THE POWER OF THE HIGH COURT TO VARY AND INCREASE SANCTIONS IMPOSED BY PROFESSIONAL BODIES

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INTRODUCTION

1. In September 2014, Frank Cowan, a 46-year-old married man with two young children, went for elective surgery in Santry Sports Clinic in Dublin. During the course of the surgery Mr Cowan sustained a catastrophic brain injury which left him completely dependent, tube fed and with no possibility of any meaningful recovery.

2. Mr Cowan's general practitioner was so concerned with the outcome of the surgery that he made a complaint to the Medical Council. The complainant emphasised that the surgical management of Mr Cowan was exemplary. However, he alleged that the anesthetic management fell below that expected from a consultant anesthetist.

3. The matter was ultimately referred to the Medical Council's Fitness to Practice Committee. During the course of a hearing it was established that the anesthetist, Dr Lohan-Mannion, had absented herself from the operating theatre on two occasions. On one of these occasions, she had simply gone for coffee. Unchallenged expert evidence established that such actions amounted to an abrogation of Dr Lohan-Mannion's "*responsibility as a consultant anesthetist to care for the safety of the patient, and thus a serious failure*."[2]

4. Despite this catastrophic result, the Medical Council (accepting the recommendations of the Fitness to Practice Committee) simply censured Dr Lohan-Mannion attaching conditions to her registration. This decision was not appealed and as such, the Medical Council sought High Court confirmation of the sanction pursuant to section 76 of the Medical Practitioners Act 2007.

5. When the matter came before Kelly P, he expressed concern at the low level of sanction imposed. He even went so far as to direct a further hearing to investigate whether the court had the power to vary or increase the sanction. At this hearing the Medical Council acknowledged that it had a duty to protect the public. However, its counsel argued that the conditions attached to Dr Lohan-Mannion's registration sufficiently achieved this goal.

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[2] *Medical Council v. Lohan-Mannion* [2017] IEHC 401 at [9].

6. Ultimately, Kelly P confirmed the sanction imposed. He emphasised that an application to confirm a sanction pursuant to section 76 of the 2007 Act would only be refused if he was satisfied that the relevant decision was one which no reasonable medical council would make.[3] However, what is interesting for present purposes is the obiter comments which the President went on to make. According to Kelly P:

> *"In these circumstances it is not necessary for me to consider the powers which the court would have if the order were to be refused. Would the court be confined to a mere refusal thus resulting in the respondent not having to face any sanction at all? Would it have power to refer the matter back to the Medical Council for reconsideration by it? Or could it be that in order to ensure that an absurd result was not brought about the court could proceed to impose a sanction which it thought appropriate?"*[4]

7. This paper attempts to answer these questions and in doing so, examines the power of the High Court to vary and increase sanctions imposed by professional bodies. To do so, it is necessary to examine the very purpose of court supervision of professional regulation itself.

THE CONSTITUTIONAL DIMENSION

8. The modern system of professional regulation can be traced back to the Supreme Court's decision in *Re Solicitors Act 1954*.[5] The Solicitors Act 1954 empowered the Law Society's Disciplinary Committee to conduct investigations into rogue solicitors and if necessary, strike their names off the roll of practice. Two solicitors, who had been found to have misused client funds, argued that such a regime was unconstitutional as Article 34.1 of Bunreacht na hÉireann requires justice to be administered by the courts. The Supreme Court agreed, and Kingsmill Moore J stated as follows:

> *"It seems to the Court that the power to strike a solicitor off the roll is, when exercised, an administration of justice, both because the infliction of such a severe penalty on a citizen is a matter which calls for the exercise of the judicial power of the State and because to entrust such a power to persons other than judges is to interfere with the necessities of the proper administration of justice."*[6]

9. While the Solicitors Act 1954 allowed for a direct appeal from the Law Society's disciplinary committee to the Chief Justice, this was not sufficient to satisfy Article 34.1. Put simply, the decision of the Disciplinary Committee, if left unappealed, would constitute an administration

[3] [2017] IEHC 401 at [63].
[4] [2017] IEHC 401 at [66].
[5] [1960] IR 239.
[6] [1960] IR 239 at 275.

of justice.[7] The finality of Disciplinary Committee's decision was what mattered.

