

Importance of Legal Ethics in the Legal Profession^{1*}

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Introduction

George Santayana once famously remarked that those who forget their history are condemned to repeat it. Perhaps rarely has more been conveyed in fewer words. And perhaps the best example of this dictum in our field is the question of ethical practices in the legal profession, once classified in both theory and practice as belonging to the “noble” professions, of which regrettably only the former remains. Ethics in the legal profession is, of course, a notoriously difficult topic to do justice to in a short time, and the most profitable approach is to ask two very specific questions as to its scope – first, whether there are broad principles which indicate with tolerable certainty the ambit of the duty in question, and secondly, what approach is best in adjudging and enforcing the *consequences* of a breach of those standards.

I propose, therefore, to focus on two specific questions in this address: one, the standards required to be complied with and the underlying rationale of those standards; and, two the consequences of lawyers not complying with the required standards of diligence.

The Significance of Legal Ethics

The traditional view has been that as long as a lawyer does not mislead the court, he is entitled to do his best for furthering his client’s interests. Senior Counsel Ram Jethmalani, one of the finest lawyers this country has ever seen highlighted this point in a recent interview. During the course of the interview, Mr Aju John, an alumnus of NLSIU Bangalore, posed him the question of the controversial cases Mr Jethmalani has taken up over the course of his career, in particular that of Manu Sharma. In his characteristically pithy style, Mr Jethmalani emphasised that the duty of every lawyer is to ensure that the presumption of innocence in criminal proceedings, and the burden of proof in civil proceedings are not subverted. The legal system based on adversarial foundations can function only when the interests of both sides are adequately and fairly represented. Often, extraordinary circumstances make this guarantee ring hollow. For instance, after the 26/11 attacks, there was a strong campaign against the lawyers in Bombay taking up the defence of those accused. We must come down heavily against such acts of terrorism and barbarity. However, situations like those force the legal profession to confront difficult questions that allow no clear answer. With a tape recording showing the accused to be at the scene of the crime, do legal ethics allow the defence of such an accused, or do they go further and require a dispassionate defence?

These competing interests result in what Dr Freedman calls a “trilemma” facing any legal professional. It is very well summarised by Mr David O’Donnell, who says,

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By the very nature of the adversarial system, the lawyer is required to represent his or her client's interest as zealously as possible. In order to do this, the lawyer must make every effort to find out everything from his client concerning the case. It would be unreasonable to expect the client to know what information is vital and/or relevant and what is not. Accordingly, the client is expected to tell the lawyer everything he or she knows. Some of this information may be detrimental to the client's interests and therefore, the only way the client can be expected to give the lawyer all the information is by assuring the client that everything that passes between him or her and the lawyer will be confidential and will always remain so. However, the lawyer in the adversarial system is also an "officer of the court".

A View From Beyond Our Frontiers

In their recent classic on the comparative study of legal ethics, Hazard and Dondi interpret 'legal ethics' as comprising all the precepts that guide lawyers in the practice of their profession, whether unwritten, or contained in professional codes of conduct or in the law itself. In their opinion, the range of ethical principles lawyers need to comply with can be classified into six broad categories: competence; independence; loyalty to client; maintaining the confidentiality of client secrets; responsibility to the courts and to colleagues; and honourable conduct in professional and personal matters. These concerns over the standards by which a legal professionals need to comply have generated a great degree of interest and academic discussion in diverse jurisdictions. As Gilda Russell points out in her recent review of the problems with legal ethics in the American legal profession suggests that inherent problems with the definition of ethics is the cause of several problems. A lawyer has to balance the varying considerations of his client's interests, the integrity of the legal system, socio-economic justice, national interests, and the overarching principles forming the foundations of humanity. The close inter-linkage between law and the fundamental principles forming the bedrock of civil society don't make matters any easier for the legal professionals either. Identifying the different strains are critical to understand the importance of legal ethics.

The problem has been exacerbated in a different context in recent times, particularly in India. Earlier, issues relating to legal ethics arose more often in criminal proceedings. However, with the commercialisation of the legal profession, self-help also is an interest which lawyers need to keep themselves away from. In an article written by Mr Danovi about the implications of the Parmalat collapse on the legal profession in Italy, he observes,

Certainly, it is sometimes not easy to distinguish between the lawful performance of a lawyer providing advice to its client, and the unlawful performance committed by the client - so in many cases it is only the knowledge of facts or the knowledge of the crime that allows one to draw conclusions. For example, a lawyer could easily not know that the constitution of a new company in a tax free haven is being used by its client as a vehicle for carrying out massive fraud, and, in such circumstances, it is not possible to blame the lawyer for the fraudulent acts of the client ... To us, it is important to confirm that within legal consultation - as in tax consultation or accounting - one must not lose autonomy and independence towards the client. This is the only means of guaranteeing regularity of contact and the honesty of behaviour that provides a shelter from the disaster that can result from the confusion of roles between client and adviser.

