Professional Negligence

Professional negligence is a substantive area of law and is an ever-increasing area where our clients are seeking advice. The purpose of this article is to briefly consider the following important issues regularly encountered:

1. Liability in both contract and tort.
2. What if any, are the advantages in suing in tort?
3. General responsibilities and duties.
4. What is the measure of the standard of service to be expected?
5. Damages.

1 Concurrent liability in both tort and contract.

All professionals owe a combination of contractual, tortious, statutory and fiduciary duties to their clients and tortious duties to third parties.

When people talk about professional negligence it tends to be in the generic sense, which will pick up all these different types of duties. The purpose of this article is to consider the tortuous and contractual duties.

Is the professional person liable in both contract and tort?

In relation to whether these responsibilities are concurrent, there were plenty of cases particularly in the medical field, which found doctors to have concurrent responsibility to their patients for physical injury. However, in the case of Henderson v Merrett Syndicates 1995**,** which was one of many cases involving the underwriting members of Lloyds Names, suing their managing agents concurrent liability was also extended to cover financial loss, which obviously had significant effect on bankers, auditors and accountants etc.

In the vast majority of situations there will be sufficient proximity between the client and professional to find a coterminous duty of care in tort. It still does not over come or avoid the circular question as to the determination of the scope of duty in tort, since it promotes the question ‘what does the concurrent duty of care in tort require? Which begs the response, ‘a duty of care in doing what?’ With the response focusing the inquiry on what was agreed to be done under the contract. Therefore using tort to overcome deficiencies in the contract will not work.

It is also worth noting that where there is a contract, a claim in tort will not usually extend the duties of the professional. The authority for this comes from Kensington and Chelsea AHA v Wettern Composites Limited 1984,

where the defendant structural engineers contractual duties included checking the adequacy of the drawings and fixing details but this did not extend to the actual supervision of the installation of the fixings. Their contractual duties were clear and a duty of care in tort did not extend these duties to include supervision.

Tort and economic loss

In circumstances where you have no contract is it worth just suing under the tort of negligence?

The answer will depend upon the type loss you are pursing. The phrase economic loss comes into play, which is an expression liable to mislead, as there is really no precise definition. Predictably it will often be dependant upon the facts and to add to the confusion the courts have provided differing views.

A possible definition for economic is loss is along the lines of:

> *"A loss, which is **not** actual damage, injury or damage to persons or property. In other words you could recover the resulting damage caused to property but not the underlying defect itself."*

This will clearly preclude a lot of construction claims, as the damage is often inherent within the building.

Whilst it seems generally the courts do not like encouraging claims for economic loss there are confusing signals which therefore make it difficult to predict with any certainty whether you can claim or not.

A case, which neatly sums up the position, is Spartan Steel Alloys v Martin Co Contractors where the electricity supply was stopped because of a damaged cable. The claimants processing plant was half way through smelting a steel ingot. Applying the logic of economic loss, they were entitled to recover the loss of the ingot value in terms of profit and cost as the ingot was damaged. However, they were not entitled to claim for loss of profits for the disruption caused to the plant as this was not considered 'damage' to property.

This should not be confused with the principle from Headley Byrne v Heller which dealt with negligent misstatements and a person who relied on them was entitled to pursue a claim for economic loss. The courts have tended to apply this narrowly and restricting its application to 'special relationships' between the parties. In practice liability is confined to the situation where information is given to a known recipient for a specific purpose in respect of which the defendant knows that his statement has been relied on.

The principle for permitting economic loss in tort comes from the case between Storey v Charles Church Developments, which involved foundation design. The court held that the principle in Hedley Byrne could apply i.e. where one of the parties has relied on a statement given by a party outside

the contract. This decision contradicted the early House of Lords decision of Murphy v Brentwood District Council where the defendant was not responsible for economic loss. Although Murphy was distinguished on the facts since in Murphy there was no direct contract with the defendant council. This important distinction where a contract exists may make the possibilities of mounting a claim for economic loss may be more tenable.

A recent case illustrates these sorts of difficulties, in Baxall Securities v Sheard Walshaw Partnership 2002 where the Appellate court looked at the architect's responsibility in design and the claimant's responsibility in discovering a patent defect. The contractor had become insolvent leaving little alternative for the claimant to pursue the architect for negligence. The claimant had purchased the building which was flooded because of a deficiency in the guttering system. The court conceded that the duty of care owed by the architect included subsequent owners to avoid causing physical damage or injury to other property.

