Is there an "insanity defence" in professional regulatory proceedings?

Simon Mills SC, PDRBA Conference, May 2019

A. Introduction

1. This is an issue that can most particularly arise when an allegation of Professional Misconduct (PM) or Poor Professional Performance (PPP) is made *without* an allegation of relevant medical disability (RMD). That is to say, a case where an allegation is made that a particular set of facts is PM or PPP, but the registrant contends by way of reply that the facts (even if admitted or proven) should not be regarded as PPP or PM, because of the effects of an illness – typically a mental illness – at the time of the conduct.

2. Conversely where RMD is alleged as well as PM and/or PPP, then the FTPC may have the choice of deciding, having heard all of the evidence, whether the matter discloses PM/PPP or RMD or both or neither, depending on the facts of the case. Here again, though, a registrant might argue that there are cases where – if RMD is proven – the RMD can be of a nature that absolves the registrant of culpability under the PM and/or PPP arms of the case and that that any sanction should be imposed only on the basis of a finding of RMD.

3. The question then is whether, in cases where PPP/PM is alleged and the practitioner successfully establishes the existence of a medical disorder that would be capable of successfully raising an "insanity defence" in criminal proceedings, will it also amount to a defence in regulatory proceedings? So, in cases where only PPP/PM is alleged, can the registrant defeat the case on the grounds that s/he was "insane" or where an insanity defence is made out in a case where RMD is pleaded, is a tribunal compelled to return a RMD finding only?

4. There appear to be no reported Irish cases on the point. However, there have been a number of cases in other jurisdictions.

B. **US Law**

Hoover 161 Ariz. 529 (1989) – Decision of the Supreme Court of Arizona

5. In *Hoover*, the respondent was an attorney with a background diagnosis of bipolar disorder with psychotic features. His condition was in remission when his case came be considered before a disciplinary body and the courts, but, while under pressure and working on a large real estate transaction, Hoover had misappropriated substantial sums from his client and fraudulently billed for personal expenses. The psychiatrists in the case concluded with essential unanimity that, at the time of his misconduct, the respondent had suffered from the psychosis and his misconduct was a product of that disease.

6. As a consequence, it had been argued before the disciplinary committee that Hoover was *M'Naghten* insane at the time of the misconduct, so that he either did not know right from wrong, the nature and quality of his acts, or both.. The disciplinary committee adopted this testimony and recommended no disciplinary sanctions, but recommended certain rehabilitative measures under the relevant rules while maintaining respondent's active status.

7. A superior body within the Bar association (the disciplinary commission) did not accept this reasoning and rejected, in particular, the effective conversion of the matter from a disciplinary proceeding to a “disability proceeding”. Accordingly, the Commission directed that there should be a new hearing before a new committee.

8. The Supreme Court held that:

    a. The Commission's remand for a *de novo* hearing before a new committee was improper and violated both the scope of the Commission's powers and respondent's right to procedural due process.
    b. The Committee did have authority under the governing rules to "convert" a disciplinary proceeding into a disability proceeding and to combine the procedures provided by these two methods of addressing attorney misconduct.
    c. Disciplinary and disability proceedings could commence simultaneously, thus making both remedy regimens available. *Id.* at 197, 199, 745 P.2d at 944, 946.
    d. On these facts, *M'Naghten* insanity was a matter that must be considered **in mitigation of bar discipline but was not a complete defense to the imposition of disciplinary sanctions for attorney misconduct**.

9. Ultimately The Commission unanimously adopted the Committee's significant factual findings (and the findings of insanity were also upheld by the Arizona

Supreme Court). It then recommended by a vote of five-to-three that despite the Committee's finding of *M'Naghten* insanity, respondent should be disciplined:

a. suspension for a period of six months and one day[1]
b. reinstatement subject to terms and conditions.
c. recommendation of "probation" during the period of suspension.

