PROFESSIONAL LIABILITY AND CONSTRUCTION: RISK RETAINED AND RISK TRANSFERRED

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Perspective

My perspective this evening is that of a returned émigré. Not only to this Society but to the whole field of construction law, having been absent, apart from brief forays, for some 15 years. An absence brought about by that well-known cause of anti-construction law dyspepsia: loss and expense arbitrations. Happily, exposure to such arbitrations or indeed the courts generally will soon be a thing of the past, following the two main recommendations to be made by Jackson LJ on his delivery next month of his *Magna Carta*, otherwise to be known as '*Magna Costa Finitum*'. First, lawyers should work for love of the law and not for money. Secondly, if a dispute is not settled by mediation, it should be settled by the throw of a coin. The Technology and Construction Court's palatial premises can then be refurbished for the more useful purpose of providing overnight accommodation for MPs, under the watchful eye of a redeployed costs judge.

But before professional liability in a construction context is consigned to history, a few reflective words.

The professional's duty of care

Professional liability remains identified by a central pillar, the duty of care owed by a professional person to his client. So central is the perception of that pillar that professional liability is regarded as synonymous with professional negligence. The theme of this paper is that the centrality of that pillar can no longer be justified. In referring to the professional's duty of care, I refer not only to the contractual duty of care, but also to its sibling, the concurrent duty of care in tort.

The construction context

Construction and engineering projects have provided some of the main proving grounds for refining the incidents of a professional's duty of care. The traditional model for a project, involving a triangular relationship of building employer, contractor and architect, has provided a simple but still challenging model for exploring issues such as the existence of concurrent duty of care in tort, scope of duty, contributory negligence, contribution between wrongdoers and limitation.

Nevertheless, over the last three decades, the traditional model has become only one of a whole variety of models for the execution of construction and engineering projects. The landscape of contractual arrangements and roles has changed and continues to change, both in variety and complexity. As to arrangements, generic descriptions may be ascribed, such as 'Design and Build' or 'Turnkey' contracts or 'Management Contracts', but those descriptions are frequently uninformative or even opaque as to the precise contractual arrangements for a particular project.

As to roles, they do not necessarily accord with those in the traditional model. So design is not necessarily the role of an architect or even that of a person traditionally regarded as a professional. There may be no direct contractual relationship between the main designer, even if an architect or engineer, and the person traditionally regarded as the employer or the client. Indeed, even the employer may not be readily identifiable or recognisable. This may be so, for example, in the case of a large project commissioned on behalf of a limited partnership (structured to represent many financial interests). In such a case, contractual arrangements with executing parties may be effected on the partners' behalf by the general partner or other agent of the partnership.

Complex contractual arrangements in construction projects reflect many aims. They will, of course, reflect those relating to the construction process itself. Other aims may relate to financing, tax, various kinds of statutory and regulatory requirements, and the end-user. The devising of contractual arrangements so as to achieve optimal satisfaction of all these aims poses many challenges.

Not the least challenge is to devise contractual arrangements so as to ensure that risks are transparent and appropriately allocated and that there is relative ease of redress in the event that risks materialise. In this regard, complex construction projects illustrate problems of the like encountered in complex investment schemes, for example hedge funds and structured investment products. Especially to be guarded against is the 'black hole' conundrum of the person owed a relevant contractual duty being different from the person who suffered a loss consequent upon breach of that duty. That conundrum is illustrated by caselaw arising from many contexts. While an agency analysis may break the conundrum in some circumstances, it may be of no avail. Tort is then the usual old workhorse invoked by a claimant who has suffered loss but lacks a contractual right of action; that is, a right of action based on an alleged duty of care in tort owed to him by the wrongdoer.

Nevertheless, the introduction of a thread of tort to save a claimant who otherwise does not benefit from a patchwork quilt of mismatching contractual rights and duties, is objectionable on several grounds. So also is analysis which too often invokes duties of care, whether contractual and tortious in origin, as convenient mastic to fill conceptual holes.

