In the Matter of Stephen Francis Roche

Case Number:	SCT/88
Date of Hearing:	3-6, 12 December 2002 & 28 March 2003
Appearing Before:	Ms C Endicott (Chairperson/Practitioner Member) Mr P Mullins (Practitioner Member) Dr J Lamont (Lay Member)
In Attendance:	Mr J Nimmo (Legal Ombudsman) Mr J W Broadley (Clerk)
Penalty:	Suspended for 12 months from 28 March 2003

Charges

The Council of the Queensland Law Society Incorporated requires the Practitioner to answer the following charges:

1. The practitioner failed to discharge his fiduciary obligations to his client Mr A in relation to the making of a retainer agreement dated 12 October 2000 between Mr A and S ("the Firm") of which the practitioner was a partner.

Particulars

(a) On or about 21 August 1996, the Firm was retained by Mr A to act in relation to a claim for damages on behalf of his daughter, AMA, arising from injuries suffered by her on or about 3 January 1984 ("the matter");

(b) On or about 23 November 1998, a formal retainer agreement ("the first retainer") was entered into between the firm and Mr A, which agreement provided:

(i) for the Firm's fees to be calculated and charged on a time basis at the following hourly rates:

Partner	$250.00
Associates/accredited specialists	$250.00
Solicitor	$200.00
Trainee solicitor/law clerk	$150.00
Paralegal	$100.00

which rates were subject to an additional charge for care and consideration calculated at the Firm's discretion at a rate not exceeding 30%;

(ii) by clause 4(c) as follows:

"(c) Variation to fees

The Firm may increase its fees from time to time but it shall not in any case:

(i) increase its fees more than once in any calendar year;

(ii) increase its fees by more than 10% on any one occasion;

(iii) increase its fees without giving the Client at lease 30 days notice in writing enclosing a copy of the new schedule of fees and charges."

(iii) by clauses 14(b) and 14(d) that the Firm could terminate the agreement in certain defined circumstances;

(c) On or about 12 October 2000, the Firm and Mr A entered into a further retainer agreement ("the second retainer") which provided for the Firm's fees to be calculated and charged on a time basis at a rate applicable to all members and employees of the firm of $300.00 (inclusive of GST) per hour plus a premium of 30% by reason of the Firm's undertaking the matter on a "no win no fee" basis.

(d) The second retainer was entered into during the course of a conference between the practitioner and his employed solicitor, S, and Mr A (together with Mrs A and AMA) at the Firm's premises on 12 October 2000 during which Mr A was informed by the practitioner and/or S that the Firm was not prepared to continue acting in the matter at the rates previously agreed (being the rates set out in the subparagraph (b)(i) hereof) but required to be paid at the rate of $300.00 per hour (inclusive of GST) plus the premium of 30%;

(e) The practitioner did not, during the course of that conference:

(i) advise Mr A of the effect of clauses 4(c) and 14 of the first retainer; or

(ii) advise Mr A that the Firm was not entitled, by reason of those provisions to:

(A) increase its hourly rate by more than 10% over the rates provided by the first retainer; or

(B) refuse to continue to act in the matter because none of the circumstances referred to in clauses 14(b) and 14(d) of the first retainer had arisen; or

(iii) advise Mr A that he should obtain independent advice as to whether it was in his interests to agree to the terms of the second retainer.

2. The practitioner was guilty of gross overcharging.

Particulars

(a) The practitioner was at all material times the partner in the Firm with responsibility for the matter;

(b) Following settlement of the matter in December 2000 upon the basis that the defendant paid to the plaintiff the sum of $X (inclusive of statutory charges and refunds) plus costs to be assessed on the standard basis, the Firm rendered its account to Mr A dated 2 April 2001 in the sum of $573,444.15 ("the account") which amount comprised:

Firm's professional costs (including $24,535.54 GST)	$350,000.00
Barristers' fees (including $8,247.50 GST)	$125,235.50
Medical and other report fees (including $3,141.78 GST)	$58,722.57
Other disbursements (including $2,373.84 GST)	$39,486.08
	$573.444.15

As at 2 April 2001, the value of time recorded by the Firm in respect of work carried out in the matter amounted to approximately $280,000.00. A premium of 25% was applied to arrive at the figure of $350,000.00 charged to Mr A.

(c) In September 2001, Mr A was charged the further sum of $45,000.00 for preparation by H, costs assessors, of an itemised bill of costs.

(d) The Firm's professional costs of $350,000.00 were charged at a level which was substantially in excess of:

(i) Professional costs claimed in an itemised bill prepared on behalf of the Firm by H (excluding costs related to preparation of the itemised bill and assessment thereof) amounting to:

$161,670.36 on the standard basis (which amount included an allowance of 50% for care and consideration)

$226,572.50 on an indemnity basis (which amount included an allowance of 75% for care and consideration);

(ii) Professional costs and disbursements recovered on the standard basis in the sum of $160,000.00;

(iii) Professional costs and disbursement calculated on an indemnity basis and agreed with the Public Trustee acting on behalf of AMA in the sum of $240,000.00;

(iv) The professional costs which would have been payable pursuant to the first retainer.

(e) From 12 October 2000 until finalisation of the matter, the Firm calculated its fees in respect of the matter at an hourly rate of $300.00 (plus GST) plus a premium of approximately 25% in respect of all items of work preformed by any member or employee of the Firm, whether or not legally qualified and whether or not the work required the application of any legal skill;

(f) The account included substantial amounts charged in respect of items of work of a clerical or secretarial nature involving no legal skill in respect of which no charge should have been made. Particulars of the staff members performing such clerical and secretarial work and the charges recorded by them in the Firm's time recording system (which recorded charges, increased by a premium of approximately 25% applied to those recorded charges formed the basis of the account) are as follows:

Employee	**Amount recorded $**
LM	439.08
AMS	16,872.92
PS	74.21
JL	740.89
SN	473.10
CK	73.99
LH	12.37
SW	18.56
RO	1,949.34
KS	88,541.20
SK	16,647.81
SP	36.89
BB	148.42
HT	49.02
CF	333.95
KK	259.73
LC	408.16
CS	457.64
SS	841.06
PT	889.19
SR	661.88
Total	$129,929.41

(All amounts exclusive of GST where applicable)

(g) The Firm adopted the practice of recording as the basis of its charge to Mr A, items of work for which no charge could properly be made, particulars of which are as follows:

(i) attempts to make telephone calls, but which calls were unanswered;

(ii) attempts to telephone persons who were unavailable to take the call and for whom messages were left to return the call;

(iii) photocopying of an account received by the Firm;

(iv) drawing a form requesting the Firm's accounts department to draw a cheque in respect of an account;

(v) diarising an appointment;

(vi) telephoning Directory Enquiries or using the telephone directory in order to obtain a telephone number;

(vii) searching for documents and files in the Firm's possession which were unable to be located readily;

(viii) typing of formal letters by staff performing secretarial duties;

(ix) arranging accommodation for counsel;

(x) internal telephone calls and emails.

