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# Professional Negligence

Through our lifetimes we all rely on services provided by professionals, for example, in the finance, medical or legal environment. We often confide our matters to them and trust they will help us in a professional manner. However, if the standard of work is lower than you would reasonably expect, the professional may have breached their duty of care to you, as the client. If that breach has caused you a financial loss, then you may have a claim for *professional negligence*.

Professional negligence claims can be brought by either an individual or corporate entity against a professional who provided a level of skill and care that fell below the reasonable standard.

Susan Hopcraft, senior associate at Wright Hassall LLP, explains that in order to be able to bring a successful claim you need to prove that a professional fell below the usual standard of a typical professional in their position. That may be by doing something wrong, such as valuing a property too high, or by failing to do something, for instance forgetting to serve a break clause in a lease or register a legal charge.

Moreover, the act or failure also has to have caused loss. The loss is usually obvious and quantifiable in terms of the financial cost to put it right, but there may be a problem that no one has yet spotted, or at least it has not cost anything yet. That loss may still be actionable.

However, as Richard Gore, partner at Gregg Latchams LLP, emphasised, the claim must be made within the limitation periods, i.e. no later than six years after the negligence took place or in some cases three years from date of knowledge.

#### Changes to professional indemnity insurance

In order to protect themselves from negligence claims many professionals are covered by professional indemnity insurance (PII). Although the existence of that insurance is often vital to meet the damages awarded, a claimant who sues a professional covered by such insurance might be put in a difficult position in relation to costs. Insurers are extremely rigorous in defending claims against their insured and, unless the individual has the financial capacity or means of funding to proceed with the claim, there will be little recourse to the courts as it will be difficult to obtain legal representation.

Ms. Hopcraft said: "There is no doubt that the simplest of claims can be muddled, over-complicated and delayed by defendants' insurers. They might ask for a huge number of documents to defend their client and suggest all sorts of different scenarios to explain away the professional's mistake, lay blame on the claimant and even try to show how the error did not cause loss. Individuals need to have patience, fortitude and often deep pockets to run down

insurers' resources. Conditional Fee Agreements (CFAs) have played a key role in redressing the imbalance between insurers and claimants."

Although PII makes it in some ways harder to make a claim against a professional, it has also become more difficult to be protected by the insurance as a few months ago the Solicitors Regulation Authority (SRA) has published proposals for changes to the professional indemnity insurance for solicitors.

Andrea Cohen, management team member of the Professional Negligence Lawyers Association (PNLA) and partner at Pannone LLP, described the main proposals:

- Removing the restriction of the single renewal date. The SRA recommended that the single renewal date was abandoned in light of the problems caused by having such a large volume of business due to be conducted by the same annual deadline.
- Permitting claims arising from work done for financial institutions to be excluded from the compulsory minimum terms of insurance. If the proposal were accepted, firms which agree not to conduct conveyancing (which is the area which involves the majority of work done for financial institutions) are likely to benefit from reduced premiums.
- Increasing controls over the ARP (Assigned Risk Pool). The SRA proposed reducing the time for which a firm is eligible to be in the ARP from 12 months to six months and require ARP firms to develop and implement effective plans to either exit the ARP into the open insurance market or undertake orderly closure. One of the issues on which the SRA was seeking views, was whether the ARP should be available to firms as a "safety net" as the ARP provides policies of Qualifying Insurance for firms either temporarily for a short period at the commencement of the indemnity year, or for a set period of time to allow firms to be "rehabilitated" back into the open market.
- Clarifying obligations on insurers to provide information to the SRA. The SRA proposed that insurers will be required to provide information to the SRA regarding firms that fail to pay their insurance premiums and firms that insurers believe may have misrepresented information. At present some of these information requirements are permissive rather than compulsory. The SRA will work with the Association of British Insurers (ABI) to agree guidance setting out

the situations in which firms should be reported.

Ms. Hopcraft commented on the proposals: "The reduced availability of the ARP should reduce the overall cost to the profession of the ARP and make it harder for firms to exist without proper insurance cover. Firms that are then unable to get cover on the open market will have to close."

Mr. Gore added: "It is likely that the availability of insurance policies will become more expensive and the controls tighter."

#### Recovery of success fees to be abolished

It is highly likely that, as early as April 2012, everyone's ability to bring a professional negligence claim against a solicitor, accountant or other professional will be severely curtailed due to the implementation of the Legal Aid Sentencing and Punishment of Offenders Bill.

As Ms. Cohen explained, currently, anyone can approach a solicitor to fund civil litigation by 'no win no fee' and if the case is assessed as a 60% chance of success they are likely to be able to obtain insurance against losing the case. Success fees and insurance premiums are recoverable from a losing party. However, if sections 43 and 45 of the Legal Aid Sentencing and Punishment of Offenders Bill are approved by the House of Lords then we will all lose the ability to recover success fees and insurance premiums if we have a strong civil case.

