

**THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
(PROCEDURE RULES 2008)**

DECISION

in hearing on Compensation in Complaint

by

**THE COUNCIL OF THE LAW SOCIETY of
SCOTLAND, Atria One, 144 Morrison Street,
Edinburgh**

Complainers

against

**DANIEL ANTHONY MCGINN, 68 Sannox
Drive, Motherwell**

Respondent

1. On 26 May 2022, Daniel Anthony McGinn, 68 Sannox Drive, Motherwell (hereinafter referred to as “the Respondent”), was found guilty of professional misconduct.
2. There was a Secondary Complainer in the Complaint.
3. The Secondary Complainer had lodged a completed compensation claim form dated 17 June 2021, together with two supporting documents. The compensation claim form was completed by Ms Alison Martin, DM Legal Limited, the representative of the Secondary Complainer. Following the finding of professional misconduct, the Tribunal allowed the Secondary Complainer 28 days from the intimation of the findings of misconduct to lodge either a fresh written claim for compensation or an updated written claim for compensation. The written findings were intimated to the Secondary Complainer. Ms Martin emailed the Tribunal Office on 20 July 2022 advising that the Secondary Complainer would rely upon the original compensation claim form.
4. The Tribunal set the matter down for a virtual compensation hearing on 21 September 2022. Notice was duly served upon the Respondent and Secondary Complainer.
5. On the evening of 20 September 2022, Ms Martin emailed the Tribunal Office indicating that she was ill and unable to appear at the hearing on the following day. In terms of Rules 56 and 45 of the Scottish Solicitors Discipline Tribunal Procedure Rules 2008 (“2008

Rules”), the Chair adjourned the virtual compensation hearing to 2 November 2022. Notice was duly served upon the Respondent and the Secondary Complainer.

6. When the virtual compensation hearing called on 2 November 2022 neither the Secondary Complainer, her representative nor the Respondent were present. The Tribunal had received an email from Ms Martin shortly prior to the hearing intimating that she was ill and unable to attend. In the circumstances, the Tribunal concluded that it was appropriate to adjourn the virtual compensation hearing to a date to be afterwards fixed.
7. The Tribunal determined that the virtual compensation hearing should be set down for 19 December 2022. Notice was duly served upon the Respondent and Secondary Complainer.
8. At the virtual compensation hearing on 19 December 2022, the Secondary Complainer was not present but was represented by Ms Alison Martin, DM Legal Limited. The Respondent was neither present nor represented. The Tribunal heard evidence from the Clerk in relation to the service of the notice of hearing upon the Respondent. Having given careful consideration to the information before it, the Tribunal concluded that it was fair and appropriate to proceed with the compensation hearing in the absence of the Respondent. The Tribunal proceeded to hear submissions from Ms Martin on behalf of the Secondary Complainer.
9. Having given careful consideration to the submissions on behalf of the Secondary Complainer and the documents before it, the Tribunal found the following facts established:-
 - 9.1 The claimant in this hearing was the Secondary Complainer in the Complaint against Daniel Anthony McGinn, 68 Sannox Drive, Motherwell. The Respondent was found guilty of professional misconduct in the following terms:-
 - a) He took instructions from the Secondary Complainer to act on her behalf in relation to a medical negligence claim and ceased to act without just cause; and
 - b) He failed to advise the Secondary Complainer that he was ceasing to act on her behalf.
 - 9.2 The Secondary Complainer lodged a written statement of claim with the Tribunal claiming the sum of £5,000.

9.3 The Secondary Complainer was directly affected by the Respondent's misconduct noted above. As a result of the aforesaid misconduct, the Secondary Complainer suffered inconvenience and distress.

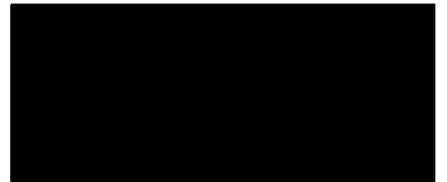
10. The Tribunal, having heard further submissions from Ms Martin in respect of expenses and publicity, pronounced an Interlocutor in the following terms:-

By Video Conference, 19 December 2022. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Daniel Anthony McGinn, 68 Sannox Drive, Motherwell and having previously determined that the Respondent was guilty of professional misconduct; Find that the Secondary Complainer has been directly affected by the Respondent's misconduct and consider that it is appropriate to award compensation to the said Secondary Complainer; Ordain the Respondent in terms of section 53(2)(bb) of the Solicitors (Scotland) Act 1980 to pay to the Secondary Complainer the sum of £1,000 by way of compensation in respect of inconvenience and distress resulting from the misconduct within 28 days of the date on which this Interlocutor becomes final with interest at the rate of 8% per annum from the due date until paid; Make no finding of expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify the Secondary Complainer or any other person.

