

PROFESSIONAL
INDEMNITY ALERT

DECEMBER 2006

FOR FURTHER INFORMATION
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**OBLIGATIONS OF PRACTITIONERS TO
DISCLOSE IN NEGOTIATIONS:
LEGAL SERVICES COMMISSIONER V MULLINS
[2006] LPT 012**

The recent decision of *Legal Services Commissioner v Mullins* [2006] LPT 012 serves as a timely reminder for all legal practitioners to act honestly, frankly and accurately in the representation of their client's case.

The Queensland Legal Services Tribunal recently found a Queensland barrister guilty of professional misconduct after he failed to disclose at a mediation conference with the defendants insurer that his plaintiff client had been diagnosed with cancer, with the result that calculations for future economic loss based on a life expectancy of 27 years were incorrect and that any settlement based on those presumptions of life expectancy were likely to be overly generous to the plaintiff.

The tribunal ordered the barrister be publicly reprimanded and pay a penalty.

The Legal Services Commissioner, Mr John Briton, stated in *The Australian* (24 November 2006):

"(it) has provided a reminder to all members of the profession to act honestly and to be candid and accurate in the representation of their client's cases whether in court, in mediations or in everyday dealings"

Facts

The tribunal found the barrister fraudulently deceived the defendant's insurer Suncorp Metway and its lawyers at a mediation held in 2003.

The barrister was representing the plaintiff who was involved in a motor vehicle accident in 2001, the injuries from which rendered him a quadriplegic. At the time of the mediation the plaintiff was 48 years of age.

A report was prepared by Evidex on behalf of the plaintiff and supplied to Suncorp. The report contained comprehensive assessment by an occupational therapist, Ms Welshe, of the future needs, and an accountant's evaluation of the cost of that care. The report expressly noted that it was based on the assumption that the information in certain medical reports was correct.

One such medical report noted that the injuries sustained in the

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accident had reduced the plaintiff's life expectancy by 20% of that of a *normal male of his age* and an award for future care costs should be assessed reflecting 80% of the life expectancy of a 48 year old male (27 years 11 months). Further, Ms Welshe stated "*but for his injury he had intended to continue working in his pre-injury occupation until retirement*".

The medical reports obtained to that point by the plaintiff suggested that, but for the accident, the plaintiff would have had a normal life expectancy.

A forensic account's report was subsequently prepared and forwarded to Suncorp which revealed the value of the plaintiff's future earning capacity was \$934,178.00, based on projected earnings to "*normal retirement age of 65*". This life expectancy projection was clearly based on the medical evidence.

A few days prior to the scheduled mediation, the barrister had a pre-conference discussion with the plaintiff and the plaintiff's lawyers. During this discussion, the plaintiff informed the barrister that he was to receive chemotherapy treatment for cancer and he had been advised by his doctor that there were cancer spots on his lungs and in other places throughout his body. The barrister thought this fact needed to be disclosed to Suncorp. The plaintiff noted that he did not wish to reveal the cancer facts unless he was legally obliged to do so.

The barrister gave evidence before the Legal Services Tribunal that he conducted some research and spoke to senior counsel about the plaintiff's predicament. He finally formed the view that as long as the plaintiff's lawyers did not positively mislead Suncorp and its lawyers about the plaintiff's life expectancy, they would not be violating any professional ethical rules.

At the mediation, the barrister relied upon the evidence of life expectancy in the Evidex reports on which the plaintiff's future economic loss claim was based, with the knowledge that this argument no longer could be substantiated.

It was recognised during the mediation that the plaintiff's life expectancy was critical to the worth of the major component of the plaintiff's claim, that being future economic loss. It was for this reason Suncorp and its lawyers were persuaded by the Evidex reports as to life expectancy and throughout the negotiations with the plaintiff supposed that the plaintiff's life expectancy accorded with that report.

The claim was settled at the conference. Suncorp later stated that had it known the undisclosed facts concerning the plaintiff's cancer and diminished life expectancy, it would not have proceeded to negotiate a settlement of the claim.

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The barrister argued before the Legal Service Tribunal that his conduct in continuing to rely on the Evidex reports without disclosing the cancer facts was not the same as making representation that *he was not aware of facts that could deleteriously impact on longevity*. It was stated that the compromise negotiations at the mediation could be characterised as “commercial” and were conducted on a tacit and common assumption that, in deciding whether to settle, the parties would rely exclusively on their own resources and information. Further, it was argued that there would not have been a reasonable expectation that influential information communicated during negotiations would not knowingly be false. The Tribunal rejected this argument and stated that the context in which the disclosure takes place influences the extent of legal and equitable obligations. The Tribunal stated that unlike disclosure duties of a fiduciary, where it ordinarily extends beyond those parties dealing at arm’s length in the pursuit of economic self-interest, “commercial” negotiations between a potential litigant and a tortfeasor’s insurer for compromise of a damages claim, rely on the idea negotiants can anticipate a measure of honesty from each other. Honesty promotes confidence in the process. The Tribunal used the analogy quoted by Lord Bingham of Cornhill in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6 that “parties entering into a commercial contract...will assume honesty...of the other; absent such an assumption they would not deal”.

Essentially, the Tribunal noted that even though the sole purpose of the mediation was to arrive at a commercial agreement to resolve the claim, the process assumed the parties would act honestly and could rely on the other party to be frank and truthful in its representation of material facts.

Professional Misconduct

The Tribunal found that the barrister, by continuing to rely on the Evidex reports to support the plaintiff’s claim for future economic loss, after learning the cancer facts and recognising their significance for the validity of the life-expectancy assumption, intentionally deceived Suncorp and its lawyers about the accuracy of the assumptions in those reports.

The Tribunal concluded that this fraudulent deception the barrister practised on Suncorp and its lawyers involved:

“...such a substantial departure from the standard of conduct to be expected of legal practitioners of good repute and competency as to constitute professional misconduct.”¹

The Tribunal stated that the financial consequences for Suncorp were serious and therefore the barrister’s misconduct warrants a public

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reprimand and a substantial fine to signify disapproval of his misconduct and to deter similar misbehaviour.

Conclusion

When taking part in negotiations to settle, the accepted conduct is that of a shared expectation between the parties that legal consequences will attach to intentional deception about material facts.²

The standard of conduct expected of legal practitioners is very high. Failure to meet those standards may have significant consequences for the practitioner professionally and personally. Legal consequences can vary from the legal practitioner being publicly reprimanded and fined, as in this case, or as harsh as the legal practitioner being struck off the roll of practitioners.

Practitioners should aspire to the highest standards of conduct and ensure their conduct does not fall below the minimum standard required exposing them to disciplinary action.

Similarly, when other professionals are engaged in negotiations, it is clear that a similar burden will be imposed on those negotiations, in that the professional will be also held to an implied standard of assumed honesty in relation to those negotiations.

¹ *Legal Services Commissioner v Mullins* [2006] LPT 012 per Byrne J at para [31]

² *Magill v Magill* at [140]