Before stating objections to duty of care analysis, some background history is relevant.

Features of duty of care

The duty of care is essentially a nineteenth century construct, sculpted in the light of claims against members of what were then seen as the learned professions of the time, essentially medicine and the law. Its simplicity and flexibility has attracted its application over the years to a wide range of other occupations, as the role of services in the economy has increased.

The duty and its features are familiar. A professional person owes to his client a duty to exercise reasonable care and skill in the performance of the task required of him. The required standard of care is that of that paragon of virtue: an ordinary skilled person of the same discipline.[1] The duty arises not only as an implied (if not express) term of the contract of engagement between the professional man and his client, but also concurrently in tort. In some circumstances the professional may also owe a duty of care in tort to third parties. Breach of the tortious duty gives rise to liability in the tort of negligence.

The domain of the tortious duty rapidly expanded in the 1970s and 1980s. Recognition of the duty as between professional and client enabled circumvention of problems, given legislation at the time, relating to apportionment of liability and limitation of actions. As a result of subsequent legislation, many of these problems no longer arise. Over the same period, recognition of a duty of care owed by professionals to third parties in novel situations resulted in a surge of claims, until tort met its Stalingrad in *Caparo.*[2] Nevertheless, tort and the tort culture have hung on to many gains of that period. The test for a duty of care in tort is a topic for another day. Suffice to say that the various tests, tripartite duty, assumption of responsibility, incremental approach etc, can be reduced to one word: 'porridge'.

No stricter duty

The duty of care is often invoked in support of the proposition that a professional is under no stricter duty. He does not impliedly agree to produce a particular result. The client's bargain is rather the product of the care which an equivalent professional could reasonably have been expected to exercise in the same circumstances. The exercise of such care may be consistent with failure to achieve the desired result. The paradigm is a doctor's failure to cure his patient or an attorney's failure to win a case.

Measure of damages

Whether the duty of care arises in contract or tort, its nature impacts on the measure of damages consequent upon breach. The application of the

1 It is variously expressed, including as the standard which members of the relevant profession *ought to* achieve. It is often referred to as the *Bolam* principle after McNair J's articulation of it in a direction to the jury in the medical negligence case *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QBD), [1957] 2 All ER 118.

2 *Caparo Industries Plc v Dickman.* [1990] 2 AC 605 (HL), [1990] 2 WLR 358, [1990] 1 All ER 568.

restorative principle in contract entails that the claimant is entitled to the benefit of his bargain, whereas its application in tort entails that he is restored to the position which he would have occupied but for the tort. In claims against professionals based on breach of the duty of care, the contractual measure and tortious measure are generally assumed to coincide. This does not mean that the tortious measure is adopted in preference to the contractual measure. Rather, the position of having care exercised is taken as representing the extent of the contractual bargain and the position which the claimant would have occupied but for the defendant's negligence. Characterisation of the counterfactual position which would have prevailed if care had been exercised, gives rise to some difficult factual and legal issues in relation to claims against professionals.

Focus of duty

While the focus of the duty of care is on the standard of performance and not result, it impacts on the result in that it allows for the possibility that the result may not be achieved. It is this feature of the duty which explains its early selection as the standard of performance required of doctors and advocates. In 1858 it was applied in a claim for negligent design against an architect arising from the collapse of a concrete roof. Erle J said:

> '... if you employ an architect about a novel thing, about which he has had little experience, if it has not had the test of experience, failure may be consistent with skill. The history of all great improvements shows failure of those who embark in them.'[3]

The claim failed.

Rationale of duty

The rationale for this duty is readily recognisable in the case of a surgeon, certainly in the nineteenth century, as based on a pragmatic and reasonable assessment of the achievability of the desired result. It reflected the need to take account of the level of medical knowledge and skill, the health and co-operation of the patient and other factors beyond the surgeon's control. In the case of an attorney, it reflected, as it still does, the need to take account the co-operation of the client, the available evidence, the credibility of witnesses, the resources deployed by the parties and other factors beyond the attorney's control. Likewise in the case of other professionals, the selection of the duty is explicable in terms of an assessment of features specific to their occupation.