(h) The practices particularised in subparagraphs (f) and (g) were in breach of the Firm's second retainer agreement which provided by clause 4(a)(iii) as follows:

> *"(iii) You acknowledge we incur various administrative expenses (eg. initial interview equipment (sic), file opening processes) while performing the work. You also acknowledge that, in the event that we are entitled to charge you for the work, we will also charge you for these administrative expenses in the form of a fixed "File Administration Fee" of $395.00, inclusive of GST. Apart from the file administration fee, we will not charge you for word processing, receptionist and general administration (eg. filing on your file) work performed for you."*

(i) In the alternative to (f), (g) and (h) the amounts charged by the Firm as particularised in subparagraph (f) were grossly excessive;

(j) The rate of $300.00 (plus GST) plus approximately 25% premium charged by the Firm subsequent to 12 October 2000 in respect of items of work preformed by solicitors was excessive because the firm relied substantially upon Mr L to perform work (in respect of which Mr L charged fees) which would ordinarily be within the competence of solicitors professing expertise in medical negligence matters and justifying such hourly rate by reference to such claimed expertise.

Particulars of the Firm's claim to expertise

The second retainer agreement (by clause 4(a)) provided:

> *"(a) Rates charged*
>
> *(i) We charge for work performed on the basis of time occupied in completing the task at the rate of $300.00 per hour. This rate recognises:*
>
> *(1) Our many years experience conducting personal injury litigation.*
>
> *(2) Our method of operation that requires that our personal injury teams work solely on personal injury claims and are therefore fully dedicated to knowing the laws and tactics relating to personal injury claims.*
>
> *(3) Our further commitment to set ourselves ahead of other forms by committing each personal injury team to one area of personal injury law. For example: our Public Liability teams work only on public liability claims and consequently have expert knowledge of all the laws and tactics relating to public liability claims. The same applies to each of our teams solely committed to Asbestos, WorkCover, Medical Negligence and Motor Vehicle claims.*
>
> *(4) Our application of systems and technology to the work, designed to enable us to perform the work as efficiently as possible.*
>
> *(5) Our commitment to excellence in training our staff in all areas of the firm. We are constantly increasing the expertise of all of our people in relation to personal injury claims.*
>
> *(6) Our commitment to providing the best possible service for each of our clients through the life of their personal injury claim."*

Particulars of the Firm's reliance upon counsel

(a) The Firm obtained from Mr L regular advice comprising approximately 18 advices during the period 18 October 2000 to 18 December 2000;

(b) Drafting of correspondence by counsel;

(c) Counsel's fees charged by Mr L in respect of the period 18 October 2000 to 21 December 2000 amounted to the sum of $33,000.00 approximately plus $3,300.00 GST.

Appearances

(a) For the Council of the Queensland Law Society Incorporated:
Mr B D O'Donnell QC instructed by Brian Bartley & Associates, Solicitors

(b) For the Practitioner:
Mr A J H Morris QC instructed by Gilshenan & Luton Solicitors

Findings and Orders

1. The Tribunal granted leave to the Queensland Law Society Incorporated to amend paragraphs 2(e), (f) and (j) of its Notice of Charge in accordance with the draft handed up to the Tribunal.

2. The Tribunal refuses leave to the Queensland Law Society Incorporated to read affidavits of Brian David Bartley sworn 28 November 2002 and 2 December 2002 and affidavits of R sworn 28 November 2002 and 2 December 2002.

3. The Tribunal finds charges 1 and 2 are proved and those charges amount to professional misconduct.

4. The Tribunal finds the practitioner guilty of professional misconduct.

5. The Tribunal orders that the practitioner be suspended from practice for a period of twelve(12) months from today.

6. The Tribunal further orders that the practitioner pay the costs of the Queensland Law Society Incorporated and of the recorder and the Clerk in an amount to be agreed, or failing agreement, to be assessed by Monsour Legal Costs Pty Ltd.

7. The Tribunal further orders that payment of the costs as agreed or assessed be made within 30 days of either the agreement or the assessment being received by the practitioner.

Reasons

Amendment of Charge and Affidavits

The hearing of two charges brought against the practitioner began today. At the outset, the Queensland Law Society sought leave to amend the Notice of Charge, to make changes to particulars set out in paragraphs 2(e), 2(f), 2(h) and 2(j) of the Notice of Charge filed 30 August, 2002.

The practitioner objects to leave being granted for these amendments. The practitioner argues that the amendments effectively require the practitioner to face a different case to that contained in the Notice of Charge filed in August and the Queensland Law Society should not be allowed to change its case with less than five days notice being given to the practitioner.

The practitioner argues that he will not be able to have a fair hearing if the amendments are allowed and he is required to proceed with his defence on the charges on the days allocated this week.

The Queensland Law Society argues that the amendments do not have the effect of taking the practitioner by surprise as the documents on which the amendments are based are documents already contained as exhibits in the affidavit of Ian Foote, which affidavit has been filed and served on the practitioner.

The Tribunal was taken in particular by the Society's counsel to certain exhibits and to certain pages contained in that affidavit. The Tribunal has read the affidavit of Mr Foote. From perusal of the time recording records exhibited to that affidavit, it is apparent that the calculation of the work in progress made on the recording of time was from 30 October, 2000 at the rate of $300 per hour plus GST, as set out on page 129.

Particulars set out in paragraph 2(e) of the original Notice of Charge was erroneous and the amendment seeks to correct that error. For that reason, the Tribunal is prepared to allow the amendment to paragraph 2(e).

The Tribunal considers that, subject to what is said by the Tribunal shortly in relation to the affidavits of Brian Bartley, the further amendments to add words in paragraphs 2(e), 2(f), 2(j) do not give rise to any prejudice to the practitioner's right to a fair hearing.

The amendments do not prevent the practitioner from giving evidence as to the rate of the premium actually applied in this case and the amendments, in themselves, particularly in relation to paragraphs 2(e), (f) and (j), do not require the practitioner to face a materially different case to that outlined in the original Notice of Charge, so the amendments to 2(e), (f) and (j) are allowed.

The Tribunal, however, does not consider that the amendment to paragraph 2(h) is in the same category. The amendment to paragraph 2(h) does appear to raise a new particular that would, in the Tribunal's view, prejudice the practitioner's right to a fair hearing today.

The practitioner is accused of breaching the terms of the second client agreement and seeks to defend himself against this allegation. Having read the affidavit of Ian Foote, the Tribunal considers that the Queensland Law Society's presentation of its case will not be materially prejudiced if the amendment to paragraph 2(h) is refused and paragraph 2(h) is retained in the form set out in the original Notice of Charge.

The Queensland Law Society can call evidence of overcharging and make submissions on this point without having to rely on the particular that is sought to be included in the amendment to paragraph 2(h).

On balance, the Tribunal considers that, out of fairness to the practitioner, the amendment sought in paragraph 2(h) should not be allowed.

We now deal with the four affidavits. The first is that of Brian Bartley, filed 28 November, 2002.

In that affidavit, the deponent deposes to various documents in Robertson O'Gorman's file, in particular a diary note of S, being a memo dated 12 October, 2000, which is exhibited to the affidavit. The balance of the affidavit sets out what Mr Morris QC, for practitioner, referred to as 'The Bartley Theory'.

The affidavit was filed late. If the Queensland Law Society seeks to rely on S' document, there are other ways of adducing that into evidence than by proving the document in an affidavit by Mr Bartley.

If the Queensland Law Society is to make submissions to this Tribunal to further 'The Bartley Theory', it is certainly open to Mr O'Donnell, for the Society, to do that.

