

# Professional Negligence

10 things for you to think about



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## 1. The engagement

Where an adviser or a person providing other types of service is instructed, they enter into a contract for services. It might not be written down and in most cases will not say anything about the quality of the services to be provided. Whether spoken or in writing, the contract is key as it will govern what the law expects of the professional in doing the job he has agreed to do. It will also allocate risk between the client and the professional.

## 2. What is the standard of care expected of the professional?

If the quality of advice or service is not set out in writing in the contract, the law will imply a term that the professional will use reasonable skill and care. The standard is:

*"...that degree of skill and care which is ordinarily exercised by reasonably competent members of the profession, who have the same rank and who profess the same specialisation (if any) as the defendant."*

## 3. Has there been incompetence?

The answer to this may be glaringly obvious: The missed time limit. It might require a view to be taken: A property valuation on which a mortgagee lends; the giving of tax advice; or the failure to identify subsidence for example. The investigation into this question will be thorough, starting with the facts. We may well also need the opinion of a member of the same profession, against the benchmark of reasonable competence in the profession.

## 4. What was the result of the incompetence?

Having identified substandard care, what damage did it cause? That enquiry might be straightforward, but it might require the opinion of the independent expert. The client may have received wholly wrong advice, but if no damage was caused by that advice, there is no claim.

## 5. What was the actual loss?

Having established damage caused by substandard care, we will need to assess what has been lost in financial terms? An accountant may be required to advise before a final figure can be claimed. The calculation is designed to put the client in the position he would have been in had no substandard care taken place. We would also consider whether the client is entitled to the return of the fee paid to the professional.

## 6. Are there any other claims?

If substandard care cannot be identified, or even if it has been, there may be other matters that should be investigated. Have any other terms of the engagement or another duty been broken?

## 7. Act promptly

Depending on the facts, a claim for "professional negligence" may arise from a breach of contractual duty or under the 'tort' of negligence. The contract may state in what time period a claim can be brought. If the contract does not give a 'claims period' or the claim is in 'tort', a claim form must be filed in Court within 6 years from the date on which the right to claim arises. The start date of this period is critical therefore. For breach of contract, this will be when the breach occurs; and in the case of negligence, when the damage is suffered. These are difficult questions. Although the period may be extended in some circumstances, the importance of this time limit can be seen from the following case:

A Mr Clifford Shaw had a claim against Sedgwick Financial Services Limited in respect of advice on his pension. Among other things, he alleged that Sedgwick had failed to advise him in early 1997 to remain in his occupational pension scheme and not transfer his benefits into a 'withdrawal' scheme. Mr Shaw transferred into the withdrawal scheme on 28 April 1997. He commenced court proceedings on 29 September 2005. The Court of Appeal decided that Mr Shaw first suffered loss when he paid his benefits into the withdrawal scheme. This was more than 6 years before Mr Shaw had begun proceedings, so his claim was barred. Although his claim may have been a good one, Mr Shaw was out of time in bringing his claim and he therefore made no recovery for his losses.

## 8. Other reasons to act promptly

If instructed to pursue a claim we will need to see the relevant documents and talk to the individuals involved to assess what evidence is available to support the claim. As time goes by, documents may be misplaced, lost or destroyed, memories fade, contacts may be lost or witnesses may die. It is harder to re-construct events several years later.

### 9. Action required before a claim is made in court

The courts expect claimants to make their allegations to the professional concerned comprehensively before proceedings are commenced. This is to see whether the claim can be settled and proceedings avoided or at least the issues narrowed. Heavy cost penalties are threatened for those who "rush in". We will therefore need to follow 'The Professional Negligence Pre-Action Protocol' or one of the other protocols for claims against specific types of professional.

Both parties are required to consider Alternative Dispute Resolution, before court action. Whilst there are various ADR procedures, this will usually be mediation, the process where an independent experienced mediator attempts to facilitate a deal between the parties.

### 10. What about costs?

Professionals are rightly held to account for their actions. They are usually backed by insurance. If a reasonably sound case can be made however, it is likely to settle. Insurers do not like losing at trial. Professional liability cases are often well suited to being run under 'conditional fee agreements' (under which costs or some of them are not payable unless the claim is successful), backed by insurance. The best time to discuss a CFA and insurance funding may be after the protocol procedure has been followed, when most issues of the claim are well exposed.

**This document is written as an outline guide only and any action should not be based solely on the information given here. Appropriate professional advice should always be taken in specific instances.**

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