

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA356/2017
[2018] NZCA 467**

BETWEEN CHRISTIAN JOHN GILLIBRAND AND
MARY CAECILIA GILLIBRAND AS
TRUSTEES OF THE CHRIS AND MARY
GILLIBRAND FAMILY TRUST
Appellants

AND GEORGE PETER SWANEPOEL
First Respondent

ANDREW PETER HOLGATE
Second Respondent

Hearing: 8 May 2018

Court: Miller, Cooper and Winkelmann JJ

Counsel: C T Patterson for Appellants
H M Twomey and S M Pasley for First Respondent
No appearance for Second Respondent

Judgment: 29 October 2018 at 3.00 pm

JUDGMENT OF THE COURT

- A The application to amend the notice of appeal is granted.**
- B The appeal is dismissed.**
- C The appellants are jointly and severally liable to pay the respondent costs for a standard appeal on a band B basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Miller J)

[1] Chris and Mary Gillibrand sued their solicitor, George Swanepoel, and their barrister, Andrew Holgate, for negligently conducting proceedings brought against them. Woodhouse J found the barrister liable and the solicitor not. He awarded special damages (\$63,950) and general damages (\$5,000 for each of the Gillibrands) against Mr Holgate.¹

[2] The Gillibrands appeal the judgment so far as it concerns Mr Swanepoel. They say that he too was negligent. They seek judgment for the same amount of special damages and \$20,000 apiece by way of general damages.

[3] Mr Holgate has taken no part in this appeal. His negligence is not in dispute. Nor is the quantum of special damages. The question is whether liability can be sheeted home to Mr Swanepoel.

Background

[4] In 2003 Chris' father, Gordon Gillibrand, suffered a stroke, and needed 24-hour care. He went into a rest home run by Bupa Care Services Ltd in May 2003, and there he remained until his death in 2011. Chris made decisions on his behalf under a power of attorney granted some years previously.

[5] In December 2003 Gordon sold his farm to Chris and Mary as trustees of the Chris and Mary Gillibrand Family Trust (the Trust). The Trust was set up specifically to purchase the farm, Chris explaining that Gordon had wanted the farm to go to his grandsons (Chris and Mary's children). Gordon advanced the entire sale price of \$505,000 to the Trust as a loan.

[6] Initially Gordon paid the rest home fees, but by November 2004 he had run out of money. The Trust then paid the fees, but it appears that Chris and Mary had run

¹ *Gillibrand v Swanepoel* [2017] NZHC 1209 [HC substantive judgment].

into some financial difficulty, compounded in 2012 when Mary suffered serious injuries in a car crash. Payments fell into arrears in 2009.

[7] As at 31 March 2010 the Trust's financial statements disclosed a liability to Gordon in the form of a balance of \$355,000, derived by deducting from the original loan the sum of \$150,000 that the Trust had paid for rest home fees. That balance formed the only asset in Gordon's estate.

[8] Mr Swanepoel is a general and sole practitioner in Whangarei. He was not the Gillibrands' traditional family solicitor. They consulted him about the rest home fees in December 2009. Bupa was pressing them for payment and Gordon was said to be at risk of being evicted from the rest home. They wanted to know if a rest home subsidy might be available.

[9] There followed communications between Mr Swanepoel and Chris Gillibrand, on the one side, and a lawyer whom Bupa had instructed to act for Gordon, Stuart Spicer. (After a medical assessment of his mental competence, Bupa had supported Gordon to revoke the power of attorney.) During those discussions Mr Spicer was provided with a copy of the Trust's 2010 financial statements.

[10] Discussions culminated in an offer which Mr Swanepoel sent to Bupa on 8 April 2011 with the Gillibrands' authority. It stated:

I refer to your letter dated 28 March 2011, which my clients have handed to me ...

What my clients propose is the following:

1. They accept that there is debt owing back to Mr Gillibrand senior by the Chris and Mary Gillibrand Family Trust of \$355,000.00, as a result of the purchase of the family farm from him some time ago.
2. To assist with the obtaining of assistance from WINZ my clients, on behalf of the Trust are now in a position to transfer to Gordon a property situated at Waihue Road, Waihue ... which currently has a capital value of \$365,000.00 ...
3. It is then envisaged that a charge can be obtained over that property in favour of WINZ from Gordon which will then secure the payments to you of the outstanding amounts.

[11] This proposal had not been accepted when Gordon died on 15 April 2011. At that time his estate was indebted to Bupa in the sum of \$44,981.68, which included interest, and to Mr Spicer for \$8,174.50 for his services.

[12] Chris was executor of Gordon's will and he instructed Mr Swanepoel to act for him in that capacity. Probate was granted in July 2011.

The Bupa proceedings

[13] We describe the proceedings and their outcome briefly before turning to the involvement of Messrs Holgate and Swanepoel.

[14] In August 2012, more than a year after probate was granted, Bupa moved to have Chris removed as executor of the estate. The application was met with the opposition that the estate had no funds and Chris, as executor, had an absolute discretion to postpone the sale and conversion of any assets of the estate. Chris maintained that his father had said the debt would never be called up.

