Record of Determinations –
Medical Practitioners Tribunal

PUBLIC RECORD

Dates: 12/12/2016 – 19/12/2016
Medical Practitioner’s name: Dr David BAXTER-SMITH

GMC reference number: 1366981
Primary medical qualification: MB BCh 1970 University of Dublin
Type of case: New - Misconduct
Outcome on impairment: Not Impaired

Summary of outcome
No action (warning not considered)

Tribunal:

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<tr>
<th>Lay Tribunal Member (Chair)</th>
<th>Mrs Lucy Reid</th>
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<td>Medical Tribunal Member:</td>
<td>Dr Ronan Brennan</td>
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<td>Medical Tribunal Member:</td>
<td>Dr Vishal Kaushik</td>
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<tr>
<th>Legal Assessor:</th>
<th>Mr Alastair McFarlane</th>
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<td>Tribunal Clerk:</td>
<td>Ms D Montgomery</td>
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Attendance and Representation:

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<th>Medical Practitioner:</th>
<th>Present and represented</th>
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<tr>
<td>Medical Practitioner’s Representative:</td>
<td>Mr James Leonard, Counsel, instructed by RadcliffesLeBrasseur</td>
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<td>GMC Representative:</td>
<td>Ms Shirlie Duckworth, Counsel</td>
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Allegation and Findings of Fact

1. During the period March 2015 to April 2016, you acted as a medical advisor to:
   a. The Graham Fulford Charitable Trust; Found proved
b. The Rotary Club of Whitchurch; **Found proved**

c. Uttoexter Lions. **Found proved**

2. During the period from March 2015 to April 2016 (‘the period’), you did not hold a licence to practise. **Admitted and found proved**

3. During the period, on more than one occasion, you undertook activities that required you to hold a licence to practise, in that you:

   a. provided medical advice to men regarding Prostate Specific Antigen (‘PSA’) blood tests; **Found not proved**

   b. provided participants in the PSA blood tests with a copy of a document headed ‘PSA Tests’; **Found not proved**

   c. arranged for PSA blood tests to be administered; **Found not proved**

   d. wrote to participants in the PSA blood tests to inform them of their test results; **Found proved**

   e. in the results letters, provided advice as to what the participants ought to do next; **Found proved**

   f. provided your direct telephone number to participants who were advised that their PSA levels were abnormal, in order to discuss their test results; **Found proved**

   g. wrote to a participant in the PSA blood tests and requested additional information about any further investigations and/or treatment that they have received after the blood test, **Found proved**

4. During the period and whilst undertaking the activities described in paragraph 3, you held yourself out as a Consultant Urological Surgeon and/or Consultant Urologist:

   a. without making it clear that you did not hold a license to practise; **Admitted and found proved**

   b. which suggested that you had a licence to practise. **Found proved**

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct.
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Attendance of Press / Public
The hearing was all heard in public.

Determination on Facts - 15/12/2016

Dr Baxter-Smith:

Amendments under Rule 17(6)

1. At the outset of the hearing, Ms Duckworth, Counsel, on behalf of the General Medical Council (GMC), made an application for the Tribunal to use its power, under Rule 17(6) of the GMC (Fitness to Practise) Rules 2004, to include an additional sub-paragraph in paragraph 3 of the allegation as follows:

   'g. wrote to a participant in the PSA blood tests and requested additional information about any further investigations and/or treatment that they have received after the blood test.'

2. Mr Leonard, Counsel, on your behalf, had no objection to the amendment. The Tribunal was satisfied that the amendment could be made without injustice and acceded to Ms Duckworth’s application.

Facts

3. The Tribunal has given careful consideration to the evidence adduced in this case, both oral and documentary. This included your oral evidence and witness statement and the expert report and oral evidence of Professor A, Consultant Urological Surgeon.

4. The Tribunal has taken account of the submissions of Ms Duckworth and Mr Leonard and noted that both parties agreed that there was no definitive guidance, either in the legislation or case law, as to when a licence to practise was required.

Background to the case

5. This case relates to charitable work that you have undertaken, during the period March 2015 to April 2016, a time when you did not hold a licence to practise.

6. The Tribunal heard that you retired from NHS practice in 2005 but continued to work as a urological surgeon in private practice until April 2013. In your witness statement, dated 6 December 2015, you stated that you contacted the GMC, in March and April 2013, about relinquishing your licence to practise on the basis that you had retired from clinical practice. You recalled that during the discussion you raised your intention to continue with charitable and medico-legal work and were
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advised that this would be acceptable provided the organisations that you worked with knew that you no longer held a licence to practise.