The court also considered that in circumstances where the claimant had actual acknowledge of the defect or should have discovered the defect, will usually be sufficient to break the chain of causation. Thus a defect is not latent if it amounted to a defect in the design or workmanship, which was discoverable with the benefit of such third party advice, or could have been expected to take whether taken or not. i.e. by a survey of the building when it was purchased by the claimant. As the floods had been caused by defective overflows which should have been detected prior to purchase this broke the chain of causation notwithstanding the architect's negligence.

2 Any advantages in suing in tort?

The main advantages for pursing a claim in tort are compared below with situation in contract:

	Contract	**Tort**
Limitation	Under the Limitation Act 1980 – the time limit for commencing an action is within 6 or 12 years of the breach of contract. The latter period if the contract is executed as a deed. Thereafter any action will be statute barred.	There are potentially better limitation periods as the cause for action does not accrue until the problem became known about, subject only to a counterclaim that it should have been reasonably discovered before hand. This provides a further 3 years from notice to bring a claim – subject to a longstop date of 15 years.
Remoteness	Under contractual damages	Whereas in comparison under

of damage	– the test to the heads of loss '*is what was within the reasonable contemplation of the parties at the time of contracting?'*	an action in tort the test for the remoteness of damage, is *'what was foreseeable at the time of the negligent act?'*

The limitation advantages offered by tort are self-explanatory. The potential advantage in regard to damages will be dependant upon the individual circumstances, but clearly the damages recoverable under tort will take into consideration known facts at the date of the negligent act, which could prove advantageous to the claimant, albeit this is also a double edge sword.

It is also particularly noteworthy that a claim in tort carries significant disadvantages in that the Professional adviser may benefit and rely on pleading contributory negligence when sued in contract by clients on the grounds of their client's own carelessness.

Although there is authority from the case of Vesta v Butcher where the Appellate court decided that whilst contributory negligence is only a defence in tort, the claimant cannot by only suing in contract deprive the defendant of the opportunity to rely on a defence of contributory negligence. Although this case has generally come under some criticism and as a consequence it may not be followed in the future.

3 General responsibilities and duties and liability issues:

The three main areas of professional duties are:

1. Contractual (Express and Implied terms)
2. In the Tort of Negligence
3. Statutory duties

Clearly in the majority of situations the duties to the client will be based upon and derived from the express (or implied) terms of the appointment.

In bringing a claim (or defending a claim) it is like that it will be essential to identify from the outset precisely what their role was. For example, if one of the standard forms of appointment had been adopted they will often refer to a schedule of one form or another containing work stages outlining the professional advisers description of work. This should be completed and will provide the starting point for determining the consultants role and thereby their responsibilities.

If for example there is a problem with the building then you must have to identify the particular service, which the professional should have performed and which has been performed inadequately. It is imperative that you particularise your claim and not simply to treat, say the Architect as

guaranteeing the end product – i.e. producing a building completely free from defects. You cannot simply list out defects or problems experienced with the building and assert that it must be the Architects fault because of a general failure to perform his duties by analogy of the doctrine *res ipsa loquitur* (i.e. as the designer it was or should have been within their complete control).

The fact remains that it is incumbent on the claimant to fully particularise their claim properly identifying specific areas the consultant has failed or was wanton in their care.

4 What is the measure of the standard of service to be expected?

As stated the contract will often determine the professional adviser's responsibilities and liabilities.

Obviously every professional owes a duty of care to his or her clients. In tort this duty of care has evolved and been developed through the common law system whereas contract whilst similar, the duty will be primarily governed by the interpretation of the contract terms.

The ground rules for the basic duty of care have been formulated over years and were set out in 1957, by McNair as:

> *'Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on top of the Clapham omnibus, because he has **not got** this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill …..he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of … men skilled in that particular art.'*

It can be said that this created a role for the expert witness in negligent cases.

This measure of care has been developed and an example of an Architects standard of care could be taken from the 1963 Australian case of Voli v Inglewood Shire Council, which approved:

> *'An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill and diligence. But he must bring to the task that he undertakes the competence and skill that is usual among architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him suffers damage, he is liable to that person. This liability can be said to arise either from a breach of contract or in tort.'*

This introduces a mechanism of determining liability from a failure of a professional to exercise the appropriate level of skill whether in contract or tort. What may be required to fulfil the standard will obviously vary according to the facts and circumstances but the starting point will be to consider the contract.

