

Welcome to the summer edition of **on duty**, the journal of the Professional Negligence group at 2 Temple Gardens.

We have articles for you by Howard Palmer QC on the decision of the House of Lords in *Haward v. Fawcetts* (dealing with limitation in an accountant's negligence case), by Dan Crowley and Emily Saunderson on the Football League's case against solicitors Edge Ellison, while Simon Goldstone tackles the question of a banker's duty to the beneficiary of funds frozen by order of the Court (*Customs & Excise v. Barclays Bank*). Stewart Chirside and Helen Wolstenholme provide an update on recent cases affecting our branch of the law, while Andrew Miller and I have penned an article on the relative responsibilities of doctor and pharmacist when drugs are misprescribed: an interesting area of the law on which there is very little direct authority.

It has been a good year for 2tg's Professional Negligence Group with our members appearing in important cases in the High Court, Court of Appeal and the House of Lords. In addition we welcome two new silks, Martin Porter and Jacqueline Perry, bringing the total number of silks in our team to eight. More than ever before, we can truly offer strength in depth in this specialist area of practice, and look forward to working with you in the year ahead.

We hope this new edition of **on duty** will be useful and also entertaining.



Bob Moxon Browne QC  
*Head of the Professional Negligence Group*

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Edited by *Helen Wolstenholme* and *Charles Dougherty*

If you have any queries or require further information on any topic in *on duty*, please contact the author of the relevant article or Lee Tyler, Senior Clerk, ltyter@2tg.co.uk

The group continues to give seminars on a wide variety of topics. If you would like further details please contact Deborah Francis on 020 7822 1287 or email seminars@2tg.co.uk.

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## WHEN DOES DAMAGE OCCUR?

### **Limitation: Howard Palmer QC considers the decision of the House of Lords in *Haward v Fawcetts*.**

Like London Buses, you wait for ages for a professional negligence limitation point to reach the House of Lords, and then two come along at once. 2006 saw the decisions of the House in *Haward v. Fawcetts* [2006] 1 WLR 682 and *Law Society v. Sephton & Co.* [2006] 2 AC 543, both concerning claims against accountants.

In *Haward v. Fawcetts* the House of Lords considered for the first time the principles to be applied when a claimant seeks to extend the limitation period in a negligence action under section 14A of the Limitation Act 1980. The guidelines laid down have since been considered by *Langley J. in Poole v HM Treasury* [2006] 1 Ll. Rep. IR 38 (paragraph 256).

*Law Society v Sephton* concerned the accrual of the cause of action in a 'pure economic loss' case, for the purposes of the application of section 2 of the 1980 Act. At first glance, there appears to be no overlap between the subject matter of the two cases. The Law Society sued Sephton & Co. in negligence for the firm's failure, year on year, to report that Mr. Payne, a solicitor and sole practitioner, was misappropriating funds from his clients. As a result, Payne was able to continue his practice of misappropriation far longer than should have been the case, and the Law Society was not in a position to intervene in, and close down, Payne's practice until May 1996. Claims were then presented to the Law Society by Payne's former clients for compensation to replace the misappropriated funds. The issue in *Sephton* was whether the Law Society's cause of action against Sephton accrued when (after a negligent failure by Sephton to report correctly) Payne made further misappropriations (thus creating a contingent liability on the Law Society to pay compensation in the future to the defrauded client); or only accrued when a claim was actually made by such a client.

Their Lordships' analysis went back to the Court of Appeal decision in *Forster v. Outred* [1982] 1 WLR 86, which was cited by Sephton as authority for the proposition that the creation of a contingent liability in the Law Society to make compensation claims was enough to start the Limitation period

running. The House had little difficulty in deciding that a 'pure contingent liability' such as that which arose in the case before them was not 'damage' for the purposes of completing a cause of action in negligence. The result in *Forster v. Outred* was correct, since the imposition of a mortgage on otherwise unencumbered real property automatically diminished the value of that property, even though the amount of diminution would depend on a contingency – whether the loan for which the mortgage was to act as security was repaid or not (Lord Hoffmann, paragraph 30). Had Mrs. Forster been persuaded to enter into nothing more than a personal covenant to guarantee her son's debts, the contingent liability thereby created would not have created a cause of action against her solicitors (Lord Walker, paragraph 48). Only when the guarantee was called on would the cause of action be complete.

The decision in *Sephton* complements both *Forster v. Outred* (when properly understood) and the lending cases such as *Nykredit (no. 2)* [1997] 1 WLR 1627 and *First National Bank v. Humberts* [1995] 2 All ER 673. In the latter, where a lender enters into a lending transaction which is backed by too little security, damage does not occur until the various contingencies occur (failure of the borrower to fulfil his personal covenant; reduction of value of the security to less than the amount of the loan) so as to make damage inevitable. *Sephton* also makes clear that where a pure purchase contract is ill-advisedly entered into, it is generally possible to conclude that a loss is suffered upon completion of the purchase, even though the quantification of that loss may be impossible to discover immediately. In the typical surveyor's negligence case, the limitation period is triggered when the Claimant enters into the contract to purchase the property upon which the surveyor has (negligently) reported upon.

However, there are other transactions where it will continue to be difficult to say precisely when damage occurs so as to complete a cause of action. Lord Hoffmann approved a statement of the High Court of Australia in the case of *Wardley Australia Ltd. v State of Western Australia* (1992) 175 CLR 514 which reads

*"where, as a result of negligent misrepresentation, the Plaintiff enters into a contract which exposes him, to a contingent loss or liability ... the Plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be incurred"* (p. 532); and "A transaction in which there

*are benefits and burdens results in loss or damage only if an adverse balance is struck” (p.536)*

A purchase, on professional advice, of a Rembrandt which turns out to be a forgery would seem, on these analyses, to cause loss and damage at the moment of purchase, even though the forgery is not discovered until later. A wager placed on a horse, or an investment in the Stock Market, ill advisedly recommended by a tipster, does not occasion damage until the contingency of the horse's or company's failure to perform is realised.

In the earlier case of *Haward*, the facts were these. The Defendants were accountants who had advised the Claimant on the purchase of a controlling interest in a trading company in December 1994. The investment comprising the original purchase was followed by further substantial investments during 1995 and subsequent years, also (allegedly) on advice from the Defendants. The investments proved disastrous and in due course they were lost. The expectation at the outset was that significant but affordable sums would have to be committed before the business was turned round to profitability. But this changed into the reality of ever increasing sums being poured in to keep the company afloat. A claim for negligence was commenced against the Defendants in December 2001. It was alleged by the Claimant that there were a number of causes of action, each coinciding with the date when the various investments were made. The Defendants contended that the causes of action based on investments made before December 1995 were statute barred because they arose more than six years before the issue of proceedings. The Claimant then sought to rely upon section 14A of the Act to establish that he did not have the requisite knowledge until after December 1998 (3 years before the issue of proceedings).