Objections to duty of care

My objections to the duty of care are directed not to its existence but rather to the fact that, all too often, it has been accorded undue primacy and potency. All too often it appears to be a conceptual rhododendron or Japanese

3 *Turner v Garland* 1853 (QB), cited in Duncan Wallace, Hudson's Building and Engineering Contracts (11th edition Sweet & Maxwell, 1995), Volume 1, 2-091 (for fuller report see The Hudson Fourth Edition Table of Cases Reprint (Sweet & Maxwell, 2001), page 1.

knotweed, which pervades the landscape for analysis and obscures other features.

Objection 1: Frustrates recognition of stricter duties

Over-focus on a professional's duty of care, may obscure or frustrate recognition of stricter duties which are justified on particular facts.

The occupations which today are regarded as professions extend far beyond those regarded as such in the nineteenth century. They have increased as human knowledge and skill and consequent specialisation have increased. Inevitably the word 'professional' has become less distinct in its connotation and unsatisfactory as a classification of occupations. Even within the same profession there may be a vast diversity of knowledge, skill and function. While some operate at the frontiers of knowledge and skill, others engage in the routine. Levels of achievability vary. It increases with improving knowledge and skill, ready access to information by electronic and other means, and the establishment of standards by professional, regulatory and other bodies. Contrasting with the Erle J's indulgence a century ago is Lord Edmund Davies's observation in a negligent design case, reflective of a more consumer-orientated society: 'The law requires even pioneers to be prudent'.[4] The claim succeeded.

Against a background of increasing achievability and expectation of achievability, it is surprising that the courts have been so hesitant to countenance a stricter duty than the duty of care.

Construction cases provide occasional illustrations of attempts to establish stricter duties against professionals, for example a duty on the part of an architect or engineer to ensure that a house or bridge designed by him will be reasonably fit for its purpose. Such attempts have occasionally succeeded, being justified in terms of the particular contract or the fact of an article being supplied as well as designed. Generally, however, attempts to establish stricter duties against professionals in building contexts appear to have been spasmodic and the success record patchy, with several judicial statements resistant to a stricter duty.[5]

The question of a stricter duty than the duty of care has arisen in other contexts. A claim to the effect that a surgeon had agreed to make the plaintiff irreversibly sterile succeeded at first instance, but failed on appeal.[6] Again, in

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4 *Independent Broadcasting Authority v EMI Electronics Ltd* (1980) 14 BLR 1 (HL), page 28.

5 See John Powell, Roger Stewart, The Hon Mr Justice Jackson (editors), *Jackson & Powell on Professional Liability* (6th edition Sweet & Maxwell, 2008), Chapter 9, paragraphs 9-165 to 9-170. Despite the open-mindedness of the author of this paper as to stricter duties, the current editor of the chapter (Miss Fiona Sinclair) seems to favour the incorrigibly conservative view of one of the two original authors and now consultant editor.

6 *Thake v Maurice* [1986] QB 644 (CA), [1986] 2 WLR 337, [1986] 1 All ER 479 (by a majority).

many cases it has been argued that solicitors were under a stricter duty – but generally unsuccessfully.

Statutory influences

Resistance to a stricter duty in relation to claims against providers of services seems consistent with classifications reflected in statutes concerning terms to be implied in different types of contract. Generally in the case of 'contracts of sale of goods', terms to be implied include terms as to quality and fitness.[7] Also, generally in the case of 'contracts for the transfer of goods', which include contracts for work and materials such as a building contracts, there are like terms.[8] In contrast, in the case of a 'contract for the supply of a service', there is no statutory implication of terms as to quality and fitness, though where the supplier is acting 'in the course of a business', there is an implied term that the supplier will carry out the service with reasonable care and skill.[9]

Grounds for stricter duty

There are persuasive grounds for more frequent recognition in professional contexts of duties stricter than the duty of care and skill.

