

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PRACTICE ACT 2003 (WA)

CITATION : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE and BROWNE [2006] WASAT 201

MEMBER : JUDGE J CHANEY (DEPUTY PRESIDENT)
MS J TOOHEY (SENIOR MEMBER)
MS B HOLLAND (SESSIONAL MEMBER)

HEARD : 2 MAY 2006

DELIVERED : 26 JULY 2006

FILE NO/S : VR 393 of 2005

BETWEEN : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Applicant

AND

STEPHEN JOHN BROWNE
Respondent

Catchwords:

Professions - Legal practitioner - Advertising of services related to personal injury claims - Whether breach of *Civil Liability Act 2002* (WA) - Whether question open for determination by Tribunal - Advertisements directed to persons who have already made claims - Whether likely to encourage a person to make a claim - Whether advertisements misleading - Whether expressions "no compensation = no legal fees" is misleading - Whether expression "your first consultation is free" is misleading

Legislation:

Civil Liability Act 2002 (WA), s 17, s 17(1), s 17(2), s 17(3), s 17(4), s 18

Result:

Finding of unprofessional conduct by misleading advertisement

Category: B

Representation:

Counsel:

Applicant : Ms PE Cahill
Respondent : MR SA Shirrefs SC and Mr GW Massey

Solicitors:

Applicant : Legal Practitioners Complaints Committee
Respondent : Holborn Lenhoff Massey

Case(s) referred to in decision(s):

Legal Practitioners Conduct Board v Ardalich [2005] SASC 478

Case(s) also cited:

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of the Tribunal's decision

1 Stephen Browne, a solicitor, placed an advertisement in newspapers, in the Yellow Pages directory, and on television in 2003 and 2004. The advertisements offered assistance to people who had made claims for damages for personal injury.

2 Section 17 of the *Civil Liability Act 2002* (WA) places certain restrictions on advertising by legal practitioners in relation to personal injury claims. The Legal Practitioners Complaints Committee alleged that Mr Browne's advertisements contravened that provision. It also claimed that the expressions "your first consultation is free" and "no compensation = no legal fees" as used in the advertisements were misleading.

3 The Tribunal concluded that the statements in the advertisements did not breach s 17, because they were expressly directed to persons who had made a claim, so that they could not be said to be intended to, or likely to encourage a person to make a claim.

4 It concluded that, on the basis of the information before it, it could not be said that the words "your first consultation is free" were misleading. However the words "no compensation = no legal fees" were misleading because a member of the public may be misled into thinking that, by using the practitioner's services, they would have no liability for any fees or costs rather than no liability for only the practitioner's own charges for legal fees. It found the placement of an advertisement which misled in that way amounted to unprofessional conduct.

Introduction

5 Stephen John Browne is a legal practitioner admitted to practice in 1980. He is the principal of a law firm which trades under the name Stephen Browne Personal Injury Lawyers.

6 In various editions in The West Australian newspaper in September 2003 and in the Telstra Yellow Pages telephone directory for 2003/2004, the firm published the following advertisements.



Injured in a road accident and made a claim?

If so, read on...*

We at Stephen Browne Personal Injury Lawyers understand how important your claim is to you. We specialise in motor vehicle injury claims like yours and we can take care of every aspect of your claim.

We have over 20 years experience in helping people, like you, who have made a claim, in obtaining their rightful compensation. Our friendly experienced team will leave no stone unturned to ensure your claim is pursued fully and professionally, so that the best possible outcome for your claim is achieved.

Your claim will be handled on the basis that:

- **Your first consultation is free**
Get expert advice regarding your claim from a lawyer.
- **No compensation = No legal fees**
If you do not receive compensation from your claim we will not charge you legal fees.
- **Free home and hospital visits**
We are happy to visit you at home or hospital to discuss your claim.

Call us now on FREECALL (all areas)
1800 006 642

*If you have not made a claim, disregard this advertisement.

 **STEPHEN BROWNE**
PERSONAL INJURY LAWYERS
www.stephenbrowne.com.au



Injured in a road accident and made a claim?

If so, read on...*

We at Stephen Browne Personal Injury Lawyers understand how important your claim is to you. We specialise in motor vehicle injury claims like yours and we can take care of every aspect of your claim.

We have over 20 years experience in helping people, like you, who have made a claim, in obtaining their rightful compensation. Our friendly experienced team will leave no stone unturned to ensure your claim is pursued fully and professionally, so that the best possible outcome for your claim is achieved.