The case was pleaded by the Claimant on the basis that loss occurred at the moment of each investment of money, and that the loss and damage **was** the investment of that money; this became common ground in the preliminary issue on Limitation; indeed, as stated by Lord Walker (paragraph 72) the Claimant was stuck with a pleading which not only alleged the total loss of each and every investment but also alleged the time of loss as the date of investment, so as to maximise the claim for interest.

However, this way of presenting the case might have been responsible for creating some of the

difficulties in analysing the application of section 14A of the Limitation Act to the facts: if one equates the damage with the investment and one has to consider when knowledge of damage occurred, one is forced to ask when the Claimant knew that he made an investment – a question with a single, obvious, answer. Had the analysis of the House of Lords in *Sephton* been applied to the facts of *Haward*, damage might have been defined as occurring when the ‘adverse balance was struck’; for instance, if the Claimant had been advised that the company, once acquired, would require a further injection of capital of £100,000 to bring it to profitability, it might readily have been concluded that an adverse balance was struck when £400,000 was required just to keep the company afloat in the first year.

Whilst, on the facts of *Haward*, it seems clear that a later date of ‘damage’ than the actual dates of investment would not have prevented the 6 year limitation period from having expired in relation to the investments preceding December 1995, the lesson should be learned that, where a limitation problem looms for a Claimant, careful thought should be given to the correct characterisation of the loss and damage claimed, in order to maximise the potential limitation period.

The first somewhat surprising (to cynical eyes) feature of a number of the speeches was the insistence that Statutes of Limitation are there to strike a balance between the desire to prevent stale claims and the desire to allow victims of torts to be compensated. There was no *a priori* assumption that the balance should be tilted in favour of Claimants: see Lord Nicholls (paragraph 2), Lord Scott (paragraph 32) and Lord Brown (paragraph 91). Lord Scott went further than merely voicing a sentiment, and laid down an important principle in relation to the Act, namely that there was no substitute for referring back to the text of the legislation:

*“Each of the various statutes of limitation that ... Parliament has enacted, starting with the Limitation Act 1623 and coming down to the 1980 Act, represents Parliament's attempt to strike a balance between these irreconcilable interests, both legitimate. It is the task of the judiciary to identify from the statutory language and the purpose of each amending enactment the balance that that enactment has endeavoured to strike and to apply the enactment accordingly. **It is emphatically not the function of the judges to try to strike their own balance, whether as a response to the apparent merits of a***

**particular case or otherwise.** In *A'Court v Cross* (1825) 3 Bing 329 Best CJ, commenting on the 1623 Act, said, at p 331, that he was "sorry to be obliged to admit that the courts of justice [had] been deservedly censured for their vacillating decisions" and went on: "When by distinctions and refinements, which, Lord Mansfield says, the common sense of mankind cannot keep face with, any branch of the law is brought into a state of uncertainty, the evil is only to be remedied by going back to the statute ..."

The emboldened passage is particularly apposite to numerous limitation cases where the rules have been stretched uncomfortably to accord with the human sympathies of the Judges involved.

It is perhaps more difficult to draw out consistent threads from all 5 speeches, or even a majority, when considering the technical aspects of the issues and arguments. Sections 14 and 14A of the Limitation Act 1980 provide, in almost identical terms in the cases of personal injury and other negligence cases, that the limitation period is not triggered for practical purposes until a claimant has acquired knowledge of various aspects of his cause of action. It was not until the early 1990s that there were significant cases (*Nash v. Eli Lilly* [1993] 1 WLR 782 (CA); *Broadley v. Guy Clapham* [1993] 4 Med LR 328 (CA); *Dobbie v. Medway Health Authority* [1994] 1 WLR 1234 (CA) in which the terms of section 14 were subjected to vigorous analysis. Meanwhile section 14A spawned a number of cases in economic loss actions, such as *Hallam Eames v. Merrett Syndicates* [2001] LI. Rep. 178 (CA); *HF Pension Trustees v. Ellison* [1999] LI. Rep. PN 489 (Parker J.); and *Fennon v. Anthony Hodari* [2001] LI. Rep. PN 183 (CA).

The provisions of sections 14 and 14A which have caused the courts the most difficulty are (1) the requirement that the claimant should have knowledge **both** of "the material facts about the damage" to "that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence" (sections 14A(6)(a) and (8)(a)) and (2) the stipulation that "knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, is irrelevant for the purpose of [establishing knowledge for the purposes of the section]" (section 14A(9)).

At the trial of the preliminary issue, the Claimant's witness evidence was directed to the

question of when he first knew that he had a potential claim for negligence.

The Judge held that the Claimant had the relevant knowledge under section 14A as soon as the investments were made and the causes of action arose. His reasoning was that the Claimant knew that he had made the investments (which constituted the damage) at the moment he made them; he knew that he had made the investments in reliance upon the advice of the Defendants, and that therefore the damage was attributable to that advice; and finally, that the advice was the essence of the act or omission which was alleged to constitute negligence. The Judge considered therefore that the only thing the Claimant did not know was that the advice had been given negligently, and that was declared to be irrelevant by section 14A(9).

The Court of Appeal carried out a detailed review of the authorities in this area, and recognised that they had the appearance of being somewhat contradictory. It considered that the Claimant could not have had knowledge of attributability whilst there were competing causes of the eventual demise of a company, namely poor agricultural trading conditions and the alleged defalcations of a director of the company. The appeal was allowed.

In this difficult technical assessment of the issues, some of the principles which were well established in earlier Court of Appeal decisions were fully endorsed. What amounts to 'knowledge' had been considered in *Halford v Brookes* [1991] 1 WLR 428 and *Wilkinson v Ancliff (BLT) Ltd.* [1986] 1 WLR 1352 and was repeated in *Haward*. It means "knowing with sufficient confidence to justify embarking on the preliminaries to the issue of [a Claim Form], such as submitting a claim to a proposed Defendant, taking advice and collecting evidence .. reasonable belief will normally suffice" (Lord Nicholls, paragraph 9, Lord Walker paragraph 57, Lord Mance paragraphs 112, 119).

The meaning of "attributable" was also well established at Court of Appeal level. The House of Lords confirmed that "attributable" means: "a real possibility the damage was caused by" or "capable of being attributed to". It does not mean "caused by". See Lord Nicholls, paragraphs 11, 19; Lord Scott, paragraph 41, Lord Walker, paragraph 80, Lord Mance paragraphs 104, 122. One must remember as well that the sub section requires only knowledge of the attributability of damage "in whole or in part."

