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CO/2983/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2020

Before :

MRS JUSTICE COLLINS RICE

- -

Between

MR ELSWORTH WRAY

Appellant

- and -

GENERAL OSTEOPATHIC COUNCIL

Respondent

- -
- -

Ms Mary O'Rourke QC (instructed by **BSG Solicitors**) for the **Appellant**
Mr Andrew Faux (instructed by **General Osteopathic Council**) for the **Respondent**

Hearing date: 19th November 2020

- -

Judgment Approved by the court for handing down

Mrs Justice Collins Rice:

Mr Wray's High Court Appeal

1. Mr Wray is an osteopath. On 30th July 2020, a Professional Conduct Committee (PCC) of the General Osteopathic Council (GOsC) found him guilty of unacceptable professional conduct (UPC) contrary to section 20(1)(a) of the Osteopaths Act 1993, and administered an admonishment. Mr Wray says the PCC's decision was wrong and unjust because of serious procedural irregularity (CPR 52.21(3)). His appeal under section 31 of the Osteopaths Act 1993 is by way of re-hearing (paragraph 19(2) of Practice Direction 52D).

The Regulatory Framework

2. The GOsC is the statutory regulator of osteopaths. Its functions come from the Osteopaths Act 1993. Its overarching objective is public protection, including promoting and maintaining public confidence in the profession through practice and conduct standards. It issues a statutory code setting them out.

3. Section 20(1) of the Act has four cases in which GOsC brings formal proceedings against individual osteopaths. Section 20(1)(a) deals with UPC: 'conduct which falls short of the standard required of a registered osteopath'. Section 20(1)(c) applies to osteopaths convicted of criminal offences. The other cases deal with professional incompetence and impaired ability to practise for health reasons. Where allegations of UPC are made, or criminal convictions are involved, a PCC is set up to consider and adjudicate.

4. PCC procedure is governed by the General Osteopathic Council (Professional Conduct Committee) (Procedure) Rules Order of Council 2000. In a s.20(1)(a) UPC case, a PCC frames an allegation and invites the osteopath to confirm if the facts set out in it are accepted. Any facts accepted are recorded as proven. Otherwise, the Rules direct a two-stage procedure. First, there is a fact-finding stage, where evidence is taken and witnesses may be cross-examined, and the PCC makes findings of fact on the balance of probability. Then the PCC retires to make its evaluative assessment of whether UPC is made out on the facts proven (by admission or on the evidence). The PCC can ask further questions at the evaluative stage. It makes a reasoned decision on UPC, and, if found, considers which sanction to apply.

5. In a s.20(1)(c) criminal conviction case, the facts of the offence are not separately proved/admitted, but are taken from the relevant prosecution files and trial evidence. There is then a separate stage at which the PCC considers the wider circumstances of the offence, mitigations, and whether the offence 'has any material relevance to the fitness of the osteopath concerned to practise osteopathy'. It then makes a reasoned decision on fitness to practise (FtP) and considers sanction.

6. Paragraph 21(2) of the Schedule to the Osteopaths Act 1993 gives the PCC a residual power to regulate its own procedures, subject to the express provision made in the Rules. I am reminded that

> "...when one is dealing with bye-laws and regulations of professional disciplinary bodies one cannot expect every contingency to be foreseen and provided for. The right question to ask of any procedure adopted should therefore be not whether it is permitted but whether it is prohibited... It must, of course, still be fair and that to my mind is the critical issue..." (*ICAEW v Hill* [2013] EWCA Civ 555).

Factual Background

7. Mr Wray came before a PCC after he self-reported to the GOsC a traumatic series of events he had been involved in. He set them out in a witness statement to the PCC. They are not materially challenged.

8. They relate to the night of 10th March 2018. It was a difficult time; following a family tragedy two years before, his teenage daughter developed behaviour and lifestyle problems, including drug taking. That night, she arrived home very late, dishevelled, distraught and apparently intoxicated by drugs. She went to bed and fell into deep sleep. Her phone rang persistently. Eventually, Mr Wray answered it. The caller was unknown to him (he later discovered it was a young man with whom his daughter was in a relationship). The phone conversation was shocking; the caller said he had attacked and hurt Mr Wray's daughter and would do it again. The caller suggested Mr Wray come to meet him locally, there and then, to discuss matters 'man to man'.