Mr Bartley's second affidavit, filed on 2 December, 2002, deals with correspondence with the practitioner's solicitors and discussions with Mr R, the proposed 'expert' witness. None of the matters deposed to in the affidavit are directly relevant to the charges.

Then there are the two affidavits of Mr R. The first was filed on 28 November, 2002. Paragraphs 1 to 5 deal with Mr R's supposed expertise in cost matters. In paragraphs 7 to 13, Mr R gives his opinion on various issues relevant to the charges which go to market rates charged by solicitors. He also exhibits copies of two reports of Mr Justice Muir's Committee.

The affidavit was filed late. None of the evidence contained in the affidavit will necessarily assist the Tribunal, which must make its own decisions on the charges. Our view is that it is not a matter where expert evidence (particularly evidence that swears the issues) will be of assistance to us.

The final affidavit of Mr R contains matters dealing with his alleged potential conflict of interest. It is not directly relevant to the matters contained in the charges.

For the reasons we have detailed, we do not propose to receive any of the affidavits into evidence.

Hearing of Charges

The practitioner has been charged with failing to discharge his fiduciary obligations to his client in relation to the making of a retainer agreement dated 12 October 2000 and with gross overcharging.

First retainer

As to the first charge, the Queensland Law Society alleges that the practitioner's firm was retained by the client Mr A in August 1996 on behalf of the client's daughter AMA for the recovery of damages for injuries sustained at birth or shortly after birth in January 1984. A formal retainer agreement was signed in November 1998 (the first retainer) which provided for a scale of fees to be charged by the practitioner's firm on a graduated hourly rate. The range of fees provided by this graduated scale was from $250.00 per hour for partners and accredited personal injuries specialists to $100.00 per hour for paralegals.

These fees were subject to an additional charge, at the firm's discretion, for care and consideration not exceeding 30%. The first retainer provided the practitioner's firm with the basis to increase these hourly rates once a year by no more than 10% on any one occasion after giving the client 30 days notice of the new increased charges.

Second retainer

On 12 October 2000 the client signed the second retainer agreement with provided the firm's fees to be calculated and charged at $300.00 per hour applicable to all members and employees of the firm plus a premium of 30%.

The second retainer was signed during a conference at the practitioner's office between the practitioner, one of his employed solicitors, the client and the client's wife. AMA was also present at this conference.

The Queensland Law Society alleged in the charge that the practitioner had informed the client that the firm was not prepared to continue acting in AMA's matter at the rates agreed in the first retainer. The Law Society further alleged that the practitioner had not advised the client of the presence of the clauses in the first retainer that had the effect of restricting the firm to a 10% annual increase in the hourly rates and that had the effect of limiting the firm as to the basis on which it could terminate its retainer in the matter.

The Law Society further alleged that the practitioner had not advised the client that the firm was not entitled to increase its hourly rates by more than 10%, that the practitioner had not advised the client that it was not entitled to refuse to continue to act in AMA's matter and that the practitioner had not advised the client that he should obtain independent advice as to whether it was in his interests to agree to the terms of the second retainer.

The evidence

The Law Society called evidence from the client. Mr A gave evidence that he had never had anything to do with solicitors before instructing the practitioner's firm in 1996 to act for AMA. Mr A gave evidence that he had read and had understood the first retainer agreement when it was sent to him in 1998. He gave evidence that he had attended a meeting at the practitioner's office in October 2000 to discuss the mediation of AMA's matter that was due to take place in December 2000. He gave evidence that the practitioner told him that the firm wanted the client to sign a new retainer agreement. No notice had been given to the client prior to this meeting that the firm wanted to enter into a new retainer agreement.

Mr A gave evidence that the practitioner had advised him that the new retainer provided for fees to be calculated and charged at the rate of $300.00 per hour for everyone who worked on the case. Mr A gave evidence that he could not see a problem with the increased hourly rate as he considered that there was not much time left to run in the matter as the mediation was to take place in less than two months from the date of the conference. Mr A gave evidence that he later had a problem with the fees charged by the practitioner's firm as the bulk of those charges were incurred after the second retainer was signed rather than during the four years prior to that retained being agreed to.

Mr A gave evidence that he could not recall any other features of the new retainer being drawn to his attention by the practitioner at that meeting. He gave evidence that there was no discussion as to his rights as the client if he did not want to agree to the increase in fees. Mr A gave evidence that he could not recall whether the practitioner had told him that he had the right to take advice from another solicitor about the new retainer. Mr A gave evidence that he knew he could seek advice if he had wanted to.

During cross examination, Mr A gave evidence that the practitioner had not told him that the firm would stop handing AMA's case if the client failed to sign the second retainer agreement. He gave evidence that he had not read the whole of the second retainer agreement before signing it but he had read those clauses pointed out to him by the practitioner. He gave evidence that the practitioner had agreed to act for the client's son, D, in a separate but similar damages claim and to charge fees in that matter calculated at the rate of $300.00 per hour rather than at the rate the practitioner would otherwise charge, namely $500.00 per hour.

The practitioner gave evidence of his dealings with the client. The practitioner gave evidence that he was aware that the client and his family were under considerable stress as a result of having to care for their disabled children in circumstances where Mr A had lost his job and had been forced at one stage to sell his furniture for living expenses. The practitioner gave evidence that he was aware that the client was desperate for AMA's case to be resolved.

The practitioner gave evidence that Mr A wanted the firm to act in the recovery of damages for birth or neo birth injuries sustained by D. The practitioner gave evidence that during the meeting held on 12 October 2000 he proposed to the client that the firm would agree to take on D's case and charge fees in that case calculated at the rate of $300.00 per hour if the client agreed to the increase of fees in AMA's matter to $300.00 per hour. The practitioner gave evidence that the hourly rate of $300.00 in D's case was a reduced rate from $500.00 per hour as the higher rate was applicable due to the nature of the claim, due to the expertise held by the firm in such matters, due to the uncertainty of the result, due to the risks in the matter and the delay in recovering fees in such a matter. The practitioner described the proposal as a pretty fair deal for Mr A and his children.

The practitioner denied that he had told Mr A that the firm would not continue to act in AMA's matter at the hourly rates agreed in the first client agreement. The practitioner denied that he had told Mr A that the firm would only continue acting for AMA if he agreed to pay fees at an hourly rate of $300.00 plus a premium of 30%.

The practitioner gave evidence that he did not have a clear and distinct recollection as to what happened at the meeting held on 12 October 2000. He gave evidence that he told the client that he did not have to agree to the increased rate for AMA's matter. The practitioner gave evidence that he could not recall whether he had told the client that he could obtain independent advice but he believed that he had given that advice to the client. The practitioner gave evidence that he had given the client the notice required by section 48 of the *Queensland Law Society Act* and that that notice, in addition to one of the clauses in the retainer agreement, contained information that the client was entitled to seek independent advice on the terms of the retainer agreement.

In cross examination, the practitioner gave evidence that he had discussed the client's rights if Mr A had decided not to agree to the new retainer agreement. In particular he had pointed out to the client the rights contained in clause 4(c) of the first retainer agreement and that the client should seek independent legal advice (see page 210 of the transcript). The practitioner gave evidence he had no clear recollection of advising the client about the right to obtain independent legal advice but that it was his usual practice to give this advice to a new client.