M'Naghten in the *Hoover* case

10. Hoover argued that, had he been charged with a crime, his mental condiction would have been a complete defence. The Arizona Supreme Court disagreed:

> In our view, bar discipline is not foreclosed merely because the ethical impropriety was the product of a mental illness. On the other hand, although insanity does not foreclose discipline, it must be considered in determining whether and what kind of discipline is to be imposed and what procedures are to be followed to protect the public. We reach this conclusion for two interrelated reasons. First, the M'Naghten standard is not a medical diagnosis, but a legal fiction developed for courtroom use…as a test for the intent necessary to hold a defendant criminally responsible…We see no need to engraft such a test onto bar discipline proceedings which are not intended to punish.
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> Although our history may compel us for now to employ *M'Naghten* as the test for the propriety of imposing punishment for crime, it does not require us to do so when considering whether to sanction an attorney for violation of lawyers' ethical precepts. Indeed, the vast majority of cases considering this issue hold that bar discipline may be imposed on lawyers with various degrees of mental illness and disturbance.
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> Bar and judicial discipline proceedings are neither penal in objective nor criminal in nature, and discipline may be imposed in manners that would be constitutionally impermissible in a criminal case.[2]

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[1] This unusual suspension period was chosen to ensure that certain, more onerous, reinstatement procedures would apply. Those procedures could not have been invoked if the suspension was 6 months or fewer.

[2] The Court cited other equivalent examples: *In re Marquardt,* 161 Ariz. 206, 214-215, (1989); *Gary v. State Bar of California,* 44 Cal.3d 820, 826 (1988) (where a Court upheld application of enhanced disciplinary sanctions to attorney's conduct occurring *after* the promulgation of the standards, even though *ex post facto* principles would have prohibited

> We do not hold that constitutional concepts such as due process and equal protection are inapplicable to bar proceedings…We hold simply that respondent is not deprived of equal protection of the law simply because he, as with other attorneys, is subject to bar discipline for conduct that could not have formed the basis for criminal prosecution. **Given the difference in objectives between bar discipline and criminal prosecution, the application of different standards of *mens rea* in the two proceedings violates neither equal protection nor due process principles**.
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> Moreover, application of equal protection principles does not invalidate imposition of bar discipline here. State discrimination between different classes of individuals is permissible as long as the classification serves a legitimate interest and the classification rationally furthers that interest…Here, the legitimate interest is to protect the public from harm at the hands of dishonest or disabled lawyers, to foster professional integrity, and to maintain the public's confidence in the organized bar as a whole. Disallowing *M'Naghten* insanity as a complete defense in discipline-disability proceedings is quite relevant to these ends.

Sanctions in Hoover

11. A related issue in *Hoover* was that, it is correct that "insanity" goes to mitigation, then was the disciplinary committee correct to suspect the attorney – or in other words, how much mitigation was his condition worth? Hoover argues that suspending a lawyer whose misconduct was caused by a mental disease over which he had no control serves no worthwhile purpose. In particular, imposing a severe sanction such as suspension would (and could) do nothing to deter others who suffer from manic depressive psychosis from engaging in improper conduct caused by a mental disease over which they have no control. However, the court noted an essential element of professional regulation:

> …another objective of bar discipline is to give the public confidence in the integrity of the bar and its ability to impose sanctions on those committing serious transgressions…([the] cause of attorney misconduct is secondary to the bar's duty to protect the public interest). In our view, mental disease or not, this respondent committed serious transgressions. One can suffer from manic depressive disease without stealing from one's clients, so we cannot say that no element of blame should attach to this respondent. Further, we

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such application in a criminal case); *In re Barclay,* 82 Utah. 288, 24 P.2d 302 (1933) (upholding "prosecution" of attorney for misconduct committed prior to state bar's organized existence); *In re Brown,* 157 W.Va. 1, 7, (1973) (upholding imposition of interim sanction for attorney misconduct even though that sanction was first adopted subsequent to the conduct giving rise to the disciplinary proceedings).

> have difficulty accepting the argument that a lawyer, while effectively managing and closing a multimillion dollar real estate transaction, can misappropriate funds, defraud his clients, conceal his defalcations (*sic*), and then escape sanctions by claiming he was unaware of what he was doing or could not appreciate the impropriety of his conduct. None of the mental health experts indicated that this respondent suffered from delusions so severe he was unaware of the implications of his conduct…

12. The Court upheld the sanction of suspension with careful reinstatement procedures and a two year probation period (aimed at ensuring follow-up medical care), but noted that:

> If not for the record establishing the diagnosis of bipolar manic depressive psychosis, the appropriate sanction for misappropriation of clients' funds normally is disbarment.[3]

[3] The reasons for not disbarring Hoover were not limited to the mental health condition, but also included: (a) a previously unblemished records including positive contributions to the Bar and to the wider community, (b) that restitution had been made, (c) the clients affected did not want him disbarred and (d) two years had elapsed since the matters complained of and there had been no further incidents in the interim and (e) no member of the disciplinary Committee or Commission had recommended disbarment. One member of the Court dissented and argued that disbarment was the appropriate sanction.