9. Mr Wray did so. He said afterwards how much he regretted it. But he said he was highly distressed and fearful about his daughter's state, anxious to know more about her intoxication. He could not wake her. He had extensive experience mentoring young people and thought he could handle a conversation to find out the facts and decide what to do next. His son tried to dissuade him. But they both set off in the car, the son anxious for his father's safety.

10. When they approached the place identified by the caller, they were surrounded by a group of young men who began hitting the car. He stopped the car. Inside was some sports kit which Mr Wray used in his regular coaching activities with young people. He picked up a softball bat before getting out of the car. He said he thought it might discourage the group from attacking him and might be needed for self-defence. He did not brandish it, but held it to his side. As soon as the two of them got out of the car, they were set upon. Someone snatched away the bat and hit Mr Wray over the head with it. He needed stitches, and suffered concussion and psychological after-effects.

11. The police saw that Mr Wray had been the victim of an attack and prepared to take a witness statement. He told them everything that had happened. When the police heard about the bat, however, they decided to charge him with having an offensive weapon, contrary to Section 1(1) of the Prevention of Crime Act 1953. That provides that anyone who, without lawful authority or reasonable excuse, has with them in a public place any offensive weapon is guilty of a criminal offence. By section 1(4), an offensive weapon means 'any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him'.

12. Mr Wray says his solicitor at the time advised him to contest the charge, but on the day of the first preliminary hearing before the magistrates, the solicitor changed his advice at the last minute and recommended an early guilty plea. He says he was advised that, having admitted to possession of the bat, he faced a prison sentence after a contested trial. He had moments to decide, and went with the new advice. He pleaded guilty as charged. There was no other evidence before the magistrates. They accepted his plea and gave him a six-month conditional discharge.

13. Preparing for his PCC hearing a few months later with a new legal team, he was told that the advice to plead was wrong, and he had had a perfectly good defence to the charge all along. Since a softball bat is not an article made or adapted for use for causing injury to the person, the only basis on which Mr Wray could have been found guilty was if he intended to use it for causing injury *and* had no reasonable excuse for taking it. His own consistent account was that he never had any such intent. His intent in leaving his car with the bat was, he says, deterrence or self-defence. The criminal law decided cases suggest that an intention to frighten does not suffice for the offence. They also suggest that someone carrying an article in anticipation of imminent attack and for the purpose of their own personal defence may have a reasonable excuse.

14. He applied to appeal his conviction, on the basis that his plea was equivocal and he had been wrongly advised. His application was rejected as being too far out of time.

The PCC Hearing and Decision

15. The case was brought as a UPC case under section 20(1)(a) of the Osteopaths Act 1993, not a criminal conviction case under section 20(1)(c). His 6 months conditional discharge had expired. Section 14(1) of the Powers of Criminal Courts (Sentencing) Act 2000 provides that on expiry a conviction 'shall be deemed not to be a conviction for any purpose' (other than for reasons not relevant to this case).

16. The PCC had particularly in mind paragraph D17 of the statutory Osteopathic Professional Standards Guidance, which provides, under the general heading of 'professionalism':

> "1. The public's trust and confidence in the profession, and the reputation of the profession generally, can be undermined by an osteopath's professional or personal conduct. You should have regard to your professional standing, even when you are not acting as an osteopath.
>
> 2. Upholding the reputation of the profession may include:
>
> > 2.1 Acting within the law at all times (criminal convictions may be evidence that an osteopath is unfit to practise)
> >
> > …
> >
> > 2.3 Not behaving in an aggressive or violent way in your personal or professional life…"

17. Further guidance on UPC is found in the decided legal cases. To constitute UPC, conduct must be serious (although that bar is not higher than would be consistent with applying the lowest form of sanction – an admonishment). It must be capable of being considered 'deplorable' by fellow professionals, and worthy of 'moral opprobrium' by the public.

18. The allegation put to Mr Wray at the PCC was that (1) on 10th March 2018 at Genotin Road, Enfield, without lawful authority or reasonable excuse, he had with him in a public place an offensive weapon, namely a softball bat, contrary to section 1(1) of the Prevention of Crime Act 1953, and (2) on 27th February 2019, at Highbury Corner Magistrates' Court, he pleaded guilty to that offence and was conditionally discharged for 6 months.

