LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

BETWEEN:

ELIZABETH CAMERON

Applicant

AND

LAW SOCIETY NORTHERN TERRITORY

First Respondent

AND

CATHY SPURR
Australian Legal Practitioner

Second Respondent

Coram: Julian Wade Roper (Deputy Chair)
Richard Giles (Legal member)
Heather King (Lay member)

Appearances:
Applicant: Mr Stuart Cameron (with leave) and the Applicant
First Respondent: Tass Liveris
Second Respondent: Ben O'Loughlin

REASONS FOR DECISION

This matter was heard before the Disciplinary Tribunal on 18 October 2018. At that time the Tribunal determined to dismiss the Applicant's appeal with written reasons to be provided. What follows are the Tribunal's written reasons.

Roper Deputy Chair:

Background

1) By Notice of Appeal dated 9 May 2018 (NoA), the Applicant seeks to appeal a decision of the First Respondent (LSNT), notified to her on or about 19 April 2018. That decision being to dismiss a complaint made by the Applicant against the Second Respondent (Spurr).

2) The subject complaint was issued 23 November 2017 and concerned an alleged failure on the part of Spurr to advise the Applicant that any lump sum settlement of a claim the Applicant had made under the *Return to Work Act,* for which she was then in receipt of benefits – the claim having been accepted, may preclude the Applicant from an entitlement to Centrelink benefits.

3) On 8 December 2017, Spurr responded to the complaint, in writing to the LSNT. Relevantly Spurr denies she was under any duty to so advise and asserts that advice of this nature would require a detailed consideration of a client's and their partner's financial circumstances and would constitute financial rather than legal advice.

4) The LSNT subsequently sought an opinion from Mr Matthew Littlejohn as to what duty, if any, a practitioner may owe in this regard and was subsequently provided with oral advices and an e-mail[1] from Mr. Littlejohn relevantly stating, *inter alia*:

> *"The minimum standard, in my opinion, would be to advise the client a preclusion period may apply and recommend that they make enquiries before settlement. Best practice would be to use the online estimator on the Centrelink website to provide the client an estimate of the likely period."*

5) Mr. Littlejohn's opinion was then provided to Spurr and on or about 21 December 2017, Spurr sourced and provided to the LSNT a submission by Mr. O'Loughlin and an attached opinion from Mr. Spazzapan, both to the effect no such duty arose in the factual circumstances of this particular case.

6) At some point in time following receipt of the O'Loughlin submission and prior to 19 April 2018, the Council of the LSNT determined to dismiss the complaint under s498(b) of the *Legal Profession Act* (the Act). As intimated above, the LSNT then notified the Applicant of that decision, in writing, on 19 April.

7) The LSNT arrived at that decision without first providing the Applicant with copies of Spurr's response, O'Loughlin's submission and/or Mr. Spazzapan's opinion.

The nature of the Appeal

8) An appeal under s506(1)(a) of the Act is by way of rehearing.[2]

9) Section 511 then provides that the Tribunal must, on hearing the appeal, either:

   a) affirm the LSNT's decision;

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1 Bearing the delivery date 11 December 2017.

2 See s507(1).

b) set aside the decision and direct the LSNT to commence disciplinary proceedings before the Tribunal; or

c) set aside the decision and take the action the LSNT could take under s499(2) of the Act.

10) The stem to s499(2) is expressed in discretionary rather than mandatory terms and provides the LSNT with power to reprimand[3] and/or fine a practitioner. The fact that the stem is discretionary suggests that the LSNT could also, having found a complaint otherwise made out, determine to take no action. The fact that elsewhere in chapter 4 of the Act the mandatory language finds expression, makes the juxtaposition of the discretionary language in this section particularly supportive of the foregoing construction.