The practitioner gave evidence that he appreciated that during the meeting with the client that he was in a position of conflict; that he appreciated that his duty to advise the client was in conflict with his own personal interest. The practitioner gave evidence that he was aware that he could only discharge his responsibilities to the client by ensuring that the client only entered into the second retainer with fully informed consent and he thought that the client had exhibited fully informed consent.

The Tribunal was able to observe Mr A and the practitioner give evidence. The Tribunal finds that Mr A was a truthful witness who carefully tried to recall what was said and done during the meeting of 12 October 2000. The Tribunal has no hesitation in accepting the evidence of Mr A.

On those points where the evidence of the practitioner differs from that of Mr A or differs from other evidence contained in documentary form, the Tribunal prefers the evidence of Mr A or the evidence in the documents.

Both Mr A and the practitioner gave evidence that nothing was said in the meeting of 12 October 2000 to give rise to the allegation that the practitioner had told the client that his firm would not be prepared to continue to act in AMA's matter at the hourly rates agreed in the first retainer. Both Mr A and the practitioner gave evidence that the client was told that the firm wanted to change the basis of charging from a graduated hourly rate to $300.00 per hour for the work done by everyone on the matter. To that extent there is agreement on the evidence.

The differing position arises from what the practitioner told the client about his rights contained in the terms of the first retainer and what the practitioner told the client about obtaining independent advice about the terms of the second retainer. Mr A gave evidence that there was no discussion as to his rights if he did not want to agree to the increase in fees. Mr A gave evidence that he could not recall whether the practitioner had told him that he had the right to take advice from another solicitor about the new retainer.

The practitioner gave evidence that he had discussed the client's rights if Mr A had decided not to agree to the new retainer agreement and that the practitioner believed that he had told the client that he had the right to obtain independent advice on the second retainer although the practitioner had no clear recollection of doing so.

The Tribunal finds that the practitioner had not advised the client of the effect of the clauses in the first retainer that limited the ability of the firm to increase its fees and finds that it is more likely than not that the practitioner had not told the client of, or brought to the client's attention, the client's right to obtain independent advice on the terms of the second retainer. In reaching these findings, the Tribunal has also taken into account the evidence that as at October 2000 Mr A was in financial difficulties, he was desperate to continue with AMA's case in which a mediation was scheduled in December 2000 and that he was anxious to have the firm take on D's claim for damages. The Tribunal also takes into account that the practitioner was aware that these factors influenced the decision of the client.

The practitioner claimed that his willingness to act in D's case at reduced rates was not used as an inducement to the client to agree to the second retainer agreement (pages 215-216 under cross examination, and the claim was repeated under re-examination, page 291). This is implausible. It is clear that the nature of the proposition put to the Mr A on 12 October 2000 was that the practitioner would agree to take on D's case at less than $500 an hour only if Mr A agreed to the higher rates contained in the new client agreement. This was clearly put as an inducement. The problem for the practitioner was not that this was an inducement (though the repeated denial of this by the practitioner is of concern) but rather that the practitioner did not provide his client with the necessary information required for the client to decide rationally whether to accept the inducement.

The Tribunal takes into account that the file notes made of the meeting record all of the essential discussion that the client and the practitioner clearly recall took place but that these notes do not record any discussion of the rights of the client to refuse to accept the terms of the second retainer nor any discussion of the right of the client to independent advice. In the absence of any mention of these matters in the contemporaneous notes, the Tribunal does not accept that these matters were in fact raised by the practitioner.

The Queensland Law Society contends that these findings made by the Tribunal should lead to a further finding that the practitioner was in breach of his fiduciary duty to the client. The Law Society contends that the practitioner could not have failed to appreciate that the client was not fully informed about his rights. The Law Society contends that the practitioner preferred his own self interest over the discharge of his duty to his client.

The Law Society relies on authorities such as *Veghely v the Law Society of New South Wales* and the *Law Society of New South Wales v Forman*. These authorities have been helpful for this Tribunal to consider whether there has been any breach by the practitioner of his fiduciary duty to the client. The Tribunal considers that the reasoning in *Forman's case* could be adopted and in particular the following passage:

> *If costs agreements of this kind are to be obtained from clients, it is necessary that the solicitor obtaining them consider carefully her fiduciary and other duties, that she be conscious of the extent to which the agreements contain provisions which put her in a position of advantage and/or conflict, and that she take care that, by explanation, independent advice or otherwise, the client exercises an independent and informed judgment in entering into them.*

In considering whether the practitioner was in breach of his fiduciary duty, the Tribunal considers that this case differs fundamentally from the more usual case where a practitioner and client are entering into an agreement for the first time. In this case, there was already an agreement in place and the practitioner was seeking to induce his client to sign a new agreement with terms different from the first agreement.

The Tribunal has determined that the practitioner did not advise his client that he should obtain independent legal advice. Giving that advice would have been the simplest way for the practitioner to have acted in accordance with his fiduciary duty. The practitioner failed to give this advice and in the circumstances, the Tribunal considers that his conduct did not come close to an acceptable standard for the carrying out of his fiduciary duty.

Furthermore, the practitioner did not give written notice to Mr A prior to the meeting on 12 October 2000 that his firm intended to increase the fees to be charged to Mr A nor did the practitioner provide to Mr A in advance of that meeting a copy of the proposed schedule of increased fees and charges. The practitioner was required to do this under clause 4c(iii) of the first client agreement.

The practitioner did not advise Mr A to bring along a copy of the first agreement to the meeting so that Mr A's rights could be explained to him. The practitioner did not give prior notice to Mr A that the meeting of 12 October 2000 would include a discussion about fees. At the meeting, the practitioner did not produce a copy of the first agreement for the use of Mr A nor did he compare all relevant differences between the first and second agreements nor did he provide any useful advice as to how the second agreement was in conflict with the client's rights as contained in the first agreement.

There was no attempt to contrast the advantages and disadvantages of the terms in the second retainer with the terms of the first retainer from the client's point of view. Mr A gave evidence that he thought, quite reasonably from the point of view of a person inexperienced in legal matters, that most of the legal costs of the action had already been incurred prior to 12 October, 2000 and so he thought that the increase in fees after 12 October 2000 would have little overall effect to the total quantum of his legal costs.

The second agreement increased the stated hourly rate of paralegals by three times. The fact that about half of the work carried out on the matter was by paralegals was unknown to Mr A but was a fact known to the practitioner. The practitioner failed to give any estimate of the likely impact that the proposed increase in hourly rates would have on the total fees charged by his firm. In the absence of advice about the likely impact of the increased hourly rates of paralegals on his total costs, Mr A was not given the opportunity to make an informed decision with respect to a contract which fundamentally affected his rights. The fact that the client later complained about overcharging is significant in the Tribunal's finding that the client was not fully informed of the consequences of agreeing to the terms of the second retainer in October 2000 and that he entered into that second retained without informed consent.

The purpose of clauses 4 and 14 in the first retainer agreement is to protect the client against the situation where an agreement about fees made at the start of a case is discarded and later replaced by an agreement for greatly increased fees at a stage of an action when the client is most vulnerable to influence. The case before the Tribunal seems to be about the very one circumstance that clauses 4 and 14 are specifically designed to prevent.

The Tribunal finds that the practitioner was in serious breach of his fiduciary duty. The Tribunal considers that the breach of fiduciary duty amounts to professional misconduct.

