Indeed Millet J in D.P.R. Futures Ltd observed '… it has been accepted there will be a real risk of prejudice to the right to a fair trial where civil proceedings are heard shortly before the criminal proceedings… on the basis any publicity… will be fresh in the minds of the jury or any witnesses' at the time of proceedings.[54] Of course, the FCA's action in Hayes was in direct response to a criminal conviction, and so the evidence may be viewed as interrelated given the circumstances, which will explain Herrington J's use of Millet J's finding. In MP the police misconduct proceedings were distinct from the criminal action being taken against MP. Of course, alternatively, it may be said the key issue in both (or indeed all) cases of this kind is temporality. That is to say, how long a period of time must first pass between one set of proceedings and another or else it may be unfair or prejudicial not grant a stay in favour an applicant claiming a lack of reasonable time to prepare or make representations?[55]

Conclusion

This short commentary on the UKUT and EWHC decisions in Hayes and MP demonstrates that there is a renewed willingness on the part of the courts to engage in difficult questions concerning applications for stays in professional misconduct proceedings. These contrasting but timely decisions offer two different approaches to existing law, illustrating minor but important developments in the assessment and criteria for relief. The decision by Herrington J in Hayes illustrates a readiness on part of the courts to use its inherent and statutory powers to provide applicants with relief where they might otherwise find themselves disadvantaged by the absence of precedent justifying the imposition of a stay. By contrast, Supperstone J's ruling in MP highlights that the courts are not prepared to rule unreservedly in favour of stays merely because applicants face the prospect of civil action prior to impending criminal proceedings. This may be seen as departure from the otherwise sympathetic approach of courts in such cases, as reaffirmed in Hayes.[56]

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Does greater regulation of care homes create better outcomes?

At a time when the health and social care sector, and particularly care home sector, is in crisis, are greater regulatory powers on the part of the CQC going to result in better outcomes for service users?

After being accused of failing to act on warnings of inhumane and cruel treatment of patients at Winterbourne View six years ago, the CQC has been striving to demonstrate that it is an effective regulator ever since. This has inevitably resulted in additional burdens being placed on care providers.

The role of the CQC as regulator of the health and social care sector has been expanding. Prior to 1 April 2015, the CQC's ability to bring prosecutions was limited and infrequently used, with other enforcement options being preferred. However, since 1 April 2015, following the recommendations made by Sir Robert Francis QC in the Mid Staffordshire Inquiry, the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 came into force and set out the new prosecution powers that the CQC now has to try and ensure that better fundamental standards are adhered to.

Section 12 of the 2014 Regulations states that care and treatment must be provided in a safe way for service users. This is clearly a wide-ranging requirement and a non-exhaustive list is provided by the legislation. The list includes the requirement that risks to health and safety to service users must be assessed and all reasonably practicable measures taken to mitigate such risks. A breach of this regulation by a care provider amounts to a criminal offence if such a breach results in avoidable harm (physical or psychological) to the service user, or if it results in the service user being exposed to a significant risk of such harm.

By way of defence, the provider must prove that they took all reasonable steps and all due diligence to prevent the breach that has occurred.

[54] *Hayes* (n 8) at [57].

[55] Herrington J observes this is not an issue where there is a 'significant gap' (ibid), but what counts as significant is not determined. In this respect, see *Dyer v Watson* [2002] UKPC D 1, [2002] 3 WLR 1488 (Lord Bingham of Cornhill) at [52] and G. Treverton-Jones and A. Hearnden, 'Pre-Trial Issues' in G. Treverton-Jones et al (n 3) 165 at 7.61 (in particular, on the first of three areas of inquiry noted by Lord Bingham, on complex cases requiring time and preparation for a fair hearing). Of course, supplement to guidance published by regulators and tribunals, CPRs leave it open to cases before the EWHC or EWCA to stay proceedings where an applicant has been unable to make representations, see eg (2) (f) or r 3 (3) (5) of the Civil Procedure Rules 1998 / 3132 while r 3 (1) of the Rules and s 49 (3) Senior Courts Act 1981 permit the courts and tribunals inherent jurisdiction on such matters, see here Vos C and others (eds), *Civil Procedure 2018: Vol. 2* (n 10) at 9A-178 and 9A-176 for discussion.

[56] *Hayes* (n 8) at [53], see also Vos C and others (eds), *Civil Procedure 2018: Vol. 2* (n 10) at 9A-178.

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This requirement is broadly similar to the offence under section 3 of the Health and Safety at Work Act 1974 whereby employers have a duty to ensure, as far as reasonably practicable, that persons who are not employees are not exposed to risks to their health and safety.

Prosecutions for health and safety offences such as these traditionally fell to the Health and Safety Executive or the Local Authority. However, in keeping with the new powers gifted to the CQC, from April 2015 enforcement responsibility for health and safety incidents relating to service users in the health and social care sector transferred from the Health and Safety Executive and Local Authorities to the CQC under a Memorandum of Understanding.

However, despite the considerably larger remit that this gave the CQC (and the corresponding drain upon its resources), in 2016 the Care Quality Commission (Fees) (Reviews and Performance Assessments) Regulations 2016 cut the regulator's budget, forcing it to make up the shortfall by transferring costs to care homes. These Regulations gave the CQC the power to charge fees associated with its review and performance assessment functions as well as all its activities associated with rating services. This caused significant concern in the House of Lords when it was debated, in recognition of the perilous state of the sector and the dangers of forcing care homes to shoulder another financial burden, and the impact that this may have on the front line care that is being provided. Nevertheless, the 2016 Regulations went through.