10. This decision in *Re Solicitor's Act 1954* heavily influenced the Oireachtas when passing the Medical Practitioners Act 1978. The 1978 Act established a system for the regulation very similar to that in operation today. A Fitness to Practice Committee was impowered to conduct investigations into allegations of professional misconduct. However, the said committee had no power to remove a doctor's name from the register. Rather, section 46(4) of the 1978 Act provided that such could only be effected by the Medical Council applying to the High Court. The constitutionality of this system of professional regulation was upheld in *M v. The Medical Council*[8]. According to Finlay P:

> *"Neither the Committee nor the Council has any power to erase the name of a practitioner from the register, to suspend him from his practice, to attach conditions to the continuation of his practice, to make him pay compensation or to award costs against him. The only power vested in them in regard to any of these matters (other than the payment of compensation — which is not provided in the Act at all) is to initiate proceedings in the High Court which may lead to an order being made by that court in respect of any of those matters. Not only is this difference between the provisions contained in the two statutes striking but it seems to me to go to the root of the decision of the Supreme Court in the Solicitors Act Case . . ."*[9]

11. This system of regulation has been adopted in respect of most other professions. The Nursing and Midwives Act 2011[10], the Vetinary Practice Act 2005[11], the Pharmacy Act 2007[12], the Teaching Council Act 2001[13] and the Health and Social Care Professional Act 2005[14] all require High Court approval for the removal of professionals from the relevant register.

THE PURPOSE OF COURT APPROVAL

12. In analysing the power of the High Court to vary and increase sanctions imposed by professional bodies, it is necessary to examine the very purpose of court approval itself. The first and most obvious purpose is the protection of the rights of the relevant professional. After all, Article 37.1 of Bunreacht na hÉireann prohibits the non-judicial imposition of criminal sanctions. In *Re Solicitors Act 1954* Kingsmill Moore J emphasised that the striking of a solicitor off the roles was a sanction of such severity that it could often be worse than the imposition of a criminal penalty. According to the judge:

[7] [1960] IR 239 at 275.
[8] [1984] IR 485
[9] [1984] IR 485 at 497-498.
[10] Section 74(1), Nursing and Midwives Act 2011.
[11] Section 80(5), Vetinary Practice Act 2005.
[12] Section 52(1), Pharmacy Act 2007.
[13] Section 44(5), Teaching Council Act 2001.
[14] Section 70(1), Health and Social Care Professionals Act 2005.

"The power to strike a solicitor off the rolls is a "disciplinary" and "punitive" power . . . It is a sanction of such severity that in its consequences it may be much more serious than a term of imprisonment . . . The imposition of a penalty, which has such consequences, would seem to demand from those who impose it the qualities of impartiality, independence and experience which are required for the holder of a judicial office who, under the criminal law, imposes a fine or short sentence of imprisonment."[15]

13. Subsequent case law has established that the High Court, in reviewing a sanction, has a positive duty to vindicate constitutional rights. It must make an independent determination on the merits of the application before it and is not simply confined to a procedural review of the determination of the relevant professional body. In *CK v. An Bord Altranais*[16] Finlay CJ summarised this duty as follows:

"The essence of the procedure contained in this Act for the regulation of the registration and disciplining of members of the nursing profession is that it is in the court, namely, the High Court, that the decision effective to lead to an erasure or suspension of the operation of registration must be made. The necessity for that procedure to vest that power unequivocally in the court, in my view, arises from the constitutional frailty that would attach to the delegation of any such power to a body which was not a court established under the Constitution, having regard to the decision of the former Supreme Court in In re The Solicitors Act [1960] I.R. 239.

