# Professional Liability Today

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Since the famous case of *Hedley Byrne & Co Ltd* v *Heller & Partners*[1] it has been possible for a plaintiff to recover damages for pecuniary or economic loss caused by a defendant's negligence. The loss caused by negligent professional people is often merely economic, although it is not necessarily so. Negligence in carrying out one's professional duties may, of course, result in physical injury to the person or damage to property[2], but *Hedley Byrne* was the starting point for the interesting developments which have taken place in the field of professional negligence liability over the past few years.

Very recently, it has been affirmed that the professional adviser is subject to parallel liabilities in contract and tort, and this raises interesting problems in the field of limitation of actions[3]. Some recent cases have also led some to conclude that the duties imposed on some classes of professional people are more onerous than was hitherto supposed[4].

The object of this paper is to look at this developing area of law and to put matters into perspective, in light of judicial developments.

**Immunity of Arbitrators?**

It is generally said that when performing his arbitral duties, an arbitrator is immune from liability in negligence. Various reasons have been advanced for this immunity being conceded. It is said, for example, that without it "arbitrators would be harassed by actions which would have little chance of success. And it may also have been thought that an arbitrator might be influenced by the thought that he was more likely to be sued if his decision went one way than if it went the other, or that in some way the immunity put him in a more independent position to reach the decision which he thought right"[5].

That great master of the common law, Lord Morris of Borth-y-Gest, put it another way: "As a matter of public policy it has been thought undesirable to allow an action against an arbitrator (for lack of care and skill) for the reason that his functions are of a judicial nature"[6]. This seems to be the most compelling and logical reason which can be advanced, and it is consonent with the immunity granted in other fields[7]. The immunity arises from the nature of arbitration[8].

Nevertheless, the extent of an arbitrator's immunity from an action for negligence is limited to those cases where he is exercising judicial functions[9] and there are statements in one case which suggest that the final word has not been said on the subject. Thus, Lord Salmon suggested that even if someone is formally appointed as an arbitrator, he ought not in all cases to be afforded immunity, though he conceded that the law confers "immunity to arbitrators when they are carrying out much the same functions as judges". It is, therefore, beyond doubt that, when acting judicially, arbitrators are protected.

It is interesting to note, however, that Lord Salmon preferred to express no concluded opinion as to whether immunity extends to experts appointed in quality arbitrations. "Undoubtedly", he said, "such an expert may be formally appointed as an arbitrator under the Arbitration Acts, notwithstanding that he is required neither to hear nor read any submission by the parties or any evidence and, in fact, has to rely on nothing but his examination of the goods and his own expertise. He, like the valuer, . . . has a purely investigatory role; he is performing no function even remotely resembling the judicial function save that he finally decides a dispute or difference which has arisen between the parties. If such a valuer who is appointed as an arbitrator makes a decision without troubling to examine the goods, surely he is in breach of his duty to exercise reasonable care, so would he be if he made only a perfunctory and wholly careless examination. . . . The question whether there may be circumstances in which a person, even if he is formally appointed as an arbitrator, may not be accorded immunity . . . may have to be examined in the future". This is important in the context of quality arbitrations.

The most that can be said with certainty, therefore, is that an arbitrator is protected when exercising judicial functions in arbitral proceedings *eo nomine*. "There may be circumstances in which what is in effect an arbitration is not within the provisions of the Arbitration Act(s). The expression quasi-arbitrator should only be used in that connection. A person will only be an arbitrator or a quasi-arbitrator if there is a submission to him either of a specific dispute or of present points of difference or of defined differences that may in the future arise and if there is an agreement that his decision will be binding"[10].

**Liability of Other Professionals**

One of the problems facing professional advisers—solicitors, architects, consultant engineers and the like—is that they have a dual liability, one head arising *ex contractu* and the other in the tort of negligence. Formerly it was thought that a plaintiff could not sue in negligence if he was statute-barred in contract, but this is no longer the law. *Esso Petroleum Co Ltd* v *Mardon*[11] establishes that there are parallel claims in both contract and tort. This has important consequences under the Limitation Acts.

