Disciplinary proceedings affecting addicted lawyers and how they impact insurers

By Jonathan Goodliffe*[1]

1 Introduction

1.1 The problem of lawyer addiction

Lawyers are expected to behave in an honest, competent and professional way, with due regard for the interests of their clients and the reputation of their profession. This is spelt out succinctly, for instance, in the regulatory Principles of the Solicitors' Regulatory Authority for England and Wales (SRA). There are similar standards applied to other classes of lawyer in the UK, to lawyers in other countries and, *mutatis mutandis*, to other professional people, such as doctors.

A lawyer who develops an addiction will struggle to meet these standards, or may lose all interest in doing so. The lawyer's behaviour while addicted may give rise to significant financial or other losses some of which will be covered by insurance. Addiction will not excuse the misconduct of the lawyer. The fact, however, that they are, or at the relevant time were, addicted may be relevant when a criminal court or a court or tribunal exercising disciplinary jurisdiction decides what penalty to impose and what other directions to make. By contrast, the lawyer's addiction will usually be entirely irrelevant in legal terms if they are sued for damages in civil proceedings, even if the addiction contributed to the negligence. So problems within the legal profession arising from addictive behaviour usually need to be addressed outside the insurance claims process. This can be done, among other things, through risk management services provided by insurers and their intermediaries.

In this article I consider addiction as a risk factor for lawyers, how it is addressed in the regulation of lawyers, and the approach of the Solicitors' Disciplinary Tribunal of England and Wales to addiction issues. I make comparisons with how the issue is dealt with in relation to UK barristers, to lawyers in other countries and to doctors. I consider the reasons for differences in approach, where they exist, and what may be considered best practice in how these cases are dealt with. I also consider how this problem impacts insurers and what they do or can do about it. In particular I suggest that they might get more closely involved in helping to reduce the problem of lawyer addiction through risk management services for the benefit of the profession as a whole. They might also support the work of the charity LawCare in helping addicted lawyers into recovery[2].

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[2] See section 9 below.

This article focuses primarily on alcoholism, because that is the addiction that most commonly arises in lawyer disciplinary proceedings in England and Wales and Scotland[3]. Alcohol is the most harmful drug for the user and those affected by their behaviour[4]. Other forms of addictive behaviour are, however, also discussed.

1.2 Why lawyer addiction is also a problem for insurers

Lawyer addiction may be a problem or an issue for insurers for a variety of reasons:

- addicted lawyers are more likely to be cognitively impaired[5], neglect their professional standards and face negligence claims or other civil claims for which they are usually required by professional rules to take out insurance,
- addicted lawyers may commit acts of dishonesty or fail to account to their clients[6]. Compensation may need to be paid to those affected. Such compensation arrangements are usually partly funded by insurance. A compensation fund is typically built up and insurance might, among other things, protect the fund against the risk of exceptionally high claims arising[7],
- the cost for treatment for addiction may be financed through private medical insurance (PMI). Most PMI policies exclude treatment for alcohol and drug problems. A significant minority, however, do provide such cover, especially when the insurance is arranged by large law firms or large corporates for their staff. National Health Service provision of such treatment is currently being run down, so there is scope for the private sector to expand[8]. There may also be enough addicted lawyers for specialised treatment services for members of that profession to be developed with the support of the insurers[9],
- insurers may benefit from taking the health of their policyholders into account when underwriting lawyers' indemnity insurance. An understanding of the problems arising before the disciplinary tribunal may inform underwriting decisions. Where the insurer is a multiline or composite there may be lessons to be learned across products where addictive behaviour gives rise to claims (e.g. life, accident, professional negligence, motor, marine, illness, PMI etc[10]),

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[3] Lawyer addiction to other drugs such as cannabis, heroin and cocaine, is more common in the USA, as emerges from the cases.

[4] Nutt, D et al 'Drug harms in the UK: a multicriteria decision analysis' *The Lancet*, 2010 Volume 376, No. 9752, p1558–1565.

[5] Oscar-Berman, M.; Shagrin, B.; Evert, D.L.; and Epstein, C. Impairments of brain and behavior: The neurological effects of alcohol. *Alcohol Health Res World* 21(1):65-75, 1997.

[6] As appears from a number of cases cited in this article.

[7] As happened in the 1950s, owing to the fraud of a solicitor, Eichholz. See *Re Eicholz, Eichholz's Trustee v Eichholz* [1959] Ch 708.

[8] Drummond, C "Cuts to addiction services are a false economy" *BMJ* 2017;357

[9] See section 6 below.

[10] See Goodliffe J., "Alcohol as a factor in insurance claims" issue *128 BILA Journal*, April 2015

- insurers may wish to, or be expected to, provide risk management advice to their policyholders and to the profession as a whole, with a view, among other things, to reducing claims and problems arising from claims,
- there may be benefits of diversification where a series of insurers within an insurance market or group (such as Lloyd's or Aviva) write different products covering risks related to addictive behaviour. So, for example, a lawyer who gets successful treatment for alcohol dependence following a claim on their PMI may be less likely to give rise to claims on their professional negligence, life, accident, motor and critical illness cover. They are also less likely to be compelled by ill health or professional problems to take early retirement,
- insurers sometimes help to finance charities providing help to addicted lawyers and other professionals[11]. When their contribution is a significant one they may nominate a member of the board or staff of the charity. The outcome of such an appointment may be to influence the charity's approach to the allocation of its resources and its governance,
- insurers are in a sense champions of good governance. The insurer RSA, for instance, was featured in the 2004 Labour Government's alcohol stategy for England for its workplace alcohol policy[12]. The Association of British Insurers publishes governance standards which it expects to be adhered to by companies in which insurers invest their technical provisions and regulatory capital[13]. These standards tend to be applied beyond the insurance sector.

2 Addiction behaviour

This section gives a brief summary of the problems arising from addiction as they are likely to affect a lawyer.

2.1 The dependence syndrome

The 10th edition of the International Classification of Diseases (ICD 10) distinguishes between the harmful use of alcohol and the less common but more serious dependence syndrome[14]. Dependence is, in a sense, both a relative and an absolute concept. "The process of neuroadaptation and the reinforcing effect of drugs together lead to gradual emergence of dependence"[15]. A dependent drinker, who satisfies the diagnostic criteria in ICD10, may be close to the borderline with harmful drinking or may have a high level of dependence.

[11] When LawCare, the legal charity, was established in 1997 it was partly financed by the Solicitors Indemnity Fund Ltd, the mutual insurer that then insured solicitors.
[12] See http://image.guardian.co.uk/sys-files/Society/documents/2004/03/15/alcoholstrategy.pdf
[13] Association of British Insurers "Improving corporate governance and shareholder engagement" 2013.
[14] ;Alcoholism' and 'alcoholic' are no longer used as scientific terms in the UK but it is convenient to continue to use them nonetheless.
[15] Drummond, D. C. "Problems and dependence: chalk and cheese or bread and butter?" 1992 in Lader et al. "The nature of alcohol and drug related problems".

Harmful drinking may be reduced by low cost interventions, such as brief advice or counselling. Full dependence will usually require more intensive and costly treatment[16]. Treatment may or may not be successful.

At a population level most problems generated by alcohol arise from harmful use rather than dependence, but at an individual level the dependent drinker will usually have more problems than the harmful drinker[17]. Their problems are likely to be proportional to their dependence[18]. A lawyer with an alcohol problem may face losing their practising certificate in disciplinary proceedings and/or being imprisoned for dishonesty. These problems are at the top end of the scale for seriousness. So a lawyer with these problems and with an alcohol problem is likely to have a high degree of dependence.

