

Liability issues for Lawyers under the Lawyers and Conveyancers Act

Introduction

Prior to 1 August 2008 the regulatory regime applying to lawyers under the Law Practitioners Act was concerned only with matters of discipline. The flip side of this was that questions of mere negligence or incompetence were of no concern to the professional body or Disciplinary Tribunals unless and until the negligence or incompetence reached the level so as to reflect on the lawyer's fitness to practice. All of this has now changed.

The depth of this change can be seen by noting that it is a stated purpose of the Lawyers and Conveyancers Act "to protect the consumers of legal services" and in doing so the Act is intended to provide "a more responsive regulatory regime in relation to lawyers".¹ The fact that duties which were previously considered to be more legal the professional are now captured by the Act is further evidenced by the articulation in s 4 of the Act of the fundamental obligations of lawyers which include "the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients". fly

It is, however, important to note that this is not just the regulatory regime casting its net more widely to be able to discipline lawyers for breaches of legal duties owed to their clients. It is also an expansion of the function of the complaints and discipline regime of the professional bodies (and now, to a limited extent, external regulators). While the Law Practitioners Act empowered the Disciplinary Tribunals to make compensatory orders² those powers could only be triggered by a finding of misconduct and even then the amount of compensation which could be ordered was the modest sum of \$2,000 (at a District Tribunal level) and \$5,000 (at the New Zealand Tribunal level).

Under the Lawyers and Conveyancers Act not only has the threshold at which orders can be made fallen with the introduction of the new (for New Zealand) concept of unsatisfactory conduct, but also the amount of compensation which may be ordered has increased significantly and at the time of writing it is understood that regulations will prescribe an upper limit of \$25,000. This is clearly not an enormous sum in comparison with losses which may be suffered by clients at the hands of incompetent lawyers. It will, however, be sufficiently large to adequately compensate for many consumer complaints.

It is also worth noting that exposure to a compensatory order of up to \$25,000 and/or a fine of \$15,000 will no doubt incentivise lawyers who are subjected to the complaints and discipline procedure to carefully manage that process, and quite possibly to inform their insurers. It is relevant therefore to consider the basis upon which such a compensatory order may be imposed.

¹ Section 3.

² Sections 106(4)(e) and 112(02)(f).

Unsatisfactory Conduct

Perhaps the most important shift under this new framework is the introduction of a new and lower disciplinary standard to which lawyers will be held. Compensatory orders may be made against lawyers who are found guilty of “unsatisfactory conduct”. That term is defined in s 12 of the Act as including “conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer”. It is of note that the Act looks to the standards expected of *a member of the public* and what they are entitled to expect from a *reasonably competent lawyer*. This is an articulation of the well established consumer protection standard of the “reasonable consumer test” which focuses not on the views of professional people (i.e. a peer based standard) as to proper standards, but the reasonable expectations of ordinary people. While in practice the two will frequently converge, the shift in focus is an important signal.

It should also be noted that unsatisfactory conduct may also be found in cases of conduct consisting of a contravention of the Act, or of any regulations or practice rules made under the Act. A cursory inquiry reveals that there are numerous rules which may apply (including Rules of Conduct and Client Care, Lawyers Practice Rules, and Lawyers Trust Account Rules). Importantly, any breach of those rules (regardless of significance) appears to be caught by the definition of unsatisfactory conduct. It is also clear that an unintentional breach is unsatisfactory conduct under s 12(c) of the Act. Wilful or reckless contravention of any provision of the Act or of any regulations or practice rules made under the Act will amount to misconduct pursuant to s 7(1)(a)(ii).

