



Solicitors' Mutual Defence Fund Limited,  
25, Lower Leeson Street, Dublin, 2. (DX. No: 6)  
**Tel:** 676 3118  
**Fax:** 661 2402  
**Email:** info@smdf.ie  
**Web:** www.smdf.ie

**Established  
by Solicitors  
for Solicitors**

**SOLICITORS' MUTUAL DEFENCE FUND LIMITED  
PROFESSIONAL NEGLIGENCE  
RISK MANAGEMENT**

**1996 No. 2  
1997 Nos 1 and 2**

The purpose of this and future memoranda is to assist Members of the fund by drawing attention to, first, judgments in cases founded on professional negligence on the part of solicitors and, secondly, errors made by solicitors in the ordinary course of their practices which have resulted in claims. General observations on the subject are then made.

1. **JUDGEMENTS:**

(i) **HUSSY V DILLON Supreme Court 26 June 1996 ( Record No 277/95)**

The plaintiff had been adjudicated a bankrupt and he instructed a solicitor specialising in bankruptcy matters (the defendant) to act on his behalf which the defendant duly did for approximately three months until the plaintiff left without any formal notice and instructed another firm. The Plaintiff's instructions were that the defendant was to do everything he could to have the adjudication set aside and his claim was that the defendant was negligent in failing to carry out those instructions.

The Supreme Court ( O'Flaherty, Barrington and Keane JJ) were satisfied that the evidence before the then President of the High Court (Costello P) provided no factual basis for any of the plaintiff's allegations of negligence. The defendant, in their view, had taken on quite a difficult task and had made good progress in dealing with it in the short space of time he had before he was dismissed by the plaintiff. To suggest that he should have taken extraordinary steps within that time to discover matters that only came to light with the benefit of much investigation afterwards would have been "to place an extravagant burden on the shoulders of any practitioner". In O'Flaherty J's opinion there were already "sufficient impediments to the expeditious conduct of legal business without expecting practitioners to engage in activities that are of no use or benefit".

(ii) **LOPES V WALKER Supreme Court 28 July 1997(Record No 163/95)**

The plaintiff had been injured in a road traffic accident on 11 December 1988. Proceedings were instituted in the Circuit Court on 10 January 1989 and culminated in a hearing on 14 May 1991. Liability was admitted and the damages were assessed in the sum of £10,000 general damages and £2,017 for special damages.

Prior to the hearing the plaintiff changed solicitors and this action concerned the manner in which the Defendant solicitor, who had obtained this file from the original solicitors in March 1991, had carried out his professional duties in relation to the conduct of the personal injuries proceedings. The essence of the plaintiff's claim was that the defendant had accepted instructions on the basis that an application would be made to transfer the case from the Circuit Court to the High Court.

The plaintiff's original solicitor had retained "distinguished counsel" to advise in relation to the plaintiff's claim. Counsel, having reviewed the facts and the medical reports then to hand, advised that the plaintiff could expect to recover around £5,000 for general damages. Counsel also dealt with the question of remitting the case to the High Court. He noted that the plaintiff was to be examined by a psychiatrist and stated that, unless there was positive evidence to establish that the plaintiff had developed some form of post traumatic neurosis, the claim was one which should be dealt with within the Circuit Court. Subsequent reports indicated that there was evidence of a post traumatic stress disorder of mild to moderate severity. Counsel's further advices on foot of these reports were that the case should remain in the Circuit Court. Two of the reports, however, contained provisos as to the possibility of further review.

On the morning of the hearing the expert witnesses fully discussed their reports with the plaintiff and his legal advisors and Counsel expressed the view that the medical evidence did not support a claim for loss of earnings or loss of job opportunities. His estimation, based on what the doctors would say, was that the plaintiff's case was worth about £10,000.

The Plaintiff contended that, notwithstanding the above circumstances, there was a duty on the defendant to procure further medical evidence to contradict or supplement that which was then available.

Murphy J was satisfied that there had been no negligence in the pleading, preparation or presentation of the plaintiff's personal injury case. The other two judges of the Supreme Court, however, took a different view. Since the Circuit Court Hearing, events had proved that the plaintiff's case should have been transferred to the High Court because the Plaintiff's injuries had turned out to be much more serious than was envisaged at the time of the trial.

Lynch J was of the opinion that, given that the defendant only received the file on 1<sup>st</sup> March 1991 and that notice the change of solicitor was only served on April 1991, an adjournment of the action of the Michaelmas sittings should have been sought in order to sort out the true state of the case and to enable not only the obtaining of up to date medical reports but also giving of proper consideration of the question of the plaintiff's loss of earnings. This latter point featured heavily in Barron J's judgement. In his opinion the defendant had failed on his duty towards the plaintiff by failing to investigate the situation in relation to the plaintiff's desire to obtain compensation for loss of earnings. More importantly Barron J said that, as the defendant had accepted the plaintiff's instructions on the basis that an application would be made to transfer the case to the High Court, he "should either have instructed counsel to make the application having first taken the necessary steps to ensure that a second opinion of the neurological evidence was obtained, that the provisos in the medical reports were explored and that the claim for loss of earnings was properly before the Court or he should have withdrawn from the case".

Consequently the plaintiff's appeal against the dismissal of the action by Morris J was allowed, by majority decision, and the matter was remitted to the High Court for an assessment of the damages to which the plaintiff might be entitled.