2.2 Irrationality and denial

A key theme in the definition of dependence in ICD 10 is the irrational nature of the behaviour:

> "persisting with substance use despite clear evidence of overtly harmful consequences, such as harm to the liver through excessive drinking, depressive mood states consequent to periods of heavy substance use, or drug-related impairment of cognitive functioning."

Irrational behaviour is supported by 'denial' and by individual vulnerability arising from co-morbid[19] conditions or, for instance, a history of abuse in childhood[20]. The drinker refuses to accept the consequences of their addiction until they start recovering from it. Even then it may take years for the drinker to come to terms with the full consequences of their behaviour. This mindset is often shared by the drinker's friends, colleagues and family who thus unwittingly help to prevent the drinker from facing up to their problems[21].

Denial may relate to the existence of the condition ('I can stop when I want to'), its consequences ('It does not affect my work') or the prospect of recovery ('I can never stop drinking')[22]. It may explain partly why many lawyers facing disciplinary proceedings do not reveal the fact that they are addicted, or do not appear before the Tribunal at all because they cannot face up to their problems. They may also keep their own lawyer and their insurers in the dark.

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[16] Raistrick, D et al 'Review of the effectiveness of treatment for alcohol problems' 2006, *National Treatment Agency for Substance Misuse*.

[17] Edwards, G et Al *Alcohol Policy and the Public Good* Oxford University Press. 1994.

[18] Drummond, D 'The relationship between alcohol dependence and alcohol-related problems in a clinical population' *British Journal of Addiction*. 1990 Mar;85(3):357-66.

[19] "Co-morbid" denotes a medical condition that co-occurs with another. Alcohol dependence is, for instance, often co-morbid with depression, bipolar disorder, or anxiety. See 2.4 "Co-morbidity" below.

[20] Marshall EJ "Doctors' health and fitness to practise: treating addicted doctors" *Occupational Medicine* 2008;58:334–340.

[21] Jackson G 'Denial' *International Journal of Clinical Practice*, March 2006, 60, 3, 253, Dare, P et al, Denial in Alcohol and Other Drug Use Disorders: A Critique of Theory' *Addiction Research & Theory* 18(2):181-193 · March 2010.

[22] Falkowski, W 'Group intervention for alcoholics and drug addicts' in Glass, I.B. 'The international handbook of addiction behaviour' 1991.

A lawyer in such denial may give perjured evidence in court and untruthful explanations to their clients, colleagues and the regulator of their profession. This is a particularly serious matter within the legal profession where honesty is key to how lawyers deal with each other and with other people. The same applies to doctors. "Although addicted doctors feel immense guilt and shame at their substance use, they 'survive' at work, using a combination of secrecy, denial and intellectualisation."[23] Dr Dominique Lannes, medical director of French reinsurer, SCOR, has stated, in the context of life assurance: "It should be recognised that alcoholics are usually dishonest about their actual alcohol intake"[24].

2.3 Cognitive functioning

Drinking affects a lawyer's cognitive functioning, most obviously when they are drunk or suffering from a hangover. They may also suffer from alcoholic amnesia or 'blackouts' following a binge. In that condition they forget what happened over long periods, including when they were dealing with their clients' affairs or appearing in court[25].

The consequences of heavy and prolonged drinking will also affect cognitive functioning even when the lawyer is 'dry' (if for instance they are a 'binge drinker' or only drink in the evening)[26]. In the medium term drinking may lead to Wernicke's Encephalopathy, involving, among other things, loss of short term memory. In the longer term the chronic form of that condition, Korsakoff's Syndrome, or 'wet brain', may set in[27].

There is a misconception that drinking affects common place skills more significantly than higher cognitive functioning (which includes the exercise of legal judgment)[28]. In an English disciplinary case[29] a solicitor had two convictions for drunken driving and had received treatment for alcohol problems. The Tribunal did not, however, consider that the public needed any protection from her in the way in which she practised, as there was nothing, in its view, to suggest that her work had been below the expected standard.

ICD 10 also mentions 'progressive neglect of alternative pleasures or interests because of psychoactive substance use, increased amount of time necessary to obtain or take the substance or to recover from its effects'. The addictive behaviour can thus reduce the amount of time the lawyer is able to devote to the finer points of developing their skills and working out solutions to their clients' problems. This tendency may be aggravated if the lawyer suffers from any of the physical conditions that arise from drinking,

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[23] See footnote 20 above.

[24] "Alcoholism and Life Insurance", SCOR Technical Newsletter published March 2002. It should be noted that the largest insurers, particularly life (re)insurers, commonly employ medical staff to assist in, among other things, the product development, underwrting and claims processes.

[25] Goodwin, DW 'Alcohol Amnesia'. *Addiction* (1995) 90, 315-317.

[26] National Institute on Alcohol Abuse and Alcoholism 'Cognitive Impairment and Recovery From *Alcoholism'* Alcohol Alert No 53 July 2001.

[27] Thomson, AD et al 'Alcohol-Related Brain Damage: Report from a Medical Council on Alcohol Symposium, *Alcohol and Alcoholism*. 2012 Mar-Apr;47(2):84-91.

[28] Oscar-Berman, M.; Shagrin, B.; Evert, D.L.; and Epstein, C. Impairments of brain and behavior: The neurological effects of alcohol. *Alcohol Health Res World* 21(1):65-75, 1997.

[29] *SRA v Gail Evans* SDT Case No. 11285-2014 8 September 2015.

such as cancer or diseases of the heart, liver or pancreas[30]. Those conditions can be expected, especially when combined with drinking, to affect people's physical and mental energy and creativity.

2.4 Co-morbidity

Addiction to alcohol and other psychoactive substances is often co-morbid with mental problems such as depression, anxiety or schizophrenia. Or it may be co-morbid with other addictions. Stress is another condition that may be a cause or an effect, or both, of heavy drinking.

George Vaillant, a leading American psychiatrist, however, has commented:

> "... once it occurs alcoholism has a life of its own and ... alcoholism is best thought of as a cause, not a consequence, of personality disorder[31]"

Because doctors have little training in treating addiction:

> "Depressive illness is often over-diagnosed in problem drinkers, with consequent needless prescribing of drugs, whilst on other occasions the diagnosis may be ignored[32]."

Doctor Jane Marshall, a consultant psychiatrist advising the NHS Practitioner's Health Programme, reports[33]:

> "Individuals with alcohol and drug problems often have other mental health problems. Because of stigma and denial, patients often present with and focus on their co-morbid condition. Less experienced doctors may not recognise the underlying addiction problem and sub-optimal treatment continues."

Patients who do not want to stop drinking may actively mislead their doctors[34]. A survey commissioned by the Law Society of England and Wales in 1996 concluded[35]:

> "the "denial" that is inherent in alcoholism leads the patient to cover things up, and an unwary doctor can be persuaded to collude in this denial. Perhaps the social standing of lawyers, and their skills in manipulating feelings, increase the likelihood of such collusion."

Disciplinary tribunals and courts in the UK[36] are even more likely than doctors, absent any clinical skills, to accept a lawyer's description of their medical problem without detecting co-morbid

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[30] See the National Health Service web page on this subject https://www.nhs.uk/conditions/alcohol-misuse/risks/.

[31] G. Vaillant *The Natural History of Alcoholism*, p. 169 (Cambridge, MA, Harvard University Press 1983).