Unsatisfactory conduct may also be found where the lawyer has engaged in “conduct unbecoming a lawyer” or “unprofessional conduct” or any other conduct which “would be regarded by lawyers of good standing as unacceptable”. The concept of “conduct unbecoming” appears in ss 106 and 112 of the Law Practitioners Act 1982. While the legal profession has not clearly divided off conduct unbecoming from misconduct under that Act, it is generally considered less culpable than misconduct. Thus the medical profession had long had a tiered approach to professional discipline from disgraceful conduct, to professional misconduct, to conduct unbecoming.³

While in the medical profession (and the legal profession in some jurisdictions) conduct unbecoming may relate to conduct outside of practice, under the Lawyers and Conveyancers Act a finding of unsatisfactory conduct grounded on conduct unbecoming may only be found where the conduct occurred “at a time when he or she is providing regulated services”. Unprofessional conduct is in many ways simply another way of saying conduct unbecoming (especially when the extra-professional element of conduct unbecoming is removed). Where such a formulation is used it refers to conduct which, while unacceptable, does not have the obloquy of misconduct.⁴

³ Although under the Medical Practitioners Act 1995 conduct unbecoming is now linked to fitness to practice and the older tiered approach must be seen in light of this: *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774.

⁴ D Searles ‘Professional Misconduct –Unprofessional Conduct: is there a Difference?’ (1992) 23 QLSJ 239; *Clough v Qld Law Society Inc* [2000] QCA 254

Compensation

It has been noted that Standards Committees (which replace both Complaints Committees and the District Disciplinary Tribunal under the current framework) can make compensatory orders of up to \$25,000 where a finding of unsatisfactory conduct is made. That power is conferred by s 156(1)(d) of the Act which provides that compensation orders may be made where “it appears to the standards committee that any person has suffered loss by reason of any act or omission” of a lawyer. This language has been imported from ss 116 and 112 of the Law Practitioners Act (dealing with the District and New Zealand Disciplinary Tribunals respectively) but there appears to be little discussion of what is required to demonstrate “that any person has suffered loss by reason of any act or omission” of the lawyer.

The standard

While the particular consumer standards inherent in the definition of unsatisfactory conduct are not invoked by s 156, the fact that orders may only be made where unsatisfactory conduct has occurred indicates that the act or omission must be (at least) unsatisfactory conduct. Where there is a more serious breach (i.e. misconduct) orders will be made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal which by s 242(1)(a) may make any order that a Standards Committee may make. What this means is that much rests on the new standard of “conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer”.

This is not the place to go in to the details of the standard of care owed by a lawyer to his or her client. It is worth observing that the duties of the lawyer in tort will rarely exceed those owed in contract.⁵ That standard will be to apply “the knowledge, skill and care of a competent practitioner having regard to the circumstances, and in particular that which he or she is instructed to do”.⁶

Limitations and exclusions

One important question is the degree to which the parties are free to lower the standard of care owed to clients given the statutory framework now imposed by the Lawyers and Conveyancers Act. There is a compelling argument that a lawyer may not wholly exclude liability for a breach of duty. While it is commonplace for lawyers to limit the scope of the work they do (as was the case in *Clark Boyce*⁷), the lawyer must still undertake the agreed work and the work that is in fact undertaken must still be conducted with the requisite care and skill. It is of note that the Lawyers and Conveyancers Act in s 3 states that it is a fundamental obligation of lawyers “to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients”. If we accept those duties as fundamental it would seem to follow that they may not be avoided by agreement.

⁵ *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782 at para 22.

⁶ Per Gault J (dissenting) in *Mouat v Clark Boyce* [1992] 2 NZLR 559; (1991) 1 NZ ConvC 190,917; ANZ ConvR 585 (CA), approved by the Privy Council *Clark Boyce v Mouat* [1993] 3 NZLR 641.

⁷ *Clark Boyce v Mouat* [1993] 3 NZLR 641.

Similarly, unsatisfactory conduct which includes the obligation meet the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer is a professional obligation which may not be excluded by agreement by the parties. While this is undoubtedly expressed in the language of a consumer standard the fact is that the benefit of the standard falls on all users of legal services whether consumers or not.

There has been some consideration of whether exclusions of liability in the solicitor client relationship might be found to be unenforceable at law. In *Frost & Sutcliffe v Tuiara* Tipping J suggested that:⁸

An express contractual limitation of the scope of the contractual duty in an artificial and improper way might result in the Court finding that the duty so excluded was nevertheless still owed in tort. The basis for that approach would be a policy one, preventing the professional person from improperly limiting the scope of their professional responsibilities by express contractual term.

