

SANCTION DECISION OF THE DISCIPLINARY COMMITTEE OF THE
GENERAL LEGAL COUNCIL

COMPLAINT NO. 190/2020

In the Matter of YHOHAN ERROL
DAVIDSON and SEAN KINGHORN, an
Attorney-at-Law.

AND

In the Matter of the Legal Profession Act,
1971

Panel: Mrs. Tana'ania Small Davis, Q.C.
Ms. Lilieth Deacon
Miss Anna Gracie

Appearances: Mr. Yhohan Davidson
Mr. Sean Kinghorn

Hearing Date: 29 January 2022

1. The Attorney was found guilty of professional misconduct on 16 November 2021, having breached **Canon IV (r) and (s) of the Legal Profession (Canons of Professional Ethics) Rules.**

2. It is appropriate to set out particularly Canon IV (r) and (s):
 - “(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.”

3. The Attorney failed to meet the standard set by this Canon.
4. It is pertinent to rehearse some of the findings of fact, to provide context for the sanction.
5. The Complainant met in a motor vehicle accident on 16 February 2008 and suffered a broken femur. He was treated at the Spanish Town Hospital. He retained the Attorney as soon as he left the hospital to get compensation for his pain, suffering and loss. Despite the Attorney's several requests, he did not receive a medical report from the Hospital. By 2015 the Complainant himself started to follow up with the hospital. He finally received the medical report in late 2016. When the Complainant took the report to the Attorney, the Attorney advised that his claim was now statute barred and that he would need to seek compensation from the hospital as it was due to their delay that a claim had not been filed. The Complainant's claim became statute barred on 16 February 2014. The Attorney had not advised the Complainant of the limitation period prior to its expiration. The Attorney did not take appropriate steps to protect the Complainant's interest by filing a claim and exhibiting thereto such medical records as he then had in his possession which would have been adequate to comply with the Civil Procedure Rules and to inform the defendant of the case that he had to meet, being able to later amend the claim to further particularise the injuries upon eventual receipt of the medical report. Alternatively, the Attorney could have advised the Complainant to obtain X-ray report or other diagnostic reports to consult with a new doctor to provide the requisite medical report.
6. The Attorney had a duty to inform the Complainant of the limitation date and the consequences of not filing a claim before the expiration of that date. An early authority for this is in the Judgment of Scrutton LJ in Fletcher & Son v Jubb, Booth & Helliwell [1920] KB 175 where he states:

“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; ... 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... 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...”

7. Allowing the limitation period to run out without filing action or informing the client of the necessity to file an action is professional negligence.
8. The Panel heard submissions in mitigation. The Attorney's main plea was that the Complainant still has a right of action against the South Regional Health Authority for the delay in providing the medical report prior to the expiration of the limitation period being 16 February 2014, the report having been provided in or around October 2016. The Attorney repeated his submissions made at the liability stage, proclaiming that he could not have brought a claim without the necessary medical report. The Attorney submitted that it would be unfair to ask him to compensate the Complainant when he has a viable claim against the Hospital who should be the one to compensate him.
9. As we held in our decision, the Attorney's discharge of his responsibilities fell far short of what could reasonably be expected of a competent Attorney. It went beyond mere neglect or negligence to have failed to inform the Complainant of the limitation period and to have advised him appropriately as the expiration date approached. Added to this is the Attorney's explanation for not acting to file the claim. A reasonably competent attorney would have explored the options to enable a claim to be filed to preserve the cause of action, attaching thereto what evidence that was in hand that related to the injuries to be set out in the particulars of claim, bearing in mind that it could later be amended when the medical report from the hospital came to hand. At the very least, if the Attorney believed that the Complainant would have been exposed to the risk of an adverse costs order if he had filed a claim that was not compliant with CPR 8.11(3) which was then susceptible to being struck out, he ought to have advised the Complainant (in writing) of his options and for the Complainant to decide whether he would take the risk in favour of filing a claim before the expiration of the limitation period. The Panel has also taken the view that even if the action against the Hospital, as contemplated by the Attorney, was available, that action may equally be statute barred, as more than six years have already elapsed from the date of the delay or negligence in failing to provide the report within the limitation period.

10. The Panel bears in mind the role of the Committee to sanction attorneys for professional misconduct. This is not a case of dishonesty or moral turpitude on the part of the Attorney and as such there will be no consideration of suspension or striking off.
11. In this case, the damage sustained by the Complainant as a result of the Attorney's inexcusable negligence in handling of his matter is relevant and Section 12 of the Legal Profession Act contemplates a compensatory element in the available sanctions. We think that it is appropriate to impose a fine upon the Attorney accompanied by a direction made pursuant to The Legal Professional Act s 12 (5) that such fine be paid to the Complainant in satisfaction of any damage that was caused to him, adopting the approach in **Leonard Wellesley v Lynden Wellesley Complaint 25/2009, delivered 28 April 2012**.
12. We have reviewed the medical report from South East Regional Health Authority dated 21 October 2016 which detailed the injuries sustained by the Complainant as a comminuted fracture of the proximal third of the right femur and there being no permanent impairment, the evidence of the treatment that the Complainant had to undergo and open reduction and internal fixation with fixation nail and three months of physiotherapy. According to the report the Complainant was unable to work for four months and thereafter had difficulty managing without frequent breaks which has had an impact on his earnings. We also reviewed the following documentation of expenses incurred:
 - i. Receipts from South East Regional Health Authority dated 18 March 2014 and 24 March 2016;
 - ii. Manuchant Limited Request Forms dated 17 February 2008;
 - iii. Manuchant Limited Invoice No. 24992 and Sales Receipt No. 40589 dated 18 February 2008 in the sum of \$52,000.00 and \$10,090.02 respectively;
 - iv. Referral Form B dated 27 February 2008;
 - v. South East Regional Health Authority Invoice dated 28 February 2008 in the sum of \$24,670.00 (which discloses an eleven (11) day hospital stay) ;