Under Section 2(1) of the Limitation Act 1939 actions founded on simple contract or in tort cannot be brought after the expiration of six years from the date on which the cause of action accrued. There are exceptions to this basic rule, and notably (*a*) cases involving personal injuries and (*b*) where the right of action is concealed by the defendant's fraud[12]. The problem is that the cause of action accrues at different times in contract and in tort.

An action against a professional adviser which is based on contract must be brought within six years from the time of the act or omission which gives rise to the breach. In tort, the position is different and in fact there is some uncertainty as to when the cause of action arises in such a case.

The uncertainty flows from a number of recent judicial decisions, starting with *Sparham-Souter* v *Town & Country Developments (Essex) Ltd*[13] where, in a claim arising out of defective building work, Lord Denning, MR, expressed the view that time does not begin to run until the plaintiff discovers the damage or ought with reasonable diligence to have discovered it. This decision led the Law Reform Committee to say:

"It is not altogether clear from the judgement . . . whether the Court of Appeal was enunciating a new principle applicable to all cases of negligence other than personal injury claims, to the effect that the cause of action in negligence is not complete until the damage caused by the negligent act or omission becomes reasonably ascertainable; or, alternatively, whether the court was declaring that analogous to those in the *Sparham-Souter* case no damage resulting from the negligent act or omission is sufficient until some outward and visible sign reveals the fact that the property affected is not in truth in as sound a condition as it appeared to be"[14].

The House of Lords added to the confusion in *Anns* v *London Borough of Merton*[15] —which was another case involving defective foundations—although the House ruled that in such cases the cause of action arises "when the state of the building is such that there is present imminent danger to the health or safety of persons occupying it": *per* Lord Wilberforce. In other words, their lordships approved in terms the *Sparham-Souter* test, but did not make it clear whether the test of "reasonable discoverability" applies to other fields of negligence as well.

The Law Reform Committee concluded that "the courts are unlikely to find the *Anns* case has disturbed the established view that the case of action in contract accrues when the breach occurs: the decision may make the distinction between actions in negligence and actions in contract more noticeable in certain circum-

stances and in certain classes of case, but we do not think that it should be taken as having undermined the law of contract. . . ."[16]

In *Midland Bank Limited* v *Hett Stubbs and Kemp*,[17] Oliver J. had to consider limitation of action in the context of professional negligence. This was an action by the personal representatives of a deceased grantee of an option to purchase land. The personal representatives claimed damages from the defendants, who were solicitors, for negligence and/or breach of duty in failing to advise the deceased grantee of the need to register the option. His lordship came to the conclusion that the cause of action in negligence arose when the damage occurred, with the result that the claim was not barred by the Limitation Act 1939.

The learned judge did not feel it necessary to consider whether the 'reasonable discoverability' rule applied, and so the position is not crystal clear. But from the point of view of the professional man it is clear that the date at which a cause of action can accrue in negligence can be much later than is the case with contractual liability. And since it is now settled law that parallel suits in both negligence and contract can be maintained, the moral is obvious.

Problems of limitation of actions apart, recent developments have highlighted the liability in negligence of professional advisers. Since this liability arises in tort it is owed to third parties as well. The current state of the law was put graphically by Lord Wilberforce in the *Anns* case.

"The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist.

Rather the question has to be approached in two stages. Firstly, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a *prima facie* duty of care arises.

Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or reduce or limit the scope of the duty or the damages to which a breach of it may give rise. . . . Examples of this are *Hedley Byrne* where the class of potential plaintiffs was reduced to those shown to have relied upon the correctness of the statement made, and . . . cases about "economic loss" where, a duty having been held to exist, the nature of the recoverable damages was limited"[18].

