DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL COUNCIL

COMPLAINT NO: 25/2009

BETWEEN	LEONARD WELLESLEY	COMPLAINANT
AND	LYNDEN WELLESLEY	RESPONDENT

The Panel: Mr. Allan S. Wood, QC
Mr. Winston Douglas
Mr. Trevor Ho-Lyn

Parties Appearing: Leonard Wellesley;
Lynden Wellesley and Patrick Bailey attorney-at-law for him.

Hearing Dates: 9th October, 4th December 2010, 17th September, 12th November 2011 and 28th April 2012

1. The Complainant has brought complaint against the Respondent in respect of his conduct in the handling of a personal injury matter which arose from a horrific accident that occurred at Knockpatrick in the parish of Manchester on the 20th March 2000 when the Complainant's shoulders were squeezed between the bars of a machine which he was working causing him to suffer fractured ribs and clavicle.

2. The Complainant's allegations of misconduct by the Respondent were that:-
   i. He has not provided me with all information as to the progress of my business with due expedition, although I have reasonably required him to do so.
   ii. He has not dealt with my business with all due expedition.
   iii. He has acted with inexcusable or deplorable negligence in the performance of his duties.

iv. He has breached Canon 1(b) of the Legal Profession (Canons of Professional Ethics) Rules, which states that "An Attorney at all times shall maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession of which he is a member."

3. At the hearing, oral testimony was given by the Complainant and the Respondent and the Respondent also called a witness, Miss Christine Campbell. Though listed for hearing over several days there have been numerous adjournments so that the actual hearings spanned 3 days.

EVIDENCE OF THE COMPLAINANT

4. The Complainant testified that he worked for D'Aguilar Brothers in Manchester and while working at his job as a machine operator, his shoulders were squeezed between the bars of the machine causing him injury and as a result he broke his collar bone and two ribs. He spent at least eight weeks in the hospital. In 2002 he was referred to the Respondent by his employer having also heard that he was a member of his family. He further testified that there was an oral arrangement for the Respondent to get 25% of the sum recovered and he would get the rest but no documents were signed. All the expenses of obtaining medical reports were met by the Respondent and in addition he would be given bus fare by the Respondent on his visits to the Respondent's office. In 2005 he visited the Respondent at his office on Duke Street and was informed by the Respondent that Dyoll Insurance Company (Dyoll) was liquidated and did not have any money. He then attended the National Insurance office and was paid some money. He was given no advice by the Respondent as to what to do. In support of his testimony his application and affidavit in support dated the 23rd February

2009 were tendered and admitted in evidence without objection as exhibit 1 and the letter stamped the 13th October 2008 to the Secretary of the General Legal Council was admitted as exhibit 1A.

5. The Complainant was cross examined by Mr. Bailey on behalf of the Respondent and admitted that he had not signed any document and had paid no fees to the Respondent and that the Respondent was kind and nice to him. He denied however that he was advised by the Respondent that the Respondent would only take the matter so far and if the matter needed to be taken to court he would have to get another attorney as it was a civil matter. He identified Christine Campbell as the secretary of the Respondent at the relevant time when he had dealings with the Respondent but denied being told several times by her and the Respondent to get a lawyer to take the matter to court. That then was the case for the Complainant.

EVIDENCE OF THE RESPONDENT

6. The Respondent gave evidence that he had been admitted to practice from 1980 and that his practice was mainly a criminal practice. The Complainant was his cousin and Christine Campbell had been his secretary at the time of his interaction with the Complainant which commenced in 2002. From the beginning he has advised the Complainant that he would go as far as he could with the matter but he would not take the matter to court. He was never paid a retainer nor was there a contingency agreement. He did write to Dyoll and also paid for the various medical reports. In 2005 Dyoll went into liquidation and he advised the Complainant that time was running out and he needed to get an attorney to put the matter before the court. He further advised the Complainant that he should go to the Legal Aid Clinic if he had

no money. His letter dated 5th May 2010, along with the attached correspondence were admitted into evidence as exhibit 2.

7. The Respondent was cross examined and he maintained that he had advised the Complainant to get an attorney to take the matter to court and he had no contingency agreement. In support of his case he called his former secretary Christine Campbell.