Stricter duties are readily recognised in relation to suppliers of services *and* goods. Yet there is nothing inimical to the implication of such duties, in relation to *all* providers of services or even to *all* professionals. Professional services include the most mundane and routine. The intended result or object of the services may be readily described and be readily achievable. Even in relation to services, there is a spectrum of achievement extending from the possible to the probable and even to the expected and readily achievable in the absence of culpable error. Many professionals have progressed along this path. While statute provides for the implication of a duty of care and skill in relation to a 'contract for the supply of a service', it does not preclude the implication of a stricter duty related to result.

The relative lack of recognition of a stricter duty in professional contexts is a product of the tort culture. Fixation on the duty of care has caused insufficient questioning of its apparent exclusivity and too formulaic an approach to claims against professionals. Too often there is inadequate analysis of whether failures amounting to breach of the duty of care, amount also to breaches of other stricter duties.

Objection 2: Obscures other duties

Over-focus on a professional's duty of care, may obscure recognition of not merely stricter duties but a range of other duties. Many aspects of the duty of care and its expression serve to give it potency and an effect which is ubiquitous, monopolistic and obscuring of other duties.

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7 See Sale of Goods Act 1979, sections 2 and 14.
8 See Supply of Goods and Services Act 1982, sections 3 and 12.
9 Supply of Goods and Services Act 1982, sections 12 and 13.

The monopolistic aspect of the duty of care was commented upon on by Oliver J in *Midland Bank v Hett Stubbs & Kemp*:

> 'The classical formulation of the claim in this sort of case as 'damages for negligence and breach of professional duty' tends to be a mesmeric phrase. It concentrates attention on the implied obligation to devote to the client's business that reasonable care and skill to be expected from a normally competent and careful practitioner as if that obligation were not only a compendious, but also an exhaustive, definition of all the duties assumed under the contract created by the retainer and its acceptance. But, of course, it is not. A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one.'[10]

The reality is that the duty of care is only one of a number of duties arising from the engagement of a professional by a client. They include other contractual duties, fiduciary duties, duties of confidentiality, statutory and regulatory duties.

Fiduciary duties

These are wholly distinct from the duty of care. Indeed, the assertion of a 'fiduciary duty of care' has evoked firm censure.[11] The place of a fiduciary duty in the pantheon of legal concepts is now better demarcated in terms of his core attribute, loyalty.[12] Although expressed as a duty of loyalty, loyalty essentially imposes an inhibition or disability. It requires, in the pursuit of the interests of the beneficiary, the exclusion of the interests of other persons, in particular the fiduciary himself. The inhibitory quality of loyalty finds manifestation in the proscriptive as opposed to prescriptive formulation of critical fiduciary duties, the 'no profit' rule and the 'no conflict' rule. The relationship between a professional and his client is a fertile ground for fiduciary duties.

Duty of confidentiality

A professional is under such a duty. It is a subject for another day. Although frequently called a fiduciary duty, it is of uncertain or mixed lineage and is not peculiar to a fiduciary.[13] Certainly its lineage is not the duty of care.

Statutory and regulatory duties

Construction, no less than other fields, is subject to an almost constant bombardment of statutory and regulatory duties, of both old and new vintage. The statutes and regulation relate to a wide variety of public interest

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10 See *Midland Bank Trust Company v Hett, Stubbs and Kemp* [1979] Ch 384 (ChD), page 434; [1978] 3 WLR 167, [1978] 3 All ER 571.

11 *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA), pages 16-18; [1997] 2 WLR 436, [1996] 4 All ER 698.

12 *Bristol & West Building Society*, note 11, page 18, per Millett LJ.

13 The basis of this duty may be rationalised as an express or implied term of a professional's contract of engagement, or as a fiduciary duty or even as a free standing duty.

considerations, including safety, quality of construction, the environment, planning, competition and investment protection. Construction involves not only the process of building or manufacturing but the creation of an enduring product. It therefore has ramifications for a whole variety of persons, including those involved in the construction process itself, purchasers and users of the product, investors and indeed society at large.