11) Before the Tribunal can set aside the LSNT's decision, it first needs to be satisfied the decision was in error.[4]

12) In the present case, the ultimate finding of the LSNT was expressed to be:

> *"...the complaint should be summarily dismissed under s498(b) of the LPA on the ground that there is no reasonable likelihood that Spurr would be found guilty by the Disciplinary Tribunal of either unsatisfactory professional conduct or professional misconduct."*

13) Ostensibly that ultimate decision was predicated upon a finding that Spurr owed no duty to advise as to any preclusion period and consequently and in failing to do so, could not be said to have engaged in any conduct that could be described as falling *"short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian Legal practitioner".*[5]

14) Both Mr. Liveris and Mr. O'Loughlin submitted that if the Tribunal is satisfied the LSNT's ultimate decision was correct, notwithstanding any errors in the processes by which it arrived at the same, the Tribunal has no power or discretion to do other than affirm it. I accept that submission as correct.

The Grounds of the Appeal

15) The NoA fails to succinctly articulate the grounds of the Applicant's challenge to the LSNT's decision. With the assistance of Mr. Cameron and at the commencement of the hearing, the Applicant articulated the main foundations of the challenge as follows:

a) the LSNT had erred in failing to provide the Applicant with procedural fairness, in that it ought have sourced independent opinions from other practitioners in answer to the opinions expressed by Mr. Spazzapan, Mr. O'Loughlin and Spurr; and

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3 Either publically or in special circumstances privately.

4 *CH v Mental Health Review Tribunal & Anor* (2017) 320 FLR 417 at [20] to [26]; *Allesch v Maunz* (2000) 203 CLR 172 at [23] per the plurality; *Coal and Allied Operations Pty Ltd –v- Australian Industrial Relations Commission & Ors* (2000) 203 CLR 194 at pp203-204 per Gleeson CJ, Gaudron and Hayne JJ.

5 As per the definition of "unsatisfactory professional conduct" in s464 of the Act.

b) the LSNT erred in characterising Mr. Littlejohn's opinion as to the duty a solicitor owed as a statement as to best practice, when that opinion was clearly an opinion that the minimum standard was one which required a solicitor to advise on the fact that a preclusion period may apply and Mr. Littlejohn's comments as to best practice were referable to what a solicitor ought advise a client to do in respect of their own investigations into that potentiality.

16) As the hearing progressed it became clear that the Applicant relied on the foregoing errors as having poisoned the LSNT's ultimate decision, in that the real gravamen of the Applicant's challenge was that the LSNT, but for these errors, ought have found that a duty to advise did exist and that in failing to so advise Spurr had fallen short of the standard of competence and diligence that a member of the public was entitled to expect of a practitioner.

17) In the alternative to the submission that no duty was extant, Mr. O'Loughlin advanced a submission that even were Spurr under any such duty, the mere failure to observe the same did not result in a sufficient basis for a finding that she had fallen short of the requisite standard of competence and diligence.

18) Mr. O'Loughlin submitted that what was required for a finding of unsatisfactory professional conduct in this regard was something more than mere negligence and relied upon a number of authorities in support of that proposition, namely *Spero Pitsikas* (1995) 1 LPDR (No 1) 5; *Law Society of NSW v Webb* [2012] NSWADT 114;[6] *Margiotta v Law Society of NSW (No 2)* [2007] NSWADT 65 and *Council of NSW Bar Association v Asuzu [2011] NSWADT 209.* My own research into the authorities has failed to turn up any more definitive authority.

19) Each of the foregoing decisions tend to suggest that something more than *"mere negligence"* is required in order for a practitioner's conduct to constitute unsatisfactory professional conduct.

20) The language of s496 of the *Legal Profession Act 2004 (NSW)* is in identical terms to that found in s464 of the Act.

21) The difficulty with the cases Mr. O'Loughlin relies upon is that they all appear to implicitly read words of limitation into the definition of unsatisfactory professional conduct, allowing for an exclusion of mere negligence not deemed sufficiently serious to merit a "black mark" against a particular practitioner's name.

22) They do so in the absence of any specific identification of ambiguity in the Act and in circumstances where the language of s464 does not appear in conflict with the Act's objects or purposes.