The most difficult issue was the requirement for the acquisition by the Claimant of knowledge that the damage was attributable in whole or in part to “the act or omission which is alleged to constitute negligence.” The first question to determine is the level of detail which needs to be known about the “act(s) or omission(s).” Here, the House approved statements at Court of Appeal level (*Nash v Eli Lilly*; *Broadley v. Guy Clapham*; *Spargo v North Essex* [1997] PIQR P235) that all that is required is “a broad knowledge of the **essence** of the relevant acts or omissions.” “One should look at the way the Plaintiff puts his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which that complaint is based” (Lord Nicholls, paragraph 10; Lord Brown, paragraph 90; Lord Walker, paragraph 79; Lord Mance paragraph 120).

However, a majority of the law lords approved the decision of the Court of Appeal in *Hallam Eames v. Merrett Syndicates*, which adds a gloss to this test. The *ratio* of *Hallam Eames* was to the effect that, in an economic loss case, one element of knowledge which was required of the Claimant was that ‘something had gone wrong’ or that there was something of which the Claimant was ‘*prima facie* entitled to complain’ (Lord Nicholls paragraph 19, Lord Walker paragraph 72, Lord Mance paragraphs 106, 116). The requirement for knowledge of ‘attributability’ of damage to the act or omission which is alleged to constitute negligence is a requirement of knowledge of an act or omission which is **causally relevant** for the purposes of an allegation of negligence. It is therefore not enough, said the majority, that the facts alone about ‘acts or omissions’ are known: the known facts must have a character about them which gives rise to a suspicion of ‘something having gone wrong’.

This element of their Lordships’ decision resolves the conflict which appeared to exist between *Dobbie* and *Hallam Eames*. Nevertheless, the issue which has bedevilled section 14A (and section 14) of the Limitation Act 1980 is the extent to which – when assessing the essence of the relevant act or omission – the Claimant needs to have knowledge of any fault or failing on the part of the Defendant. On the facts of any given case it is often difficult to know where knowledge ‘that something has gone wrong’ (e.g. that the advice was flawed) ends, and knowledge of negligence begins. Knowledge of negligence as such is NOT required – see section 14A(9). The disparity between the various speeches in *Haward* means that this problem has not been finally resolved, and it seems likely that the boundaries of section 14A will have to be tested in the Court of Appeal again.

All the law lords appear to have agreed that the “damage” was the lost investment. They also seem to have agreed that it was necessary for the Claimant to know that the investment had become damage in the sense that it was lost. What then was the essence of the act or omission which was alleged to constitute negligence? Lord Nicholls (with whose approach Lord Mance agreed) considered that the Claimant needed to know that the Defendant’s advice might be flawed, in the sense that some element of the necessary homework preceding the advice had been omitted. Lord Mance said that “a claimant who has received apparently sound and reliable advice may see no reason to challenge it unless and until he discovers that it has not been preceded by or based on the investigation which he instructed or expected.” Thus Lord Nicholls and Lord Mance considered that it was not sufficient simply for the Claimant to know that he had entered into the investment in reliance upon advice. The giving of advice was not in itself the essence of the act or omission alleged to constitute negligence.

In the event however, both Lord Nicholls (paragraph 23) and Lord Mance (paragraph 128) decided the case on the basis of the burden of proof, concluding that the Claimant had not discharged the burden that was firmly upon him to establish that he had first acquired the relevant knowledge of a ‘cause for complaint’ (the gloss arising from *Hallam Eames*) within the 3 years preceding the issue of proceedings.

Lord Scott expressed himself to be in agreement with the other law lords. However, he and Lord Brown tended toward a more reductionist approach, finding it sufficient that the Claimant knew at an early stage that the investments were lost, and that no warning had been given by the Defendants against the Claimant’s making such disastrous investments (Lord Scott, paragraph 50; Lord Brown paragraph 90). They agreed with the Judge that “There was nothing of a factual nature that was latent; all was patent, the only thing that he did not know was that Fawcetts had been . . . negligent.” (Lord Scott paragraph 52)

Lord Walker concluded, on the facts, that the Claimant needed to know no more than that his investment had been lost and that he had made his investment in reliance upon the advice of the Defendant. Whilst he approved the *Hallam Eames* gloss, he decided on the facts that the huge gulf between the expectation engendered by Fawcetts’ advice (‘you will need to inject an extra £100,000 in the first year to turn the company round’) and the

reality (£400,000 injected in the first year, and losses continuing at a massive level) was itself sufficient to satisfy the requirement for knowledge that there was “something of which [the Claimant] would *prima facie* seem entitled to complain” (paragraph 72 – 73).

The disparity of approach by the members of the Judicial Committee demonstrates the levels of complication and subtlety that can arise in this difficult area of the law. Encouragement for defendants facing professional indemnity claims can be found in the general sentiment that issues of Limitation must be determined in accordance with the delicate balance between allowing stale claims to proceed and denying victims a remedy; and that the words of the statute must be adhered to rather than an instinctive feel as to where justice lies.

Further encouragement comes from the upholding of the meaning of ‘attributable’ and from the insistence that no detailed knowledge is required to be acquired about the acts or omissions on the part of the Defendant – knowledge of the “essence” of the complaint is sufficient.

It was perhaps inevitable that, in these difficult cases concerning economic loss, especially those arising predominantly out of omissions by the professional man, the *Hallam Eames* gloss – that the Claimant must have knowledge that ‘something has gone wrong’ – would be entrenched into Limitation law. It will be important for both sides preparing for a preliminary issue on this section of the Act to be astute to characterise the facts and matters which might be said to have made it clear to the Claimant that ‘something had gone wrong’ so as to determine whether the Limitation period can be extended under section 14A or not.



**Howard Palmer QC appeared for the Appellant in *Haward v. Fawcetts* [2006] 1 WLR 682, leading Neil Moody.**

## I'M A LAWYER NOT A BUSINESSMAN!

### **Daniel Crowley and Emily Saunderson consider the circumstances in which a solicitor may owe a duty to advise on commercial risks**

Two recent cases have given the courts the opportunity to review the scope of the duty owed by solicitors to clients who are experienced businessmen.

In a judgment delivered last summer, Rimer J in *The Football League Limited v Edge Ellison (a firm)* [2006] EWHC 1462 (Ch) held that there was no general duty on solicitors to warn clients who were experienced businessmen of the **commercial** risks of transactions on which the solicitors were instructed to provide **legal** advice. The decision was followed a month later by Lawrence Collins J in *Marplace v Chaffe Street (a firm)* [2006] EWHC 1919 (Ch).

