

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

**F I N D I N G S**

**in Complaint**

**by**

**THE COUNCIL OF THE LAW  
SOCIETY of SCOTLAND, 26  
Drumsheugh Gardens, Edinburgh**

**against**

**MICHAEL ALAN GRANT  
McNIVEN, residing at The  
Granary, Skirling Mill, Biggar**

1. A Complaint dated 21<sup>st</sup> June 2006 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Michael Alan Grant McNiven, Solicitor residing at The Granary, Skirling Mill, Biggar (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 28<sup>th</sup> September 2006 and notice thereof was duly served on the Respondent. This hearing was discharged on the motion of the Respondent. A fresh hearing date was fixed for 28<sup>th</sup> November 2006 and notice thereof was duly served on the Respondent.

4. When the Complaint called on 28<sup>th</sup> November 2006, the Complainers were represented by their Fiscal Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented himself.
5. The Respondent's Answers accepted the facts in the Complaint.
6. The Tribunal found the following facts established

6.1 The Respondent was born on 7<sup>th</sup> October 1947. He was admitted as a solicitor on 28<sup>th</sup> November and enrolled on 11<sup>th</sup> December both months of 1972. The Respondent resides at The Granary, Skirling Mill, Biggar. The Respondent had his name removed from the Roll of Solicitors in Scotland on 1/11/05 at his request.

6.2 **CONVICTION OF 24<sup>TH</sup> MARCH 2004**

On 24<sup>th</sup> March 2004, the Respondent appeared in the Sheriff Court at Lanark and pled guilty to a contravention of Section 5(1) of the Road Traffic Act 1988. The libel was in the following terms:

(001) on 16<sup>th</sup> March 2004 on a road or other public place, namely the A702 Edinburgh Road, Dolphinton you MICHAEL ALAN GRANT MCNIVEN did drive a motor vehicle, namely motor car registered number N399AMS after consuming so much alcohol that the proportion of it in your breath was 81 microgrammes of alcohol in 100 millilitres of breath which exceeded the prescribed limit, namely 35 microgrammes of alcohol in 100 millilitres of breath:

CONTRARY to the Road Traffic Act 1988 Section 5(1)(a)

6.3 The Respondent had sentence deferred until 6<sup>th</sup> May 2004. On that date he was fined £800 and disqualified for holding or obtaining a driving licence for a period of four years.

6.4 On 29<sup>th</sup> September 2004 the Respondent appeared in the Sheriff Court at Peebles. He pled guilty to contraventions of Sections 103(1)(b) and 143(1)(2) of The Road Traffic Act 1988. The libel was in the following terms:-

(001) on 19 May 2004 on A roads (sic), namely Bogsbank Road, West Linton you MICHAEL ALAN GRANT McNIVEN being a person disqualified from holding or obtaining a licence to drive a motor vehicle did drive a motor vehicle namely motor car registered number T597 TSG while so disqualified;

CONTRARY to the Road Traffic Act 1988 Section 103(1)(b)

(002) on 19 May 2004 on a road or other public place, namely Bogsbank Road, West Linton you MICHAEL ALAN GRANT McNIVEN did use a motor vehicle, namely motor car registered number T597 TSG without there being in force in relation to the use of said motor vehicle by you such a policy of insurance or such a security in respect of third party risks as complied with the requirements of Part V1 of the Road Traffic Act 1988:

CONTRARY to the Road Traffic Act 1988, Section 143(1) and (2) as amended.

6.5 Sentence was deferred until 27<sup>th</sup> October 2004. On that date, the Respondent was ordered to carry out 80 hours of community service, fined £200 and disqualified for holding

or obtaining a driving licence for a period of 9 months. This court appearance attracted adverse publicity in the national press. The penalties imposed by the court have been implemented by the Respondent.

