

Running Professional Negligence claims arising out of Personal injury litigation

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Contents

- Scope of Duty
- What can go wrong in a PI claim?
- What a PN claim arising out of a PI claim is not?
- An example ...

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Scope of Duty?

- What the reasonably competent practitioner would do having regard to the standards normally adopted in his profession.¹
- The precise content of the duty of reasonable skill and care will depend on the circumstances of each case. In particular, the standard of care must be judged by the nature and scope of the retainer.
- Retainer – written, oral or inferred from conduct.

¹ [1996] 1 PNLR 45

Scope of Duty?

- **Miller v Irwin Mitchell²**
 - 13 May 2014 – Claimant fell down stairs on holiday and injured her leg
 - 19 May 2014 – Claimant called Defendant’s legal helpline and was given some advice.
 - November 2015 – Claimant’s leg was amputated due to an infection.
 - January 2016 – Claimant entered into Defendant’s CFA agreement.
- Letter of claim sent – subsequently the Insured became insolvent and the Insurer refused to pay because the insured had not complied with the notification requirement.
- CoA – held that there was no express or implied retainer or any like tortious duty of care in respect of a duty to advise as to how to safeguard against the risk that the potential defendant’s insurer would not cover liability to pay her claim.

² - Miller v Irwin Mitchell [2024] EWCA Civ 53

Scope of Duty?

- Jackson & Powell on Professional Liability 9th Edn Chapter 11-087 provides:

"The question whether the defendant solicitor made a mistake in any given case is usually capable of a definite answer. The question whether a particular mistake was negligent is a matter upon which (in borderline cases) the mere citation of authority is unlikely to be decisive. The judge applies what he perceives to be the standard of "the reasonably competent solicitor", a creature as mythical as the man on the Clapham omnibus."

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Scope of Duty?

- The mere making of a mistake is not of itself sufficient to establish negligence. Lord Diplock expressed it this way:

"If subsequently a barrister is sued by his own client for negligence on what he advised or did in the particular case, he has the protection that the judge before whom the action for negligence against him will be tried is well qualified, without any need of expert evidence, to make allowance for the circumstances in which the impugned decision fell to be made and to differentiate between an error that was so blatant as to amount to negligence and an exercise of judgment which, though in the event it turned out to have been mistaken, was not outside the range of possible courses of action that in the circumstances reasonably competent members of the profession might have chosen to take." ³

³ - Saif Ali v Sydney Mitchell & Co [1980] AC 198

Scope of Duty?

"In this world there are few things that could not have been better done if done with hindsight. The advantages of hindsight include the benefit of having a sufficient indication of which of the many factors present are important and which are unimportant. But hindsight is no touchstone of negligence. The standard of care to be expected from a professional man must be based on events as they occur, in prospect and not in retrospect." ⁴

- The assessment of a solicitor's conduct must take place without the use of hindsight.

⁴ - Duchess of Argyll v Beuselinck [1972] 2 Lloyds Rep 172

Scope of Duty?

- Jackson and Powell on Professional Liability 9th Edn Chapter 11-184:

"The conduct of litigation is in part a matter of routine and in part it is an art. By exceptional ingenuity or foresight, the solicitor may secure advantages (sometimes decisive) for his client over the other party. The skilful use of a request for further information, or a timely application for specific disclosure, may bring the other party to its knees in civil litigation. ... However, the solicitor is not negligent if he fails to display exceptional ingenuity in matters of tactics or procedure. What is required of a solicitor is reasonable competence and reasonable familiarity with the procedures of the courts in which he practices, including following local practice directions."

Scope of Duty?

- Jackson and Powell on Professional Liability 9th Edn Chapter 11-191:

"Decisions on matters of evidence frequently involve a high degree of judgment. Witnesses on the fringe of events or corroborative witnesses often turn out to do more harm than good (if, for example, they are shaken in cross-examination, or their evidence conflicts with that given by the primary witnesses). Errors of judgment made by solicitors in this regard are unlikely to be held negligent. For example, in *Roe v Robert McGregor and Sons Ltd*, [(1968) 1W.L.R. 925 at 930G–930H and 934G–934H] the solicitors acted for contractors who erected a fence and were sued for negligence by plaintiffs who crashed into it. The Court of Appeal held that the solicitors were not at fault in failing to interview a passenger in the car who it was reasonable to suppose would be extremely unlikely to give evidence against his friend the driver and might himself bring an action."

Scope of Duty?

- Even if breach of duty is established, in order for a claim for professional negligence to succeed the Claimant has to show that:
 - The established negligence
 - CAUSED
 - The Loss and Damage complained of



Scope of Duty?

- Burden of proof is on the Claimant to show that he has lost a real and substantial chance of obtaining the outcome he contends for as opposed to a speculative chance.
 - “the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.”⁵

⁵ - Allied Maples Group Ltd v Simmons and Simmons [1995] 1 WLR 1602

Contents

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What can go wrong in a PI claim?

- Fail to issue within 1^o limitation period
 - 3 year time period - most PI claims
 - Extensions – s.33 LA 1980, s.14 LA 1980
 - 2 year time period – The Montreal Convention (Article 35)
 - No extensions
- Fail to serve the claim form within the 4 month validity period
- Fail to obtain expert evidence or obtain permission to rely on it

What can go wrong in a PI claim?

- Fail to comply with court directions
 - Relief from sanction application:
 - If relief not given - claim struck out or unable to rely upon an updated schedule of loss, a witness statement or an expert report etc.
- Fail to pay the trial fee
 - Relief from sanction application:
 - If relief granted may still need to pay the other side's costs of the application

What can go wrong in a PI claim?

