THE LAW OF PROFESSIONAL NEGLIGENCE

BREACH OF DUTY IN CONTRACT AND TORT

Negligence by a professional person can give rise to liability to the victim in contract or in tort. There is usually some contractual arrangement between the claimant and the professional person whereby the latter came to be appointed to provide the professional services in question. Any contract whereby a person was appointed to provide professional services would, in the absence of any exclusion clause, contain express or implied obligations to provide the services with reasonable skill and care to be expected of such a professional in such circumstances. The content of such implied term would almost always be coterminous with the duty of care which such relationship would give rise to as between the parties to the contract. In such circumstances the only differences between pleading the case in tort and pleading it in contract would be:

1. The cause of action in tort may arise at a different time to the cause of action in contract, which will have limitation period consequences (see, for example, Pech v Tilgals (1994) 28 A.T.R. 197). In contract the cause of action accrues when breach occurs whether or not damage is suffered at that time, whereas in tort the cause of action accrues when the claimant suffers actionable damage (which may be later than the date when the breach of duty occurs).

2. The different provisions which the Limitation Act 1980 applies to obligations in tort and obligations in contract.

3. Possibly, differences in the measure of damages which a successful claim in contract or tort may give rise to.

4. Possibly, the ability to satisfy the different grounds for justifying the service of a claim form out of the jurisdiction under CPR Pt 6.

There are of course situations where a professional person will come under a duty of care to a claimant despite the absence of a contractual arrangement between them. In such case, only a claim in tort will be available.

Duty of care
It is a question of law and fact as to whether or not a duty of care arises. Although ultimately the exercise is a balancing one, the existence of a notional duty will arise, as a matter of law, if three criteria are satisfied (Caparo Industries Plc v Dickman [1990] 2 A.C. 605, HL and Spring v Guardian Assurance Plc [1995] 2 A.C. 296, HL):

1. **Foreseeability of damage**: the damage must be of a kind that the party owing the duty ought reasonably to have foreseen would flow from his acts or omissions.

2. **Proximity**: there should exist between the party owing the duty and the party to whom it is owed a relationship of “proximity” or “neighbourhood”. The concept of proximity involves the notion of nearness or closeness and includes physical proximity (in the sense of space and time), circumstantial proximity, causal proximity and assumption of responsibility (Sutherland Shire Council v Heyman (1985) 60 A.L.R. 1).

3. **Fair, just and reasonable**: the court must consider that it is fair, just and reasonable that the law should impose a duty of a given scope on one party for the benefit of the other. In deciding whether it is fair, just and reasonable to impose a duty the court will consider all the circumstances including the position and role of the alleged tortfeasor and any relevant policy considerations.

In Caparo Industries Plc v Dickman [1990] 2 A.C, 605 at 618 Lord Bridge stated that, whilst he recognised the importance of the underlying general principles, the law had moved in the direction of attaching greater significance to the more traditional categorisation of distinct recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. This is often referred to as the “incremental” or pragmatic approach, whereby in deciding whether or not there is duty of care in a new situation the courts should decide gradually, step by step and by analogy with previous cases and, as a result, in some situations, only limited reference will be required to be made to the “threefold” test.

The elements of foreseeability of damage and proximity and considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of the loss (Marc Rich & Co. v Bishop Rock Marine Co. Ltd [1969] 1 A.C. 211, HL). However, in relation to economic loss, assumption of responsibility (which was first enunciated in Hedley Byrne & Co. Ltd v Heller & Partners Ltd [1964] A.C. 465, HL) has been identified as the key criterion. Once that principle has been shown to be satisfied there is no need to embark on any further inquiry whether it is fair, just and reasonable to impose
liability for economic loss (*Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, HL, *White v Jones* [1995] 2 A.C. 207 HL and *Williams v Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830, HL). However, it has been suggested that whichever approach is adopted the same result should be yielded and, therefore, it should not matter whether the “three-fold” test, the “incremental” approach or the assumption of responsibility test is applied (*Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No. 2)* [1998] P.N.L.R. 564, CA and *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] 3 Q.B. 266 at 274A, CA).

More recent case law has recognised that it is impossible to reconcile all the judicial statements on the correct methodology to be applied to novel situations in which a person is alleged to owe a duty of care to another, and that the courts should take a more cautious approach to imposing that duty where economic loss is claimed than in relation to physical damage. The appropriate course for ascertaining whether there is a duty of care in an economic loss case is to look at any new set of facts by using each of the three approaches namely, the threefold test, the voluntary assumption of responsibility test and the incremental test which disclosed no single common denominator by which liability could be established: see, for example, *Commissioners for Customs and Excise v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181, HL. When determining whether a duty of care is owed the court will focus its attention on the detailed circumstances of the case and the particular relationship between the parties in the context of their legal and factual situation taken as a whole.