8. Christine Campbell testified that she was a legal secretary who had formerly been employed to the Respondent from 1995 to 2008 at his office at 45 Duke Street, Kingston. She met the Complainant in 2001 when she was introduced to him by the Respondent as his cousin and the Complainant had met in an accident and wished to be compensated. Letters were written by the Respondent on behalf of the Complainant to the insurance company and the doctor. She further testified that the Complainant was repeatedly advised to get an attorney to take the matter to court and on one occasion in particular she was asked to witness such a conversation when this advice was given. She however conceded that she made no written record of this particular occasion and the advice given although she would have expected it to have been done.

9. This then was the case for the Respondent and written submissions were filed on his behalf. The thrust of these submissions was that no retainer existed between the parties and there was no contingency agreement. It was submitted on behalf of the Respondent that he assisted the Complainant on the basis of a family relationship and they were not dealing with each other on the basis of a professional attorney/client relationship. In addition he had

advised the Complainant that he would not take the matter to Court and this was supported by the witness Christine Campbell his former secretary. As a consequence of this he was not in breach of any of the Canons outlined in the complaint.

10. The following facts are not in dispute:-

1. The Complainant was injured while on his job working for D'Aguilar Brothers in Manchester. From the correspondence that passed between the Respondent and the insurer, tendered in evidence by the Respondent as exhibit 2, the date of the accident was stated to be 20th March 2000.
2. The Complainant's employer referred him to the Respondent and as a result in 2001 he attended the offices of the Respondent with a view to pursuing a claim for compensation for his injuries.
3. The Respondent wrote letters and submitted a claim to the insurance company Dyoll on behalf of the Complainant; this claim was quantified by the Respondent's letter to Dyoll dated 15 November 2004.
4. The Respondent at his own expense obtained medical reports from Dr. Dundas detailing the Complainant's injuries.
5. In March 2005 Dyoll went into liquidation.
6. No action was filed on the Complainant's behalf nor has he been compensated for his injuries. The claim against his employer is now statute barred.
7. That there was no written contingency agreement and there was no retainer fee paid.

11. On the other hand the factual areas of dispute all revolve around the issue of the limited representation of the Complainant by the Respondent and whether or not the Complainant was advised to get another attorney to take the matter to Court. In determining this complaint we accept and apply the standard of proof as laid down in Campbell v Hamlet 2005 UKPC 19, which held that in disciplinary proceedings concerning the legal profession the requisite standard of proof is the criminal standard of proof beyond reasonable doubt as stated by Lord Brown:

> "That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt."

12. The first issue to be determined therefore is whether the Complainant was the client of the Respondent or whether he was merely a needy relative in need of assistance and for whom there were no legal responsibility. A duty of care to the Complainant would clearly be owed if the Respondent had been retained by them. It is often quite difficult to determine whether an attorney has been retained by a client for the simple reason that the retainer agreement need not be in writing and indeed such an agreement may not be expressed or verbalised at all but simply implied from the conduct of the parties. Halsbury Laws of England 4th Ed Vol 44(1) at par 103 states:

> "Implied Retainer. Even if there had been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case. Thus where a person has received a fund out of court which was produced by an action, or where a person about to become a trustee has consented to solicitors acting in a mortgage transaction for the trust, or where a defendant called at a solicitor's office and left the writ and other papers and subsequently expressed an intention to go to the bottom of the matter, a retainer was implied."

13. The answer to this issue of whether the Respondent was retained as attorney for the Complainant is settled by reference to the letters which formed part of the Respondent's response to the claim and were admitted as exhibit 2. These

documents are summarized as follows:-

i. By letter dated 22 January 2001 the Respondent wrote to Dr. Dundas advising that he acted for the Complainant with respect to an incident occurring on 20 March 2000 and requesting a medical report on the basis that he acted for the Complainant and undertaking to pay the costs of the report.

ii. By letter dated 11th April 2001, Dyoll wrote to the Respondent acknowledging receipt of a letter from the Respondent to their insured D'Aguilar Brothers Construction concerning an incident on 20 March 2000 involving his client named Norman Wellesley and requested the Respondent to submit details of the claim.