(signed)
Colin Bell
Chair

11. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent and the Secondary Complainer by recorded delivery service on **15 February 2023**.

IN THE NAME OF THE TRIBUNAL



Colin Bell
Chair

NOTE

Following a finding of professional misconduct against the Respondent on 26 May 2022, and after sundry procedure, the Tribunal set down a virtual compensation hearing for 19 December 2022. At that hearing, the Secondary Complainer was absent but was represented by Ms Alison Martin, DM Legal Limited. The Respondent was neither present nor represented. The first issue that arose was whether or not it was appropriate to proceed to deal with the compensation claim in the absence of the Respondent. Ms Martin indicated that she had no objection to the case continuing in his absence.

The Tribunal proceeded to hear evidence from the Clerk confirming that a letter giving notice of the compensation hearing, addressed to the Respondent at the address in the Complaint, was sent to Sheriff Officers for service. Sheriff Officers had provided an execution of service noting that they had deposited this letter at the address in the Complaint on 14 November 2022. The Clerk confirmed that no contact had been made by the Respondent at any time since the Complaint itself had been served upon him.

The Tribunal was satisfied that notice of the compensation hearing had been effected upon the Respondent within the terms of the Tribunal Rules. The next step for the Tribunal was to consider whether it was fair and appropriate for the hearing to proceed in his absence. The Tribunal considered the terms of the case of R-v-Jones [2002] UKHL5 and the need to exercise its discretion in this matter "*with great caution and close regard to the overall fairness of the proceedings*". The Tribunal noted that the Respondent had not engaged with the disciplinary process from the outset. The hearing of the Complaint itself had taken place in his absence. It was apparent that the Respondent's precise whereabouts were unknown. Little purpose would be served by further adjourning this hearing. In all of the circumstances, the Tribunal considered it both appropriate and fair to proceed in the absence of the Respondent.

On reconvening, the Chair drew Ms Martin's attention to the list of documents within the written claim for compensation which had not been lodged with the Tribunal. Ms Martin indicated that she had prepared a written statement which she requested she read to the Tribunal. This written statement covered the issue of the documents not lodged and the wider scope of the hearing. Ms Martin explained that the Secondary Complainer preferred not to speak about the issues and rather communicated with her by way of email. She believed that the Secondary Complainer was suffering from mental health difficulties, although she had no medical evidence to that effect. The last email she had received from the Secondary Complainer was on 24 November 2022.

In response to a question from the Tribunal, Ms Martin confirmed that she had specific instructions to appear on behalf of the Secondary Complainer at this hearing.

The Tribunal invited Ms Martin to proceed with her written statement.

Ms Martin indicated that the Secondary Complainer's mental health was not good, although she had no medical evidence to produce today. The Secondary Complainer had been unable to provide Ms Martin with the supporting evidence referred to in the written claim. However, what was obvious and statable was the seriousness of the level of professional misconduct found to be established at the original hearing and which was noted as such within the detailed Tribunal findings. She explained that the upset and anguish which was caused by the loss of the Secondary Complainer's child had been immeasurable. She considered that the continuation of that anguish caused by the Respondent's conduct and the loss of opportunity to raise an action against the hospital should be considered at the highest end of the scale for compensation. Ms Martin stated that she understood that there was a lack of medical evidence but she was inviting the Tribunal to look at the circumstances as a whole. She submitted that this was such a significant breach of trust that the Tribunal removed the Respondent from the roll of solicitors. Accordingly, she invited the Tribunal to award the Secondary Complainer the maximum compensation allowed.

The Tribunal asked Ms Martin if it had not been possible for her to obtain a mandate from her client in order to obtain the necessary supporting information. Ms Martin responded that she had not wanted to cause any further delay. She stated that she believed she could obtain the medical information using such a mandate if the Tribunal wished her to do so. She was uncertain about obtaining a supporting statement from the Secondary Complainer indicating that she thought this would depend on the Secondary Complainer's state of mental health.

The Tribunal adjourned to consider Ms Martin's submissions.

Ms Martin had confirmed to the Tribunal that she had the Secondary Complainer's instructions to appear on her behalf at this hearing. She was not making a motion to adjourn the hearing but was offering to attempt to obtain the documents referred to in the written claim for compensation, if requested by the Tribunal. The Tribunal noted that the Findings were intimated to the Secondary Complainer by letter dated 22 June 2022 and that this was the third compensation hearing fixed. The Tribunal Clerk had written to Ms Martin on 21 September 2022 and 2 November 2022 raising the issues of supporting evidence for how the Secondary Complainer's health had been affected by the Respondent's misconduct;

more information regarding the loss of opportunity to raise a civil action against the NHS; and reminding her that the supporting documents referred to in the written claim for compensation had not yet been lodged. On 2 November 2022, the Tribunal Clerk had written to the Secondary Complainer in similar terms.