[32] Marshall EJ. et al. *'The Treatment of Drinking Problems',* (Cambridge Cambridge University Press 2010).

[33] Goodliffe, J. 'The Co-morbid lawyer' New Law Journal 27 October 2016.

[34] Palmieri, J et al. 'Lies in the doctor-patient relationship' *Primary Care Companion to the* Journal of Clinical Psychiatry. 2009; 11(4): 163–168.

[35] See footnote 42 infra.

conditions[37], unless expert evidence is made available[38]. Insurers, who commonly employ medical directors and commonly insure many risks arising from alcohol misuse, may be less inclined to accept the addicted lawyer's denial at face value.

2.5 Stigma

A German study[39] has found that:

> "compared with people suffering from other, substance-unrelated mental disorders, alcohol-dependent persons are less frequently regarded as mentally ill, are held much more responsible for their condition, provoke more social rejection and more negative emotions, and they are at particular risk for structural discrimination."

This has historically applied within the British legal profession[40]. It is much less the case in North America, where training on substance misuse is provided for in the mandatory continuing legal education of attorneys in the larger states and provinces[41]. In a 1996 study of alcoholism in the legal profession in England and Wales[42] one of the respondents said: 'I am confronted by ageism and the stigma of my illness and my professional suspension.'

Stigma is another reason why co-morbid lawyers may focus on recovery from one health condition when another condition is more serious.

The Royal College of Psychiatrists has reported[43]:

> "It is clear that unless medical training addresses the attitudes that underpin the stigmatisation of substance misusing patients, and supports the acquisition of the necessary skills and knowledge, a significant proportion of patients will be denied due response and intervention."

Stigma and denial feed on ignorance[44]. When the legal charity LawCare[45] was in the planning stage in 1997 the then president of the Law Society of England and Wales, Charles Elly, recommended that young lawyers and law students should be educated about the problems caused by alcohol misuse. Although such education is available if one looks for it, it is rarely taken up, either by lawyers

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[36] In the USA and Canada they tend to be more aware of the pitfalls of relying on a lawyer's self diagnosis,as is discussed below.
[37] See SDT case *SRA v Brierley* 11077 of 2012.
[38] See "Lawyer disciplinary proceedings in the UK" below.
[39] Schomerus, G et al 'The Stigma of Alcohol Dependence Compared with Other Mental Disorders: A Review of Population Studies' Alcohol and Alcoholism 2011 Mar-Apr;46(2):105-12.
[40] Goodliffe J and Brooke D 'Alcoholism in the Legal Profession' New Law Journal, January 1996.
[41] See for instance the MCLE requirements of the State Bar of California http://mcle.calbar.ca.gov/Attorneys/Requirements.aspx .accessed 31 December 2016.
[42] See note 40 above.
[43] Royal College of Psychiatrists. Changing Minds—Drugs and Alcohol: Whose Problem Is It Anyway? Who Cares? London: *Royal College of Psychiatrists*; 2011.
[44] Highlighted in the UK Government's Alcohol Strategy, March 2012, Cm 8336, paragraphs 1.1 and 1.3.
[45] See infra.

themselves or by law students, who tend to focus on subjects most likely to get them through their examinations or satisfy their compulsory professional development requirements[46].

2.6 Effect of addiction on others

The effect of addiction on persons other than the addict has been a subject for research for only a short time[47]. None of this research has focused on the legal profession.

A lawyer, however, who is a functioning drunk may neglect client matters, create considerable burdens for his colleagues and draw them into his or her own problems, particularly if they are business partners and therefore jointly liable for acts of negligence. Spouses and children will be affected and their distress will in turn create more problems for the lawyer.

Abbey et al.[48] found that 25 percent of American women have experienced sexual assault, including rape. About one-half of those cases involve alcohol consumption by the perpetrator, victim, or both. In the UK there has been a regular flow of cases involving sexual misconduct by lawyers, often combined with drinking, before the Solicitor's Disciplinary Tribunal[49] and the Bar Disciplinary Tribunal[50]. They often feature the use of child pornography.

2.7 Problems in abstinence

Alcoholic lawyers continue to have serious problems after they have stopped drinking and started seeking and receiving help. They may still be suffering from a co-morbid condition, such as depression. Or their cognitive function may not have fully recovered. They may have to face up to many problems which arose when they were drinking. They may encounter stigma. Their personal and professional confidence will usually be at a low point and they may have neglected the development of their professional skills and contacts when they were drinking. So in some cases a disciplinary suspension for a year or two may help them to concentrate on their recovery as well as protecting the public.

In the case of *Leslie Burke*[51], an alcoholic solicitor committed Solicitors Accounts Rules breaches and an act of dishonesty after he became abstinent. The Tribunal stated in its findings and order:

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[46] Wallach, S 'Law: 'The dangers of drinking and advising' *The Independent*, 18 October 2004

[47] Gell, L et al 'Alcohol's harm to others' July 2015 publication by the Institute of Alcohol Studies, http://www.ias.org.uk/uploads/pdf/IAS%20reports/rp18072015.pdf Accessed 1 January 2016

[48] 'Alcohol and sexual assault' National Institute of Alcohol Abuse and Alcoholism, undated https://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm Accessed 1 January 2016.

[49] See, for instance, footnote 37 above and the case of Angus Diggle, 'Rape case solicitor is suspended for a year', *The Independent*, 12 January 1995.

[50] See the case of *John Randall*, 14 December 2016, http://www.tbtas.org.uk/wp-content/uploads/hearings/3474/Outcome-Posting-Randall.pdf accessed 1 January 2016, the case of Angus Diggle, supra, article in the "*Independent*" "Convicted solicitors free to practise" 2 December 1998, *SRA v James-Guy Jacobs* Case No. 11200-2013, *SRA v Jackson* Case No. 11340-2015, *SRA v Loveridge* Case No. 11482-2016 , *SRA v Coleclough* Case No. 11584-2016.

[51] No 7115/1996. Burke was involved in the early stages of the foundation of LawCare. See below.

> "The Tribunal accepts how difficult it is for a reformed alcoholic to maintain his equilibrium and have given Mr. Burke credit for the fact that he has displayed considerable strength in coping with his arrest and conviction and being diagnosed as suffering from terminal illness."

However the findings against Burke were considered to be too serious for the Tribunal to do anything other than strike him off.

2.8 Other addictions

The ICD 10's description of the dependence syndrome is not confined to alcohol. In the UK the Tribunal's database of judgments suggests that alcohol is by far the most common addiction. The statistics of the helping agency LawCare support this proposition[52].

Illegal drugs such as cocaine, heroin and cannabis are only occasionally encountered in UK disciplinary cases. They are much more common as impairment issues in US and Canadian cases. It is said that there is an epidemic of opioid use in North America[53]. Prescription drugs such as the Benzodiazepines do occasionally feature in UK cases, often in combination with alcohol.

As to the behavioural addictions, gambling features from time to time[54] but not so far workaholism[55]. There are also cases of addiction to sex in general and, more recently, illegal pornography in particular[56]. This is encouraged, no doubt, by the growth of the Internet, the fact that most lawyers now use online computers and the popularity of smart phones. One individual may have multiple addictions[57].

Sussman et al[58] have produced a table of the various negative consequences of 11 potentially addictive behaviours covering, for instance, legal, financial, emotional and withdrawal-like problems. Addiction to alcohol, drugs, sex and gambling scores highest. This provides a useful starting point for identifying risks to the profession arising from different kinds of addictions.