The impact of such statutes and regulation extends further than the particular regimes they establish, including *statutory* duties and liabilities. Their impact extends to standards and other requirements which modify, extend and sometimes even limit what otherwise may have been contractually agreed.

An aspect of my second objection to the duty of care is that it has a voracious appetite for statutory and regulatory requirements. It is assertive of its own ability to impose them under the guise of those requirements being *no less* than what is required by way of the standard of care. Statutory and regulatory requirements are thus transmuted to common law requirements as well and, often, have extra requirements added. Hence the importance of scrutinising the precise scope and purpose of requirements under statutory and regulatory regimes, and to guard against the *de facto* extension, however inadvertent, of those requirements under the guise of the standard demanded by a contractual or tortious duty of care.

Objection 3: Chameleon quality

This objection arises out of the chameleon quality of the duty of care. It is apt to be taken as pertaining not only to the *standard* of performance but also to the *scope* of performance. Put another way, it is apt to be taken as answering not only the question 'how?' but also as answering the question 'what?'

A contention that an issue as to *scope* of performance falls to be determined by reference to a duty of care merits great circumspection. Take first an example other than from a construction context. To say that an auditor must exercise reasonable care and skill in auditing a company hardly defines *what* is required of an audit. To say that an auditor must exercise the care of a competent auditor is likewise opaque. Historically, it is true that many of the incidents of an audit engagement were rationalised by the courts by reference to the duty of care. But many of the incidents are more properly the product of the very nature of the engagement as auditor, which the courts have played an important role in delineating and prescribing. Over the last three decades, the incidents have increasingly been prescribed by statute, professional and regulatory rules. Inspection of records is intrinsic to an audit contract. Total failure to do so is of course a breach of a duty of care, but is it not more fundamentally a breach of an *absolute* duty to inspect? The same may be said of a duty to report to an appropriate level of management or, in some circumstances a regulator, upon discovery of a serious fraud.

Take another example, this time from a construction context. The issue of the nature and extent of an architect's duty to review his design has been engaged

in many cases.[14] In many, the issue has been seen as dependent on divining what was required by the duty to exercise reasonable care and skill and what a competent architect would have done in like circumstances. The difficulty with this approach is that it obscures the need for enquiry into the particular circumstances, including the particular contract of engagement, the particular express terms and terms properly to be implied by the criterion of *necessity* as distinct from the criterion of *reasonableness*. The reality is that, depending on the circumstances, an architect's review duty may be non-existent, minimal or extensive. A search for the extent of a review duty by reference to the architect's duty of care risks the heresy of the imposition of a one-size-fits-all solution.

In short, ascertainment of the scope of a professional engagement or what precisely was required of the professional demands enquiry beyond the duty of care. An appropriate riposte is: 'duty of care in doing *what*?' That riposte highlights the chameleon character of the duty of care and the need to enquire as to the contractual environment of that duty. To search for answers to *scope* questions in the duty of care itself, or in the paragon comparator of the reasonably competent practitioner, risks not just obscurity but also obscurantism and error.

Objection 4: Obscures transparency of reasoning

Fixation on the duty of care has another disadvantage. It often results in a lack of transparency between the judge's expressed legal reasoning and his conclusion. In recent years it has become apparent that, in relation to several types of claims against professionals arising from failure to achieve the desired result, the courts are particularly prone to find against the professional however understandable his apparent error. Examples are claims against solicitors in relation to conveyancing, surveyors in relation to house surveys and valuations, architects and engineers in relation to design failures and investment advisers in relation to mis-selling of retail investment products. Conventionally, pleading and reasoning intone the *Bolam* test[15] and liability is deduced from a conclusion that the defendant failed to exercise the care and skill of a competent like professional. The process frequently involves long and detailed investigation and analysis of fact, including the practices of the particular profession: hence the motivation for expert evidence, often complex and of dubious relevance.