That comment should, however, be read against a general acceptance that parties should be able to limit the scope of their potential liability by the terms of their contract. It is therefore clear that the exposure of a lawyer may be curtailed by a close definition of what a lawyer is obliged to do. They may, for example, make it clear that they do not undertake to give advice on the wisdom of the transaction. However, Tipping J makes clear that he considers there to be a line over which the lawyer may not cross. A lawyer may not circumscribe his or her role so narrowly so as to make it effectively devoid of substantive obligations:⁹

There is, however, a clear difference between the wisdom of a transaction and its legal effects, whether actual or potential. In the latter respect a contract of retainer which purported to exclude responsibility for giving advice or its accuracy might be thought so antithetical to the professional relationship between the parties that the purported exclusion might not be effective to oust the solicitor's general responsibilities in tort. It is not necessary to decide that issue in the present case. Anything more definitive should be left for another day.

While Tipping J focussed his attention on tort duties surviving contractual exclusions, there is no conceptual reason why the argument needs rest on a complex tort-contract relationship. An equally justifiable stance would be to say that given the professional relationship (and the statutory context) any contractual term purporting to exclude responsibility for giving advice or its accuracy is void as against public policy and in breach of statute.

It should also be noted that r 3.4 of the Rules of Professional Conduct and Client Care explicitly allow the possibility that a contract of retainer will include terms of limitation or exclusion, however with the rider that such terms must be clearly disclosed to the client and also must be "fair and reasonable having regard to the nature of the legal services to be provided and the surrounding circumstances".

⁸ [2004] 1 NZLR 782 at para 12.

⁹ [2004] 1 NZLR 782 at para 22.

It does seem to follow that an absolute exclusion of a duty of care is not possible given the statutory framework and associated rules. Certainly a standards committee has an unfettered right to order compensation when unsatisfactory conduct has occurred and loss has been suffered by reason of the act or omission which constituted that unsatisfactory conduct. In considering such matters the committee will obviously take into account the scope of the work and any terms of the retainer. It is likely that the courts would take a similar approach – it would after all be anomalous to say the least if a standards committee was empowered to compensate for such a breach but the ordinary courts were not.¹⁰

Causation

The words of the legislation appear to require only a modest causative link between the acts and omissions of the lawyer and the loss suffered. In particular all that need to be shown is that loss has been suffered *by reason of* the act or omission. Exactly what this means is unclear. In light of this lacuna there is a strong argument that the provision effectively invokes the usual legal rules as to causation. That is to say that well established two – limb test of *Hadley v Baxendale*¹¹ will apply and that damages will be those losses which arose naturally and foreseeably from the usual course of things, along with any damage that ought reasonably have been in the contemplation of the parties when they made the contract. Given the intimate knowledge that a lawyer has of the affairs of a client it is likely that the second limb of actual foreseeability will be important.

It should also be noted that the rules of causation are slightly different where the claim relates to a breach of fiduciary duty. In particular there is a strong presumption that a fiduciary breach led to any loss suffered by the client and the onus will fall on the lawyer to show that the loss complained of would have been suffered despite the breach. A lawyer, as a fiduciary, may not speculate that the wronged client would have acted as she or he did and incurred the loss in any event.¹²

Heads of Damage

The statutory empowerment of Standards Committees found in s 156(1)(d) states that they order compensation where a person “has suffered loss”. It goes without saying that where it can be shown that the party claiming has suffered some loss measurable in financial terms compensation may be awarded. The availability of such special damages is well established. However the question arises as to whether damages ought to be obtainable outside of this class of special damages – that is to say damages which can be linked to some particular and quantifiable loss.

Given the use of the word “loss” in the legislation it is suggested that exemplary damages would be clearly inappropriate. Exemplary damages are conceptually problematic at the best of times and there is no justification to import them into the

¹⁰ It should also be noted for completeness that s 28 of the Consumer Guarantees Act 1993 imposes an obligation on lawyer to carry out their functions with “reasonable care and skill”. That obligation cannot be contracted out of where the service is provided to a consumer: s 43.

¹¹ (1854) 9 Exch 341, 545.

¹² *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83; *Sims v Craig Bell & Bond* [1991] 3 NZLR 535.

professional regulatory framework of lawyers. This is doubly so given the fact that there is a specific jurisdiction to punish by fines and other measures in the Act.