C. UK Law

Sreenath v. General Medical Council [2002] UKPC 56

13. The facts of this case are somewhat different from *Hoover*, but the Prvy Council arrived at many of the same conclusions. Dr Sreenath had been the subject of a decision of the GMC that his name should be erased from the medical register. He had been charged with serious professional misconduct by behaving inappropriately and indecently towards two of his female patients on two separate occasions while acting as a locum general practitioner. He was also charged with having committed breaches of conditions imposed on his registration which had been imposed by the Interim Orders Committee of the GMC.

14. During the course of the GMC inquiry, Dr Sreenath had argued that either:
    a. His case should be referred to a health committee, or
    b. The inquiry should be adjourned to allow him to obtain definitive medical evidence of his mental condition before proceeding further.

15. Both applications were refused and the outcome was a negative finding against him. After the charges were found proved, but before sanction was imposed, Counsel for the doctor counsel then sought (and was granted) a short adjournment to enable him to be examined by a consultant psychiatrist. The purpose of the adjournment was stated to be to obtain to determine the doctor's current psychiatric condition and in particular whether he was fit to give instructions to those representing him on the issue of penalty. It was not suggested that the evidence would have any bearing on his mental condition at the time of the offences.

16. During the course of assessment by the psychiatrist, the doctor disclosed new matters relevant to his mental health (relating to a suicide attempt by carbon monoxide in 1995). At the resumed hearing his counsel placed before the Professional Conduct Committee a psychiatric report that concluded

    a. that the doctor was suffering from an acute anxiety state or acute stress reaction which with the benefit of appropriate medication was likely to have subsided sufficiently by the time of the resumed hearing to enable him to give proper instructions for the conduct of his case;
    b. that he was not suffering from any form of major mental illness, clinical depression or psychosis; but
    c. that it was possible that he might be suffering from organic brain damage in the form of dysexecutive disorder syndrome affecting his understanding and judgment.

17. Dysexecutive disorder syndrome was an organic personality change resulting from significant brain insult. Since the only history of brain insult was the suicide attempt in 1995, he took that to be the likely cause. In order to confirm his diagnosis one way or the other, it would be necessary to undertake a battery of neuro-psychological tests matched with a much more detailed history and probably brain imaging. This new evidence grounded an application to transfer the case to the Health Committee;[4] or for an adjournment to seek further evidence.

18. The Professional Conduct Committee refused the application and proceeded with the inquiry in public. At the conclusion, his name was erased (both the improper conduct and the breaches of interim conditions were found proven).

19. Following the conclusion of the inquiry, the doctor obtained further reports, which showed that:

    a. the doctor's account of his attempted suicide in 1995 was corroborated by contemporary medical notes; and
    b. that he was currently suffering from
        i. acquired cognitive deficits consistent with dysexecutive syndrome attributable either to cerebrovascular disease or to cerebral hypoxia at the time of the attempted suicide;
        ii. a significantly reduced ability to cope with situations of stress and anxiety; and
        iii. a bipolar affective disorder associated with disinhibition and socially inappropriate behaviour.
    c. The consultants were of opinion that the doctor's mental condition affected his ability to practise effectively and **may have contributed to his conduct at the time of the offences in question.**

[4] Rule 51(1) of The General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules 1988 (SI 1988 No 2255) provides that, where in the course of an inquiry it appears to the Professional Conduct Committee that a practitioner's fitness to practise may be seriously impaired by reason of his physical or mental condition, it may refer that question to the Health Committee for determination. If following such a reference the Health Committee certifies its opinion that the practitioner's fitness to practise is not seriously impaired by reason of his physical or mental condition, the Professional Conduct Committee is required to resume its inquiry and dispose of it: (rule 51(3)). If on the other hand the Health Committee certifies its opinion that the practitioner's fitness to practise is seriously impaired by reason of his physical or mental condition, the Professional Conduct Committee ceases to exercise its functions in relation to the case: (rule 51(4)). Importantly, for the purposes of the Sreenath case, the Health Committee could not erase the doctor's name, although it could impose suspensions, including effectivel indefinitely suspensions.