7. You relinquished your licence to practise in May 2013 but maintained your registration with the GMC. You stated that you relinquished your licence to practise as you wished to save the cost and administrative burden of full registration but that you would not have done so if you had been in any doubt as to whether you could legitimately continue with your charitable work.

8. In your witness statement you set out the nature of your charitable work. You stated that, while working as a consultant urological surgeon, you identified a lack of support for men, and the families of men, suffering from prostate cancer. In around 2002, you founded a local prostate cancer support network, in the form of a charitable organisation, called the Kidderminster Prostate Cancer Support Group. This local group expanded rapidly and as a consequence, it broadened its scope to include, and eventually focus on, raising awareness of prostate cancer at local meetings. A number of similar groups have since formed, together comprising the Federation of Prostate Cancer Support Groups, of which the Graham Fulford Charitable Trust (GFCT) is a member. You assisted the GFCT with the organisation of prostate cancer awareness events, attended meetings organised by them and gave input into meetings. You also assisted the Rotary Club of Whitchurch and the Uttoxeter Lions.

9. The Tribunal was informed that at these events, men are offered Prostate Specific Antigen (PSA) testing. PSA is a protein made by the prostate gland which can be measured in the blood. An abnormally high PSA level may indicate the presence of cancer, although this is not the only cause of an elevated PSA level. A ‘substantial’ volume of literature about the prostate is also provided which attendees are encouraged to take and read. You stated that much of the material is freely and independently available on the internet, at health centres and via other charities such as Prostate Cancer UK.

10. Following introductions you would often give a presentation, lasting 30 minutes or so, about the prostate, covering where it is and what it does. You would also explain what PSA is and what can lead to increased PSA levels in the blood. The talk would also cover statistics around the prevalence of prostate cancer, the number of diagnoses and signs which may be indicative of prostate trouble. The presentation would also cover the efficacy of the PSA test, making clear that although it was not perfect, it was the best available. Following the presentation attendees can complete the consent form and have a blood test, the results of which are then reviewed and reported to them by you.

11. You were referred to the GMC in April 2015, by Dr C, a GP partner at the Biddulph Primary Care Centre. Dr C raised concerns about the fact that one of his patients had brought him a letter setting out the results of a PSA test that he had
undertaken at a local awareness event. The letter was signed by you using the title ‘Consultant Urological Surgeon’. As Dr C had not heard of you he checked the GMC website and noted that although you remained registered, you did not have a licence to practise. Dr C queried whether you could use the title Consultant Urological Surgeon and provide medical advice without a licence to practise.

12. The GMC alleges that the nature of your charitable work required that you hold a licence to practice. However, it has conceded that there is no absolute or definitive guidance in relation to what activities a registered medical practitioner can undertake without a licence to practise.

Tribunal approach

13. The Tribunal has borne in mind throughout that the burden of proof rests with the GMC and that the standard of proof is the balance of probabilities. This means that the Tribunal will be satisfied that an event occurred if it considers that the occurrence of the event was more likely than not.

14. The gravamen of this case concerns whether the activities you undertook for the 3 charities specified, which included the dissemination of information about PSA testing at cancer awareness events, the subsequent testing of the attendees and informing them of their results, amounted to activities that required you to hold a licence to practise.

15. A doctor wishing to practise medicine in the UK must hold registration and a licence to practise. The Tribunal noted that it was common ground that a licence to practise is relevant to the regulatory framework to ensure that doctors are safe to practise, keep up to date and also enable the GMC to discharge its overarching duties to protect patients and the public.

16. The Tribunal makes it clear that in your case there has been no evidence to suggest that your activities presented any risk to the public. In fact, the evidence indicated the reverse. The only evidence the Tribunal has received indicates that you are a highly regarded expert in the urological field with over 40 years’ experience. It has received no information to indicate that you are other than highly competent in the area of prostate cancer. Further, the GMC have accepted that your activities in the charitable field have only been driven by the best of motives; that your actions have helped save lives and that there is no question of your having undertaken these activities without a licence to practise for any ulterior motive. It noted that the expert witness called in this case gave an unchallenged opinion that your actions were laudable.

17. The Tribunal states these matters at this factual stage only to put into the appropriate context the discrete questions it has been asked to determine, namely:
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- what was the extent of the activities you undertook for the charities, and
- whether those activities were such that a licence to practise was required.

18. In summary, the GMC contended that the activities amounted to providing medical advice as an expert; interpreting PSA results as a doctor and providing follow-up advice and support as a doctor and that these activities trespassed into activities that required a licence to practise.