Ms. Cohen said: "The Bill is now in the Committee stage and a decision on the proposed amendments will be made this or next month. The Bill then moves to the report stage. There is much speculation on the outcome. Many members of the House of Lords have expressed concerns about the impact on access to justice for ordinary people. There will be considerable pressure for some assistance to be given to non injury litigation in similar terms as for the injury cases, in particular in cases where the defendant is an insurer or other large and well resourced business."

She added: "The PNLA has actively been raising awareness of the impact of the abolition of recovery of Conditional Fee Agreement (CFA) success fees and After the Event (ATE) premiums on ordinary claimants – whether individuals or businesses."

Ms. Hopcraft noted that practitioners from her law firm have been working on publicising the impact of the Bill so that anyone with a claim has every chance



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As a partner in the Commercial Litigation department at Pannone LLP, Andrea Cohen headed up the Professional Negligence unit dealing with a range of claimant clients.

She is now the Compliance, Client Care and Training Partner for Pannone. Her role encompasses compliance, risk management, client care, training, graduate recruitment and trainees, business continuity, insurance and data protection. She also deals with professional negligence claims against the firm and aspects of professional indemnity. She is a founder member of the Professional Negligence Lawyers Association (PNLA) and member of the PNLA management team and member of the Editorial Advisory Board of the 'Journal of Professional Negligence'.



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Susan Hopcraft is a Senior Associate in Wright Hassall's professional negligence team.

She is also a member of the firm's specialist lender services group, with extensive experience in professional negligence claims in the financial sector, including eight years at CMS Cameron McKenna in London. Currently Ms. Hopcraft is very active with recoveries for lenders arising out of mortgage fraud and has also recently obtained damages against solicitors and accountants in other contexts.



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Richard Gore is a litigation partner at Gregg Latchams LLP.

He is recommended in Chambers 2012 in dispute resolution as "an excellent litigator with a no-nonsense approach; a lawyer you would want on your side in a scrap." He is a long standing member of the Professional Negligence Lawyers Association (PNLA) and deals with professional negligence claims on a regular basis. He also writes and contributes to articles on professional related issues and tweets regularly about the subject.

to bring it before the advantageous costs regime is withdrawn, if that is the outcome. She said: "If the landscape alters as widely predicted, then we aim to continue to offer conditional fee agreements within the revised framework. It is particularly the lower value cases that may fall away if the Bill is passed in its current form, because of the relatively high level of costs required to bring these types of claim, as compared with the recovery. That will have an impact on businesses and individuals alike."

When asked about it what effects the Bill will have in his opinion, Mr. Gore responded: "Whilst it is unclear what impact this will ultimately have, my initial view is that claims against professionals will drop off as the ability to recover ATE premiums and success fees disappears. This will make it less attractive to customers to pursue such claims and potentially less attractive to lawyers who will be limited in the level of success fee they can recover and will be less inclined to take on borderline cases with the lack of definite cash flow. At the same time lawyers will have to become more innovative as to how they are able to offer funding for these claims and I anticipate an increase in the use of discounted CFAs for a lot of claims."

#### Dynamic future of the sector

The professional negligence sector is currently experiencing many changes. According to Mr. Gore, a potential consequence of the changes in addition to those identified above will be that insurance companies will take a more robust approach to claims. From a commercial point of view they may well perceive that customers and lawyers will be less likely to pursue a claim all the way to trial and will thus raise irrelevant issues to counter and frustrate claims.

In his opinion an interesting recent development was the case of Jones v Kaney where an expert in a personal injury claim gave negligent advice and was pursued for professional negligence with the claim succeeding. Previously the liability of experts for negligent advice was severely limited.

Apart from the changes that are already taking place, there still many more to come. Ms. Cohen noted there is some confusion currently about the relationship between professional negligence claims and consumer Ombudsman schemes providing compensation for poor or inadequate professional service. She explained: "There is an overlap in scope

for claims and complaints. However, the approaches to damages and compensation are entirely different. It is highly topical as to how clarification will develop on the correct procedure to be followed in such overlapping cases."

Ms. Cohen also believes that 'no win no fee' and insurance against losing cases are likely to become less available during 2012 and will potentially fall away altogether as a viable financial option shortly after that. "Much depends on the decision of the House of Lords," she said. "There is therefore some urgency for potential claimants to take advice now as it may be very difficult to fund cases if the law is changed as proposed. The PNLA is the only body providing details for specialists in professional negligence claims. Those who think they might have a claim are very welcome to contact our members."

Giving her predictions on the developments in the professional negligence sector, Ms. Hopcraft said that third party claims funding is likely to become an increasingly important aspect for higher value claims. "We will be monitoring closely how this might become available for lower value claims," she concluded.