JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 93/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	**KATHRYN SHIELDS-BRODBER**	**PLAINTIFF/ APPELLANT**
AND	**RALSTON SMITH**	**DEFENDANT/ RESPONDENT**

Miss Carol Davis for the appellant

David Johnson, instructed by Piper and Samuda, for the respondent

October 22, 23, 1998; March 3, 4; July 26, 27, 1999 and July 31, 2000

RATTRAY, P.:

I find myself greatly assisted by the submissions of Counsel on what is a novel point with no direct authorities being provided.

Kathryn Shields-Brodber, the plaintiff/appellant in this appeal, suffered injuries in a motor vehicle accident in June 1989 and was awarded damages in an action brought by her in the Supreme Court and tried before Cooke, J.

In relation to the quantum of damages, the plaintiff/appellant challenged the judge's assessment on appeal on the ground that it was too low.

Mrs. Shields-Brodber was at the material time of the accident a lecturer in the Department of Linguistics of the University of the West Indies and she maintained that consequent on the injuries which she suffered in the accident her prospects for promotion at the University were substantially adversely affected.

In this regard, she was supported by the evidence of Dr. Hubert Devonish, the Head of her Department at the University of the West Indies. He evidenced a reduction in her capacity for publication and described it as slow in comparison to her former output. This would affect her prospects of promotion to senior lecturer. His cross-examination was minimal.

How did the trial judge deal with the evidence of Dr. Devonish? He regarded the case as not one involving mental impairment and stated:

> "It is my view that the highest that the plaintiff can say is that because of the injuries I was prevented from putting myself within the class of persons eligible for promotion. Having come to this view I think the proper approach is to regard the pain and suffering which precluded her from putting herself within that class as part of the loss of amenities and pain and suffering."

In practical terms, therefore, the evidence of Dr. Devonish did not cause the trial judge to award damages consequent on her disadvantage in relation to promotion, which indeed was the purpose for which he had been

called. I make this review in order to put into context the complaint now being considered.

Dr. Devonish was in fact the husband of Miss Carol Davis, Counsel for the appellant. As a professional person she maintained her maiden description and carried on her practice under that name. The fact of her relationship with Dr. Devonish, the witness, was not disclosed and Counsel for the respondent was not aware of it.

The hearing of the appeal was part-heard and adjourned sine die. It then came before the court for continuation on the 3rd March, 1999.

In an affidavit sworn to on the 2nd March, 1999, and filed in the court, Mr. David Johnson, Counsel for the respondent, deponed that in late April 1999 he received information, of which he was not previously aware, that Dr. Devonish was, at the time he gave evidence, and is, in fact the husband of Counsel for the appellant, Miss Davis. This information he confirmed on March 1, 1999, by making direct inquiry of Miss Davis.

Mr. Johnson contends in his affidavit that the evidence of Dr. Devonish was proffered to establish the following:

> **(a)** that the plaintiff/appellant was an excellent teacher active in university service;
>
> **(b)** the plaintiff/appellant was above average in the areas of research and publications and had a good memory;
>
> **(c)** bearing in mind the potential and achievement demonstrated by the plaintiff/appellant up to 1989, all things being equal it was expected that the

> plaintiff/appellant's application in 1993 for a senior lecturer's post would have had a very good chance of succeeding. He evaluated this chance at 80%.

Mr. Johnson maintained that the failure of the attorney-at-law, Miss Davis, to disclose to the court the fact that her witness, Dr. Devonish, was her husband had the following effect:

> "**(a)** it precluded the Honourable Court from properly assessing whether the evidence of Dr. Devonish was unbiased ('unvarnished') and consequently to either accept or reject the same having regard to the existing circumstances;
>
> **(b)** it prevented me from testing Dr. Devonish's credit as an unbiased witness given the benefit that his said evidence may have afforded to the plaintiff/appellant and by extension to his wife."

Mr. Johnson, therefore, maintained that there was a duty on Miss Davis to disclose to the court the relationship between the witness, Dr. Devonish, and herself, that the non-disclosure was material and that Counsel's failure to disclose severely prejudiced the defendant's case and goes to the root of this appeal.

The court adjourned the proceedings and on resumption Lord Anthony Gifford, Q.C., requested and obtained the permission of the court to make submissions as amicus curiae and the contrary propositions were contended for by Mr. Charles Piper who now appeared, for the purposes of this argument, with Mr. Johnson.

The question then which has to be determined at this stage is whether there was a duty on Counsel (Miss Davis) to reveal a material relationship

with the witness (Dr. Devonish) called by her to support the claim for damages.

We have not been provided with any authority to support the proposition that Counsel in a civil action has a duty to disclose to the court a special relationship such as arises in this case between himself/herself and the witness called to support the client's case. The fact, however, that no authority has been unearthed to this effect does not remove from the court the duty to examine the issues raised on the principles governing Counsel's conduct in a hearing by the court.

The first question would be whether Counsel or the client would have received an unfair advantage by the non-disclosure.

I understand Mr. Johnson's position to be that had he been aware of the relationship he may have probed the witness more assiduously in his cross-examination.

If I can interpret this to mean that he may have suggested that Dr. Devonish had skewed his evidence to favour the plaintiff because his wife was the plaintiff's Counsel, without any basis on which to make such an obnoxious suggestion, this would have been in breach of the duty of Counsel not to make statements or ask questions merely scandalous and intending only to insult or annoy the witness. Counsel must have some satisfactory basis before he or she can launch such an attack on the witness' credibility. It is not suggested that Mr. Johnson had any such basis. I find it difficult,

therefore, to unearth a legitimate purpose which would permit Counsel to probe in this manner.

I cannot find also in the canons of professional ethics any provision creating a breach because of a non-disclosure by Counsel of her relationship with the witness. Indeed, if Counsel had disclosed to the court her special relationship with the witness it may well have been interpreted as an attempt to have the trial judge favour the witness by virtue of that personal relationship with Counsel.

Mr. Piper has frankly stated that there is no question of professional misconduct being canvassed and has identified the relevant questions to be: (1) whether or not there has been non-disclosure of a material fact in the circumstances of the case; (2) the nature of the non-disclosure through its effect.

He raises the possibility of bias because of the relationship, which would remain secret because of the non-disclosure. We will need, therefore, to apply the principle being canvassed in relation to the facts of the case. This non-user of her husband's name by Miss Davis has not come into being for the purposes of the case. In our modern world, it is not particularly unusual amongst husbands and wives who practice or belong to differing professions. The materiality of the non-disclosure to the facts of this case eludes me.

