

General Medical Council v Diana Warner GMC ref: 2580395

Expert Statement of Melinda Janki on the Rule of Law

Introduction

1. My name is Melinda Janki. My address is [REDACTED] Due to my work I spend a great deal of time overseas, where my address is [REDACTED] Georgetown, Guyana. I request that any notices or other correspondence are sent to me via email [REDACTED]
2. I have been asked by Dr Diana Warner to provide an expert statement on the rule of law. I have agreed to do so on the basis that my role is to assist the Medical Practitioners Tribunal (MPT), the General Medical Council (GMC) and Dr Warner on the question of the rule of law; it is not my role to advocate for one side or another.
3. The Medical Practitioners Tribunal Service is not a court. It is a legally constituted committee of the General Medical Council which sits as a tribunal with legal powers to impose sanctions. Its decisions can be appealed to the High Court of Justice. It has an obligation to respect the rule of law in its proceedings.
4. This statement is intended to be
 - a. Fair, objective and non-partisan; and
 - b. Related to matters that are within my area of expertise.
5. I am not an expert on medical law or the procedural requirements of the medical profession.

Qualifications, experience, expertise

6. In March 2023, I was awarded the Commonwealth Law Conference Rule of Law Award in recognition of my dedication to and success in upholding the Rule of Law including my work to stop unlawful oil and gas activity.
7. I was educated at the Cheltenham Ladies College. I read law at university and hold an LL.B from University College, London; the BCL (masters) from Oxford University and a second masters the LL.M in public international law, from University College, London.
8. I worked in London as a solicitor with Lovells (now Hogan Lovells). I worked as an-house lawyer for the oil supermajor BP in London. I have also worked as a consultant to BP and other oil supermajors in other countries. I have advised international companies, governments and international financial institutions including the World Bank (IDA and IFC), Inter-American Development Bank, DfID (British Government), KfW (German Government), USAID (American Government), FAO, UNDP, Commonwealth Development Corporation, Government of Guyana and Pacific Islands governments.

9. I lead a team of lawyers representing citizens in public interest litigation to uphold the rule of law in the oil and gas industry in Guyana. Current cases are against the Attorney-General of Guyana, the Environmental Protection Agency, the petroleum minister, ExxonMobil Guyana, Hess and the Chinese National Offshore Oil Company.
10. I remain on the Solicitors Roll in England but I do not maintain a practising certificate as all of my work is now international and outside of England and Wales. I am admitted to practice as an Attorney-at-Law in Guyana and, if required, can provide my certificate of good standing which entitles me to practice before the courts of Guyana and the regional apex court, the Caribbean Court of Justice.
11. I have served on a number of professional and voluntary bodies in various capacities including the international committee of the Law Society, the steering committee of the World Commission on Environmental Law, treasurer of the Solicitors International Human Rights Group, Chair of the Greater Caribbean for Life¹, vice-president of the Guyana Bar Association, and trustee of various trusts for the protection of people and nature.

The Facts

12. According to the papers in the Hearing Bundle on 27th April 2022, Dr. Warner glued her hand to a pane of glass in Stratford Magistrates Court. On 31st May 2022 at Highbury Corner Magistrates Court, a district judge convicted her of damaging furniture to the value of under £5000 and sentenced her to 12 weeks imprisonment. There is no evidence of the amount of damage and whether it was £1 or £4,999 or some amount in between those 2 extremes.
13. I asked Dr. Warner for further information and was told that she was glued to the glass for about 2 hours over lunch time due to a delay in the arrival of the debonding team by which time her hand had come away from the glass; that there was a hand print on the glass with some glue; that the courtroom was set aside for Insulate Britain and no other members of the public were delayed that day.
14. The register (page 3 of the Hearing Bundle) states that Dr. Warner's action was viewed as "a direct attack on the rule of law."

Breaking the law is not automatically a threat to the rule of law

15. Law is not applied in abstract. It is an error to assume that breaking the law is automatically a threat to the rule of law. The courts have long held that there are circumstances in which a person will be able to benefit from an illegal act. In *Howard v Shirlstar Container Transport*

¹ A regional organisation that opposes the death penalty in all circumstances

*Ltd.*² the Court of Appeal ordered a company to pay a pilot even though he committed an offence under Nigerian law in fulfilling his part of the agreement. The Court of Appeal held that their conscience was 'not affronted' by the illegal action and that they would have reached the same conclusion if he had committed the offence under English law. A key part of the decision was that the pilot's illegal action was designed to free himself and his wireless operator from pressing danger in Nigeria.