- vi. South East Regional Health Authority Receipts dated 17 February 2008 and 7 March 2008 in the sum of \$300.00 and \$2,930.00 respectively;
- vii. Receipt No. CCRR No. 429136 for Abstract of Police Accident Report in the sum of \$1,000.00;
- viii. Pharmacy receipt dated 28th February 2008 in the sum of \$4,200.00;
- ix. Invoice from Portmore Wrecking Service Limited dated 13 March 2008 in the sum of \$5,000.00;
- x. Invoice from Your Choice Wrecking dated 13 March 2008 in the sum of \$2,500.00;
- xi. Receipt No. CCRT No. 2898268 for Medical Report in the sum of \$1,000.00;
- xii. Receipt (undated) from Dr. Jithendra Vijayendra for Medical Report in the sum of \$20,000.00;

totalling \$161,490.02.

13. We considered the following reports of awards for personal injuries of a similar nature to that of the Complainant, which we have updated to the December 2021 CPI of 117.0:

Terrence Lawrence v Ernest Young & Donald Young Khan Vol. 3 at page 75, the claimant suffered from a comminuted fracture of his right femur and loss of consciousness. He was admitted to hospital given pain killers and a splint. He had skeletal traction after a Steinman Pin was placed in the right upper tibia. He remained an out-patient for 5 months and was left with a limp due to the shortening of his leg which caused a strain to his hip and back pains. He suffered a permanent partial disability of 15 – 20% of his whole person. For pain and suffering, loss of amenities and handicap on the labour market he was awarded the sum of \$70,000 which updates to \$2,604,715.12.

Beverley Francis v Donovan Pagan and Maurice Smith, Khan Vol 4 page 52, the Claimant suffered a comminuted fracture of the left femur and was assessed as having a PPD of 20% and was awarded \$350,000 for pain and suffering on 15 June 1994 (10). Updates to \$4,095,000.

Jason Edwards v Phoebe Buchannan, Harrison & Harrison Assessment of Damages for Personal Injuries at page 120, a 14 year old student who was injured in a motor vehicle accident in July 1987. Consequently, he suffered a displaced fracture of the left femur. His medical report stated that a radiograph showed severe displacement at the lower end of the shaft. Having undergone surgery and physiotherapy, he was totally disabled for a few months and was expected to have partial disability of 30% for a further two (2) months. In the final analysis though,

he had no permanent partial disability, the medical report indicated. In November 1989, he was given an award of \$45,000.00 for general damages (2). Updates to \$2,632,500.00.

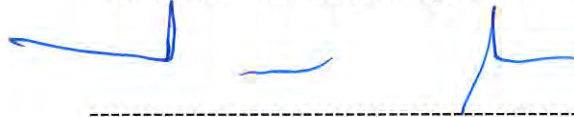
John Shirley v Jamaica Premix Ltd., & Hopeton Smith, Harrison & Harrison Assessment of Damages for Personal Injuries at pages 214, the claimant suffered a fracture of the right femur at the lower end; blow to the right thigh; multiple abrasions and lacerations over the right arm and elbow. General damages were awarded in the sum of \$200,000.00 in October 1992 (6.6). Updates to \$3,545,455.00.

Wade McKoy v Hilda Bennett, , Harrison & Harrison Assessment of Damages for Personal Injuries at page 327, Fracture to the mid shaft of the left femur, cut to forehead, hospitalised for 25 days, leg placed in traction and internally fixed, leg shrunk and shortened by 1 cm, assessed as having a 14% ppd of the whole person, awarded \$60,000 in October 1990 (2.5). Updates to \$2,808,000.00.

14. Bearing in mind the vagaries of litigation and there is by no means certainty of outcome (even though the third party's insurers had written to invite a detailed claim proposal), the Panel considers that a conservative estimate of the damages that the Complainant may have been awarded by a court is in the region of \$2,500,000.00. The Complainant would also be entitled to interest on both special damages for a period of fourteen years and general damages for a period at least eight years. A rough calculation of damages for the physical injuries inclusive of interest at 3% per annum is approximately \$3,330,000.00. We have not considered loss of earnings. Applying a discount of 40% to account for the contingencies of litigation and fees, we consider \$2,000,000 to be fair and reasonable.
15. In these circumstances, it is the decision of the Committee that pursuant to Section 12 (4) and 5 of the Legal Profession Act:
 - (a) The Attorney, Sean Kinghorn, is fined the sum of Two Million Dollars (\$2,000,000.00), to be paid to the General Legal Council on or before 15 December 2022.
 - (b) Pursuant to Section 12(5) of The Legal Profession Act, it is directed that the aforesaid fine shall be paid to the Complainant when collected by the General Legal Council in satisfaction of any damage caused to him by the Attorney's misconduct.

(c) The Attorney, Sean Kinghorn, must pay cost of these proceedings in the amount of \$100,000.00 to the General Legal Council on or before 1 June 2022.

Dated the 13th day of April 2022.



TANA'ANIA SMALL DAVIS, Q.C.



LILIETH DEACON



ANNA GRACIE