The second charge against the Practitioner is that he is "guilty" of "gross overcharging".

What constitutes "gross overcharging"?

It was submitted by Mr Morris QC for the practitioner that the issues for the Tribunal to determine in relation to the second of the charges were twofold:

1. Is the charging of a blended rate of $390.00 per hour ethical?
2. Has there been overcharging in the sense that more was charged than the agreed billing structure permitted?

The first of the questions may well broadly address the central issue that the Tribunal has to determine but the Tribunal does not accept that charges strictly in accord with the agreed billing structure could not amount to gross overcharging.

Mr O'Donnell QC for the Queensland Law Society Inc referred to the decision in *D'Alessandro v Legal Practitioners Complaints Committee* (BC 9504091). That decision is authority for the proposition that charging can be overcharging notwithstanding that it is within a contractual arrangement entered into between the solicitor and the client.

Historically, evidence of gross overcharging constituted grounds on which a client of a solicitor could tax the solicitor's bill even after twelve months had elapsed from the delivery of the bill (see *Halsbury's Laws of England*, Second Edition, Vol XXXI 'Solicitors' paragraph 221at page 196).

The author of the Second Edition *Halsbury's* there sets out a number of instances which would be considered gross overcharging. The examples are as follows:

1. Where a considerable amount of the bill was for business needlessly done (*re Barlow* [1853], 17 Beav. 547);
2. Where a client was charged for 165 unnecessary letters (*re Brady* [1867], 15 WR 632);
3. Where charges were made on the higher scale, and in fact the lower scale applied (*re Durnford* [1883] WN 29);
4. Where the bill contained charges which no solicitor dealing properly with his (sic) own client would have made (*Horlock v Smith* [1837], 2 My & Cr 495).

These historical examples give the flavour of what might traditionally have been regarded as gross overcharging.

Further, the author of Second Edition *Halsbury's* notes as follows:

> *"Nor are gross overcharges proved to exist unless the overcharges are substantial"* (see Second Edition *Halsbury's Laws of England* Vol XXXI 'Solicitors' at page 197).

The authority there quoted for that proposition is *re Chowne* [1884] 52 LT 75.

Consistent with the notion of what has traditionally been regarded as "gross overcharging" and further consistent with more current statements, to which the Tribunal was referred in the course of submissions, gross overcharging will be found in circumstances where the bill contains charges which no solicitor dealing properly with his or her own client would have made. However a caveat needs to be put on that principle, and the caveat is that gross overcharging should only be found where the overcharging is substantial. For gross overcharging to be found there must be substantial charges which fall into the category of being beyond the boundary of professional propriety.

Onus of proof

It is well established that for the charge to be proved against the practitioner, the Tribunal must be satisfied to the required standard referred to in *Briginshaw*. What is required to be proved for the charge to be found against the practitioner is very serious improper conduct and so the Tribunal must be satisfied on the balance of probabilities that the facts going to prove the charge have been established but having regard to the serious nature of the charge and its ramifications for the practitioner, the Tribunal must be reasonably certain of those facts.

The evidence

In evidence, the practitioner admitted that he did have responsibility for deciding the charges to be made to the client. That evidence is contained in the transcript of 5 December 2002. There is no doubt that the practitioner did have overriding responsibility for the matter, including the responsibility for deciding the charges to be made to the client.

The evidence establishes that the plaintiff, the client's daughter, settled her claim and that the settlement sum which included statutory charges and refunds, together with costs which were assessed on the standard basis, was recovered from the defendant in the proceedings. Following that the evidence establishes that a bill of costs was rendered to the client dated 2 April 2001.

The evidence establishes that as at the date of the rendering of the bill on 2 April 2001, the value of time recorded by the practitioner's firm in respect of the work carried out on the file, amounted to approximately $280,000.00. The evidence also establishes that a premium was applied to arrive at the figure for the firm's professional costs which were charged at $350,000.00.

The practitioner admitted he did not look at the running total of work in progress as per the billing guide prior to the despatch of the bill. Although he did not look at these personally, he says that he relied on what he was told by an employed solicitor of the firm, Mr S, about what the total of the work in progress was. In these respects, the Tribunal accepts the practitioner's evidence.

There was also evidence that the client was charged a further sum for preparation by cost assessors of an itemised bill of costs. This assessment covered both standard basis costs and indemnity costs.

It was established in evidence and the Tribunal accepts that the costs assessment on the standard basis included an allowance of some 50% for care and consideration. The amount of costs allowed by the assessors on a standard basis including the allowance for care and consideration amounted to $161,670.36.

The assessment of costs on the indemnity basis included an allowance of 75% for care and consideration and the amount of the assessment on the indemnity basis including the allowance for care and consideration was $226,572.50 for professional costs.

It was also established by evidence that the amount of professional costs and disbursements actually recovered on the standard basis in the matter were $160,000.00. It was also established in evidence that professional costs and disbursements calculated on an indemnity basis which were agreed with the Public Trustee acting on behalf of the client's daughter were in the sum of $240,000.00.

All these factual matters are uncontroversial.

Paragraph 2(d) of the Charge

It is clear that there are discrepancies between the amount actually charged on the firm's bill of 2 April 2001 and the following amounts:

1. The amount assessed by the assessors for professional costs on the standard basis;
2. The amount of costs assessed by the assessors on an indemnity basis;
3. The amount of professional costs and disbursements recovered on the standard basis;
4. The amount of professional costs and disbursements calculated on an indemnity basis and agreed with the Public Trustee.

It was argued by Mr O'Donnell QC on behalf of the Queensland Law Society that these discrepancies were probative of gross overcharging by the practitioner in the bill of 2 April 2001.

The Tribunal notes the various discrepancies but does not consider they necessarily prove overcharging. In determining whether there has been gross overcharging the Tribunal must look at the bill as delivered and not compare it with other amounts calculated for other purposes. The assessment on the standard basis is prepared for a separate purpose and the quantum of costs recoverable on a standard basis really bears no direct relationship with the amount which a practitioner ought properly be entitled to charge his or her client.

Whilst it might be argued that an assessment on an indemnity basis should be more closely related to what a practitioner ought properly be able to charge to his or her client, the Tribunal does not find that the discrepancy here necessarily proves overcharging.

Likewise, the evidence of what was actually recovered on the standard basis and the evidence of what was actually agreed with the Public Trustee for professional costs and disbursements on an indemnity basis also reveals discrepancies. The Tribunal does not consider that either of those discrepancies necessarily prove gross overcharging.

Paragraph 2(e) of the Charge

The evidence established that the time spent on the file by paralegals under the first retainer agreement was to be charged at an hourly rate of $100.00 whereas a partner's time was to be charged at an hourly rate of $250.00. There was a care and consideration uplift of 25% on those rates.

The evidence also establishes that in the second retainer agreement on and from 12 October 2000, and until the matter was completed, the firm was entitled to charge an hourly rate of $300.00 an hour (inclusive of GST) plus a premium of 30% in respect of all items of work performed by any member or employee of the firm whether or not legally qualified. In effect then, the total fees charged for paralegals went from $100.00 an hour plus 25% care and consideration (say $125.00 an hour) to $353.60 an hour clear of GST (but inclusive of the 30% uplift) – a 250% increase. It was also established in the evidence that paralegals in the firm did approximately 50% of the work on the client's file.