[15] Judicial conferences before Heath J resulted in the Public Trust being appointed on 4 December 2012 as an additional and independent trustee to advise on the estate's financial position. It duly reported that the Trust debt was payable to the estate and the Trust was able to pay it.

[16] The Gillibrands did not agree. They resisted Chris' removal as trustee on the grounds that the debt had been forgiven and Bupa had mistreated Gordon by failing to care for him. These allegations were advanced in successive notices of opposition filed on 23 May and 10 June 2013, supported by in the latter case by affidavits sworn by Chris Gillibrand.

[17] On 27 June 2013 Bupa sued Chris in debt, in his capacity as executor. A defence was filed by Mr Holgate on 24 July 2013. It repeated the mistreatment allegations.

[18] On 14 August 2013 Heath J delivered a decision removing Chris as executor. An independent executor was appointed.²

[19] On 20 November 2013 the Judge ordered that Chris pay indemnity costs to Bupa for all steps in the proceeding dating from the second opposition filed on 23 May.³ Costs prior to that were on a standard 2B basis. In his reasons Heath J explained that until May sensible steps had been taken to resist removal on orthodox grounds.⁴ Indemnity costs were payable thereafter because the claim that Bupa had ill-treated Gordon so as to create a counterclaim was “hopeless” in the sense used in *Bradbury v Westpac Banking Corporation*.⁵

[20] Following the costs award, the executor demanded the round sum of \$200,000 from the Trust to pay the Bupa debt, the costs awarded and his own costs. Mr Swanepoel acted for the Gillibrands, negotiating a settlement with Bupa for \$150,000. The Trust subsequently paid the executor’s costs also.

The allegations of negligence against Messrs Holgate and Swanepoel

[21] The special damages awarded against Mr Holgate comprised that portion of the settlement of \$150,000 that the judge found attributable to the award of indemnity costs.⁶ The general damages were awarded as some compensation for stress and anxiety.⁷ Woodhouse J awarded costs against the Gillibrands in favour of Mr Swanepoel, but there is a separate appeal pending in this Court against that judgment and we say no more about it.⁸

[22] The Gillibrands’ losses were said to have resulted from the negligence of solicitor and counsel in two respects: the claim that the estate could not pay, and the attempt to defend Bupa’s claim by alleging mistreatment of Gordon. The following

² *Bupa Care Services NZ Ltd v Gillibrand* [2013] NZHC 2086, [2013] 3 NZLR 701 [Heath J removal judgment].

³ *Bupa Care Services NZ Ltd v Gillibrand* [2013] NZHC 3067.

⁴ At [26]–[27].

⁵ At [30], citing *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400.

⁶ HC substantive judgment, above n 1, at [240]–[244].

⁷ At [258].

⁸ *Gillibrand v Swanepoel* [2018] NZHC 1376. The appeal against the costs decision was filed after the appeal in this case had been heard.

account focuses on those allegations and what Messrs Holgate and Swanepoel did, or allegedly failed to do, about them. We record that the appeal focuses on the mistreatment allegation, since that led to costs being awarded on an indemnity basis and hence to the damages now claimed.

[23] Mr Swanepoel briefed Mr Holgate in October–November 2012, to act for a period of two weeks while Mr Swanepoel was on leave. Mr Holgate and the Gillibrands developed a strong rapport and they were enthusiastic about his approach. On Mr Swanepoel’s return, Chris instructed him to engage Mr Holgate as counsel. Mr Swanepoel did so in November. He remained solicitor on the record.

[24] We have referred to Mr Swanepoel’s letter of 8 April 2011. It is not suggested that his advice was wrong at that time. The allegations against him began with a letter that he wrote on 21 December 2011 asserting that the Trust could not pay and, for limitation reasons, need not pay:

... I have Spoken to Chris and looked at the letter attached which was a proposal put forward by clients to try and assist with obtaining a loan or subsidy to pay Gordon’s accounts. The offer in the letter was never acknowledged or accepted by Bupa. Nor was it approved by all the trustees of the family trust as it was purely a proposal. Obviously once Gordon passed away it no longer applied and it was for Chris as executor to make a decision on. In my discussion with Chris he is still very upset about the way Darryl [Bupa’s manager at Gordon Gillibrand’s resthome] went about terminating his power of attorney and the stress he put Gordon under as a result for which Chris has had no acceptance of any wrong doing or apology.

He has approached the other trustees of the trust but they are correctly pleading the statute of limitations apply and they have an obligation to the beneficiaries of the trust to protect the trust assets ...

...

The bank accounts [of the estate] have rendered no funds and we hold nothing in trust so the Estate is bankrupt. It is my recommendation that Chris administers the estate pursuant to part 17 of the Administration Act 1969.