7. Having heard submissions from both parties, the Tribunal found the Respondent guilty *in cumulo* of Professional Misconduct in respect of his conviction for a contravention of Section 5 of the Road Traffic Act 1988 and his driving while disqualified from driving by Order of the Court at a time when he was not covered by any policy of insurance.
8. Having heard the Respondent in mitigation and having noted a previous finding of professional misconduct against the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 28<sup>th</sup> November 2006. The Tribunal having considered the Complaint dated 21<sup>st</sup> June 2006 at the instance of the Council of the Law Society of Scotland against Michael Alan Grant McNiven, The Granary, Skirling Mill, Biggar; Find the Respondent guilty *in cumulo* of Professional Misconduct in respect of his conviction in contravention of Section 5 of the Road Traffic Act 1988 and his driving while disqualified from driving by order of the Court at a time when he was not covered by any policy of insurance; Censure the Respondent and Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that for a period of six years any practising certificate held or to be issued to the Respondent shall be subject to such Restriction as will limit him to acting as a qualified assistant to such employer as may be approved by the Council of the Law Society of Scotland or the Practising Certificate Committee of the Council of the Law Society of Scotland, said Restriction to run concurrent with his existing Restriction; Find the Respondent liable in the expenses of the Complainers and in the expenses of the Tribunal as the same may be taxed by the auditor of the Court of Session on a solicitor and client

indemnity basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £11.85; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

**Malcolm McPherson**

**Vice Chairman**

9. 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 by recorded delivery service on

**IN THE NAME OF THE TRIBUNAL**

**Vice Chairman**

**NOTE**

The Respondent's Answers admitted the averments of fact and the averments of duty in the Complaint. The Respondent however denied that the facts amounted to professional misconduct.

**SUBMISSIONS FOR THE COMPLAINERS**

Mr Lynch advised the Tribunal that on 24<sup>th</sup> March 2004 the Respondent had been convicted of drunk driving in respect of an offence on 16<sup>th</sup> March 2004. On 6<sup>th</sup> May 2004 he was fined £800 and disqualified from holding or obtaining a driving licence for a period of four years. Thirteen days later on 19<sup>th</sup> May 2004 the Respondent drove while disqualified and while not having in place any policy of insurance. On this occasion he was fined £200, disqualified from holding a driving licence for 9 months and ordered to carry out 80 hours community service. Mr Lynch submitted that community service was used as an alternative to custody and this sentence showed that the Sheriff viewed the conviction very seriously. Mr Lynch referred the Tribunal to a number of other cases where the Tribunal had found acting in a solicitor's personal life to amount to professional misconduct. Mr Lynch pointed out that in this case the Respondent was still in practice when the offences were committed. In response to a question from the Tribunal, Mr Lynch stated that he did not think that it was automatic that the Crown Office referred any criminal conviction of a solicitor to the Law Society. Mr Lynch submitted that there was no undue delay in respect of the Law Society taking the prosecution to the Tribunal.

**SUBMISSIONS FOR THE RESPONDENT**

The Respondent explained that he had considered making a plea under the Human Rights Act that there had been excessive delay. He however indicated that he was aware that the matter had been considered in the past. He pointed out that the Complaint had not been brought within two years of the commission of the offences. He also stated that the Complaint was not specific with regard to which section of Section 53C of the Solicitors (Scotland) Act 1980 was being referred to. At this point

the Tribunal enquired as to why the preliminary issues had not been raised earlier, Mr Lynch submitted that it was too late for the Respondent to raise the issues at this stage. The Tribunal indicated that if the Respondent was to continue with his preliminary pleas, an adjournment would be given to the Complainers for them to be given a chance to address the matter. The Respondent indicated that he did not think his preliminary pleas were strong enough to press the point and he accordingly withdrew the preliminary pleas.