Rule by Law

16. It may be helpful to start by reminding the MPT and the parties that the 'Rule of Law' is not the same thing as 'rule by law.'
17. A society subject to rule by law is a society in which those in power can arbitrarily create or apply law as they choose. All that is required is a law that the public authority can rely upon.
18. In a society subject to rule by law, there is nothing to prevent the law from being used to inflict unequal treatment, unfair processes and other violations of human dignity.
19. In Germany genocide was legal in the twentieth century. Barbarous systems such as slavery, colonialism and apartheid/segregation were all legal at one time and for centuries those who rebelled against them were tortured and executed. This is rule by law not the rule of law.

The Rule of Law

20. In a society governed by the rule of law, law and action purportedly taken by public authorities under the remit of law, can be struck down by the courts for violating the rule of law.
21. Under the rule of law, the power to make and enforce law exists for the purpose of protecting the population. As stated by the great Roman jurist Cicero, "Salus populi suprema lex esto." The health/well-being of the people is the supreme law. This is not an invitation for governments to do what they think is best for the public but a restraining legal principle to ensure that governments use their powers for the benefit of the people.
22. If the UK or European countries attempted to put the clock back and reintroduce slavery, colonialism, genocide and other crimes into their legal systems, the courts would strike down such laws as contrary to the rule of law. In countries with a written legal constitution the courts would strike down such laws as violating fundamental rights including rights to life and liberty. In the UK, which has parliamentary sovereignty, it is likely that the courts would find some way

²[1990] 3 All ER 366

to hold such laws violate the rule of law. If they did not, then the likely result would be rebellion.

23. The right to rebel is expressly recognised and preserved in the United Nations Declaration of Human Rights which states, “Whereas **it is essential**, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, **that human rights should be protected by the rule of law.**” [my emphasis].
24. Despite the importance of the rule of law there is no single definition of it. Its meaning evolves as values change and societies progress. Nevertheless there is a core content that is generally agreed upon by judges.

The right to life

25. The rule of law includes the protection of fundamental human rights.³ It goes without saying that the most important human right of all is the right to life.
26. As Lord Steyn pointed out in 2001 in the criminal case of *R v Secretary of State for the Home Office ex p Daly*,⁴ “In law, context is everything.” Thus it is important to examine the right to life in the current context before turning to the question of whether the rule of law has been violated.

The context

27. The most authoritative statements globally on public health and the implications for the right to life are those produced by medical research and published in peer-reviewed journals. I therefore draw the MPT’s attention to “The 2023 report of the Lancet Countdown on health and climate change: the imperative for a health-centred response in a world facing irreversible harm.” (“Lancet Countdown”).
28. Just the first few pages of Lancet Countdown are sufficient to cause well-founded alarm. It states (my emphasis in **bold**) that
 - (i) “Harnessing the rapidly advancing science of detection and attribution, new analysis shows that over 60% of the days that reached health-threatening high temperatures in 2020 were made more than twice as likely to occur due to anthropogenic climate change (indicator 1.1.5). and **heat related deaths of people older than 65 years increased by 85% compared with 1990-2000...**”⁵;

³ See for example “The Rule of Law” by Tom Bingham (former law lord) especially chapter 7 on human rights

⁴ [2001] 3 All ER 433

⁵ Page 1

- (ii) A higher frequency of heatwaves and droughts is is “putting **millions of people at risk of malnutrition** and potentially irreversible health effects.”⁶
 - (iii) With 1337 tonnes of CO₂ emitted each second, **each moment of delay worsens the risks** to people’s health and survival.”⁷
 - (iv) “...years of scientific warnings of the threat to people’s lives have been met with **grossly insufficient action** and policies to date have put the world on track for almost 3°C heating;”⁸
 - (v) “With the world currently heading toward 3°C of heating, **any further delays in climate change action will increasingly threaten the health and survival of billions of people alive today.**”⁹
 - (vi) A record hot summer caused **almost 62 000 deaths** in Europe in 2022; extreme floods affected 33 million people in Pakistan and 3.2 million people in Nigeria; a record drought in the Greater Horn of Africa, made more severe by climate change, contributed to worsening local food insecurity, which now affects 46.3 million people.”¹⁰
29. An editorial in the British Medical Journal¹¹ states that, “Lelieveld and colleagues’ estimates of fossil fuel-related deaths are larger than most previously reported values suggesting that the **phasing out of fossil fuels might have a greater impact on mortality than previously thought**” and that, “Phasing out the use of fossil fuels would have **health benefits far beyond reducing premature mortality.**”
30. The United Kingdom is not immune. Ella Kissi Debrah died on 15th February 2015 as a result of air pollution. The coroner’s report in 2019 stated that, she had been exposed to levels of nitrogen dioxide and particular matter in excess of World Health Organisation Guidelines and that the principal source of her exposure was traffic emissions i.e. pollution from burning fossil fuels in an internal combustion engine.
31. The British Medical Journal in November stated that, “An estimated **5.13 million** (3.63 to 6.32) **excess deaths** per year globally are attributable to ambient air pollution from fossil fuel use.”¹²
32. Who then should act? The Lancet Report sees the medical profession as key. It states that, “Safeguarding people’s health in climate policies will require the leadership, integrity, and

