Is a duty of care owed to a potential client?

Many solicitors offer initial consultations to prospective clients with a view to securing new instructions. The recent Court of Appeal decision in *Miller v Irwin Mitchell LLP [2024] EWCA Civ 53* considered the duty owed by a firm in this situation.

The Claimant had suffered a personal injury on 13 May 2014 arguably due to a third party's negligence. The Claimant had an initial telephone call with a legal helpline run by the Defendant firm of solicitors on 19 May 2014. In this call it was made clear to the Claimant that the advice being given was general and preliminary and that detailed advice relating to the specific circumstances of the Claimant's case could only follow after a specialist legal team at the Defendant had examined the matter in more detail. The Defendant provided the Claimant with a high-level explanation of how a claim for negligence could be pursued and informed her that a claim needed to be issued at Court within 3 years of the date of the accident. The call ended with the Defendant's call handler informing the Claimant the matter would be referred to the Defendant's specialist legal team.

Following the telephone call, the Defendant wrote to the Claimant on 20 May 2014 to request documents from her so that the specialist legal team could review the claim in detail. The Defendant's letter expressly stated that, after the requested documentation had been reviewed, the Defendant would contact the Claimant to discuss whether it was able to accept her case.

Nearly one year later, on 8 April 2015, the Claimant provided the Defendant with the documents the Defendant had requested in its letter dated 20 May 2014.

In January 2016 the Defendant wrote to the Claimant, sending her a retainer letter and stating it was ready to proceed with her claim. The Defendant also sent her a CFA which she did not sign until July 2016.

The Claimant's personal injury claim was ultimately abandoned. The underlying defendant had gone into administration and, crucially, its Insurers had declined cover for the Claimant's claim due to the late notification of the claim by the underlying defendant. This meant that the Claimant could not recover damages from the underlying defendant and could also not successfully pursue a claim against its Insurer under the Third Party (Rights Against Insurers) Act 1930.

The Claimant accordingly sued the Defendant for failing to advise her, in the telephone call on 19 May 2014, that she should ensure the underlying defendant's Insurers were notified of her claim.

The Court of Appeal agreed with the lower Court's finding that there was no express or implied retainer between the Claimant and Defendant until 25 January 2016 when the Defendant sent its retainer letter to the Claimant and stated it was ready to proceed with her claim. Until that date, the Claimant was only a *potential* client of the Defendant. A retainer was established on 25 January 2016 as it was by that date the Claimant had communicated

her decision to instruct the Defendant and the Defendant had communicated its willingness to accept those instructions, subject to funding.

However, despite there being no contractual retainer between the parties until January 2016, the Court found the Defendant owed a tortious duty to the Claimant in respect of the advice it gave in the telephone call on 19 May 2014.

The Court considered the principles set out in *Spire Property Development LLP v Withers LLP* *[2022] EWCA Civ 970* to establish whether there had been an assumption of responsibility by the Defendant and the scope of any duty of care. The Court expressly repeated the observation in *Spire* that the fact advice is provided gratuitously is not a bar to a finding of a duty of care.

The Court found the Defendant had assumed a duty to take reasonable care when providing advice in the telephone call on 19 May 2014. The Court found the Defendant would expect callers to rely on what they were told, that it would be reasonable for callers to rely on what they were told and that the Defendant did not give a disclaimer as to its advice. The Court did note that in the call the Defendant explained that the scope of the helpline was limited to providing general preliminary legal advice and checking that the caller did not already have a solicitor for the matter they were calling about.

Having established a duty of care arose in the call on 19 May 2014, the Court next focused on the scope of the duty. The Court noted that the scope of the duty should be judged objectively in context, without the benefit of hindsight, and a fact-sensitive enquiry would be required.

The Court considered *Crossan v Ward Bracewell & Co [1984] PN 103* in which a solicitor made enquiries as to whether a prospective client could obtain legal aid in respect of criminal proceedings he was facing. After establishing legal aid would not be available, the solicitor incorrectly told the prospective client that he only had two options; fund the defence himself or represent himself. The Court found the solicitor had breached his duty of care as there was a third option, the prospective client's insurance might have funded the litigation. The solicitor knew that funding via a prospective client's insurance policy was an option and accepted that he would usually have mentioned it when discussing funding with prospective clients.

The Court found in *Crossan* that the solicitor's duty extended to giving accurate advice on the potential funding of the prospective client's litigation. The facts demonstrated that the solicitor had gone beyond just telling the prospective client that, since Legal Aid was unavailable, he would not be able to represent him - and leaving the investigation of alternative funding to the prospective client. He had instead taken it upon himself to give advice on the funding options and accordingly had a duty to give accurate advice.

The Court stated *Crossan* was a classic example of a *Hedley Byrne v Heller* type of misrepresentation on the very subject matter which the solicitor had offered his expert assistance.

Applying the scope of duty test in *Miller v Irwin Mitchell LLP*, the Court held that in the telephone call on 19 May 2014, the Defendant took it upon itself to offer high-level preliminary advice about how a claim in negligence could be pursued and advised on the 3-year limitation period for personal injury claims. The Court found the advice given on those topics was accurate.

The Court found the Defendant did not take it upon itself to give wider-ranging advice to the Claimant about any steps she might reasonably take to *"protect her position*" before she issued proceedings. The Court also found it would not have been reasonable for the Claimant to have relied on the Defendant to give her such advice or to have thought the Defendant was giving her advice of this nature. The Court also recorded that, in general, a solicitor is not obliged to advise a client to take steps to safeguard against the risk that a judgment might be unenforceable due to insolvency or the impecuniosity of the other party to actual or prospective litigation, unless he is specifically put on notice that the Defendant is in financial difficulty.

The Court concluded that simply because the Defendant informed the Claimant that she had three years from her accident in which to issue a claim for damages, the Defendant did not assume a responsibility to advise the Claimant to take a step to safeguard against the risk that the underlying defendant would not notify its insurer as per its policy requirements.

The Court rejected the argument that the Defendant's advice to the Claimant on the limitation period could be said to extend the scope of duty as to advising that there were no other steps she needed to take to protect her position. The Court noted limitation did not concern the prospective defendant's insurance position or its solvency.

Conclusion

Solicitors should be mindful that whenever giving advice to someone who may rely on that advice – even if the law firm is simply trying to be helpful and summarise the position in broad terms - they risk being found to have assumed a duty to ensure such advice is complete and accurate. Although sometimes counterintuitive, that suggests the firm should go no further than strictly necessary in addressing the specific situation highlighted by the third party.

Nevertheless, the Courts will still have discretion as to interpreting the scope and nature of the (accurate) advice required to be given, so that, even if solicitors have assumed a duty to a third party they did not intend to, its scope can still be limited by the circumstances of the case.