In order for the court to be the effective decision-making tribunal leading to a conclusion that the name of a person should be erased from the register or the operation of registration should be suspended, it is, in my view, essential that having regard to the particular facts and issues arising in any case, it is the court who should make the vital decisions.

In a case such as this undoubtedly is, where the whole question as to whether the applicant is a fit person to remain as a registered nurse depends upon the truth or falsity of evidence as to her conduct and not on any question of standards or rules or principles of professional conduct, it seems to me essential that the High Court must reach its own conclusion as to the truth or falsity of those allegations. In order for it to do so, it must, it seems to me, hear the witnesses, for not on any other basis could it safely reach any such conclusion."[17]

14. While the protection of constitutional rights is the primary purpose of judicial supervision of

[15] [1960] IR 239 274-275.
[16] [1990] 2 IR 396.
[17] [1990] 2 IR 396 at 403.

professional regulation, other collateral purposes have been emphasised by the courts. In *Herman v. Medical Council*[18] the appellant doctor had been suspended from practice for one year. She appealed the severity of the sanction imposed. According to Charlton J:

> *"In considering the question of the sanction, the Court's focus should be both on the conduct underpinning the sanction and the reasoning of the Medical Council in arriving at its decision. Because of the relatively greater experience of the Medical Council in imposing sanctions, its knowledge as to relevant precedents and the expert nature of the task undertaken, the High Court, on an appeal as to sanction, should treat the decisions of the Medical Council with respect. An independent view should be taken as to what ought to be done. Where an error has been made in the context of a sanction which is otherwise appropriate, then it should be corrected. If, however, the level of sanction is one which is justified by the material before the Medical Council, then the Court would need to find a specific reason for altering it on the evidence presented on the appeal."*[19]

The judge concluded that:

> *"the penalty imposed by the Medical Council was proportionate and justified by the circumstances. The rehabilitative measures proposed are sensible. The alteration that is required in the conditions for return to practice continues to recognise that supervision over a period of three years is a proportionate rehabilitative and punitive response to the findings against the appellant."*[20]

15. This reasoning was endorsed by Kelly P in *Medical Council v. Lohan-Mannion.* Here, the President went further emphasising that *"the protection of the public is a paramount consideration for the Medical Council and the court on an application of this sort*." [21] It follows the judicial supervision of professional regulation has several purposes. The primary purpose is to protect the constitutional rights of the relevant professional. However, as well as this, courts must consider whether the sanction imposed is proportionate, fosters rehabilitation and adequately protects patient safety. Importantly, a court must take an independent view as to what ought to be done.

THE PROCEDURE: SECTIONS 75/76 DISTINGUISHED

16. Before analysing the power of the High Court to vary and increase a recommended sanction, it is necessary to distinguish between section 75 (appeals) and section 76 (confirmation hearings) of the Medical Practitioners Act 2007. The legislation governing the other statutory professions contains a similar distinction. Section 75 allows medical practitioners to appeal

[18] [2010] IEHC 414.
[19] [2010] IEHC 414 at [12].
[20] [2010] IEHC 414 at [31].
[21] [2017] IEHC 401 at [61].

sanctions imposed by the Medical Council to the High Court. At the appeal hearing, the practitioner is entitled to rely on evidence which was not put before the Fitness to Practice Committee. Section 75(3)(a) provides that on considering such, the High Court can:

> *"(i) confirm the decision the subject of the application, or*
> *(ii) cancel that decision and replace it with such other decision as the Court considers appropriate, which may be a decision –*
>
> I. *to impose a different sanction on the practitioner, or*
> II. *to impose no sanction on the practitioner"*

17. It follows that the High Court has the power on hearing such appeals make different findings of fact and to vary the sanction imposed. This is to be contrasted with section 76 of the 2007 Act which requires, in the event that a sanction is not appealed, the Medical Council to apply for High Court confirmation. According to section 76(3): *"The Court shall, on the hearing of an application under subsection (1), confirm the decision under section 71 the subject of the application unless the Court sees good reason not to do so."* As stated above, the Court must confirm the sanction unless it is satisfied that it is wholly unreasonable.