[25] Woodhouse J accepted Mr Swanepoel’s evidence that he was following instructions when he wrote the letter.⁹ He also found that Mr Swanepoel recommended to the Gillibrands in January 2012 that they should use the opportunity

⁹ HC substantive judgment, above n 1, at [32].

presented by a property refinancing to pay Bupa. They refused, and for the first time told him that the debt had been forgiven.¹⁰

[26] The mistreatment allegations stemmed from information provided to Mr Swanepoel by another client, Mr Nola. Mr Nola had reported seeing Gordon sitting by an open window in some distress. Mr Swanepoel reported this to the Gillibrands, though the Judge found that Mr Swanepoel saw Mr Nola's evidence as possible leverage in negotiations rather than evidence of serious misconduct.¹¹

[27] Mr Holgate met the Gillibrands on or about 5 November 2012 and advised them to accede to the Public Trust being appointed as an additional executor to inquire into the Trust debt, as noted above. They agreed, and on 15 March 2013 Mr Holgate made that offer to Gibson Sheat, who acted for Bupa. Gibson Sheat asked who would indemnify the Public Trust for its costs. Mr Holgate replied: "that blood-sucking client of yours let this particular genie out of the bottle, and having done so, will have to front indemnification, if any is required." This email was sent without reference to Mr Swanepoel. When Mr Swanepoel saw it he rang Chris and expressed his concern but was told that Chris was happy with it.

[28] Woodhouse J found that Mr Holgate's "decidedly unprofessional and intemperate" description of Bupa heralded the following important developments:¹²

- a) a significant change in the advice Mr Holgate gave to the plaintiffs;
- b) a new position adopted by the plaintiffs on whether there was a debt owed by the estate to Bupa and on whether Mr Gillibrand should stand because of a conflict;
- c) a resistance by Mr Gillibrand to stand down because of a conflict of interest; and

¹⁰ At [34].

¹¹ At [52] and [54].

¹² At [50].

- d) a general approach by Mr Holgate which lacked reasonable judgment and objectivity.

[29] This stance had first been signalled in a letter Mr Holgate wrote to the Public Trust in February 2013. Mr Swanepoel had seen a draft of this letter because his typist, who also worked for Mr Holgate, had shown it to him. The draft likened Bupa's facility to Auschwitz. Mr Swanepoel remonstrated with Mr Holgate and that reference, which Mr Holgate put down to humour, was removed. Mr Swanepoel's evidence was that he thought Mr Holgate attributed it to a momentary lapse of judgment and he had "got the message".

[30] The mistreatment allegation appeared in detailed form in court papers when Mr Holgate filed the second opposition to Mr Gillibrand's removal as executor. The Judge recorded that:¹³

- (a) It was alleged that Gordon Gillibrand died due to Bupa's negligence, with particulars in that regard including the following:
- Gordon Gillibrand "had chronic bronchitis or quite possibly cardio-pulmonary obstructive disease".
 - Gordon Gillibrand was placed at a wide open window when the cold air coming in exacerbated his condition and increased the distress that he was in and when he could not move himself.
 - Bupa failed to monitor Gordon Gillibrand and had it done so his death could have been averted.
- (b) It was alleged, in the alternative, that if Gordon Gillibrand was terminally ill Bupa's negligence brought his death forward and shortened his life such that there was a "causal link between Bupa's conduct and the death of" Gordon Gillibrand.
- (c) There was an alternative defence that Bupa was precluded from recovering its fees because it came to Court without clean hands.
- (d) There was a third alternative contention that Bupa was precluded from recovering its fees because its treatment of Gordon Gillibrand "was inhuman [sic] and degrading treatment and/or punishment". This included a particular that Gordon Gillibrand "was effectively left to drown on the mucous [sic] in his lungs, alternatively left in great distress with callous disregard to the distress that he was in".
- (e) In respect of the mistreatment allegations, the opposition concluded:

¹³ At [59].

In all the circumstances Bupa seeks reward from [Gordon Gillibrand's] estate for killing him. This is both an absurd claim and a clear instance of trying to take advantage of its own wrong-doing.

- (f) The second opposition also recorded that there was an issue whether the trust debt had been forgiven, with a positive statement that “there is evidence to show that the debt has been forgiven”. It may be noted here that no evidence was ever produced that the debt had been forgiven other than the generalised contentions of Mr and Mrs Gillibrand to that effect.

The Judge found that the second opposition was prepared and filed without reference to Mr Swanepoel.¹⁴

[31] By letter of 30 May Gibson Sheat protested, writing to Mr Holgate to say, among other things, that the allegations against Bupa were of a criminal nature, could not be more serious, and were advanced without proper grounds. The letter was evidently copied to Mr Swanepoel, who said he did not recall seeing it at the time. Neither man replied to Gibson Sheat.