Dr Sreenath's position was therefore quite different from Hoover's position: there was not question of a *M'Naghten* defence, but there was a stateable argument that his fitness to practice might be "seriously impaired by reason of his…mental condition."

20. At the hearing of the appeal his counsel placed these reports before the Board and asked their Lordships to:

    a. quash the decision of the Professional Conduct Committee to erase his name from the register and
    b. direct either
        i. that the case be transferred to the Health Committee or
        ii. that the appropriate penalty be reconsidered by the Professional Conduct Committee.

21. It was accepted that the Committee was entitled to take a serious view of the conduct and did not challenge the Committee's conclusion that it amounted to serious professional misconduct which justified erasure. The challenge was confined to the refusal of the Professional Conduct Committee to adjourn the hearing to allow the doctor to further amplify the initial psychiatric report and evidence.

22. The doctor's counsel argued that an adjournment to get further reports:

    a. would provide the Committee with fuller and more complete evidence of the doctor's mental condition without which it could not make an informed decision whether to transfer the case to the Health Committee; and
    b. it would be relevant to the issues of serious professional misconduct and penalty.

    The Privy Council rejected both contentions.

23. The Court noted the different functions of the Conduct and Health Committees:

    > The functions of the Professional Conduct Committee and the Health Committee, though complementary, are distinct. The Professional Conduct Committee is concerned to maintain professional standards of integrity and competence and the reputation of the medical profession. Its function is disciplinary. If it finds that a practitioner has been guilty of serious professional misconduct, it must consider whether the safety of the public and the reputation of the profession require that his name be erased from the register so that he cannot carry on a medical practice even if medically fit to do so; or whether some lesser penalty such as conditional registration or suspension for a limited period would be sufficient. The functions of the Health Committee

are not disciplinary. It is concerned to protect the public (and the practitioner himself) from the dangers of a practitioner being allowed to carry on practice while he is medically unfit to do so, whether or not he has committed a disciplinary offence. Its powers are limited to enable it to achieve this purpose. It cannot order the practitioner's name to be erased from the register. The most it can do in an appropriate case is to order indefinite suspension, and such an order is reviewable at any time. If the Health Committee is satisfied that the practitioner has recovered sufficiently to be allowed to resume practice, it will terminate his suspension.

24. The Court noted the earlier case of *Crabbie*:

> …in *Crabbie v General Medical Council* (unreported) Privy Council Appeal No 7 of 2002, 23rd September 2002; their Lordships held that the Professional Conduct Committee should not refer a case to the Health Committee unless it was satisfied that an order directing the erasure of the practitioner's name from the register was not appropriate. In giving the judgment of the Board Lord Scott of Foscote said:
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> > "…whether the [Professional Conduct Committee] should exercise its…power to refer the case to the Health Committee should be considered in conjunction with the question whether the case is or may be one which calls for a direction of erasure. The [Professional Conduct Committee] should not…refer a case to the Health Committee unless and until satisfied that a direction of erasure would not be the right direction to make. And once the [Professional Conduct Committee] has decided that a direction of erasure is the right direction to make, the question whether the case should be referred to the Health Committee has received its answer."

25. It should be noted that there is not an equivalent statutory arrangement under Irish professional regulatory law. Where a case is advanced as a medical disability case, the regulator will typically have all relevant sanctions open to it, including erasure from the register.

26. Perhaps more contentiously, the Privy Council also rejected the idea that the PCC should have awaited relevant additional psychiatric evidence before considering what sanction to imposed. The Court concluded:

> The second ground is essentially that the material was relevant to issues of mitigation. Its relevance to these issues was a matter for the Professional Conduct Committee. Their Lordships would endorse the Committee's observation that inappropriate and indecent behaviour by a doctor towards a patient is always a matter of grave concern, since it is an abuse of the

> doctor's position and offends against the rights of the patient. It is conduct which reflects adversely on the doctor concerned and damages the reputation of the medical profession, as well as undermining the trust which members of the public should have in the medical profession. In their Lordships' opinion the Committee was entitled to take the view that [the doctor's] conduct amounted to serious professional misconduct and that the protection of the public required the erasure of his name from the register whether or not he was suffering from a psychiatric disorder at the relevant time. It follows that it was entitled to take the view that further evidence corroborative of Dr Campbell's report would not be of assistance and to refuse an adjournment sought for the purpose of obtaining such evidence.