iii. That by letter dated 28th March 2003 Dr. Dundas provided his report to the Respondent setting out the details of the Complainant's injuries and his prognosis of the Complainant.

iv. By letter dated 15th November 2004 the Respondent submitted details of the claim on behalf of the Complainant to Dyoll.

v. By letter 10th January 2005, the Respondent again wrote to Dr. Dundas enclosing a letter dated 5th January 2005 from Dyoll requiring a further examination of the Complainant in accordance with Dyoll's request.

vi. By letter dated 30th November 2007 the Respondent again wrote to Dr. Dundas acknowledging receipt of Dr. Dundas' letter of 8th April 2005 and referring to the Respondent's letter of the 10th January 2005 and requesting another detailed medical report and offering to pay the cost thereof. This letter enclosed a written authorization signed by the Complainant which stated inter alia that the report was needed for legal proceedings.

vii. By letter dated 3rd January 2008 the Respondent was advised that an

appointment for the further evaluation of the Complainant by Dr. Dundas was set for 7th February 2008.

14. Throughout his correspondence to Dyoll as insurer and to Dr Dundas, the medical practitioner who was being requested to assess the injuries, the Respondent was plainly intent on pursuing a claim on behalf of the Complainant who is referred to throughout as his client. The Respondent specifically refers to the Complainant as his client in setting out the quantum of the claim to Dyoll. This evidence is sufficient to establish that no matter the informality the Respondent was retained by the Complainant and in that regard we accept the evidence of the Complainant as being consistent with the correspondence that he met with the Respondent and the Respondent agreed to act on his behalf on the basis that the Respondent would retain 25 percent of any sum recovered. The Respondent sought to negative a professional relationship on the basis that the Complainant was his cousin. However it is to be observed that the Respondent did not deny that the Complainant was referred to him by D'Aguilar Brothers which also supports that the Respondent would have understood from the outset that he was being required to act on a professional basis as attorney for the Complainant.

15. In any event once the Respondent proceeded to act by communicating the claim on behalf of the Complainant he was clearly pursuing a professional engagement as attorney for the Complainant. Approximately 18 months after the action had become statute barred the Respondent was still pursuing the matter by writing to Dr. Grantel Dundas by letter dated 30th November 2007 requesting a (second) detailed medical report which repeatedly referred to the Complainant as his client as follows:

> "I am in receipt of your letter dated April 8th, 2005 and apologise for the long delay in responding as this was due to lack of communication from my client.
> Please make reference to my letter dated January 10th, 2005.
> In the interim, kindly examine my client, your patient, Mr. Leonard Norman Wellesley and advise me appropriately with respect to the request of Dyoll Insurance Company Ltd. Kindly prepare a detailed Medical Report on your findings. Enclosed, please see letter dated January 5th, 2004 and letter of authority.
> As my client is unable to pay please send the bill to me at the above address and I will defray the cost.
> Your kind cooperation is appreciated."

16. The letter of authority which was enclosed with the aforesaid letter was also dated 30th November 2007 signed by the Complainant and was in the following terms:

> "I, Leonard Norman Wellesley, c/o my Attorney-at-Law, Lynden Wellesley of Lynden Wellesley & Associates, 45 Duke Street, in the parish of Kingston hereby authorise you to release to my said Attorneys-at-Law, Lynden Wellesley my Medical Report which is need *(sic)* for legal proceedings."

17. The letter and the authorization enclosed therewith clearly support that even after the Complainant's cause of action had become statute barred, and the employer's insurer had been put into liquidation, the Respondent was continuing to act for the Complainant with the intent of pursuing legal proceedings. Plainly by November 2007 that was a meaningless exercise given the fact that the 6 year period of limitation for commencing an action against the Complainant's employer had expired on 21st March 2006 and the insurance company handling the claim on behalf of the employer was in liquidation by that date. It seems plain that the Respondent lost sight of the date on which the action became statute barred. We find the following extract from the judgment of Scrutton LJ in Fletcher & Son v Jubb, Booth &

Helliwell [1920] KB 175, 281 to be worthy of repetition albeit made in respect of the Public Authorities Protection Act (UK) that had stipulated a one year limitation period:

> "Now it is not the duty of a solicitor to know the contents of every statute of the realm. But there are some statutes which it is his duty to know; and in these days when the defendants in so many actions are public authorities the Public Authorities Protection Act, 1893, is one of those statutes. The appellants instructed the respondents to make a claim and, if necessary, to bring an action against the Bradford Corporation for damage done by one of the tramcars of the corporation. The respondents wrote and for some time continued writing to the corporation. It is well known that public authorities are willing to avoid litigation if they can settle claims upon reasonable terms, and equally well known that they do not admit claims which they regard as unreasonable; and in the correspondence which took place between the corporation and the respondents I cannot find any admission of liability to the claim the appellants were making. What is the duty of a solicitor who is retained to institute an action which will be barred by statute if not commenced in six months? His first duty is to be aware of the statute. His next is to inform his client of the position. The corporation made an offer to settle this claim; the solicitors sent on the offer to their clients, and they made no answer. The time of limitation was running out. The clients did not know this and they were not warned by the solicitors. One would expect that as the time drew near the solicitors would tell them that if they did not bring an action their claim would be barred. Instead of that they wrote on March 10, the day on which the time expired, to ask if the claim had been settled and if so upon what terms. I cannot understand how they came to write that letter except on the footing that they were still the legal advisers of the appellants."

18. We find that on the totality of the evidence that the Respondent was in fact retained and acted as attorney for the Complainant and as such he owed a duty of care to the Complainant as set out in The Legal Profession (Canons of Professional Ethics) Rules 1983 Canon IV (r) and (s) which provide:-

> "(r) An Attorney shall deal with his client's business with all due expedition and shall whenever reasonably so required by the client provide him with all information as to the progress of the client's business with due expedition.
> (s) In the performance of his duties an Attorney shall not act with inexcusable or deplorable negligence or neglect".

19. It is well established by authority that it is negligent for an attorney who is retained to pursue a claim to allow the limitation period to run out without

filing action or informing the client of the necessity to file an action: Kitchen v Royal Air Force Association [1958] 1 WLR 563; Fletcher & Son v Jubb, Booth & Helliwell [1920] KB 175. However the Canons import a more stringent test of the degree of neglect or negligence that constitutes professional misconduct. As stated by Carey J.A. in the case of Earl Witter v Roy Forbes (1989) 26 JLR 129:

> "Specifically, rule (s) of Canon IV is concerned with professional conduct for Attorneys. It is expected that in any busy practice some negligence or neglect will occur in dealing with the business of different clients. But there is a level which may be acceptable, or to be expected, and beyond which no reasonable competent Attorney would be expected to venture. That level is characterized as 'inexcusable or deplorable'."

20. A single act of negligence in the course of a matter would not normally be regarded as inexcusable or deplorable negligence so to amount to professional misconduct within Canon IV (s). At the other end of the scale the facts of Witter v Roy Forbes (supra) justified a finding of inexcusable or deplorable negligence or neglect, there being a consistent failure in attending to the client's business for a significant duration of time, in that the attorney had received a settlement proposal on 27th January 1979 which had a deadline for acceptance by 30th September 1979 and the attorney failed to communicate the proposal to his client until October 1980, well after the deadline had passed.

21. Similarly in the case of Re A Solicitor [1972] 2 All ER 811 the failure by a solicitor to discharge his duty in having his books of account written up for a period of three years was similarly found by the English Court of Appeal to justify a finding of inexcusable negligence or neglect amounting to professional misconduct as stated by Lord Denning MR.

"On the second charge (of professional misconduct in not keeping the books in proper form) counsel for the solicitor challenges the finding of professional misconduct. Counsel has quoted cases to show that professional misconduct should only be found when the solicitor has been guilty of conduct which is disgraceful or dishonourable and is such as to be condemned by his colleagues in the profession. I do not think that definition is exhaustive. In my opinion negligence in a solicitor may amount to professional misconduct if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession. We were referred to a case in New Zealand in which it was said that the failure of the solicitor to have his trust accounts audited amounted to professional misconduct. In that case it was argued that his failure was due merely to carelessness, and that as there had been no dishonesty, it was not professional misconduct. But the Court of Appeal in New Zealand held that neglect amounts to professional misconduct. So here. The negligence of the solicitor was reprehensible. He failed for the three years 1967 to 1970 to see that the books were written up. Then when the Law Society's accountant drew his attention to the failure in September 1970, he still failed to get them written up. Then when proceedings were taken against him and constant pressure brought on him, even after two hearings of the disciplinary committee, he still failed to do it to their satisfaction. This failure and delay was so reprehensible that the committee were entirely justified in finding him guilty of professional misconduct."