Mr. Piper has asked us to examine the duties of Counsel in the conduct of a trial. He has made reference to the dicta of Lord Esher, M.R. in ***Re: G. Mayer Cooke*** (Times Law Report for week ending 20/11/1888 Vol. 5 page 407), in dealing with the duty of a solicitor that:

> "He had however a duty to the court, and it was part of his duty that he should not keep back from the court any information which ought to be before it."

I doubt very much whether in 1888 Lord Esher would have been contemplating a position in which a female practising Counsel would have as witness in a case a husband who was also a professional person giving professional evidence, and there being no disclosure that Counsel was the husband of the witness because they practised under different surnames.

The inhibiting social shackles on the ladies of that age did not accommodate the emergence of such a phenomenon in the 19th century either in England or in Jamaica.

Reliance has been placed on ***Meek v. Fleming*** [1961] 3 All E.R. 148 where the defendant who gave evidence had been a Chief Inspector of Police but was at the time of the trial a Station Sergeant, having been reduced in rank by virtue of a disciplinary breach. This reduction in rank was concealed on the advice of his lawyers. At his trial he attended in civilian clothes and was referred to as Chief Inspector despite his demotion and paraded as such with the full agreement and collusion of his lawyers. That deception led to the order for a new trial, fresh evidence having emerged as to the true status

of the witness at the time of giving evidence. Holroyd Pearce, L.J., at page 153 stated:

> "Where, however, the fresh evidence does not relate directly to an issue, but is merely evidence as to the credibility of an important witness, this court applies a stricter test. It will only allow its admission (if ever) where, per Tucker, L.J., in ***Braddock v. Tillotson's Newspapers, Ltd.*** [1949] 2 All E.R. 311; [1950] 1 K.B. 53:
>
> > 'the evidence is of such a nature and the circumstances of the case are such that no reasonable jury could be expected to act on the evidence of the witness whose character has been called in question',
>
> or, per Cohen, L.J. [1949] 2 All E.R. 312; [1950] 1 .B. 56,
>
> > '...where the court is satisfied that the additional evidence ***must*** have led a reasonable jury to a different conclusion from that actually arrived at in the case.'
>
> Counsel for the plaintiff claims that the fresh evidence in the present case satisfies even that strict test. Whether that be so it is not necessary for us to decide.
>
> Where the judge and jury have been misled, another principle makes itself felt. Lord Esher, M.R., in ***Praed v. Graham*** (1889) 24 Q.B.D. 55 said:
>
> > 'If the court can see that the jury in assessing damages have been guilty of misconduct, or made some gross blunder, or have been misled by the speeches of the Counsel, those are undoubtedly sufficient grounds for interfering with the verdict...' "

Mr. Johnson's affidavit is in fact in the nature of fresh evidence and to merit consideration its relevance has to be established.

In the instant case, there is nothing to suggest that the trial judge was misled by the fact that Miss Davis practised in the name she had always used professionally and did not disclose that Dr. Devonish, the witness, was her husband. The relevance of that fact to the trial judge, in making his determination in the case eludes me as, indeed, the relevance of the contents of Mr. Johnson's affidavit.

Nor does the complaint find support in the passage from Lord Reid's judgment in ***Rondel v. Worsley*** [1969] 1 A.C. 191 at 227-228 which states that:

> "Every Counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him."

Complaints against Counsel in these regards must establish the malafides of Counsel and none appear in this case. Furthermore, even in cases of professional misconduct by Counsel in a specific case it does not necessarily follow that the effect will be the allowing of an appeal on that ground and ordering a new trial. The likely consequence of the effect of the misconduct on the determination of the court in the trial is what is relevant to a judicial decision as to whether to allow an appeal or not.

It is necessary to note as far as unprofessional conduct is concerned that no trick or deception is unearthed with respect of the conduct of the trial by Miss Davis.

I can, therefore, find nothing in the canons of ethics governing the practice of the legal profession which had been breached by Miss Davis in practising in the name in which she has always practised and calling as a witness the Head of the Department at the University to which the plaintiff was attached to give a professional assessment of the effect of Mrs. Shields-Brodber's injuries on her career path which could in any way affect one way or the other the assessment of the determination of the trial judge in this regard.

I would rule, therefore, that the application to order a new trial, consequent on the allegations in Mr. Johnson's affidavit, be refused.

I am grateful for the full exploration by both Lord Gifford, Q.C., and Mr Piper of the issues raised.

HARRISON, J. A.

I agree with the reasoning and conclusion of Rattray, P. (Retired) and I have nothing further to add.

Downer, J.A: (Dissenting)

An important point of law has arisen during the course of this appeal. This Court has to determine whether Miss Carol Davis of counsel had a duty to disclose to the Court below that the witness Dr Hubert Devonish the head of the Department of Language, Linguistics and Philosophy at the University of the West Indies was her husband. It is a matter which touches and concerns the inherent jurisdiction of this Court recognised by section 5(1)(b) of the Legal Profession Act. The jurisdiction is exercised to ensure that the highest standards of conduct by counsel are maintained in the administration of justice. Carberry J.A. put it thus in **W. Bentley Brown v Raphael Dillion and Sheba Vassell** (1985) 22 JLR 77 at page 94:

> "Apart from these statutory provisions, the courts exercised over solicitors and attorneys an inherent jurisdiction as they were officers of the court, and as such bound to do what was considered right and just, regardless of whether or not they were liable in law. For example, undertakings given by them in their capacity as solicitors were enforceable by the courts whether they created a legal obligation or not: Re a solicitor **ex parte Hayles** (1907) 2 K.B. 539 (1907) All E.R. 1050; **United Mining and Finance Corpn v Beecher** (1910) 2

> K.B. 296. Further, they might be held liable to pay costs incurred by the other side due to their default in the conduct of the litigation; **Myers v Elman** (1940) A.C. 282."

