Can a doctor be tried twice for the same allegation?

Can the GMC Prosecute a Case where the Police have chosen not to prosecute?

At Doctors Defence Service, we are frequently asked: Can a doctor be tried twice for the same allegation? Once in the criminal courts and then once in the GMC? The answer is a, perhaps surprising, “Yes!“. Doctors who are acquitted by a jury or magistrate in the criminal courts have for some time been at risk of a General Medical Council (GMC) ‘prosecution’ (in a regulatory / disciplinary sense) for the same alleged misdemeanour, by way of fitness to practise proceedings. [The same general approach will apply where the police investigate a case but determine not to prosecute the doctor because of a lack of evidence or where the public interest test is not met.]

The most frequent examples of this situation occurring are where a doctor faces an allegation of sexual assault on a patient. A patient will usually have made an allegation to the police, in the first instance. Criminal Charges would then be brought where it is considered by the Crown Prosecution Service (CPS) that there is a reasonable prospect of success of proving the case (to the criminal standard) and that it is also in the public interest to bring the criminal proceedings.
In some cases, the doctor and the patient may be the only witnesses to the events that took place. The usual story in sexual allegations cases, by way of example, is that the patient becomes concerned that the doctor took advantage of them while they were being examined and in a state of undress, by carrying out a sexually motivated examination of breasts or genitals. The doctor, in contrast, however, will frequently say that the patient’s claim is as a consequence of a misunderstanding about the clinical examination that took place, or that the allegation is a complete fabrication.

The doctor will usually instruct his or her own legal team to defend them at the criminal trial, and the CPS will prosecute the case at the criminal trial, in the criminal courts. A considerable amount of work will go into the defence case in a criminal trial and many doctors are exhausted by the criminal defence preparations and trial process.

A **criminal allegation** can only be found proven if the tribunal (a jury or magistrates) is “satisfied so it is sure” of the doctor’s guilt – that he did do act alleged, with intent or otherwise. That is known as the criminal standard of proof; also referred to as the “Beyond Reasonable Doubt” test.

Where a doctor has been found not guilty of a criminal offence of indecent (or sexual) assault (or any other crime), the evidence has only been tested to the criminal standard. In other words, the doctor may have been found to be not guilty of a criminal offence, but that in itself does not determine the doctor’s innocence in relation to the allegation. It is still open to the patient to make a complaint to the GMC or to sue the doctor in the civil courts. In both instances, the evidence will be tested to the civil standard.
As a consequence of a recommendation contained in the Shipman Reports, the GMC consulted and changed its disciplinary procedures to change the standard of proof required in fitness to practise (FTP) proceedings. Out went the criminal standard of proof that had been in place for decades, and in came the civil standard of proof; the standard used in most civil courts and tribunals, which are not part of the criminal justice system. The civil standard of proof is, of course, the balance of probabilities test. Or, put another way, “which version of events is more probable or more likely to have occurred, taking inherent probabilities into account?”.

A doctor’s fitness to practise (impaired by professional misconduct) is now deemed to be a separate issue from whether a doctor has committed a criminal offence. In other words, the criminal justice system and the system that disciplines doctors are considered to be two entirely separate jurisdictions, leading to the possibility that the doctor will face to ‘prosecutions’ for the same allegation – one in the criminal courts and one in GMC FTP proceedings.

Arguments that a doctor has been acquitted in the criminal courts and so should not therefore face the same allegation twice are now considered to be obsolete, in most circumstances. While there is still the permitted opportunity to raise an Abuse of Process argument during a GMC FTP hearing, the appellate courts (which supervise the GMC’s decision-making processes) have frequently dismissed appeals brought by doctors on this point. Only in exceptional cases might a GMC case be Stayed (stopped) as an Abuse of Process, within the proceedings themselves. On rarer occasions still will the appellate courts seek to overturn a GMC decision that is adverse to a doctor.

Doctors who have been acquitted in the criminal courts should, at the earliest opportunity, consult with specialist regulatory law lawyers, where the GMC has indicated that it will bring proceedings against the doctor. In some rare
instances, there may be identifiable factors that could lead to an Abuse of Process argument being successful, leading to the case against the doctor being halted.