*Edge Ellison* concerned the deal under which ONdigital was granted television rights to Football League games. ONdigital, a limited company whose parents were TV heavyweights Granada and Carlton, went into administration leaving the Football League with no income for its TV rights. The League brought proceedings against Edge Ellison, the firm which had provided legal advice in drawing up the ONdigital deal, claiming that it should have recommended to the Football League that Carlton and Granada provide financial guarantees for ONdigital.

In *Marplace*, the law firm that advised the claimant company on its option to purchase another company was sued for failing to advise that the target company's parent was in breach of the option agreement, and that the claimant had remedies against the parent company. Lawrence Collins J based his decision on the scope of the solicitors' duty largely on the decision of Rimer J in *Edge Ellison*.

Both judges gave careful consideration to previous case law and to the relevant factors in determining the scope of the solicitor's duty when dealing with businessmen. In broad terms, those factors are: the scope of the retainer; the nature of the client; and the catch-all consideration, “any other circumstances”. In practice, it is likely that “any other circumstances” will be factors affecting the scope of the retainer or what the solicitor knew or ought to have known about the client.

The starting point for both judges in determining the scope of the duty was an assessment of the specific instructions given to the solicitors.

In *Edge Ellison*, the solicitors' express instructions were set out in a strategy document, and they focused on assisting in the formulation of tender documents and advising the Football League of the legal consequences of any deal. There was no express instruction to advise on bidder solvency.

The Football League was not short of advisers on their proposed deal. They had commissioned a report on the market from a consultancy firm specialising in the valuation of sports broadcasting rights. They had also employed the services of a company called Active Rights Management Limited (ARM) to court potential bidders and build interest in the broadcasting rights. ARM's role was basically to get the best deal possible for the Football League.

In addition, the Football League had put together a special Commercial Committee to oversee the deal for the TV rights to its games because the League's previous deal with Sky had not provided enough income for the League's clubs. The Committee members were representatives of the First, Second and Third Division clubs that make up the Football League, and they were chosen because of their business experience. Three of them had experience in the sale of media rights. Each of the members of the Commercial Committee who gave evidence agreed that they were well aware of the dangers of contracting with a limited liability company without financial guarantees.

Nonetheless, the Football League argued that Edge Ellison should have appreciated that commercial security from ONdigital was or might be required, and that they should have sought further instructions on that specific issue.

Rimer J found that that it was no part of the express retainer that Edge Ellison should advise the Commercial Committee of commercial considerations arising from the negotiations, or indeed from the final deal that was agreed, for the TV rights. The business experience of the Commercial Committee and the existence of other advisers meant that there was no implied duty either.

The judge emphasised that the Football League's problem had arisen from a commercial matter – not asking for financial guarantees from ONdigital's

parent companies - and this was a decision which hindsight had shown to be wrong. He said at paragraph 270:

*"Had some other commercial matter been later seen to have gone wrong, is it to be said that Edge Ellison owed a duty to prompt the Committee to think about it? Is the solicitor supposed to review the whole range of commercial considerations that underlie a particular deal, work out which ones he is concerned the client may not have given sufficient thought to and remind him about them? In my judgment, the answer is no."*

Rimer J commented that the concept of financial guarantees was the most basic business consideration of which all the Football League's Commercial Committee and Management Board were aware; they had simply not chosen to deal with the issue.

Assessing the scope of the express instructions will usually be relatively straightforward; determining the implied duty (or implied term of the retainer) may be more problematic.

In determining any implied duty, the court will have regard to the experience of the client. Where the client is an experienced businessman, the solicitor's duty will usually only extend to advising about risks or hidden pitfalls which concern the legal aspects of a transaction, but it may extend to commercial matters where the client has a lower level of business know-how.

Where the risk or pitfall of which the solicitor becomes aware concerns a legal issue, no matter how obvious the problem may appear to be, the solicitor certainly has a duty to inform his client. So, in *Credit Lyonnais v Russell Jones & Walker* [2003] PNLR 2 the defendant firm was found to have been negligent in failing to advise its client that the operation of a break clause in a lease was dependant on the prompt payment of a fee. At p.25, Laddie J said of the solicitor's duty to advise his client:

*"He is under no general obligation to expend time and effort on issues outside the retainer. However, if in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing "extra" work for which he is not being paid."*

In determining the scope of the retainer, the court will also give effect to the presumed intentions of the parties (see *Edge Ellison* at paragraph 266), and to the experience of the client, and this may give rise to implied duties to advise on commercial considerations, depending on the circumstances of each case.

The courts generally take the view that the more experienced the client, the less onerous the duty on the solicitor to advise the client of business considerations. But how will the courts expect a solicitor to assess the business experience of his client?

The Privy Council considered this question in *Pickersgill v Riley* [2002] PNLR 31. It held that the solicitor's duty depends on the **apparent** business experience of the client. In *Pickersgill*, the Privy Council considered the duty owed by a solicitor to Mr Riley, the owner of a company which published free newspapers, to warn him of the dangers of accepting a guarantee from a limited company. Lord Scott said at paragraph 7:

*"It is plain that the scope of that duty of care is variable. It will depend, first and foremost, upon the content of the instructions given to the solicitor by the client. It will depend also on the particular circumstances of the case. It is a duty that it is not helpful to describe in the abstract. The scope of the duty may vary depending on the characteristics of the client, in so far as they are apparent to the solicitor. A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering into a commercial transaction that it would be pointless, or even sometimes an impertinence, for the solicitor to offer an obviously experienced businessman."*

The Privy Council had expounded the same principle ten years earlier in the case of *Clark Boyce v Mouat* [1994] AC 428, at 437, and it was very much in evidence in *Marplace* where the clients clearly gave the impression of being sophisticated businessmen (see paragraphs 392 to 394), and only gave their solicitors the information they as clients thought was necessary for the solicitors to fulfill their instructions.

The apparent characteristics of the client are also relevant on the issue of the solicitors' discharge of the duty of care. In *Reeves v Thrings & Long* [1996] PNLR 265, the claimant businessman had sought

the advice of the defendant solicitors before he bought a hotel. There was a car park within the hotel grounds, but access to the car park was across land belonging to the local council. The hotel had a licence, which was due to expire in just over three years at the time of the purchase, to use the land to access its car park.

The solicitor dealing with the purchase had advised Mr Reeves about the licence and warned him that there was no automatic right of renewal. Mr Reeves had gone ahead with the purchase but been forced to buy adjoining land when the licence expired to ensure continuing access to the car park. He sued the solicitors who had advised him on the hotel purchase, claiming that he had not been warned sufficiently about the implications of the licence, and particularly what would happen when it expired.