Recounting the history, the learned judge stated at page 110:

> "Section 41of the Legal Profession Act refers to a schedule 5 consisting of laws repealed by the new Act; they include the entirety of (a) the Old Jamaica Bar Regulation Law (Cap.171), (b) the Solicitors Law (Cap. 363), (c) the new Bar Regulation Law, Law 3 of 1960, and in addition section 19 of the Judicature (SC) Law, (Cap. 180). The fact that a repealing law has itself been repealed does not of course revive the laws that it repealed. The draftsman of the Legal Profession Act has however gone out of his way to repeal all the sections, wherever they were to be found, that recognized in the judges of the Supreme Court an inherent jurisdiction over both solicitors and barristers. The reason appears to have been because it was thought that such inherent powers related solely to the disciplining of these legal practitioners by striking off or suspending and these particular powers had now been given to disciplinary committees appointed for that purpose. This was of course not so, as reference to cases dealing with the enforcement of undertakings and costs will show: see again **Myers v. Elman** (1940) A.C. 282. However the insertion in the new Legal Profession Act of Section 5 (1) (b) which expressly makes the Attorney-at-Law 'an officer of the Supreme Court' will have the effect of once again recognizing the learned judge of the judges (sic) over the legal practitioners, so that one may perhaps say 'all is well that ends well'."

Dr Devonish was examined by Miss Davis and he gave evidence on the probable delayed promotion of Kathryn Shields-Brodber, a lecturer in his department as a result of her injuries from a motor car accident for which Ralston Smith was found liable by Cooke J. at the trial. Mr David Johnson, counsel for the defendant told this court that he had no knowledge of the relationship between Carol Davis and Dr Devonish. His cross-examination was therefore restricted and he had no opportunity to adduce evidence of bias, if he would have chosen to do so. Mr Charles Piper who appeared at this stage of

the proceedings asked that a new trial be ordered. Lord Gifford sought and obtained permission to appear as counsel for Miss Davis. He presented skeleton arguments, made oral submissions and cited authorities and suggested that there was no duty to disclose the relationship, and that the hearing of the appeal should continue. He was certainly no mere amicus except in the extended way it was put by Lord Morris in **Rondel v Worsley** [1969] 1 A.C. 191 at page 247. It is against this background that the issue raised must be determined.

Is full disclosure of material facts a necessary incident of adversary proceedings?

In order to ensure justice, there are procedural rules which make provision for further and better particulars, interrogatories and discovery of documents. For the system to work effectively the proper conduct by counsel is essential. It is for the Courts to ensure the requisite conduct, and in so doing we do not confine our search to finding direct authorities but find the principle which governs those authorities. The principles of the common law are capable of accommodating new factual situations, and common law judges always relied on analogies to ensure the vitality and relevance of the unwritten law. In addition to section 5(1)(b) of the Legal Profession Act there are statutory rules and the General Legal Council which reinforce the role of the court in this critical area of the law. These rules are embodied in The Legal Profession (Canons of Professional Ethics) Jamaica Gazette Rules Proclamations, and Regulations December 29, 1978 which reads:

"CANON VIII
General

(a) Nothing herein contained shall be construed as derogating from any existing rules of professional

conduct and duties of an Attorney which are in keeping with the traditions of the legal profession although not specifically mentioned herein.

(b) Where in any particular matter explicit ethical guidance does not exist, an Attorney shall determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

*(c) Where no provision is made herein in respect of any matter, the rules and practice of the legal profession which formerly governed the particular matter shall apply in so far as is practicable, and a breach of such rules and practice (depending on the gravity of such breach) may constitute misconduct in a professional respect".

The generality of these canons are of sufficient breath to cover modes of conduct or misconduct not covered by previous authority. Also, they rightly assume that attorneys-at-law are men and women of principle and when confronted with ethical issues which underpin the law they will be guided by the moral rules which govern the profession so as to ensure the integrity of the legal system.

So we turn to the method by which a witness comes to give evidence in court. Since 1972 there has been a fused profession, so counsel in court is frequently the same lawyer who takes the witness statement. It would be a misreading of human nature to assume that the close and intimate relation between husband and wife are totally discarded at this stage of the proceedings. So the relationship should be disclosed to the court so that the assessment of evidence can take into account this important fact. Then there is need for disclosure so as to enable counsel on the other side to carry out an effective cross-examination. Fairplay is essential to ensure justice for the opposing party.

Equally, in marshalling of the evidence without disclosing the relationship, Miss Carol Davis could have created an impression of detachment which generally impresses tribunals.

Also relevant in this jurisdiction is section 21 of the Legal Profession Act which permits contingency fees.

Transparency is the life blood of our system. Our courts are open. The public is in attendance and the press is there to inform the public. It is by full disclosure that the public can have confidence in the impartial administration of justice. I am compelled to set out these circumstances because when the issue was raised by Mr Johnson, Miss Davis stated in court she had done no wrong in failing to disclose, that her husband was the essential witness on this aspect of the case. Further, she presented an affidavit of some seven paragraphs defending her position. She has also retained Lord Gifford Q.C. to make submissions on her behalf. He was of great assistance to the court. In fairness to him I must cite the opening paragraph of his skeleton argument to demonstrate that he has tended to confuse the role of friend of the court with that of counsel on behalf of Miss Carol Davis. Here are the opening paragraphs:

> **Skeleton argument on behalf of**
> **Carol Davis, Attorney-at-Law**
>
> **"BACKGROUND**
>
> I have been instructed to represent Carol Davis, attorney-at-law appearing for the Appellant, following a hearing before the Court at which Counsel for the Respondent submitted:
>
> (a) that he had learnt for the first time that Ms Davis was the wife of Prof. Hubert

Devonish, who gave evidence for the Appellant at the trial;

(b) that this relationship ought to have been disclosed to the Court and to himself;

(c) that his client's interests were prejudiced by his not being able to have cross-examined Dr. Devonish as to the possible bias which might arise from his relationship to Ms Davis.

2. As the conduct of Counsel has been impugned, I seek leave to appear as amicus to make submissions on her behalf. I do not appear for the Appellant. I seek only to submit that there was no duty upon Ms. Davis to disclose her relationship to the Court or to the other side, and no failure on her part in the professional discharge of her duty".

If Lord Gifford was amicus in the conventional mode he would present such authorities as he thought necessary but would not ask for a specific result. Turning to the specifics of the skeleton arguments, here is how it reads at paragraphs 14 and 15:

"COUNSEL HAD NO DUTY TO INFORM THE COURT

14. It is submitted that if there was no duty to inform the defendant, then fortiori there was no duty to inform the Court. Nothing in the Canons of Professional Ethics suggests such a duty. No question of conflict of interest arose

CONCULSION

15. The Court is respectfully invited to hold:

(1) That Carol Davis, attorney-at-law, had no duty to inform the defendant or his Counsel, or the trial judge, that the witness Prof. Devonish was her husband.