Mr Danovi makes a very important point indeed. Especially in cases like the tax avoidance/tax evasion debt, what is the role of the lawyer? Although avoiding tax is not illegal, is advising a client on tax avoidance techniques a breach of ethical principles? With Parmalat, the other major corporate meltdown in the recent past has been the Enron debacle. David Andrews picks up

on this disaster, and asks what lessons may be learnt from it. He points out that in the modern legal profession, several of the younger practitioners are more proactively involved in their clients' commercial affairs, thus teetering on the edge of legal ethics. Further, the spate of mergers, particularly of legal and accountancy firms over recent years, has created partnerships the size of which was never previously contemplated and which virtually defy the maintenance of professional standards, appropriate controls and good order.

Parsons and Wilkins also point out that the new push for corporate social responsibility has had immense implications for the legal profession, with law firms being forced to advise companies on these new principles, and also incorporating some themselves. Citing some examples of this, they observe,

Contrary to the stereotypical 'fat cat' criticisms of the business lawyer, law firms have taken an admirable lead in the CSR movement. Linklaters, Allen & Overy and other magic circle London firms have active programmes, and are passing this on to clients. One of the most visible proponents of CSR, Baker & McKenzie, has been promoting its internal CSR expertise for several years. The firm's CSR practice group encompasses partners from the environmental, employment, litigation, corporate, anti-trust and trade departments, and has been involved in several of the high-profile CSR-related cases that have taken place in the US and UK. Eversheds ran a seminar earlier this year entitled 'Corporate Karma: How CSR can benefit your business', which encouraged clients to embrace the concept of a responsible strategy by outlining the business case and inviting senior advisers from the nonprofit making sector to demonstrate how CSR can contribute to both sustainability and profitability.

These competing pulls are best summarised by Mr Sutti, when he says,

All-important lobbies, political groups, very large companies and banks, even influential families - let alone organised crime - have an obvious inclination to interpret their lawyers' loyalty in a sense broader than is healthy for the system and the profession. Such pressure may be lower for hyper-specialised areas of the law, where the best experts available are instructed no matter what, but is very high for routine, however highly paid, work, and for clients and groups of clients who have a critical mass sufficient to command a significant percentage of one firm's turnover; so that it is unrealistic and unfair to appeal only to single lawyer's integrity and spirit of independence. In a cultural and social context where a lawyer is held responsible for the identity, if not for the behaviour, of his clients, even reflections in the mass media and in public opinion cannot be ignored ... In a scenario where the legal profession is facing fast and deep transformations and is rethinking its identity and role, the issues at stake here should not be underestimated.

Before concluding with this first section, I would like to mention the facts which were considered by the Indian Supreme Court in *Ramon Services v. Subhash Kapoor*. The question was- "*should a litigant suffer penalty for his advocate boycotting the court pursuant to a strike call made by the association of which the advocate was a member*"? In answering this question, Mr Justice Sethi made some enlightening observations which are worth quoting in full,

Persons belonging to the legal profession are concededly the elite of the society. They have always been in the vanguard of progress and development of not only law but the polity as a whole. Citizenry looks at them with hope and expectations for traversing on the new paths and virgin fields to be marched on by the society. The profession, by and large, till date has undoubtedly performed its duties and obligations and has never hesitated to shoulder its responsibilities in larger interests of mankind. The lawyers, who have been acknowledged

being sober, task-oriented, professionally responsible stratum of the population are further obliged to utilise their skills for socio-political modernization of the country. The lawyers are a force for the perseverance and strengthening of the Constitutional Government as they are guardians of the modern legal system. After independence, the concept of social justice has become a part of our legal system. This concept gives meaning and significance to the democratic ways of life and of making the life dynamic. The concept of welfare state would remain in oblivion unless social justice is dispensed with. Dispensation of social justice and achieving the goals set forth in the Constitution are not possible without the active, concerted and dynamic efforts made by the person concerned with the justice dispensation system. The prevailing ailing socio-economic-political system in the country needs treatment which can immediately be provided by judicial incision. Such a surgery is impossible to be performed unless the Bench and the Bar make concerted effort. The role of the members of the Bar has, thus, assumed great importance in the post-independent era in the country.