The process is in large part the consequence of the test of liability being care and skill in performance. By allowing for the possibility that failure to achieve the desired result may be consistent with care and skill, it permits and encourages extensive exploration and assessment of that possibility by way of defence.

Yet often it is a vain defence. Despite imposition of liability by reference to the test, the more realistic interpretation of the judge's reasoning (although not

14 See *Jackson & Powell on Professional Liability*, note 5, Chapter 9, paragraphs. 9-030 to 9-038.

15 *Bolam*, note 1.

expressed) is that the professional concerned is to be taken as having agreed to achieve the desired result; a result that was achievable and should have been achieved. This reasoning should be transparent and should be openly expressed. The point was illustrated by Lord Hoffman in a lecture in 1992[16] by reference to two well known decisions in a conveyancing context, where the defendants were held liable notwithstanding cogent evidence that the impugned conduct reflected common practice.[17] He went further:

> 'What you are getting very close to there is treating the conveyancing solicitor as if he had contracted to produce a result. He has contracted to give you a clear title and practically any mistake on his part which prevents that result from being attained will attract liability. The underlying truth seems to be that judges regard conveyancing as an activity which should give a result to the client …
>
> The trouble is that most lawyers, judges included, find it much easier to reach the right answer than to explain how they have done so. They prefer to rest upon well-worn formulae rather than to puzzle out the real reasons why one case is different from another.'[18]

Put another way, the duty of care has became a default option for the accommodation of lazy reasoning.

Objection 5: Encourages sloppy-thinking and a pro-claimant bias

My fifth and strongest criticism of the duty of reasonable care is that it encourages sloppy-thinking and a pro-claimant bias. This is thanks to the fuzzy-edged word 'reasonable' and the cuddly-bear connotation of the word 'care'. Concentration on the duty of reasonable care so easily results in asking the question of what was *reasonable* in the circumstances and a subconscious assumption that an unfortunate outcome was the product of lack of care or even unrequited love.

The proper question in a contractual context is what was *necessary* under the relevant contract, including a professional contract of engagement. Asking that question prompts a more nuanced and rigorous enquiry into the terms of the contract and the allocation of risk under it. The point has particular relevance in relation to claims against solicitors in respect of matters which they were not expressly asked to investigate or advise upon.[19]

The law of contract brings to claims against professionals a rigour in ascertaining duties and the consequent allocation of risk, which the duty of care alone, and the law of tort generally, does not. Ideally the duties should be

16 Lord Hoffman, 'The reasonableness of lawyer's lapses', address to the Professional Negligence Bar Association on 14th October 1992 (1994) 10 PN 6.

17 See *G & K Ladenbau (UK) Ltd v Crawley & De Reya* [1978] 1 WLR 266 (QBD), [1978] 1 All ER 682; *Edward Wong Finance Company Ltd v Johnson, Stokes & Master* [1984] AC 296 (PC), [1984] 2 WLR 1.

18 Note 16, pages 8 and 9.

19 For example *Clark Boyce v Mouat* [1994] 1 AC 428 (PC), [1993] 3 WLR 1021, [1993] 4 All ER 268.

express, but frequently they are not. The question then arises: 'what terms ought to be implied?' On the implication of terms, 'The touchstone is always necessity and not merely reasonableness.'[20]

Preferable approach: Primacy of contract engagement

In claims against professionals, the starting point for analysis should always be the professional's contract of engagement, the nature of the required services and the terms, express and implied. There should be an evaluation of whether there are specific considerations which favour or, as the case may be, disfavour stricter duties than the duty of care. While in the case of a vast range of services it may be inappropriate to imply a duty that is stricter than the duty of care and skill, the fact that the services are provided by persons perceived as professional no longer provides a rational justification. That justification for denying the stricter duty should rather be recognised as an anachronism, which – though in its day an appropriate capsule for a number of specific considerations – should now be discarded. It diverts attention from separate evaluation of the individual potency of those and other considerations in a particular case.