23) Moreover and on this construction, the test of what *"falls short of the standard of competence and diligence that a member of the public is entitled to expect"* under s464 is, under the subject authorities, necessarily put at a different level from the test that would apply in a common law action for negligence.

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6 This matter was subsequently appealed by the NSW Law Society, seeking findings of professional misconduct as opposed to unsatisfactory professional conduct. In that appeal Meagher JA (with whose judgment Leeming and Simpson JJ concurred), neutrally and in *obiter*, references the comments in the decision below referable to *Spero Pitsikas*: *Council of the Law Society of New South Wales v Webb* [2013] NSWCA 423.

24) That approach would seem inconsistent with the divination of legislative intent as provided for in *New South Wales Bar Association v Bland*.[7] In that matter the Administrative Appeals Tribunal specifically references and reproduces extracts from the second reading speech with respect to the NSW legislation and relevantly opines:[8]

> *"The above second reading speeches make clear that one of the mischiefs at which the legislation was aimed, was that conduct of lawyers falling short of serious professional misconduct, such as delay and negligence, was not subject to disciplinary action. The legislation was aimed to make such conduct subject to disciplinary action."*

25) There is another construction of the Act available, namely that a proper construction of the language of s464 results in any negligent conduct of a practitioner, in the performance of that practitioner's practice of law, necessarily satisfying the definition of unsatisfactory professional conduct. This construction would seem to fit better with the divination of legislative intent provided for in *Bland*.

26) Under such a construction, it does not follow that having found such conduct disciplinary action must necessarily result.

27) Under this latter construction it is at the stage of consideration of a penalty that the seriousness of the negligence ought be considered. On this construction, one would no doubt argue that is precisely why the language to the stem of s499(2) is discretionary rather than mandatory. At that point and if the conduct is considered to constitute "mere negligence" and/or otherwise is considered conduct not meriting a "black mark" against the practitioner's name, the LSNT under s499(2) and the Tribunal exercising those same powers under s511(1)(a)(iii), could determine to impose no penalty and take no further action.

28) The problem with this latter construction results from s500 of the Act, which provision requires the LSNT to maintain a record of its decisions.

29) In such circumstances and even were the LSNT or Tribunal of the view that any unsatisfactory professional conduct resulting from mere negligence in the circumstances of a particular case was not deserving of censure, the affect of a finding of such conduct and then no action under s499(2) would still result in a record adverse to the practitioner. The negative finding would still subsist and the dreaded "black mark" still result.

30) Where there are competing constructions available, that most consistent with the objects and purposes ought be preferred.[9]

31) While both constructions admit of some difficulty, on balance it is my view that the position taken by the authorities cited by Mr. O'Loughlin ought be preferred as being more consistent with the Act's objects and purposes. It is difficult to conceive, for example, how the interests of the administration of justice and the protection of the public could be served by providing for practitioners to be disciplined for minor errors:

    a) which may amount to no more than mere negligence;

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7 [2010] NSWADT 34.
8 Ibid at [190].
9 *Interpretation Act* s62A.

b) which occasion no damage to the client or the administration of justice; and

c) the prosecution of which would simply serve to:

i) further distract the practitioner in question from their duties;

ii) place an unnecessary and additional burden on the allocation of both the LSNT's limited funds and resources.

32) Notwithstanding my tentative views, it is not strictly necessary to resolve this question in the context of these proceedings, simply because, as set out below in these reasons, my view is that Spurr was under no such duty to advise.

Findings

33) Section 504 of the Act relevantly provides that the rules of procedural fairness apply to Chapter 4.

34) The minimum the rules of procedural fairness required in the context of the present case was that the LSNT provide the Applicant with copies of Spurr's response, Mr. O'Loughlin's submission and Mr. Spazzapan's opinion and then invite the Applicant to seek their own legal opinions, before proceeding to a decision.

35) That said, the Applicant had ample time between notification of the decision and the hearing of this matter before the Tribunal, to source and provide any such opinions and elected not to do so.