Paragraph 2(f) of the Charge

It is alleged against the practitioner that the $129,929.41 recorded for paralegals' time was for work done of a clerical or secretarial nature involving no legal skill and in respect of which no charge should be made.

The difficulty here is that the agreement specifically allowed the time to be charged.

Charging for paralegals' time per se does not amount to evidence of gross overcharging. The Tribunal does not find that a solicitor cannot charge for work done by unqualified staff. There may be an issue about the proper quantum of the charge but in the modern legal services market, a solicitor can properly have some work done by unqualified staff and nonetheless charge for that work.

The Tribunal's view is that the charging by the practitioner for the time of unqualified staff for work of a clerical or secretarial nature (of itself) does not amount to gross overcharging.

Paragraph 2(g) of the Charge

The evidence established that the billing guide recorded time of paralegals was $129,929.41 (see exhibit F to Mr Foote's affidavit). It was submitted by Mr O'Donnell on behalf of the Society that there were significant instances of the kind referred to in paragraph 2(g)(i) to 2(g)(x) in the Notice of Charge to establish that there was gross overcharging.

The evidence does establish there were instances of charges being included in the bill relating to attempts to make telephone calls where such calls were unanswered. Likewise, the client was charged for attempts to telephone persons who were unavailable to take the call and for whom messages were left to return the call.

Likewise, there were instances of photocopying of an account received by the firm for which a charge was raised and included in the bill to the client. Further, there were instances of drawing request forms to request the firm's accounts department to draw cheques in respect of accounts and specific charges were included in the bill to the client for such items.

There were instances in the evidence of diarising of appointments and time charges being made to the client for those, as well as phone calls to Directory Assistance or enquiries through the telephone directory in order to obtain telephone numbers. These items were the subject of specific charges to the client on a time basis. Likewise, there was time charged for searching for documents on files where they could not be readily located and for typing the formal letters by staff which could be characterised as secretarial duties. Further, time charges were made to the client for time spent arranging accommodation for Counsel and for internal telephone calls within the firm and for e-mails internally within the firm from one person to another.

The Tribunal is not satisfied that the evidence of these instances establish that the time charges made to the client for these items was substantial. There was anecdotal evidence of such instances and the billing guide itself demonstrates the inclusion of such items in the time recorded but the Tribunal's analysis of the evidence is such that it cannot be satisfied on the *Brigginshaw* test that the time charges made for these items were substantial.

As the Tribunal is not satisfied that these charges were substantial, the Tribunal does not consider that they can constitute gross overcharging.

Paragraph 2(h) of the Charge

It was argued by the Society that there was significant work of a clerical or secretarial nature which involved no legal skill and for which no charge ought to have been made. It was argued that these sorts of items including those particularised in 2(g)(i) to 2(g)(x) of the Notice of Charge ought not to have been the subject of time charging, having regard to paragraph 4(a)(iii) of the second retainer agreement which indicated that an administrative charge would be made in the form of a fixed file administration fee of $395.00 including GST and that apart from that file administration fee, the firm would not charge for word processing, receptionist or general administration work performed on the file.

The Tribunal does not regard clause 4(a)(iii) of the retainer agreement to be sufficiently clear to be satisfied on the *Brigginshaw* test that the time recorded and charged for these items constitutes overcharging. It is more probably the case than not that the contract entitled the practitioner to charge the client for its staff time spent in pursuing items of the kind referred to in 2(g)(i) to 2(g)(x) of the Notice of Charge. The Tribunal is not satisfied that the charging of time charges for those items establishes overcharging because the time charges made for such items are not substantial.

Paragraph 2(j) of the Charge

Another allegation made against the practitioner in paragraph 2(j) of the Notice of Charge is that the charging of the blended rate under the second retainer agreement for work done by solicitors was excessive because the firm relied substantially on senior Counsel to perform work.

The evidence on this issue does establish that the firm did rely heavily on Counsel. Mr L involved himself intimately in strategy in the drawing and settling of documents including letters. He also dealt carefully with the medical evidence. However, having heard all of the evidence on the issue, the Tribunal cannot be satisfied on the *Brigginshaw* standard that there was over reliance on Counsel. To the contrary, the evidence establishes this practitioner had quite properly engaged a very experienced Senior Counsel and relied on that Senior Counsel's competence and experience but not to an excessive degree and not to an extent to which charging for the solicitors' own time at the agreed blended rate constitutes in itself gross overcharging.

In the period of just over two months, Counsel's fee was $33,000.00. The Tribunal does not regard the quantum of that fee to be so excessive as to warrant a reduction in the charges made for solicitors' time nor does the quantum of Counsel's fee constitute any proof of over reliance by the practitioner on Counsel.

Paragraph 2(i) of the Charge

Paragraph 2(i) of the Notice of Charge pleads against the practitioner that the amounts charged by the practitioner as particularised in subparagraph 2(f) were grossly excessive. This amounts to an allegation against the practitioner that the time charges made for the time of paralegal staff not legally qualified at the rate of $300.00 an hour including GST plus a premium of 30% was, having regard to the amount of time involved on the quantum of the hourly charge, grossly excessive.

If the Tribunal was to find that charge proved, it can only do so if it is satisfied on the *Brigginshaw* standard that the rate and/or total quantum of the charge for paralegal time represents a charge that no solicitor acting properly should have made to his or her client.

This is the sole issue which is left for the Tribunal to determine. It is whether the blended rate charged for the time spent on the file by paralegals or non legally qualified persons establishes that there was gross overcharging. Mr O'Donnell for the Society pointed to the practitioner's evidence to the effect that there was no evidence of abnormal risk to the solicitor as the basis for justification of the charges entitled to be made under the second retainer agreement (see transcript 232).

The Society submitted that there was no evidence that the matter was a risky case. The move to the flat rate in the second agreement is said by the Society to have been made only by reference to what other competitors were charging. The Society referred to evidence that paralegals did 50% of the work on the particular file in question (see transcript 244.5). The Society submitted that the flat rate was not justified generally or in the particular case of the client.

The members of the tribunal were invited by the Society to act on our own knowledge of what partner rates were at the relevant time. It has not been necessary to do that. There was evidence from the practitioner that during 2000 he was aware that a well established solicitor of a major personal injury law firm operating on a speculative basis but not bearing outlays would be charging $500.00 per hour. He also gave evidence that a well established solicitor at the same time in a major firm conducting cases on a speculative basis and carrying all outlays would be charging rates as high as $450.00 per hour plus a 40% uplift for care and consideration. That evidence is contained in the transcript of 5 December 2002. The Tribunal accepts that evidence as being accurate.

The practitioner gave evidence that the blended rate of $390.00 per hour after uplift constituted $300.00 an hour for legal services and $90.00 an hour which was a risk compensation factor. The point made by the Society in argument was there was no evidence that the case was a risky case. The Tribunal can infer from the evidence of the involvement of Mr L and from the evidence from the practitioner and Mr C about the difficult issues which were involved, that the matter was a significantly risky case. The practitioner and Mr C gave evidence about difficult issues of causation and difficult medical issues involved.

However, this does not assist the Tribunal in determining whether the blended rate charged for the time spent on the file by paralegals constituted gross overcharging. In that regard, the Tribunal was referred to the case of *Law Society of NSW v Foreman* (34 NSW LR 408) where the importance of the client entering into a costs agreement exercising an independent and informed judgment was emphasised (see page 437).