⁶ Page 1

⁷ Page 2

⁸ Page 2

⁹ Page 3

¹⁰ Page 4

¹¹ *BMJ* 2023;383:p2774 <http://dx.doi.org/10.1136/bmj.p2774> Published: 29 November 2023

¹² *BMJ* 2023;383:e077784 <http://dx.doi.org/10.1136/bmj.e077784> November 2023

commitment of the health community. With its science driven approach, this community is uniquely positioned to ensure that decision makers are held accountable ...”¹³ and that, “Driven by the **mandate to protect people’s health, wellbeing, and survival above all else, health professionals are uniquely positioned** to guide actions to safeguard the human right to health and a healthy environment.”¹⁴

33. Clearly the medical profession has concluded that fossil fuels are killing people, that phasing out fossil fuels faster would save lives and that people are running out of time to stop irreversible impacts.
34. In this context how does a medical professional act with integrity? What is a doctor to do when faced with “grossly insufficient action” and unacceptable delays by politicians? How does a doctor protect public health when fossil fuel pollution is killing people and the impact of fossil fuels such as climate change are also killing people? What should a doctor do when faced with a government that is not taking the actions necessary to protect the lives and health of individuals and community?
35. Dr. Warner’s statement to the police (Page 6 of the Hearing Bundle) is that she is taking measures that normally she would never do because the government, “is not responding to the red alert regarding red alert [sic] to the climate and ecological destruction.” She further points out that people are dying of climate change. Thus Dr. Warner’s stated reasons are to protect life.
36. **In my opinion Dr. Warner’s action does not constitute an attack on the rule of law. Viewed from the perspective of the rule of law and the obligation to uphold the right to life, Dr. Warner’s actions are fully in harmony with the values upon which the rule of law rests.**
37. **In my opinion the rule of law not only protects Dr Warner in carrying out such actions but may even require her to commit acts that would technically be considered unlawful in the interests of protecting life by drawing attention to the existential threat to humanity posed by fossil fuel pollution.**

Equal treatment

38. A core principle of the rule of law is that the law applies equally to everyone and is enforced equally against everyone. The right to a fair trial is therefore an essential part of the rule of law. The rule of law does not permit public authorities to enforce the law in an arbitrary manner or to punish some but not others without an objectively justifiable reason.

¹³ Pages 3-4

¹⁴ Page 40

39. The established legal principle of jury nullification which entitles a jury to refuse to convict is an essential protection against the State's use of law and the judicial system for the purpose of stopping actions of which a public authority disapproves, especially when the jury considers such actions to be justifiable in the greater public interest. Recent examples are the refusal of juries to convict climate protesters despite the judge directing the juries that the protesters' actions are illegal. A clear example of this is the jury which acquitted the women who had broken the windows of HSBC. Their action caused hundreds of thousands of pounds worth of damage to HSBC. Their reason was that HSBC invests in fossil fuels which result in the existential threat of climate change.¹⁵ Whether one agrees or disagrees with the jury's decision to acquit, the jury's right to follow their consciences is critical for the protection of fundamental rights and the rule of law.
40. Ironically had Dr. Warner smashed HSBC's windows and caused hundreds of thousands pounds worth of damage she would have been charged with a serious offence. She would then have been entitled to trial by jury and would have been acquitted by her peers along with the other HSBC protesters. There would be no criminal record.
41. **In my opinion the judge was wrong to view Dr. Warner's action of gluing her hand to a pane of glass as a "direct attack [on] the rule of law." Dr. Warner's action falls within the ambit of legitimate action.**
42. **Furthermore Dr. Warner's action would have been seen as legitimate by anyone exercising a little commonsense in the current crisis as evidenced by medical profession research that fossil fuel pollution is killing people.**

The role of the profession

43. The Medical Act 1983 states at s1A that the overarching objective of the GMC in exercising their functions is the protection of the public.
44. S1B states that this involves the pursuit of 3 objectives
- (a) to protect, promote and maintain the health, safety and wellbeing of of the public;
 - (b) to promote and maintain public confidence in the medical profession; and
 - (c) to promote and maintain proper professional standards and conduct for members of that profession.