19. Mr Leonard contended that the activities amounted to the dissemination of information as opposed to medical advice; that the participants were not patients and that in effect, the only advice given was, when appropriate, for the attendee to see their GP and that none of the activities you carried out required a licence to practise.

Admissions

20. At the outset of the hearing you admitted the following paragraphs of the allegation and these were announced as admitted and found proved.

   2. During the period from March 2015 to April 2016 ('the period'), you did not hold a licence to practise.

   4. During the period and whilst undertaking the activities described in paragraph 3, you held yourself out as a Consultant Urological Surgeon and/or Consultant Urologist:

       a. without making it clear that you did not hold a license to practise.

Tribunal Findings

21. The Tribunal has considered each paragraph and sub-paragraph of the allegation separately and has made the following findings.

   1. During the period March 2015 to April 2016, you acted as a medical advisor to:

       a. The Graham Fulford Charitable Trust has been found proved;

       b. The Rotary Club of Whitchurch has been found proved;

       c. Uttoexter Lions has been found proved.

       You accepted during your evidence that you provided advice to these charities in your capacity as an experienced doctor in
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Urology. The Tribunal also noted that when asked by the GMC what your job title and grade was for the period in question, you documented ‘I act as medical advisor to many national prostate support groups’. The Tribunal also had evidence in the form of a letter from the GFCT describing you as their ‘medical advisor’. It was also accepted by you that the role that you fulfilled for GFCT was of a similar nature to that of the Rotary Club and the Uttoexter Lions. Further, it noted that you used your previous medical title and qualifications in your dealings with these charities. Considering these matters, the Tribunal was satisfied that your role could reasonably be described as ‘medical advisor’ for the period in question in that you were advising the organisations in this context.

3. During the period, on more than one occasion, you undertook activities that required you to hold a licence to practise, in that you:

a. provided medical advice to men regarding Prostate Specific Antigen (‘PSA’) blood tests **has been found not proved**;

The Tribunal determined that this sub-paragraph only referred to the presentations given by you at the awareness events. The Tribunal considered the nature of the presentations. It accepted that these were general presentations to participants, as opposed to your patients, concerning information which included the importance of PSA tests. The Tribunal was satisfied that although this was based on your medical knowledge and experience it amounted to a general dissemination of information and could not be categorised as medical advice to an individual on the basis of his own personal circumstances. For these reasons the Tribunal was not satisfied that your presentations either amounted to medical advice or in any event was activity that required a licence to practise.

b. provided participants in the PSA blood tests with a copy of a document headed ‘PSA Tests’ **has been found not proved**;

The Tribunal accepted your evidence that the document headed ‘PSA Tests...’ was included in the ‘substantial’ volume of literature available to participants at events. The Tribunal did not accept that your assistance in advising on the set-up and running of the event meant that you personally provided participants with this document.
c. arranged for PSA blood tests to be administered **has been found not proved**;

   There was no evidence before the Tribunal to support the assertion that you arranged for the blood tests to be administered. The Tribunal accepted that although you may have provided advice on the organisation of events, including the number of phlebotomists that may be needed, you did not arrange to administer the blood tests yourself.

d. wrote to participants in the PSA blood tests to inform them of their test results **has been found proved**;

e. in the results letters, provided advice as to what the participants ought to do next **has been found proved**;

f. provided your direct telephone number to participants who were advised that their PSA levels were abnormal, in order to discuss their test results **has been found proved**;

g. wrote to a participant in the PSA blood tests and requested additional information about any further investigations and/or treatment that they have received after the blood test **has been found proved**.

You accepted at the outset of the hearing that you had undertaken the activities set out in sub-paragraphs 3(d), 3(e), 3(f) and 3(g). However, you did not accept that these activities required you to hold a licence to practise.

The Tribunal was provided with a sample of letters sent to participants advising them of their PSA test results. The letters were issued in the format of ‘green’, ‘amber’ or ‘red’ letters, which you explained indicated respectively whether the results were within normal range, borderline or outside normal range. You stated that in assessing the result you considered, amongst other things, indicators such as age, race and family history. You also acknowledged that you had access to the consent form completed by the participants prior to the test, which provided information on factors which may have influenced the PSA level.

In some instances, depending upon the result, you advised patients to see their doctors and in others you recommended further tests or monitoring.
You informed the Tribunal that you provided your direct telephone number to the recipients of amber or red letters so that they had a point of contact should they be concerned by the results. You stated that your intention was not to engage in dialogue or to provide medical advice and that if this was requested you would refer the participant to their doctor. You confirmed that you had spoken on the telephone to a number of men regarding their results.