19. Mr Wray admitted the facts alleged against him, but, on the basis of the account set out above, disputed that it amounted to UPC. His further representations were to the effect that he was otherwise of unblemished character, unimpeachable professional competence and high standing in the community. The PCC accepted his admission of the facts alleged, recorded them as proven and concluded the fact-finding stage of its proceedings. It then went on to consider whether the facts, as alleged, admitted and 'proven', amounted to UPC.

20. The PCC's decision on UPC concluded as follows:

> "30. The Committee was advised in relation to 3 further points following further submissions by both parties as to the Law. First, it was advised that the criminal offence of possession of an offensive weapon was not an offence involving violence, but that the definition of an offensive weapon as a matter of law was as follows: "any article made or adapted for use to cause injury to the person, or intended by the person having it with him for such use." In this case the conduct admitted by the Registrant was that he picked up the softball bat as a deterrent or for self-defence. Second, the Committee was advised that the case of Samuel v RCVS [2014] UKPC 13 was authority for the proposition that the context and events leading to the offending behaviour should be considered in assessing whether or not the conduct amounted to UPC. Third, for the purposes of establishing whether or not UPC was made out, an assessment of the evidence leading to the commission of the offence did not extend to those matters that were properly to be considered matters going solely to personal mitigation, for example the Registrant's voluntary work as a church organist.
>
> "31. In reaching its decision on the question of UPC the Committee read and carefully considered all the material that had been put before it, whether in written or oral form.
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> "32. The Committee considered the context in which the offence had taken place. It accepted the evidence the Registrant had given regarding his motivation for going out on the night in question to meet "T" although the Committee noted that in his written evidence the Registrant did accept a level of anger had clouded his judgment. The Committee considered the Registrant had been subjected to extreme provocation by "T" on the phone before making the decision to go and meet him, and

that his remorse in making the decision to handle the matter as he had done, was genuine. The Committee reminded itself that there was no evidence before the Magistrates' Court, nor was there any evidence before it today that would suggest the Registrant behaved in an overtly aggressive manner when he stepped out of his vehicle, over and above his decision to equip himself with the softball bat. It accepted that the Registrant made no attempt to move towards "T" or any of his companions and that his intention in picking up the bat was as a deterrent or for self-defence. The Committee therefore did not consider that paragraph 2.3 of Standard D17 was engaged in the particular circumstances of this case. Nonetheless this did amount to a criminal offence.

“33. Whilst the Committee accepted that at the time the Registrant's judgment may have been clouded by anger and concern for his daughter, it considered that the act of equipping himself with the softball bat in the circumstances of a potentially aggressive confrontation escalated the situation.

“34. The Committee noted that the Registrant had chosen not to stay with his daughter and avail himself of the support of other healthcare professionals or the Police, rather choosing to meet "T" in spite of his son's attempts to dissuade him from that course.

“35. The Committee had some sympathy for the Registrant. The circumstances he found himself in were exceptional, were upsetting and were extremely stressful. It accepted that his level of criminal culpability was towards the lowest end of the scale.

“36. However, in spite of the prevailing circumstances, the Committee considered that the Registrant's behaviour in taking out a softball bat in a public place, which amounted to the criminal offence of possession of an offensive weapon, in front of bystanders, outside a crowded wine bar in the early hours of a Saturday morning, was a serious departure from the standards expected of a registered osteopath. It had the clear effect of escalating and antagonising a potentially dangerous situation, and could and did lead to consequences outside the Registrant's control. The Committee noted the only person to suffer any serious injuries that evening was the Registrant, and that police had treated him as a victim of crime until his own frank admission of possession of the softball bat.

“37. In spite of the sympathy the Committee had for the Registrant's position, it could not escape the conclusion that equipping himself with a softball bat in a public place, in front of a crowded bar, in a potentially volatile situation, and thereby committing a criminal act, would attract a degree of moral opprobrium from an objective bystander, knowing all the facts. Further, the Committee considered that the behaviour would be considered deplorable by other practitioners knowing all the facts. It was behaviour that did not meet the standards required of a registered osteopath, in particular Standard D17 of the OPS, and fell far enough below those standards so as to amount to UPC in all the circumstances.