[32] Mr Holgate then filed the third opposition on 10 June, again without reference to Mr Swanepoel. He also filed an affidavit from Chris Gillibrand in support of an application for discovery of Gordon's medical records and in opposition to removal. The mistreatment allegation was maintained in these papers, the Judge summarising it as follows:¹⁵

- Bupa was culpable for causing Gordon's death.
- Bupa failed to monitor Gordon when he was in significant distress, and had it done, the death could have been averted.
- On being warned of Gordon's plight Bupa and its staff showed contumelious disregard for Gordon's rights and circumstances by refusing point blank to take any steps at all.
- The Deceased was effectively left to drown on the fluid in his lungs, alternatively left in great distress with callous disregard to his plight.
- In all the circumstances Bupa seeks reward from the Deceased's estate for killing him.

¹⁴ At [58].

¹⁵ At [62].

[33] Mr Gillibrand’s affidavit annexed a statement from Mr Nola that Mr Holgate had prepared in the form of an affidavit. The statement did not support the serious mistreatment allegations, and it was unsworn.

[34] Bupa served its debt claim on Mr Gillibrand on 28 June. That evening Mr Holgate emailed a journalist at the Northern Advocate Newspaper, attaching copies of the debt claim, the third opposition and the affidavits from the Gillibrands. He included a link to news reports of Bupa’s alleged negligence in the United Kingdom and said:

Chris and the estate have refuted [Bupa’s claim for fees] saying that Bupa caused Gordon to die in absolutely inhumane and distressing circumstances and they forfeited the right to payment of anything because of their wrong-doing — the evidence is very bluntly stated in affidavits — Mr Nola’s [affidavit] shows that there were even reprisals by Bupa against him because he came forward to give evidence about the case.

... We exhibit a letter where Bupa’s solicitor says that we are making a serious allegation of wrongdoing — as you can see from the evidence we have filed, we are pulling no punches about the fact that we can produce evidence on oath to back it up.

Mr Holgate did not discuss with Mr Swanepoel his decision to go to the media. He did discuss it with the Gillibrands, who accepted his advice to pursue the attack. The Judge found that they could not be criticised for accepting counsel’s advice on this point.¹⁶

[35] On 5 July the Northern Advocate published an article quoting the claim that Bupa sought to profit from killing Gordon.

[36] Gibson Sheat emailed Messrs Holgate and Swanepoel on 8 July about the article, inquiring whether they knew beforehand that Chris intended to go to the media. Mr Holgate claimed, misleadingly, that he was “told about this article by a client.”

[37] Gibson Sheat then wrote to Mr Holgate and Mr Swanepoel on 11 July repeating that the allegations should not have been made and pointing out that they had had no

¹⁶ At [72].

reply to their letter of 30 May. The Judge found that not until about 11 July did Mr Swanepoel see the second or third oppositions to removal.¹⁷

[38] Messrs Swanepoel and Holgate responded separately to Gibson Sheat, contending that the allegations were properly before the Court. Mr Swanepoel said that “Mr Nola’s evidence is properly before the Court and records what he saw”, and noted that “We have a duty to our client to put forward his case as you have a duty to do the same for your client.” Mr Holgate’s response was aggressive, and he threatened to seek indemnity costs.

[39] On 24 July, a statement of defence was filed in response to the debt claim, as noted. It appears, based on an email from Mr Holgate to the Gillibrands the previous day, that Mr Holgate prepared and filed the statement of defence. The statement of defence contained the same mistreatment allegations that had been advanced in the removal proceedings, and argued they were a complete defence to the debt owing.

[40] On 29 July Mary repeated the allegations to the television current affairs programme Campbell Live. She did not consult Mr Holgate before doing so but she copied him afterward. She also copied Mr Swanepoel, saying she thought she would “send this to you to read as well!”

[41] There followed Heath J’s decision on the removal application, in which the Judge made it plain that far from justifying Mr Gillibrand’s resistance to removal, the pursuit of an apparently unfounded claim of mistreatment made the outcome inevitable.¹⁸

Mr Gillibrand’s ability to bring an independent mind to the question whether the debt is valid is questionable, to say the least. He has strongly held views (not presently substantiated in any meaningful way) about the impact of Bupa’s care on his father, believing it was causative of death. He also has financial interests to protect; both as sole beneficiary of the estate and the trustee (and beneficiary) of a Trust, a debt from which is the only source from which money could be recovered to pay Bupa.

¹⁷ At [58].

¹⁸ Heath J removal judgment, above n 2, at [21(c)].

Woodhouse J's reasons for judgment

[42] We have summarised Woodhouse J's narrative findings above, and we need not go into all of his reasons for finding Mr Holgate liable and rejecting Mr Holgate's cross-claims against the Gillibrands. We focus on his conclusions relating to Mr Swanepoel.

