



PROFESSIONAL APPROACH

Kevin Donoghue explains how the Court of Appeal rejected a negligence claim against solicitors

Lord Justice Jackson has been in the news again. In *Graham Thomas v Hugh James Ford Simey (HJFS) Solicitors* [2017] EWCA Civ 1303, he dismissed Mr Thomas's claim against his previous solicitors. The legal press reported Jackson's criticism of firms seeking professional negligence work for allegedly under-settled claims. He said:

'The civil justice system exists to enable injured parties to recover compensation for genuine wrongs. It does not exist to service artificial claims stirred up by advertisements.'

While this comment made headlines, the interesting aspect is in the detail. The reasoning in Jackson's judgment should help personal injury solicitors:

- advise clients
- avoid potential professional negligence claims, and
- protect the profitability of their practices.

The initial professional negligence claim

Mr Thomas was a former coal miner. He sought HJFS's help to claim compensation for vibration white finger (VWF) via a government-backed fixed legal costs scheme. Ms Kinsey, his solicitor at HJFS, helped him claim compensation for his general damages for pain, suffering, and loss of amenity. The firm also discussed

claiming special damages for help with DIY, gardening, decorating and so forth. Mr Thomas told Ms Kinsey he 'was not too bothered at all' about them. He said that he was getting help from friends 'as a favour'.

So in a face-to-face meeting on 23 January 2001, the claimant signed a form of authority accepting £10,0482.72 'in full and final settlement' of his claim. That amount was the tariff-based award for his general damages. Under the scheme his solicitors received £607 + VAT in costs.

That was an end to the matter until 2008. Then, Mellor Hargreaves Solicitors advertised to help people whose VWF claims might have been under-settled. They issued proceedings on behalf of Mr Thomas. Among other things, Mr Thomas now claimed that HJFS failed to tell him about the value of a potential special damages claim. He said special damages could have resulted in an extra £16,654.

HJFS denied liability. The firm said that it was not required to discuss special damages any further, once Mr Thomas said he did not want to claim for them. Undeterred, Mellor Hargreaves took the case to a County Court trial in Leeds in 2016. There, Mr Thomas lost his professional negligence claim.

The judge, Mr Recorder Cameron, found Mr Thomas to be an 'unreliable witness'. He also criticised Mellor

Hargreaves after learning that they gave Mr Thomas information about the potential special damages award that 'turned his head' so that he was 'prepared to advance incorrect assertions'. In finding for HFJS, the Recorder said:

'I do not think it is – or ought to be – the role of a solicitor to tempt his or her client with 'astronomical' sums once it appears to have become apparent that a claim for such sums is not practicable.'

The Court of Appeal

In the Court of Appeal, Lord Justice Jackson focussed on whether the facts found by the Recorder constituted a breach of duty by HJFS. He considered previous Court of Appeal guidance, especially *Procter v Raleys Solicitors* [2015] EWCA Civ 400, a similar VWF case.

There, Tomlinson LJ found against the defendant firm. He said that the court should not impose an 'unrealistic standard' on solicitors conducting litigation in high volume, low cost commoditised schemes such as these. And yet, in that case, the lawyer dealing with the matter did not meet the required standard of 'the reasonably competent practitioner specialising in whatever area of the law the solicitor holds himself out to be a specialist'.

In *Thomas*, Jackson LJ noted that the retainer between solicitor and

client was to require HJFS 'to advise the claimant about his possible claims for general or special damages and to pursue such claims as were appropriate'. He found that, even though the medical evidence existed to support a special damages claim, the lack of factual evidence to support it meant that Mr Thomas did not pursue it.

Mr Thomas's barrister argued that Ms Kinsey should have 'probed matters in the hope of changing the claimant's mind'. He said that she should have:

1. advised her client about the potential value of special damages claims, and
2. that interim payments of 80% were available.

Jackson LJ dismissed this, saying:

'I cannot accept any of those arguments. The client was, as the judge found, an intelligent and articulate man. He knew his own mind. He decided not to pursue a claim for special damages and he so instructed his solicitors.'

This shut down any further lines of enquiry. It limited the retainer to the issue in hand: general damages. Jackson LJ continued:

'In my view, if a client instructs his solicitor that he does not wish to pursue a particular head of claim and that he does not have evidence to support it, the solicitor is not necessarily under a duty to challenge that decision or to try to change the client's mind. Obviously, issues such as this are fact-sensitive, as Mr Watt-Pringle pointed out. Even so, if the client is an adult of full capacity, there comes a point when his autonomy should be respected.'

Comment

This judgment will provide much-needed certainty to personal injury solicitors. As solicitors of the Supreme Court, we are under a duty to act in our clients' best interests, and those of the court. We must also help our firms survive and thrive. The code of conduct includes reference to these duties. The principles state that solicitors must, among other things:

- uphold the rule of law and the proper administration of justice;
- act with integrity;
- act in the best interests of each client;
- provide a proper standard of service to clients;
- run their business or carry out their role in the business effectively and in accordance with proper governance and sound financial and risk management principles.

Ms Kinsey fulfilled the retainer by discussing the possibility of a special damages claim with Mr Thomas. But once it became obvious that he did not want to pursue it, she rightly closed off that line of enquiry, meeting her professional obligations. As Jackson noted:

'It is not the role of a solicitor to tempt the client by referring to large sums, once it is clear that supporting evidence for a claim is not available.'

If he was tempted, he might have tried to justify special damages by exaggerating claims or fraudulently creating them. If proven, these false claims can lead to criminal convictions and / or wipe out entire claims (including legitimate ones such as personal injuries). Either way, the consequences for Mr Thomas

would have been grave. There was no benefit in trying to 'turn his head', as Mr Recorder Cameron described.

Professional negligence guidance

Jackson's reforms came into effect in April 2013. They introduced fixed costs to most personal injury claims. In *Thomas*, the judge considered solicitors working in the environment of 'high volume, low-value personal injury cases for fixed costs'. He admired the amount of work done by HJFS for modest costs, and noted that Ms Kinsey met Mr Thomas twice. The first time was to explain the scheme and take instructions. At the second meeting they discussed special damages. In finding that HJFS were not in breach of duty, he said:

'Neither advocates nor judges should lose touch with reality...There must be a sensible limit upon what we can expect solicitors to do in such cases.'

And,

'The solicitors must still exercise reasonable skill and care in advising clients and pursuing claims. But the solicitors cannot be expected to turn over every stone and to pursue avenues of enquiry which the client has closed down.'

This is a sensible view of the standard of care. It should help solicitors defend future professional negligence claims for under-settlement in fixed costs cases. Practitioners can now argue that they did all they reasonably could bearing in mind the limited fees paid.

Given the anticipated expansion of fixed costs in civil litigation, I expect this judgment will prove very useful indeed.

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