The question might reasonably be asked whether a committee is right to determine (without hearing the evidence) that there could be no mitigation that could ever move the committee away from erasure, without knowing what that possible mitigation might be. It seems arguable that – in this aspect - *Sreenath* might not be followed in this jurisdiction.

D. Australian Law

BRJ (NSW Supreme Court, 2016)

27. The most recent decisions in the area come from Australia and they demonstrate the same broad line of analysis as *Hoover*, save that they appear to leave open the possibility that there may be cases where an analysis of the facts might, in certain circumstances, lead to a conclusion that the conduct was not blameworthy. The current state of the law in Australia was most recently considered in *BRJ v Council of the New South Wales Bar Association* [2016] NSWSC 146.

28. In *BRJ,* the registrant was a barrister who had admitted certain charges of "unsatisfactory professional conduct" (UPC), but argued that the tribunal hearing her case should not make any findings against her because she was suffering from an eating disorder.[5] The nature of the UPC related to failed to attend for rostered duty and certain professional conflicts that were allowed to arise in her capacity as both landlord and barrister for a particular client. The agreed medical situation was as follows:

> "During the period relevant to this proceeding, [BRJ] was suffering from anorexia nervosa and … it is likely that her cognitive functioning was impaired by this condition. In addition, the physical symptoms of the condition caused or contributed to the Respondent's lateness on the occasions referred to in [the charge sheet]."

29. The Tribunal found that (a) the plaintiff's mental condition (and associated physical symptoms) caused her lateness for Court and that (b) her judgment and cognition were affected by her mental condition such that she did not sufficiently understand her conduct and was not able to properly reason in relation to it, insofar as those matters gave rise to the additional charges. **However**, the Tribunal found that the conduct alleged in Grounds A, B and C in the application did amount to unsatisfactory professional conduct. It took into account the plaintiff's mental condition in deciding: not to reprimand her; that the conduct would not appear on the Register; that her name ought be anonymised; and that the material ought not be published. The barrister appealed this decision.

[5] Of some note, the barrister had denied she was unwell until a medical report came into being, because the Bar Council had directed the barrister to attend a medical examination with a psychiatrist. Had that not occurred, the reason for her conduct would not have come to light because there had been a sustained non acceptance by the barrister that she was ill.

30. In *BRJ*, the NSW Supreme Court appeared to accept that there might be cases where a mental impairment could be relevant to the type of conduct being alleged.

31. The Court considered the competing lines of authority, commencing with the case of *Robinson*:

    78. In Robinson v The Law Society of New South Wales (Supreme Court of New South Wales, Court of Appeal, unreported, 17 June 1977) (Robinson) the Court of Appeal heard an appeal under the 1898 Act from the Statutory Committee which had found Robinson guilty of professional misconduct. The Court held that, although it was entitled, in the exercise of its inherent jurisdiction, to consider fitness to practice even in the absence of professional misconduct, the Statutory Committee's powers depended on its being satisfied that the practitioner was guilty of professional misconduct, by reason of the wording of the Act that conferred jurisdiction on the Committee (see s 76 of the 1898 Act, referred to above).

    79. The Court of Appeal allowed Robinson's appeal on the basis of his mental impairment (arising from alcohol intoxication). Chief Justice Street (Moffitt P and Glass JA agreeing) said:

        "In the present case the medical evidence did establish a degree of impaired judgment to such an extent as, in my view, to preclude the appellant's conduct being categorised as "professional misconduct" within the full import of those words (*Re Hodgkiss* 62 SR 340). His mental condition was such as to prevent it being held against him that his conduct was dishonourable and disgraceful."