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[52] See the statistics in LawCare's 2015 Annual Report.

[53] E Zimmerman, The law, the addict, *New York Times*, 15 July 2017 https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html accessed 19 February 2018

[54] *Lipkin Gorman v Karpnale* [1991] 2 AC 548

[55] "Workaholism" is an expression in common use even in peer reviewed journals. See for instance Griffiths, M.D. (2005). "Workaholism is still a useful construct". *Addiction Research and Theory*, 13, 97–100. There is also a fellowship of Workaholics Anonymous

[56] *Solicitors Regulation Authority v James-Guy Jacobs* Case No. 11200-2013. Addiction to legal pornography may also give rise to serious problems.

[57] Schneider, P. 'Sex addiction: Controversy within Mainstream Addiction Medicine, Diagnosis Based on the DSM-III-R, and Physician Case Histories' *The Journal of Treatment and Prevention* Volume 1 1994 page 19

[58] 'Prevalence of the Addictions: A Problem of the Majority or the Minority?' *Evaluation & the Health Professions* 34(1) 3-56

3 Practice rules

Some statutory/Bar/Law Society regulatory provisions address the issue of health and addiction as risk factors. Others do not. Each jurisdiction has its own approach to the issue.

So there is nothing in the England and Wales SRA Handbook that directly addresses issues of health and addiction, although being addicted to alcohol can be expected to affect the character and suitability of a solicitor. By contrast the rules of the Bar of England and Wales do define the fitness that a barrister is required to maintain[59]. It includes not being addicted to alcohol or drugs. Arguably the outcome is to put lawyer sobriety more firmly on the Bar's regulatory agenda.

If there are any cases where the SRA intervenes on health grounds they do not get reported, no doubt for confidentiality reasons. In theory the SRA could intervene where a solicitor in solo practice is addicted to alcohol[60]. It is more likely, however, to rely on breaches of the Handbook arising from his or her behaviour and the risks arising from those breaches. This is because in many cases such matters will be easier to prove. On the other hand there must be cases where intervention at an early stage on health grounds will avoid problems which might arise if the regulator waits for rule breaches to arise. Mr Edward Nally, the President of the Solicitors' Disciplinary Tribunal for England and Wales has remarked:

> "You won't find many cases which are specific to health, but there must be a respectable section of them where health has been an issue in relation to the demise of that particular individual or his or her firm[61]."

The British Columbia Bar[62] says on its web site: 'Lawyer Wellness is important, because the profession is expected to be at the top of its game at all times. Lawyers are relied upon when people are in crisis.' Lawyers can be required to submit to a medical examination on the initiative of the benchers[63].

Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct requires a lawyer to decline to represent a client if the lawyer's physical, mental, or psychological condition materially impairs the lawyer's fitness to represent the client.

The same principle is expressed in the General Medical Council's publication 'Good Medical Practice' at paragraph 28:

> 'If you know or suspect that you have a serious condition that you could pass on to patients, or if your judgment or performance could be affected by a condition or its treatment, you must consult a suitably qualified colleague. You must follow their advice about any changes to your practice they consider necessary. You must not rely on your own assessment of the risk to patients.'

[59] Section B2 rQ9
[60] Solicitors Act 1974 section 32A.
[61] Nally, E, 'Disciplinary action against solicitors and the role of the Solicitor's Disciplinary Tribunal' Medico-legal journal 2017 vol 85(2) 60-69
[62] http://www.cbabc.org/Publications-and-Resources/Lawyer-Wellness
[63] See BC Legal Profession Act section 26.02

This principle is doubtless implicit in rules in other jurisdictions, including the UK, but arguably is best made explicit.

4 Lawyer disciplinary proceedings in the UK

4.1 The Solicitors Disciplinary Tribunal

4.1.1 The role of the tribunal

Disciplinary proceedings are brought against solicitors when they are alleged to have committed misconduct[64].

In England and Wales the SRA has the power to impose a reprimand or a fine on a solicitor[65]. More serious penalties, including suspension and striking off, are usually imposed by the Solicitor's Disciplinary Tribunal. The Tribunal sits as a panel of solicitor and lay members. Its overriding objective is:

> "to ensure that all cases brought before the Tribunal are dealt with justly and in accordance with our duty to protect the public from harm and maintain public confidence in the reputation of solicitors (in particular) and providers of legal services more generally"

Appeals from substantive decisions of the Tribunal are made to the Administrative Court. That court usually sits in a panel of one lord justice of appeal and one justice of the High Court.

The Tribunal publishes the full text of its judgments on its web site. This is a source of the law applying to solicitors and a perspective on the most serious problems affecting them, including the role within those problems of addictive behaviour.

4.1.2 The approach to sanctions

The judgment of Sir Thomas Bingham, Master of the Rolls, in *Bolton v The Law Society*[66] sets out the fundamental principle and purposes of the imposition of sanctions by the Tribunal. Lord Justices Rose and Waite agreed with his judgment:

> "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him … to punish him for what he has done and to deter any other solicitor tempted to behave in the same way ...' '… to be sure that the offender does not have the opportunity to repeat the offence; and' '… the most fundamental of all: to maintain the reputation of the solicitors' profession as one in

[64] See the SRA's guidance "Issuing solicitors disciplinary proceedings".
[65] The jurisdiction also extends to a recognised body, a registered European lawyer or a registered foreign lawyer
[66] [1994] 1 WLR 512

> which every member, of whatever standing, may be trusted to the ends of the earth … a member of the public … is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires…."
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> "..,It can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears, likely to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

The practical implications of these principles are spelt out by Mr. Justice Coulson (with whom Lord Justice Laws agreed) in *SRA v Sharma* [2010] EWHC 2022:

> "(a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see *Bolton*[67] and *The Law Society v Salsbury*[68]. That is the normal and necessary penalty in cases of dishonesty, see *Bultitude v the Law Society*[69]. (b) There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances, see *Salsbury*. (c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary, such as in *Burrowes v the Law Society*[70] or over a lengthy period of time, such as *Bultitude*; whether it was a benefit to the solicitor (*Burrowes*), and whether it had an adverse effect on others."

The concept of dishonesty has recently been redefined in the UK Supreme Court[71]. It is no longer necessary to prove that the defendant must have realised that ordinary honest people would regard their behaviour as dishonest.

A recent guidance note by the Tribunal on sanctions[72] quotes the judgment of Sir Thomas Bingham MR in *Bolton*[73] extensively and states:

> "Particular matters of personal mitigation that may be relevant and may serve to reduce the nature of the sanction, and/or its severity, include that:

[67] Supra.
[68] [2008] EWCA Civ 1285.
[69] [2004] EWCA civ 1853.
[70] [2002] EWHC 2900 Admin.
[71] *Ivey (Appellant) v Genting Casinos (UK) Ltd t/a Crockfords (Respondent)* [2017] UKSC 67
[72] Solicitors Disciplinary Tribunal Guidance Note on Sanctions 5th edition December 2016.
[73] See note 66 *supra.*

> the misconduct arose at a time when the respondent was affected by physical or mental ill health that affected his ability to conduct himself to the standards of the reasonable solicitor. Such mitigation must be supported by medical evidence from a suitably qualified practitioner."