The Respondent referred the Tribunal to the question of culpability as set out in the Sharp case (Sharp-v-Council of the Law Society 1984 SLT313). The Respondent also referred the Tribunal to the letter from the Keel Centre in connection with his health. The Respondent indicated that when he crashed the car he only narrowly missed serious injury and it brought him to his senses. He explained that he was aware that he had been acting recklessly but this had been brought on by a depressive illness. The Respondent submitted that his actions were not wilful and he did not set out to flout Court Orders. As the offences were statutory offences with a strict liability he had no defence to them. He however indicated that the Tribunal had a duty to look beyond the mere facts of the conviction and consider the whole circumstances. He asked the Tribunal to find that he did not have the necessary intent. In connection with the cases referred to by the fiscal, he pointed out that in the case of McPherson there were four offences of drunk driving and the Respondent was imprisoned for a period of four months. In connection with the two cases involving assaults, the Respondent indicated that assault was more damaging to the reputation of the profession than drunk driving. The Respondent also alleged that solicitors did not enjoy the same respect as they used to. He pointed out that his offence did not involve third parties or clients. The Respondent submitted that it was only himself that he had brought into disrepute rather than the profession. The Respondent also alleged that the Law Society were selective in who they prosecuted before the Tribunal in connection with criminal convictions. He indicated that he thought the Law Society had taken the decision to prosecute him in order to teach him a lesson as there had been other issues ongoing at the time. In response to a question from the Tribunal, the Respondent indicated that he was suffering from depression caused by business stress which had caused him to become reckless and had clouded his view. He confirmed

that he was working as a solicitor at the time of the accident but that he stopped almost immediately thereafter and decided not to keep his name on the Roll.

## **DECISION**

The Tribunal has previously considered whether or not a solicitor's conduct in his personal life can amount to professional misconduct. One of the essential qualities of a solicitor is integrity which extends to the personal as well as the professional conduct of a solicitor. The Tribunal has made it clear on a number of occasions that the Tribunal must demonstrate to the public that the profession of solicitors seeks to maintain the highest standards of conduct and that a solicitor cannot separate his personal conduct from his membership of the profession. The Tribunal consider that the Respondent's conduct in this case represents a serious departure from the standards expected from a member of this profession. Such an event and the inevitable publicity that followed is damaging to the reputation of the profession. The Tribunal however do not consider that the fact that this case had a lot of press coverage makes it more serious than it would otherwise have been. The Tribunal were particularly concerned in this case that the Respondent drove while disqualified only thirteen days after the disqualification had been imposed in flagrant breach of the Court Order. This taken together with the conviction for drunk driving is regrettably disgraceful and dishonourable and warrants a finding of professional misconduct *in cumulo*. The Tribunal could not accept that the Respondent did not have the necessary mens rea as suggested by him. The Tribunal did not see how it was possible to drive a car while disqualified without realising that this was what was being done. The Respondent was still working as a solicitor at the time of the offence and the Tribunal accordingly do not accept that the Respondent's health prevented him from having the necessary intent.

## **MITIGATION**

The Respondent referred the Tribunal to comments of Lord Bingham in the Bolton case (Bolton-v-Law Society 1994 IWLR512) and suggested that any sentence should take account of the fact that there had already been a punitive punishment imposed by the Court. The Respondent also pointed out that he had suffered financial losses as



his car had been written off. He alleged that he had paid his debt to society by implementing the punishments imposed by the Court. He asked the Tribunal not to impose a financial penalty. He also asked that the Tribunal not to award expenses against him as he had a modest financial position.

The Fiscal asked for the expenses of the proceedings because the Respondent had been found guilty of professional misconduct. The Fiscal also lodged a previous finding of professional misconduct against the Respondent which was admitted by the Respondent.

### **PENALTY**

The Tribunal took account of the fact that the Respondent had already suffered financial losses and had obtempered the punishments meted out by the Court. The Tribunal however was very concerned that the Respondent in the previous findings of the Tribunal had been found to have a reckless disregard for the Law Society and had now shown, in this case, that he has a reckless disregard for the Court. Although the Court sentence reflects public disapproval of the conduct, the Tribunal considers that it is appropriate to impose an additional penalty to reflect the special circumstances of the Respondent being a solicitor. Given the Respondent's financial position and the fact that he will be liable to pay the expenses of the proceedings, the Tribunal saw no purpose in imposing an additional fine. The Tribunal consider that in order to protect the public from a relapse into reckless behaviour there should be a Restriction on the Respondent's practising certificate for a period of six years. This will run concurrent with the existing Restriction imposed by the Tribunal in January 2004. The Tribunal saw no reason to depart from the usual practice of awarding expenses against a solicitor where a solicitor is found guilty of professional misconduct. The Tribunal made the usual order with regard to publicity.

**Vice Chairman**