The Court of Appeal held by a majority, with Lord Bingham MR dissenting, that the solicitor's explanation had been sufficient to discharge his duty of care. Hobhouse LJ said at page 288D:

*"Provided that the solicitor uses language which would lead a reasonable person in the position of the solicitor to believe that his advice was being understood, and there is no evidence that the solicitor should reasonably have observed that his advice was not being understood, the solicitor has discharged his duty."*

Where a claimant who is an experienced businessman alleges that his solicitor negligently failed to advise him of the commercial implications of a transaction, it is clearly vital to assess the duty owed to the client by the solicitor. Any such assessment will involve a consideration of the following:

- (1) What was the solicitor expressly asked to do?
- (2) Can any extended duty be implied by the context in which the solicitor was instructed?
- (3) Does the claim arise from a commercial decision made by the client, and if so, was the decision influenced by a consideration of the legal consequences, or would it have been if such advice had been given?
- (4) Did the solicitor become aware, or should he have become aware, of the problem that has given rise to the litigation while he was acting for the client, and if so, should he have and did he warn the client about it?

(5) What did the solicitor know about the client's business experience?

(6) What did the solicitor assume about the client's business experience, and was this assumption reasonable?

(7) What did the client know (or what ought he to have known) about the problem now complained of?

Generally, the courts will be reluctant to make a solicitor bear responsibility for a poor commercial decision by his client unless the decision was poor because the client was unaware of a particular legal consequence, or the client was inexperienced and was looking to the solicitor for guidance and the solicitor should have known that.



**Daniel Crowley and Emily Saunderson are members of 2tg's Professional Negligence Group.**

## *DON'T BLAME ME, BLAME THE DOCTOR'S HANDWRITING...!*

**Bob Moxon Browne and Andrew Miller consider the relative responsibilities of physician and pharmacist when the wrong medication is dispensed**

The overworked doctor with bad handwriting who produces an illegible prescription is a familiar stereotype, and likely to remain so as long as some doctors continue to insist on writing prescriptions by hand. Safer by far to use the computer to print off a replica from the patient's medication record; this is becoming much commoner, but is still by no means always the rule.

The problem is compounded by the fact that for reasons which may be rooted in the traditional idea that the less the patient knows about his treatment the better, prescriptions are still sometimes written partly or largely in Latin, often confusingly abbreviated. Hopefully the pharmacist will know that q.d ("quotidien") means "one per day"; but will he also know that q.d.s (or is that "s" a smudge of ink?) means "four per day"?

And occasionally the doctor simply gets it wrong, perhaps prescribing 5 mg of a drug when the safe and intended dose is 0.5 mg.

The role of the pharmacist in all of this is to exercise an independent judgment as to the reliability of the prescription (e.g. whether he is satisfied it is unambiguously legible) and the appropriateness of the strength of medicine prescribed and the dosage instructions. In case of any doubt on any of these matters, he should check with the doctor that his understanding of the script is correct.

In applying his mind to these questions, the pharmacist may in cases where the patient has regular medication have access to the computerised record kept in the pharmacy of all drugs dispensed. It is good practice to consult this, to ensure that the prescription matches the patient's medication history; or if it does not, that there is some apparent reason for the discrepancy. Nowadays these records are almost always kept on a computer. In the case of an existing customer, it will be automatic for the pharmacist to enter the prescription against the patient's name, and in doing so, to check the history before printing off a

label, which will usually be an exact match of the computerised record. This process removes much of the risk that a mistake will be made.

Although prescription and dispensing errors are unhappily not uncommon, there is very little authority on the question of legal responsibility for them. This is probably because in most cases the issue will be straightforward. If the prescription is clearly written and correct, but the pharmacist dispenses the wrong drug, or the right drug but the wrong dose, clearly the error and the responsibility will be his; while if the prescription is wrong but the pharmacist has no means of suspecting a mistake, the doctor must bear responsibility.

However interesting questions can arise in cases where the doctor has made a mistake of the sort which ought to have been picked up and queried by a competent pharmacist.

In *Dwyer v. Rodrick and Ors.* (unreported, 10.2.1982) the Claimant was prescribed Migril, a proprietary drug for the treatment of migraine, "2 every 4 hours PRN". This was a dangerous over-dose, which went unnoticed by the pharmacist who dispensed the medication. The use of the shorthand PRN ("pro re nata" – a recondite Latin phrase which translates very roughly to "as necessary") was not alleged to have contributed to the confusion, but it may have done so.

The claimant was badly poisoned by excessive quantities of Migril, and substantial damages were divided effectively equally between the doctor and the pharmacist involved, Stuart-Smith J holding that while it was the doctor who set in motion a disastrous chain of events, it was the pharmacist who dealt with the claimant face to face when handing her the drug which poisoned her, having failed to take advantage of the last opportunity to avert the injury.

*Dwyer* was not a case where the pharmacist had an opportunity to check the appropriateness of the right prescription against the patient's medication record, because it was the first time that the claimant had been prescribed this drug. It was a different situation in *Horton v. Lloyds Pharmacy plc* [2006] EWHC 2808 (QB) tried very recently by Keith J in the High Court. Mrs Horton was prescribed 4 mg of dexamethasone, a potent corticosteroid, instead of her usual "maintenance dose" of 0.5 mg. The pharmacist dispensed the higher dose, notwithstanding that his records showed that this was 8 times Mrs Horton's usual dose. No division was made as to liability as between the pharmacist and the doctor, because the latter dropped out of

the case after a mediation; so any assumption that the Judge might split liability in the same way as in *Dwyer* was never put to the test.

In *Horton* the pharmacist was criticised by the Judge for failing to consider that, in the absence of information as to the dose of the medication prescribed, the strength of the prescription could exceed the maximum in the British National Formulary ('BNF') recommended range.

The Judge held that the pharmacist should not have formed a conclusion as to the total strength of the prescription without clarifying information as to the prescribed dose with either the patient or the doctor.

However, in *Horton*, the failure to check the dose was held not to be causative of the Claimant's condition because had the pharmacist checked what dose has been prescribed, it would not in all likelihood have revealed the mistake as to the strength of the medication prescribed.

The pharmacist was criticised by Keith J for failing to go behind the guidance given in the BNF and question the prescription given to Mrs Horton. The Judge held that the eight-fold increase in the strength of the prescribed medication should have caused the pharmacist to question it.

The Judge held that the pharmacist had failed to conform to the requirements under the Royal Pharmaceutical Society Guidelines and the Common Law, that a pharmacist should exercise his independent judgement to ensure the drug is apt for the patient and conforms to the physician's requirements.