36) When asked why this was so, the Applicant gave evidence from the bar table, through her Husband, that they had in fact sought independent opinions post the date of the LSNT's decision, however, no one they had approached wished to provide any such opinions.

37) The Applicant made it clear that she did not wish to source any opinions in the circumstances and instead sought to argue that the duty of procedural fairness required that the LSNT itself ought source additional independent submissions, in answer to those relied upon by Spurr. With respect to the Applicant, the duty of procedural fairness cast no such obligation onto the LSNT. If the Applicant wished to be heard further, they have now had that chance and determined not to take advantage of it, with one notable caveat discussed below.

38) In the premises and even assuming the LSNT had not provided procedural fairness in the course of arriving at the decision to dismiss under s498((b), I am satisfied that failure has been remedied and that, given the position ultimately taken by the Applicant, that failure led to no error in the ultimate decision arrived at.

39) The caveat referenced in [37] above is that the Applicant relies on a document sourced from Centrelink and styled *"Compensation Kit – What you need to know"*, which document was tendered by the Applicant in the course of the hearing and marked exhibit "A".

40) The Compensation Kit is some eighteen (18) pages and provides information, *inter alia*, about Centrelink's preclusion period and compensation calculator.

41) The Applicant relies on a number of observations in the Compensation Kit to the following effect:

At page 8:

"We recommend solicitors log onto our website and obtain an estimate [of any debt or preclusion period] *and provide a copy to their clients when advising them about the implications of a settlement on their Centrelink income."*

AND

"The online compensation estimator is there to help solicitors and other professionals ***to meet their duty of care to their clients****. Many people who are awarded compensation payments approach us to apply for payments after they have spent or invested their compensation monies. Professionals should ensure their clients fully understand the implications of their settlement prior to settling."* (emphasis added)

At page 11:

"Prior to settling a matter, solicitors should check whether there is a Centrelink liability. We have a compensation estimator available..."

AND

"Solicitors should access the compensation estimator prior to meeting with the compensation payer to settle the claim. The compensation estimator online provides a guide to how a lump sum might affect payments already being paid by the department to your client or payments which may be sought in the future. This information should be sought before instructing your client to accept a settlement offer and before your client makes any decisions about spending or investing the lump sum."

42) The Applicant argues that the foregoing extracts demonstrate Centrelink's opinion, and that of its lawyers, that practitioners owe a duty to advise their clients of the preclusion period, in the course of any settlement discussions.

43) The Applicant further argues that the opinions it says are manifest on the face of the Compensation Kit should be added to Mr. Littlejohn's opinion and weighed against those relied upon by Spurr.

44) The problem for the Applicant is that the Compensation Kit is of little weight or assistance in these proceedings.

45) Firstly, its authors were not called and their knowledge and experience and the assumptions on which the foregoing statements were advanced, cannot be tested. Nor can their views as to whether a duty would exist on the facts of the present case be meaningfully examined. Moreover and as Mr. Liveris quite properly submitted, the Compensation Kit itself includes a disclaimer to the effect it is *"intended only as a guide"* and then only insofar as matters stood in July 2015. [10]

46) Secondly, it may well be that a duty of care is owed in certain circumstances, for example where a practitioner is retained or asked and accepts instructions to advise specifically on Centrelink preclusion periods, in which case the compensation estimator would no doubt assist the practitioner to meet the resulting

[10] Exhibit A at p17.

duty of care. It is quite another proposition to assert that the Compensation Kit should be taken as evidence of an opinion that a practitioner is always under a duty to so advise, irrespective of the circumstances of the particular retainer, the matter in which they act and/or their professed areas of expertise.

47) Turning then to the second ground of challenge, did the LSNT err in failing to properly characterise Mr. Littlejohn's opinion?