In other words, there has been a considerable development in this area since *Donoghue* v *Stevenson*[19] and considerations of policy are now taken into account, as Lord Denning, MR, emphasised in *Dutton* v *Bognor Regis District Council*[20] where a local authority was held liable to a house purchaser who had bought a house with defective foundations which its building inspector had negligently passed as sound. There are many other instances of this extension of liability consequent on *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd.*[21]

These developments have naturally worried professional advisers and there has been an upsurge in the market for professional indemnity policies. But the liability is based on *fault*; it is not a strict liability. The duty is to exercise reasonable care and skill in one's professional activities. If a professional man fails to exercise this reasonable care and skill he will be liable in negligence. As Lord Denning, MR, put it in *Dutton's* case,[22] "a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who he knows is relying on his skill to save him from harm. . . . The essence of this proposition, however, is the *reliance*. . . . The professional man must know that the other is *relying* on his skill and the other must, in fact, rely on it".

What is the *standard* of care required of the professional man? The duty is to use reasonable care and skill in the course of one's employment. The extent of this duty was described by McNair, J., in *Bolam* v *Friern Hospital Management Committee*[23] and the standard is that ordinarily to be expected of the professional man:

"Where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the 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. . . . It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

The recent cases have not changed that standard and some of the comment on these recent decisions has been extraordinarily ill-informed. One case which caused some concern at the time was *Greaves (Contractors) Ltd* v *Baynham Meikle & Partners*[24]. The facts were that the plaintiffs were employed to construct a factory and ancillary buildings. The building owner was a supplier of lubricating oils, and its business required the storage of full drums of oil and the movement of them on the first floor of the warehouse by means of fork-lift trucks.

Because of the complex nature of the construction project, the plaintiffs called in the defendant consultant engineers and engaged them to design the structure of the warehouse. The design was a composite construction of steel and concrete and the plaintiffs told the defendants that the first floor of the warehouse had to take the weight of fork-lift trucks. British Standard CP 117 was followed by the defendants. Paragraph 8 of CP 117 deals with deflections of a composite beam and there is the following note:

"The designer should satisfy himself that no undesirable vibrations can be caused by the imposed loading. Serious vibrations may result when dynamic forces are applied at a frequency near to one of the natural frequencies of the member".

The warehouse was built to the defendant's design but within a few months the concrete surface of the first floor began to crack. The plaintiffs were liable to the building owners to remedy the damage. In turn, they claimed an indemnity from the defendants on the basis that (i) there was a breach of an implied term in the contract between the parties that the design would be fit for its intended purpose *or* (ii) that the defendants were in breach of their duty to exercise reasonable skill and care.

At first instance Kilner-Brown, J., who confessed to 'being almost blinded by science and partially bemused by esoteric formulae', found that the cracks were due to the vibrations caused by the fork-lift trucks, and also held that the design of the floors was such that they did not have sufficient strength to withstand the vibrations. Expert evidence established, amongst other things, that the defendant's design had not taken account of the random vibrations set up by the fork-lift trucks. The learned judge gave judgement for the plaintiffs.

Before considering the views of the Court of Appeal it should be noted that Kilner Brown, J's, judgement caused some consternation since, on one reading, it appeared to indicate that professional men were under some kind of obligation to guarantee the desired result. The learned judge found that at the time when the defendants prepared their design, an ordinary competent professional engineer would not necessarily have appreciated that the footnote warning in BS Code of Practice was a warning against the danger of vibration in general rather than the danger of repeated rhythmic impulses. However, he went on to find that the consultant engineers "knew or ought to have known that the purpose of the floor was safely to carry heavily laden trucks and that they were warned about the dangers of vibration and did not take these matters into account. The design was inadequate for its purpose".

The judge appeared to hold that there was a higher duty imposed on consultant engineers—and presumably on many other groups of professional advisers—than is imposed by law on, for example, the medical profession. His lordship said: "The courts have repeatedly taken the view that a doctor should not be inhibited by anxiety as to legal consequences when trying to cure illness or save life. . . . It seems to me that there is a different situation where an engineer fails to design properly what he is specifically engaged to design".

