

LAWYERS, LANGUAGE AND LEGAL PROFESSIONAL STANDARDS: *LEGAL SERVICES COMMISSIONER v TURLEY* [2008] LPT 4

NICKY JONES *

I INTRODUCTION

Lawyers have a duty to cooperate with other legal practitioners, with clients and with others they deal with in practice, and to treat them with courtesy. The duty includes the expectation that a practitioner will not use irresponsible, provocative, offensive or intimidatory language during court proceedings or in any other public forum. The Roman poet Horace is said to have noted that ‘lawyers are men who hire out their words and anger’. The modern lawyer too will get angry. Sometimes it is feigned, but genuine anger is still inevitable in a role that necessarily involves conflict. But what the lawyer does with his or her anger or how the lawyer gives expression to it is, as it is for any person, a matter for ethical evaluation.

The use of poor or aggressive language is an area where discipline applications seem to be on the rise. As is evident from the analyses of courts and tribunals, this is much more than a simple question of decorum. It can raise significant questions regarding the place of the lawyer in the administration of justice. This became evident in the decision of the Legal Practice Tribunal in *Legal Services Commissioner v Turley*,¹ in which a solicitor was charged with making ‘scandalous and offensive submissions’ during court proceedings and using an intimidatory approach to a judicial officer. Drawing on the principles expressed in disciplinary proceedings case law in this area, the article will consider some of the issues arising in relation to a legal practitioner’s use of offensive language or intimidatory conduct.

II *LEGAL SERVICES COMMISSIONER v TURLEY*

A Charges against the legal practitioner

In this case, the respondent solicitor, Mr Turley, was charged with two breaches of professional standards.

The first charge was based on comments made by Mr Turley in the course of representing a mother in child protection proceedings in the Magistrates Court at Gladstone. In his first comment, Mr Turley described the service of an affidavit upon his client, presumably by the Department of Child Safety, as ‘the lowest act of any department that this office has seen. Certainly the lowest act I have seen in 35 years by the department.’ He further commented that ‘one cannot trust the department. It is almost staffed by animals.’ Next, Mr Turley described an order that his client’s children undergo psychological treatment as one which asked ‘the client, my client, to let her children be killed or destroyed by’ the relevant doctor. Finally, he stated that ‘the children should be returned to my client and not put in the hands of these people who are almost like a (coven) of witches.’²

The second charge concerned a letter written by Mr Turley and sent to the presiding magistrate three days after the hearing. During the hearing, the magistrate had warned the

* BA(Hons), LLB(Hons) (UQ), Licence ès Lettres Modernes (Mention FLE) (Orléans), PhD (UQ), Lecturer in Law, University of Southern Queensland.

¹ [2008] LPT 4.

² *Legal Services Commissioner v Turley* [2008] LPT 4, 2.

solicitor, saying ‘If you continue using language like that I will report you to the Law Society.’ Mr Turley claimed in his letter that he was concerned by ‘threats’ that had been made by the magistrate during the hearing and considered that the threats constituted ‘a threat with menaces not only arising in this case but in other matters into the future.’ Moreover, he stated in the letter, ‘such was the degree of impropriety of that threat that you should disqualify yourself from further conduct of this matter.’³

B Tribunal reasons and orders

The Legal Practice Tribunal found that ‘[t]he use of grossly offensive language in the course of Court proceedings and an intimidatory approach to a judicial officer based on an untenable interpretation of what had occurred in the Court proceedings [were] matters of some gravity.’⁴

In relation to the second charge, the Tribunal confirmed that Mr Turley’s letter was ‘an improper ex parte communication with the Bench’ and that his contention was untenable: the magistrate had made a ‘reasonable attempt to pull [Mr Turley] into line’ and should not have been subjected to the implied intimidation in the letter nor to pressure to disqualify himself when there was simply no justification for him to do so.⁵

The Tribunal ruled that each of the breaches surpassed unsatisfactory professional conduct and amounted to professional misconduct.

III ISSUES FOR THE COURT TO CONSIDER

A Professional privilege and responsibility

An important issue arising in this case concerns the lawyer’s role as an officer of the court. Although a legal practitioner has a clear duty to represent and advance a client’s interests,⁶ the courts have cautioned that that this duty is subject to the practitioner’s duty to the court to act with fairness, honesty and candour.⁷ As an officer of the court, a legal practitioner must not cast baseless aspersions on other parties, witnesses or third parties. The professional privilege and immunity from prosecution which advocates enjoy in relation to their court work impose on them a commensurate professional responsibility not to make allegations without a sufficient basis or reasonable grounds.