(2) That the fresh evidence produced to the court by the Respondent, regarding that relationship, can not properly affect any issue in this appeal,

> or be grounds for ordering a new trial, or a new assessment, to be held".

So we must turn to the authorities and the statutory provisions to see how the principle of disclosure is applicable to different factual situations. The disclosure required by the courts have their parallel in many other areas of life. If Ms. Davis were to be retained as counsel to the Department of Linguistics I am sure that Dr Devonish would declare an interest or decline to sit on the appointing committee.

What guidance is there from the authorities?

Lord Esher M.R. in **In re Cooke (1888) 5 TLR 407 35 Sol J 397** states some timeless principles appropriate to those countries whose legal heritage is the common law. It reads in part at page 408:

> "A professional man, whether he were a solicitor or a barrister, was bound to act with the utmost honour and fairness with regard to his client. He was bound to use his utmost skill for his client, but neither a solicitor nor a barrister was bound to degrade himself for the purpose of winning his client's case. Neither of them ought to fight unfairly, though both were bound to use every effort to being their client's case to a successful issue. Neither had any right to set himself up as a judge of his client's case. They had no right to forsake their client on any mere suspicion of their own or on any view they might take as to the client's chances of ultimate success. The duty of a solicitor to his client arose from the relationship of solicitor and client. A solicitor had no relation with his client's adversary which gave rise to any duty between them. His duty was, however, not to fight unfairly, and that arose from his duty to himself not to do anything which was degrading to himself as a gentleman and a man of honour. He had, however, a duty to the Court, and it was part of that duty that he should not keep back from the Court any information which ought to be before it, and that he should in no way mislead the Court by stating facts which were untrue". (Emphasis supplied)

Here Lord Esher states, the duty to fight fairly, the duty to maintain the ethics of a lady or gentleman and the duty to disclose. These three guiding principles can solve most of the issues which confront counsel in conducting a case in court. Then Lord Esher stresses the duty of counsel to apply the ethical rules to the profession, thus on the same page:

> " If either a solicitor or a barrister were willfully to mislead the Court he would be guilty of dishonourable conduct. How far a solicitor might go on behalf of his client was a question far too difficult to be capable of abstract definition, but when concrete cases arose every one could see for himself whether what had been done was fair or not. If a client came to a solicitor with a case which was such that the solicitor must know that it was absolutely and certainly hopeless, and if the client nevertheless insisted on the solicitor going on with the case, although there could be absolutely no doubt as to the result and although the solicitor knew this, then, if the solicitor were to go on with the case in consequence of these mad instructions in order to make cost for himself, he would be betraying his duty to his client and would be guilty of a dishonourable act. But if the solicitor could not come to the certain and absolute opinion that the case was hopeless, it was his duty to inform his client of the risk he was running, and, having told him that and having advised him most strongly not to go on, if the client still insisted in going on the solicitor would be doing nothing dishonourable in taking his instructions".

Lord Esher was mindful that counsel was not bound to assist his opponent, but he stressed the duty not to fight unfairly, thus at page 408:

> " If an attorney were to know the steps which were the right steps to take and were to take a multitude of wrong, futile, and unnecessary steps in order to multiply the costs, then if there were both that knowledge and that intention and enormous bills of costs resulted, the attorney would be acting dishonourably. A solicitor must do for his client what was best to his own knowledge, and if he failed in either of those particulars he was dishonourable. If he knew that his client must succeed and took unnecessary steps in order to swell the bill of costs against his client's opponent that would be dishonourable and unprofessional

> and would be fighting unfairly. These instances, of course, were not exhaustive – many others might be suggested. A solicitor or a barrister was not on the other hand, bound to assist his adversary. If he knew that there was a witness who would assist the adversary and injure his own client he was not only not bound to inform his adversary of this, but he would be betraying his client if he did so. But if he were to know that an affidavit had been made in the cause which had been used and which, if it were before the Judge, must affect his mind, and if he knew that the Judge was ignorant of the existence of that affidavit, then if he concealed the existence of that affidavit from the Judge he would fail in his duty. Of course if he were to make any willful mistatement to the Judge he would be outrageously dishonourable" [Emphasis supplied]

So from the 19th century the principle that counsel should not keep back from the court any information which ought to be before it that counsel should "fight fairly" and that their conduct should be that of ladies or gentlemen of honour was recognised and expressly stated.

Tombling v Universal Bulb Co. Ltd. [1951] [W.N.] 247 demonstrates the difficulty that court faced in applying the principle enunciated by Lord Esher. Sommerville L.J. the presiding judge gave no direct decision on the matter. He put it thus at page 247:

> "On the question whether the court should be aware in all cases that a witness came from prison, as it was when the escort was in uniform, he desired to express no opinion. He could see arguments on both sides. He, having more time than Mr MacDermot to consider what was the right course, thought it would have been better if counsel had omitted to question the witness as to his address and previous position as a prison governor ; but he could not regard what had happened as a trick" [Emphasis supplied]

So the learned judge did not equate Mr MacDermot's conduct with trick, but he was critical of his conduct. It was a word to the wise which the learned judge thought was sufficient.

Singleton L.J. was emphatic and applied the principle which I think was correct.

That learned judge said at page 247:

> " ... that he would have been disposed to direct a new trial, but, as the other members of the court took a different view, he contented himself with expressing regret that a false picture of the witness was before the judge. It ought not to have been. They had been told by Mr. MacDermot that after consideration he had come to the conclusion that it was not his duty to disclose that the witness came from prison, and that if he were under that duty it might equally be said to be the duty of counsel to disclose any previous convictions of a witness. He (his lordship) did not think that was the right approach. In any event it was disposed of by the reply of Mr Elwes that there was a great difference between non-disclosure and affirmation ; and the transcript of evidence showed that counsel had put the question: 'Do you live at 96 Church Road, Stoneygate?'
>
> He (his lordship) was quite sure that if a witness were brought from prison the court and the opposing party ought to know it. He believed that to have been, and to be, the practice. In **The Ethics of Advocacy** Lord Macmillan, at p. 17 said: 'In the discharge of his office the advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to the State and a duty to himself. To maintain a perfect poise amidst these various and sometimes conflicting claims is no easy feat'. It seemed to him that in this case counsel had thought only of his duty to his client to the exclusion of the duty which he owed to others, and, in particular, that which he owed to the court".