More difficult are claims for that general class of injury that is variously described as mental distress, anguish, humiliation, upset, inconvenience and stress. Such damages have recently been awarded as between lawyer and client in one case where the lawyer acted in a highhanded manner in peremptorily dismissing his client on the eve of a conveyance.¹³ In that case Chisholm J awarded a significant sum in general damages because “As I see it, the Heslops have been subjected to enormous anxiety, distress, humiliation, pain and suffering as a direct consequence of Mr Cousins’ breaches”.¹⁴

Such damages are intended to be compensatory and certainly on one analysis such distress is a loss, albeit a loss of enjoyment of life rather than of material wealth. McLauchlan has suggested that “it is now more widely accepted that, where significant mental distress is caused by a breach of contract, the promisee has suffered real damage which is deserving of compensation”.¹⁵ This certainly was the approach of Jeffries J in *McKaskell v Benseman*¹⁶ when he stated that “damages must be reasonable compensation for any pain, discomfort, tears and anxiety the plaintiffs suffered as a result of the conduct of the defendants” although in that case a claim for \$60 000 was rejected and an award of \$1000 made.

The availability of such damages in a lawyer-client relationship can perhaps be seen as an application of the principle enunciated by Bingham LJ in *Watson v Morrow*¹⁷ where he observed:

Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective.

Indeed it is probably worth observing that New Zealand courts have tended to take an even broader view of the availability of general damages finding that in non commercial contracts such damages will be available as a matter of course providing that the usual tests of remoteness, causation and proof of loss can be met. This certainly accords with the expectation basis upon which damages in contract are awarded. Where it is the expectation that one consequence of a contract will be peace of mind or absence from worry and this does not occur it is reasonable to be compensated for this failure of the other party to deliver.

There has long been a debate about whether damages for distress are properly obtainable when the parties to the contract have been acting in a commercial or business capacity. Certainly where the injured party is a private client the argument for distress damages is considerably stronger as it is oftentimes for the very piece of mind that has been shattered that such individual retain the services of a lawyer.

¹³ *Heslop v Cousins* [2007] 3 NZLR 679.

¹⁴ Para 305.

¹⁵ D McLauchlan “Mental Distress Damages for Breach of Commercial Contracts” (1997) 3 NZBLQ 130). See also *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at para 171.

¹⁶ [1989] 3 NZLR 75 at p 91.

¹⁷ [1991] 1 WLR 1421, 1445.

Cooke P observed in *Mouat v Clark Boyce*¹⁸ “one of the very purposes of imposing duties on professional persons to take reasonable care to safeguard the interests of their clients is to enable the clients to have justified faith in them”.

There is a strong argument that the commercial / non commercial distinction is unsustainable.¹⁹ It is now moderately well established that distress damages may be claimed by parties who are engaging in a commercial enterprise, though it may be that the threshold that must be reached before they are awardable is somewhat higher. Chisholm J noted in *Heslop v Cousins*²⁰ that “there is no hard and fast rule and general damages have been awarded in a commercial context”.

There is also the longstanding (though perhaps hard to justify) view that general damages must be “parasitic” on some other special damage, at least unless the contract was one for enjoyment or freedom from worry. However, there has been something of a move away from this and certainly in insurance cases (with which comparisons may be drawn) there has been a willingness to award general damages without proof of other loss.²¹ It is suggested that, at least in a domestic setting the retention of a lawyer is intended to give a sense of security in much the same way that taking out insurance is and those cases are a useful guidance.²²

Limited Discretion

The language of s 156(1)(d) is discretionary in that it states that a standards committee “may” make a compensatory order. It bears considering therefore what kind of reasons might exist for a standards committee to decline to make an order even though it is satisfied that loss was caused by the act or omission of the lawyer. At the outset it must be said that such a discretion, if it is correctly thought of as a discretion, should be treated with considerable caution given the purposes of the Act and strong presumption that a remedy where available should not be lightly denied.