**Standard of care**

The same standard of care is required of all professional men and women. It is that of “an ordinary skilled man exercising and professing to have that special skill. A man need not profess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary skill of a competent man exercising that particular art”: and *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582. The standard expected is not dependent on the training and experience of the individual involved but is that of a person holding a particular rank or professing a particular specialist or, in a medical context, a specific post in a particular unit: see *Wilsher v Essex Area Health Authority* [1987] Q.B. 730 (reversed by the House of Lords on a different point). A hospital or firm may be liable for a failure to provide a practitioner of sufficient skill, for example, a junior doctor when a consultant is required.
A doctor is not negligent if he or she acts “in accordance with a practice accepted as proper by a responsible body of medical men skill in that particular art. ... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view”: Bolam, above. In other words, it is not appropriate for the court to determine which of two bodies of distinguished medical opinion it prefers (Whitehouse v Jordan [1981] 1 W.L.R. 246). This applies to diagnosis (Maynard v West Midlands Regional Health Authority [1984] 1 W.L.R. 634) and advice (Sidaway v Bethlem Royal Hospital Governors [1985] A.C. 871) as well as to treatment. The test also applies to causation where an issue as to standard of care arises. Where it is established what course would, but for the negligence, have been adopted and that the outcome would have been the same, the claimant has to prove that no responsible body of medical opinion would support such a course (Bolitho v City & Hackney Health Authority [1998] A.C. 232). The same principles apply to all professions (Saif Ali v Sydney Mitchell [1980] A.C. 198, per Lord Diplock at 220D).

As to what constitutes a body of medical opinion sufficient to satisfy the Bolam test, Lord Browne-Wilkinson said in Bolitho, above at 243C, that it is not enough that a number of medical experts are genuinely of the opinion, the opinion must be reasonable and responsible. However, “it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable”. He or she could only do so when satisfied that the opinion cannot be supported. In Smith v Southampton University Hospital NHS Trust [2007] EWCA Civ 387; (2007) 96 B.M.L.R. 79 the Court of Appeal indicated that, where the experts are largely in agreement as to what has gone wrong and only differ as to whether it amounts to negligence, the court should decide between them and not simply rely on the Bolam test. See also Edward Wong Finance Co Ltd v Johnson Stokes & Master [1984] A.C. 296 (a case on solicitors’ negligence where the adoption of a widely used practice was held to be negligent). In Sidaway, above, the majority of the House of Lords did not recognise that there might be circumstances where the risk involved in medical treatment was so grave that its disclosure would obviously be necessary to informed consent, notwithstanding any responsibly body of medical opinion or practice.

A duty similar to that in tort will normally be implied into a contract for professional services provided this does not conflict with express terms.

CAUSATION AND LOSS
The burden is on the claimant to show that the breaches of duty alleged caused the losses complained of. Causation is often not straightforward in professional negligence cases and the courts are wary of claims which seek to make the defendant’s insurers liable for all the problems which have befallen the claimant. For example, in *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360 the Court of Appeal differentiated between a breach which caused the loss and one which merely provided the occasion or opportunity for the subsequent suffering of the loss. Thus the mere fact that a negligent audit of a company’s account which showed profits when they should have showed losses had the effect of enabling the company to remain trading (i.e. “but for” the negligence it would have stopped trading) does not mean that the auditors were liable for all the losses consequent upon that continued trading. Rather there had to be a specific and substantial link between the breach and the loss alleged.

Although in the context of an accountant’s failure to discover fraud see *Sasea Finance Ltd v KPMG* [2001] 1 All E.R. 676, CA. In cases where it is difficult to say which of a number of factors might have caused the harm suffered but where one or more did, but it cannot be said of any it probably did so, see *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 A.C. 32, HL and *Barker v Corus UK Ltd* [2006] 2 A.C. 572, HL (although see s.3 of the Compensation Act 2006 which reverses the effect of this ruling; see also *Sienkiewicz v Grief (UK) Ltd* [2011] UKSC 10; [2011] 2 W.L.R. 523, SC).

The courts are equally concerned to impose limits on the type and extent of losses which can be claimed. In *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] A.C. 191, HL the important point was made that the kind of loss recoverable depends on the nature and scope of the duty alleged. The professional who gives advice as to which course of action to take may fairly be held responsible for all losses which flow from the taking of that course (subject, of course, to foreseeability). On the other hand, the professional who provides information which will then form part of a larger decision-making process undertaken by the claimant (e.g. the provision of a valuation to a bank) should not be held liable for all the losses flowing from the action taken in reliance upon that information (among other things). Thus the bank which decides to lend on security valued by a negligent valuer cannot claim from the valuer the losses arising from the diminution in value to the property due to a fall in the market, for such a loss is unconnected to that particular duty undertaken.

The normal rule requiring proof that the negligence complained of caused or materially contributed to the injury was modified by a majority of the House of Lords in *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134. The defendant surgeon had negligently failed to warn the claimant that the intended operation carried a 1-2 per cent risk of neurological injury, which in fact occurred in her case. If he had been warned, there was no finding on the balance of probabilities that she would not have
had the operation. On normal principles she could not establish causation but the importance of her right to be fully informed denied her by the defendant meant that he could still be responsible for her losses as they fell within the scope of his duty to warn.

In the context of clinical negligence, where the defendant negligently failed to advise the claimant to have an examination so that diagnosis of cancer was delayed by a year, by which time it had advanced, a majority of the House of Lords held in Gregg v Scott [2005] UKHL 2; [2005] 2 A.C. 176 that the claimant could not establish causation where, at the time when he should have been diagnosed, he only had a 42 per cent chance of cure (i.e. surviving more than 10 years) even though by the time of actual diagnosis this had reduced to 25 per cent. Proof of causation on a balance of probabilities was required and could not be substituted by a lesser award to reflect the lower prospects of cure analogous to the “loss of a chance” cases.

It should be remembered that claimable losses may include wasted expenditure (often useful as an alternative to damages based on what would have happened in the absence of negligence which might be highly speculative) and also the costs of reasonable mitigation undertaken by the claimant even if unsuccessful.