Independent panels sit in judgment of doctors and it is they (with the assistance of legal guidance from an independent lawyer, called a legal assessor) who will make the decision in each case. Each fitness to practise case, it should be remembered, turns on its own facts and will therefore need individual scrutiny by experienced regulatory law lawyers, to plan the defence. In some cases the GMC FTP defence case may be a rerun of the case that was run in the criminal courts. In other instances, the GMC may bring allegations that have similar thematic themes but which cite new or additional nuances or allegations of mischief and professional misconduct.

Doctors frequently find it hard to believe that they can be in pretty much the same position twice, with as much to lose at the second hearing as in the first, in relation to both reputation and registration. Indeed, to have to go twice through the heartache and agony of a hearing, defending one’s innocence, not knowing what the outcome will be, brings many doctors to breaking point.

There are now numerous examples of doctors having been acquitted in the criminal courts who have subsequently been found guilty by the Fitness to Practice Panel of the GMC. One example is where a doctor was prosecuted for indecent behaviour towards young males. The doctor was acquitted in the criminal courts but later ‘prosecuted’ by the GMC for the same conduct, with the same complainants giving evidence a second time. The witnesses knew what questions were coming and some would say that they may have had an unfair advantage second time around.

Of course, where a doctor is found guilty of a very serious misdemeanour (such as sexual assault on a patient) there is
likely to be only one outcome: erasure from the register (otherwise known as being struck off the register). The more serious the misdemeanour proved the greater the likelihood is that a doctor will be struck off.

The GMC’s primary remit is to protect patients and the public generally, and to uphold public confidence in the profession. The GMC must act reasonably and proportionately toward the doctor, when deciding on which sanction to impose. A strike off is not automatic, but it is a likely outcome the more serious the allegations that have been proved.

If there are strong mitigating features a doctor may well receive a sanction that falls short of erasure. However, where there has been serious wrongdoing, such as sexually motivated touching of patients, the doctor is highly likely to be struck off with negligible prospect of ever returning to clinical registered practice again.

A doctor, with the assistance of an experienced defence team can still make a difference to the outcome of a GMC Fitness to Practise hearing, in most cases. Unfortunately, some doctors are found guilty of misconduct that is so serious that they are struck off. Such doctors feel very angry that the complainant has had a second opportunity to have their allegation heard, with the fore-knowledge of what the defence team is going to put to them. These are, regrettably, the known risks of a case being run a second time, and which have been given consideration by the appeal courts (see for example the defining case of R (Redgrave) v Metropolitan Police Commissioner (2003) 1 WLR 1136 – a case concerning a police officer, but which confirmed the lawfulness of professional conduct disciplinary proceedings following an acquittal in the criminal courts. The GMC cites this case as authority and there have been GMC appeal cases that have confirmed the relevance of that decision. The position was further confirmed in the case of Bhatt v GMC [2011] EWCA 783 (Admin). See also the case of Ashraf v General Dental Council.
‘It is therefore important to confirm that although it is not inherently unfair to bring misconduct charges against a professional who has already been acquitted in the criminal courts, this does not mean that there will not be circumstances in which it may well be unfair to proceed. Allegations of crime (which if leading to a conviction would justify erasure) may, in some circumstances, not justify further investigation by a regulator. Without seeking to be determinative, it might be that no further investigation by the regulator is justified because the allegations do not, in any way, touch upon professional responsibilities either to patients or (as here) to the NHS (which is required to invest trust in the integrity of the professional to fulfil the terms of the funding contract honestly). This elaboration, however, is not intended to be definitive guidance: regulators must each determine how they go about achieving their regulatory objectives and, bearing those objectives in mind, faithfully apply the well known principles engaged within the concept of abuse of process.’ per Sir Brian Leveson P, in Ashraf.

View our DDS regulatory law case digest for further information about the development of GMC case law in this area of law.

The status quo, for the foreseeable future, is that doctors will be at risk of having to face two trials for the same misdemeanour, where the GMC considers the allegation to be serious enough to bring charges, following an acquittal in the criminal courts.

There is an in built presumption within the guidance issued to GMC case examiners (who decide, at a preliminary stage, on whether there is a case against a doctor), that fitness to practise will be impaired if allegations of a sexual nature
are proved. In most cases, therefore, where the evidence is considered sufficient to prove the facts, a referral will be made by the case examiners to a fitness to practise hearing, even in cases where there has been an acquittal in the criminal courts.

(DDS Article: January 2016)

Doctors Defence Service advises doctors on GMC fitness to practise regulatory law and represents doctors at GMC hearings. To discuss a particular issue or point of law with one of our specialist lawyers, call us on: 0800 10 88 739