The issues of professional privilege and responsibility were discussed in *Clyne v NSW Bar Association*,⁸ in which the High Court considered the conduct of a barrister who deliberately used court proceedings ‘to make a savage public attack on the professional character’ of a solicitor who was the subject of the proceedings.⁹ The court affirmed the earlier decision to disbar the barrister and noted that ‘from the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of

³ Ibid 3.

⁴ Ibid 4.

⁵ Ibid 3.

⁶ See comments by Lord Reid in *Rondel v Worsley* [1967] 3 All ER 993, 998; see also rule 12.1 of the Law Council of Australia’s *Model Rules of Professional Conduct and Practice*, rule 16 of the *Legal Profession (Barristers) Rule 2007* (Qld) and rule 12.1 of the *Legal Profession (Solicitors) Rule 2007* (Qld).

⁷ *Clyne v NSW Bar Association* (1960) 104 CLR 186, 200-1; *Giannarelli v Wraith* (1988) 165 CLR 543, 555-7.

⁸ (1960) 104 CLR 186.

⁹ Ibid 188.

doing harm which it confers, should not be abused. Otherwise grave and irreparable damage might be unjustly occasioned.’¹⁰ The court observed that the disbarring order was made ‘from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege.’¹¹ This principle was cast as rule 37 of the *Legal Profession (Barristers) Rule 2007* (Qld), which states that a barrister must take care to ensure that any decisions to make allegations or suggestions under privilege against any person are reasonably justified or appropriate and are not made principally in order to harass or embarrass the person or to gain some collateral advantage.¹²

In line with the Law Council of Australia’s *Model Rules of Professional Conduct and Practice*, legal practitioners ‘in all their dealings with the courts [...] should act with competence, honesty and candour.’¹³ Rule 13.3 further provides that a practitioner must not ‘express views to a court on any material evidence or material issue in the case in terms which convey or appear to convey the practitioner’s personal opinion on the merits of that evidence or issue.’ This prohibition has been incorporated into rule 13.3 of the *Legal Profession (Solicitors) Rule 2007* (Qld) and rule 22 of the *Barristers Rule*.

In view of these principles, Mr Turley’s comments on which the first charge was based clearly constituted an unbalanced and emotive attack on the Department of Child Safety. In terms which were neither measured nor moderate, he conveyed to the court his apparent personal opinion of the actions, staff and professionalism of the department. The suggestion that either the opposing side or the court were asking his client ‘to let her children be killed or destroyed’ by allowing them to undergo psychological treatment was plainly ridiculous and indeed insulting.

B *Offensive language*

Further reinforcing the requirement to act with ‘honesty, fairness and courtesy’, rule 21 of the *Solicitors Rule* (based on rule 21 of the *Model Rules*) also stipulates as follows:

A solicitor, in all of the solicitor’s dealings with other legal practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the solicitor’s communications are courteous and that the solicitor avoids offensive or provocative language or conduct.

Mr Turley’s comments in his letter sent to the presiding magistrate after the proceedings, in which he stated that he regarded the magistrate’s mild admonition as ‘a threat with menaces not only arising in this case but in other matters into the future’ and that the threat constituted a strong degree of impropriety, were unnecessarily belligerent. They were also arguably imprudent. Although no legal professional rules specifically address the issue of a practitioner’s relationship with the bench and there is no rule expressly prohibiting practitioners from advising the bench of their concerns regarding any disadvantage that they believe might flow from judicial conduct, ordinary professional prudence would suggest that the latter course be undertaken only where strictly necessary: where great disadvantage to

¹⁰ Ibid 200-1.

¹¹ Ibid 201-2.

¹² More recently, in *NSW Bar Association v di Suvero* [2000] NSWADT 194, a barrister whose ‘hostile exchanges’ with a prosecutor and ‘angry remarks’ to the presiding judge were found to constitute unsatisfactory professional conduct was suspended from practice for three months.

¹³ Law Council of Australia, *Model Rules of Professional Conduct and Practice*, 12.

their client might result or where clear judicial bias had been demonstrated. In the present case, the magistrate's mild warning to Mr Turley that his continued use of unsatisfactory language might result in a possible report to his professional association does not appear to fall into either of those categories.