One problematic situation which might give pause for thought is where the loss suffered exceeds by a considerable margin the jurisdiction of the standards committee. If, for example, a claim lies for \$250,000 and it is clear that it will be pursued (through litigation or otherwise) there is at least an argument that the question should be dealt with by one procedure. However, having noted this fact, it should be observed that the Act explicitly contemplates that a later action for further compensation in another forum may be pursued by the claimant. In particular s 156(4) provides that:

The making of an order under this section for the payment of compensation to any person does not affect the right (if any) of that person to recover damages in respect of the same loss, but any sum ordered to be paid under this section, and the effect of any order made under this section for the reduction,

¹⁸ [1992] 2 NZLR 559 (CA) at 569.

¹⁹ See McLauchlan above at 138 – 139.

²⁰ [2007] 3 NZLR 679 at para 303 citing *Tak & Co Inc v AEL Corporation Ltd* (1995) 5 NZBLC 103,887 and *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 454).

²¹ *Stuart v Guardian Royal* (1988) 5 ANZ Ins Cas 75,274 (HC of NZ); *Gaunt v Gold Star Insurance Co Ltd* [1991] 2 NZLR 341.

²² See also the words of Tipping J in *State Insurance Ltd v Cedenco Foods Ltd* 6/8/98, Gault, Henry, Thomas, Blanchard and Tipping JJ, (CA) at p 7.

cancellation, or refund of fees, must be taken into account in assessing any such damages.

In the face of such a statutory recognition of the appropriateness of awarding compensation when a further action is likely it would seem that the mere fact that other proceedings are likely (or even certain) will not of itself be enough to refuse compensation.

A more difficult situation might arise where other proceedings for recovery are actually in train. There is no conceptual difficulty with two tribunals considering matters arising from a single course of events provided the jurisdictions do not overlap. For example where a wrongdoer is both being prosecuted for fraud there is no conceptual bar to an action for recovery in the civil courts even though for practical reasons it is commonplace to await the outcome of the criminal action before commencing a civil recovery. However there are both practical and conceptual difficulties where two tribunals are considering essentially the same legal question at the same time. In the event that a standards committee is asked to award compensation in respect of a matter which is before the civil courts there appears to be a good argument that any standards committee should defer to the courts and decline to make an award.

This approach, however, presumes that the standards committee will be applying the same standard / duties as the ordinary courts and it is not yet entirely clear that this is the case. It may be that the law in this area develops and compensation for a professional breach (i.e. unsatisfactory conduct or misconduct) is found to be available even where no breach of legal duty (e.g. contractual, fiduciary or tortious) has occurred. It is, however, suggested that such a divergence is unlikely and were it to emerge would be unhelpful.

A final consideration is that where a matter has been considered by another tribunal, or has been the subject of some other final dispute resolution process (such as a concluded mediation or arbitration) there are well established and sound policy reasons for not reopening the question. While it might not be entirely appropriate for fully fledged doctrines of *res judicata* and issue estoppel to be applied in standards committees, the underpinning values of finality and an avoidance of abuse of process hold true.

The fact that the same issue may be considered by successive tribunals does, however, raise the spectre of inconsistent findings by the respective tribunals. While it is unlikely that a standards committee would hear a matter after it has been heard and determined by a court, the reverse is very likely (and probably inevitable). The possibility therefore exists that a court will reach a conclusion on conduct and/or liability which differs from that of a standards committee.

Many lawyers will be able to appreciate that each tribunal is obliged to take its own view of the facts and law in reaching its conclusions and the fact that the conclusions may differ is simply proof of the less than certain nature of the law and fallibility of the fact finding process. This may be compounded here due to the fact that a Standards Committees may “receive in evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not the statement, document, information, or matter that would be

admissible in a court of law”.²³ It is also the case that subject to the rules of natural justice a standards committee “may regulate its procedure in such manner as it thinks fit”.²⁴ While such evidential and procedural differences may justify differing conclusions to lawyers it may be difficult to explain this to an individual who obtained compensation before a standards committee but who was refused relief for the lions’ share of the claim before the ordinary courts.