The Tribunal gave careful consideration to all of the aforementioned circumstances and determined that it was appropriate to proceed on the basis of the documents before it and Ms Martin's submissions. However, the Tribunal members had further questions for Ms Martin regarding the written claim for compensation.

On reconvening, the Tribunal clarified with Ms Martin that the Secondary Complainer was claiming for both loss of opportunity to raise an action for medical negligence and for inconvenience and distress.

The Tribunal invited Ms Martin to address the Tribunal on the authorities setting out how it required to approach cases of loss of opportunity and to expand upon how her client's case fell into this category. Ms Martin responded that she did not have those authorities with her and therefore was not able to do so.

The Tribunal invited Ms Martin to describe how she understood the misconduct in this case had caused a loss of opportunity. She submitted that she had understood there to be no dispute that this was the case. She submitted that the Respondent had accepted instructions to act for the Secondary Complainer and had granted her advice and assistance on 28 May 2016. The Secondary Complainer contacted Ms Martin in September 2016 advising that she had been unable to contact the Respondent. After the Law Society investigated, it became apparent that the Respondent had abandoned his office. Ms Martin advised the Secondary Complainer to instruct another solicitor and had made it clear that she was unable to progress the Secondary Complainer's civil action for her. The Secondary Complainer had been stressed by what had happened, in particular by the loss of the medical reports detailing the death of her baby. She did not want to engage another solicitor. The Central Legal Office for the hospital concerned had advised Ms Martin in 2017 that the triennium had expired.

Ms Martin confirmed that she and the Secondary Complainer had discussed a claim in relation to the Marsh insurance policy, but nothing was pursued.

Ms Martin emphasised that she had hoped that she would recover the Respondent's file and the process of determining what had happened had been complicated. The Respondent was known to Ms Martin's

business partner through family. He had returned from England to set up his own practice. DM Legal had a number of clients requiring to instruct a solicitor. DM Legal and the Respondent joined in a business sense, in terms of referring clients. Ms Martin was still at university at this time and was going into the office between classes. Her business partner had left university and started a traineeship with the Respondent. The Respondent's mother contacted Ms Martin's business partner to tell her that she was concerned about the whereabouts of her son. His mother reported him missing to the police, who subsequently traced him to London. The Respondent contacted his mother, angry at her involving the police. No further contact has been made by him. They did not know where he was, and no legal action was taken against him.

Ms Martin conceded that it was clear that there had been time to retrieve the situation between the disappearance of the Respondent and the expiry of the triennium in March 2017. However, the Secondary Complainer had not wanted to engage another solicitor.

The Tribunal noted that loss of opportunity cases required a calculation of the prospects of success and invited Ms Martin to make submissions on the merits of the case for medical negligence and its prospects of success. Ms Martin responded that she was not factually familiar with the civil claim and would not want to comment beyond saying that the Respondent had thought it worth getting further medical evidence.

The Tribunal asked Ms Martin if she wanted to expand on her submissions in relation to distress and inconvenience caused.

Ms Martin explained that the original negligence on the part of the hospital had caused the Secondary Complainer great trauma and distress. The way the Respondent had behaved had caused the Secondary Complainer to relive that trauma. She referred to the effect the loss of medical records had had upon the Secondary Complainer, but conceded that this was not part of the misconduct held to be established in this case and explained she only referred to it for context.

DECISION

The powers of the Tribunal to award compensation are set out within Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 which provides that:-

“Where the solicitor has been guilty of professional misconduct, and where the Tribunal consider that the Complainer has been directly affected by the misconduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000, as the Tribunal may specify to the Complainer for loss, inconvenience or distress resulting from the misconduct.”

The Tribunal noted that its power to award compensation was limited. Any loss, inconvenience or distress must have resulted from the misconduct that was found to be established at the original hearing. It could only direct a solicitor to pay compensation up to a maximum award of £5,000. The standard of proof in connection with a claim of compensation is that of the balance of probabilities. The onus of proof rests upon the Secondary Complainer. The Tribunal has a discretion to award compensation but is not obliged to do so.

In this case, the Tribunal had the benefit of the written claim for compensation, together with two supporting documents, and the submissions made on behalf of the Secondary Complainer by Ms Martin.

The starting point for the Tribunal was to consider the misconduct found to be established. The basis of the misconduct in this case was that the Respondent, having taken instructions from the Secondary Complainer to act on her behalf in relation to a medical negligence claim, ceased to act for her without just cause and without telling her that he was ceasing to act on her behalf.