[43] We begin by observing that the Judge's reasons turned on his findings of fact. He concluded that he preferred the evidence of Mr Swanepoel and Mr Holgate to that of the Gillibrands where there was a conflict. He attributed this conclusion to discrepancies between the Gillibrands' evidence in chief and their cross-examination, inconsistencies between their evidence and the contemporaneous documents, and sheer implausibility of some of their claims:¹⁹

[142] A principal reason for my conclusion is that there is a substantial number of inconsistencies between material contentions of Mr and Mrs Gillibrand in their statement of claim and, more importantly, their briefs of evidence — and especially the brief of evidence of Mr Gillibrand — and what each of them said on these matters in cross-examination. These inconsistencies cannot reasonably be attributed to understandable difficulty in remembering a particular matter, or to the pressure of being in a courtroom under cross-examination, or other matters which may bear on the reliability of the evidence as opposed to the credibility of the witness. In addition, positive assertions of Mr Gillibrand, or Mrs Gillibrand, on central issues are inconsistent with contemporaneous documents. And some of those documents are ones which one, or both, of the Gillibrands approved in draft or, less often, themselves produced. And there are positive assertions of Mr Gillibrand or Mrs Gillibrand which are simply not plausible.

[44] He went on to demonstrate in detail why he had reached these conclusions. Relevantly, the Judge flatly rejected the claim that Mr Swanepoel had wrongly advised the Trust had no liability to the estate, for no such advice was given. On Mr Swanepoel's advice the Gillibrands accepted before Gordon died that the Trust debt remained.²⁰ The Judge found that the Gillibrands did not tell him until around February 2012 that the debt had been forgiven. The claim that the debt had been forgiven was implausible and wrong.²¹ Mr Swanepoel advanced the Gillibrands' instructions in the first opposition to removal, but he was not negligent in doing so:

¹⁹ HC substantive judgment, above n 1.

²⁰ At [147]–[148].

²¹ At [173]–[174].

[175] The steps taken by Mr Swanepoel, after he had been instructed that the debt had been forgiven and that the trustees in consequence wished to resist any payment to the estate, and with Mr Gillibrand as executor in turn resisting payment to Bupa on the grounds of insolvency, were not negligent steps for Mr Swanepoel to recommend in light of the instructions he had. And, contrary to an important part of the contentions of the plaintiffs, Mr Swanepoel was not himself making any positive assertion that the trust debt was not recoverable by the estate. He did draft and file the first opposition to the removal application, but the substance of this was an application for directions from the Court to deal with the conflict that had arisen for Mr Gillibrand, and the uncertainty only recently raised by the plaintiffs as to whether there was any liability to the estate. This approach by Mr Swanepoel was clearly reflected in the proposals that were put to Heath J and which resulted in the order appointing the Public Trust as an additional and independent trustee of the estate for the purpose of investigating whether the trust debt was payable to the estate and, if so, whether the trust had any assets to enable payment to be made.

[45] The Judge added that Mr Swanepoel was seeking to delay or deflect the Bupa claim because of the Trust's difficult financial position, and he noted Heath J's remark that until Mr Holgate wrote to Gibson Sheat on 15 March 2013 sensible steps had apparently been taken to resolve the litigation. Thereafter the Gillibrands' actions were taken on Mr Holgate's advice alone.²²

[46] Turning to the mistreatment allegations, the Judge noted that the Gillibrands pleaded that Mr Swanepoel:²³

- (a) failed to advise them of Mr Holgate's intention to change strategy by filing the second and third oppositions; and
- (b) failed to advise that the mistreatment allegations supplied no grounds for resisting removal as executor, and so served no useful purpose.

[47] With respect to the first claim, the Judge found that Mr Swanepoel did not know that Mr Holgate intended to file a second opposition and was not consulted about the third.²⁴ With respect to the second claim, the Judge summarised the Gillibrands' evidence:

²² At [176]–[178].

²³ At [101].

²⁴ At [210].

[213] Mr and Mrs Gillibrand's evidence in support of this claim included the following contentions: the mistreatment allegations were initiated by Mr Swanepoel following his discussion with Mr Nola; Mr Swanepoel advised them that the mistreatment allegations provided grounds to oppose the removal application; Mr Swanepoel advised them that the mistreatment allegations had merit; Mr and Mrs Gillibrand were not themselves involved in any significant way in advancing the mistreatment allegations; they were guided by advice they got from Mr Swanepoel as well as by advice from Mr Holgate; they did not have any direct knowledge of the evidence that might support the mistreatment allegations; and they did not understand the allegations.

[48] The Judge rejected these claims. He examined Mr Swanepoel's evidence of what he knew and did, assessing that evidence against the standard of care required of an instructing solicitor. He concluded that:

- (a) Mr Swanepoel maintained the level of review required of a solicitor with a legal practice of the kind he had.²⁵
- (b) Mr Swanepoel sought advice from Mr Holgate at appropriate times and relied appropriately on it.²⁶
- (c) Mr Swanepoel did not rely blindly on Mr Holgate. He sought instructions directly from Mr Gillibrand and sought to caution against the course of action they had embarked upon. They positively instructed him that they knew they might not succeed but were confident and determined to oppose Bupa's claims.²⁷
- (d) The Gillibrands made it clear that they liked Mr Holgate's approach and wanted Mr Swanepoel to leave matters with them and Mr Holgate.²⁸

[49] The Judge accepted that Mr Swanepoel was aware of signs that Mr Holgate lacked objectivity, but he responded appropriately when matters of concern were brought to his attention. Not until the end, when it was too late, did he notice indications that Mr Holgate was not coping.²⁹

²⁵ At [219].