Even in relation to non-contractual duties, the contract of engagement has significance. The law has progressed (or regressed) to a point where it is scarcely arguable that the fact of a contract is inconsistent with a concurrent duty of care in tort. Nevertheless, the terms of the contract are highly relevant in defining the scope of the duty of care in tort. An effective limitation of liability provision in contract is also likely to be effective to limit liability under a concurrent duty of care.[21] As regards fiduciary duties, the contract of engagement regulates whether and to what extent the professional is in a fiduciary position relative to the client.[22] In practice, professionals frequently seek to contract with clients on terms which constrain fiduciary disabilities. A fiduciary duty will not be imposed which is inconsistent with the contractual terms agreed. Thus a client's agreement (which may be implied) to a professional acting for two principals with conflicting interests, whether express or implied, negates or modifies fiduciary duties which otherwise would preclude him from so acting.[23]

Readier recognition of circumstances in which a professional person is to be taken as having agreed to achieve a result would provide further incentive for letters of engagement and written client agreements in which the professional's duties are clearly stated and explained. Such documents enable a more informed assessment of the relevant services and reduce the scope for

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20 *Liverpool City Council v Irwin* [1977] AC 239 (HL), page 260D, Lord Edmund-Davies; [1976] 2 WLR 562, [1976] 2 All ER 39, cited in Hugh Beale (editor), *Chitty on Contracts* (30th edition Sweet & Maxwell, 2008), Volume 1, paragraph 13-009.

21 *Sed quaere* whether, in the absence of contract, it is possible to limit as opposed to exclude liability in tort. The question has relevance to barristers.

22 The classic statement of principle is that by Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (High Crt of Australia), page 97. It has often been cited by English courts.

23 See *Kelly v Cooper* [1993] AC 205 (PC), [1992] 3 WLR 936 and *Clark Boyce v Mouat*, note 19 (solicitors).

misunderstanding and argument as to the duties undertaken. Insofar as the professional does not wish to be taken as having agreed to produce a particular result, that can be expressly provided for. Professional and regulatory bodies have an obvious role in developing standard agreements. Happily, such agreements have become far more widespread over the last two decades. Not only do they allow for clear delineation of duties and risk, they may also provide for limitation of liability.

Recognition in certain circumstances that a professional agreed to achieve a result would also impact on the measure of damages. Assessment of the loss consequent upon the breach of that agreement would simply entail a comparison of the promised result and the actual position achieved. There would be no need to go down the road of investigating the counterfactual of what would have been achieved by the exercise of the care of a competent professional in like circumstances.

Risk evaluation

Claims against professionals are still too often advanced and decided on the basis of no more heinous default than breach of the contractual duty of care and skill and a concurrent duty of care in tort. But, as explained in my fourth objection, that approach often does not reflect the real reason for the decision. The real reason is a perception based on risk analysis and allocation. It should be expressed.

Risk analysis is very much the territory of economists and is less familiar to lawyers. It is an economist who made the important distinction between risk and uncertainty. 'Risk proper' is a 'measurable uncertainty' and, in effect, is not an uncertainty at all.[24]

Risk analysis has useful application to the solution of legal problems. The undertaking or imposition of a duty implies a transfer of risk (or bundle of risks) from the person owed the duty to the person owing the duty. A fair allocation of risk requires a realistic appreciation of the nature and degree of risk transferred *and* a realistic appreciation of the nature and degree of risk retained by the person to whom the duty is owed.

