

The Good, the Bad and the Ugly: The Influence of criminal law on regulatory proceedings in Canada, the UK and the US
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Audience Survey Q1

My regulatory body is located in:

- A. United Kingdom
- B. U.S.A
- C. Canada
- D. Australia
- E. Other jurisdiction



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Audience Survey Q2

Registrants facing discipline proceedings should have all of the same protections provided to individuals facing criminal charges, given the potential impact of adverse findings (e.g., damaged reputation, loss of license after years of training, loss of income).

- A. Agree
- B. Disagree
- C. Undecided



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Audience Survey Q3

Fairness to the registrant is equally as important a consideration in discipline proceedings as is public protection/public interest.

- A. Agree
- B. Disagree
- C. Undecided



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Audience Survey Q4

In a discipline hearing, the registrant is presumed innocent of the allegations against him/her.

- A. Agree
- B. Disagree
- C. Undecided



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Audience Survey Q5

A registrant should have the right to remain silent/right against self-incrimination and should not have to disclose any aspect of his/her case to the prosecution in advance of the hearing (except expert reports).

- A. Agree
- B. Disagree
- C. Undecided



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The Canadian context

- The Charter of Rights and Freedoms is the “supreme law”
NB: not all Charter rights apply to discipline proceedings
- Discipline proceedings are administrative (civil) proceedings
- As creatures of statute, regulatory bodies are acting as “the state”
- Discipline proceedings must comply with principles of natural justice (duty of fairness)



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The “identity crisis” in Canada

- In Canada, discipline hearings for regulated professionals are civil proceedings.
- Despite this, they are rife with criminal law;
 - language,
 - concepts/processes, and
 - analogies.
- In addition, we draw comparisons between discipline proceedings and criminal law in some cases and contrast them in other circumstances.



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Criminal influence - language/terminology

- Not uncommon terminology
 - charges
 - guilt
 - conviction
 - sentence
 - penalty
 - punishment
 - “professional death sentence”



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Richard Steinecke's caution

The RHPA does not mention findings of "guilt" or the imposition of "penalties" or "sentences". There is a deliberate attempt to avoid criminal-sounding language so that the proceedings do not even appear to be criminal in nature. While it is common to slip into this type of language, one should always remember that discipline proceedings are not criminal or penal in nature, a fact which has significant consequences in terms of the legal rules that apply.

-Steinecke, Richard, *A Complete Guide to the Regulate Health Professions Act*, Canada Law Book, April 2014, at 6-122.



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Where we see criminal language/terminology

- statutes
- hearing documents (e.g., settlement docs, Decision and Reasons)
- language used by lawyers/tribunal in proceedings
- language used by regulatory bodies (e.g., staff and literature)
- court decisions



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Criminal influence - concepts/processes

- presumption of innocence
- taking a plea/conducting a plea inquiry
- leaving the registrant with a "record"
- one-sided disclosure obligations
- the "state" against the individual



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Criminal influence - analogies/analysis

- Questions which, when discipline tribunals asks “what can/should we do”, we answer by reference to what occurs in criminal proceedings:
 - relevant considerations for determining the appropriate order
 - test to interfere with a joint submission
 - test for severing matters
 - motions for third party records
 - withdrawing allegations

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The Good...

The infiltration of criminal language, concepts and comparisons to discipline proceedings likely results in increased vigilance, regarding the importance of fairness to the registrant.

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The Bad...

- In many circumstances, there are other, more appropriate safeguards and mechanisms available in discipline proceedings to ensure/rationalize the requirement of fairness to the registrant (e.g., statutory provisions, principles of natural justice, applicable Charter rights).
- The references to criminal language and concepts, together with comparisons and contrasts between discipline hearings and criminal proceedings creates confusion, particularly for unrepresented registrants and discipline panels.

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The Ugly...

- The confusion about whether discipline hearings are civil, criminal or something in-between could potentially impact:
 - the appropriate balancing of the registrant's rights/interests against the public interest, and
 - the development and use of appropriate policies, rules and processes for discipline proceedings.