That is a convenient framework within which to pose our second question for the day: what consequences should follow from the conclusion that there has been a breach of legal ethics? One obvious answer is that the relevant professional body is empowered to take the action its charter authorises it to, and indeed, that is the most common way in which the problem is addressed. However, with the rapid growth of commercial litigation in India over the past decade, we must ask whether it is possible for a *civil claim* to be brought against a lawyer by one wronged by his breach of ethics. It is clear that this claim cannot be brought in contract, unless of course it is the case that the lawyer's breach of ethics is vis a vis his client, and in a way that is connected with the contract. In the more common case of breach of ethics vis a vis the court or the opposition or a third party or the public at large, the question remains whether those affected entities may move a civil court to claim damages in *tort*.

One is reminded immediately of the classic statement of principle of Chief Justice Cardozo, who said that cases giving rise to *economic loss* are especially difficult in the law of tort, because they lead to potentially the imposition of '*liability in an indeterminate amount, for an indeterminate time, to an indeterminate class.*' The implications of economic loss cases thus pose challenges completely different to those of pecuniary loss. It is important to note that a large number of economic loss cases involve huge claims, which is inherent in the nature of economic loss itself. Social policy and economic considerations weigh against the imposition of such liability. The result is that it might be desirable not to compensate certain types of foreseeable damage.

The concept of foreseeability is critical to understanding and appreciating the complexities of economic loss. It is common knowledge that Lord Atkin's seminal speech in *Donoghue v. Stevenson* established the now famous 'neighbourhood principle', which states that there is a duty on people to avoid acts or omissions which they can reasonably foresee would harm their 'neighbours'. Lord Atkin did not refer to neighbours in the literal sense, or proximity in the physical sense. His Lordship defines neighbour as one who is closely and directly affected by the act in question that the defendant ought to have had him in contemplation at the time the act was committed. This is the genesis of the principle of foreseeability. It was immediately realized that applying the principle of foreseeability would lead to unfortunate results in cases of economic loss. It is pertinent to reiterate that liability is indeterminate in economic loss cases, such as the negligent preparation of an audit report. The auditor has absolutely no idea as to who might rely on his report for what purpose and to what extent. However, it is entirely foreseeable that potential investors or creditors might refer to the audit report prior to making investment or lending decisions, as the case may be.

It is at once apparent that the case of a lawyer who acts in breach of his ethical duties is perhaps different to the extent that the nature of *liability* may not be indeterminate, even if the *extent* and the class of people to which it is owed are indeterminate. Ought that to make a difference? The roots of an answer lie in the classic development of the doctrine of “assumption of responsibility” in English common law and especially in what is perhaps the most famous case in the common law over the past fifty years or so – *Hedley Byrne v Heller & Partners*.

The genesis of that case itself lies in *Candler v. Crane, Christmas & Co.*, where the Court of Appeal held that a duty of care is *not* owed to a third party with whom the professional man did not have a contractual or fiduciary relationship. Lord Denning wrote a strong dissenting judgment in that case, which later gained widespread approval and was to prove extremely influential. In *Hedley Byrne*, the House of Lords adopted Lord Denning’s reasoning to hold that a third party who relied on a negligent misstatement, to his detriment, could sue even in the absence of privity, subject to certain conditions. Thus, Lord Reid stated that there is good reason for holding that mere misstatements will not give rise to any liability to a third party, and that there must be something more. Further, it was held that persons uttering statements owed a duty of care to any third person with whom a ‘special relationship’ existed. *Candler* was therefore overruled. The House of Lords spoke in terms of ‘assumption of responsibility,’ to constitute the sufficient condition for liability. Lord Reid stated that a professional making a statement without any qualification will have to assume some responsibility for it. As Lord Griffith pointed out, ‘assumption of responsibility’ merely refers to situations where the law will impose a responsibility on the maker of the negligent statement for damage caused by it, irrespective of the actual intention of the parties, depending on the facts and circumstances of the case. It does not indicate under what circumstances the law will impose this ‘assumption of responsibility.’ A similar situation had arisen in *Glanzer v. Shepherd*. The defendants were held not liable, solely because they had disclaimed responsibility. In *Home Office v. Dorset Yacht Co. Ltd.*, it was suggested that the time had come to regard the neighbour principle as a general principle to determine the existence of a duty of care in any situation. This is precisely what *Anns v. Merton London Borough* did, introducing for the first time the test of foreseeability to determine the nature and scope of the duty to third parties.

