



NEWS

Cause and effect – establishing the true cause of damage in professional negligence claims

02 July 2010 [Commercial Disputes](#)

In professional negligence claims, proving that the professional was negligent is only half the battle. In this article, [Michael Axe](#) looks at how it is not always a straightforward matter to prove that the negligence was the actual cause of the losses suffered.

Many potential claimants assume that if they hire a professional (such as an accountant, surveyor, auditor, architect, lawyer or similar), and that professional then carries out their work negligently, then they will be able to pursue a claim against the professional. However, the Courts have confirmed on many occasions that it is not enough to simply show that the professional was negligent – you must also show that the negligence was the real cause of any loss or damage which you are seeking to claim.

There have been many cases that have provided detailed guidance on how to properly assess whether a professional's negligence was the actual cause of the losses suffered, but the basic approach to adopt can be summarised by asking the following three questions:

1. Is the loss suffered the type of loss which the professional was under a duty to prevent?
2. Did the professional breach that duty?
3. Would the loss not have been suffered but for the professional's breach of duty?

The first question is designed to weed out claims relating to matters for which the defendant owed no duty to the claimant in the first place. For example and by way of analogy, in the 2008 Court of Appeal case of *Calvert v William Hill Credit Ltd*, the defendant was found not to be under a duty to prevent the claimant (a compulsive gambler) from gambling, having only assumed a responsibility not to allow the claimant to place telephone bets with the defendant.

The second question confirms the need for the claimant to show that the professional was negligent because he breached the duty of care owed to the claimant. However, it is the third question (also known as the "but for" test) that is often the most problematic one to answer.

However, two recent decisions from the Court of Appeal and High Court have provided some further guidance on how the Courts will assess whether the negligence was the cause of the damage in question. Whilst both these cases relate to professional negligence claims against solicitors, the principles involved are equally applicable to negligence claims involving any professionals.

***Levicom v Linklaters* – the assumption that advice will be acted on**

This recent Court of Appeal case related to a £37m claim brought by Levicom against their former solicitors, in which they alleged that their solicitors had provided them with negligent advice on the strength of their case against a third party. The advice given by the solicitors at the outset was that Levicom had good prospects of success and should reject the settlement offer currently on the table. Levicom rejected the original settlement offer and pursued the matter through to arbitration, by which time it had become apparent that Levicom's position was not as strong as first advised. Levicom eventually settled their claim, but on less advantageous terms than the original settlement offer which they had rejected.

At the initial hearing of the claim brought by Levicom against their solicitors, the Court ruled that although the solicitors' advice had been negligent, the negligent advice had not caused Levicom any loss. The Court's reasoning was that even if Levicom had received proper advice at the outset, they would not have acted any differently in rejecting the offer and proceeding with the arbitration. On this basis, the Court only awarded Levicom £5 in damages for the solicitors' negligent advice.

Levicom, however, appealed the initial decision to the Court of Appeal. The Court of Appeal overturned the lower Court's decision, ruling that when a solicitor advises a client to start litigation rather than settle, and the client does just that, then the "normal inference" is that the client did so based on the solicitors' advice. The Court of Appeal commented that "*one has to ask why a commercial company should seek expensive City solicitors' advice (and do so repeatedly) if they were not to act on it*".

The Court of Appeal confirmed that if a professional wants to rebut the "normal inference" and argue that the negligent advice was not the "cause" of the client's actions, then the burden is on the professional to produce evidence to prove that the client did not act on the advice given. In this case, the Court of Appeal ruled that the solicitors had not produced sufficient evidence to rebut the inference that Levicom had been acting on the negligent advice given when they rejected the original settlement offer and proceeded with the arbitration.

The Court of Appeal's guidance on the "normal inference" that a client will act upon advice sought from a professional, will be equally applicable to claims arising from negligent advice provided by all types of professionals, not just solicitors.

***Stoll & Others v Wacks Caller* – the agreement of third parties**

This recent High Court decision provides a useful contrast to the scenario in *Levicom v Linklaters*.

In this case the claimants were in the process of purchasing a property from a third party with the intention of redeveloping it. The contract for the purchase was conditional upon the claimants obtaining planning permission to convert the property, but the claimant's solicitors did not advise the claimants to include a "call-in clause" in the contract (which would have meant that the contract only became unconditional once there was no longer any risk that the planning permission could be challenged). Ultimately, planning permission was granted and the purchase was completed, but the development never went ahead because after the purchase was completed a neighbour successfully applied to the Courts to have the planning permission decision quashed.

The claimants brought a claim against their solicitors alleging that:

- a) the solicitors had been negligent in not including a "call-in" clause in the contract; and,
- b) the solicitors' negligence had caused the claimants' loss (ie the devaluation in the property when they had had to sell it on without the benefit of the planning permission), because such negligence had prevented the claimants from being able to exercise the "call-in" clause.

However, the High Court ruled that although the solicitors had been negligent in not advising the claimants to include a "call-in" clause in the contract, the solicitors' negligence had not caused the claimants' loss.

The High Court was not persuaded on the evidence presented by the claimants that there was a "real or substantial chance" that the third party seller would have had any reason to agree to include a "call-in" clause in the contract, even if the claimants' solicitors had properly advised the claimants to seek one. In that scenario,

the High Court believed that it was likely that the claimants would have taken the risk and proceeded with the purchase even without the "call-in" clause.

This decision highlights the difficulties in proving that a professional's negligent advice is the cause of the loss in cases where the agreement of a third party would have been needed to proceed in the desired way, and was unlikely to be forthcoming.

A fine line

Whereas in *Levicom v Linklaters* the Court of Appeal was satisfied that the clients would have been able to avoid their losses by following the professional advice given had it been given correctly, in *Stoll & Others v Wacks Caller* the Court concluded that the clients in that case would have been likely to suffer the same losses anyway, even if the solicitors had properly advised them, because it was unlikely that the third party seller would have agreed to the clients' request in acting upon the professional advice given.

There is clearly only a fine line separating these two decisions, even though the end results in each case are worlds apart. It is understood that the defendant solicitors may be considering appealing the decision in *Levicom v Linklaters* to the Supreme Court, so the story might not be over just yet...

For further information on this or any other issue relating to professional negligence, please contact Michael Axe by emailing Michael or by calling him on 08450 990045, or speak to your usual contact in the Commercial Disputes Team.

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