4.1.3 Solicitors appearing before the tribunal

Most of the solicitors appearing before the tribunal, whether addicted or otherwise, practise solo or in small firms. Only a small proportion practise in large organisations. There may be a number of reasons for this, so far as addicted lawyers are concerned. First working in isolation is an occupational risk factor for drinking[74]. Secondly heavy drinking lawyers may be forced out of larger firms and compelled to practise solo. Thirdly It may be that some larger firms are able in one way or another to absorb the problems which arise when one of their partners becomes addicted. They may, for example, be able to help them into recovery, to provide cover when they are being treated or unable to practise, to intervene to prevent problems from getting worse or to ensure that aggrieved clients get redress without needing to complain to the regulator.

4.1.4 Serious cases in the Solicitors' Tribunal

In the 1990 case of *Law Society v X* the Solicitor's Complaints Bureau (then the regulator) intervened in X's practice and took it over. Disciplinary proceedings were launched against X who, among other things, had withdrawn some £5,000 from client account with no apparent justification. He explained that he had been drinking heavily at the time and could not remember withdrawing the money. He adduced medical evidence. The Tribunal noted:

> "Clearly the respondent's judgment has been seriously hampered by the illness of alcoholism. He has taken enormous steps to deal with that problem and indeed appeared to have recovered to a considerable degree and the prognosis for his future recovery was excellent."

A period of suspension was imposed. X (now deceased) received considerable support from a group of recovering alcoholic lawyers which then existed . He also helped in establishing the legal charity LawCare, which provides help and support to impaired lawyers. All this happened before *Bolton* and *Sharma* were decided. Nonetheless the case is still sometimes cited in Tribunal proceedings. *X* may be the only English case to date where evidence of recovery from alcoholism and involvement in pro bono activities has apparently avoided a striking off order.

In the recent case of *SRA v Robinson*[75] the respondent had committed client money breaches. These resulted in a deficit on her client account of over £100,000.The Tribunal also noted:

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[74] Brooke, D 'Impairment in the medical and legal professions' *Journal of Psychosomatic Research* 1997 Vol 43 page 27.

[75] Case No.11426-2015.

> "Transfers of lump sums from client to office account were carried out by the Respondent whilst in a confused state, as a result of alcohol-related problems that she was experiencing at the time. Transfers were also duplicated by the Respondent which resulted in over transfers."

The respondent stated 'I deserve to be struck off the Roll of Solicitors.' She filed medical evidence as to her addiction. This persuaded the SRA to withdraw its allegation that she had been dishonest. She did not appear at the Tribunal hearing. The Tribunal noted the medical evidence. It considered, however, that a lesser sanction than striking off was not appropriate. This was because of the seriousness of her proven and admitted misconduct.

The outcome might perhaps have been different if she had had more support within the profession, if she had offered evidence of recovery, if the deficit had been in 4 figures rather than 6 and if she had been able to repay it.

In *Kaberry v Solicitors Regulatory Authority*[76] a solicitor had been struck off in 1995 because of client money breaches which had led to payouts totalling £650,000 from the SRA Compensation Fund[77]. He had already made one unsuccessful attempt to be restored. He made a further attempt in 2011. He relied on the fact that at the relevant time he had been addicted to the benzodiazepine drug Dalmane[78]. He also had problems with alcohol. He relied on an 11 year old report and oral evidence from Professor Malcolm Lader, a leading expert in drugs used in psychiatry and their negative side effects. Lader gave evidence as to the general side effects of Dalmane, but had not carried out an up to date assessment of Kaberry. He has said 'It is more difficult to withdraw people from benzodiazepines than it is from heroin.' [79]

The Tribunal restored Kaberry to the roll, even though he had not made full restitution of the client moneys found to have been misused in the 1995 tribunal hearing. Kaberry maintained that he had never taken this money and the 2011 Tribunal seems to have accepted this. It also accepted that he was rehabilitated, although it is not clear how much evidence of that there was and whether it included evidence of full recovery from Dalmane and alcohol addiction.

An appeal to the High Court by the SRA was allowed. Giving judgment, Lord Justice Elias, with whom Mr. Justice Singh concurred, considered that the tribunal had in effect been retrying the issues determined in 1995, which was not open to it. Kaberry's problem with Dalmane did not excuse his conduct. Elias LJ considered in any event that Kaberry was not rehabilitated, since he still did not accept his culpability and had only paid back £12,000 odd of the £650,000 paid out by the Compensation Fund. Elias LJ commented:

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[76] *Solicitors Regulation Authority v Kaberry* [2012] EWHC 3883 (Admin) 30 October 2012.

[77] Which provides compensation for the clients of solicitors whose solicitors have failed to account to them.

[78] Scientific name flurazepam, a benzodiazepine drug used for treating sleep disorders. All benzodiazepines cause problems when used with alcohol.

[79] See Lader's web site http://www.benzo.org.uk/lader2.htm retrieved 24 March 2016.

> "None of these experts, in truth, was able to say what the effect of these drugs would be specifically in relation to Mr Kaberry. They could put in general terms the adverse effects of taking these drugs, and they plainly would have had some effect, and perhaps a significant effect, on Mr Kaberry's behaviour. I do not suggest for one moment that he would necessarily have behaved in the same way had he not been on these drugs. But that is not, it seems to me, the relevant question."

Sometimes problems with alcohol are barely mentioned in the Tribunal's judgment but were clearly a factor contributing to the misconduct. In *SRA v Verghese*[80] the solicitor was struck off for swearing an untruthful affidavit. He had also been verbally aggressive during a telephone conversation with another solicitor, while attending his employers" offices under the influence of alcohol. He did not mention his alcohol problem in his mitigation.

In *Khan v Solicitors Regulation Authority*[81] the applicant was a foreign advocate who had applied to be admitted as a solicitor. He had initially failed to disclose a criminal conviction. He did disclose it at a later stage of his application, but the review panel of the SRA refused his application, considering that he did not have the requisite character and suitability. It commented:

> "The panel accepts that at the time Mr Khan completed the ..... application he was not in the best of health. But in the absence of cogent medical evidence, it does not accept that his symptoms would have affected him to the degree claimed. It was also of concern that he appeared not to have any strategies for dealing with stress from which he said he continues to suffer."

In the High Court, however, Lord Justice Elias and Mr. Justice Keith considered that the applicant had been rehabilitated and allowed his appeal.

Sometimes disciplinary cases are dealt with by consent. Solicitor Timothy Latter was sentenced to 2 years imprisonment for making fraudulent insurance claims. In mitigation he said that he was suffering from alcohol dependency syndrome and depression as a result of a challenging home life, pressure of work and financial difficulties. The SRA agreed to him voluntarily removing himself from the roll of solicitors[82].

4.1.5 Medical evidence in tribunal cases

Addictive behaviour may be a factor in less serious cases before the Tribunal, where striking off is not an issue. Often the same solicitor features in successive disciplinary proceedings and typically only drops out of practice when he or she is approaching retirement age.

[80] Case No. 10691-2010.
[81] [2010] EWHC 1555 (Admin).
[82] Report in the *Law Society's Gazette*, 30 July 2015.

So in *Solicitors Regulation Authority v Brierley*,[83] the respondent solicitor was convicted of assaults on two girl friends of his daughter, whom he believed had harmed her. On both occasions he was under the influence of alcohol. On the second occasion he was fined £5,000 by the Tribunal.

His psychiatrist's report on the second occasion was quoted as stating 'that in all the circumstances the Respondent's action [i.e. the assault] had been 'a totally understandable reaction'. The Respondent had sought psychiatric help for reactive depression.'