Your claim will be handled on the basis that:

- **Your first consultation is free**
Get expert advice regarding your claim from a lawyer.
- **No compensation = No legal fees**
If you do not receive compensation from your claim we will not charge you legal fees.
- **Free home and hospital visits**
We are happy to visit you at home or hospital to discuss your claim.

Call us now on FREECALL (all areas)
1800 006 642

*If you have not made a claim, disregard this advertisement.

 **STEPHEN BROWNE**
PERSONAL INJURY LAWYERS
www.stephenbrowne.com.au

7 In the 2004/2005 edition of the Telstra Yellow Pages, the firm inserted the following advertisement

296 S (Solicitors)



Injured in a road accident and made a claim?

If so, read on...*

We at Stephen Browne Personal Injury Lawyers understand how important your claim is to you. We specialise in motor vehicle injury claims like yours and we can take care of every aspect of your claim.

We have over 20 years experience in helping people, like you, who have made a claim, in obtaining their rightful compensation. Our friendly experienced team will leave no stone unturned to ensure your claim is pursued fully and professionally, so that the best possible outcome for your claim is achieved.

Your claim will be handled on the basis that:

- **Your first consultation is free**
Get expert advice regarding your claim from a lawyer.
- **Free home and hospital visits**
We are happy to visit you at home or hospital to discuss your claim.
- **No compensation = No legal fees**
If you do not receive compensation from your claim we will not charge you legal fees. Nearly all claims are resolved without the need to commence legal proceedings. However, if that is needed, then you may be required to pay the defendant's legal costs if you are not successful. For further details see our website or contact us.

Call us now on **FREECALL (all areas)**
1800 111 535

*If you have not made a claim disregard this advertisement

 **STEPHEN BROWNE**
PERSONAL INJURY LAWYERS
www.stephen-browne.com.au

8 During September and October 2003, the firm advertised on television. The advertisements featured the characters depicted in the advertisement which appeared in the West Australian newspaper in September 2003 with a voiceover and text materially the same as the text of the newspaper advertisements.

9 Section 17 of the *Civil Liability Act 2002* (WA) (the CL Act) provides:

Restriction on advertising legal services relating to personal injury

- (1) A legal practitioner or a person acting for a legal practitioner must not publish or cause to be published a statement that may reasonably be thought to be intended or likely to encourage or induce a person —

- (a) to make a claim under any Act or law for compensation or damages for a personal injury; or
- (b) to use the services of the legal practitioner, or another named legal practitioner or a named firm of legal practitioners in connection with the making of a claim mentioned in paragraph (a),

except if section 18 allows publication of the statement.

Penalty: \$10 000.

- (2) A legal practitioner or a person acting for a legal practitioner does not contravene subsection (1) only because of —

- (a) a statement made —

- (i) to a person who is already a client of the legal practitioner or in a costs agreement within the meaning of the *Legal Practice Act 2003*;
- (ii) to a person at the legal practitioner's place of business; or
- (iii) under an order by a court;

or

- (b) a statement made on the legal practitioner's internet website that is limited to statements about —

- (i) the operation of the law of negligence and a person's legal rights under that law; and
- (ii) the conditions under which the legal practitioner is prepared to provide personal injury services.

- (3) The liability of a legal practitioner who contravenes subsection (1) to the penalty provided under that subsection does not prevent the legal practitioner from being charged with, or found guilty of, unprofessional

conduct because of the conduct involved in the contravention.

- (4) Subsection (1) does not apply to a statement made in an edition published before the commencement of this section."

10 The Legal Practitioners Complaints Committee (the Committee) alleges that Mr Browne was guilty of unprofessional conduct in publishing the advertisements referred to above by reason that the advertisements constitute a breach of s 17 of the CL Act, and are misleading as to the costs payable by potential clients.

11 The Committee contends that the advertisements constitute a breach of s 17 in that each advertisement, read as a whole, constitutes a statement that may reasonably be thought to be intended, or likely to, encourage or induce a person to make a claim under an Act or law for compensation or damages for personal injuries, or the use of the services of the practitioner or the law firm, in connection with the making of the claim under an Act or law for compensation or damages for personal injury. Section 18 of the CL Act provides for certain exemptions from the prohibition under s 17, but it is common ground that none of those exemptions are relevant in the present case.