The likelihood of differing orders may be increased due to the radically different processes involved. Standards Committees are investigatory in nature and while bound by the principles of natural justice²⁵ are not obliged to adhere to any strict rules of procedure. They are also not bound by the rules of evidence and may receive evidence that would not be admissible in a court of law.²⁶ Hearings of Standards Committees are also presumptively on the papers²⁷ although given the wide powers of the Committees there is a strong likelihood that lawyers will request the Committees to exercise their discretion to conduct oral hearings.

Fines and costs

The existing Disciplinary Tribunals have a power to fine lawyers. These penalties have, however, long been of a modest amount. The District Tribunal may fine up to \$2,000²⁸ and the New Zealand Tribunal may fine up to \$5,000.²⁹ It also bears noting that fines appear to be only occasionally imposed in any event.³⁰ This may be in part due to the fact that orders for costs routinely exceed any fine that might be imposed and indeed might be seen as derisive by comparison. There is also the possibility that many practitioners who find themselves before the Tribunal do not have the most successful of practices and would be hard pressed to meet a fine in any event.

Under the new Act a Standards Committee has the power to impose a fine of up to \$15,000.³¹ This is clearly a far more substantial amount than the predecessor District Tribunals, though inflation will undoubtedly eat away at its significance over time. The Disciplinary Tribunal has a power to impose a fine of up to \$30,000.³²

One point that is interesting to note is that orders may be made by Standards Committees only where there has been a finding of unsatisfactory conduct.³³ That is to say that Standards Committees have no jurisdiction to make orders in respect of misconduct which they are of the view has occurred. In such a case it is the role of the Standards Committee to prosecute the matter before the Disciplinary Tribunal.³⁴ Given that the Standards Committees have the power to impose a fine of up to

²³ Section 151.

²⁴ Section 142.

²⁵ Section 142(1).

²⁶ Section 151(1).

²⁷ Section 153(1).

²⁸ Section 106(4)(a) Law Practitioners Act 1982.

²⁹ Section 112(2)(d) Law Practitioners Act 1982.

³⁰ In 2007 the New Zealand Tribunal appears not to have imposed any fines – NZLS 2007 Annual Report p 19.

³¹ Section 156(1)(i).

³² Sections 242(1)(j)).

³³ Sections 156(1) and s 152(2)(b).

³⁴ Sections 152(2)(a) and s 154.

\$15,000 this appears to mean that for the most egregious case of unsatisfactory conduct this very significant fine should be imposed. It should however be noted that unsatisfactory conduct will exist almost exclusively in cases without intent or moral turpitude.

An important practical point is that many lawyers may not be insured for penalties or fines. One readily available professional indemnity policy specifically excludes “punitive, aggravated, liquidated, multiple or exemplary damages, or fines or penalties imposed by law”.³⁵ Any fine imposed by a standards committee or the Disciplinary Tribunal will fall foul of such a clause.

As has been noted, in many cases under the current system the order for costs imposed by the Tribunal far exceeds any possible fine. In 2007 costs orders before the New Zealand Tribunal ranged from modest to one order of in excess of \$92,000.³⁶ There is no suggestion that these orders will reduce in size. It is, however, of note that many lawyers’ indemnity policies will cover such adverse costs awards, as well as the costs of defending professional disciplinary action.

Burden of Proof

Professional disciplinary proceedings sit in a strange twilight zone as regards questions of burden of proof. They are quite clearly not criminal and this has been repeatedly stated by the courts. However, suggestions that such proceedings are merely ordinary civil actions is at odds with the fact that sanctions (rather than merely compensation) are being imposed for wrongdoing. In *Gurusinghe v Medical Council of New Zealand*³⁷ the court, although applying a civil standard, noted that there was an analogy with criminal proceedings in some respects.