22. In Witter v Forbes (1989) 26 JLR 129, Carey JA in setting out the requisite standard required by Canon IV (s) stated:-

"We are not in this appeal dealing with professional misconduct involving an element of deceit or moral turpitude.
Both rules of which the appellant was found guilty are concerned with the proper performance of the duties of an Attorney to his client. The Canon under which these rules fall, prescribes the standard of professional etiquette and professional conduct for Attorneys-at-Law, vis-à-vis their clients. It requires that an Attorney shall act in the best interest of his client and represent him honestly, competently and zealously within the bounds of the Law. He shall preserve the confidence of his client and avoid conflict of interest.
The violated rules, both involved an element of wrong-doing, in the sense that the Attorney knows and, as a reasonable competent lawyer, must know that he is not acting in the best interests of his client. As to rule (r) it is not mere delay that constitutes the breach, but the failure to deal with the client's business in a business-like manner. With respect to rule (s) it is not inadvertence or carelessness that is being made punishable but culpable non-performance. This is plain from the language used in the rules."

23. The Respondent contends that from the outset he made clear to the Complainant that he would not be taking the matter to court and in that regard the Respondent was supported by the evidence of his former secretary who testified that she overheard the initial discussions when the Respondent informed the Complainant that he would assist him, but in relation to taking the matter to court he could not help him there and that thereafter on several occasions he informed the Complainant that he should get another attorney to put the matter in the court. The Respondent further explained that he did not have a civil practice and that he would not be able to pursue a civil action. On the other hand, the Complainant denies that any such discussions occurred.

24. In determining this issue of fact, the Panel at the outset finds it wholly remarkable that the Respondent should have undertaken the matter at all if he thought himself incompetent to pursue an action and particularly in circumstances where the Complainant came to him by referral from the Complainant's employer. Further, we observe that in formulating the claim, the Respondent displayed no lack of competence. To the contrary, the personal injury claim as quantified by the Respondent displays a sound grasp and understanding of the principles involved as set out in letter to Dyoll dated 15th November 2004, which is as follows:

> "I must apologise for the delay. I have outlined my client's claim below.
> In the case of Rupert McDonald v East Ocean Textiles Ltd, (Suit No. CL 1990/M179), in Assessment of Damages for Personal Injuries by Justice Karl Harrison at page 249.
> In that case similar to our pain and suffering and loss of amenities will *(sic)* assessed at $400,000.00. The disability of the whole person was 18% in our case it is 19%.
> By using the C.P.I. table an award today would be reflect this.
> $400,000.00 on June 17th, 1992 the C.P.I. was 389.9 the present is 1909.02.

Present Index X Award= 1909.02 X $400,000.00 = $1,958,471.40
Index at award 389.9

An award for Handicap on the labour market of $100,000.00 would be acceptable. Special Damages of $117,800.00. Total $2,194,071.40. This reflects the totality of my clients claim."

25. Further, where an attorney accepts a retainer to pursue a claim through negotiation with a limitation that he will not pursue the matter to action, such a limitation being so unusual, it would be expected that the attorney would have a written retainer agreement which expressly sets out such a limitation on his professional obligations in plain and unambiguous terms. At the very least there ought to be some written record such as a file note recording the exact terms of the conversation, the time and place that it occurred. Nothing of the sort was produced in the present case and the Respondent's former secretary's evidence was that no such record exists.