A later English case in 1988 of Eckersley v Binnie and Partners ratifies that the professional advisers needs to keep themselves reasonably up date on the professions developments and determined the standard as:

'a professional man should command the corpus of knowledge of the ordinary member of his profession. He should not lag behind… in knowledge of new advances, discoveries and developments in his field. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combing the qualities of polymath and prophet'

Comparatively recent developments in 2001 found the Court of Appeal deciding a case of JD Williams v Michael Hyde Associates were they stated that the 'Bolam Test' for professional negligence was not necessarily of universal application and in some instances the Judge may decide on what the appropriate standard of care was, rather than defer to the standard of care set by a responsible body of opinion within the profession.

Summary of the duty of care:

- The original essence was expressed in Bolam, and whilst still good law today dependant upon the circumstances the courts may have jurisdiction over what was the duty of care.[1]

- Under concurrent duty in contract and tort, the duty of care under tort will not usually extend the contractual duties.[2]

- What is required to fulfil the standard will vary according to the facts and circumstances and the starting point will be to consider the contract. But the test introduces a mechanism of determining liability from a failure of a professional to exercise the appropriate level of skill whether in contract or tort.[3]

- Although evidence will normally be put before a court of general practice it is not necessarily decisive of what is required to discharge the standard of reasonable care.

- The standard is reasonable skill and care not perfection not every error will therefore be negligence.

- Once established that an architect owes a duty either under contract or tort to provide a service, it is irrelevant what special skills the client may have in the same area as the architect's responsibility to exercise reasonable skill and care is undiminished.[4]

- The relevant standard is that of a competent practitioner at the time when the services were performed.[5]

---

[1] JD Williams v Hyde BLR 2001
[2] Kensington and Chelsea AHA v Wettern Composites Limited
[3] Voli v Inglewood Shire Council 1963
[4] Investors in Industry Commercial Properties v South Bedfordshire D.C.; Ellison and Partners and Hamilton Associates (1986) 1 All ER
[5] Nye Saunders v A E Bristow 1987

5 Damages

Following the decision in Banque Bruxselles v Eagle Star Insurance it is necessary to consider the type of loss, which is recoverable before considering the actual measure of loss.

Irrespective of a claim made in tort of contract the measure of loss is to put the claimant so far as money can do in the same position he would have occupied if the construction professional had properly discharged his duty.

Broadly this can happen in one of two possible ways

1. By paying the claimant the monetary equivalent of any benefits of which he has been deprived; or

2. By indemnifying the claimant against any expenses or liability, which he has incurred.

In circumstances the claimant has suffered non-pecuniary loss, for example physical injury or inconvenience, subject to the rule on remoteness the claimant will be entitled to general damages.

<u>The following are examples of the heads of loss which could fall under item 1</u>

Rectification costs

Usually the main head of loss if a building suffers damage as a result of negligence. In considering this the court would usually have in mind that the costs of putting right the damage are proportionate to the benefit as per the matter of Ruxley Electronics v Forsyth.

Equally full rectification costs may not be recoverable if it can be demonstrated by the consultant that even with proper and competent supervision the building contractor would still have failed to properly carried out the works

Moreover if the ‘proper’ design improves the negligent design and this results in an increase in the initial costs to the client, he will have to give a credit or recognise the increased benefit, as was illustrated in the decision in MOD v Scott Wilson Kirkpatrick. This case involved the fixing of a roof with the incorrect length of nails. The roof blew off and the redesign involved a much more expensive system and court held that the MOD were not entitled to claim for the new more expensive method of fixing as they should have paid for it any way.

Where the claimant rebuilds the works or part of the works at a higher standard than the original design there is always potential for considerable argument regarding 'betterment'.

The only circumstances when the claimant can ask the consultant to pay for the increased costs for benefit was summarised by J. Newey in Richard Roberts v Douglas Smith Stimson as:

> *'If the only practicable method of overcoming the consequences of a defendants breach of contract is to build to a higher standard then the contract had required, the plaintiff may recover the costs of building to that higher standard. If, however, a plaintiff needing to carryout works because of a defendant's breach of contract, chooses to build to a higher standard than strictly necessary, the courts will, unless the new works are so different as to break the chain of causation award him the cost of the works less a credit to the defendant in respect of betterment.'*

The following could fall under item 2

An example here is where an architect is negligent and exposes the client to a third party. For example if an architect failed to take or make a proper site examination and survey which then resulted in the building encroaching a third party's land. In these circumstances the architect would be responsible for indemnifying the client for the cost of his trespass.

Similarly, if a third party is injured because of the architect's negligence, he would be required to indemnify the employer accordingly.

Author: **Graham Read**
Date: **April 2004**
Email: **graham.read@alway-associates.co.uk**
Web: **www.alway-associates.co.uk**