This was clear guidance on the issue of failure to disclose as well as unfair conduct by counsel.

Denning L.J. went the other way. His Lordship said at page 248:

> " ... agreed that there was no ground on which the court could enter judgment for the defendants. He desired to add only a few words on the application for a new trial on the ground of improper conduct of the case by the plaintiffs. That raised an important question of professional duty. The duty of counsel to his client in a civil case, or in defending an accused person, was to make every honest endeavour to

> succeed. He must not knowingly mislead the court either on the facts or on the law, but short of that he might put such matters in evidence, or omit such others, as in his discretion he thought would be most to the advantage of his client. So also, when it came to his speech, he must put every fair argument which appeared to him to help his client towards winning his case. The reason was that he was not the judge of the credibility of the witnesses or of the validity of the arguments. He was only the advocate employed by the client to speak for him and present his case, and he must do it to the best of his ability without making himself the judge of its correctness, but only of its honesty. Cicero made the distinction that it was the duty of the judge to pursue the truth, but that it was permitted to an advocate to urge what had only the semblance of it. That was also our English rule: see Professor Christian's illuminating note on Blackstone, Book IV, p. 356.
>
> Applying those tests, he saw nothing improper in the conduct of the case by the plaintiff's counsel ; there was no duty on counsel to tell the judge that a witness came from prison to give evidence, any more than there was to tell him that the witness had had previous convictions. He was quite satisfied that counsel had not intended to mislead the court".

Meek v Flemming [1961] 3 All E R 148 shows how the principle of failure to disclose was applied when the conduct of counsel was deliberate. Here it is of importance to note the affidavit of Ms Carol Davis in which she reiterated her oral submission that she had done nothing wrong. Here are the material parts of her affidavit:

> "3. With regard to paragraph 5 of the said affidavit, I say that the instant appeal is based on the evidence of the Plaintiff and also of her witness, Dr. Hubert Devonish. Dr. Devonish is and was at all material times Head of the Department of Languages and Linguistics and the Plaintiff's Head of Department, and further was the person in the University of the West Indies who had previously evaluated the Plaintiff's work for the purposes of promotion, and who from his experience had knowledge of the promotion system of the University of the West Indies.

4. With regard to paragraph 6 of the said affidavit, I say that I have been married to Dr. Devonish since 1987. Dr. Devonish has now been promoted to Professor of Language, Linguistics, and Philosophy. I have never used the surname Devonish, and as far as I am aware there is no legal requirement for me to do so".

Here is how she answers the issues of not to fight unfairly and her duty to disclose to the court:

"5. With regard to paragraph 8 of the said affidavit, I say that I never informed Mr. David Arthur Johnson of my marital status firstly because he never asked me, and more importantly because I verily believe that my marital status and/or that of Dr Devonish is none of his business. I did not inform the Court of the marital status of either myself or Dr. Devonish. because in my opinion it had no bearing on the matter before the Court. Further, while our marriage is not a secret and we do not deny our relationship, neither my husband nor myself make public announcements with regard to same, since we both regard it as our private business. We are professional persons, and within our respective professional spheres we operate independently. This is one of the reasons why we decided that I would not use my husband's name. In this case Dr. Devonish was giving evidence with regard to a member of his department. In my opinion his relationship with me would in no way affect that evidence, and as such I did not consider it necessary to bring our relationship to the attention of the Court.

6. With regard to paragraph 9 of the said affidavit, I say as follows:

a. With regard to a) I say that the Honourable Mr Justice Cooke is an experienced judge, and well able to properly assess the evidence of Dr. Devonish and all other witnesses that appear before him. Further in the instant case he did in fact assess and accept the evidence of the

witnesses of the Plaintiff, and totally reject the evidence of the Defendant. I verily believe that Dr. Devonish's marital relationship to me was not an issue that affected his credit, and had it been known to the learned Trial Judge, I verily believe that it would in no way have affected his assessment of the evidence. Further Dr. Devonish was called as a witness for the Plaintiff. While to the best of my knowledge and belief everything that he said in evidence was truthful, in our adversarial system it is to be expected that his evidence would be favourable to the Plaintiff.

b. With regard to b., I say that Mr David Arthur Johnson did cross-examine the Plaintiff, and all her witnesses including Dr. Devonish, as to credit and otherwise. Despite his efforts, the learned trial judge accepted all the Plaintiff's witnesses, who were to the best of my knowledge and belief telling the truth. Further save that he was giving evidence on behalf of the Plaintiff, Dr. Devonish did not afford any 'benefit' to the Plaintiff, save her due and just legal rights resulting from the Defendant's negligence. The idea that Dr. Devonish would be biased in his evidence in order to assist me to win a case is frankly offensive and an insult both to his professional integrity and to mine.

7. With regard to paragraph 10 of the said affidavit, I absolutely deny that I have committed any 'material non-disclosure' as alleged or at all. I have practiced law for in excess of 12 years, both in England and in Jamaica. I have never knowingly misled any court. Further I have always done my best to obey the rules of court, and the code of conduct of Attorneys. I am aware of no rule of law or any rule of practice or Canon of the profession that would have required me to disclose my marriage to Dr. Devonish to the Court. As far as I am aware, his relationship with me in no way affected his evidence".

It is important to state how this issue was brought to the attention of the court. The appeal was part-heard on 22/10/98 and 23/10/98. At the resumption on 3/3/99 Mr Johnson raised the issue in court by stating that he had just been informed of the marital status of Miss Davis and made submission to this effect. Miss Davis commenced her reply and asked for an adjournment so that she could be represented by counsel and Lord Gifford appeared. Mr Piper then joined Mr Johnson and it was Mr Piper who addressed the court on this issue. It was in this context that Mr Johnson produced an affidavit dealing with the issue of fresh evidence that arose in this hearing. Both affidavits were expansions and refinement of what was previously said in open court.