Recently in *ADLS v C*³⁸ the court emphasised the protective (as opposed to punitive) function of professional discipline and applied the civil test. In doing so the Court followed the decision of the Court of Appeal in *Z v Complaints Assessment Committee*.³⁹ It has been often noted that in such cases what is required to discharge the civil burden will depend in part on the nature of the conduct which is alleged to have occurred. The idea of a variable civil standard is of course familiar to insurance lawyers who have to grapple with the burden of proof in cases where the insurer seeks to decline a claim on the basis of a fraud either in the proposal or in the claim.⁴⁰

³⁵ Lumley General Professional Indemnity Policy clause 4.7 <http://www.lumleygeneral.co.nz/GetDownload.aspx?st=4&id=38>. See also the Vero policy which in clause 1 appears to cover only “claims for compensation” and fines and penalties would therefore not fall within the cover: [http://www.veroliability.co.nz/dirvz/liability/liability.nsf/AttachmentsByTitle/pdf_PolicyWording_Professionallndemnity/\\$FILE/VL+POL+PI-0903.pdf](http://www.veroliability.co.nz/dirvz/liability/liability.nsf/AttachmentsByTitle/pdf_PolicyWording_Professionallndemnity/$FILE/VL+POL+PI-0903.pdf).

³⁶ *Canterbury District Law Society v Wills* 27 February 2007 NZLPDT. The amount is cumulative of costs of \$22,723.87 to the NZLS and \$69,587.39 to the Canterbury District Law Society.

³⁷ [1989] 1 NZLR 139.

³⁸ (HC, Auckland, 29 April 2008, Randerson, Williams and Winkelmann JJ, CIV 2007-404-4646).

³⁹ [2007] NZAR 343 (CA) (concerning discipline of a dentist).

⁴⁰ *Back v National Insurance Co of NZ Ltd* [1996] 3 NZLR 363.

The applicability of the civil standard in disciplinary proceedings now appears to have been put beyond doubt by the Supreme Court in *Z v Complaints Assessment Committee*⁴¹ which largely upheld the Court of Appeal and affirmed that:

A flexibly applied civil standard of proof should be adopted in proceedings under the [Dental Act 1988] and other similarly constituted disciplinary proceedings in New Zealand unless there is a governing statute or other rule requiring a different standard.

One argument for such a variable standard is simply pragmatic – namely that where the harm to the person against whom the allegation is made is significant an increased standard should apply.⁴² An alternative analysis justifies the shifting standard on the basis of the greater difficulty of proving matters that are increasingly unlikely to have occurred – the inference being that intentional wrongdoing is inherently less likely to have occurred than mere negligence. This was expressed by Lord Nicholls in *Re H* thus:⁴³

When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

It perhaps bears noting that New Zealand appears to have parted ways with English law on the appropriate standard of proof in disciplinary proceedings. In *Campbell v Hamlet*⁴⁴ the Privy Council made very clear the fact that in its view the criminal standard of beyond reasonable doubt was applicable to disciplinary matters, citing with approval *Bhandari v Advocates Committee* [1956] 1 WLR 1442. However in doing so their Lordships observed that the civil standard is flexible and the weight of evidence required to discharge it may increase with the seriousness of the allegations. The statement of Lord Bingham that “the heightened civil standard and the criminal standard [are] virtually indistinguishable”⁴⁵ was cited with approval.

In any event in New Zealand it appears more or less certain that a civil standard of proof will apply, albeit one which will increase with the seriousness of the allegations made. It might also be noted that this is entirely consistent with the statutory framework under the Lawyers and Conveyancers Act (which should of course be the starting place of the analysis). Standards Committees presumptively hear matters on the papers (s153) and are essentially a tribunal of inquiry with wide powers of investigation (s 147). Such a framework is inconsistent with a quasi criminal approach to procedural questions such as onus and burden of proof. Perhaps most tellingly, Standards Committees in particular do not determine questions of misconduct. Rather they simply determine whether an issue of misconduct should be charged before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. Orders of a disciplinary nature are made only in respect of unsatisfactory conduct which encompasses matters of incompetence and negligence. As such the findings

⁴¹ [2008] NZSC 55 25 July 2008 at para 118. Elias CJ dissented on this point.

⁴² *Gate v Sun Alliance Insurance Ltd* [1995] LRLR 385.

⁴³ [1996] AC 563; [1996] 1 All ER 1 at p 586.

⁴⁴ [2005] 3 All ER 1116 (PC).

⁴⁵ *Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340.

which may be made by Standards Committees are not of egregious conduct in respect of which a criminal standard of proof would be appropriate in any event.