The Tribunal has found that the practitioner had breached his fiduciary duty in relation to the entering into the second of the retainer agreements.

It was suggested by the Society that it might be justified to move the solicitors' rate from $250.00 to $300.00 (including GST) but there was no justification for movement of the paralegal rate from $100.00 to $300.00 (including GST). The practitioner's explanation for justifying that movement was the knowledge of what his competitors were charging (see transcript 240.4 and 243.6). That knowledge which the practitioner had extended only to what competitor solicitors were charging for their own time. There was no evidence before the Tribunal of what competitor firms were charging for paralegals' work.

The Tribunal had evidence of what competitor solicitors were charging for professional time and evidence that prior to the second retainer agreement the practitioner charged $100.00 per hour for paralegals' work. In the Tribunal's view, there was sufficient evidence given to the Tribunal for it to make an independent judgment as to whether the charging of the increased blended rate for paralegals applied over the full extent of the paralegals' time spent on the file amounted to gross overcharging.

The practitioner gave evidence (on 5 December 2002) that (without looking at the billing guide personally) he accepted what Mr S told him and that was that total WIP for the file was $280,000.00. He then applied the 30% uplift and that brought the amount to $366,000.00. He decided to charge $350,000.00 (accepting Mr S' recommendation) noting that that represented a discount to the client of $16,000.00. Mr Z's evidence was not helpful on this issue.

The Law Society submitted that there was nothing wrong in charging the paralegals' time provided the work charged for advanced the file. It was submitted on behalf of the Society that the practitioner's firm deliberately did not have secretaries but paralegals and that the firm created the blended rate so that it could profit from high fees recovered for the work of unqualified persons.

The charging for paralegals at the same rate as solicitors and partners cannot be attacked on a contractual basis because the contract allowed the practitioner to charge accordingly. However, the Tribunal has found that the practitioner failed to carry out his fiduciary duty at the time when the client entered into the second retainer agreement by which the client agreed to a blended rate so that the time spent by paralegals was charged at the same rate as solicitors. He entered into that agreement without knowing that of the work done on the file approximately 50% would be handled by paralegals.

The Tribunal regards the charging for paralegals' time at $300.00 per hour (including GST) plus a 30% uplift as an unusually high charge. The movement from $100.00 an hour to $300.00 an hour (including GST) and 30% uplift was an unusually high increase. Allowing a $16,000.00 discount on a recorded but uplifted amount of $366,000.00 does not affect the Tribunal's view on this issue.

As the client did not have the advantage of independent advice prior to the entering into the second of the agreements, he did not have the opportunity to enquire whether a charge of $300.00 an hour plus 30% uplift for paralegal time was unusual. He did not know that it was likely paralegals would do half of the work on the file.

The practitioner referred to *QIW v Felview* (1989 2 QR 245), a decision of Mr Justice Macrossan as he then was. This case is not helpful because it does not contain any proposition relevant to this charge. It is a single case where a Judge preferred one expert opinion over another and no broader principle was involved. Mr Morris QC for the practitioner suggested there were three aspects to the overcharging allegation or perhaps three perspectives, namely:

1. The viewpoint of the solicitor and in that regard he suggested that in this case it is relevant to note that the practitioner had not made much profit from his no win-no fee practice in medical negligence;
2. The issue of protecting the client and in that regard he submitted that the client knew what he was doing and was entitled to make his own bargain;
3. The perspective of protection of the public and in that regard Mr Morris submitted that plaintiffs in personal injury medical misadventure litigation should have someone willing and available to act for them. He seemed to suggest that there was an access to justice issue involved here.

The first of the perspectives is clearly irrelevant to the issue the Tribunal must determine. That issue is whether there has been actual gross overcharging.

It is not appropriate for the Tribunal to address the overcharging allegation in the manner submitted by Mr Morris. Mr Morris suggested that the Tribunal, if it is to find guilt on the second charge, must find that to charge a blended rate in the quantum charged here was grossly inconsistent with what is acceptable to honourable members of an honourable profession.

The Tribunal, however, prefers to characterise the issue as whether the charging of that rate for the time spent by paralegals having regard to the magnitude of time spent by paralegals on the particular file constitutes the charging by the practitioner of a fee which was grossly inconsistent with what would be expected of an honourable member of an honourable profession. This effectively is the test set out in *NSW Bar Association v Evatt* referred to by Mr Morris.

Exhibit F to Mr Foote's affidavit shows that there was a significant amount of work recorded by paralegals of a fairly mundane nature.

The Tribunal has already found that work of the kind particularised in paragraph 2(g)(i) to (x) was not substantial. The description "mundane" however extends to a much broader spectrum of work. It encompasses (for example) such items as:

1 Attendances to discuss the file with other staff members;

2 Telephone calls to a doctor's rooms concerning x-rays required;

3 Telephone attendances on the client about an unlocated fax;

4 Preparation of a letter to the defendant's solicitors enclosing documents;

5 Perusal of the file to ascertain its present position;

6 Telephone call to a doctor's surgery chasing a report;

7 Phone to a doctor's rooms requesting to be advised of the client's date of birth;

8 Preparation of a letter to a doctor chasing a report;

9 Preparing a letter to the client enclosing a copy of an OT report;

10 Preparation of similar letters to both defendants' solicitors;

11 Attending on another paralegal providing details of a paper delivered on medical negligence at a breakfast seminar and arranging for a request to be made of the barrister presenter to obtain a copy of his notes;

12 Phoning the barrister presenter when advised he did not have any written papers;

13 Perusal of the signed client agreement;

14 Phone to a staff member in the practitioner's Brisbane office concerning an earlier phone call from a doctor.

15 Perusing the file to ascertain whether a doctor's report had been received;

16 Phone call to Senior Counsel's secretary to appoint a time for a conference;

17 E-mail to Mr C with details of arrangements for that conference;

18 Tagging documents to be included in briefs to Counsel;

19 E-mail to Mr C with a message from a doctor;

20 Phone call to a specialist to make an appointment;

21 Similar call to a specialist's rooms to appoint a conference with Counsel;

22 Preparation of a letter to Counsel with a copy of a doctor's report;

23 Preparation of similar letters to defendant's solicitors enclosing a medical report;

24 Preparation of similar letters to other doctors enclosing a medical report;

25 Preparation of a fax to doctor to arrange an MRI scan to be done on the plaintiff's brother;

26 Searching for relevant medical and school reports to send to a doctor;

27 Phone call to a doctor's rooms concerning times for tests for the plaintiff;

28 Perusal of the file to locate documents listed in an occupational therapist's report;

29 E-mail to Mr C with a detailed telephone message;

30 Attendance on the file to check if an account with a private hospital had been incurred;

31 Preparation of a receipt voucher to send to the accounts section with a cheque received from the defendant's solicitors for photocopying expenses;