The Tribunal was also provided with a letter to a participant to enquire as to what had happened following their previously reported abnormal result. You advised that this was not intended as a ‘follow up’ but instead to obtain information on the outcome of the visit to the GP. You explained that this was to provide information to the charity on outcomes following the events. However, the Tribunal noted that you then went further by replying to the participant and advising them to ‘ask your doctor to monitor your PSA level – perhaps on an annual basis – and if there is again a significant increase then to seek the opinion of a specialist’.

The Tribunal considered that these activities went beyond the mere sending of results set against normalised values. The Tribunal determined that you had medically interpreted the results using your expertise. You were dealing with individuals and it was satisfied that the advice that you gave the participants was medical advice. It was not merely ‘go and see your GP’. It considered that the fact that you were interpreting the test results, using information provided by the participants to inform the type of letter and advice, trespassed into areas that required a licence to practise.

The Tribunal also found that by providing your direct telephone number and thereafter discussing concerns that some participants had about their results, you were acting as a doctor and this could be construed as medical practice requiring a licence to practise.

Having considered all the evidence, the Tribunal was satisfied that the activities set out in sub-paragraph 3(d) to 3(g) required a licence to practise.

4. During the period and whilst undertaking the activities described in paragraph 3, you held yourself out as a Consultant Urological Surgeon and/or Consultant Urologist:
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b. which suggested that you had a licence to practise has been found proved.

You have admitted that whilst undertaking the activities set out at 3(d) – 3(g) you held yourself out as a Consultant Urological Surgeon and/or Consultant Urologist without making it clear that you did not hold a licence to practise. The basis of this admission was that this was an objective fact and there had been no intent to deceive. This was accepted by the GMC. Both parties also accepted that the wording of sub-paragraph 4(b), on that objective basis, and given the absence of inappropriate intent, added little, if anything, to the GMC’s case. The Tribunal agreed and was satisfied that by holding yourself out as a Consultant Urological Surgeon and/or Consultant Urologist, it suggested objectively to the informed observer that you were currently employed as such and would therefore hold a licence to practise.

Determination on Impairment - 19/12/2016

Dr Baxter-Smith:

1. Having announced its findings on the facts, the Tribunal has now considered whether your fitness to practise is impaired by reason of misconduct.

2. The Tribunal has taken into account all the evidence before it, both oral and documentary. This included a bundle of testimonials submitted on your behalf at this stage of the proceedings with the agreement of the GMC.

3. The Tribunal has considered the submissions of Ms Duckworth, Counsel, on behalf of the General Medical Council (GMC) and those of Mr Leonard on your behalf. The full submissions of both Counsel are a matter of record and the Tribunal has not rehearsed them in detail in this determination.

4. Ms Duckworth submitted that the facts in this case amount to misconduct and that your fitness to practise is impaired as a result. She submitted that you failed to have any regard for the importance of having a licence to practise and that public confidence in the profession would be undermined if a finding of impairment were not made.

5. Ms Duckworth referred the Tribunal to the paragraph 12 of the GMC’s guidance, Good Medical Practice (2013) (GMP), which states:
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‘12. You must keep up to date with, and follow, the law, our guidance and other regulations relevant to your work.’

6. Mr Leonard submitted that the admitted and proven facts in this case could not conceivably amount to misconduct. There was no evidence that you had presented any risk to the public. Further, in any event, he contended your fitness to practise is not impaired.

7. Mr Leonard accepted the important role that a licence to practise has to play in ensuring that doctors are fit to practise. However, he submitted that in no sense at all can you be said to have deliberately removed yourself from a regulatory framework which you knew applied to you. He submitted that there is ‘complete absence’ of any guidance from the GMC as to what does or does not require a licence and that confusion is being promulgated. He referred the Tribunal to GMC advice, given to a third party in May 2016, that the question of whether a doctor required a licence to practise was ‘currently an employer issue’. He stated that your conduct was inadvertent and unintentional and, in the context of 40 years of service to the medical community, represented an isolated feature of your professional life. He further submitted that there is no evidence that your knowledge and skills were inadequate or fell below the standards.

Tribunal decision

8. In deciding whether your fitness to practise is impaired, the Tribunal has exercised its own judgement. It has borne in mind the statutory overarching objective which is to protect the public. This includes: to protect and promote the health, safety and wellbeing of the public; to promote and maintain public confidence in the medical profession and to promote and maintain proper professional standards and conduct for members of the profession.

Misconduct

9. The Tribunal first considered whether the admitted and proven facts in this case amount to misconduct.

10. During the period March 2015 to April 2016, you acted as a medical advisor to the Graham Fulford Charitable Trust, the Rotary Club of Whitchurch and the Uttooxter Lions. You have admitted that during that period you did not hold a licence to practise.