Despite the limiting of its resources, there has been a considerable rise in the number of prosecutions being brought by the CQC. In the two years following the 2014 Regulations coming into force on 1 April 2015, there was a 200% increase in the number of prosecutions brought by the CQC, up from the two years preceding the Regulations. Indeed, the CQC appears to exert its powers in relation to care homes to a greater degree than the HSE used to. In England, the HSE only undertook two prosecutions in relation to care home residents under section 3 of the Health and Safety at Work Act 1974 between 2013- 1 April 2015. By contrast, between 1 April 2015- 1 October 2017, the CQC undertook 8 prosecutions in relation to care home residents.

While this increase in enforcement action might appear to suggest an act of strength on the part of the CQC, and indicate that it is getting a handle on its new enforcement powers, it could also represent a sector that is in crisis, with the CQC failing to engage with providers quickly enough to stop problems before they escalate, therefore ultimately requiring more serious enforcement action (i.e. prosecution) later needing to be taken.

Currently, service users or relatives cannot directly contact CQC inspectors. Urgent matters that a relative or service user may want to speak to an inspector about are currently routed to a national call centre where the staff have no direct involvement with the care home. This inevitably causes delay in dealing with the issue. Clearly, not dealing with problems as soon as possible can allow them to get worse, leading to serious situations escalating. Further, the CQC has no separate division for enforcement, as is the case with other sector regulators (such as Ofsted and the FCA). Therefore, serious problems, such as a culture of abuse, may go overlooked for years before the next scheduled inspection takes place.

The question remains whether 'meeting the fundamental standards' as set by the CQC is really translating into better front line care.

Ultimately it must be remembered that the CQC set the standards by which they judge success. The CQC is likely to be aware that too rigorous an approach could crush the sector completely, with the number of providers closing down recently hitting record highs – particularly as the providers themselves now shoulder the burden for the costs of inspection. Reportedly, 421 homes closed due to insolvency between 2010-May 2017.

Targeting large providers carries a special risk. If large providers disappear, so too will far too many beds at a time when demand is already beginning to outstrip supply. In these circumstances, the CQC may feel it has little choice but to take a more lenient approach towards large providers.

If the standards being set by the CQC are superficial, so too will be the improvements that they generate. Although there has been a rise in the number of care homes that improved their rating after being initially rated as inadequate, the inspection regime may be less effective than it appears. In 2017, 23% of adult social care services rated 'good' saw their ratings drop on re-inspection, raising questions about whether compliance with CQC standards are sustainable and whether

services' responses to inspections are superficial. In 2017, 38% of adult social care services rated 'requires improvement' remained at this rating upon re-inspection.

Clearly a proper and efficient regulator is critical to ensuring the safety of service users within the care sector. However, Winterbourne View illustrated that the worst cases of abuse were about a care home's culture, not record keeping. It may be to the detriment of service users that CQC inspections appear to be increasingly focused on this area.

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LEGAL UPDATE

Professional Standards Authority v. Health and Care Professions Council and Doree [2017] EWCA Civ 319

Lindblom LJ (with whom Sharp LJ agreed) said at [38] that he did not accept that, in principle, a professional disciplinary committee may only reasonably find that a registrant has shown insight or remorse after he has given oral evidence to demonstrate it, and has made himself available for cross-examination or other questioning on that evidence – even if it has rejected his evidence on some or all of the allegations he faced. Whether a registrant has shown insight into his misconduct, and how much insight he has shown, are classically matters of fact and judgment for the professional disciplinary committee in the light of the evidence before it. Some of the evidence may be matters of facts, some of it merely subjective. In assessing a registrant's insight, a professional disciplinary committee will need to weigh all the relevant evidence, both oral and written, which provides a picture of it. This may include evidence given by other witnesses about the registrant's conduct as an employee or as a professional colleague, and, where this is also relevant, the quality of his work with patients, as well as any objective evidence, such as specific works he has done in an effort to address his failings. Of course, there will be cases in which the registrant's own evidence, given orally and tested by cross-examination, will be the best evidence that could be given, and perhaps the only convincing evidence. Any such evidence may well be more convincing if given before the findings of fact are made. But this is not to say that in the absence of such evidence a professional disciplinary committee will necessarily be disabled from making the findings it needs to make on insight, or bound to find that the registrant lacks it.

Hussain v. General Pharmaceutical Council [2018] EWCA Civ 22

This case arose from a BBC documentary into a number of pharmacies in London selling prescription-only medicines without a valid doctor's certificate, and the appellant Mrs Hussain was the responsible pharmacist on duty when an undercover reporter was able to buy Amoxicillin, a prescription-only medicine, over the counter in the absence of a valid prescription. In directing the removal of her name from the register of pharmacists, the committee said in its determination that Mrs Hussain maintained that she had strengthened the standard operating procedures in the pharmacy, but the committee were not satisfied that she really understood the reasons behind the Human Medicines Regulations 2012, and the vital role entrusted to the profession as gatekeepers for the safe and lawful use of medicines. The committee was not satisfied that she had any real understanding of the risk to patient safety or the public interest, and they were unable to assess the risk of recurrence in her favour, given that she had no insight. The committee said that having seen and heard the registrant give evidence, they considered that there was little or no prospect of her developing true insight. The Court of Appeal (Peter Jackson, Newey and Singh LJJ) dismissed Mrs Hussain's appeal from the decision of Elisabeth Laing J: [2016] EWHC 656 (Admin), who had dismissed her appeal from the committee. Newey LJ said that the committee was plainly entitled to take the view that Mrs Hussain's conduct involved a "flagrant" and "extremely serious" breach of the law that went to the heart of the profession's standards of conduct, ethics and performance and the court would not be justified in rejecting the committee's conclusion on insight. Moreover, the conduct related to professional performance. Singh LJ agreed that the court could not say that the committee was wrong. Peter Jackson LJ said

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