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EI-Baroudy v GMC [2013] EWHC 2894 Admin

Background

Dr EI-Baroudy worked in various middle-grade posts in obstetrics and gynaecology since qualification and also as a part-time forensic medical examiner between 2006 and 2009. He appeared before a Fitness to Practise Panel ('Panel') in relation to serious failings in relation to his work as a forensic medical examiner.

The matter was considered by a Panel between 5 and 14 March 2013 which determined that his fitness to practise was impaired and a sanction imposed.

Dr EI-Baroudy appealed the Panel's determination under section 40 of the Medical Act 1980.

Appeal

The appeal was considered by His Honour Judge Raynour QC on 5 August 2013.

The Judge set out the background to the case including the details of the charges at paragraphs 4 to 8.

He noted (paragraph 9) that there was no allegation in the charges that Dr EI-Baroudy, by his gross or serious misconduct, either caused the death of AR or even caused AR to lose a substantial, significant or real chance of survival.

The first issue which HHJ Raynour QC considered was what allegations it was admissible to pursue at the hearing in the light of the charges (paragraph 10). He referred to three specific authorities (paragraphs 11 -13).

Having already determined there was no allegation that the misconduct either caused death or caused the loss of any realistic chance of survival he confirms (paragraph 14):

The MPTS makes impartial decisions in doctors' fitness to practise hearings. The MPTS is part of the General Medical Council, but it is operationally separate and it is accountable to Parliament.

'Had the GMC wished to pursue those allegations, which would have been highly material, then in my judgment they should have been clearly stated in the charges and, in the absence of being stated, evidence directed to those issues should not have been led and the Panel should not in any way have based a judgment as to whether the fitness to practise was impaired or as to sanction on any question of causation, causation being defined as causing death or indeed causing the loss of any chance of survival.'

The Judge was clear that evidence was led directed to the issue of causation as set out above (paragraphs 15 -21). He concluded, in relation to that issue, that the negligence (and the gross negligence) of Dr El-Baroudy caused AR to lose any significant chance of survival beyond a short period of time in hospital was not even established (paragraph 22).

HHJ Raynor QC goes on to say that, in any event, he is satisfied that given the state of the charges the Panel should not have allowed evidence to have been led as to the issue of causation and should not have allowed the issue of causation to affect judgments as to impairment or as to sanction.

The Judge then goes on to consider whether or not the Panel did in fact allow questions of causation to influence its decision on impairment and sanction (paragraph 23).

He acknowledged that the matter was complicated in relation to evidence which was in the bundle and was subsequently excluded but it was not clear that the Panel had ever had that evidence in mind (paragraph 24).

HHJ Raynor QC then goes on to deal with what the Panel actually decided. He noted that the findings of fact were given on Day 7 and substantially all of the allegations were found to be proved. Having found them proved the Panel, on addressing the question of impairment, correctly directed itself in accordance with the judgment of **Grant v NMC** (paragraphs 25 -26). The Panel concluded that misconduct had placed AR at unwarranted risk of harm, brought the medical profession into disrepute, and breached a number of the fundamental tenets of the profession; all of which indicated findings of impairment.

In the Panel's judgment the misconduct was so serious and the care of the patient was so inadequate the finding of impairment *'is inevitable regardless of remediation.'* The Panel also had in mind that the finding of impairment fell to be made *'given the tragic outcome for AR'* (paragraph 27) and given that it is clear that the Panel saw the responsibility of the doctor's involvement in the loss of what was described as the *'opportunity... to survive'*, it was clear to the Judge in finding impairment that one matter that was taken account of was the fact that his lack of care did have a causative effect in relation to the death, if only the loss of what was described as the opportunity for AR to survive.

He then goes on to say that it was *'perfectly plain that one reason for erasure or one fact taken into account was the Panel's perception that "through your neglect of your duty of care, an opportunity for AR to survive was lost."* (paragraph 27)

HHJ Raynor QC considered there were three difficulties with taking account of the consequence that *"through neglect of your duty of care, an opportunity for AR to survive was lost"* (paragraph 29) which he thereafter set out (paragraphs 30-32) in summary as follows:

1. The Panel should not have borne in mind evidence as to causation so as to include not just whether the death was ultimately the doctor's responsibility but also the loss of the chance (if the GMC had wanted to allege such an outcome, it should have been alleged specifically. Not being so, the evidence should not have been led);
2. The Judge was not sure what the Panel meant when it said *'an opportunity for AR to survive was lost'*;
3. That on a fair reasoning of all the evidence of Dr Cary it was not apparent that any real opportunity for AR to survive in any meaningful sense of survival was actually lost.

In the circumstances HHJ Raynor QC was persuaded that the allowing of evidence of causation to be given and the taking into account of evidence of causation in a way in which he was satisfied the Panel did amounted to a serious procedural irregularity which resulted in impairment and on sanction unjust.

The Judge concluded that, as he had stated at the outset of the judgment, he regarded the case against Dr El-Baroudy as extremely serious irrespective of causation. He also confirmed that it may well be that, irrespective of any question of causation, the same result will follow, but it may well not.

He therefore concludes (paragraph 34):

'A fresh Panel will consider the matter and will look at the matter afresh, leaving aside any question of causation, because I direct that, in assessing whether there is impairment and in determining the sanction, the fresh Panel should proceed upon the basis that it is not alleged that Dr El-Baroudy's misconduct either caused AR's death or caused the loss of any real chance of survival. Evidence that is available directed to those issues should be disregarded.'

The Judge therefore quashed the findings of impairment and sanction and directed that there should be a re-hearing of those issues in accordance with his directions.

Salient Point

- A Panel should not make any findings in relation to 'causation' if the GMC has not pleaded the actual causative effect of the failures that they allege against the practitioner nor should a Panel take such matters into account in determining impairment or sanction.

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