Predictably, *Anns* led to unfortunate results. In *JEB Fasteners, Ltd. v. Marks Bloom & Co.*, JEB Fasteners (JEB) acquired all of the shares in a private company, relying on an unqualified audit report produced by accountants, Marks Bloom. The financial statements contained numerous errors and thus JEB acquired overvalued stock. Although the auditors did not know about any specific takeover bidder during the audit, they later discovered the identity of the bidder, and contacted him to supply relevant information. JEB sued the auditors for damages, claiming Marks Bloom provided negligent auditing services. Naturally, the loss was purely economic. Strictly on the duty of care issue, the High Court found the auditors owed JEB a duty of care. Mr. Justice Woolf (later Lord Woolf MR and Lord Chief Justice Woolf) relied on both *Anns* and *Scott Group, Ltd. v. McFarlane*, in concluding the plaintiffs could derive duty from foreseeability alone. *Scott* was a New Zealand case where the facts were similar to *Caparo*.

This change in policy culminated in *Caparo*. The House of Lords unanimously held that an auditor of a public company, in the absence of special circumstances, owes no duty of care to an outside investor or an existing shareholder that buys or sells stock relying on a statutory audit. The duty of care is limited to the shareholders as a collective body. The House was greatly influenced by what Lord Bridge termed the masterly analysis of Lord Denning in *Candler*. Lord Denning had suggested that the auditor must be aware of, *inter alia*, the purpose the accounts are required for. This is a far better test to constitute special relationship than the ‘assumption of responsibility’ used in *Hedley Byrne*, which was liberally interpreted since it was divorced from the actual intention of the parties. Two cases just preceding *Caparo* greatly influenced it. *Smith v. Eric S Bush* and *Harris v.*

Wyre Forest District Council were heard together. In the case of *Harris* the mortgagees were the local authority who employed a member of their own staff to carry out the inspection and valuation. His report was not shown to the plaintiff, but the plaintiff rightly assumed from the local authority's offer of a mortgage loan that the property had been professionally valued as worth at least the amount of the loan. In both cases the terms agreed between the plaintiff and the mortgagee purported to exclude any liability on the part of the mortgagee or the surveyor for the accuracy of the mortgage valuation.

The position in another great common law jurisdiction – Canada – is similar. The leading Canadian authority, *Haig v. Bamford*, resembles *Hedley Byrne*. The Supreme Court of Canada held that there must be actual knowledge of the limited class that will use and rely on the statement. The most important factor taken into consideration in reaching that decision was the statement's purpose. The court balanced the need to protect the public against the need to protect accountants from indeterminate liability essentially by adopting Lord Denning's dissent in *Candler*. In *Haig*, the financial statements were actually used for the purpose for which the accountants intended, namely, for decision-making by a lending institution and potential investors. However, by holding that knowledge of the specific investor is unnecessary, the Supreme Court of Canada left open the possibility of applying the foreseeability test. However, Canada followed the UK in widening the scope of liability and almost adopted verbatim the *Anns* test in *Kamloops (City of) v. Nielson*. However, Justice McLachlin (later Chief Justice McLachlin), in *Canadian National Railway v. Norsk Pacific Steamship*, characterized the *Kamloops* approach as an incremental approach, which is more sensitive to excessive liability. Still, this created a fear of indeterminate liability.

A recurrent theme in the analysis above is the importance of policy considerations in limiting the liability of auditors. A lot of these considerations are common to economic loss cases. By 1990, Canadian accountants faced over 100 lawsuits, a substantial increase in a short period of time, and claims of around C\$ 1.2 billion were pending against Canadian accountants by 1994. In the UK, the 'Big 6' accounting firms faced 627 outstanding cases, claiming damages of £20 billion, by mid-1994. Moreover, by 1999, changes were affected to the procedural law that swung the pendulum in favour of plaintiffs. There are now compelling incentives for a defendant to settle early rather than risk going to trial. The pressure to settle increases the longer the case runs. As a result, UK's largest accounting firms spend as much as 8 percent of their auditing and accounting income on professional liability insurance. The total estimated amount of negligence claims brought against Australian accountants accumulated to approximately A\$8 billion.

These are challenges to which there are no easy answers. Indeed, when faced with two unattractive questions – must a victim of unethical behavior be left without a remedy, or must law firms and lawyers be saddled with prohibitive and economically inefficient professional liability insurance costs – the law will fall short no matter what it chooses. The best lesson is this: there was a time in England, and in India, when a barrister would walk out of court and accept whatever fee his client chose to pay him. It is no doubt unrealistic to expect that such practices ought to continue unaffected by the march of time – and yet, apocryphally, perhaps there lies a clue that will allow the Indian legal system to avoid having to make this Hobson's choice, and promote a culture based on internal regulation. History will bear witness to the choice it makes, although those who make it will not.