Inquiries, Investigations and Admissions

Clauses prohibiting insureds from making any admissions to the other party in respect of a claim are more or less universal in liability policies. Such clauses do not sit well with any professional disciplinary framework, and sit particularly ill with the Lawyers and Conveyancers Act framework under which complaints resolution (including complaints resolution by conciliation, negotiation or mediation) is an important part. The jurisdiction of the Standards Committees falls well under the deductible of many practitioners who belong to larger firms (or have a particularly bad claims record). However it is important to note that not only would an order of \$25,000 be considerably more than the deductible of many smaller firms and sole practitioners, but also that the claim itself may well exceed \$25,000 and the manner in which the issue is resolved before the standards committee may have a significant impact on a subsequent claim in the ordinary courts for the balance.

For this reason it is inevitable that if a lawyer seeks to claim under his or her professional indemnity policy the insurer will take a keen interest in any proceedings before a standards committee and may well take the view that the practitioner should not cooperate by disclosing damning information without compulsion. Of course it should not be ignored that on a purely pragmatic basis enlightened insurers may also seek to engage in a conciliatory manner on the basis that in the long run the overall costs will be less. The likelihood of this approach is enhanced by s 143(5) which makes it clear that no admission or information disclosed in a negotiation, mediation, or conciliation which was directed by a standards committee is admissible before a standards committee (or any other adjudicative forum) except where it would otherwise have been admissible or discoverable.

Standards Committees have wide powers of investigation. They may either exercise those powers of investigation themselves or may appoint an investigator to do so.⁴⁶ The investigatory powers enable the standards committee to require the production of records. Importantly, such an ability to require the production of records relating to clients' affairs will trump any claim of confidentiality. Moreover, any claim of privilege will of course belong to the client and the lawyer will not be able to assert it on their own behalf. A lawyer may only assert privilege in his or her own right where the document in question relates to a relation in which the lawyer him or herself was the client / litigant in respect of which advice was sought or litigation contemplated. In such a case of course the privilege will be absolute.⁴⁷

However, probably the most powerful weapon in the arsenal of the standards committee is found in s 141(b) of the Act under which the committee may "require or permit the person complained against to appear before it to make an explanation in answer to the complaint". Given that the committees also have the power to require evidence to be given on oath⁴⁸ this amounts to a considerable inquisitorial power. Importantly any misconception that practitioners are entitled to remain silent in the

⁴⁶ Section 144.

⁴⁷ *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC).

⁴⁸ Section 151(2).

face of an inquiry should be quickly dispelled. Not only had there never been a right to silence in disciplinary proceedings,⁴⁹ increasingly the rules approach a positive obligation to disclose damning information to a standards committee on inquiry.

Conclusion

There are significant parallels between the preceding framework of professional complaints and discipline under the Law Practitioners Act 1982 and those now in place under the Lawyers and Conveyancers Act 2007. It would, however, be a significant error to leap to the conclusion that little has changed. Although the core procedures of investigation and prosecution remain the same, it should be noted that Standards Committees are both first ports of call for complaints, and Tribunals with considerable summary jurisdiction. With the cumulative powers of compensation orders and fines, and the ability to impose significant costs orders the potential exposure of lawyers who are brought before such committees is considerable.

However, the more significant shift is perhaps more subterranean. There has been a significant change in emphasis from a focus on misconduct and discipline to inadequate professional service and redress. This has been accompanied by a top to bottom rewriting of the rules of professional conduct (now the Rules of Conduct and Client Care). Additionally there has been an across the board increase in the input from outside of the profession. This includes lay membership on Standards Committees and the Disciplinary Tribunal, the advent of the Legal Complaints Review Officer (replacing lay observers and radically expanding the role), and self regulation under the shadow of intervention by the Minister of Justice. While only time will tell exactly what impact these additions will have, early signs suggest that a major shift towards client focussed regulation is in progress.

Duncan Webb
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⁴⁹ *Bowen-James v Walton* (New South Wales Court of Appeal, unreported, 5/8/91), *Belhumeur v. Barreau du Québec (Comité de discipline)* (1988), 54 D.L.R. (4th) 105 (Que. C.A.) at 117; *Re White Cartwright*, PJ, Chair: Medical Practitioners Disciplinary Tribunal (MPDT), 87-98-36C, Aug 20, 1999.