

Duties owed when providing free preliminary advice

The Court of Appeal, in its recent judgment in the case of *Miller v Irwin Mitchell LLP [2024] EWCA Civ 53*, considered the extent of a solicitor's duties when giving preliminary advice via a free telephone helpline

Background

The matter arose from a serious personal injury claim that occurred whilst the Claimant, Mrs Miller, was on holiday with her husband in Turkey in May 2014. The holiday was booked by the husband through a Spanish registered travel operator – Lowcostonholidays Spain SLU ("Lowcost") who, in turn, had booked the accommodation via an intermediary, LTS. The contract between Lowcost and Mrs Miller was subject to English law.

In the early hours of 13 May 2014, Mrs Miller tripped down a staircase at the hotel, which caused her to sustain an open fracture to her leg ("the Accident"). Surgery was required in Turkey. At the time of the Accident, Lowcost was insured by HCC for accidental bodily injury occurring during the policy period.

After the Accident, Mrs Miller notified the Hotel. LTS became aware of the accident, who, in turn, relayed the information to Lowcost. However, this never reached the employee handling insurance matters, and the claim was not notified to HCC at the time. The policy with HCC contained a condition precedent requiring Lowcost to notify HCC of any accident that might give rise to a claim.

Mrs Miller first made contact with Irwin Mitchell on 19 May 2014, a few days after her return to the UK. Prompted by a TV advertisement, she telephoned a "Legal Helpline" operated by Irwin Mitchell. The firm employed law graduates to answer calls. Aided by a pro forma document, the employees would provide high level advice and refer matters to the relevant team.

Thus, during the conversation, Mrs Miller was advised in general terms on the principles for bringing a personal injury claim. She was also advised that the limitation period was 3 years; before the call concluded with the call operator confirming that she would refer the matter to the firm's International Travel Litigation Group ("ITLG").

The ITLG subsequently contacted Mrs Miller a few days later, inviting her to provide relevant documentation to enable them to investigate the matter. However, Mrs Miller did not respond to this until 8 April 2015. In November 2015, Mrs Miller told Irwin Mitchell that, due to complications, she was to undergo an amputation of her injured leg. This resulted in her case being transferred to a different team at Irwin Mitchell, dealing with higher value claims.

On 25 January 2016, Irwin Mitchell confirmed that it would act on Mrs Miller's behalf and a Letter of Claim was sent to Lowcost on 22 February 2016. Unfortunately for Mrs Miller, HCC declined cover for the claim due the failure to comply with the notification provisions in the policy. Shortly thereafter, Lowcost entered administration.

The Claim and First Instance Judgment

Given her inability to recover from Lowcost or HCC in respect of the Accident, Mrs Miller then turned her attention to Irwin Mitchell, whom she said had neglected their duty to protect her position. In the first instance, her primary position was that she and Irwin Mitchell had entered an express retainer during the phone call on 19 May 2014 or, alternatively, that a retainer was implied at that stage from the conduct of the parties. Under those circumstances, she said, Irwin Mitchell was under a duty to protect her claim, either by way of advising her to issue an invitation to Lowcost to notify their insurers, or by Irwin Mitchell doing so themselves on her behalf.

The Judge rejected that a retainer was created during the 19 May 2014 phone call. At that point in time, Mrs Miller was merely a prospective client. It was further found that Irwin Mitchell did not owe her a duty of care equivalent to that arising under a contractual retainer until 25 January 2016 and it was not under a duty to advise Mrs Miller to notify Lowcost of the accident or tell Lowcost to notify its insurer prior to 22 February 2016.

The Appeal

On Appeal, Mrs Miller argued that the Judge ought to have found that Irwin Mitchell owed her a common law duty of care, or a contractual duty of care under an implied retainer, from 19 May 2014 onwards. Whilst the latter argument was not formally abandoned, it was not pursued in oral argument. Andrews LJ (giving leading judgment) addressed it only briefly to confirm that the Judge had plainly been right on that issue, before turning to what was the crux of the appeal: whether the Judge ought to have found that Irwin Mitchell owed Mrs Miller *"an equivalent duty of care in tort"* resulting in an obligation from 19 May 2014 onwards to advise her to notify Lowcost.

Andrews LJ accepted the argument that Irwin Mitchell had assumed a duty to take reasonable care in and about the advice they gave over the "Legal Helpline", noting that she did not read the judgment as suggesting otherwise. Irwin Mitchell had voluntarily assumed responsibility for the limited task of providing high level advice to callers. However, the question was what the ambit of that duty is.

Counsel for Mrs Miller suggested that the fact the call operator speaking to Mrs Miller had volunteered advice on the issue of limitation meant that she had assumed responsibility for advising fully on steps for Mrs Miller to take to protect her interests. Making this argument, he relied on observations made in *Carradine Properties Ltd v DJ Freeman & Co [1955-1995] PNLR 221* that *"an inexperienced client will need and be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client."*

However, Andrews LJ rejected the argument, holding that *"those observations were specifically addressed to the situation where there is a retainer. Outside that situation, if a solicitor takes it upon himself to give legal advice to someone who is not a client, the inexperience of that other person in*

legal matters will be a factor in determining whether the advice is couched in appropriate terms, and whether it was reasonable to rely on it. Beyond that it will be of limited assistance in determining the ambit of the solicitor's responsibility, which will depend on the facts."

Mrs Miller further argued that the scope of duty on these facts extends beyond ensuring representations made to the caller were accurate and truthful, saying that a correct statement can still be misleading, if the information given is incomplete. In the context of the matter at hand, she argued that Irwin Mitchell's advice on limitation had given her the (false) impression that there was no urgent requirement to progress her matter, and that she could take her time.

Andrews LJ also rejected the assertion that a solicitor in those circumstances could be required to advise on steps to take that are not express, legal requirements to keep the claim alive. Consequently, the appeal was dismissed.

CPB Comment

The judgment is clear that a professional, in this case a solicitor, advising outside of a retainer does owe the prospective client a duty to take reasonable care. The scope of the duty to advise is highly fact sensitive, and it will turn on the specific circumstances. The clearest example as to where a duty might arise for a legal adviser pre-retainer is in the context of limitation. Andrews LJ accepted by way of example, the situation where, during a phone call it emerges that the limitation period is imminent, the call operator might be under a duty to advise on limitation.

The fact sensitive nature of the issue makes it an area that is likely to see further litigation in the future. The guidance provided will not only apply to preliminary advice provided via a free helpline, nor will it only apply to advice provided by solicitors. It can apply to any pre-retainer advice. Accordingly, professionals need to be aware of the risks of assuming duties to potential clients through the provision of preliminary advice prior to the retainer. Firms must ensure that their staff are adequately trained and competent to advise prospective clients. Further, they must understand the limits of the advice to be offered.

March 2024

Any questions

If you have any questions regarding the issues raised in this article, please get in touch with Dean or Lisbeth.



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