> In so finding the Committee reminded itself of the case of Shaw v GOsC [2012] EWHC 2317, in which the Court found that for UPC to be proved the conduct in question had to be serious but not so serious that the lowest form of sanction would not be appropriate.
>
> "38. The Committee therefore found UPC proved."

21. This reasoning and these conclusions are challenged as revealing that the PCC fell into serious procedural error by muddling UPC and conviction case procedure under the Rules. As a result, it is said, it mishandled fact-finding, confused its evaluative functions, and ultimately applied the wrong tests to the wrong facts. The result produced is said to be wrong and unfair.

Discussion

(i) Treatment of the Facts Alleged

22. From the outset, this case looked hybrid. Prevented from being a conviction case by s.14(1) of the Powers of Criminal Courts (Sentencing) Act 2000, it did not allege conviction. But nor did it lay out a set of facts and an express allegation of UPC. It simply cited the criminal charge brought against Mr Wray, and the historic facts of his plea and (spent) sentence. The charge itself was in the usual form, setting out basic facts (place, time, possession of a bat) and issues of criminal law (that the bat was an 'offensive weapon' and that Mr Wray was acting 'without reasonable excuse'). The implicit allegation was that all of this – or at any rate the underlying conduct – amounted to UPC.

23. A number of questions immediately arise. In the first place, this is hard to reconcile with section 14(1). The allegation may not use the word 'conviction', but since it recites charge, plea and sentence, it might as well have done. Mr Faux says on behalf of the GOsC that the effect of s.14 is only to wipe away the status of conviction as such – so for example if a prospective employer asks about convictions, nothing need be said – but not to wipe away the historical facts of the underlying criminal process. I was shown no authority for that proposition, and it is on the face of it surprising. The plain words of s.14 entitle someone to be treated, not least in an employment or professional context, as not convicted. If that could be got around by indirect allusion to conviction, including by reference to the spent conditional discharge itself, it would be set at naught. The allegation in this case clearly identifies Mr Wray as convicted. On the face of it, that disregards his legal protections.

24. Mr Faux's submissions, to be fair, invite me to focus on the legal consequences of the guilty plea as such, and I consider that further below. There are, however, other problems with the formulation of the allegation in this case.

25. The purely, or expressly, factual content of the allegation is limited. A UPC case requires the identification of a set of facts, or actions, by the practitioner, but this allegation instead simply recites the brief criminal charge. Mr Faux says that is not a problem. The reference to section 1(1) of the Prevention of Crime Act 1953 (and the guilty plea) does all that is needed factually – it 'pleads out' an intention to use the bat to cause injury to

the person, and a lack of reasonable excuse. This explanation of the factual content of the allegation, however, raises further questions.

26. As to content, it lacks specificity. There was no factual evidence before the PCC that Mr Wray had an intention to injure. He denied in his witness statement that he did. The 1953 Act places the burden on a criminal defendant to establish reasonable excuse; however, if 'lack of reasonable excuse' is treated as a factual disciplinary allegation it is unclear who is being asked to establish what. It is a basic proposition of procedural fairness that a practitioner is entitled to know what factual case is alleged against him. That is why the Rules create a distinct fact-finding stage in UPC cases.

27. In this case, the only facts established by the PCC at the fact-finding stage were those accepted by Mr Wray. What matters therefore is not only what can be said now, as a point of interpretation, to be the factual content of the allegation, but also what Mr Wray understood about that at the time, and therefore the factual content of his acceptance. His witness statement unambiguously asserted both lack of intention to injure and, also reasonable excuse. Before the PCC he unambiguously maintained that position. The transcript of the hearing is incomplete, but Mr Wray's representative was asked at the outset whether 'any part of the allegations and factual particulars' were accepted. The response was that 'each of the two factual particulars' were accepted. The Chairman recorded that 'factual particulars 1 and 2, and 2 in its entirety' were accepted. What did Mr Wray think he was accepting for the purpose of a UPC fact-finding exercise?

28. Perhaps if asked he would have said something like 'I accept that I did plead guilty, and that I did have the bat, but I should never have pleaded guilty because I never intended to hurt anyone and I took the bat out of the car to deter attack and defend myself if I had to'. That is in summary what his witness statement says. It seems from paragraph 30 of the decision that that is what the PCC thought he had admitted. If it had been clear to him that the 'factual allegations' put to him included the 'facts' of intent to injure and failure of reasonable excuse it is inconceivable in my view that he would have accepted them. I am not persuaded that he did. Those 'facts' were unaccepted, unevidenced and unproven.

