No ifs, no buts

Cost pressures & solicitors' negligence are no excuse for cutting corners, says Helen Pugh

IN BRIEF

- Clear and accurate drafting is particularly important where legal services are provided on a no frills, standardised basis.
- The language and means of communication should adapt to the relative sophistication of the client.
- Financial pressures in the legal sector are no excuse for lowering the standard of care owed by solicitors to their clients.

The expansion of the portals, conditional fee agreement and after-the-event insurance reforms, legal aid cuts and the unstoppable march towards costs proportionality all contribute to challenging times for litigation solicitors. Should this be a reason to adjust the standard of care owed by such solicitors? No, was the answer given in the recent Court of Appeal decision of *Procter v Raleys Solicitors* [2015] EWCA Civ 400, [2015] All ER (D) 227 (Apr).

The facts

Mr Procter was a Yorkshire miner who developed vibration white finger in the course of his employment with British Coal and later the UK Coal Mining Limited (the employers). Both employers participated in a DTI compensation scheme to which Procter was entitled to apply.

Raleys Solicitors held themselves out as experts in handling miners' claims for compensation and indeed handled many thousands of these claims. Procter duly instructed Raleys to pursue his claim in or around January 2000.

Raleys operated a standard procedure for dealing with these types of claim. Procter was sent an initial questionnaire. Based on his answers, various standard form letters of advice were sent out and Procter was invited to provide his final instructions by filling out a "tick box" form sent with those letters. One such tick box asked whether he wished to make a claim for the cost of services, ie assistance with domestic tasks attributable to the disability. Procter left the box unticked.

On 17 November 2003 Procter's claim against the employers settled for the sum of £11,141. This sum comprised:

i. general damages for pain, suffering and loss of amenity;
ii. damages for handicap on the labour market; and
iii. interest.

The settlement did not include any sum for the cost of services because no such sum had been claimed.

In a subsequent professional negligence action Procter argued that in breach of duty Raleys had failed to advise him that he could claim damages for additional domestic assistance required as a result of his illness even though that assistance was provided gratuitously by family. He had erroneously believed that he could only claim if he had actually paid, or was paying, for extra help with services.

First instance

The judge made two key findings:

i. As a finding of fact Procter did require additional assistance with certain domestic tasks as a result of his disability and would have received an award of £5,539.50 plus interest; and
ii. The failure to obtain such an award was caused by Raleys' negligence. Instead of sending a series of long standardised letters and expecting Procter to tick the correct boxes, Raleys should have discussed matters with the client to ensure that he had read and understood the correspondence.

The appeal

The appeal proceeded on the basis that Procter would have been entitled to recover the cost of services. The remaining issue was simple: Had Raleys been negligent in failing to conduct either a meeting or a telephone conversation with Procter in order to satisfy themselves that he fully understood the advice tendered in three letters?

The short answer was yes. Lord Justice Tomlinson, with whom Kitchin and Gloster LJJ agreed, held: "It is not asking much of a solicitor in such circumstances to make sure that his client understands the opportunity apparently being passed up."

It is worth considering the reasons in some detail.

1. Poor drafting

The content of the standardised letters was heavily criticised by the Court of Appeal.

Initial information about the client and his claim was obtained by sending Procter a standard form questionnaire to complete. There were no questions on the form directly relevant to a services claim or seeking

information about any additional assistance required with domestic tasks.

Template letters were sent advising, amongst other things, on when a claim for services could be made. These were either unclear or misleading. By couching the advice in the language of "financial losses", "expenses" and "the cost of any assistance" the advice gave the impression that only actual financial outlay was recoverable.

2. An unsophisticated client

Procter himself was a relevant circumstance. According to Lord Justice Tomlinson: "It is of course a mistake to assume that someone who has not had the benefit of formal education beyond the age of sixteen is necessarily lacking in powers of comprehension, but such a person who has thereafter worked as a miner is not likely to have a detailed understanding of the concepts relevant to the availability of compensation…the situation here cried out for a short discussion with the client, preferably face to face, but if necessary over the telephone."

In this case both the language in the advice and the means of communicating that advice should have been geared to assisting the understanding of the unsophisticated Procter.

3. Overlooked clues & missed opportunities

Undoubtedly the Court of Appeal were influenced by the fact that there was enough to put the solicitors on notice that Procter might not have understood the advice given.

4. Financial constraints

Although Raley's counsel drew the Court of Appeal's attention to the difficulties which reforms and financial constraints posed to solicitors, Raleys had in fact spoken to Proctor twice by telephone. It would only have increased the solicitors' costs by a trifling amount to extend one of those calls to ensure that Procter understood the advice he had been given.

Analysis

This case should be of interest to any solicitor feeling the financial squeeze and in particular to those implementing or considering implementing standardised systems.

1. Poor drafting

Clear and accurate drafting is always desirable, but the shift towards a system-based approach to legal services makes it ever more so. Where client contact is predominantly carried out by way of template correspondence, with less opportunity for face-to-face or telephone contact, it is vital that the template correspondence leaves as little scope for confusion as possible. Standardised correspondence containing unnoticed errors are also likely to adversely affect many more clients than an individualised service, exposing solicitors to greater liability.

2. An unsophisticated client

A common sense observation or an unflattering stereotype, either way the Court of Appeal has made it clear that the service provided by the solicitor must take into account the specific client.

In practice this is likely to have one of two relevant consequences. Either it will impair standardisation of legal services because letters will have to be modified to suit the particular client, or it will lead to "defensive" customer service, ie template letters and systems designed to meet the needs of the most vulnerable or unsophisticated clients by default.

The former option will undoubtedly generate higher costs but is likely to suit practices with a mixed clientele and bring customer service gains. The latter option should allow competent services to be provided at modest cost although there are obvious disadvantages if your clients range from Albert Einstein Limited to Homer Simpson.

3. Overlooked clues & missed opportunities

It's easy to explain *Procter v Raleys* away on the basis of human error: there were signs that Procter did not understand the advice given to him. But human error is a fact of life. The key in this case was that the systems in place did not correct or compensate for the possibility of human oversight.

4. Financial constraints

The real significance of this case lies in its approach to the very real tension between fixed costs and cost proportionality on the one hand and the duty to act as a reasonably competent solicitor on the other. The Court of Appeal was told that there was an important question at stake, namely how to handle large volumes of modest value personal injury claims at economic cost to the client.

While acknowledging that what precisely is expected of solicitors will be a question of fact and degree, Tomlinson LJ was firm in rejecting cost as an excuse for sub-standard service: "For the avoidance of doubt I reject the notion that a solicitor should feel inhibited from ensuring that his client has understood advice given to him by the consideration that so ensuring might generate a further fee payable by the client."

Conclusion

The trend in legal services towards a no frills, standardised model is likely to continue. However, *Procter v Raleys* makes it clear that the no frills model must still ensure that instructions received are informed by clear and accurate advice.

The jury is out on whether this decision is a welcome defence of professional standards or marks a chasm between the lofty ideals of professional negligence arbiters on the one hand and the foot soldiers on the other. **NLJ**

Helen Pugh, barrister, 3 Hare Court (*helenpugh@3harecourt.com*; *www.3harecourt.com*)