THE POWER TO INCREASE A SANCTION

18. With this background in mind, we can now consider the power of the court to vary or increase the sanction imposed by a relevant professional body. This question is considered both in the context of appeal hearings (section 75) and confirmation hearings (section 76).

19. Firstly, in the context of appeal hearings, there is little doubt that the High Court has the power to increase the sanction imposed. Section 75(3)(a)(ii)(I) confers an express power on the court to impose a "different sanction" on the relevant practitioner. While the High Court is yet to exercise this jurisdiction, it could do so to protect patient safety and/or to ensure that the measure imposed by the Medical Council is sufficiently punitive.

20. There is also an analogy with criminal law. When convicted in the District Court the defendant has the right to a *de novo* appeal to the Circuit Court.[22] While improbable, the Circuit Court has jurisdiction to increase the sentence imposed.[23] Given the case law discussed above, there are considerable similarities between a section 75 appeal and *de novo* appeal (i.e. new evidence can be adduced in both). Of course, for the a court to increase a sanction in an appeal hearing, it would almost certainly have to do so on its own volition. A professional body, defending an appeal, will usually argue that the sanction imposed at first instance was appropriate.

[22] Section 18(1), Courts of Justice Act 1928. See also: *State (McLoughlin) v. Shannon* [1948] IR 439.
[23] *State (Ahern) v. Cotter* [1982] IR 188.

21. Different considerations apply in confirmation hearings. Section 76 of the 2007 Act fails to confer on the court an express power to vary the sanction imposed. Of course, there are various mechanisms through which a court could infer this power. Firstly, the court could take a purposive interpretation of the 2007 Act. As well as protecting the rights of doctors, the purpose of the act is to protect the public, raise professional standards and ensure that sanctions are proportionate. Case law establishes that the court cannot simply act as a rubber stamp in approving the decision of a fitness to practice committee. Independent judgment must be exercised. As such, a court could find that by implication, and to adequately carry out its functions, it must be able to increase a sanction in an appropriate case.

22. Of course, the difficulty with such an interpretation is that it stretches the reasonable meaning of the 2007 Act. The 2007 Act is highly proscriptive in the role afforded to the courts. Moreover, given that the imposition of a professional sanction analogous to a criminal penalty, it would be very difficult for a court to effectively invent such a statutory power. After all, a long standing common law maxim is to construe criminal provisions narrowly.[24]

23. Alternatively, a court could adopt a softer approach. Instead of inferring a power to independently vary a sanction imposed, the court could instead engage in a dialogue with the relevant professional body. After all, in *Lohan-Mannion* itself, Kelly P indicated at the first directions hearing that he was unhappy with the sanction imposed. The Medical Council then reconvened to consider these comments. While it did not vary the sanction, it provided further clarification on the conditions attached to Dr Lohan-Mannion's registration. In different proceedings, one can imagine the High Court indicating that it will not approve the sanction and the relevant professional body going on to change such.[25]

24. Of course, there are several problems associated with this approach. Firstly, the High Court has no express power to order a professional body to reconsider the relevant sanction. Moreover, it would be highly inappropriate for a decision maker to reopen an investigation at the extra-legal suggestion of a third party (even if the third party is a High Court judge). As Kelly P stated in Lohan-Mannion:

> *"I should make it clear that the Council met of its own volition. I did not and could not have asked it to do so and indeed the only element of its decision that it could consider was clarification of the notification provision. It was not open to it to reconsider the*

[24] *Walsh on Criminal Procedure*, 2nd Ed., (Round Hall, 2016) at [1-45]. *"A characteristic feature of penal legislation in that it is interpreted strictly in the sense that any ambiguity that cannot be resolved through the ordinary principles of statutory construction will be interpreted in favour of protecting the rights and freedoms of the suspect of the accused."*