Six months after *Turley*, the Legal Practice Tribunal again considered the question of improper language used by a solicitor in court in *Legal Services Commissioner v Winning*.¹⁴ In this matter, Mr Winning had referred to the Director of Public Prosecutions ('DPP') as 'this stupid woman' and 'this silly woman' during his submissions to the magistrate. Although Mr Winning apologised to the DPP nearly two years after making the comments, the tribunal found that his language was 'grossly offensive and insulting', was highly discourteous to both the DPP and the court and 'had the potential or tendency to bring the legal profession and criminal justice system into disrepute'. Accordingly, the tribunal held that Mr Winning's comments constituted professional misconduct.¹⁵

In a comparable Western Australian case – *Legal Practitioners Complaints Committee v Quigley*¹⁶ – the State Administrative Tribunal considered complaints that a legal practitioner had engaged in 'intimidatory and threatening behaviour' by making numerous claims in letters sent to the Legal Practitioners Complaints Committee and its Law Complaints Officer in relation to disciplinary proceedings initiated against him, including that the Committee and Complaints Officer were guilty of 'serious impropriety', 'arrogance and foolishness', 'invention and misrepresentation', 'unprofessional conduct', 'deceit and malice' and 'perjury'. The tribunal noted that these were 'allegations of the most serious nature' which had not been supported by any evidence. Accordingly, the tribunal found Mr Quigley guilty of unprofessional conduct consisting of 'conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence'.¹⁷

Another recent case on point was *Council of the New South Wales Bar Association v Slowgrove*.¹⁸ In this matter, Mr Slowgrove had sent several letters to the magistrate presiding over proceedings in which he was appearing, including one in which he stated that he expected the magistrate to recuse himself immediately from the proceedings, indicated that he regarded the magistrate as personally liable to his client for exemplary damages and suggested that the magistrate could be liable for breaches of international law. The Administrative Decisions Tribunal considered that the letter contained inflammatory and 'inappropriate language' and a 'threatening tone' which was clearly intended to intimidate. Accordingly, Mr Slowgrove's conduct was found to constitute professional misconduct, 'namely, conduct occurring in connection with the practice of law that would justify a finding that he is not a fit and proper person to engage in legal practice.'¹⁹

C Mitigating factors

1 Medical conditions

Although a solicitor may plead medical illness or substance addictions in an attempt to justify or mitigate the seriousness of his or her misconduct, evidence of such conditions will not

¹⁴ [2008] LPT 13

¹⁵ Ibid [62]-[64].

¹⁶ [2005] WASAT 215.

¹⁷ Ibid [148]-[149].

¹⁸ [2009] NSWADT 150.

¹⁹ *Council of the New South Wales Bar Association v Slowgrove* [2009] NSWADT 150, [18]-[19].

necessarily carry any weight since it does not address the protective function of disciplinary proceedings. This is all the more so where the solicitor's misconduct has involved dishonest behaviour.²⁰ A review of Australian case law confirms that courts will be reluctant to accept mental illness or addictions as factors mitigating a lawyer's liability for breach of professional standards.²¹ However, if a court is convinced that a solicitor's misconduct is indeed attributable to a mental illness or other condition, it may order that the solicitor be suspended from practice for a period of time in order to address and recover from or control the condition. If the court allows the solicitor to remain in practice, such practice may be subject to certain conditions.²²

In *Turley*, the Legal Practice Tribunal noted that Mr Turley had been suffering from depression and other medical problems at the time the events took place but was now receiving 'proper treatment' for these conditions. The tribunal took into account these 'personal circumstances', as well as his previously unblemished record, and ordered that he receive a public reprimand.

However, the tribunal also noted that it had the opportunity to 'mould an order which will assist the [solicitor] to avoid the recurrence of these sorts of problems.' Accordingly, it made its orders conditional upon Mr Turley's undertakings to the tribunal that he would seek further psychological counselling and treatment, and further ordered that he provide a psychologist's report in respect of his mental state to the Legal Services Commissioner within 12 months.

2 Attitude

The lawyer's attitude to a tribunal's concerns about the use of poor or intimidating language may also influence the court. So, for example, any attempts to conceal or make light of professional misconduct, to explain, justify or deny it or to shift blame or diminish culpability for it will not be well regarded by the court. In *Legal Services Commissioner v Baker*,²³ the Legal Practice Tribunal found that Mr Baker's use of insulting and offensive language to or in the presence of clients and members of his staff, together with his attempts at self-justification and his 'persistence and reluctance to accept the implications of his behaviour', constituted a high degree of unprofessional conduct.²⁴

Similarly, in *Slowgrove*, the Administrative Decisions Tribunal expressed its concern over Mr Slowgrove's varying approach to his conduct and the proceedings, ranging from his 'carefully couched denial' that he had written the letter and failure to apologise for it to his final concession at the hearing that he had indeed drafted the document. Indeed, the tribunal noted that the 'single most troubling consideration' was the barrister's absence of contrition, or even a sense of any need for contrition, and his 'evident lack of insight into his behaviour'.²⁵

²⁰ *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467, [28]-[29] and [39]-[40].

