CASE NOTES

CLYNE v. THE BAR ASSOCIATION OF NEW SOUTH WALES[1]

Legal practitioners—Conduct of case for client without means—Professional misconduct—Standard required

In *Tuckiar v. The King*,[2] four members of the High Court in a joint judgment said, 'Our system of administering justice necessarily imposes upon those who practise advocacy duties which have no analogies, and the system cannot dispense with their strict observance'. In the present case, the High Court has specified the nature of some of those duties and has provided therein a very useful guide to the responsibilities of advocates.

Before considering the substance of the decision, the facts, which are not without interest, should be adverted to. J and his wife (or reputed wife) had indulged in what the High Court described as an 'orgy of litigation', most of which had been initiated by J. The lady, however, had commenced some four proceedings and in the course of these, J came to the conclusion that these proceedings would be abandoned or easily compromised if the lady's solicitor could be prevailed upon not to act for her. It was at that stage, apparently, that J changed his solicitor and counsel, and the new solicitor instructed the appellant, a member of the Bar of New South Wales, to act for J. The appellant was consulted by J to see what could be done about the lady's solicitor and the appellant suggested three possible lines of attack on the solicitor. Finally, it was decided that the best plan would be to prosecute the lady's solicitor for the common law misdemeanour of maintenance. It was hoped that rather than face trial for these alleged offences, the solicitor would agree to cease to act. The proceedings were taken with the sole object of eliminating the solicitor and the High Court described 'the whole enterprise' as being 'irresponsible and mischievous'.[3]

Four informations, one in respect of each of the abovementioned proceedings, were accordingly laid against the solicitor, and in the course of opening the proceedings, 'the appellant deliberately used the occasion to make a savage public attack on the professional character of that solicitor. He made that attack in extravagant terms, alleging fraud, perjury and blackmail. He knew that he had no evidence to substantiate such allegations.'[4] At the end of his opening, the appellant invited the solicitor to cease to act for the lady and the criminal proceedings could be discontinued. The solicitor refused this offer, evidence was led and the solicitor was committed for trial. It is sufficient to say that the High Court expressed the view that on the evidence the solicitor should not have been so committed.

Proceedings were then taken in the Supreme Court of New South Wales to strike the name of the appellant off the roll of barristers on the ground that in the abovementioned circumstances he had been guilty of such grave professional misconduct as showed him not to be a fit and proper person to practise as a barrister. The Supreme Court held that the appellant was guilty of such misconduct and, in consequence, disbarred

[1] (1960) 34 A.L.J.R. 87. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Menzies and Windeyer JJ.
[2] (1934) 52 C.L.R. 335, 347.
[3] (1960) 34 A.L.J.R. 87, 89.
[4] (1960) 34 A.L.J.R. 87, 88.

him. From the order of the Supreme Court, the appellant appealed to the High Court which rejected his appeal.

In the course of giving judgment, the High Court referred to a number of matters of essential importance to practitioners. The first and foremost of general interest to the whole profession was a statement (made by way of *obiter dictum*) that there was no unlawfulness in a solicitor undertaking a case with the knowledge that he may never be paid unless his client should be successful in the litigation. This proposition was subject to two conditions; first, that the solicitor had considered the case and believed that his client had a reasonable cause of action or defence, as the case may be; and secondly, that he must not bargain with his client for an interest in the subject matter of the litigation or for remuneration proportionate to the amount which may be recovered by his client in the proceeding. It may interest the reader to know that in many states of the United States of America, a 'contingency fee' (that is, a proportion of the recovery) is quite legitimate and, frequently, is very remunerative to the practising attorney who, in some states, may retain as much as 33⅓ *per cent* of the amount recovered.

The second matter of interest in the judgment of the High Court was an exposition of the duties of an advocate. The High Court divided the rules which governed these duties into two classes. The first were merely conventional, but important. Usually breach of them did not lead to disbarment, unless persisted in deliberately. Of this class, the High Court cited the examples of a Queen's Counsel always appearing with a junior and the prohibition against advertising. The second class was quite distinct and fundamental to the practice at the Bar. These rules rested essentially on generally accepted standards of common decency and fairness. To the Bar, it was more a matter of 'does not' than 'must not'. For example, counsel have many privileges, including the unqualified privilege of saying anything they think proper, without fear of being sued for slander. Such privilege must not be abused. It would be quite unfair for counsel in his opening to say scurrilous things about a person knowing that he had no evidence to support his allegations. Common decency would inhibit most practitioners from doing such a thing. A sense of fairness would demand that it should not be done.