- PoC – pleading error ‘out of service London red double decker bus number 67 registration number LK03 **NNJ**’
 - Application to amend was refused (significant delay). Permission to appeal was obtained but appeal Judge upheld the lower courts decision. Permission to appeal to Court of Appeal refused at an oral hearing.⁶
- Simple mistakes can’t always be rectified (e.g. delay) and the consequence can be an £expensive professional negligence claim.

⁶ - *Erdogan & ORS v Firstgroup PLC* [2017] (unreported)

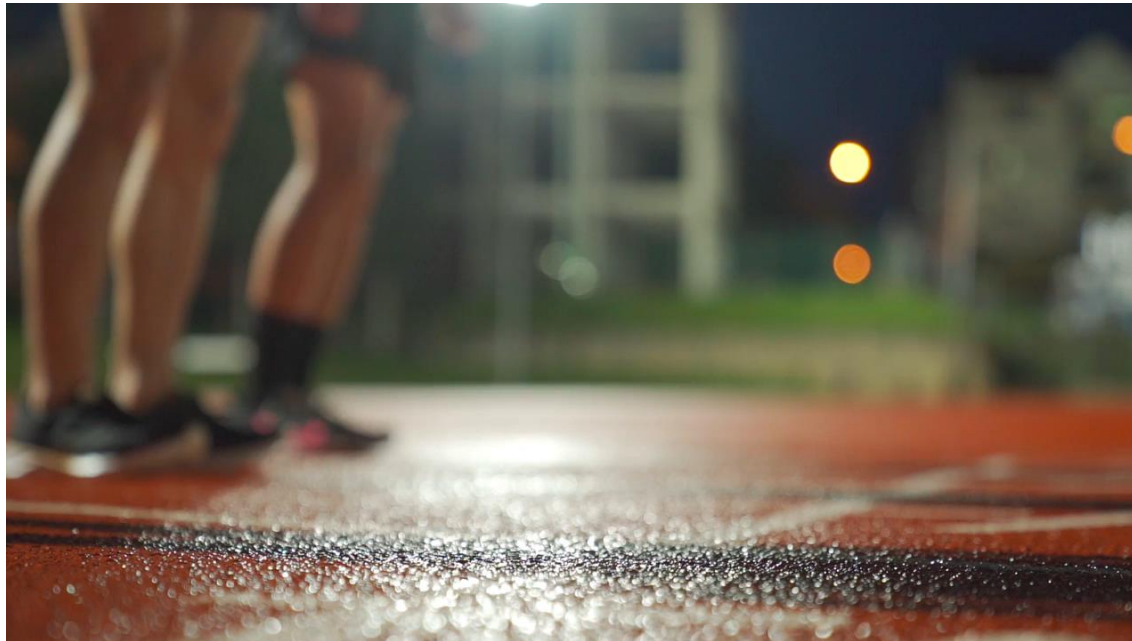
Contents

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What a PN claim arising out a PI claim is not?

- A professional negligence claim arising out of a personal injury claim is not a second go at the personal injury claim.



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An example...

- The PI Claim:
 - Mr Smith retains PI solicitors to bring a claim for a back injury
 - Solicitors instruct GP expert (one of the solicitors panel experts):
 - Opinion - injury is a modest soft tissue injury – prognosis full recovery 1 year.
 - Solicitors inform Mr Smith case is low value – Mr Smith is unhappy
 - Pleadings prepared on the basis that total damages are <£25K
 - Solicitors fail to issue the claim within 1^o limitation period
 - No application is made to extend under s.33 LA 1980 and s.14 LA 1980 doesn't help.
 - Claim Statute barred

An example...

- The PN Claim:
 - Mr Smith retains new solicitors (some time later)
 - New solicitors instruct range of new experts (ortho, spinal, psych, care):
 - Opinion – injury is a debilitating back injury – Mr Smith may never work again
 - New solicitors inform Mr Smith case is high value – Mr Smith very happy
 - Pleadings prepared on basis that damages are £500K
 - Schedule of Loss – drafted in PI claim format
 - Loss of earnings to retirement age
 - Care for Life
 - Gardener
 - Aids & equipment
 - Loss of pension
 - Loss of share options

An example...

- The PN Claim:
 - Pleadings – particulars of negligence:
 - Failure to issue within 1^o limitation period.
 - Reliance on Panel GP Expert was negligent
 - Different experts would have come to a more favourable view regarding the injury.
 - Schedule of loss was itself pleaded negligently.

An example...

- The PN Claim:
 - HOWEVER – Valuation: fails to take account of:
 - Liability situation in PI claim (e.g. contributory negligence)
 - Defendant in PI claim may have asked Part 35 questions of C's experts or instructed its own experts
 - No discount given to take into account that Claimant has only lost the loss of chance or pursuing the PI claim
 - 'New Better Experts' were not and were never going to be instructed in the PI action.
 - Likely date of trial (or ADR settlement):
 - Deterioration of Mr. Smith came many years later after the likely date of the trial in the PI claim if it had been issued within the 1^o limitation period.
 - Mr. Smith would have still been employed at the date of the likely trial.
 - Mr. Smith preferred to spend his wages and thus he would never had invested in the pension or share schemes.

An example...

- The PN Claim:
 - Is there a defined ‘cut off’ date?

“In every such case, the court is seeking to establish what was lost by the claimant, as at the date, often the notional date, of the original trial or settlement. ... what the claimant should recover in the professional negligence claim is not established by answering the question: how much of the original claim can he prove now? Rather it is established by answering the question: what was the value of what he lost then?”⁷

- Not all ‘after-coming evidence’ falls to be assessed in every case.

⁷ – Edwards v Hugh James Ford Simey (A Firm) [2018] EWCA Civ 1299

Thank you!

Any questions?

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