48) The complaint in this regard stems from the following language in the LSNT's notification of decision:

> *"The Council of the Law Society has considered the complaint and the opinions provided by Littlejohn, Spazzapan and O'Loughlin and concluded that, while Littlejohn's practice might represent best practice, it did not appear to be standard practice and that accordingly, it could not be said that Spurr had engaged in unsatisfactory professional conduct."*

49) The Applicant argues that the reference to "best practice" in the foregoing extract suggests that the LSNT misconstrued what Mr. Littlejohn in fact said and purports to cast his observations concerning the minimum standard as best practice.

50) While the LSNT's reference to "best practice" in this regard was perhaps less than felicitous and perhaps even prone to give rise to some confusion, I consider it more likely that the LSNT here was suggesting that the entirety of Mr. Littlejohn's opinion, irrespective of his views as to whether the same constituted the minimum standard, in fact represented best practice. So much would seem to be clear given the LSNT's seeming contrast between Mr. Littlejohn's views and what the LSNT refers to as "standard practice".

51) I am not satisfied there was any error by the LSNT in this regard.

52) Even were there any such error, it does not follow that the LSNT's decision ought be overturned. As stated above, that depends on whether, irrespective of the errors made in the process, the Tribunal is convinced that the LSNT was wrong in its ultimate decision.

53) Although I have found that the two plinths of the Applicant's case upon which her challenge is predicated are not made out, it remains necessary to consider the pivotal question of whether Spurr was under a duty to advise specifically as to the existence and effect of a preclusion period.

54) If such a duty was owed and given no such advice was provided, then Spurr's conduct may satisfy the definition of unsatisfactory professional conduct.

55) When a practitioner is retained by a client with a work related injury and before any claims are made, a reasonably prudent and competent practitioner, practicing in the work health area, should investigate the various avenues of redress open to the client and advise on what those avenues would likely mean in terms of the amount of and duration of compensation.

56) For example, such a practitioner should enquire into whether the client has private Third Party Disability insurance, whether the client's income was such that the client would be better refraining from making a formal claim under worker's compensation legislation (factoring in costs and delays) and would be simply better

off to claim Centrelink benefits and/or whether there is any action open against other parties at common law.

57) A practitioner who is instructed only after a claim is already on foot, where a mediation has already been scheduled, where proceedings have been mooted and who has been ostensibly retained to appear at the mediation with a view to effecting a settlement of the claim, is under very different obligations. Those are the facts of the present retainer.

58) The evidence is that Spurr advised the Applicant, on a number of occasions and in writing, that had the Applicant been in receipt of any benefits from Centrelink, the same would be repayable following any settlement and out of the proceeds of same. The evidence is also clear that the Applicant raised no queries and sought no specific advice from Spurr, as to the effect of any settlement on any future Centrelink entitlement.

59) Was Spurr under any obligation, in those circumstances, to advise as to the existence or effect of a Centrelink preclusion period? In my view and consistent with both Mr. O'Loughlin's submission and Mr. Spazapan's opinion, the answer is a simple "no".

60) A preclusion period in this regard is a period of time, calculated by reference to 50% of any lump sum settlement, during which a person who would otherwise be entitled to receive Centrelink benefits is held out from the same.

61) There was no evidence advanced by the Applicant that her financial circumstances were such that she would in fact be entitled to Centrelink benefits, even were she to apply.

62) The legislative intent behind s17 of the *Social Security Act (Cth)* and the provisions of that Act which are dependent on it, was that a person should seek compensation against the person at fault for any incapacity, *inter alia*, under any specific State or Territory compensation regimes and should not be doubly compensated by both the person at fault and the taxpayer.

63) Ostensibly the Applicant's case, boiled down, is that Spurr was under an obligation to advise the Applicant that she could not be compensated twice for the same incapacity. Once by her employer and once by the taxpayer under Centrelink.

64) With respect to the Applicant, that simply cannot be. It ought have been a matter which was self evident, and to the extent there was any doubt, that doubt must have been wholly alleviated by Spurr's repeated advices to the Applicant about the obligation to repay any Centrelink benefits already received.