    80. In *Robinson* the practitioner's mental condition was relevant to whether conduct constituted professional misconduct **since the definition depended on the view of others (in the profession) that the conduct was dishonourable or disgraceful**. *Robinson* illustrates the relevance of subjective matters such as mental illness which are capable of preventing conduct that is objectively reprehensible from being classified as "professional misconduct" where the moral culpability of the proponent is thereby reduced. [Emphasis added]

32. However, in *Ardalich* (cited with apparent approval in *BRJ*), the SA Supreme Court did not permit an acute psychiatric condition to excuse significant dishonesty (27 admitted charges of unprofessional misconduct, some of which involved appropriation of clients' money). Notwithstanding that the solicitor's

mental condition had been sufficiently serious[6] that he was acquitted of criminal charges, the Court held, unanimously, that the appropriate order was to strike the practitioner's name from the Roll (recognising both (a) that even a serious illness will not be exculpatory and (b) may not even be sufficient mitigation to avoid cancellation):[7]

> [42] The admissions made by the practitioner as to his commission of the objective facts associated with each of the counts was sufficient to justify the finding of unprofessional conduct with respect to each count.
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> [43] The practitioner's mental state, serious though it was, could not deflect the Tribunal from a finding that the charges of unprofessional conduct were made out once the objective facts were proved or admitted. What would otherwise amount to unprofessional conduct does not cease to be such, by reason of the existence of a mental illness on the part of the practitioner, which had the potential to establish a mental impairment defence under Pt 8A of the CLCA (*Criminal Law Consolidation Act*).
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> [44] The disciplinary provisions of the Act which come into play upon a finding of unprofessional conduct reflect the interests of the public in ensuring that legal practitioners answer to the high standards of probity and competence which must be observed if the integrity of the administration of justice is to be preserved.
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> [45] Mental illness of a practitioner which may cause or contribute towards his commission of acts constituting unprofessional conduct cannot excuse the conduct, but may be a mitigating circumstance in considering what disciplinary orders should be made.
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> …
> [47] The primary function of disciplinary proceedings is not to punish the practitioner, but to protect the public and the administration of justice by ensuring that that practitioners live up to the high standards expected of them.
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> [48] In determining the approach to be adopted in a particular case, it may be relevant to take into account the fact that the mental illness of the practitioner is of temporary duration and unlikely to recur, or may be successfully treated. Consideration could then be given to the question whether or not the

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[6] His condition was a bipolar disorder, but it was only diagnosed after the events giving rise to the complaints.

[7] Other relevant factors in the case included the fact that the conduct continued for a long period of time (c. 2years) and encompassed a diverse range of misdeeds.

practitioner should be permitted to resume practice, perhaps after a period of suspension, or subject to conditions.

[49] There will be cases, however, where the offending conduct was so serious and particularly where it has persisted over a period of time, that evidence of a mental state or illness which explains the conduct cannot be permitted to deflect the court, acting in the public interest, from striking off the practitioner.

33. However, in *BRJ*, the Court also noted the decision in *Butland* (2008) NSWADT 120 (an administrative tribunal decision rather than a Court decision) in which a barrister sought to excuse his conduct on the basis that it resulted, at least in part, from Borderline Personality Disorder which made him more inclined to act impulsively or carelessly and to react poorly to stress. he ADT noted that the medical evidence did not go as far as to suggest that the barrister's mental condition was such that he was not able to control his actions. The Bar Association submitted, on the basis of Ardalich, that the barrister's mental condition was irrelevant to the question whether he was guilty of professional misconduct or unsatisfactory professional conduct. The ADT rejected this submission, **commenting that it went too far** and considered that the judgment whether, for example, conduct would reasonably be regarded as disgraceful or dishonourable would need to take into account all relevant factors, including the mental state of the perpetrator.

34. Similarly, the Court in *BRJ*, noted another administrative tribunal decision in *Council of the New South Wales Bar Association v Kay* [2009] NSWADT 139. In *Kay*, the administrative tribunal had concluded that depression and other symptoms (as a consequence of a life-threatening assault) were not sufficiently severe to relieve the Solicitor of culpability for misappropriating funds. The Court in *BRJ* concluded that the Administrative tribunal was wrong in concluding that:

> If the relevant mental intent is lacking because there was a "degree of impaired judgment" within *Robinson* then there must be a finding of no unsatisfactory professional conduct or professional misconduct."

Rather the court noted that the defence of impaired judgment was limited only to those *Robinson*-type cases where there might be a determination to be made about whether conduct was disgraceful or dishonourable and where that determination might be affected by knowledge of the perpetrators mental state. It would not apply to cases of 'mere' falling short of expected standards of conduct.