This raises the questions, which may or may not have been addressed by the psychiatrist: why should he not behave in this way a third time? Did his impairment affect his professional competence and integrity? What was the prognosis? What ongoing treatment was he receiving? What about his drinking?

In *SRA v Mackenzie*[84] a much more appropriate procedure was followed. The respondent obtained a medical report from an independent eminent psychiatrist, Professor Benjamin Green, who only supported the respondent's case "on the balance of probabilities". The report was agreed by the SRA. Professor Green's report was part of the evidence which persuaded the Tribunal not to make a finding of deliberate misconduct.

The president of the Solicitors Disciplinary Tribunal for England and Wales has said[85]:

> "What does suitable medical evidence mean? I think the general wisdom is not to deal with this in an over-prescriptive way, and to duck the notion of defining it, because it's a bit like an elephant. It is difficult to describe, but you know one when you see one."

4.1.6 Serial offenders

In another case involving serious defaults but no dishonesty, *Yerolemou v The Law Society*,[86] the Tribunal struck the solicitor off. The Divisional Court allowed the solicitor's appeal and substituted a suspension of 2 years. Mr. Justice Lloyd Jones, with whom Lord Justice Leveson concurred, noted:

> "The appellant was under very considerable pressure in terms of his practice. He had to cope with these proceedings, and he was also attempting to re-establish his reputation following the intervention in his previous firm. In addition to that there was the financial pressure which was applied to him as a result of the intervention in his previous firm. Moreover, it is clear to us that he was under colossal pressure in his private life. He experienced serious matrimonial problems directly linked to the mental pressure that he was under and to the financial pressure that the household was under."

[83] 11077 of 2012.
[84] Case No. 11535-2016.
[85] See footnote **Error! Bookmark not defined.** above.
[86] [2008] EWHC 682.

Why, though, should these problems not affect him again? Had he learned his lesson? Had he received professional help? Was there a report? What was the prognosis?

Three years later, on his third appearance before the Tribunal, the same solicitor was faced with another series of serious defaults, although again not involving dishonesty. He was again suspended for three years. The underlying cause of his declared personal problems does not appear to have been considered by the Tribunal.[87]

4.2 Barrister tribunals

The Bar Tribunal and Adjudication Service (BTAS)[88] publishes the findings of disciplinary tribunals involving barristers. These tend to be much shorter than the findings and orders published by the Solicitors' Disciplinary Tribunals for England and Wales and for Scotland. In particular it is not apparent from them what submissions are made to the Tribunal on behalf of the barristers concerned, except if and when an appeal is filed to the Visitors of the Inns of Court.

The Bar Standards Board Handbook[89] states that:

> "It is important to note that an underlying addiction to alcohol is excluded from the Equality Act 2010 and is not considered a disability".

The suggestion here seems to be that a lawyer's problem with alcohol is irrelevant within the disciplinary process. So such problems are not generally mentioned, except when they are obvious, e.g. because the barrister concerned has been convicted of drunken driving.

As with solicitors, however, issues not considered by the Tribunal may emerge in local newspapers. So barrister and solicitor Frances Brough[90] was disbarred in 2015 as a result of repeated violent and some dishonest behaviour resulting in criminal convictions. The fact that she had alcohol and mental health problems is not mentioned in the published details of the Tribunal's findings. Instead it emerges from various newspaper reports and from the judgment of the Solicitors Disciplinary Tribunal striking Ms Brough off as a solicitor[91].

Convictions for drink driving commonly arise in cases before the Bar Tribunal. Other examples of misconduct include assaults, aggressive and rude behaviour (sometimes under the influence of alcohol), tax evasion, making misleading statements, and misconduct in the court room. As with solicitors,

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[87] *Solicitors Regulation Authority v Yeremolou and Gandesha* Case 10888 of 2011.
[88] http://www.tbtas.org.uk/ Retrieved 24 March 2016.
[89] https://www.barstandardsboard.org.uk/media/1553795/bsb_handbook_jan_2014.pdf Retrieved 24 March 2016.
[90] http://www.tbtas.org.uk/wp-content/uploads/hearings/3000/Outcome-Posting-Brough2.pdf Retrieved 24 March 2016.
[91] She was also struck off as a solicitor without appearing before the Solicitors Tribunal http://www.solicitorstribunal.org.uk/Content/documents/11148.2013.Brough.pdf Retrieved 24 March 2016.

barristers who are guilty of dishonest behaviour are generally disbarred. The Handbook sentencing guidelines[92] do say, however:

> "The general starting point [where dishonesty is established] should be disbarment unless there are clear mitigating factors that indicate that such a sanction is not warranted. Therefore, no common circumstances are listed below but instead the emphasis should be on the potential mitigating factors that might reduce the sanction from disbarment".

There seems to be a different nuance here from the equivalent rule as applied to solicitors. This may be related to the fact that holding client money and misusing it is a risk factor for drinking solicitors, whereas barristers in England and Wales very rarely hold client money.

5 Disciplinary proceedings in foreign jurisdictions

5.1 The USA

In the USA, lawyer disciplinary proceedings commonly come before state courts and are covered in the regional law reports.

An early US case involving alcohol addiction related to Theodore Cohen, an attorney now still practising in Los Angeles in his eighties. He served a term of imprisonment in 1971 for theft and forgery. But the Supreme Court of California did not disbar him. Its judgment 3 years later[93] reveals that Cohen had had family problems and was addicted to alcohol.

At this point Cohen's sobriety and rehabilitation were fully demonstrated. So, while his then 6 year suspension from practice was continued for another 5 years, the suspension was stayed subject to compliance with stringent probationary conditions.

By the time of the Supreme Court judgment, Cohen and others had already begun the foundation of 'The Other Bar'.[94] It is a network of Californian lawyers recovering from alcohol and other substance misuse problems. It has inspired similar organisations in North America and beyond, including the UK. Cohen and fellow Other Bar members have helped many others to recover from addiction and the problems which it causes.

The approach in the *Cohen* judgment is followed in many (but not all) other US states. Often a defaulting lawyer relies on his or her addiction or other impairment as mitigation. In that event a key issue will generally be whether that impairment actually caused the misconduct. Or would it have happened in any event, e.g. because the lawyer is dishonest whether he or she is drunk or sober? This is

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[92] https://www.barstandardsboard.org.uk/media/1464375/130415_-_sentencing_guidance_2013.pdf retrieved 24 March 2016.

[93] 1974 11 Cal. 3rd 935.

[94] http://www.otherbar.org/ accessed 23 March 2016.

referred to as the 'but for' test.[95] Among other things, therefore, it identifies those individuals who are likely to remain long term professional and insurance risks.

In the USA if the lawyer is not disbarred, their practice will usually be subject to stringent conditions. Typically these include an initial suspension, the appointment of a 'sobriety monitor', restitution of any amounts owing to clients and others, and active involvement in the state 'lawyer assistance programme' ('LAP')[96]. LAPs are established to help lawyers achieve full recovery from impairing conditions. They are themselves supported by voluntary work provided by those lawyers.

The LAPs represent a significant investment for the State Bar. So the state court will not wish to make it unduly difficult for lawyers to rehabilitate themselves, since that would undermine the work of the LAPs.