²⁶ At [220].

²⁷ At [221].

²⁸ At [221].

²⁹ At [222]–[223].

[50] In reaching these conclusions the Judge:

- (a) Accepted Mr Swanepoel’s evidence that after receiving Gibson Sheat’s letter of 11 July Mr Swanepoel intervened, expressing reservations about the litigation strategy to Chris Gillibrand and warning that the Gillibrands were at risk of having to pay costs.³⁰
- (b) Accepted Mr Swanepoel’s evidence that Mr Swanepoel was concerned about the litigation strategy pursued by Mr Holgate, and specifically asked Mr Holgate about whether there was enough evidence to sustain the mistreatment allegations. Mr Swanepoel deferred to Mr Holgate because of his experience as a barrister and in the medico-legal field.³¹
- (c) Relied on expert evidence from a very experienced solicitor, Christopher Darlow, to the effect that in the circumstances Mr Swanepoel had acted as a reasonably competent instructing solicitor would.³²
- (d) Found that Mr Swanepoel could have achieved nothing had he sought at an earlier stage to withdraw Mr Holgate’s instructions, for the Gillibrands would not have permitted it.³³ Mr Swanepoel might have withdrawn, but it was “reasonably unlikely” that the Gillibrands would have been deterred from maintaining the mistreatment allegations.³⁴

[51] Each of these findings is in issue on appeal.

The appeal

[52] We turn to the grounds of appeal. These Mr Patterson, who appeared for the Gillibrands, summarised as follows:

³⁰ At [215]–[216].

³¹ At [217].

³² At [225].

³³ At [226].

³⁴ At [228].

- (a) Mr Swanepoel breached his duty to inquire into relevant matters, to warn of specific risks and likely consequences, and to ensure that the risks and consequences were understood;
- (b) Woodhouse J erred in his factual findings to the contrary; and
- (c) the Judge ought not to have admitted, or given much weight to, the opinion of Mr Darlow much of which was prepared by others or inadmissible argument.

The pleadings issue

[53] Ms Twomey, who appeared for Mr Swanepoel, submitted that the case was not pleaded as breach of a duty to warn. Rather, the pleading was that Mr Swanepoel negligently advised that the mistreatment allegation supplied good grounds for resisting removal. Prior to the hearing the Gillibrands attempted to file amended grounds of appeal that sought to appeal the Judge’s finding that “the Respondent had no duty to enquire, warn and/or ensure that the Appellants understood the risks arising from” several actions of Mr Holgate. Mr Swanepoel abided a decision as to whether leave should be granted, but emphasised that the Gillibrands ought not be able to advance new arguments on appeal or change their position on appeal.

[54] This issue appears to have its origins in an attempt by counsel for the Gillibrands to file a further amended statement of claim at the closing of the trial. Woodhouse J refused leave to do so, reasoning that the amended statement of claim then before the Court was sufficiently particularised and that the Gillibrands should not have been able to rely on numerous additional allegations of breach that were unpleaded.³⁵ Some of these are detailed in closing submissions for the Gillibrands, including an allegation that Mr Swanepoel ought to have warned the Gillibrands that their case was weak, and ought to have overseen, questioned and intervened if Mr Holgate was not carrying out his brief competently.

³⁵ At [90]–[91].

[55] We accept that the amended statement of claim before the Court is somewhat opaque as to whether a duty to warn was being pleaded. It refers to a claim that Mr Holgate was acting as Mr Swanepoel’s agent, and twice pleads as particulars that Mr Swanepoel “failed to advise the plaintiffs of Mr Holgate’s intention to change strategy” at certain points in the narrative. It does not appear that several of the amended grounds of appeal in this Court were averred to in the pleadings with specificity; the amended notice of appeal adds multiple particulars of a duty to warn, including with reference to Mr Holgate’s letter to the Public Trust (where he initially compared the Bupa facility to Auschwitz) and his letter to Gibson Sheat (where he referred to Bupa as “that blood-sucking client of yours).

[56] That said, the Judge dealt with the level of supervision Mr Swanepoel should have had of Mr Holgate. We have set out above his findings on the subject; to repeat, the Judge found that Mr Swanepoel exercised the amount of supervision appropriate for his role as solicitor, did not rely blindly on Mr Holgate’s advice and sought instructions from Chris directly. This suggests that, even if the pleadings were opaque, the Judge was concerned to address the argument that Mr Swanepoel had not monitored Mr Holgate enough or warned the Gillibrands of his conduct.

[57] In this Court Mr Patterson claimed that the addition of the duty to warn to the notice of appeal was done out of an abundance of caution. While that is perhaps stretching matters, we do not consider there is any real prejudice to Mr Swanepoel from allowing the argument to be run in this Court. It proceeds on the basis of evidence that was in issue at trial, and we are not convinced that there is a reasonable prospect that the defence would have been run differently had counsel been clearer as to the arguments at trial.

