A second bite at the cherry?

Handling professional negligence claims arising out of personal injury actions has its own pitfalls. Mary Duncan and Penny Heighway of Henmans advise on how to avoid adding insult to injury.

Professional negligence claims against solicitors who conduct personal injury actions make up about 20% of claims against the profession (Solicitors’ Indemnity Fund annual report 2002). In the writers’ experience of defending solicitors, such claims mostly result from administrative failures, such as missing limitation periods, or delay in the conduct of a case, rather than from ignorance of legal principles.

At some time, most personal injury lawyers will be asked to review a case which has been conducted by another firm. What should you look out for? Might you be negligent yourself and miss the limitation period for bringing a professional negligence claim? The rules are not straightforward.

This article aims to highlight matters that may be overlooked by personal injury lawyers dealing with this type of professional negligence claim.

What has to be proved?
As with any professional negligence claim, the claimant has to establish breach of a specific or implied contractual duty, and/or common law negligence or breach of a fiduciary duty, and that this breach or negligence caused loss.

The test
The correct approach is to judge the defendant solicitor by the standard of a reasonably competent practitioner specialising in whatever area of law the defendant holds themselves out as specialising in – see Green v Collyer-Bristow [1999]. Recent case law suggests that compliance with the common practices of a profession is not always an absolute defence (Bolitho v City and Hackney Health Authority [1997]).

In this type of claim, the breach can be obvious, for example missing a primary limitation period. However, there are many cases which are less straightforward. A solicitor is not expected to be flawless in their judgement, nor possess an encyclopaedic knowledge of legal principles. A solicitor will be judged in the light of the circumstances at the time, although their actions may, with the benefit of hindsight, be shown to have been less than ideal.

There is frequently scope for different opinions and this can most clearly be seen in under-valuation claims. There is often a range in awards when valuing not only general, but also special, damages. Add to this concerns as to which witnesses or experts are likely to be preferred, and a particular figure arrived at for settlement may be justifiable, even if to another professional (with the glorious benefit of hindsight) it may seem like an under-valuation of the claim.

Solicitors will, however, be held liable for advising their client to settle at too low a figure as a result of their failure to make proper enquiries or give proper advice. For example, a client who is short of money and therefore keen to settle, should be advised that an interim payment may be possible.

Reliance on counsel’s advice is not, as is commonly thought, a complete defence. A solicitor must be careful in selecting suitable counsel, and then not blindly rely upon counsel’s advice, but exercise their own independent judgement. However, the more complex the issues, the more reasonable it is to rely on counsel. Solicitors, whether holding themselves out as personal injury specialists or not, are expected to know the provisions of the Limitation Act 1980 (Bond & ors v Livingstone & Co [2001]).

Causation
However obvious, the breach itself must have caused a loss. Even a missed primary limitation period does not necessarily give a good basis for a negligence claim. Was it a hopeless case?
Anyway? Could the claimant have continued to fund the claim?

Loss of chance

When assessing the viability of a claim, an important distinction must be made between what the claimant themselves would have done in a given set of circumstances and what third parties over whom they have no control would have done (Allied Maples v Simmons & Simmons [1995]). If a claimant proves on the balance of probabilities that they would have done x or y, then the court proceeds as if it were historical fact. In relation to third parties, the test is only whether there was a substantial chance that they would have behaved in a certain way.

A claimant in a professional negligence claim is therefore often in a better position than they would have been in the original action. Despite the disadvantage of facing yet another defendant, who this time knows all the weaknesses of the case, the claimant only has to show that they have lost a substantial (not a speculative) chance of success in the original action. This chance may well be less than 50%.

As a matter of practice, the courts tend to lean in favour of the claimant when considering, hypothetically, what would have happened if the defendant solicitors had performed their duty properly.

Harrison v Bloom Camilllin [2000] contains a comprehensive analysis of the method of assessing the value of a lost opportunity to litigate. It also illustrates the numerous barriers that can face litigants relying on a lost chance. In that case, the claimants sued a firm of solicitors for damages which they claimed to have suffered as a result of the defendant’s failure to serve a writ on a firm of accountants within the limitation period. The defendant unsuccessfully argued that, had legal aid been withdrawn, then the claimants would not have proceeded with the action. The court however considered that the claimant’s evidence, on certain issues, would not have been accepted by the judge when trying the action. The court therefore made a deduction of 35% to take into account the uncertainty of establishing negligence and a further discount of 20% for the risk of not succeeding on causation.