12 The Committee asserts that the advertisements are misleading as to the costs payable by a potential client in that each advertisement:

- "a) includes the statement 'No compensation = no legal fees';
- b) does not disclose that the potential client may have a potential liability to meet disbursements incurred by the law firm in respect of the potential client's matter;
- c) except in relation to the 2004/2005 Yellow Pages telephone directory, does not disclose that the potential client may have a potential liability to pay the costs of the party against whom a claim is made or legal proceedings are issued on behalf of the potential client;
- d) does not disclose that the potential client may have a potential liability to the law firm for fees or disbursements in the event that the law firm ceases to act for the potential client'

- e) includes the statement 'First consultation free' or 'Your first consultation is free' but does not disclose the scope or content of the first consultation and does not disclose whether or the extent to which legal advice is, or legal services will be, provided without charge to the potential client."

13 Mr Browne admits that he is responsible for placing the advertisements. He argues that, given that the contravention of s 17 is a simple offence attracting a penalty of \$10 000, it is not open to this Tribunal to make a finding that he has breached the CL Act. If it is open, then he argues that the advertisements do not, in any event breach s 17. If, contrary to that submission, the Tribunal were to find that a breach of s 17 had occurred, then Mr Browne argues that that breach should not amount to unprofessional conduct, since he did not place the advertisements before first taking the advice of three counsel who all advised him that the advertisements did not contravene s 17. He also denies that the advertisements are misleading.

The Tribunal's jurisdiction to determine a breach

14 Mr Shirrefs, who appeared, with Mr Massey, for Mr Browne, argued that the Tribunal does not have jurisdiction to determine whether the practitioner has contravened s 17 of the CL Act. Rather, he argued, it is the province of the Magistrate's Court, applying the criminal standard of proof, to determine breaches of a criminal offence. It was submitted that it is not appropriate for the Tribunal to "embark upon some sort of quasi criminal trial" upon a lower standard of proof to determine whether the respondent is guilty of unprofessional conduct. He relied upon the decision of Perry ACJ in *Legal Practitioners Conduct Board v Ardalich* [2005] SASC 478 at [37] as authority for that proposition.

15 Those submissions overlook s 17(3) of the CL Act which expressly preserves the possibility of a legal practitioner being charged with, or found guilty of, unprofessional conduct by reason of conduct involving a contravention of s 17 notwithstanding the liability of the practitioner to prosecution under s 17(1). That subsection is a complete answer to the proposition advanced by Mr Shirrefs.

Do the advertisements breach s 17?

16 The question for determination is whether the advertisements contain "a statement that may reasonably be thought to be intended or likely to encourage or induce a person to make a claim, or use the services of a

legal practitioner in connection with the making of a claim". The Committee contends that those expressions should be construed broadly in order to achieve the purpose identified in the long title to the CL Act, namely "to restrict advertising legal services relating to personal injury, to restrict touting, and for related purposes".

17 The respondent contends that "statement" should be read in its ordinary meaning, which the *Oxford English Reference Dictionary* (2nd ed) defines as "an expression in words". Accordingly, the respondent argues, it is necessary to examine the words used in the publication in order to determine whether those words may reasonably be thought to be intended or likely to encourage or induce a person to make a claim. He submits that questions of style, format or font size are not addressed by s 17.

18 It is plain that the advertisements in question have been drawn with s 17 in mind. The opening words, in large bold print, identify to whom the advertisement is directed, namely those who have been injured in a road accident "and made a claim". That the advertisement is expressly directed to people in that category is confirmed by the following words "if so, read on ... *". The asterisk refers to a footnote which reads "* if you have not made a claim disregard this advertisement". The text which follows assumes an existing claim. It speaks of "how important your claim is to you", specialisation by the firm in "vehicle injury claims like yours", and informs the reader that the firm can "take care of every aspect of your claim". The advertisement refers to people "like you, who have made a claim".

19 The respondent argues that those words cannot be construed as encouraging or inducing the making of a claim, because the advertisement is predicated on a claim already having been made. He argues that, in order to constitute a breach of s 17, the words of the "statement" contained in the advertisements would need to be construed in a way which conflicts with their plain meaning.

20 The Committee contends that, notwithstanding the words used, the use of different size and type of font has the effect of minimising the importance of the admonition to disregard the advertisement if a claim has not already been made. The reference to free hospital visits is likely, the Committee argues, to attract potential clients who have been recently injured but have not yet made claims. It is also argued that it is reasonable to assume that persons who have already made a claim will be already represented by a legal practitioner whereas the advertisement, on

an ordinary reading, appears to be directed to persons other than legally represented persons.