¹⁵ <https://www.theguardian.com/environment/2023/nov/16/climate-protesters-cleared-of-causing-criminal-damage-to-hsbc-london-hq>

45. This leads to the question: how the public can retain confidence in a medical profession which does not use its unique scientific understanding to alert the public and to stand up to the institutional systems that are allowing one industry to destroy and damage human life?
46. There is no easy professional answer. It may be helpful to give an example from the legal profession. I am a co-founder of Lawyers Are Responsible, a group of legal practitioners who have made a declaration that we will withhold our services in respect of
- (i) Supporting new fossil fuel projects; and
 - (ii) action against climate protesters exercising their democratic right of peaceful protest.
47. We consider that (i) and (ii) are incompatible with the rule of law. We also consider that it is essential that professionals are free to exercise freedom of conscience (rule of law) rather than being forced by professional rules to do what they believe is wrong (rule by law).
48. Our declaration of conscience was *prima facie* incompatible with the well-established ‘cab rank’ rule that lawyers must not withhold their services on the basis of their personal convictions. This rule has been fundamental to the barrister’s profession for centuries. Nevertheless following our declaration of conscience the Bar Council have made a bold and principled change to their position and have stated that barristers may refuse to take on cases as a matter of conscience.¹⁶ The Law Society has also published guidance that solicitors may refuse to act in support of projects leading to catastrophic climate change.
49. This leadership from the legal professional bodies is important if the public is to retain confidence in the legal profession and if the legal profession is to be able to justify its privileged place in society.
50. Thus the larger question for the GMC is what steps it will take to perform its obligations under s1A and s1B to protect the public. One answer has already been provided by Dr Richard Horton, (editor-in-chief of Lancet), who stated in an interview that, “Doctors and all health professionals have a responsibility and obligation to engage in all kinds of non-violent social protest to address the climate emergency.”¹⁷
51. This is an authoritative statement by a senior medical professional which doctors are entitled to consider when deciding what their professional duties are and how to act in line with their conscience.
52. Whether the GMC agrees or disagrees with the views of Dr. Horton it is clear that climate change is not only a threat to individual health or public health but poses an existential threat

¹⁶ <https://www.lar.earth/press/press-release-26th-april-fig-leaf-falls-from-legal-profession-as-bar-council-ethics-committee-chair-concedes-barristers-may-act-on-conscience/>

¹⁷ <https://www.youtube.com/watch?app=desktop&v=YEVGNeneYug>

to humanity and that it requires a response not just from individual doctors but from the GMC in light of s1A and s1B of the Medical Act.

53. In my view the rule of law requires the GMC to

- (i) **not seek sanctions against Dr. Warner; and**
- (ii) **to consider the existential threat posed by fossil fuels, to consult the medical profession and the public, and to take action to bring about an end to fossil fuels in order to protect human life.**

Subsidiary considerations: violation of the rule of law by the judge

54. The judiciary are seen as the guardians of the rule of law but it is important to remember that judges are human beings and they are not infallible. Judicial decisions can and sometimes should be criticized. As Lord Atkins pointed out, “Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful and though outspoken comments of men.”¹⁸

55. In my opinion the judge confused ‘rule by law’ with the rule of law and thus violated the rule of law in the following ways:

- (i) by finding that this was a case of high culpability merely because Dr. Warner deliberately glued her hand to the glass;
- (ii) by failing to make a finding of fact as to the amount of damage caused which is a factor in determining the seriousness of the offence;
- (iii) by imposing a custodial sentence when Dr. Warner poses no threat to the public;
- (iv) by imposing the maximum custodial sentence of three months¹⁹ despite the requirement in sentencing guidelines that the restriction on the offender’s liberty must be commensurate with the seriousness of the offence;
- (v) by taking into account irrelevant matters viz. that, “significant disruption resulted to court proceedings.”

Conclusions

56. In my opinion

- (i) Dr Warner has not attacked, undermined, violated or threatened the rule of law.;
- (ii) Gluing a hand to a pane of glass in court is a peaceful and non-violent action which has put no-one at risk and is well within the ambit of legitimate forms of protest;
- (iii) The right of peaceful protest is an essential component of the rule of law;

¹⁸ *Ambard v AG of Trinidad and Tobago* [Privy Council Appeal No. 46 of 1935.

¹⁹ <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/criminal-damage-other-than-by-fire-value-not-exceeding-5000-racially-or-religiously-aggravated-criminal-damage/>

- (iv) The medical profession has authoritatively stated that fossil fuels pose an existential threat to humanity and thus to individuals, communities as well as the human species;
- (v) Unless the right to peaceful protest is upheld across the professions, members of society will eventually resort to violence in order to reduce or halt the violations of the right to life perpetrated by the fossil fuel industry and permitted by governments;
- (vi) It is the duty of the GMC to uphold the rule of law by taking action to protect the right to life.

A handwritten signature in black ink, appearing to read 'Melinda Janki', is centered on the page. The signature is written in a cursive style with a long horizontal stroke at the end.

Melinda Janki