Accordingly, he gave judgement for the plaintiff contractors and the defendant consultant engineers appealed. The Court of Appeal dismissed the appeal, but two of its members indicated that the decision turned on its own special facts and laid down no principle of general application[25] and, as one of the learned Lords Justices remarked, "the difficulty has arisen very largely from the way in which the learned judge expressed his finding". The correct

holding is well-expressed in the headnote to one report of the case:[26]

"(i) There should, as a matter of fact, be implied into the agreement between the (parties) an absolute warranty that the design would be fit for its intended purpose since the evidence . . . established that it was the common intention of the parties that the defendants should design a warehouse which would be fit for the purpose for which it was required. Since the defendants had failed to make such a design, they were in breach of warranty.

(ii) The defendants were also in breach of the duty to use reasonable care and skill imposed by law on a professional man such as an engineer. The measures to be taken by a professional man in discharging that duty depended on the circumstances of the case and in a particular case there might be special circumstances which required special steps to be taken in order to fulfil that duty. Having regard to the particular circumstances, ie, that the defendants knew of the plaintiffs' requirements with regard to the warehouse, knew that a new mode of construction was to be used and were aware of the circular (*sic*) warning against vibrations in such constructions, the defendants were in breach of their duty to use reasonable care and skill in failing to take those matters into account".

This ruling did something to quieten the fears of professional engineers and other professionals, but it is submitted that in this age of rapidly changing technology similar 'special facts' might readily be found. And it is clearly incumbent on the professional adviser to keep up to date if he is to avoid liability, and the *Greaves* case clearly has a potential effect on the standard of care which is expected of professional advisers.

Fairly recently, some sections of the architectural profession have been concerned by the decision of the High Court in *B L Holdings Ltd* v *Robert J Wood and Partners*,[27] and the casual reader of the report might well be forgiven for thinking that the case apparently imposes more arduous duties on architects who advise on planning law than was hitherto supposed. It is suggested, with respect, that these alarmist views are not supported by the judgement. It merely reaffirms that architects are expected to know the general rules of law as it affects their work[28]. Indeed, Mr Justice Gibson foreshadowed the subsequent comment when he said: "It may be thought by some to be 'hard' to require of an architect that he know more law than the planning authority or at least have a sufficient awareness of what may be bad law enunciated by such an authority as to make him to advise his clients to check up on it". His lordship went on to emphasise that "the standard which the law sets, namely that of the ordinarily competent and skilled architect, certainly required of (the defendant) that he should at least have given that advice and warning to his clients. It would be wrong to excuse an architect in these circumstances on the ground that he was entitled to rely upon and accept the views of the planning officer. *The client pays an independent professional adviser for independent and skilled advice and a payment due should be sufficient to recognise the burden and obligations which the independent professional adviser assumes*". (Italics supplied). That is the crux of the matter, and it is submitted that the decision has no effect on the standard of care and skill which is ordinarily to be expected of a professional adviser.

**Summary**

The present position in law, as regards professional people in general, may be summarised as follows:

(a) The professional adviser owes parallel duties to his client in contract and in tort.

(b) The time when the plaintiff's cause of action arises in tort is not clearly established so far as professional negligence liability is concerned, but it is clearly later than is the case in a purely contractual action.

(c) The professional adviser owes duties in tort to third parties as well. This liability arises independently of contract and may be more extensive than has hitherto been supposed.

(d) The standard of care expected is that of the ordinarily competent person in the particular profession.

(e) The special circumstances of the case may need to be taken into account in determining whether that duty has been met.