²¹ *Legal Practitioners Conduct Board v Trueman* [2003] SASC 58, [23]; *The Law Society of South Australia v Murphy* (1999) 201 LSJS 456, [21]-[28].

²² *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320, [32]-[33]; *Prothonotary of the Supreme Court of NSW v Farran* [2003] NSWCA 372, [14]-[17].

²³ [2005] LPT 2.

²⁴ *Legal Services Commissioner v Baker* [2005] LPT 2, [222]-[224].

²⁵ *Council of the New South Wales Bar Association v Slowgrove* [2009] NSWADT 150, [22], [24], [26].

Conversely, if a lawyer responds honestly and frankly to the court's enquiries, pleads guilty, acknowledges genuine remorse and provides evidence of rehabilitation or restoration to those who have suffered as a result of the breach, the court may reduce the severity of the disciplinary sanction imposed.²⁶ An apology tendered at the time of making improper comments may therefore also serve to mitigate their effects and, accordingly, any resulting penalty orders made against a practitioner. In *Winning*, the tribunal concluded that some of Mr Winning's comments, although 'offensive, insulting and discourteous not just to the opponent but also troubling to the Bench', did not tend or have the potential to bring the legal profession or the criminal justice system into disrepute because he had offered an immediate apology in court, which meant that any person who heard the disparaging words would also have heard the apology.²⁷

In the present case, although Mr Turley did not tender an apology either to the court or the magistrate, there was no evidence that he did not accept the allegations made against him. He had sought medical treatment for his depression and other problems, as was clear from a psychologist's report considered in the proceeding, and he offered undertakings to the tribunal that he would undergo further psychological counselling and treatment.²⁸ Moreover, the tribunal took into consideration his 'personal circumstances' (such as, presumably, his age and perhaps also his medical conditions), the many years he had practised, the fact that he had not previously been found guilty of any professional breach and that he had admitted the two charges brought against him by the Legal Services Commissioner.²⁹

D Sanctions

In cases where lawyers have on single occasions used insulting or offensive language to an opponent, the lawyers involved have been reprimanded or severely censured.³⁰ In contrast, a court will be critical of any evidence of persistent reoffending, as was clear in *Baker*.³¹ It will also consider whether there is any element of dishonesty or other impugning of the solicitor's integrity inherent in his or her conduct, absence of which will count in the solicitor's favour.³² In *Turley*, Mr Turley's conduct did not reflect adversely on his honesty or integrity. Although his 'use of grossly offensive language in the course of Court proceedings and an intimidatory approach to a judicial officer based on an untenable interpretation of what had occurred in the Court' were clearly in breach of legal professional standards and indeed were 'matters of some gravity',³³ they did not attract a severe sanction.

IV CONCLUSION

As the case law indicates, high standards of professionalism and courtesy are imposed on a legal practitioner's conduct and language in relation to other practitioners and these standards are reflected in the penalties which a court will impose on a practitioner whose conduct and language fall short. The message that courts send to practitioners is clear: lawyers should

²⁶ See, for example, *Attorney-General v Bax* [1999] 2 Qd R 9, 23-5.

²⁷ *Legal Services Commissioner v Winning* [2008] LPT 13, [32].

²⁸ *Legal Services Commissioner v Turley* [2008] LPT 4, 4.

²⁹ *Ibid* 2, 4.

³⁰ See *Re a Solicitor; Ex parte Prothonotary* (1952) 69 WN (NSW) 356, 358; also *Council of the New South Wales Bar Association v Slowgrove* [2009] NSWADT 150, [22].

³¹ [2005] LPT 2, [216], [223]-[224].

³² See, for example, *Council of the Queensland Law Society Inc v Cummings; Ex parte A-G (Qld) and Minister for Justice* [2004] QCA 138, [24]-[25].

³³ *Legal Services Commissioner v Turley* [2008] LPT 4, 4.

avoid any attempt to mislead, threaten or intimidate other practitioners, including judicial officers, or the use of any offensive, derogatory or improper language when communicating with clients, staff or other members of the profession.

A lawyer's breach of the high standards of legal professional conduct and courteous language may have significant consequences for the lawyer, giving rise to professional disciplinary proceedings and the possible award of penalties against him or her. However, its consequences for the profession may be even more significant: it may diminish public confidence in the legal profession, judicial system and administration of justice as a whole. The rise – across Australia – in the number of disciplinary proceedings for this behaviour is, for a profession whose public image is already in decline,³⁴ cause for serious concern.

³⁴ A 2009 Morgan 'Image of Professions' survey indicated that only 30% of respondents believed that lawyers had high or very high standards of ethics and honesty, down from 44% in 1984. Roy Morgan Research <<http://www.roymorgan.com/news/polls/2009/4387>> at 27 October 2009.