NEGLIGENT SETTLEMENT ADVICE

Daniel Crowley and Leona Powell consider the Court’s approach to negligent settlement advice.

The standard of care owed by a solicitor to his client has been established for a considerable time. There is no liability for loss caused by an error of judgement, “unless the error was such that no reasonably well-informed and competent member of that profession could have made.”

This raises the difficult question of how a breach of duty can be established in the context of the settlement of claims. Advising upon and settling cases inherently involves the weighing up of many precarious factors, for example, how your own or the other side’s witnesses will “perform” in Court. Moreover, the circumstances in which barristers and solicitors have to exercise their judgement varies enormously from case to case. Some advice will be given after ample time, consideration and research, many months before trial. Other advice will be given in court with little time for reflection and discussion.

**Breach of duty**

There are two main factors that the courts will consider when deciding whether settlement advice is negligent. The first is the context in which the advice is given, the second is the reasoning behind the advice.

(i) **Context**

In the very recent decision in *Griffin v Kingsmill* the Court of Appeal indicated that context will have a direct and profound effect on how easily a breach of duty can be established.

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2 EWCA Civ 934 (8th June 2001).
Where advice is given in court ‘it may be very difficult to categorise the advocate’s decision as negligent even if later events proved it to have been wrong.’ Similarly, where advice is given in a very complex or particularly difficult case, the courts will recognise that a difficult judgement has to be made and ‘unless the advice was blatantly wrong…it cannot be impugned and the prospects of successfully doing so would seem very slight.’

In contrast, where a case is simple and there is plenty of time for consideration, poor advice can be less easily excused. The courts will turn instead to giving detailed consideration to the rationale behind the advice.

(ii) Methodology

In Griffin the facts and law were fairly straightforward: it was described by the court as a typical personal injury case. The child claimant was seriously injured in a road traffic accident and it was agreed that on a full liability basis the claim would have been worth around £500,000. There were only two witnesses to the accident: the Defendant driver and the Claimant’s grandfather. Essentially it was one person’s word against the other. The Defendant’s insurers put forward an offer of £50,000. The Claimant was advised to accept this offer on the basis that the claim had no reasonable prospect of success. It appears that her advisers had thought that the evidence of her grandfather would carry no weight. The Court of Appeal found that:

‘It is not enough that counsel and solicitors have read the papers and given clear advice which could be understood. In a case such as this, logical and sensible reasons have to be given for rejecting the favourable evidence of [the Claimant’s grandfather]. If the reasons do not bear examination they are not such as can be expected from a competent and experienced practitioner.’

The methodology may also be flawed if there has been no proper investigation of the case. In McNamara v Martin Mears & Co, solicitors were found liable for failing properly to investigate the assets of the Claimant’s husband in matrimonial

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3 Para 65.
proceedings. As a result she was advised to settle her claim for £12,000 when it was found to have been worth around £24,000.

It is clear that the courts will look behind the quantum of the valuation, to the processes by which it was reached. It is in those machinations that negligence will be found, if it is to be found at all. Thus, if there has been a proper investigation and assessment of the facts, it will be very difficult to establish that there has been a breach of duty, even if the resulting valuation of the claim is deemed inaccurate. However, the more inaccurate the valuation, the greater the scope for criticising the reasoning which led to that valuation.

**Lack of Means**

In *Griffin v. Kingsmill* it was argued that the advice to accept £50,000 was justified as the case was privately funded and the Claimant and her parents had limited means. But the Court of Appeal rejected this argument. It said it was for Counsel to advise on the prospects of success and whether the Claimant had reasonably good grounds for getting more than £50,000. It was for the Claimant to then decide what money they would risk to achieve it. This means that advice to a Claimant to accept a “low” offer because of the lawyer’s doubts as to the Claimant’s ability to fund the action or ability to take the risk of paying the other side’s costs if the offer is not beaten may well be subject to criticism.

**Causation**

There are two main elements to establishing causation. Firstly, as in all cases, a claimant must establish that the alleged negligence has caused a quantifiable and recoverable loss. In *Ochwat & Anr v Watson Burton*, two retired coal miners sued their former solicitors for advising them to accept too low a sum in settlement of their claims for damages for deafness. Smith J found that the solicitors had not even:

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5 In any event, the Claimant would shortly have been able to obtain legal aid- para 74.
6 141 SJLB 163.
‘applied their minds to the question of whether it was in the interests of their clients to accept the scheme offers. I do not think they reached that conclusion even instinctively.’