However one very interesting point about causation and remoteness did emerge from the Court's judgment in *Horton*. Agreed evidence in the case showed that Mrs Horton did not in fact take any harm from the tablets supplied to her following the misprescription, because this was in the form of 2 mg tablets, which the claimant took one at a time (i.e. 2mg per day), in the belief that they were her usual 0.5 mg tablets. No harm was done until the claimant came to renew her prescription with a different doctor, to whom she showed her pill bottle. Although this was marked "Dexamethasone 2 mg to be taken as directed by doctor", the new doctor prescribed 4 mg tablets to be taken one a day.

Lloyds Pharmacy argued that the Second Doctor, who issued the repeat prescription with the increased dosage of 4mg, resulting in the

Claimant's condition, broke the chain of causation from the original failure on the part of the pharmacist to issue the incorrect strength of medication.

The Judge held that a Doctor issuing a repeat prescription, who is not initiating a course of treatment, should be able to rely on the expertise of the physician who initiated treatment and was entitled to rely on the assurances given to him by the Claimant that she had been on the same dose for many years, and to look to the label of the bottle to ascertain that dose.

In *Horton* the Judge found that the prescribing by the Second Doctor was a direct consequence of the pharmacist's error, because (so he concluded) it could be foreseen that the new doctor might have surmised that the medication previously prescribed to the Claimant was intended to be a month's supply, and hence he could be expected to deduce from the quantity in the bottle that the pills were intended to be taken 2 at a time.

While it is an everyday experience that doctors may rely on medication labels in order to see what the appropriate prescription is, it is less clear that a doctor might foreseeably make mistaken guesses about what another doctor has intended, based on calculating how long a given quantity of pills might last if taken at a given dosage.

An appeal in *Horton's* case is under consideration. Whatever the outcome, the decision helps to emphasise that even if incorrectly dispensed medication does not cause the Claimant any immediate injury, the pharmacist may still be liable if it can be shown that successive doctors are misled by reliance on the printed label rather than (for example) by direct questioning of the patient. How liability in such cases might be split between the erring pharmacist and the doctor who is led into subsequent error is a question which remains for decision on some future day.



**Bob Moxon Browne QC appeared for the Defendant in *Horton v. Lloyds Pharmacy plc* [2006] EWHC 2808 (QB), leading Andrew Miller.**

## FURTHER DEVELOPMENTS IN DUTY

### **Simon Goldstone reconsiders the law on duty of care and economic loss following the House of Lords' decision in *Commissioners of Customs and Excise v Barclays Bank plc***

The facts of *Commissioners of Customs and Excise v Barclays Bank plc* [2006] 3 WLR 1 are straightforward: the Commissioners obtained freezing orders against the Bank's customers; the Bank was duly informed of the orders; a glitch in the Bank's systems allowed the customers to withdraw and dissipate funds, leaving the Commissioners unable to enforce any judgment against the customers.

Last Summer, the House of Lords gave judgment on the preliminary issue: Was there a tortious duty on the Bank not to expose the Commissioners to pure economic loss by allowing funds to be withdrawn contrary to the freezing orders?

This narrow issue had provoked considerable judicial reflection on a far wider question both at first instance and in the Court of Appeal: namely, how should a court determine whether a duty of care in respect of pure economic loss arises? Various possible tests emerged from the case law: "the assumption of responsibility" test; the "three-stage" test first formulated in *Caparo v Dickman* [1990] 2 AC 605; and the "incremental" test which was set down by Brennan J in the Australian case of *Sutherland Shire Council v Heyman* (1985)157 CLR 242 and which met with warm approval in *Reeman v Department of Transport* [1993] PNLR 618 and subsequent cases of this jurisdiction.

Following the Court of Appeal decision in this case I wrote in the 2005 edition of "On Duty" that "the nature of relationship between the tests and the question of their relative utility are unsettled questions...The law lords will soon have the opportunity to provide clear guidance on these points and it is to be hoped that they will do so." Did the law lords rise to the challenge?

Lords Bingham, Hoffmann, Walker, Rodger and Mance each allowed the Bank's appeal, finding that the Bank did not owe the alleged duty. It is now clear that a third party, in possession of assets frozen by a court order, is not under a duty of care to protect the beneficiary of that order from pure economic loss. This is an important finding in its own right.

Of wider interest, however, is the extent to which

the law lords took the opportunity to provide predictable, objective guidance as to **how** a court should decide whether, in a novel situation, a duty of care arises. Sadly in a short article of this nature it is not possible to discuss fully the approach of each of the law lords to the various submissions. I have sought to focus on the elements of their lordships' speeches which are likely to be of the most practical assistance.

The '**incremental test**' approach was given short shrift by their lordships. Lord Bingham thought that this test was "of little value as a test in itself"; it was generally of peripheral interest in their lordships' deliberations.

The Bank relied on the '**assumption of responsibility test**' and argued that:

- (1) It could not objectively be seen to have assumed responsibility towards the Commissioners to preserve the assets from dissipation; and
- (2) There was a precondition to liability for pure economic loss namely that the Defendant assume responsibility towards the Claimant in respect of the performance of the task in question; therefore
- (3) The claim must fail.

Their lordships accepted the first proposition. Whether a party had assumed responsibility for the liability in question would depend upon "what would reasonably be inferred from his conduct against the background of all the circumstances of the case". The Bank's potential liability had arisen entirely involuntarily, by means of the court order. Their lordships agreed that there had been no conduct on its part such as would allow the court to find that it had objectively assumed responsibility towards the Claimant. Lord Hoffmann, in particular, placed great weight on the passive nature of the Bank's role in making his finding on this point. He referred to a "general principle that...the law of negligence does not impose liability for mere omissions".

In the absence of any assumption of responsibility, was the bank off the hook?

Lord Hoffmann considered that the purpose of the assumption of responsibility enquiry was to establish whether "there was, in relation to the loss in question, the necessary relationship (or "proximity") between the parties, and...the existence of that relationship and the foreseeability of economic loss will make it unnecessary to undertake any further inquiry into whether it

would be fair, just and reasonable to impose liability". Accordingly, his Lordship found that as the Bank did not assume, as towards the Commissioners, any responsibility to adhere to the freezing order, there could be no duty of care.

The other members of the House surveyed the extensive appellate case law for guidance as to whether the assumption of responsibility was the "single touchstone of liability", absent which there could be no relevant duty of care. Lord Mance found that the assumption of responsibility test was "particularly useful" in cases where the defendant had a fiduciary duty towards the claimant and where the defendant had voluntarily assumed responsibility when it knew or ought to have known that the claimant would rely upon the defendant. In such cases the assumption of responsibility test "may effectively subsume all aspects of the three-fold approach". However, in other types of cases such as the present appeal, an assumption of responsibility would be "a sufficient but not a necessary condition of liability."