Starting from a concept of reasonable care and the competent professional downplays scrutiny of the claimant's role too easily, if perhaps

24 Frank Knight, one of the founders of the Chicago School of Economics in *Risk, Uncertainty and Profit* (1st edition Hart, Schaffner & Marx, Chicago 1921; reprint Beard Books, 2002), 'Uncertainty must be taken in a sense radically distinct from the familiar notion of Risk, from which it has never been properly separated … The essential fact is that 'risk' means in some cases a quantity susceptible of measurement, while at other times it is something distinctly not of this character; and there are far-reaching and crucial differences in the bearings of the phenomena depending on which of the two is really present and operating … It will appear that a measurable uncertainty, or 'risk' proper, as we shall use the term is so far different from an immeasurable one that it is not in effect an uncertainty at all.' The concept of a 'measurable uncertainty' is not foreign to lawyers. It is echoed in the legal dichotomy between losses which are foreseeable (which the defendant must bear) and those which are unforeseeable (which the claimant must bear).

subconsciously. Worse, it encourages *a priori* reasoning. In contrast, the concept of risk and its evaluation in a particular case encourage a more open-minded evaluation.[25]

Implied in a realistic appreciation of the risk transferred and risk retained is an appreciation of the following. First, risk is not a single entity. Secondly, risk may not be wholly transferred. It may be shared to differing extents. Thirdly, the nature and degree of risk transferred may differ as between different parties to different but similar transactions and in differing circumstances, according to their relative status, knowledge, experience and even resources.

In no area of the law has risk as a concept been more dominant and influential in the development of principles and rules than in relation to investment liability. It is a relatively recent development and the trailblazers have been regulators and not judges. I refer to the regulatory regime for financial services initially established by the Financial Services Act 1986 and now governed by the Financial Services and Markets Act 2000. From inception, the regime reflected a highly nuanced allocation of risk. Different investors have different appetites for risk and different capacities to absorb risk. Different investment products have different risk profiles, as do different investment services. The regime for regulation of financial services responds accordingly: hence the regulatory focus on the type of product, service, consumer and provider, with rules fine-tuned accordingly.

This focus and the consequent evaluation of the *risks transferred* and *risks retained* are far better than the approach of focussing on the unrealistic ideal of the reasonably competent practitioner. It also avoids artificial problems created by the latter approach, such as the problem of whether there is a different standard of care for the specialist practitioner.[26] Also, regulatory concepts such as customers' understanding of risk, 'know your client' and 'suitable advice' have wider currency, both for construction law and professional liability law generally. The task of the lawyer is to be sensitive to the interrelationship between common law principles and regulatory concepts and to the scope for development by analogy.

Conclusion

For too long the assertion of failure to exercise reasonable care has been a portmanteau term, which has aided the less than rigorous practitioner and judge to avoid articulation of more precise reasons for his contention or

25 This point may be seen as underlying Lord Hoffmann's assertion in *SAAMCo* (*South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (HL), [1996] 3 WLR 87, [1996] 3 All ER 365, 80 BLR 1, 50 Con LR 153) that the starting point for damages assessment is ascertaining the scope of the duty undertaken or imposed. Note also Lord Nicholls (explaining Lord Hoffmann's reasoning in *SAAMCo*) in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL), page 1631: the valuer 'is not liable for consequences which would have arisen even if the advice had been correct … because they are the consequences of risks the lender would have taken upon himself if the valuation advice had been sound.' (Also [1998] 1 All ER 305.)

26 See for example in the context of solicitors: *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep 172 (ChD).

conclusion. A focus on risk requires greater scrutiny of the particular task undertaken for the particular client and of the precise contractual obligations undertaken. The tortious focus on not causing harm, linked to the Atkin concept of reasonable care, is too blunt and has dominated the analysis of professional liability cases for too long. It needs to be approached with especial caution in relation to the huge variety of contractual arrangements in construction and engineering projects.

Note the reference in the title to this paper to 'professional liability' not 'professional negligence'. It is deliberate. Other than in medical contexts, contract provides the basis for most professional relationships. Therefore contract principles rather than tort principles should provide the prime basis for analysis in such cases, supplemented in regulatory contexts by regulatory principles and requirements. A rigorous contractual analysis should also lead to better analysis of the scope of the contract and the services agreed to be provided – and to the articulation of more precise express and implied duties than the too general duty to exercise reasonable care and skill. The classification 'Professional Negligence' should be buried: RIP. Long live the phoenix of 'Professional Liability'.

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