The style compensation claim form separates the claim for compensation into two parts, namely (A) financial loss, and (B) inconvenience and distress. The completed form in this case under part (A), made a claim for financial loss in relation to legal expenses to be paid to DM Legal for their legal work. This was said to be 20% of any compensation won by them for the Secondary Complainer. Clearly as no action was pursued against either the hospital concerned nor the Respondent himself, the only compensation payable would be in this case. The question of expenses would not arise until the Tribunal had concluded that an award of compensation was appropriate. Ms Martin had made no reference to this claim in her submissions.

Under part (B) of the claim form, the Secondary Complainer made a claim for inconvenience and distress in relation to (1) a data protection breach, (2) the loss of opportunity in taking up a case against the hospital concerned due to the expiry of the triennium, and (3) a loss of faith in the legal profession on the part of the Secondary Complainer caused by the Respondent’s misconduct.

Ms Martin had conceded in her submissions that any inconvenience and distress caused by a breach of data protection rules was not part of the misconduct found in this case.

The claim in relation to the loss of opportunity to raise a case against the hospital appeared to the Tribunal to be capable of being interpreted both as a claim for the financial loss associated with this loss of opportunity as well as inconvenience and distress. Ms Martin confirmed in her submissions that her client was claiming for both aspects. The Tribunal considered the issue of financial loss first.

The loss of opportunity in this case is said to be the loss of the possibility of raising a claim against the hospital for medical negligence due to the expiry of the triennium. In order for this claim to succeed, it required to be established that the loss of possibility of raising this action was caused by the misconduct upheld in this case. In her submissions, Ms Martin conceded that there was time for the situation to be retrieved in-between the disappearance of the Respondent becoming apparent and the expiry of the triennium.

The Tribunal also required to assess what the opportunity was that was potentially lost here. In this respect, the Tribunal had regard to the cases of Kyle-v-P and J Stormonth Darling WS 1993 SC57; Allied Maples Group Limited-v-Simmonds and Simmonds [1995] 1WLR1602(CA); and Iain Robertson-v-The Law Society of Scotland [2015] CISH95. In order for this claim to succeed, the Tribunal required to be satisfied that the Secondary Complainer had a real and substantial, and not a speculative chance, of success in the proposed action for medical negligence. Unfortunately, Ms Martin was unable to provide the Tribunal with any information with regard to the merits of any such action or the prospects of success.

In all of the above circumstances, the Tribunal was unable to make a finding that the Secondary Complainer had sustained a loss resulting from the Respondent's professional misconduct.

The Tribunal thereafter went on to consider the claim in relation to inconvenience and distress. Whilst the information available to the Tribunal was restricted to the documents before it and the submissions made, the Tribunal was satisfied on a balance of probabilities that the Secondary Complainer was directly affected by the misconduct of the Respondent and that inconvenience and distress had been caused by that misconduct. The Secondary Complainer was a vulnerable client. The matter in which he was instructed was a very sensitive and personal one. The way in which he ceased to act caused chaos and uncertainty. The Secondary Complainer clearly had been caused inconvenience, worry, anxiety and upset. The Respondent had taken no steps to rectify matters. As a consequence of the Respondent's conduct, the Secondary Complainer had lost faith in the legal profession. Having regard to the

information before it, the Tribunal considered that the appropriate award of compensation was one of £1,000.

In her submissions, Ms Martin had referred to the seriousness of the professional misconduct found to be established in this case. The Tribunal considered it important to clarify that any award of compensation made by the Tribunal requires to be based on any actual loss, inconvenience and distress suffered by a Secondary Complainer as a result of the misconduct. It does not automatically follow that a finding of serious professional misconduct will merit the highest award of compensation. Serious misconduct can cause little in the way of loss, inconvenience and distress whilst misconduct at the lower end of the scale can cause significant loss, inconvenience and distress.

The Tribunal invited further submissions with regard to expenses and publicity. Ms Martin confirmed that she was making no motion for expenses and that she had no fee to charge the Secondary Complainer in this case. She invited the Tribunal not to name the Secondary Complainer in any publicity.

In the circumstances, the Tribunal considered that the appropriate order in relation to expenses was one of no expenses due to or by either party. With regard to publicity, the Tribunal noted that, at the hearing of the Complaint, it had been considered that naming the Secondary Complainer might run the risk of adding further to her distress. Accordingly, the Tribunal considered it appropriate to adopt the same approach and directed that publicity should be given to this decision and that the publicity should include the name of the Respondent but need not identify the Secondary Complainer or any other person.



Colin Bell
Chair