[25] In fact, in the recent case of *Medical Council v. S* (ex tempore, High Court, Kelly P, 3 May 2019) Kelly P refused to confirm a sanction on the grounds that it was too lenient. Instead he adjourned the proceedings generally allowing a suspension order to remain in place. The case is of limited precedential value as no written judgment was given and reporting restrictions were ordered.

adequacy of sanction nor did it attempt to do so."[26]

25. Should a professional body vary its decision, without input from the professional under investigation, it would certainly be open to a challenge by way of judicial review. It follows that if the High Court is not satisfied that the relevant sanction is not sufficiently punitive, the only option available to it would be to refuse to confirm it on the grounds set out in section 76 of the 2007 Act. This would probably lead to the absurd result of no sanction whatsoever being imposed.

POSSIBLE REFORMS: THE UNITED KINGDOM, THE LEGAL SERVICES REGULATION ACT 2015

26. The regulation of professionals in the United Kingdom is broadly similar to that in this jurisdiction. To take the example of doctors, the Medical Act 1983 establishes several committees with the power to investigate the conduct of doctors. Any doctor dissatisfied with a finding made by such a committee has the right to appeal to the High Court.[27] Given that no constitutional considerations apply, the General Medical Council is not required to apply to court for confirmation of unappealed sanctions.

27. However, the United Kingdom has also established a different entity known as the Professional Standards Authority. Essentially, this body regulates the regulators. If the Authority believes that:

> *"(a) a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both, or*
>
> *(b) a relevant decision falling within subsection (2) should not have been made,*
>
> *and that it would be desirable for the protection of members of the public for the Council to take action under this section, the Council may refer the case to the relevant court."*[28]

28. It follows that the Professional Standards Authority is empowered to appeal sanctions which it believes are too lenient. While this paper certainly does not advocate the establishment of a corresponding authority in this jurisdiction, it is interesting to note that United Kingdom has effectively established an independent authority to deal with the problem identified by Kelly P in *Lohan-Mannion*.

[26] [2017] IEHC 401 at [30].
[27] Section 40, Medical Act 1983.
[28] Section 29(4), National Health Service Reform and Health Care Professions Act 2002.

29. Finally, it is also worth considering the Legal Services Regulation Act 2015. While not yet commenced, the system of professional regulation established thereunder differs substantially from that which governs other professions. The 2015 Act establishes a Disciplinary Tribunal which investigates and imposes sanctions on legal practitioners. While all practitioners have a right of appeal to the High Court, section 83 of the 2015 Act allows the Legal Services Regulatory Authority to appeal findings made by the Disciplinary Tribunal to the High Court.

30. An appeal can be brought on the merits (i.e. to overturn an acquittal) or on the level of sanction imposed (i.e. on the grounds that the sanction is too lenient). The constitutionality of the said provision is yet to be tested. However, given that the High Court has the final say, the legislation is likely to be upheld.

CONCLUSION

31. In conclusion, the High Court theoretically has the power to increase and/or vary a sanction imposed by a professional regulator. This power stems from the court's duty to exercise independent judgment when imposing a sanction on a relevant professional. However, such powers will be exercised rarely. In defending appeals, professional regulators are unlikely to ask the court to vary the sanction imposed on the ground that such was unduly lenient. Moreover, in confirmation hearings, a court is unlikely to impose a quasi-criminal penalty in the absence of an express power to do so. While the United Kingdom has established an independent entity to ensure that professional regulators sufficiently protect the public, there is no pressing need for a regulator of regulators in this jurisdiction.

32. Of course, statutory regulation is only one manner by which the actions of professionals are controlled. In the aftermath of the mistakes made by Dr Lohan-Mannion, Mr Cowan ultimately settled his personal injuries action for €7.1 million.[29] Tort law plays an important role in the regulation of medical professionals.

[29] *The Irish Times*, 9 November 2016.