(iii) **CANCER RESEARCH CAMPAIGN V ERNEST BROWNE & CO.**

**(English High Court, Chancery Division, 27 October 1997)**

A testator died in December 1986 leaving his residuary estate to his sister who in turn died in May 1988 having left her residuary estate to the charity. The charities in question could have avoided £200,000 in tax arising on the first death had the sister executed a deed of variation in her lifetime. It was held that the sister's solicitors owed no duty to advise on tax avoidance schemes applicable to another estate. It was further held that the solicitors were under no duty to inform the charities of the contents of the will prior to the sister's death.

(iv) **BRITISH RACING DRIVERS CLUB LTD. V HEXTALL ERSKINE & CO**

**[1996] 3 All ER 667 (English High Court, Chancery Division)**

The second plaintiff, a wholly owned subsidiary of the first plaintiff, operated a motor racing circuit owned by the first plaintiff. The first named plaintiff's board including the Chairman of the board of the second plaintiff (W) who was also the Chairman and substantial owner of a company carrying on a retail motor business (T Ltd) The defendants provided advice to both plaintiff's in relation to a joint venture agreement whereby the second plaintiff purchased a half interest in T Ltd's business. This advice was negligent in that, because of W's interest in the transaction, the prior approval of the first plaintiff's members was required. When the agreement was subsequently put to the members for their retrospective approval, it was rejected and the directors were instructed to extricate the plaintiffs from the agreement. It proved impossible to secure rescission and following litigation, a settlement was agreed with W whereby he purchased the shares at a significantly reduced price. The defendants admitted that they had been negligent but denied that they were liable for the loss allegedly suffered on resale of the shares.

Carnwath J rejected the defendants' contention. The purpose of the relevant provision of the companies legislation was to safeguard a company from losses resulting from transactions between the company and its directors. The defendant, by failing to advise the board of the need to comply with this provision, deprived the company of the protection of the approval of the members in general meeting. Consequently, it followed that the loss on the shares, even though it was directly caused by the directors' decision to make a bad investment, was fairly within the scope of the dangers which it was the defenders' duty to provide protection.

## 2. **CLAIMS**

### (i) **UNDERTAKINGS**

In a number of cases before the Registrar's Committee in the Law Society, solicitors have been found to have given undertakings to lending institutions without having the title documentation and the mortgage documentation executed by the purchaser. Furthermore undertakings have been found to have been given which are not qualified to the extent to that they can only relate to the site and do not extend to the building works to be done thereon. Undertakings should be qualified to the effect that they exclude all compliance with planning and building regulations. Under no circumstances should an undertaking be given to the effect that the builder would build a house in accordance with a planning permission granted.

### (ii) **PHASED PAYMENTS**

In another case, a solicitor, acting for the purchaser of a house in the course of construction, gave an undertaking to a lending institution and received the cheque. He got all the mortgage documentation completed and then released the cheque to the builder. However, the title was not being given by the developer on payment of the initial money. The client then disappeared and the solicitor has handed over the money, does not have the title and has no chance of getting the title from the builder without the payment of further moneys.

### (iii) **LICENSING**

A number of cases have arisen following failure to thoroughly check that the licence which is being bought or sold is what it purports to be and that there are no endorsements or restrictions thereon. One area where there has been a number of claims is where a vendor thinks he or she is selling a seven day publican's ordinary licence and subsequently it transpires that the licence is in fact a hotel licence.

## 3. **GENERAL OBSERVATIONS**

- (i) The Fund is grateful to one of our County Cork members for drawing attention to the necessity, if one is acting for a foreign national purchasing a business in Ireland, of securing Department of Justice permission for non-EU nationals – such as Swiss or Japanese – to carry on business in Ireland. Members are advised to contact the Immigration and Citizenship Division of the Department at 72/76 St Stephen's Green, Dublin 2. for further information.

(ii) Civil litigation and domestic conveyancing continue to be the main cause of claims. Common errors in the former are

- failure to identify and/or join all proper defendants;
- drafting errors in Court documents;
- missing limitation period dates;
- missing call-over and hearing dates;
- failing to file appearances, defences and in particular third party notices (a further report on this important issue will feature in the next issue);
- settling matters without instructions

Consequently members are urged to document clients' instruction, to note all important dates in a diary, to keep proper file notes and most importantly to analyse the legal issues involved before commencing proceedings ( a point emphasised by Barron J in Lopez v Walker, supra) and then to develop an effective legal strategy to deal with all the issues.

- Common errors that occur in domestic conveyancing include
- failure to advise clients about the important terms of the mortgage such as possible penalty interest terms in the event of early discharge;
- delay in lodging mortgage documents;
- failure to advise clients to seek independent legal advice where there is a potential conflict of interest;
- failure to ensure guarantee documents are correctly attested and dated.

Consequently members are urged to confirm advice in writing about the critical terms, to be alert for potential or critical conflicts of interest, and to have a second pair of eyes in the office to check the details on documents.

#### **DISCLAIMER**

This memorandum provides "information" and is designed to minimize the possibility of solicitors being guilty of professional negligence. The material presented does not establish, report, or create the standard of care for solicitors. The content does not represent a complete analysis of the Topics presented and readers should conduct their own appropriate legal research.