**References**

1. (1963) 1 All ER 575 (HL).
2. As in the 'defective foundations' cases in a construction context. The loss which is caused by many categories of professional adviser—accountants, solicitors and valuers, for example—is almost invariably economic only.
3. See *Esso Petroleum Co Ltd* v *Mardon* (1977) 2 WLR 583, which overruled the earlier authorities such as *Bagot* v *Stevens Scanlan & Co Ltd* (1966) 1 QB 197 and *Clark* v *Kirby-Smith* (1964) Ch. 506.
4. For example, *Greaves & Co (Contractors) Ltd* v *Baynham Meikle & Partners* (1975) 3 All ER 99.
5. *Per* Lord Reid in *Sutcliffe* v *Thackrah* (1974) 4 BLR 16, at p. 20.
6. *Ibid*, at p. 29.
7. Thus in *Rondel* v *Worsley* (1969) 1 AC 191, the immunity of advocates from liability for negligence was affirmed on the ground of public policy. It is not certain whether that immunity would apply to lay advocates who so often and properly appear in arbitral proceedings, but in principle it ought to do so. In *Dutton* v *Bognor Regis UDC* (1972) 1 All ER, at p. 475, Lord Denning, MR, addressed himself specifically to the question of policy considerations: "In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. . . . Nowadays we direct ourselves to considerations of policy . . . we look at the relationship of the parties; and then say, as a matter of policy, on whom the loss should fall . . .".
8. There are dicta in the later case of *Arenson* v *Cassan, Beckman, Rutley & Co* (1977) AC 405, at pp. 430, 431, 440 and 442 (HL), which suggest that the final word has not been said on the subject of an arbitrator's immunity. It is submitted that these are inconsistent with the views expressed in *Sutcliffe* v *Thackrah, supra*, which are to be preferred. Fur further reference see D. Keating's *Building Contracts*, 4th edn., 1978, p .234. The *Arenson* case concerned a valuation of shares.
9. *Sutcliffe* v *Thackrah, supra*, at p. 37, per Lord Morris of Borth-y-Gest, and Lord Salmon to the same effect.
10. This was really the point at issue in *Sutcliffe* v *Thackrah* itself. That case establishes that, when certifying under the JCT Form of Building Contract an architect does not enjoy immunity. He is not a quasi-arbitrator and does not enjoy arbitral immunity, even though he is under a duty to act fairly as between the building owner and the contractor.
11. (1977) 2 WLR 583.
12. As to the meaning of 'fraud' in this context see, for example, *Applegate* v *Moss* (1971) 1 QB 406.
13. (1976) 2 All ER 65.
14. Twenty-first Report, 1977, Cmnd. 6923, para. 2; 13.
15. (1977) 2 WLR 1024.
16. Report, para. 2:20.
17. (1977) 3 WLR 167.
18. (1977) 2 WLR, at p. 1032.
19. (1932) AC 562.
20. (1972) 1 All ER 470.
21. (1963) 1 All ER 575. See *Home Office* v *Dorset Yacht Co Ltd* (1970) 2 All ER 294.
22. (1972) 1 All ER, at p. 473.
23. (1957) 2 All ER 118, which was approved by the Privy Council in *Chin Keow* v *Government of Malaysia* (1967) 1 WLR 813.
24. (1975) 3 All ER 99. The judgements both at first instance and on appeal should be studied and contrasted. The first instance decision is reported at (1974) 3 All ER 666.
25. Browne and Geoffrey Lane, LJJ.
26. (1975) 3 All ER, at p. 100.
27. (1979) 10 BLR 48.
28. As to which see Keating's *Building Contracts*, 4th. edn., pp. 209-211, and Hudson's *Building Contracts*, 10th edn., 142-144.

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**'The Quantity Surveyor'**

In the January edition we promised earlier delivery of the Journal, we regret that this promise has not generally been kept within the U.K. Strict schedules have been maintained by all parties on the publication side and posting out has been on the first Wednesday of each month. Revised arrangements were made with the G.P.O. so that sorting of the envelopes was done prior to delivery to the G.P.O., this we were able to achieve with the use of the computerised records.

Complaints have been registered with the G.P.O. about the excessive time required for delivery as against the originally promised three-day delivery and we hope the situation will improve. We extend our apologies to our readers and, in particular, our advertisers.