But here lies the daily problem facing every advocate. He is the *alter ego* of the client and he is bound to act fearlessly and solely in the interests of his client. One remembers the example of the unfortunate Dr E. V. Kenealy Q.C., who became so wrapped up in the case of his client, Orton, the Tichborne pretender, that in the face of a hostile court he 'showed a signal lack of discretion and decorum and scattered improper charges broadcast and insulted the Judges, all in the supposed interests of his client'.[5] So an advocate can easily become too zealous in his client's cause, forgetting the inhibitions imposed on him in his professional capacity. The crucial question arises—how far should he go in his client's interest? The High Court attempts to answer this question by pointing out that there was no written code thereon to which an advocate could be referred but in the exercise of his privileges and in the course of his fighting he must not overstep the obvious bounds of common decency and fairness. No one can positively predicate the dividing line between the duty to the client and the responsibility as a practitioner, but in every case the advocate must use his judgment. If he is

[5] Lord Maugham, *The Tichborne Case* (1936) 368.

alive to his responsibilities, he will know what he should do or not do. It is to be hoped that as a result of *Clyne's* case advocates will not be deterred from carrying on their clients' causes with characteristic courage and intellectual vigor. At the same time, it is equally to be hoped that *Clyne's* case will be a constant reminder not to abuse the privileges granted to counsel in the combative processes adopted in our system of justice. The ultimate responsibility must be a personal one. It depends primarily on the self-discipline exerted by the individual, and on the collegiate discipline exerted by a Bar Association through precept and example. If these should fail then drastic steps as in this case must be taken to ensure that privilege does not become the avenue of abuse and injustice to innocent people.

It should perhaps be added that although proceedings were taken in this case in New South Wales under legislation quite different from that in Victoria, the same kind of principles would apply to practitioners in this State and, in particular, with respect to barristers. The latter practitioners are subject to the provisions of the Legal Profession Act 1958, and if any were guilty of misconduct in the relevant sense, they could be struck off the roll of barristers and solicitors. In assessing whether their conduct as barristers amounted to misconduct the same kind of consideration would have to be made as was given by the High Court to *Clyne's* case. As a result, the reasons for judgment in that case are of particular interest to any persons practising or intending to practise solely at the Bar and should be read carefully by them as a guide to their future behaviour when faced with the problem of reconciling their forensic duty to their client with their responsibility as professional men engaged in the judicial procedures in which they are required to act decorously, fairly and according to the standards of common decency.

O. J. GILLARD Q.C.

CHIEF SECRETARY OF NEW SOUTH WALES v. OLIVER FOOD PRODUCTS PTY LTD[1]

Statutory bodies—Tests as to Crown agency—Immunity from statute—Terms of incorporation

The plaintiff, the Chief Secretary of New South Wales, a Minister of the Crown, and established as a corporation sole by section 41A of the Fisheries and Oyster Farms Act 1935-1949 (N.S.W.), sued the defendant for the price of fish sold and delivered to the defendant. Section 41A entitled the plaintiff to sue in and by its corporate name. The defendant pleaded that, as the sales in question were completed before 1949, the action had not been brought within six years of accrual of the cause of action, and he relied on the Statute of Limitations[2] to bar the claim. The plaintiff demurred to this on the ground *inter alia* that under section 41A of the Act the plaintiff was an agent of the Crown and thus immune from the operation of the Statute of Limitations, by virtue of the Crown privilege of immunity from statute unless expressly or impliedly bound.

The three judges of the New South Wales Supreme Court agreed that the plaintiff represented the Crown, and was not bound by the Statute. Judgment was given for the plaintiff on the demurrer.

[1] (1960) 77 W.N. (N.S.W.) 122; Supreme Court of New South Wales; Herron, Sugerman and Else-Mitchell JJ. [2] 21 Jac. I c. 16.