11. The Tribunal has found that, on more than one occasion, you undertook activities that required you to hold a licence to practise, in that you wrote to participants in the PSA blood tests to inform them of their test results and provided advice as to what they ought to do next. You also provided your direct telephone number to participants who were advised that their PSA levels were abnormal, if
they wanted to discuss their test results. On more than occasion, you wrote to a participant in the PSA blood tests and requested additional information about any further investigations and/or treatment that they had received after the blood tests.

12. You admitted that whilst undertaking these activities you held yourself out as a Consultant Urological Surgeon and/or Consultant Urologist, without making it clear that you did not hold a licence to practise. The Tribunal found, on a purely factual basis, that your use of the title Consultant Urological Surgeon and/or Consultant Urologist suggested that you had a licence to practise.

13. The Tribunal considers that the principle that a doctor should not practise without a licence is an important one. A licence is granted on the basis that a doctor is engaging in revalidation which provides an essential safety net in ensuring that practising doctors are competent and working within current guidelines and systems. Self-evidently, any attempt to bypass the regulatory framework is a serious matter and one which would inevitably amount to misconduct.

14. However, in your case, there is no evidence before the Tribunal of any deliberate intent on your part to flout the regulatory framework. Rather, you were proactive in attempting to ascertain whether the activities you intended to continue post-retirement required a licence to practise. You were told that you could undertake charitable work if the charities were content. In their emailed response to your enquiries, the GMC stated that ‘only doctors with a licence to practise are legally permitted to carry out certain activities’ but gave only very limited guidance and referred you to ‘The Privileges and Duties of Registered Medical Practitioners’, dated 2009. It does not refer to a ‘licence to practise’ at all and its schedule, listing various areas of medical practice, does not relate to the activities you undertook. There is also no mention of charitable work.

15. The GMC’s email of 7 May 2013, which stated, ‘You are not permitted to undertake any form of medical practice within the United Kingdom for which a licence to practise with the GMC is required’ was in the Tribunal’s view almost valueless. Also when you contacted the GMC again for clarification, in 2014, their own attendance recorded their view that it was not ‘their place to interpret legislation’. Further the Tribunal noted that it has not been provided with any regulations concerning licences to practise which the Medical Act 1983 mandated the GMC to make. The Tribunal concluded that you were not given any clear guidance by the GMC and considered their approach to providing guidance on this area to be worthy of criticism. While this does not negate the obligation upon each individual practitioner to be responsible for his or her own practice, it sets the context in your case where the Tribunal has found you made specific attempts to seek advice from your regulator.

16. Whilst the Tribunal has found that your work trespassed into activities that required a licence to practise, it considered that the trespass was limited to a
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discrete area of practice. The Tribunal noted that, although you notified participants of their results and gave advice in relation to what they should do next, generally you were advising them to see their General Practitioner to have their PSA level monitored and/or tested going forward. The Tribunal considered that your trespassing into any area that it has determined required a licence to practise was wholly inadvertent.

17. Furthermore, and most importantly, the Tribunal was satisfied that in this discrete area of your activities presented no risk to the public whatsoever and that the very purpose of a licence to practise (to ensure practitioners are up to date and safe) was not frustrated in your case. It was satisfied that you are a highly regarded expert in this field and were highly competent and up to date in respect of the limited activities you undertook, that the Tribunal found required a licence to practise, even though you did not have one.

18. In respect of your use of the title Consultant Urological Surgeon and/or Consultant Urologist and the impression that it gave, the Tribunal considered this a serious matter which has the potential to undermine public confidence in the profession. However, there is no suggestion from the GMC that you were trying to mislead people into thinking that you held a licence to practise. It is clear from the testimonials that the charities were aware that you had retired. When the matter was raised with you, you amended your title to include the word ‘retired’. The mischief here was confined therefore to non-intentional misleading at its highest.

19. Having considered all the evidence, the Tribunal was satisfied that you had a genuine belief that a licence to practise was not required for your charitable work. It therefore concluded that your trespass into activities that required a licence to practise was inadvertent and unintentional and was done in the absence of clear guidance from your regulator.

20. Taking into account the specific facts of your case, the Tribunal was satisfied that your conduct did not fall significantly below the standards to be expected. It had no hesitation in concluding that your actions did not reach the threshold to be categorised as misconduct.

21. Having determined that the facts in this case do not amount to misconduct, the Tribunal has accordingly determined that your fitness to practise is not impaired.

Confirmed
Date 19 December 2016

Mrs Lucy Reid, Chair