21 We do not accept the Committee's submissions in this regard. Section 17 is addressed to publication of "a statement". The plain words of the advertisement make it clear that the advertisement is directed to persons who have already made a claim. Any encouragement that the form and presentation of the advertisement may give to a person who has not yet made a claim is expressly countered by the direction to those people to disregard the advertisement.

22 The long title to the CL Act does not specify the manner in which the Act seeks to restrict advertising legal services relating to personal injury. The manner in which it does so is found in sections 17 and 18. The restriction is directed to advertising which might encourage or induce claims to be made. Section 17 imposes a liability to significant fine for legal practitioners who contravene the section. It makes illegal, and accordingly unprofessional, conduct which, prior to its enactment, was common place amongst personal injury lawyers. The significant consequences of the prohibition call for a construction which is no broader than the words used in the section. We find that the advertisements do not breach s 17 of the CL Act.

Are the advertisements misleading?

23 The Committee contends that the advertisements are misleading in two respects. The first is the assertion "no compensation = no legal fees" followed by the words "if you do not receive compensation from your claim we will not charge you legal fees". The Committee complains that the advertisements do not disclose to potential clients that they may have a liability:

- i) to meet disbursements incurred by the law firm in respect of the potential client's matter;
- ii) to pay the costs of the party against whom a claim is made or legal proceedings are issued on behalf of the potential client; or
- iii) to the law firm for fees and disbursements in the event that the law firm ceases to act for the potential client.

24 The practitioner responds by observing that the relevant words in the advertisement make no reference to disbursements, or party/parties' costs arising out of contested litigation. It can be seen that, as a result of

concerns expressed by the Committee, Mr Browne modified the advertisement which appeared in the 2004/2005 edition of the Telstra Yellow Pages by placing the following words after the expression "no compensation = no legal fees":

"If you do not receive compensation from your claim we will not charge you legal fees. Nearly all claims are resolved without the need to commence legal proceedings. However, if that is needed, then you may be required to pay the defendant's legal costs if you are not successful. For further details see our website or contact us."

25 The Law Society of Western Australia published guidelines for the advertising of legal services in October 2000. The guidelines formed a schedule to the Law Society's Professional Conduct Rules. The guidelines were amended in October 2003 as a result of the CL Act. The guidelines in relation to the expressions "no win – no fee" and "no win – no pay" remain unchanged. The guidelines read:

"On the face of it these expressions appear to refer to those circumstances where a lawyer or other legal service provider agrees to waive his or her professional fees in the event that a particular legal action is unsuccessful. There does not appear to be an obvious distinction between the two terms and in practice they are often used interchangeably.

For consumers, however, these expressions could have the effect of implying that a legal transaction is entirely free of charge. This is almost never the case because there are often disbursements and other costs that are payable by the consumer even in the event of a win. If a case is lost the costs to the consumer may be even higher, with the possibility of the losing party being saddled with the other party's costs. Care should be taken to ensure that fees that could be payable regardless of the outcome of a case (in particular the possibility of liability for disbursements and other party costs) are clearly disclosed in advertisements that use the terms 'No Win – No Fee' and 'No Win – No Pay' or similar terms.

In so far as an advertisement can be placed in relation to practising in personal injuries, no advertisement should make mention of 'No Win – No Fee' and 'No Win – No Pay'."

26 In September 2003, the Committee sought Mr Browne's comments in relation to the proposition that his advertisements breached s 17 and were misleading. In a letter in response, dated 10 September 2003, Mr Browne drew a distinction between the phrase "no compensation = no legal fees" and the phrase "no win, no fee". The distinction was, he contended, that the latter expression connoted a victory in court whereas the expression "compensation" did not carry that connotation. He advised that the majority of claims were settled through negotiations with the Insurance Commission of Western Australia and without legal proceedings ever being commenced. Where proceedings were necessary, Mr Browne advised that he entered into a fresh retainer with the clients in relation to those proceedings. Accordingly, he asserted that the concerns expressed in the Law Society guidelines had no application to the expression used in his advertisements.

27 In our view, the expression "no legal fees" would be construed by a member of the public as encompassing more than simply the practitioner's own fees. In particular, we do not accept that a member of the public would draw a distinction between the legal fees of his or her own practitioner, and legal fees which might be payable to the defendant's solicitors in the event of an unsuccessful claim. Nor do we consider that a member of the public, who is told there would be no legal fees, would conclude that there might be a liability for disbursements, such as court fees, payable in respect to a claim.