[58] We grant the application to amend the notice of appeal accordingly.

Did Mr Swanepoel breach his duty to the Gillibrands?

The instructing solicitor’s duty

[59] Speaking generally, by offering legal services a solicitor represents to a client that he or she possesses adequate skill, knowledge and learning for the business to be

conducted.³⁶ The standard of care required is that of a qualified, competent and careful lawyer in the circumstances.³⁷

[60] Generally, the solicitor must follow the client's instructions, whether they are wise or not, and this extends to the presentation of the client's case in court. The solicitor must advise on legal weaknesses and the risk of failure. In the ordinary way, a solicitor may rely on the advice of counsel to discharge their duty, provided the advice comes in properly reasoned form and the solicitor is satisfied, after appropriate consideration, that the advice is tenable. Appropriate consideration does not mean that the solicitor must replicate the consideration given by counsel or deploy the same skill and experience.³⁸ If the solicitor thinks counsel's advice is "obviously wrong", the solicitor should reject it, as Kirby J put it in *Boland v Yates Property Corp Ltd*.³⁹

Ordinarily in a divided legal profession it is responsible conduct for a solicitor (particularly if he or she has no disclosed specialist experience in a field of legal practice) to rely upon a competent barrister's advice. Doing so makes proper use of the specialised bar. However, the solicitor must not accept the barrister's advice blindly. He or she retains a legal duty to the client, separate, independent and personal, both by reason of the general law of negligence and the contract of retainer. The solicitor must exercise independent judgment to the extent that it is reasonable to demand this having regard to the solicitor's reputed knowledge and experience, the complexity of the case and the skill and experience of the barrister who has been retained. If the solicitor reasonably considers that the barrister's advice is obviously wrong, it is the solicitor's duty to reject that advice and to advise the client independently, including as to the wisdom of retaining a fresh barrister.

(Footnote omitted.)

[61] This is not the case to review these principles. Accordingly, we accept that Mr Swanepoel continued to owe professional duties to the Gillibrands after Mr Holgate was briefed. He was required to consider counsel's advice, when made aware of it, and if he thought the advice was obviously wrong he ought to have told the Gillibrands that was his opinion.

³⁶ *Cavell Leitch Pringle & Boyle v Thornton Estates Ltd* [2008] NZCA 191, [2008] 3 NZLR 637 at [31], citing *Bannerman Brydone Folster & Co v Murray* [1972] NZLR 411 (CA) at 421.

³⁷ G E Dal Pont *Lawyers' Professional Responsibility* (6th ed, Lawbook Co, Sydney, 2017) at [5.165].

³⁸ *Harley v McDonald* [1999] 3 NZLR 545 (CA) at [85].

³⁹ *Boland v Yates Property Corp Ltd* [1999] HCA 64, (1999) 167 ALR 575 at [142].

Did Mr Swanepoel breach a duty to intervene?

[62] Mr Patterson argued that on at least four occasions Mr Swanepoel ought to have known that Mr Holgate's strategy "presented specific risks".

- (a) In February 2013 he became aware that Mr Holgate had drafted a letter to Gibson Sheat in which he likened the care facility to Auschwitz. Mr Swanepoel intervened and Mr Holgate removed the reference from what became his letter of 8 February 2013.
- (b) In March to May 2013, when he became aware that the mistreatment allegations were being advanced.
- (c) On receipt of the warning letters of 30 May and 11 July 2013 from Gibson Sheat.
- (d) From August 2013, when Bupa complained to the Law Society and sought costs against counsel personally.

[63] The Judge found, as we have noted, that Mr Holgate embarked on his litigation strategy without telling Mr Swanepoel. We have not been persuaded that his findings about that were wrong. It is clear that Mr Holgate took instructions direct from the Gillibrands, who preferred it that way, and filed papers under Mr Swanepoel's name without consulting Mr Swanepoel. It was late in the day — about 11 July — that Mr Swanepoel first learned what exactly had been alleged. And Mr Swanepoel acted reasonably when dealing with the earlier Auschwitz comment, remonstrating with Mr Holgate, insisting the reference was removed and accepting at that early stage that it was a momentary lapse in judgment.

[64] We also consider that it was not negligent to think, as Mr Swanepoel did when Mr Nola came to him, that Bupa's treatment of Gordon might be useful to the Gillibrands in negotiations with Bupa. Nor was it unreasonable to rely on the opinion of counsel, who held himself out as expert in medico-legal matters, to the effect that mistreatment might assist the Gillibrands on the removal application. Mr Holgate was adamant that there was a sufficient foundation for the allegations.

[65] This brings us to what in our view is the dispositive factual contest on this appeal. It concerns what Mr Swanepoel did when he saw the second and third oppositions and confronted Gibson Sheat's vigorous and well-founded condemnation of what had been done.

