed. It is incumbent upon the GMC to review its decision to adopt the civil standard of proof with a view to returning the criminal standard of proof.

#### Conflict of interest

AD appeared before two interim orders panels, in 2006 and 2007, neither of which imposed any sanction.

#### References

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