28 On 1 December 2003, Mr Browne wrote to the Committee in response to a further enquiry by the Committee. He said:

"I advise that since receiving this letter and giving the contents due consideration my policy in respect of those matters which either:

1. do not result in any compensation being paid to my client;
or
2. compensation does not exceed any moneys payable by my client (whether in the nature of disbursements or adverse costs orders or otherwise),

then in such events I shall pay such disbursements or adverse costs orders myself to the extent that the same exceeds any compensation received."

29 While that approach to avoid the consequence of the otherwise misleading words in the advertisement is commendable, it is clear that, prior to that time, Mr Browne did not have that policy in place.

30 In our view, the expression "no compensation = no legal fees" is misleading where they appear in the advertisements published in September 2003. The advertisements speak of leaving "no stone unturned to ensure your claim is pursued fully and professionally", and the services being offered clearly contemplate potential litigation. The effect of the advertisement is that a member of the public may be misled into thinking that, by using the practitioner's services, he or she would have no liability for any fees related to the pursuit of the claims. That person would not anticipate that, if litigation became necessary, a new retainer would be required involving some different exposure to "legal fees" than was advertised.

31 In view of the warnings contained within the Law Society guidelines, advertising in this misleading way falls short of the standard of conduct observed and approved by members of the profession of good repute and competence, and is thus unprofessional conduct.

32 The Committee also contends that the expression "your first consultation is free" is misleading. The guidelines contain the following passage:

"The use of the term 'first appointment free' can also create a great deal of confusion for consumers. Some legal service providers have taken the view that a first appointment is necessarily followed by a second, with a bill for a second appointment being sent even where the consumer did not contract with them to do their legal work after the initial appointment. Some consumers have formed the view that all lawyers operate on a 'first appointment free' basis, although in reality this practice is far from universal.

An advertisement of 'first appointment free', should be capable of being read at face value. What constitutes the 'first appointment' could also be a source of confusion for consumers. Lawyers who only regard the first 20 minutes of the first appointment as free should make sure the consumer is aware of this before beginning to charge. To avoid misleading consumers, advertisements that offer 'first appointment free' should clearly spell out the terms and conditions of the offer."

33 After the words "your first consultation is free" the advertisements in question contain the words "get expert advice regarding your claim from a lawyer". The practitioner draws a distinction between the use of the word "consultation" and the word "appointment" of which the guidelines speak. He submits that the expression "consultation" is spelt out as being an occasion where expert advice is provided by a lawyer regarding the client's claim.

34 There is no suggestion in these proceedings that any client has complained of having been misled by this advertisement. There is no evidence which suggests that Mr Browne does not, in fact, provide a consultation where advice is given in relation to the claim without charge. The issues identified in the guidelines as possibly confusing consumers involved possible practices by practitioners, such as regarding only the first 20 minutes of the consultation as free, which might be unexpected by consumers who expect their "first appointment to be free". This case involves no such practice on Mr Browne's part. There is no basis, on the materials before the Tribunal, to suspect that what appears on the face of the advertisement (in respect of the first consultation) is not what in fact occurs. The advice contained within the guidelines is obviously sound, and is directed to ensuring that practitioners make proper disclosure of their practices, and avoid confusion on the part of consumers. In this case, however, the Committee has not demonstrated that some false impression might be conveyed by the words used.

35 In our view, the portion of the advertisement relating to the first consultation cannot be said to be misleading.

Conclusion

36 It follows that, in our view, the advertisements the subject of these proceedings do not breach s 17 of the CL Act. The advertisements which appeared in the September 2003 editions of the West Australian newspaper and in the 2003/2004 edition of the Telstra Yellow Pages are misleading to the extent that they use the words "no compensation = no legal fees". They are not misleading in relation to the words "your first consultation is free".

37 It is apparent from the papers before us that, in inserting his advertisements, Mr Browne has taken advice of counsel (including eminent senior counsel) in relation to the compliance of s 17 of the CL Act. It is also apparent that he has had regard to the guidelines, and has sought to meet the concerns expressed in those guidelines, albeit, in our view, unsuccessfully in one respect. It is also apparent that he has

responded appropriately when concerns have been raised about the advertisements by the Committee, while at the same time being anxious to promote his practice to the extent that he properly might. They are matters which are relevant to the appropriate penalty in relation to our finding of unprofessional conduct against Mr Browne, which is a matter upon which we will hear the parties.

I certify that this and the preceding [37] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE J CHANEY, DEPUTY PRESIDENT