[66] Mr Swanepoel's evidence in chief was that before replying on 12 July to Gibson Sheat's letter of 11 July he called Mr Gillibrand and went through Gibson Sheat's letter with him. He warned Mr Gillibrand that the removal application was likely to succeed and the estate "could be required to pay costs." Chris confirmed that he was happy with what Mr Holgate was doing.

[67] In cross-examination Mr Swanepoel confirmed the discussion with Mr Gillibrand and explained that he had warned that they might have to pay a percentage of Bupa's costs. He did not warn about the risk that they might have to pay indemnity costs:

Q. So it's your evidence, would it be your evidence that you advised Chris and Mary Gillibrand that there was a risk that they could have to pay some costs?

A. My advice to Chris and Mary was yes, if they lost then there's always the risk that they would have to pay not only the debt but also the costs of the other side. At that time what I envisaged that they'd actually have to pay ... the scale costs as amended by the Court which normally is not the full amount of the costs. I had never anticipated and never advised them that they could actually face indemnity costs, no.

Q. But you never told them what scale costs were, did you?

A. As far as I can recall I think we actually talked about percentages.

Q. Percentages of what?

A. Of what the other sides costs were.

...

Q. Percentages.

A. Yes. They could be liable for up to 60% of the other sides costs.

[68] Mr Gillibrand denied having any such discussion with Mr Swanepoel, but the Judge accepted Mr Swanepoel's evidence.⁴⁰ Mr Patterson challenged the Judge's findings that the Gillibrands directed Mr Swanepoel to leave matters with them and Mr Holgate (and that they were effectively directly instructing Mr Holgate), but those findings were based on credibility findings relating to the Gillibrands and were plainly open to the Judge on the evidence.

[69] The appeal then reduces to the question whether Mr Swanepoel breached his duty by failing to warn that costs might be awarded on an indemnity basis. Mr Patterson emphasised that Mr Swanepoel did not detail this risk to the Gillibrands, nor did he recommend an adjournment or suggest the Gillibrands seek independent advice. If he had the Gillibrands might have withdrawn the mistreatment allegations. Ms Twomey rejoined that this was one of the particulars of breach advanced in closing submissions that the Judge did not make a finding on. It was advanced at too late a stage.

[70] We do not accept that Mr Swanepoel was required to do more than he did in the circumstances. He warned the Gillibrands he disagreed with Mr Holgate's strategy and they demurred.

[71] It follows that Mr Swanepoel discharged any duty to warn of error in counsel's advice and the risk that the defence would not only fail but also sound in costs.

[72] We also accept Ms Twomey's submission that it would have made no difference had Mr Swanepoel intervened more forcefully, or even withdrawn. The Gillibrands were committed to following Mr Holgate's advice.

[73] We record finally that Mr Patterson also contended that Mr Swanepoel was at fault for recommending Mr Holgate in the first place. There is nothing in this point. He had no reason to doubt Mr Holgate's competence or judgment when he first briefed him, and this was not a difficult matter.

⁴⁰ HC substantive judgment, above n 1, at [215]–[216].

Was the Judge wrong to admit the evidence of Mr Darlow?

[74] As noted above at [50(c)], the Judge relied on the evidence of Mr Darlow that, speaking generally, Mr Swanepoel acted as a reasonably competent solicitor would have acted. Mr Patterson contended that Mr Darlow's evidence amounted to impermissible advocacy, commented on legal matters that were properly for the Judge and was not prepared by him or based on specific information set out in his brief. He also contended that Mr Darlow had insufficient knowledge of the issues surrounding solicitors briefing barristers and that in any event the evidence was not substantially helpful because the trial Judge was well placed to rule on the practice of solicitors briefing barristers.

[75] Ms Twomey submitted in response that Mr Darlow freely admitted that his evidence was based on the assumption that Mr Swanepoel was correct in his evidence, and in that sense it was not an exercise in advocacy. He was a well-qualified expert, and it was entirely appropriate for him to refer to case law in formulating his views on the appropriate conduct for a solicitor in the circumstances.

[76] Section 25 of the Evidence Act 2006 sets the test for the admissibility of expert evidence. The evidence must be of substantial helpfulness to the Judge before it is admissible;⁴¹ substantial helpfulness is an amalgam of relevance, reliability and probative value.⁴²

[77] The Judge did not refer to the evidence in detail, but he referred to it as supporting the conclusions he had reached.⁴³ He evidently found it substantially helpful. We are not prepared to interfere with his assessment.

Result

[78] The application to amend the notice of appeal is granted.

[79] The appeal is dismissed.

⁴¹ Evidence Act 2006, s 25(1).

⁴² *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR 750 at [94].

⁴³ HC substantive judgment, above n 1, at [225].

[80] The appellants are jointly and severally liable to pay the respondent costs for a standard appeal on a band B basis and usual disbursements.

Solicitors:

Woodward Chrisp Lawyers, Gisborne for Appellants

Robertsons Barristers & Solicitors, Auckland for First Respondent