Nonetheless, having applied himself to the task of valuing the claim properly, the judge found that a competent adviser would have come to the same conclusion as the negligent solicitors. The first claimant’s claim accordingly failed.

*Ochwat* is also a useful illustration of the second causal hurdle; that a claimant must prove that he would have behaved differently had he been given proper advice. The judge found that the second claimant’s claim had been (negligently) undervalued, and that ‘*no competent adviser would have simply advised [him] to accept the offer.*’ However, the judge found that factors such as the second claimant’s anxiety to finalise his claim, his age and his financial position meant that he would have accepted the offer in any event. Thus, his claim also failed.

**Measure of damages**

At first, it might appear that the measure of loss would be ascertained by analogy to the method in surveyor’s negligence cases: to look for the settlement value that a non-negligent lawyer would have put upon the case. However, this is not the approach that the courts have taken in practice. Instead, the starting point is an assessment of the likely award had the case proceeded to trial. In *Griffin*, the Court of Appeal expressly approved the approach set out in *Allied Maples Ltd v Simmons & Simmons*, that the loss should be calculated as the value of the loss of a chance. For example, in *Griffin*, it was accepted that the Claimant had established as a matter of causation that she had a real and substantial chance of succeeding at trial, but a discount of 20% from the full value of the claim was made to account for the fact that the Claimant would probably have accepted a higher offer from insurers. In other words if an offer

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8 Para 99.
of 80% of the full value of the claim had been made it would probably have been accepted.\textsuperscript{10}

As Smith J succinctly put it in \textit{Ochwat}:

\begin{quote}
\textit{[the claimant] may prove his loss by showing that the value of the opportunity which he gave up in exchange for the settlement exceeded that settlement. The amount by which it exceeded that settlement would be the quantum of damage.}
\end{quote}

\textbf{Conclusion}

It seems that the relatively benign approach of Anderson J in the Canadian case of \textit{Karpenko v Paroin, Courey Cohen \& Houston}\textsuperscript{11}: will not survive cases such as \textit{Griffin v. Kingsmill} as lawyers’ reasoning will be subject to more searching scrutiny. In that case, Anderson J said,

\begin{quote}
\textit{In my view, an important element of public policy is involved. It is in the interests of public policy to discourage suits and encourage settlements. The vast majority of suits are settled. It is the almost universal practice among responsible members of the legal profession to pursue settlement until some circumstance...leads them to conclude that a particular dispute can only be resolved at trial. I say nothing of the suits which are settled by reason of sloth, or inexperience, or lack of stomach for the fight. They have nothing to do with this case. What is material and relevant to the public interest is that an industrious and competent practitioner should not be unduly inhibited in making a decision to settle a case by the apprehension that some judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the bench, may tell him he should have done otherwise. To the decision to settle a lawyer brings all his talents and experience both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its practises. Not least he}
\end{quote}

\textsuperscript{10} Although there was no evidence that such an offer would have been made if the case had progressed.

\textsuperscript{11} 117 DLR 3d 383, at 397.
brings to it his hard-earned knowledge that the trial of a law suit is costly, time consuming and taxing for everyone involved and attended by a host of contingencies, foreseen and unforeseen. Upon all of this he must decide whether he should take what is available by way of settlement, or press on. I can think of few areas where the difficult question of what constitutes negligence which gives rise to liability and what constitutes at worst an error in judgment, which does not, is harder to answer.”

It seems that the key to avoiding liability lies in giving a proper explanation of how the conclusion on valuation was reached and being able to justify the methodology used (and keeping a contemporaneous note of the methodology and reasoning). In the words of Kay LJ in Griffin:

‘Litigants do require clear advice…nothing in the conclusions I have reached in this case would discourage the giving of such robust advice provided it was given with proper care…counsel need do no more than refer to those parts of the evidence in their opinion that justify their conclusion on material matters. The absence of a reference to a piece of evidence clearly does not in itself lead to any inference that it was overlooked. If, however, that evidence is such that it would appear against counsel’s conclusion then a failure to explain why the point had been rejected may lead to a conclusion that insufficient or inappropriate weight has been given to the point.”

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