32 Phone call to defendant's solicitors when advised they had not finished photocopying documents requested;

33 Issuing a request for juniors to collect boxes of documents from the defendant's solicitors;

34 Phone call to a copy centre making arrangements for the centre to photocopy the remainder of documents for discovery;

35 Phone call from a person in Chinchilla who had apparently received a fax from the practitioner's firm by mistake;

36 Further call to that person requesting he destroy the fax "as it is very confidential";

37 Sorting out photocopies;

38 Preparation of a letter to a doctor requesting a report;

39 Preparation of a letter to a hospital paying an account;

40 Phone call to Mr C (on mobile in Roma) to advise him of the results of two calls to doctors chasing their reports;

41 Perusing of the file searching for CT scans;

42 Preparing a letter to the defendant's solicitors enclosing CT scans and MRI;

43 Perusal of the file to ascertain if the scans had been retained by the defendant's solicitors;

44 Letter to defendant's solicitors chasing return of the scans;

45 Phone call to doctor's rooms when advised corrections to the draft report had been made by the doctor and now had to be typed;

46 Phone call from the same doctor's surgery later the same day when advised of the amount of the doctor's fee for the report and when advised the corrections to the report would be typed "on Friday";

47 12 minute attendance with another staff member to make arrangements to purchase for the same doctor's secretary "a box of chocolates and a nice thank you card";

48 12 minute attendance wrapping the box of chocolates;

49 Letter to Counsel enclosing a copy of the plaintiff's Statement of Loss and Damage;

50 Receipting of a cheque into trust being reimbursement of travel expenses received from the defendant;

51 Perusal of file to find documents requested by Senior Counsel;

52 Preparing a letter to the Health Insurance Commission enclosing a completed schedule;

53 Phone call to a Judge's Associate concerning a date for review;

54 Phone call to a hotel making a reservation for the client for mediation dates;

55 Similar phone call relating to travel arrangements;

56 Phone call to a Brisbane office staff member to arrange the uplifting of a brief from Senior Counsel and the delivery of same to Junior Counsel;

57 Attendance by the Brisbane staff member on the same telephone call;

58 Request for 7 new sub files to be made;

59 Preparing a letter to the client enclosing a copy of the signed client agreement;

60 Requesting the delivery of a letter and cheque to a medical centre;

61 Completing a request to re-enter CT head scan in the strong room on return from the medical centre;

62 Telephone request to AMA to obtain a copy of its scale of fees;

63 Preparation of memo to new medical negligence paralegal as to the background of the file;

64 Writing a detailed file note of a phone conversation to a hospital "due to Lawmaster being down";

65 Half hour attendance perusing file and the solicitor's notes of conference with Counsel;

66 Half hour attendance preparing a draft of Notices of Non Party Discovery directed to two hospitals;

67 Perusal of a doctor's notes to ensure that the Miles Hospital records were included;

68 18 minute attendance perusing file notes "to ascertain what has happened in the last 24 hours";

69 1.1 hr attendance in preparation of schedules of data;

70 Research – locating a doctor;

71 Amending letters to be sent to specialists;

72 Amending correspondence and locating attachments;

73 Perusal of a doctor's CV;

74 Pulling the quantum medical reports subfile apart, resorting all the documents, putting the index in chronological order, checking all reports and placing them in the file in order;

75 A 2.3 hour meeting to discuss the file;

76 Entering apportionment details into all relevant diaries;

77 Having a fax to Queensland X-Ray signed and checked;

78 A discussion with admin concerning "assistance with photocopying";

79 18 minute perusal of file to check bring-ups are up to date;

80 Further 12 minute perusal of file bring-ups (on the same day);

81 Again on the same day, a further 30 minute perusal "to check that bring-ups up to date";

82 Half hour attendance to discuss the file with the responsible solicitor;

83 A telephone call to reception concerning a courier;

84 1 hour attendance re-organising medical report subfiles;

85 Phone to the client to discuss an outlay authority;

86 A 48 minute attendance updating liability and quantum indexes (sic);

87 Telephone call to the Health Insurance Commission;

88 Half hour attendance searching for family medical records;

89 Preparation of filing instructions to ensure that all faxed advice from LL are placed onto the correspondence section;

90 Assisting S to locate various documents for the mediation brief;

91 Phone from a Judge's Associate concerning the court file's location;

92 Twelve minute attendance perusing Senior Counsel's account;

93 Perusing of file to confirm whether Centrelink have been advised of the settlement and locating settlement notification form;

94 Phone call to Junior Counsel to request his final account.

These examples reflect the significant amount of paralegals' time on what are mundane matters.

No fairminded practitioner would be justified in charging his or her client at what the Tribunal regards as an unusually high rate across the large number of hours involved including the significant time on the mundane matters of the kind described. As to quantum of the rate and as to the hours involved, the amount charged by the practitioner for the work done by paralegals amounts to gross overcharging of a substantial kind. The overcharging was substantial by reason of the fee rate having increased effectively from $100.00 an hour plus care and consideration of approximately 25% (say $125/hour) to $300.00 an hour (GST inclusive) plus 30% uplift for paralegals' work and it is also substantial because of the number of hours of paralegals' work charged for. The Tribunal finds Charge 2 proved.

The Tribunal finds that the time charges made for paralegals' work were substantially above what any reasonable solicitor would contemplate as being a proper charge. The Tribunal cannot accept that any solicitor acting properly toward his or her client could have charged for the time spent by unqualified staff at the rate charged by the practitioner over the extensive time involved. The Tribunal finds that the practitioner's proved conduct in this regard as amounting to professional misconduct.

Penalty Hearing

The practitioner is one who has made an admirable contribution to the legal profession and to the wider community through his involvement in the Australian Plaintiff Lawyers Association and other community work about which he has given evidence before this Tribunal.

This confirms the Tribunal's impression of him when he gave evidence before the Tribunal, that he is a person of integrity and one who was frank and honest in his evidence before the Tribunal.

The Tribunal can be confident that, generally speaking, he is frank and honest in his dealings with clients and other practitioners. Character evidence called before us today supports that impression.

The subject matter of these two charges represents a serious error of judgment on the practitioner's part. He has not, however, been found guilty of a continuing or serial misconduct but rather two incidents, one of a breach of fiduciary duty and the other of gross overcharging. These were two very serious errors of judgment which occurred in relation to the same matter.

It was suggested that the practitioner should not be made a scapegoat in a situation where there is genuine confusion in the legal profession about the proper remuneration or basis of charging for difficult matters like the one, the subject matter of this case, which was a difficult medical negligence case involving a plaintiff with cerebral palsy, but there should have been no confusion on the practitioner's part about his fiduciary duty to his client.

If there is doubt in the profession about the appropriateness of blended rates of charges, then that may well ameliorate the significance of the second charge, but still it was a serious error of judgment. Given our view about the Practitioner's honesty and integrity, we have confidence that he will learn a valuable but painful lesson as a result of these serious errors of judgment.

We accept that the Practitioner is a person who will be prepared to learn and adjust his professional behaviour accordingly, after an appropriate period of suspension.

We have a duty to protect the public, but we are confident that the practitioner will act in future in a professional manner. He is not a practitioner who has demonstrated any permanent unfitness to practice by reason only of these two very serious errors of judgment. It is not appropriate therefore that he be struck off the Roll.

We do need to send a message to the profession that in securing client agreements, solicitors have a serious duty not to advance their own interests over their clients' interests. The breach of fiduciary duty here was compounded by the gross overcharging which occurred.

We will send appropriate messages to the profession by imposing an appropriate and serious penalty and we will thereby fulfil our duty as a Tribunal to protect the public.

Given the serious nature of these two errors of judgment which amount to serious misconduct, we believe the appropriate penalty is a suspension for a period of 12 months from today.