It was accordingly necessary to consider the "**three-fold test**" of foreseeability, proximity, and whether it was just, fair and reasonable to impose a duty. This third element was referred to as "policy" by Lord Bingham.

The Bank conceded that foreseeability was not in issue, but there was some disagreement on the issue of proximity. Lord Mance considered that the Bank, on receipt of the freezing orders, was in a closely proximate relationship with the Commissioners, as the Commissioners were likely to be heavily dependent on the Bank's adherence to the orders.

For Lord Hoffmann, proximity was a corollary of an assumption of responsibility – as there was no assumption of responsibility, the parties could not be said to be in a proximate relationship. As noted above, however, Lord Hoffmann did not consider proximity in the context of the three-fold test, as he did not find it necessary to take his inquiry beyond the assumption of responsibility test. Lord Rodger held that the requisite proximity was absent as the parties were in an adversarial relationship, and "very much at arm's length". Lord Bingham was alive to the distinction between reliance and dependence: while the Commissioners may have depended (if they were to get an enforceable judgment against the customers) on the Bank adhering to the terms of the orders, they did not modify their actions in reliance on their expectation that the Bank would do so. However, none of their

Lordships considered proximity to be determinative.

The determination of this appeal by the majority eventually came down to various issues considered under the “policy” header. This involved lengthy discussion on the availability of contempt proceedings for the flouting of a court order. It will be noted that a party will be in contempt of court if it wilfully disregards a court order; where a party, through mere carelessness, defeats the intent of the order, there is no contempt. Without a common-law claim for negligence there would be no remedy for the intended beneficiary of the order.

The Commissioners invited the House to rectify this lacuna by placing the Bank under a duty of care towards them. The essence of their contention was that it was unfair for a party to be deprived of its remedy by another’s carelessness.

Lord Bingham found that the wording of the court order “did not hint at the existence of any remedy” other than the potential for contempt proceedings. No commonwealth or other jurisdiction supported the Commissioners’ contention that such a duty should be imposed. In such circumstances, the court was reluctant, in principle, to accept the Commissioners’ contention.

Moreover, the potential size of the liability to be faced by a bank in the position of the current Defendant militated against the imposition of a duty of care. Lord Mance reflected on the arguments:

*“it may be said that, if the court can revoke the bank’s contractual mandate from its customer and can impose on the bank a potential liability for contempt in a case of knowing assistance in or permission of a breach, the court may also go further and impose a duty on the bank towards the claimant to take care to avoid any disposition of the defendants’ frozen assets contrary to the freezing order. But that would be to impose a liability on an involuntary third party which would be outside the court’s control, and which might be measured in very large sums, even for quite venial fault.”*

Lords Walker and Mance were able to conceive of examples where parties with smaller resources than banks would be faced with a substantial liability for failing negligently to preserve the assets that had been made the subject of a court order.

Neither was confident that it was possible to distinguish between financial institutions and other types of defendants in order to determine when the duty to preserve assets would be imposed. The unavoidably wide application of the duty under discussion was the determinative factor for Lord Walker, who was of the view that it would produce “unfair, unjust, and unreasonable results if the duty contended for extended to any person affected by notice of a freezing order”.

The way in which this article has been organised might lead readers to conclude that their lordships recommended a systematic and scientific application of the relevant tests in cases where a court has to determine whether a duty of care arises in a novel situation. Such a conclusion, however, hardly leaps from the pages of the law report.

In fact, the speeches are dotted with warnings advising judges not to concentrate too hard on the various formulations suggested in the case law.

Lord Bingham warned of overlaps between tests:

*“The further this [assumption of responsibility] test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test.”*

Further, the tests are to be treated with circumspection and are no substitute for detailed reflection on the particular circumstances of the case in hand. Lord Hoffmann noted “a tendency, which has been remarked upon by many judges, for phrases like “proximate”, “fair, just and reasonable” and “assumption of responsibility” to be used as slogans rather than practical guides to whether a duty should exist or not...these phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance”. His lordship sought to “encourage the evolution of lower-level principles which could be more useful than the high abstractions commonly used in such debates.”

See Lord Rodger’s pithy observation:

*“Part of the function of appeal courts is to try to assist judges and practitioners by boiling down a mass of case law and distilling some shorter statement of the applicable law. The temptation to try to identify some compact underlying rule which can then be applied to solve all*

future cases is obvious.... But the unhappy experience with the rule so elegantly formulated by Lord Wilberforce in *Anns v Merton LBC* suggests that appellate judges should follow the philosopher's advice to "Seek simplicity, and distrust it."

Would it be cynical to suggest that in setting their deliberations against the context of observations such as these, the lords were providing a justification for a highly subjective approach to liability in the case in question? Perhaps not – after all, Lord Bingham seems to place great faith on judges' ability to find a fair result, via whatever advertised route: "it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome."

In this appeal their lordships studiously resisted any temptation to revise or reject any of the tests under consideration. Nor, thankfully, did they provide any new formulation to add to the already confused state of affairs. It may be that their lordships were reluctant to do so, on the basis that the arguments regarding contempt were peculiar to this appeal, making it readily distinguishable in the future cases.

Rather, their lordships have entreated judges to analyse arguments at the lowest level, and to trust their sense of justice and fairness in determining, when a new category of relationship is under consideration, whether policy demands that a duty should exist or not.

In the circumstances, it must be doubtful whether this case will prove of any major precedent value to future tribunals in assessing in whether or not a duty of care might exist in a novel situation.



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## UPDATER

**Helen Wolstenholme and Stewart Chirside provide a whistle-stop tour of some recent professional negligence cases.**

The issue of limitation has figured prominently in recent case law. As well as the decisions of the House of Lords in *The Law Society v Sephton & Co* and *Haward v Fawcetts* (see Howard Palmer QC's article in this journal), we have seen the Court of Appeal consider the knowledge requirement under the Limitation Act in *3M United Kingdom Ltd v Linklaters & Paines* [2006] PNL R 30.

In *3M* the claimant tenants failed to bring proceedings against their solicitors for negligence within 3 years of the date when they knew or ought to have known for the purposes of s14A that an assignment of a lease had caused the loss of the break clause in it, which was personal to the original tenant, and that the damage attributable to that loss occurred as a result of the acts or omissions of the solicitors. The original tenant had been 3M United Kingdom Plc but the company had changed its name following restructuring to 3M UK Holdings Plc and transferred its operations to a subsidiary which was confusingly called 3M United Kingdom Plc. S14A(7) requires the claimant to know such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify instituting proceedings against a defendant who did not dispute liability and was able to satisfy judgment. The claimant argued that at the time it was not clear to them that the landlord would rely on the change of tenant as invalidating the break clause, the change of names being so similar. Had the landlord not done so, the claimant would have suffered no loss from the solicitors' negligence. It was held that the claimant knew or ought to have known that it had lost valuable rights and that, although the landlord may not have realised this or relied upon it, the chances of that happening were not good. Thus, it appears that it may be enough to start time running to know that valuable rights have been lost, whether or not it is known that the loss will cause actual financial loss.