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Disclosure in civil/criminal

- Move towards full, reciprocal disclosure in civil proceedings in Canada
- "Trial by ambush" no longer accepted
- In criminal proceedings, only the prosecution is required to make disclosure (few exceptions)
 - Onus on Crown & innocent until proven guilty
 - Right to remain silent (s. 11, s. 13)
 - Right to life, liberty and/or security of the person (s. 7)



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Disclosure in discipline

- In professional discipline proceedings, the prosecution tends to provide disclosure at a level commensurate with or very close to criminal proceedings (*Stinchcombe*)
- There tends to be no requirement for reciprocal disclosure in professional discipline cases, with the exception of experts reports.
- Why is this?
 - Civil proceedings
 - No presumption of innocence?
 - No right to remain silent
 - No right to life, liberty and/or security of the person at issue



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Food for thought

- NOT suggesting that fairness to the registrant is not important. Suggesting instead that we be aware and mindful of:
 - the presence of criminal law terminology, concepts and analogies and the potential for that presence to influence how we think about discipline proceedings (level of fairness owed, appropriate policies, rules, processes);



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More food for thought

- watch for signals from the courts/legislature about where/how discipline proceedings are similar/different from criminal law to ensure that the latter's influence comes in the appropriate places and at an appropriate level;
- use the appropriate tools to consider what level of fairness is required (statutory provisions, natural justice, applicable Charter provisions); and
- develop policies, rules and processes, which reflect:
 - the level of fairness required in discipline proceedings;
 - the purpose of efficiency in discipline proceedings; but
 - not necessarily what is required in criminal law.



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Guilt by association: Fitness to practise and the criminal law
Jonathan Bracken



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Professional Regulation

We take the view that the medical profession should be largely self-regulated. The principle reason for our view is that we have no doubt that the most effective safeguard of the public is the self-respect of the profession itself and that we should be everything to foster this self-respect.

Words like 'discipline', 'punishment' and 'offence' should be avoided.

Merrison Committee, 1975 (CMnd 6018)

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Fitness to Practise

(2) A person's fitness to practise shall be regarded as "impaired" for the purposes of this Act by reason only of:

- (a) misconduct;
- (b) deficient professional performance;
- (c) a conviction or caution in the British Islands for a criminal offence...;
- (d) adverse physical or mental health;
- (e) a determination by a body... responsible... for the regulation of a health or social care profession to the effect that his fitness to practise... is impaired...

section 35C, Medical Act 1983 (as amended in 2004)

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Fitness to Practise: Sanctions

"...the purpose of FTP procedures is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The [Panel] thus looks forward not back."

"[The] principal purpose of the Panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice..."

GMC v Meadow [2006] EWCA Civ 1319
Fatnani and Raschid v GMC [2007] EWCA Civ 46



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What about the public?

The Panel's initial task is "to consider the [allegations] and decide on the evidence whether they are proved in a way in which a jury... has to decide whether the defendant is guilty of each count in the indictment".

Subsequently, the Panel is "concerned with the issue of whether in the light of any misconduct [etc.] proved, the fitness of the [registrant] to practise has been impaired taking account of the critically important public policy issues":

- protecting service users;
- declaring and upholding proper standards of behaviour; and
- maintaining public confidence in the profession.

Cohen v GMC [2008] EWHC 581 (Admin)



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Shipman Inquiry

"...there should be full recognition that the [regulator's] primary function is to exercise a protective jurisdiction and not a punitive one. That means that the civil standard of proof will usually be appropriate. I recommend that the GMC should introduce the civil standard of proof for all FTP decisions. However, I do accept that it is arguable that, for allegations which also amount to a criminal offence, the criminal standard of proof may be appropriate."

Shipman Inquiry (Fifth Report) 2004, Para 27.256



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The Civil Standard of Proof

- 60A Standard of proof in fitness to practise proceedings
- (1) The standard of proof applicable to any proceedings to which this subsection applies is that applicable to civil proceedings.
 - (2) Subsection (1) applies to any proceedings before a committee of a regulatory body, a regulatory body itself or any officer of a regulatory body, which relate to a person's fitness to practise a profession to which section 60(2) applies.

Health Act 1999
(as amended by the Health and Social Care Act 2008)



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But, wait a minute...

"Much judicial time has been spent in the last 50 or 60 years in attempts to explain what is required by way of proof of facts for a court or tribunal to reach the proper conclusion. It is indisputable that only two standards are recognised by the common law, proof on the balance of probabilities and proof beyond reasonable doubt. The latter standard is that required by the criminal law and in such areas of dispute as... disciplinary proceedings brought against members of a profession. The former is the general standard applicable to all other civil proceedings ..."

Re Doherty [2008] UKHL 33



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Once and for all...

"despite the care that [was taken in re H] to explain that having regard to the inherent probabilities did not mean that the standard of proof was higher, others had referred to a "heightened standard of proof" where the allegations were serious. ...the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not"

Hale SCJ, *Re S-B (Children)* [2009] UKSC 17



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