Despite what had been done over the decades to help lawyers with drink problems in the USA, a 2016 study[97] of 2,825 licensed, employed attorneys found:

> "substantial rates of behavioural health problems, with 20.6% screening positive for hazardous, harmful, and potentially alcohol-dependent drinking. Men had a higher proportion of positive screens, and also younger participants and those working in the field for a shorter duration. Age group predicted AUDIT (Alcohol Use Disorders Identification Test) scores[98]; respondents 30 years of age or younger were more likely to have a higher score than their older peers. Levels of depression, anxiety, and stress among attorneys were significant, with 28%, 19%, and 23% experiencing symptoms of depression, anxiety, and stress, respectively."

5.2 Canada

The Canadian tribunals follow a similar approach to that applied in the USA. Where addictive behaviour has been identified they tend more often to treat it as a primary issue than do the UK tribunals. They also expect to see convincing evidence of recovery. They may require the addicted lawyer to attend 12 Step meetings[99].

In Canada lawyer disciplinary proceedings come, in the first instance, before a tribunal constituted by the Provincial Law Society. So in *Law Society of Upper Canada v. Anthony Edward McCusker*[100] the tribunal noted:

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[95] The leading explanation of the test is in *Re B. Franklin Kersey* (1987) 520 A. 2d 321. See Goodliffe, J. 'Alcohol and depression in English and American lawyer disciplinary proceedings' *Addiction* (1994) 89, 1237-1244.

[96] See, for instance, *In re Johnny S Azalone*, Supreme Court of Louisiana 16 September 1998 http://files.lsba.org/documents/LAP/LAPExhibitI.pdf accessed 1 January 2016.

[97] Krill, P 'The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys' *Journal of Addiction Medicine* Volume 10, Number 1, January/February 2016.

[98] The Alcohol Use Disorders Identification Test (AUDIT) is a ten-question test developed by a World Health Organization-sponsored collaborative project to determine if a person may be at risk for alcohol abuse problems.

[99] In the UK this might be incompatible with the European Convention on Human Rights.

[100] 2013 ONLSHP 53 (CanLII).

> "According to the medical evidence and in particular the report of Dr. Judson, for recovery to be possible, Mr. McCusker must abstain absolutely from alcohol. Remission from the disease cannot be established until an individual has remained abstinent from all addictive substances for one complete year. He must participate in the Fellowship of Alcoholics Anonymous and follow the 12-Steps to recovery in that program and he must attend a minimum of four meetings per week.
>
> If Mr. McCusker were to ever seek to be re-admitted to the practice of law, the criteria for real long term recovery set out [above] should serve as a guide in such an event.
>
> McCusker's licence was suspended on that basis."

This case represents a typical outcome in Canada and the USA. The system there encourages lawyers faced with possible disbarment to seek support from the LAP, to focus on their health problems and to present the tribunal with a plan as to how they expect to achieve recovery, as well as how to resolve the other professional problems arising from their addiction.[101] In some cases they will doubtless require the support of their insurers to achieve this goal.

5.3 New Zealand

A recent study by Jennifer Moore and others examined disciplinary proceedings in the New Zealand Lawyers and Conveyancers' Disciplinary Tribunal. It focused on cases involving lawyers with physical and mental impairments[102]. The main types of impairments were depression, anxiety, substance misuse and stress.

21 of the 74 cases in the study period involved impaired lawyers. The authors remark that this was probably 'the tip of the iceberg'. This is because impairment rarely arises except when it is raised by the lawyer who is subject to the disciplinary proceedings. The authors recommend that tribunal decisions might be more forthcoming about the fact that health conditions affect the lawyers concerned, without actually publishing the full clinical details.

One decision of the Tribunal (*Canterbury Standards Committee No. 1 v X*[103]) referred to by Moore et al., suggests that it applies a strict test, similar to the US 'but for' test, to determining whether a lawyer's impairment is causative of misconduct.

In a case[104] reported since the Moore et al. article was published, a lawyer was convicted of two counts of possession of methamphetamine[105]. He was fined a total of NZ$1,300 in the criminal proceedings and this was upheld on appeal. The Tribunal sentenced him to a 6 month suspension. The lawyer was

[101] See, for instance, *Law Society of Canada v RW Barton* 2004 LSBC 20.
[102] Moore, J. Buckingham, D.and Diesfeld, K. 'Disciplinary Tribunal cases involving New Zealand Lawyers with Physical or Mental Impairment' *Psychiatry, Psychology and the Law* (2015) 22(5).
[103] [2011] NZLCDT 9.
[104] *National Standards Committee v Jefferies* [2016] NZLCDT 29 (3 October 2016).
[105] A stimulant used as a recreational drug

directed to submit to random drug tests as directed by the Chief Executive of the New Zealand Law Society. The Tribunal considered that these ought to include a test before the lawyer resumed practise, and four further tests over the following two year period.

6 The UK GMC

The US/Canadian practice is also generally in line with the UK disciplinary regime of the General Medical Council ('GMC')[106]. The GMC applies a special procedure to doctors whose default arises from health issues, no doubt at least partly because of the risks to patients. Alcohol or drug misuse or other mental health conditions arise. The medical regime is aimed at encouraging recovery. The doctor under investigation will be referred for a medical assessment by two other doctors appointed by the GMC[107]. If it is considered that the default arises from health issues the case will then be dealt with on a confidential basis, unless the doctor disputes the health findings against him or her.

In *Sarkodie-Gyan v. Nursing & Midwifery Council*[108] the Council's Health Committee[109] found the appellant's fitness to practise was impaired by reason of her physical or mental health and imposed a 'conditions of practice' order for 12 months. It was common ground that her appeal had to be allowed because of procedural irregularities in the investigation of her condition. The committee had wrongly combined the fact-finding stage with the assessment of impairment stage. The court, on appeal, emphasised that in a health case it was still necessary for the committee to apply a 3 stage process of fact-finding, assessment of impairment, and, if appropriate, sanction. This contrasts starkly with the approach of the Solicitors' Disciplinary Tribunal to health issues[110].

Linked to and supporting the GMC's regulatory regime, within Greater London there is a 'Practitioners Health Programme' (PHP)[111]. This arranges treatment for impaired medical practitioners. The treatment is financed within the National Health Service budget. Most of the addicted doctors are sent to the same treatment centre. This makes it possible to develop programmes which cater specifically for their needs.

Similar arrangements exist for impaired doctors in other countries[112]. They are generally more sophisticated in their approach to this issue than equivalent arrangements in the legal profession. This is no doubt at least partly because doctors can draw on their professional skills, tend more to analyse problems in clinical terms rather than in terms of what is right or wrong, and in the UK are supported by the National Health Service.

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[106] See K. Hamer, 'Fitness to practice', published by Henderson Chambers http://www.hendersonchambers.co.uk/wp-content/uploads/pdf/fitness-to-practise.pdf .Retrieved 24 March 2016.

[107] 'Professional Conduct and Discipline: fitness to practise'. *General Medical Council* http://www.gmc-uk.org/prof_cond_dis_fitness_to_practice_aug_1983.pdf_25416578.pdf Retrieved 24 March 2016.

[108] [2009] EWHC 2131 (Admin).

[109] which operates under similar rules to the GMC Health Committee.

[110] See the section 4.1 above.

[111] http://php.nhs.uk/ retrieved 24 March 2016.

[112] I. Freckelton and P. Molloy 'The health of health practitioners: remedial programs, regulation and the spectre of the law' (2007) 15 *Journal of Law and Medicine* 366.

7 LawCare

The UK lawyers assistance plan, or LAP, was founded in 1997. It was aimed at helping impaired solicitors in England and Wales and is now called 'LawCare'. Its original raison d'être was to work on alcohol problems, but from its incorporation it covered a much wider range of impairments. In recent years stress problems have been its main area of interest.