29. None of this, of course, would matter in a conviction case, proceeding on the basis that the facts of conviction need not be proven. But this was a UPC case where the proof of facts, whether or not by admission, was the crucial first stage.

(ii) Treatment of the Guilty Plea

30. Mr Faux, however, says all of this is nothing to the point. It is, he says, clear as a matter of law and public policy that the PCC was not only entitled, but obliged, to rely on Mr Wray's guilty plea. It (and he) was bound by it and unable to go behind it. It would have been wrong to take any other course (such as requiring the GOsC to adduce evidence of the underlying components of the criminal offence). He says that, both as to procedure and in the decision itself, the PCC tried to give Mr Wray the maximum benefit of all his representations and evidence, *consistent with* the immoveable object of his plea. That, he says, was fair and decent, and unimpeachable on appeal.

31. Mr Wray expressly invited the PCC to go behind his plea. He said it was a mistake, explained how it happened, and recounted his unsuccessful efforts to undo it via an appeal. There is no sign in the PCC decision, nor in what exists of the transcript, that they took any notice. Mr Faux says that is just as it should be.

32. It is certainly so in conviction cases. The authorities have consistently held that where statutory provision is made for disciplinary bodies to attach professional consequences to a criminal conviction, the effect of the statute has been to preclude the practitioner from denying the truth of any facts necessarily implied in the conviction. In such cases, the decision of the disciplinary body is properly based on the fact of the conviction, and the practitioner cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted (*Kirk v The Royal College of Veterinary Surgeons* 2004 WLUK 267, paragraph 6; *General Medical Council v Spackman* [1943] AC 627, 634–635). That includes cases where conviction is based on a guilty plea (*Royal College of Veterinary Surgeons v Samuel* [2014] UKPC 13). Additional evidence about the underlying facts on which the conviction is based may be adduced and relied on in relation to the disciplinary *consequences*, provided the facts are not inconsistent with the finding that the practitioner was guilty of the offence. What the practitioner cannot do is to relitigate the conviction as to the *facts*.

33. That is why regulatory regimes, including the one in this case, make special provision for conviction cases. It is both unnecessary and undesirable to re-try a criminal case – unnecessary where the facts have already been pleaded and established to the criminal standard, and undesirable because of the public interest in the finality of criminal procedure. The only issue left for a disciplinary body is the relevance of conviction and sentence to the professional standing of the participant.

34. But this was not a conviction case. Mr Faux says that the same consequences nevertheless flow from a guilty plea in its own right. I was not shown any authority to that effect. On the one hand, it might be said (and Mr Faux did say) that similar public policy considerations are in play. It might be wrong, for example, if a practitioner could take the benefits of an early guilty plea in criminal proceedings, knowing that he had an imperfect answer to a criminal charge, but was then able to resile from that and put a regulatory body (and witnesses) to the trouble of relitigating the facts to which he pleaded. The Privy Council in the *Samuel* (conviction) case doubted whether, on one of the charges to which the practitioner had pleaded guilty, the prosecution would have been able to prove the necessary intention in the end, but it did not go as far as finding the contrary.

35. On the other hand, however, if the public policy concern is effectively about abuse of process, then it might have been thought relevant to consider the facts of the case and the merits of Mr Wray's evidence about his plea. Nor is it obvious how Mr Faux's argument survives s.14 of the 2000 Act and the public policy expressed there. The effect he seeks to attach to the guilty plea does not in truth attach to the plea itself but to its acceptance – that is, to the conviction and the presumed irrevocability of the plea that that creates.

36. In this case, there had been no trial. No facts had been established to the criminal standard, or even appeared from a prosecution case. Unlike *Samuel*, there was no detailed set of factual evidence before the PCC capable of amounting to *any criminal offence at all*. All there was, was the plea-and-conviction, and the conviction had been wiped away. The PCC seems to have responded by treating Mr Wray's case in hybrid fashion. It accepted the plea as conclusive, as it would have done in a conviction case, but in circumstances which left ambiguity as to the precise matrix of facts that it was conclusive *of*. And unlike in a conviction case, they did not then go on to consider the *relevance* of the conviction (if any) to Mr Wray's fitness to practice. Instead, they turned to apply the UPC test to the 'facts'.