Returning to **Meek v Flemming** here is how Willmer L.J. at page 156 put it:

> "In the present case there is no doubt that the course taken, which had the effect of deceiving the court, was taken deliberately. Counsel for the defendant has so informed us with complete candour. I accept his assurance that the decision was not taken lightly, but after careful consideration, and in the belief that the course taken was proper in all the circumstances. But for my part I am in no doubt that it was a wrong decision. I would venture to follow the example of Singleton, L.J., in **Tombling's** case in quoting from Lord Macmillan on **The Ethics of Advocacy**, at p. 17. This is what Lord Macmillan said:
>
> > 'In the discharge of his office the advocate has a duty to his opponent, a duty to the court, a duty to the state and a duty to himself'.
>
> It seems to me that the decision which was taken involved insufficient regard being paid to the duty owed to the court and to the plaintiff and his advisers.
>
> The result of the decision that was taken was that the trial proceeded in a way that it should not have done. Where the court has been thus deceived in relation to what I conceive to be a matter of vital significance. I think that it would be a miscarriage of justice to allow a verdict obtained in this way to stand. For these additional reasons, as well as for

> the reasons already stated by Holroyd Pearce, L.J., I agree that this appeal must be allowed".

Before those words Willmer L.J. had said at page 155-156:

> "I think that the exceptional nature of the present case becomes clear when regard is had to the features which distinguish it from **Tombling v Universal Bulb Co., Ltd.** [1951] 2 T.L.R. 289. There the application was to adduce further evidence by way of cross-examination of a witness for the plaintiff in respect of matters going to his credit. True, he was an important witness, but failure to disclose his record was only of incidental significance. But here we are concerned with evidence relating to the character of one of the parties to the suit, and it is a case in which the character of the parties was of peculiarly vital significance so that failure to disclose the defendant's record amounted in effect to presenting the whole case on a false basis. Next, the matter sought to be proved against the witness in **Tombling's** case was his conviction for a wholly irrelevant offence that is to say, a motoring offence. Here the matter sought to be proved against the defendant was an offence involving not only the deception of a court of law but also a question of police discipline, a matter which, I should have thought was of crucial importance having regard to the issues to be determined. Lastly, in **Tombling's** case what was done was not done knowingly to deceive the court; see per Denning L.J. Had it been done knowingly, Denning L.J., would have regarded it as improper; and it is to be inferred that he would have concurred in the view of Singleton, L.J., that a new trial should have been directed."

Here it must be pointed out that Dr Devonish was the only and vital witness on the issue of the prospects of the promotion to the post of Senior Lecturer. It would have been open to the defendant to call a member of the University Promotion and Assessment Committee responsible for considering Dr Devonish's recommendation. It could then be established whether he painted too rosy a picture of the plaintiff's prospects and whether the picture he painted was biased having regard to his marital status with Ms Davis.

Pearson L.J., was equally emphatic, he said at page 156-157:

> "It was decided, after very careful consideration, that the defendant's case should be conducted in such a way as not to reveal to the judge and jury the fact that the defendant had been demoted from the rank of chief inspector to the rank of station sergeant. Well-devised and effective steps were taken to carry out the decision, with the consequence that the defendant appeared to the judge and jury throughout the trial as a person still holding the rank of chief inspector, and therefore as a highly credit-worthy person, whereas in fact he had been demoted for an offence involving deception of a court. Whatever erroneous analogies may have prompted the decision, which was well-intentioned, it was, in my view, utterly wrong, and it had deplorable results. There was in the result at the trial of this action a deception of the court, and the defendant in cross-examination was giving uncandid (and at one point false) evidence in order to preserve the concealment of the truth".

Turning to the leading judgment of Holroyd Pearce L.J., he said at p. 151:

> "The facts have been agreed between the parties for the purpose of this appeal in the following terms.
>
> > '(1) At the date when the defendant gave evidence at the trial of the action, his true rank in the Metropolitan Police Force was station sergeant. (2) The defendant reduced from the rank of chief inspector to station sergeant on December 16, 1959. (3) On December 16, 1959, the defendant appeared before a disciplinary board on the following charges: (i) Acting in a manner prejudicial to discipline by being a party to an arrangement with [a police constable] whereby that officer purported to have arrested a street bookmaker on October 26, 1959, when in fact you were the officer who made the arrest. (ii) Without good and sufficient cause did omit promptly and diligently to attend to a matter which was your duty as a constable, that is to say having arrested for street betting on October 26, 1959, you did not attend the hearing of the case against him at Thames Metropolitan Magistrates' Court on October 27, 1959. The defendant was reduced in rank to station sergeant on each charge, but on appeal to the commissioner on December 30 the punishment on the second charge was reduced

> to a reprimand, but there was no variation in the first punishment'."

Then Holroyd Pearce L.J. continued thus:

> "It is conceded that those facts were known to the defendant's legal advisers and his counsel, and that as a matter of deliberate policy they were not put before the court. A letter written by the defendant's solicitor on November 21, 1960 pending the appeal says:
>
> > 'The learned Queen's Counsel instructed by me was throughout, as I believe you are aware, in full possession of all the facts relating to my client's past and present status and the reasons for his reduction in rank, and conducted the case in full knowledge of these facts in the manner he felt was consistent with his duty to his client and the court, and he is fully prepared to defend and justify his handling of the case at the proper time if called upon to do so'.
>
> It having been decided not to reveal these facts, the following things occurred at the trial. The defendant attended the trial not in uniform, but in plain clothes, whereas all the other police witnesses were in uniform. Thus there was no visible sign of the defendant's altered status. He was constantly addressed by his counsel as 'Mr', and not by his rank of sergeant. Counsel tells us that he would so address a sergeant in the normal case. When the defendant entered the witness box, he was not asked his name and rank in the usual manner. No suspicions were aroused since no one had any reason to suspect. The plaintiff's counsel, however, and the judge frequently addressed the defendant, or referred to him as 'inspector' or 'chief inspector', and nothing was done to disabuse them".

Turning to **Tombling** here are the learned judge's comments at page 153to 154:

> "In **Tombling v Universal Bulbs Co. Ltd.** [1951] 2 T.L.R. 289 it was sought to adduce fresh evidence on the ground that there had not been revealed to the judge the fact that a highly material witness was at the time of the trial serving a prison sentence for a motoring offence. Counsel had allowed him to give in evidence a residential address which was his normal home, and asked him questions which

indicated that he had in the past held a responsible position. The appeal was dismissed; but Singleton, L.J., described the case as 'near the line'. Denning, L.J., there said:

> 'This case raises an important question of professional duty. I do not doubt that, if a favourable decision has been obtained by any improper conduct of the successful party, this court will always be ready to grant a new trial. The duty of counsel to his client in a civil case – or in defending an accused person – is to make every honest endeavour to succeed. He must not, of course, knowingly mislead the court, either on the facts or on the law, but, short of that, he may put such matters in evidence or omit such other as in his discretion he thinks will be most to the advantage of his client'.

