RPC

Bossing the rules: lowering the standard?

27 January 2019

Solicitors everywhere will be concerned at the recent move of the Solicitors Disciplinary Tribunal, alongside the recent SRA Standards and Regulations reforms, to alter the standard of proof to be applied in disciplinary proceedings. This article looks at the background to the Tribunal's recent decision, the reasons for the change, and the concerns around it.

The Solicitors Disciplinary Tribunal has become the latest in a line of regulators to announce that it will be applying the civil (balance of probabilities) standard of proof in solicitors' disciplinary cases, following closely on the heels of the Bar Standards Board which switched from the criminal to the civil standard with effect from 1 April 2019. The new standard of proof is now enshrined in Rule 5 of The Solicitors (Disciplinary Proceedings) Rules 2019, and will apply to all proceedings issued after the Rules came into force on 25 November 2019.

What has changed and why?

Historically, the SDT was known for having never specifically codified its standard of proof, leading to numerous cases on the point moving gradually towards confirmation of the criminal standard ("beyond reasonable doubt"), for instance:

- ***Bhandari v Advocates Committee (1956)***[1], when the Privy Council placed the standard of proof at an unspecified level higher than the civil standard, commenting that "...a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities".

- ***Re a Solicitor (1993)***[2], which held that "where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof".

- ***Campbell v Hamlett (2005)***[3], another Privy Council case where it was held that "the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession" (confirmed obiter in *Re (D) v Life Sentence Review Commissioners (Northern Ireland) (2008)*[4]).

However, the trend throughout the regulatory sphere generally has been away from the criminal standard and towards the adoption of the civil standard of proof. By about 2010, and in particular in the wake of the Shipman Inquiry (2009), medical regulators that had previously applied the criminal standard of proof had made the shift to the civil standard, a standard also applied by the Accountancy and Actuarial Discipline Board and the Royal Institution of Chartered Surveyors. The Bar Standards Board has recently followed suit, with the result that solicitors and vets were then the only remaining regulated professionals insisting on proof beyond reasonable doubt.

In 2011, the SRA, introducing its own SRA Disciplinary Procedure Rules, opted to apply the civil standard of proof in its internal adjudication and decision-

1. Bhandari v Advocates Committee (1956) 1 WLR 1442
2. Re a Solicitor (1993) QB 69
3. Campbell v Hamlett (2005) UKPC 19
4. Re (D) v Life Sentence Review Commissioners (Northern Ireland) (2008) UKHL 33

making processes. Broadly speaking, this includes "less serious" disciplinary cases in respect of which the SRA's own sanctions (reprimands, rebukes, and monetary penalties of up to £2,000) are appropriate. Interestingly, since the SDT acts as the review body from decisions of the SRA, this led to the rather incongruous position exemplified in the 2016 "Arslan" judgment[5] which found that the Tribunal should apply the civil standard of proof when acting as a review body, in line with the SRA's first instance findings, albeit that following caselaw it was still held to the criminal standard of proof when acting as a fact-finding body at first instance. Leggatt J speaking obiter in that case commented that the authorities "do seem to me ripe for reconsideration", pointing out that it was "unsatisfactory and illogical" that the SDT and SRA should be applying different standards of proof when carrying out the same primary fact-finding role. However, since the Arslan case did not turn on the point, Leggatt J declined to express a concluded view on the question.

The SDT consulted on the proposed change to the standard of proof during 2018 and, despite a rather underwhelming lack of support (with only eight out of 28 respondents advocating the change), the Tribunal announced in April 2019 that it intended to move to applying the civil "balance of probabilities" standard of proof.

The SRA has retained the civil standard of proof in its internal regulatory and disciplinary processes (Rule 8.7 of the new SRA Regulatory and Disciplinary Rules) and the same has now been specifically stated at Rule 5 of the SDT's new Solicitors (Disciplinary Proceedings) Rules 2019. Solicitors should be aware that the previous (criminal) standard of proof will continue to apply to proceedings issued prior to 25 November 2019.

Concerns and issues raised

Advocates of the proposals have argued that it will provide more protection to the public and that the previous system favoured individual solicitors even in circumstances where they are more likely than not to have committed the alleged misconduct.

However, there has, understandably, been a great deal of concern about the change. Notable objectors in the 2018 consultation had included The Law Society, relying on its own feedback from 40 members, 37 of whom favoured the retention of the criminal standard of proof. The Society pointed to the already high prosecution success rate as proof that a lower standard of proof was not necessary; on the SDT's own figures, only 2% of substantive hearings before the Tribunal in 2018 resulted in a finding that no allegations were proved. The Law Society also warned against an increased risk of miscarriages of justice, particularly where the potential consequences were career-ending, and in light of an imbalance in resources between the SRA, as regulator, and individual solicitor Respondents, who are often without insurance cover for disciplinary proceedings. There are also concerns about the additional stress on practitioners who will undoubtedly feel more vulnerable.

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5. Solicitors Regulation Authority v Solicitors Disciplinary Tribunal (2016) EWCA 2862 (Admin)

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