(iii) Additional Findings of Fact

37. Three objections are made to the conduct of the PCC at this evaluative stage. It is said that they did in fact, inconsistently, go behind the guilty plea; embarked on a second round of (unevidenced) fact-finding; and misapplied the UPC test.

38. There is no doubt that a quantity of new factual material was introduced at this second stage. In conviction cases, Rule 36 provides for the Chairman at this stage to invite the legal adviser to address the PCC, adduce any further (consistent) evidence of the circumstances of the conviction and the character of the practitioner, and invite the practitioner to address the PCC by way of mitigation and any further such evidence. Both may then address the PCC on whether the offence has any material relevance to the practitioner's FtP. It then retires to consider sanction.

39. In a UPC case, however, the process set down is that the PCC first hears and concludes the evidential stage and then retires with its legal adviser to apply the test of UPC to those facts. There is a reason for that. Fairness requires everyone to be clear what facts the UPC test is to be applied to. Rule 34 provides for any member of the PCC, or the legal adviser, with the permission of the Chair to question at any time those presenting evidence or any witness. But that is in my view not a basis for the mingling of a UPC evaluative stage with a fresh fact-finding exercise imported from conviction case procedure. The risk with that is inevitably a real lack of clarity about the facts that are being evaluated for UPC. That problem is in my view evident on the face of the decision as set out above.

40. I asked Mr Faux whether the proper analysis was that the fresh factual material at this stage in reality amounted to submissions about whether the facts admitted to constituted UPC or not; but he did not agree. He said that this was a legitimate fact-finding exercise. Paragraph 30 of the decision states that the PCC was advised that the ***Samuel*** case was authority that 'the context and events leading to the offending behaviour should be considered in assessing whether or not the conduct amounted to UPC'. However, both ***Samuel*** and ***Kirk*** are authorities on the relevance of criminal conviction to fitness to practise; neither is an authority on UPC.

41. I agree with Mr Faux when he says that what the PCC did was adduce evidence about events leading up to the conviction, just as it would have done in a conviction case, and reached such factual conclusions as appeared open to it consistent with the necessary ingredients of the conviction. But that was not the task on which it was properly engaged, and it led to two problems in particular.

42. The first is that it in paragraph 32 of the judgement it 'accepted' that Mr Wray's intention on picking up the bat was deterrence or self-defence. That is not a state of mind consistent with the offence. The PCC accepted there was no evidence before it (or before the magistrates) of aggressive or violent conduct. It also accepted a substantial amount of Mr Wray's account which, on the face of it, goes to the issue of reasonable excuse. At the same time it made consistent reference to the criminal nature of the conduct. Mr Faux says that the PCC must have concluded that in the moments between picking up the bat, and having the bat snatched from him and being attacked with it, Mr Wray had formed the necessary criminal intention. That is valiant, but unstated in the decision, unsupported by the evidence, and implausible. In my view, the PCC had simply got into a muddle with its hybrid process and reached internally inconsistent positions.

43. The second problem is that, unlike in a conviction case, the PCC appeared to have found a number of (new) facts *adverse* to Mr Wray which it then simultaneously concluded amounted to UPC. These included, for example, that the production of the bat had caused an escalation of the situation (they did not say that Mr Wray had thereby brought the attack upon himself, but that is what might well be inferred) and, also the reaction of bystander witnesses to the events. There was, to repeat, no evidence of either before them. These matters did not plausibly fall within any factual admission Mr Wray may have made. They formed no part of the charge against him or the plea on which he was convicted. There is no explanation of why, if it did, the PCC found them proven to the civil standard.

(iv) Applying the Test for UPC

44. The focus in the PCC's decision on the reaction of bystanders raises another question. As in most regulated professions, practitioners are enjoined by their professional standards to behave appropriately in public at all times, bearing in mind that they are always ambassadors for their profession. The public conduct of a practitioner, even when off duty, is clearly capable of constituting UPC. Regulators have responsibilities for the public standing and reputation of the profession. The fact that this case related to behaviour in a public place was potentially relevant. But it is objected that the preoccupation of the PCC with the reaction of the actual bystanders in Enfield (a question of fact) suggests confusion with the application of the UPC bystander test (a question of law).