The court initially assesses damages on the basis of quantum had the claim been progressed properly, and then scales down the award to take into account the fact that there may have been a range of possible outcomes. Factors include the factual and legal strengths and weaknesses of the original case. When dealing with a case of this type, always check what the original solicitors wrote as to the prospects of success on the legal aid application form, if there is one. The court will consider possible arguments for contributory negligence, difficulties in funding the claim (for example, if the legal aid certificate was withdrawn or the claim had to proceed in a foreign jurisdiction), and whether the claimant would have accepted a lower offer or rejected any offer and pursued the case unsuccessfully to trial.

In the recent case of Brian v Russell Jones & Walker [2002] (a failed defamation claim) the court also took into account the impecuniosity of the original defendant when valuing the quantum of the original claim.

Percentage deductions for loss of chance are extremely difficult to gauge. There may only be a nominal discount of 5 to 10% (if any) in a rear-end shunt road traffic case where liability was conceded by the insurers but the solicitors missed limitation. By contrast, in a case where there was contradictory witness evidence, legal aid was withdrawn and counsel had provided pessimistic advice, then the percentage deduction may be as high as 80%. If possible, try to agree the deduction for loss of chance with the other side as, if the matter goes to trial, it can often be something of a lottery. Part 36 offers can be helpful in reaching agreement on a figure.

Quantifying the loss

The claim should be valued according to the usual principles for personal injury claims and then the loss of chance discount applied. The points below are peculiar to professional negligence claims.

Notional trial date

The parties should attempt to agree the date when the original claim would have been tried or settled had it progressed properly. The date chosen can make a substantial difference to the value of the claim. Solicitors should bear in mind changes in the law which may have affected the original claim’s valuation, including those resulting from cases such as Wells v Wells [1998] (and other changes in the discount rate) or Heil v Rankin [2000] (valuation of general damages) as well as alterations to the rules affecting CRU recoupment.

Events after the notional trial date

Events after the notional trial date should be ignored, save when to do so would result in an absurdity (Charles v Hugh James Jones & Jenkins [2000] – see box above).
Professional negligence pre-action protocol

The structure of the protocol is as follows:

- A preliminary notice is sent, notifying the defendant of the claim and (if possible) the value. This should be acknowledged within 21 days. The defendant should inform its professional indemnity insurers. There is no obligation to take any other further action.

- A detailed letter of claim then follows. This is an open letter. It is worth summarising the complaint along the lines of a draft particulars of claim.

- The defendant must reply with a letter of acknowledgement within 21 days, followed within three months by a letter of response and/or letter of settlement. Unless the defendant denies the claim in its entirety and makes no settlement offer, the parties should negotiate with a view to settlement within six months of the defendant’s letter of acknowledgement.

- Importantly, alternative dispute resolution is encouraged. If a party fails properly to consider mediation to resolve a dispute, adverse costs consequences are likely to follow.

- Unless expiry of a limitation period is imminent, proceedings should not be started before the negotiation period has ended. If proceedings are issued before the end of the negotiation period, a stay will usually be granted by the court for the remainder of the three-month period.

The courts will take into account the overriding objective when considering whether medical evidence which arose after the notional trial date should be taken into account. For example, if the claimant’s original solicitors should have obtained a psychiatric report, the court is likely to allow further psychiatric evidence even if this is obtained after the proposed notional trial date. However in *Sharif v Garrett & Co [2001]* (a failed claim against an insurance broker) the court took a much harder line when the defendant attempted to introduce new evidence. In this case, however, the original claim had been struck out as delay had made a fair trial impossible.

**Interest rates**

The appropriate special account rates apply when valuing special damages in the original claim. From the notional trial date the judgment debt rate of interest should arguably be added to the judgment sum. However, there is conflicting authority as to whether the special account rate should apply (*Harrison v Bloom Camillim (No 2) [2001]*). The court obviously has discretion, so interest may be reduced to take into account any delay on the part of the claimant, or indeed their current solicitors.

**Benefits**

Professional negligence claims are exempt from the CRU regulations, but benefits received by the claimant are still relevant to the valuation of the underlying claim. Benefits are deducted from damages according to the CRU principles applicable at the time of the notional trial date. The old rules will apply to cases with a notional trial date before 6 October 1997, with no ring-fencing of general damages but a £2,500 payment exemption. The benefits position may dictate whether or not there has been any loss at all.

Details of all benefits received by the claimant are available from the claimant’s benefits office direct, not from the CRU. (A form of authority will be required.) Often the relevant information is located in separate offices, so check when you have your income support information that you do not need to write again for details of disability living allowance.