It is interesting to see that the House of Lords' decisions in *The Law Society v Sephton & Co* and *Haward v Fawcetts* are already featuring in the reports of lower courts' decisions on limitation issues. In *Jessup v Wetherell* [2007] PNL R 10, for example, Silber J cited the Lords' decisions and took a robust approach to the 1980 Act in a case where

the underlying proceedings had been struck out for want of prosecution. Silber J held that limitation starts to run when proceedings are “doomed to failure” or “subject to a very serious risk of a strike-out”, and not only when they have been struck out. The defendant solicitors had retained the claimants’ papers pending payment of their fees, and it was argued by the claimants that this amounted to a “deliberate concealment” within s.32 of the 1980 Act (the effect being that limitation did not start to run until the papers had been disclosed). This argument was unsurprisingly rejected by Silber J, given that the claimants’ were aware prior to the release of the papers that the original proceedings had been struck out.

Moving away from the sphere of limitation, but staying on the topic of solicitors’ negligence, there have been two interesting Court of Appeal decisions relating to the summary disposal of solicitors’ negligence claims. In *Miller v Garton Shires* [2007] PNLR 11, the claimant brought proceedings against two separate firms of solicitors, both of whom had failed to issue his personal injury claim before it became statute-barred, for damages reflecting his loss of a chance of success in the personal injury proceedings. The defendants argued that the personal injury claim would have failed in any case and applied for summary judgment. The District Judge granted the summary judgment application solely on the papers before him, even though some of the witness statements conflicted. The claimant appealed on the basis that it was inappropriate to conduct a “mini-trial” of this kind on consideration of the papers alone. The Circuit Judge and the Court of Appeal both dismissed the claimant’s appeal. It was held that where a court could say “with confidence” on the material before it that the factual basis of a claim was “entirely unsubstantial”, it could be just to dismiss the claim summarily on the papers. Before doing so, however, a judge had to bear in mind that evidence in witness statements untested by cross-examination should not be summarily rejected unless, when taken with other incontrovertible evidence, it was manifestly unreliable; and that summary judgment was not appropriate unless the claimant had no realistic prospect of success and there was no compelling reason for trial.

In *Cohen v Kingsley Napley* [2006] EWCA Civ 66 the claimant sued her solicitors in relation to a counterclaim she had brought against a firm of architects. The counterclaim was struck out for want of prosecution in 1998. The solicitors applied to strike out the claimant’s claim for negligence against them on the grounds that it was statute-

barred in respect of damage before November 1996 (six years prior to the claimant commencing proceedings). The judge held that most of the counterclaim had no value in November 1996 because if an application had been made to strike it out at that time it would have been struck out. The claimant argued that if the defendant solicitors had taken a step in the counterclaim before November 1996, there was a real prospect the architects would not have applied to strike it out for want of prosecution. The Court of Appeal held that whether a cause of action had value at the material time would depend on whether it would have been struck out if an application had been made. But even if the answer to that question were yes, a claim would still have value if on considering the facts an application might not have been made, for example because the defendant wished to inquire into the facts on receiving a notice of intention to proceed from the claimant. If there was a substantial chance that the architects would not have applied to strike out then the claim retained value and on the facts it was found that there was.

Two recently reported solicitors’ negligence cases have involved advice given to clients in relation to settlements. Both cases highlight the potential pitfalls for both barristers and solicitors when giving such advice. In *Gosfield School Ltd v Birkett Long* [2006] PNLR 19 a school sued its legal representatives over a settlement it had reached with parents of pupils, against a complex background of litigation, for failing to advise that a settlement with the parents did not prevent the pupils bringing their own claims in future. It was held that there was no breach of duty for having failed to spell out a warning that a settlement with the parents would leave the school exposed to possible future claims by pupils. It was enough that the defendants had advised the school of the difference between an action by the parents and one by the pupils, from which the possibility of independent legal action by the pupils could be inferred. There could be no general rule as to whether and when to settle claims individually or collectively as each case depended on its own particular circumstances.

*Hickman v Blake Laphorn* [2006] PNLR 20 involved a claim against both the claimant’s barrister and solicitor in relation to a settlement at court immediately before a liability only trial in a personal injury action. Counsel, who had not previously had to value the claim in depth, led the settlement negotiations and advised that the offer be accepted on the basis that the claimant would regain full time employment, which he had

subsequently been unable to do. It was held that, although counsel was not required to have all the medical reports in mind when he came to court to argue liability, he was not in a position to advise on settlement until he had familiarised himself with the reports. In particular, his failure to consider that there was a real and substantial possibility that the claimant would be unable to work again was negligent. It was also held that, although the solicitor had acted largely as an observer during the negotiations, it was her duty to intervene if she saw something was going wrong. She was in breach of duty for failing to raise the possibility that the claimant may never work again. Liability was apportioned two thirds one third in favour of the solicitor in light of counsel's greater experience and leading role in negotiations. However, against this was to be weighed the solicitor's greater knowledge of the case.

At the end of this whistle-stop tour it is worth noting that even apparently-settled principles of professional negligence law continue to be litigated.

In *Riyad Bank v Ahli United Bank (UK) PLC* [2007] PNLR 1, the Court of Appeal provided a comprehensive review of relevant case law and confirmed the *Henderson v Merrett* approach to the issue of assumption of responsibility. It was noted that it is for an adviser to establish that a contractual context negatives an assumption of responsibility, and not for a claimant to show that the assumption survives notwithstanding the context.

The case of *Andrews v Barnett Waddingham* [2006] PNLR 24 offered another good example of the application of SAAMCO and Lord Hoffmann's famous example of the mountaineer. The claimant relied on the advice of the defendant actuaries in deciding whether to take a pensions policy with Equitable Life. The defendants negligently told him that the Policyholders Protection Act 1975 would apply when it did not. The defendants' negligence was the 'but for' cause of the claimant's loss. But for the negligent advice he would not have taken out the policy. However, the non-applicability of the Act had no bearing on his loss. The Act provided protection in the event of the insurer becoming insolvent but Equitable Life remained solvent albeit in financial difficulty. Thus, like Lord Hoffmann's mountaineer who suffered an accident which was a foreseeable consequence of mountaineering but had nothing to do with his knee which the doctor had negligently pronounced fit when it was not, the claimant would have been in exactly the same position if the advice had been correct.



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