45. That test requires consideration of whether other practitioners, knowing all the facts, would consider the conduct 'deplorable', and whether a similarly informed by-standing member of the public would consider it as meriting 'moral opprobrium'. The bystander is the usual legal personification of an objective test. There is in my view room for doubt, reading the decision, about whether the PCC maintained analytical rigour about the difference between the potential of Enfield locals to be frightened by an unfolding scene of public violence in front of them (committed not by, but against, Mr Wray) on the one hand, and the detached evaluation of the whole story by a disinterested lay-person applying an objective test.

46. In any event, it is not obvious from the PCC's decision that they did what they needed to do – stand back, take into account the whole of the circumstances and submissions, and reach an objective reasoned evaluation. Instead, it misdirected itself on ***Samuel***, focused on evaluation of the 'offence', and reached a conclusion on UPC anchored in breach of the criminal law. It accepted that this was not a case of violent conduct, but the criminal charge brought against Mr Wray and pleaded to was one of violent intent. That, it seems, was what made it a case of UPC.

(v) Conclusions on the PCC Decision

47. In all of these circumstances, I conclude that the PCC's conduct of Mr Wray's hearing was seriously irregular. The Rules may not spell out how to handle a case involving a spent conviction based on an early guilty plea which is subsequently renounced. Perhaps such circumstances are rare. But I consider that the hybrid procedure adopted by the PCC is excluded by the express provision made in the Rules, and that it was unfair, for the following reasons.

48. In bringing this as a UPC case, the PCC must have accepted that it was not open to them to bring a conviction case because of the 2000 Act and the public policy considerations underlying it. Yet without using the word 'conviction', the allegation made was in terms of charge, plea and sentence, necessarily implying conviction. That is in substance an allegation of conviction which is in my view contrary to the letter and spirit of the 2000 Act and unfair to Mr Wray.

49. Putting charge-plea-sentence to Mr Wray as a set of facts at the opening stage of UPC procedure created a situation of real ambiguity as to the 'facts' with which Mr Wray was being invited to agree. His witness statement and consistent evidence under questioning did not agree that he had acted at any time with intent to injure or without good reason. Fixing him with *actual* agreement to diametrically opposite 'facts' by inductive reasoning from the recitation of statute in the allegation is not something which I am satisfied was explained, understood or fair – or reflected in the decision.

50. Fixing him with *deemed* agreement as a legal consequence of his guilty plea – regardless of his evidence that the plea was equivocal - is for the reasons set out above tantamount to treating this as a conviction case. As explained, I am not convinced that there is a legal duty or power, or an underlying public policy reason, for the PCC to do that. Nor does it appear to have made clear to Mr Wray that that is what it was doing.

51. In any event, unlike a conviction case, the PCC had no proven facts or prosecution case before it, and indeed no *factual* evidence capable of adding up to criminal conduct at all. It had only the bare plea. So again, there was no clear *factual* basis, particularly as to intention or reasonable excuse, on which it could anyway have proceed to the evaluative stage of a conviction case as to the seriousness of the offence and relevance to FtP.

52. At the second stage, the PCC appeared to be trying simultaneously to apply conviction case and UPC case evaluation processes. Those evaluative processes are in my view mutually exclusive. For a UPC case, Mr Wray was entitled to the application of the legal tests to facts either agreed or properly established against him at a prior fact-finding stage. For a conviction case, he was entitled submit factual and personal mitigations and make submissions on relevance to fitness to practise. These are entirely distinct procedures for fact-finding, for different purposes and addressed to different legal tests, As it was, the PCC engaged in a degree of further fact-finding; reached factual conclusions adverse to Mr Wray, on no recognisable evidential basis and without explanation as to reasoning or relevance; adopted inconsistent findings; and did not clearly apply the UPC test by standing back and objectively considering the case as a whole. Instead it rooted its conclusion in the (assumed) criminal character of the conduct, without applying the specific test of relevance which would have been applied in a conviction case.

53. In other words, the hybridity of the procedure in this case gave Mr Wray the worst of both worlds. For that reason, its finding of unacceptable professional conduct cannot fairly be allowed to stand.