**Damages for upset/inconvenience**

These are generally not recoverable. To succeed, a claimant would have to show that a major or important objective of the contract was to provide pleasure, relaxation, or peace of mind. This is not usually held to be part of the original contract in claims against solicitors. However, if a solicitor has, for example, misled a claimant about the progress of a claim, then a claim in deceit may be brought. Damages for mental distress then may be awarded (*Shelley v Paddock [1978]*).

**Procedural points**

**Limitation**

Time runs in contract from the date of breach, and in tort from the date of damage. However, it is dangerous to assume that the date of damage is when the claim was struck out. For example, in *Khan v Falvey [2002]* the claimant sued his solicitor for failing to pursue three debt recovery claims expeditiously. The solicitor was first instructed in 1986. All claims were struck out for want of prosecution between 1997 and 1999. Proceedings against the solicitors were issued in June 1999. It was held in the Court of Appeal that damage had been suffered by the claimant before the original claims were struck out. It was clear that the value of the claims had been substantially diminished before the strike outs and therefore the bulk of

---

**Reference point**

The CPR Professional negligence pre-action protocol can be found at: www.lcd.gov.uk
the professional negligence claim was statute barred.

In Hatton v Chase [2003], a professional negligence claim was held to be time barred when proceedings against the solicitor had been issued within six years of the striking out of the original claim. The Court of Appeal made it clear that time ran from when the claimant had suffered relevant recoverable damage as a result of the negligent delay. In this case, the damage was caused to the claimant when he had no arguable basis for avoiding the claim being struck out. At that point, the original claim became worthless. On the facts, this was considerably earlier than the date on which the original claim was eventually struck out. The claimant’s argument that his date of knowledge was later, and thus s14A Limitation Act 1980 might assist, was also dismissed.

Protocol
The July 2002 professional negligence pre-action protocol (see box opposite) is now one of the approved CPR pre-action protocols. It therefore must be followed or there may be adverse costs consequences. The protocol requires the claimant to do what they can clearly to formulate, organise and quantify the claim, including putting together all the supporting paperwork and evidence before any proceedings are started.

The protocol puts a similar burden on the defendant in relation to any defence of the claim. However, the burden of investigating the claim is not merely on the defendant, it is on the claimant – or rather on their legal advisers – as well. This contrasts with the pre-CPR practice. The protocol makes a general point that it is the duty of all parties to act reasonably. This includes allowing reasonable extensions of time, which clients sometimes find difficult to accept, particularly if there has already been a considerable delay in proceeding with the original claim.

answer (which usually works on appeal if not before) is that the defendant in the original action would have obtained their own expert evidence, so the best way to achieve justice between the parties is to proceed to obtain further expert evidence. (See also ‘Events after the notional trial date’ above.)

Claims for the future?
In the last few years, the writers have noticed an increase in under-settlement claims and are already seeing new claims arising out of funding issues. Given the enormous changes in personal injury litigation over the last five years, such claims are surely set to increase. It is hoped this article will help to ensure that, when asked to advise claimants on such claims, we will not add insult to injury.

Mary Duncan is a partner and head of the personal injury department and Penny Heighway is an assistant solicitor at Hemmans.

"Given the enormous changes in personal injury litigation over the last five years, under-settlement claims and claims arising from funding are surely set to increase."

Expert evidence
Expert evidence is generally not required to deal with the question of the defendant solicitor’s negligence or breach of duty. However, expert evidence will be required to assist with the value of the underlying personal injury claim. Experts should be asked to consider the case as at the notional trial date or else at several dates, if there is a disagreement between the parties. The defendant may find itself faced with the argument that it should stick to the experts originally instructed for the claimant in the original action. The

Case references
Allied Maples Group Ltd v Simmons & Simmons [1995] 4 All ER 997
Bolitho v City & Hackney Health Authority [1997] 4 All ER 771
Bond & others v Livingstone & Co [2001] PNLR 30
Brins & Anr v Russell Jones & Walker [2002] EWHC 2727 (QB)
Charles v Hugh James Jones & Jenkins [2000] 1 All ER 289
Green v Coleby-Bristow [1999] Lloyd’s Rep PN 798
Harrison v Bloom Camillin [2000] Lloyd’s Rep PN 89
Harrison v Bloom Camillin (No 2) [2001] PNLR 195
Hatton v Chase [2003] EWCA Civ 341
Heil v Rankin [2000] 1 All ER 289
Khan v Falvey [2002] EWCA Civ 400
Sharif & ors v Garrett & Co [2001] EWCA Civ 1269
Shelley v Paddock [1978] 3 All ER 129
Wells v Wells [1998] 3 All ER 481