35. The Court in BRJ concluded, therefore, in less categorical terms than *Hoover* and Sreenath:

> The language of the definition of "unsatisfactory professional conduct" is apt to connote that the test is an objective one. In these circumstances the objective conduct, rather than the professional culpability of the practitioner, is of prime, if not sole relevance. Therefore, generally speaking, any mental affliction which the practitioner may suffer is irrelevant to the characterisation of conduct as unsatisfactory professional conduct. However, where the conduct contains a mental element (such as in *Kay* where the allegation in the complaint was that he had "wilfully" breached s 255 of the 2004 Act), the test is not entirely objective, since a mental condition may affect the question whether conduct is "wilful".
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> Where the question is whether certain conduct amounts to "professional misconduct", the relevance of a mental condition will depend on the species of professional misconduct. For example, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence (in s 497(1)(a)), the practitioner's mental condition may not be relevant.
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> The mental condition of a practitioner, if it is relevant to the conduct, will generally be relevant to the question what orders ought be made as a consequence of a finding of professional misconduct or unsatisfactory professional conduct.

36. Accordingly, while leaving open that there might other cases in which the mental impairment might lead to no finding, the Court in *BRJ* reiterated the underlying principle apparent from other case law:

> I do not accept the plaintiff's submission that there was no purpose to be served by the Tribunal's making of findings [of UPC] in accordance with its reasons. As referred to above, one of the purposes of the discipline of the legal profession…is "for the protection of . . . the public generally". The "protection of the public" is regarded as the principal purpose of disciplinary proceedings, which are *sui generis*: *Wentworth v New South Wales Bar Association* [1992] HCA 24; (1992) 176 CLR 239 at 250-251.
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> The protection of the public is advanced, not merely by regulating those who are entitled to practise and removing from practise those who are no longer fit, but also by educating the profession, and the public, as to the applicable standards of professional conduct (and personal conduct where it bears on the profession); and maintaining public confidence in the legal profession… The making of findings serves an important educative role, particularly where, as here, no disciplinary action is taken notwithstanding that a practitioner has been found guilty of unsatisfactory professional conduct.

E. Conclusions

37. The position adopted in Australia seems to be a reasonable one, reflecting as it does the essential position that:

    a. Professional regulatory processes have a different purpose to criminal proceedings;

    b. The paramount requirements of protecting the public mean that (a) a practitioner will not be able to escape culpability merely by advancing what would be a suitable criminal defence on health grounds and (b) the advancing of health grounds may not even prevent the ultimate sanction of erasure.[8]

    c. However:

        i. The door is not closed to the possibility that there *may* be a limited category of cases in which mental health may provide a defence, where it is inescapably relevant to the conduct in question. In general however, the scenario will be one where the existence of the mental condition, may **explain**, but does not **excuse** the conduct. The test is ultimately an **objective test**, based on the nature of the conduct (see for example, the decision in the Australian case of *Legal Services Commissioner v XBN* [2016] QCAT);

        ii. Even if not wholly exculpatory, mental health will ordinarily always be admissible in mitigation, with the weight to be attached to it a matter for the hearing committee. As I note below, raising mental health will always e a double edged sword.

    d. The first step for the registrant will be demonstrating that there is an illness present that could ever meet the test for exculpation. If the evidence does not disclose such a condition, then the height of any argument will only ever go to mitigation.

    e. Where a RMD case is pursued by the regulator alongside a PM or PPP case, it seems probable that, in the absence of compelling exculpatory evidence, it will be open to the regulator to opt for neither, either or both at the conclusion of a case, assuming the facts of the case support the conclusion reached.

[8] See also *Legal Practitioners Complaints Committee v De Pardo* [2007] WASC 266

f. Where mental health is a significant element of a case, then that is likely to strengthen the grounds for a hearing proceeding otherwise than in public.

g. Where a registrant seeks to defend themselves against a PM/PPP case by reference to their mental health, they will – of course – be opening the door to a possible complaint and/or other adverse outcome on mental health grounds. As Australian barrister, Stephen Warne, has noted:

> '…psychiatric evidence called in aid of the disciplinary defendant, a solicitor, [can be] used in support of [a] Tribunal's decision effectively to strike the solicitor off. In relation to mental illness, the 'protective not punitive' mantra of the law of professional discipline has some bite, and it should. The 'sting' can only ever have operation where the psychiatric problem which gave rise to the impugned conduct is also present at the date of the penalty hearing; **the only risk in the plea in mitigation 'I was unwell in my mind at the time I did these things, but I'm better now' is in not making out the 'I'm better now' bit**. [emphasis added]