Decision on Mr Wray's Appeal

54. I have a discretion simply to quash the PCC's decision, to remit the case for a second hearing (with or without further directions), or, having proceeded by way of rehearing, to substitute conclusions of my own.

55. In reflecting on the exercise of my powers, I am guided to correct any material errors of fact and law, and to exercise a judgment, 'though distinctly and firmly a secondary judgment', as to the application of the relevant principles to the facts of his case (*Fatnani, Raschid v General Medical Council* [2007] 1 WLR 1460, paragraph 20). I am reminded that it is the PCC, which includes professional and lay members and is legally advised, that has the expertise to know the appropriate standards expected of osteopaths and to appreciate what is necessary to maintain public respect for the profession (*Moody v General Osteopathic Council* [2004] EWHC 967 (Admin), paragraph 14).

56. I keep that in mind. I also bear in mind, however, that there is no real argument here about the facts, only about the conclusions to be drawn from them. I note that the PCC itself considered that, even on the basis of aggravations which in my judgment it acted unfairly in finding, anything other than the minimum sanction would have been 'wholly disproportionate'. In all the circumstances, I do not consider it to be in the interests of justice to remit this case for a fresh hearing.

57. If this had been brought as a conviction case, then I would have been entitled to form my own view about the gravity of the conviction and its relevance to fitness to practise osteopathy. The sentence passed points to an offence, even given a mental element importing some degree of intention to injure, at the lowest end of the scale. As to relevance and fitness to practise, I would have adopted the eminently sane analysis in paragraph 31 of the *Samuel* case, a case of actual assault and threatening behaviour. A full understanding of the circumstances in which Mr Wray was for a few moments in public with a softball bat – just before being beaten up with it – might properly lead to an objective conclusion that those circumstances had little bearing on his fitness to practise as an osteopath.

58. However, in my view the effect of the 2000 Act is that Mr Wray was entitled not to have a conviction case brought against him, either expressly or by the necessary implication of alleging plea and (spent) sentence. Mr Faux suggested that one of the reasons I should not reach the view I have in the end reached is that it would be prohibitively difficult to bring a UPC charge in a case like this if it were necessary to prove all the elements of underlying criminal conduct from scratch. I make two observations in response. It is never necessary to establish all the elements of a criminal offence in a UPC case; the regulator is always free to bring (and prove) whatever facts it considers may add up to UPC. And if it has to think twice before bringing a case going behind a spent conviction, there may be good reason for that.

59. On the assumption, however, that a UPC allegation was properly brought against Mr Wray, then on the factual case as set out in his witness statement and substantially accepted, and uncomplicated by inductive reasoning from the criminal context, the tests of moral opprobrium amongst the public, and deplorability within the profession, would fall to be applied straightforwardly to the whole affair.

60. As to the former, I cannot see how the test is met. At worst, a fair-minded observer might conclude that Mr Wray had been foolish and ill-advised to rush out that night, contrary to his son's advice and leaving his daughter unattended, and without seeking the help of emergency services. An observer might also conclude that he had been foolish and ill-advised to get out of the car and face a gang. The observer might think the same thing about picking up the bat. The observer might, especially, think he had been foolish and very ill-advised to plead guilty to a criminal offence if he had a proper defence to the

charge. But in the absence of any other information, the observer would in my view be likely to think no worse than that of him, to share the substantial degree of sympathy the PCC expressed for his plight in the whole circumstances of his story, and to be baffled by an invitation to discern grounds for moral opprobrium.

61. As to the judgment of other members of Mr Wray's profession, here above all it is important to acknowledge a necessary degree of humility. However, for conduct to be regarded as deplorable in an osteopath, and at least worthy of admonishment - especially where it is not in the conduct of his professional functions and where his identity as an osteopath was irrelevant and probably unknown – it has to cross a threshold of seriousness and of risk of damage to the reputation of the profession. In my view, while Mr Wray's conduct may be thought ill-judged and regrettable in a professional, and was apparently regretted, there were extenuating circumstances. 'Deplorable' would seem an unjustifiably exaggerated response in all the circumstances. I do not see on what basis the threshold can fairly be said to have been crossed.

Conclusion

62. In all these circumstances, and for the reasons given, I conclude that the right result is simply to set the decision aside. Mr Wray's appeal is allowed. The decision of the PCC is quashed.