26. Further, if such a limitation on the Respondent's professional obligations had been agreed, there would have been no difficulty in finding an attorney who would be prepared to pursue such an action on a contingency fee basis in good time before the expiry of the limitation period. It would be expected that as the expiry of limitation period drew near, the Respondent would have advised to the Complainant as to the date on which his action would be statute barred and offering to hand over his file containing correspondence and the medical report to another attorney who would be prepared to pursue the claim and perhaps even offering to assist in identifying an attorney to take over the matter. Again it would be expected that some written record of such advice would be made either in the form of a letter or at the very least a file note. Far from adopting such a course, up to November 2007 the Respondent was continuing to act and forwarded an authorization dated 30th

November 2007 to Dr. Dundas signed by the Complainant plainly stating that information from Dr. Dundas in the form of a medical report was needed to pursue legal proceedings. This supports that contrary to his testimony, the Respondent was intent on pursuing legal proceedings for the Complainant and was seeking an updated medical report for that purpose.

27. For the foregoing reasons, we do not accept the testimony of the Respondent and his witness that he informed the Complainant that he would not be prepared to file action in court nor do we accept that the Complainant was told to take his matter elsewhere given the correspondence that reveals that long after the action became statute barred, the Respondent intent on pursuing legal proceedings continued to act for the Complainant.

28. As to the issue of delay, an examination of the letters tendered by the Respondent reveal that the invitation to submit details of the claim was done by letter dated 11th April 2001 yet the claim was not submitted until 15th November 2004 a delay of approximately 3.5 years, which was an inordinate delay to say the least. It is also observed that a letter was sent to Dr. Dundas for a follow up examination in 2005 yet the relevant consent and follow up letter are dated the 30th November 2007 again, in the context of a matter where the statute of limitations was running, an inordinate delay. This evidence coupled with the fact that the claim was allowed by the Respondent to become statute barred supports a finding of inexcusable and deplorable negligence and neglect by the Respondent in the discharge of his professional duties that were owed to the Complainant.

29. In summary the Panel accordingly finds that the Respondent has committed

the following acts of professional misconduct:

i. In breach of The Legal Profession (Canons of Professional Ethics Rules) 1978 Canon IV (r) the Respondent has not dealt with his client's business with all due expedition.

ii. In breach of Canon IV (s) the Respondent has in the performance of his duties as attorney for the Complainant acted with inexcusable and deplorable negligence or neglect.

iii. In breach of Canon IV (r) the Respondent has failed to provide the Complainant with all information as to the progress of the Complainant's business with due expedition when reasonably required so to do.

30. In turning to consider the sanction which ought to be imposed, we state at the outset that this is not a matter of dishonesty or moral turpitude to warrant any consideration of suspension or striking off. We think that it is appropriate to impose a fine upon the Respondent accompanied by a direction made pursuant to The Legal Professional Act s12 (5) that such fine be paid to the Complainant in satisfaction of any damage that was caused to him

31. In determining the amount of the fine, we commence by taking the figure of $2,194,071.40 which was proposed by the Respondent to Dyoll by letter 15th November 2004. It is to be noted that in the correspondence from Dyoll there was no suggestion that the insured, D'Aguilar Brothers, the employer of the Complainant had any arguable defence to the claim. It therefore appears to the Panel that the Complainant's prospects for successfully pursuing the claim had it been filed would have been good. The figure proposed by the Respondent represents in our view a reasonable award that

would have been made in 2004 for the injuries suffered by the Complainant that resulted in permanent disability of 19% of the whole person. By rough and ready update, the sum that had been proposed for general damages in November 2004 of $1,958,471.40 would equate to approximately $4m in today's money. Accordingly taking the figure of $4,000,000.00 we would discount same by 25% to allow for legal fees that would have been payable and we apply a further 25% discount for the other contingencies of litigation. We come to the sum of $2,000,000.00.

32. It is accordingly ordered that:

1. The Respondent is to pay a fine of $2,000,000.00 to the General Legal Council of which $500,000.00 is to be paid on or before 1st July 2012 and the balance of $1,500,000.00 is to be paid on or before 1st October 2012.
2. Pursuant to The Legal Profession Act s 12 (5), it is directed that the aforesaid fine shall be paid to the Complainant when collected by the General Legal Council in full satisfaction of any damage caused to him by the Respondent's misconduct.
3. The Respondent is to pay costs to the Complainant in the sum of $60,000.00 on or before 1st July 2012.

Dated: 28th day of April 2012

MR. ALLAN S. WOOD, QC

MR. WINSTON DOUGLAS

MR. TREVOR HO-LYN