It expanded at an early stage to cover barristers, judges, legal executives and other quasi-legal professions. It also soon expanded to cover the whole of the British Isles and the Republic of Ireland.

LawCare's 2017 report says that alcohol problems represented 3% (i.e. about 17 individuals) of its caseload in 2016. The figure for 2015 was 4%. Stress problems accounted for 38% in 2016 and depression 12%.

Yet in 2006 the prevalence of alcohol dependence in England was found to be 3.6 per cent, with six per cent of men and two per cent of women meeting the diagnostic criteria[113]. Lawyers are probably no better than average. So LawCare is only scratching the surface of the profession's drinking problem.

It is therefore not surprising that hardly any of the addicted lawyers appearing before the Tribunal seem to be getting help from LawCare.[114] In any event it appears from its annual report that it is largely led by the demand for its services. It may be that a more proactive approach would be needed to help lawyers with alcohol problems, most of whom will be 'in denial'. A significant initiative by Lawcare might, however, only be possible by reducing its other activities or by raising further resources. When it was first established part of its funding was provided by the Solicitors Indemnity Fund, which at that time insured solicitors. Currently, however, no insurer seems to be providing funding to LawCare.

The resources available to LawCare in any event represent a small fraction of those available to the typical US or Canadian LAP, even allowing for the higher salaries payable to staff in North America. A comparison between the financial statements of LawCare and the Massachusetts LAP 'Lawyers Concerned for Lawyers', indicates that LCL spends the equivalent of £22.30 per practising lawyer in Massachusetts, compared to LawCare's expenditure of £1.64 per lawyer in the jurisdictions that it covers.

8 Lessons to be learned

The UK disciplinary tribunals and the courts that hear appeals from them adopt a humane approach to health issues, but sometimes the respondent's account of his or her health problems seems to be taken at face value without being fully investigated. The Tribunal might therefore consider a much more comprehensive practice statement covering health issues. It could make clear, as the existing guidance does not, that evidence of health problems should include evidence of recovery (if any) and

[113] Drummond, C, et al (2005). Alcohol Needs Assessment Research Project (ANARP): 'The 2004 National Alcohol Needs Assessment for England'. London: Department of Health.

[114] Although it is fair to mention that LawCare may be helping in some cases 'behind the scenes'.

rehabilitation to help to ensure, among other things, that the behaviour of addicted lawyers does not give rise to further claims which are covered by insurance. There is also probably scope for it to work more closely with LawCare.

The principles for applying sanctions in the most serious cases are set out in the judgments of Sir Thomas Bingham MR in *Bolton v Law Society* and Coulson J in *SRA v Sharma*[115] and in other cases. They have yet to be applied to cases where addicted lawyers seek to avoid the ultimate sanction of striking off although cases involving other health issues provide some guidance.

They seem, however, flexible enough to be intelligently applied in such cases. In recent years the Tribunal and the Court have been willing to withhold the ultimate sanction of striking off even in cases even where solicitors have been guilty of dishonesty. In one case that course was taken where the solicitor's dishonesty was 'spontaneous and occurred over a short period of time'[116]. In a more recent case a solicitor had made untrue statements to a client and to her employer and had backdated letters. These acts had been dishonest. The Tribunal, however, withheld the ultimate sanction of striking off and merely suspended her. She had come under pressure from the culture of the firm where she worked and had had mental health problems[117]. She had also rehabilitated herself. The SRA has, however, filed an appeal against this decision.

9 What can insurers contribute?

At present no insurer is represented on the board of LawCare, nor does it appear that any insurer is contributing to its finances or otherwise supporting its work. The Solicitors Indemnity Fund, however, then the mutual insurer of the solicitor's profession, made a substantial donation when LawCare was founded in 1997. It nominated a member of its staff to the Board of LawCare. Later, Olivia Burren was appointed to the Board and became chairman. She has since retired. She was a risk manager with Travelers Insurance Company, which provides insurance for solicitors, among others. Perhaps the fact that no insurer is currently represented on the LawCare board is at least partly because the insurers who provide the cover are now private and not mutual and are members of a very long list of "participating insurers".

There is, nonetheless, scope for another insurer or syndicate of insurers to follow this precedent by providing further resources and risk management advice. They may do so already to their policyholders. Arguably, however, the whole profession and not just the individual firm facing the claim should benefit from the insurers' expertise and any lessons learned Any additional resources could be ring fenced to projects most likely to reduce harm and the level of insurance claims.

Whether helping respondents in the Tribunal is the most cost effective use of resources, is, however, far from clear. It is possible that providing help for lawyers whose problems are not yet quite so serious

[115] Supra.
[116] *R. (on the application of Solicitors Regulation Authority) v Imran* Queen's Bench Division (Administrative Court), 22 July 2015 [2015] EWHC 2572.
[117] *SRA v James*, 11657-2017.

would be more cost effective in the long term. There are many other projects which could be undertaken with greater resources. If necessary, the SRA's Indemnity Insurance Rules 2013 could be amended to require the insurance taken out by solicitors to provide for the insurer to contribute towards the cost of such initiatives. They might then pass on the expense to their policyholders through higher premiums.

One would expect any insurer providing this help to be able to learn lessons which might be used in underwriting and in claims management, not just in the insurance of lawyers but also in other products.

There may also be a case for commissioning research into specific aspects of LawCare's work, as was done by the Law Society and the Solicitors' Indemnity Fund before LawCare was founded in 1997[118].

Most peer reviewed research carried out into alcohol and drug problems tends to be led by the clinical professions and to address clinical issues. There are possible lines of research aimed at providing insights to the legal profession. An example might be to research how heavy drinking affects the higher functions of lawyers. These functions include professional judgment, integrity, attention to detail, listening skills and creativity.

For many people it might be obvious that these functions are likely to be affected by heavy drinking. Others, including, it seems, the Disciplinary Tribunal[119], would expect the proposition to be proved.

10 Conclusion

Addictive behaviour, and particularly alcohol dependence, causes problems for lawyers, their colleagues, clients and family. Addictive behaviour is not just a symptom of other conditions, such as stress and depression, but is a treatable condition in its own right.

Disciplinary cases involving lawyers demonstrate some of the harm that arises from addictive behaviour. Other instances of harm are more difficult to demonstrate because of the denial and stigma which attaches to some forms of addictive behaviour and because the fact that someone is addicted is irrelevant to the outcome of the litigation.

The disciplinary regime can perform a role in the rehabilitation of addicted lawyers although it is not its primary function. Helping agencies such as the National Health Service, LawCare, private medicine, therapists and Alcoholics Anonymous, can support lawyers in recovery and there may be scope for developing interventions which are specific to those working in the legal profession.

The UK tribunals may learn from the experience of overseas lawyer disciplinary regimes (such as the USA, Canada and New Zealand) and from the approach of the General Medical Council. LawCare might consider going back to its roots and focusing more on addiction problems. It will need further funds to do, some of which could be provided by "participating insurers".Insurers have a key role to play in reducing harm arising from addictive behaviour in the legal profession by, among other things,

[118] Resulting in the publication of the paper Goodliffe J and Brooke D 'Alcoholism in the Legal Profession' *New Law Journal*, January 1996.
[119] See footnote 29 above.

providing risk management services, by financing projects which are proved to reduce harm and by writing private medical insurance cover which extends to (rather than excluding) alcohol treatment.