I respectfully agree with those words. Denning, L.J., then discussed the facts of that case, and came to the conclusion that there had been nothing improper in the conduct of the case of the plaintiffs. In that case the failure to reveal was not a premeditated line of conduct. Nor was conviction for a motoring offence so relevant on credibility as the demotion of a chief inspector (who a party to the case) for an offence which consisted in deceiving a court of law as to the accurate facts relating to an arrest. There is no authority where the facts have been at all similar to those of the present case, but in my judgment the principles on which we should act are clear". [Emphasis supplied]

Then the learned Lord Justice further said at page 154:

> "Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so) it would be wrong to allow him to retain the judgment thus unfairly procured. Finis litium is a desirable object, but, it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and to even greater harm than the multiplication of trials. In every case it must be a question of degree, weighing one principle against the other".

Then the learned judge continued thus on the same page:

> "In this case it is clear that the judge and jury were misled on an important matter. I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client. I accept that in the present case the decision to conceal the facts was not made lightly but after anxious consideration. In my judgment the duty to the court was here unwarrantably subordinated to the duty to the client. It is no less surprising that this should be done when the defendant is a member of the Metropolitan Police Force on whose integrity the public are accustomed to rely".

Be it noted that Ms Davis deliberately decided not to reveal her marital position to Dr Devonish. Her quest in this court is for additional damages on the basis of the evidence given by Dr Devonish. The respondent's case is if the decision of Cooke J. is to be disturbed it would be fair for him to be able to cross-examine Dr Devonish on this issue. Further he would bring evidence which could establish bias.

It is now appropriate to turn to the affidavit of David Johnson of counsel at page1 which supported his oral motion:

> 3. "That the trial of Suit No. C.L. C-147 of 1994: **Carolyn Cooper and Katherine Shields-Brodber vs Ralston Smith,** the subject of the instant Appeal, was heard by the Honourable Mr. Justice Cooke on the 23rd, 24th, 28th and 29th days of April, 1997, on which latter date the Honourable Court delivered Judgment in the Second Plaintiff Appellant's favour on the issue of liability. That the proceeds of the said Judgment were subsequently paid over to the Plaintiff/Appellant's Attorney-at-Law, Ms Carol Davis, on or about August 12, 1997.
>
> 4. That during the hearing of the said trial the Plaintiff/Appellant's said Attorney-at-Law (hereinafter referred to as 'the Appellant's Attorney') called Dr Hubert Devonish as a witness on the Plaintiff/Appellant's behalf, from which said witness the following evidence was adduced in support of the Plaintiff/Appellant's claim:-

(a) That the Plaintiff/Appellant was an excellent teacher active in University service;

(b) The Plaintiff/Appellant was above average in the areas of research and publications and had a good memory;

(c) Bearing in mind potential and achievement demonstrated by the Plaintiff/Appellant up to 1989, all things being equal he expected that the Plaintiff/Appellant's application in 1993 for a Senior Lecturer's post would have had a very good chance of succeeding. That he evaluated this chance at 80%.

5. That the above evidence which was adduced from Dr Hubert Devonish is the very basis on which the instant appeal is founded and without which, I do verily believe, the Plaintiff/Appellant's said appeal would be untenable.

6. That on the evening of April 28, 1999 I was advised by a third party that Dr Devonish is the husband of the Appellant's Attorney and that this state of affairs existed in April, 1997, the month during which the said trial was conducted".

To my mind, on this issue, Mr Piper was right and Lord Gifford was wrong in the application of the principle of disclosure and fair play. There are two further aspects of Mr Piper's submission which merit serious consideration. Firstly, immunity of counsel and secondly, bias. It was contended that to ensure fair play advocates are accorded immunity from negligence for their conduct of case in court. In that context the speeches in **Rondel v Worsley** [1969] 1 A.C. 191 were cited. Here is how Lord Reid states the position of counsel at pages 227-228:

> "Every counsel had a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his client's but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him".

Then Lord Reid continues thus at page 228:

> "Is it in the public interest that barristers and advocates should be protected against such actions? Like so many questions which raise the public interest, a decision one way will cause hardships to individuals while a decision the other way will involve disadvantage to the public interest. On the one hand, if the existing rule of immunity continues there will be cases, rare though they may be, where a client who has suffered loss through the negligence of his counsel will be deprived of a remedy. So the issue appears to me to be whether the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable. I would not expect any counsel to be influenced by the possibility of an action being raised against him to such an extent that he would knowingly depart from his duty to the court or to his profession. But although the line between proper and improper conduct may be easy to state in general terms, it is by no means easy to draw in many borderline cases. At present it can be said with confidence in this country that where there is any doubt the vast majority of counsel put their public duty before the apparent interests of their clients. Otherwise there would not be that implicit trust between the Bench and the Bar which does so much to promote the smooth and speedy conduct of the administration of justice. There may be other countries

> where conditions are different and their public policy may point in a different direction. But here it would be a grave and dangerous step to make any change which would imperil in any way the confidence which every court rightly puts in all counsel who appear before it".

Then Lord Morris said at page 247:

> "I pass, therefore, to consider whether so far as concerns what is said or done in the conduct or management of a case in court the public interest requires that an advocate should have immunity. In the first place, it will be helpful to examine the nature of the duty which is owed by an advocate. I think that it must be true to say, as was said in **Swinfen v Lord Chelmsford**, 5 H & N 890 that the duty undertaken by an advocate is one in which the client, the court and the public have an interest because the due and proper and orderly administration of justice is a matter of vital public concern. The advocate has a duty to assist in ensuring that the administration of justice is not distorted or thwarted by dishonest or disreputable practices. To a certain extent every advocate is an amicus curiae. In the Irish case of **Reg. v. O'Connell** (1844) 7 I.L.R. 261 at 313 it was said by Crampton J. that though an advocate for an individual is retained and remunerated for his services 'yet he has a prior and perpetual retainer on behalf of truth and justice'. His duty to the client is to exercise a reasonable degree of care and skill. In the nature of things that, in turn, involves that he must make decisions which call for the exercise of personal judgment". [Emphasis supplied]

Turning to the speech of Lord Upjohn he stated his position at page 282 thus:

> "The second and more important consideration is that the barrister is engaged in the conduct of litigation whether civil or criminal before the courts. He is not an officer of the court in the same strict sense that a solicitor is; if a solicitor fails in his duty to the court he is subject to the jurisdiction of the court, which can, and in proper cases does, make summary orders against him. The barrister is not subject to any such jurisdiction on the part of the judge. To take a simple example: if a solicitor is not present in court personally or by an authorised representative, he is open to be penalised by being ordered to pay personally costs thrown away, at the discretion of the judge. If counsel is not present, it may be that the judge will express

> his views upon the matter but I do not believe he has any power over counsel save to report him to the Benchers of his Inn. But while the barrister is not an officer of the court in that sense he plays a vital part in the proper administration of justice. I doubt whether anyone who has not had judicial experience appreciates the great extent to which the courts rely on the integrity and fairness of counsel in the presentation of the case. I do not propose to expand this at very great length, for it has been developed in the speeches of those of your Lordships who have already spoken upon this matter; but while counsel owes a primary duty to his client to protect him and advance his cause in every way, yet he has a duty to the court which in certain cases transcends that primary duty". [Emphasis supplied]

The summary orders adverted to by Lord Upjohn are explained in **Re Suey** [1892] 2 Q.B. 446 by Lord Esher and **Geoffrey Silver and Drakes v T.A. Barnes** [1971] 1 All E.R. 473 cited with approval by Carberry J.A. in **Imperial Life Assurance Co.v Judah Desnoes and Co.** (1983) 23 J.L.R. 415 at 437.

Lord Gifford stressed the fact that Ms Davis as counsel owes no duty to those who are not her clients. He relied on the following passage of the unreported decision of the English Court of Appeal **Margaret Conolly-Martin v James Joseph Davis** dated 27th May 1999 (Beldam, Brooke, Mummery LJJ), at page 6 which reads

> "Miss Smith submitted, and Mr Richardson did not dispute, that as a general principle counsel owes a duty to his lay client to do for him all that he properly can, with due care and attention. Counsel owes no such duties to those who are not his clients. He is no guardian of their interests, and indeed what he does for his client may be hostile and injurious to his opponents. In the ordinary course of adversarial litigation counsel or solicitor owes no duty to the lay client's adversary.
>
> These general proposition of law are, in my judgment, well settled. See **Orchard v South Eastern Electricity Board** [1987] 1 QB 565, 571F-G and 581B-C; **Business Computers International Limited v Registrar of Companies** [1988] 1 Ch 229, 239F-240C:

> Ll-**Kandari v Brown** [1988] 1QB 665, 672A-F and 675E-676B; **White v Jones** [1995] 2 AC 207, 256D-E; and **Elguzouli-Daf v Commissioner of Police** [1995] QB 335, 348C-F and 352A-C.
>
> During the course of argument we were shown a number of cases where the courts in this country and New Zealand have been willing to hold a lawyer acting for one party liable to compensate the other party (or someone other than his client) without any breach of the principles I have set out above. In addition to the cases listed above, we were also referred to **Batten v Wedgwood Coal and Iron Company** (1886) 31 Ch D 346; **Welsh v Chief Constable of Merseyside Police** [1993] 1 All ER 692; and the New Zealand cases of **Allied Finance and Investments Ltd v Haddow & Co** [1983] NZLR 22, and **Connel v Odlum** [1993] 2 NZLR 257 ".

The principle enunciated in the above unreported case does not in any way detract from the duty of counsel to disclose to the court, the duty to be fair to the court and to a brother counsel which was stated by Lord Esher more than a century ago and has been reiterated during the 20th century. I venture to suggest it is good enough for the 21st century.

As regards the possibility of bias on the part of Dr Devonish, **Cross and Tapper on Evidence** eighth edition was cited. The passage reads at page 336:

> "Bias was more important under the old law when incompetence on account of interest was widespread. If a wife was totally incompetent to testify for a spouse, it was not unnatural for a court to allow a witness to be asked whether she was the mistress of the party for whom she was testifying, and even for her denial to be rebutted. In the modern law it is quite clear that many witnesses such as parties and their close relatives, are likely to be biased, and there is no special need to bring this out. In some cases it may not be obvious, and it is then perhaps desirable to make the true position clear by permitting rebuttal of a denial".

R v Phillips (1936) 26 Cr. App. Rep 17, was cited to support the above paragraph. It was contended that it was impossible to adduce rebutting evidence if the marital relation is concealed. Mr Piper added that the duty to disclose a relationship reaches even to the

doors of the House of Lords to ensure that justice is seen to be done and is in fact done. See **Reg v Bow Street Metropolitan Stipendiary Magistrate Exparte Pinochet Ugarte No. 2** [1999] 2 W.L.R. 272.

Miss Davis is a forthright and able advocate but I think she misjudged the situation in an area devoid of direct authority. This court has had the advantage of reasoned argument and the opportunity of examining the issue from first principles. In exercising the inherent jurisdiction of the court, I would admonish and discharge her and hope that this modest dissent might be of some guidance to the profession.

What ought to be done?

Be it noted that the specific area of appeal concerned loss of earnings on which Dr Devonish was the sole witness. The grounds of appeal are :

> (1) "That the Learned Judge erred as a matter of law and in the light of the evidence in failing to make an award of special damages to the 2nd Plaintiff for loss of earnings prior to the trial date.
>
> (2) That the Learned Trial Judge erred as a matter of law and in the light of the evidence in failing to make an award to the 2nd Plaintiff in general damages for loss of earnings/loss of earning capacity subsequent to the trial date".

This issue ought to be remitted to the Supreme Court for a new trial in the interests of justice.

The passage in the judgment of Cooke J which was challenged in the grounds of appeal reads:

> "This court is of the view that there is a distinction between persons who are injured and because of mental impairment are precluded from progress and this case, which is not a

> case of mental impairment. There is nothing to indicate mental impairment. She is now writing a book. Those cases are not helpful.
>
> It is my view that the highest that the plaintiff can say is that because of the injuries I was prevented from putting myself within the class of persons eligible for promotion.
>
> Having come to this view I think the proper approach is to regard the pain and suffering which precluded her from putting herself within that class as part of the loss of amenities and pain and suffering".

It would be appropriate that the retrial on this issue should be before a different judge. Only then would it be appropriate to consider the grounds of appeal. There ought to be no order for costs for this aspect of the appeal.

RATTRAY, P: (RETIRED)

Consequent on my retirement from the Court of Appeal the following is the appropriate order:

By a majority the hearing of the appeal is to recommence.