65) The only circumstances in which I could conceive any such duty may exist is where there was a specific request for such an advice and a practitioner accepted instructions to advise and/or purported to provide advice in response to the request.

66) Absent such a request, a practitioner is entitled to expect a client, particularly an articulate and intelligent woman such as the Applicant, to have some basic common sense grasp of the fact that one cannot be compensated twice for the same injury, retain both tranches of compensation and obtain a windfall as a result.

67) Even had the Applicant been informed of the preclusion period in this case and refused to settle as a result, she would have, on her own submission, either:

a) remained on Worker's compensation entitlements and not been entitled to Centrelink benefits anyway; and/or

b) sought a larger amount in settlement, the paradoxical effect of which would have been to increase the duration of any preclusion period.

68) It follows that, with the greatest respect to Mr. Littlejohn, I consider Mr. Littlejohn's opinion that the minimum standard off care requires that a practitioner always advise a client as to the existence and effect of preclusion periods in any settlement of worker's compensation claims, to be patently wrong. There is simply no such duty upon a practitioner, absent a specific acceptance of instructions so to advise.

69) Even were I wrong in my views, I would not consider the failure to advise in this case would merit any disciplinary action against Spurr. It is not conduct, irrespective of what view one takes as to the proper construction of ss464 and 499(2) of the Act; sufficient in nature so as to merit a "black mark" against the practitioner's name.

70) The Applicant's appeal should be dismissed accordingly and a date should be allocated for argument as to costs.

Giles, Legal Member:

71) I agree with the conclusions reached by the Deputy Chair except for the observations and conclusions in:

a) paragraphs 24-27 that the approach in the cases relied upon by Mr O'Loughlin and as described in paragraph 18 are inconsistent with the divination of legislative intent as provided for in *New South Wales Bar Association v Bland*,[11]. In that matter, the Tribunal:

(i) having considered the second reading speeches stated that those "*speeches make clear that one of the mischiefs at which the legislation was aimed, was that conduct of lawyers falling short of professional misconduct, such as delay and negligence, was not subject to disciplinary action. The legislation was aimed to make such conduct subject to disciplinary action.*"

(ii) then, in making its decision (at paragraph [102]) adopted the terminology and approach in *Pitsikas*, namely that the conduct of the practitioner in that matter was not 'mere negligence' but was sufficiently serious to warrant a 'black mark'. The inference is that if the conduct in that matter had amounted to 'mere negligence', it would not have been sufficiently serious to warrant a 'black mark' and a finding of "unsatisfactory professional conduct".

(b) paragraph 31 that "both *constructions admit of some difficulty*". As to this:

(i) I do not agree that any conduct that might be described or categorised as "negligence" or "mere negligence" necessarily constitutes "unsatisfactory professional conduct";

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[11] [2010] NSWADT 34.

(ii) In my view, there must be more than that in order for the conduct to amount to "unsatisfactory professional conduct", that is, fall "*short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian Legal practitioner*";

(iii) The additional matter required in order for the conduct to amount to "unsatisfactory professional conduct" will depend on the facts in each particular case[12]. Whilst I agree that the matters listed in sub-paragraphs 31 a), b) and c) are relevant factors to be considered, it is not only "minor errors" where all three of those matters apply that fall outside what is "unsatisfactory professional conduct";

(iv) I adopt and accept the submissions of Mr O'Loughlin and the authorities cited in paragraph 18.

(v) In my opinion, irrespective of whether the conduct of Spurr was negligent, I agree that it was not sufficient to constitute unsatisfactory professional conduct and agree that the appeal should be dismissed.

King, Lay Member:

72) I concur with the reasons advanced by the Deputy Chair.

Dated: 8 November 2018

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By the Disciplinary Tribunal
Deputy Chair

[12] Refer comments of the Legal Professional Disciplinary Tribunal in the matter of *Spero Pitsikas* (1995) 1 LPDR (No 1) 5 at 10 as referred to in *Council of the Law Society of NSW v Webb* [2012] NSWADT 114 at paragraph 73.