

Fact Sheet 9 – Negligence

August 2020

A lawyer has a duty to provide professional services with reasonable care and skill. A lawyer who fails to do this might have breached their duty of care to a client and been negligent.

Some acts of negligence are more serious than others. For example, having the wrong description of a property on a contract of sale is usually far less damaging to a client than a lawyer's failure to lodge forms with a court or registrar when this failure might lead to the case being struck out. Between the two extremes there are many other acts or omissions which might also be negligent.

Clients can make a complaint to the Office of the NSW Legal Services Commissioner (OLSC) about an alleged act of negligence. If appropriate, the OLSC will try to help the client and the lawyer reach a satisfactory resolution. In simple cases this can mean an apology, the correction of an error, the reduction of an account or other suggested solutions.

Negligence and disciplinary action

The *Legal Profession Uniform Law (NSW)*, *Legal Profession Uniform Application Act 2014* and the Regulations and Rules made under these set out the rules which solicitors and barristers in New South Wales must follow and standards of legal practice they must meet. The *Legal Profession Uniform Law (NSW)* sets out two kinds of breaches of those standards:

- **Unsatisfactory professional conduct** includes conduct occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.
- **Professional misconduct** includes unsatisfactory professional conduct, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence or diligence.

Unsatisfactory professional conduct and professional misconduct can lead to disciplinary action. This can involve the imposition of a caution or reprimand by the regulator or referral to the NSW Civil and Administrative Tribunal (NCAT) – Occupational Division ('the Tribunal'). The purpose of disciplinary action is to protect the public, ensure that breaches do not occur again and correct the professional conduct that causes them.

The Tribunal and superior courts have determined that not all negligent acts of a lawyer amount to unsatisfactory professional conduct or professional misconduct warranting disciplinary action. For example:

- A lawyer who does not know that a contract for the sale of land must be stamped before it can be registered shows a lack of professional competence and diligence. This could lead to disciplinary action.
- A lawyer might know that a contract needs to be stamped but makes a simple mistake when calculating the amount of stamp duty due. This may be negligent — but not a breach which would lead to disciplinary action.

The dividing line between acts that may be negligent but not unsatisfactory professional conduct or professional misconduct is not clear. In the experience of the OLSC, very few complaints of negligence amount to unsatisfactory professional conduct or professional misconduct.

Compensation

The avenues for recovering monetary compensation through the complaints process are limited.

The NSW Legal Services Commissioner (and his delegates, the Law Society Council and Bar Council) only have power to make a compensation order if the complainant was the person to whom the lawyer provided legal services. An order may be made if, in the Commissioner's (or his delegate's) view, it is fair and reasonable in all the circumstances, to a maximum of \$25,000. A compensation order cannot be made if the complainant was not provided with legal services by the lawyer.

The NSW Civil and Administrative Tribunal has power to make a compensation order, but only if:

- disciplinary proceedings are brought against a lawyer by the NSW Commissioner, the Law Society Council or the Bar Council
- the Tribunal, after it has completed a hearing into a complaint, makes a finding of unsatisfactory professional conduct or professional misconduct

The person requesting a compensation order makes the application and must satisfy the Tribunal they have suffered loss because of the conduct concerned, and that it is in the interests of justice that the order be made. Importantly, a compensation order is not to be made in respect of any loss for which the person has received, or is entitled to receive, compensation under an order that has been made by a court.

The amount of compensation awarded is limited to \$25,000, although the Tribunal can order more with the consent of the lawyer.

A compensation order may be filed as a judgment of the local court and enforced as such.

Taking action for negligence

Complainants who want compensation from a lawyer usually have to take private legal action against the lawyer for professional negligence. Legal action can be taken in the courts or in the Tribunal - Consumer and Commercial Division (for claims of under \$40,000).

When considering legal action against a lawyer, complainants should get legal advice. Sources of assistance include:

- **Law Access** on 1300 888 529
- a **Community Legal Centre**, which can provide some free legal advice, information and referrals. To find the nearest legal centre, call (02) 9264 9595
- The **Chamber Service** (for Registrars or Deputy Registrars) in Local Courts can assist with procedural advice about the court process or documents to be put to the Court
- The **Law Society's Solicitor Referral Service** on (02) 9926 0300

Complainants can lodge a complaint with the OLSC at the same time as taking action for professional negligence. The two processes are different:

- A complaint with the OLSC can lead to dispute resolution or disciplinary action. There are no fees or charges involved, however there is limited opportunity for the complainant to receive compensation.
- An action for professional negligence can lead to a court order for damages. It can be expensive — even if successful — because it usually means hiring another lawyer to present the case.

The OLSC does not play any part in private court actions for professional negligence. Complaints against lawyers will usually not be finalised until court proceedings are completed.