

Welcome to *on duty*!

*Bob Moxon Browne QC looks at trends in the profession in 2004 and introduces a new issue of **on duty** with a blast on the trumpet for 2tg.*

Welcome to the first 2005 edition of *on duty*. A glance at the contents will tell you that our Professional Negligence Group is thriving, bringing together separate specialisms and appropriately wide general experience, as well as in-depth experience in particular areas. Where else would you find authoritative articles on the duties of placing brokers, the responsibilities of construction professionals for the spread of fire and the law of limitation as it affects breaches of professional duty – all under one cover!

2004 has seen a continuing emphasis on increased specialism at the Bar. 2tg has striven to provide genuine expertise in a number of different areas, rather than becoming focussed on a single practice area. This has proved to be of great benefit to 2tg's Professional Negligence Group. It is trite to observe that if you want someone to defend a solicitor or barrister who has made a mess of an employment claim, you may do well to instruct someone with experience in this field as well as in professional negligence. Of course the same principle applies to cases concerning construction industry professionals, insurance intermediaries, accountants and so on. 2tg's Professional Negligence Group includes amongst its members long-established specialists in the fields of insurance, construction, medical law, property law, financial services, employment and banking.

In this connection our Professional Negligence Group has recently been augmented by (amongst others) a further insurance law specialist (**Alison Green**) a property specialist (**Chris Lundie**) and (most recently) by **Jacqueline Perry** who has enjoyed a very successful career in the field of catastrophic injury and clinical negligence. It was no surprise to me that within short months of joining us, Jacqueline was steering the case of Chester to the House of Lords. In my view Chester – dealing with the duty of professionals to warn their clients of risk – is the most important professional negligence case to be decided in the last 12 months, albeit that its ambit has yet to be worked out.

Long established members of the group have also found themselves at the cutting edge of the law. **Howard Palmer QC** and **Neil Moody** have been in the Court of Appeal on matters relating to knowledge in the limitation context, and are looking forward to an outing to the House of Lords. Read on to find their detailed article on the decision in *Haward v Fawcetts*.

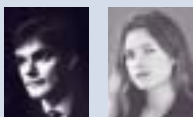
Interestingly 2004 saw fresh actions started in the TCC fall to an all time low, prompting fears that adjudication and mediation are stifling the work. My own view is that, perhaps unfairly, the TCC has been a victim of a loss of confidence amongst its traditional clientele. Certainly there has been no apparent fall-off in construction and property related professional negligence work being started in the Chancery or Queen's Bench divisions, to the evident satisfaction of all concerned.



Bob Moxon Browne QC
Head of the Professional Negligence Group

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DUTIES OF PRODUCING AND PLACING BROKERS: WHERE SHOULD ONE PLACE THE BLAME?

Alison Green considers the appropriate analysis of the duties owed by producing and placing brokers to an insured.

The involvement of more than one insurance broker may occur in a variety of situations, for example, an overseas broker may wish to use a London broker to place insurance on the London market or a broker lacking expertise in a particular type of insurance may wish to use a specialist broker. There may be a chain of brokers involved in more complex insurance or reinsurance arrangements. When something goes wrong with the placing of the insurance, the client invariably wants to know whether he can get redress from his brokers.

What are the duties of the producing broker towards the insured when there is also a placing broker involved?

The producing broker owes the client a duty in contract. In a straightforward case the duty of this broker may be simply to seek insurance on the client's behalf and to advise about cover. However, in the London market it is increasingly common to find specific trading terms or letters of engagement in relation to the placing of more complex risks.

The producing broker may be liable for breach of the express terms of the contract and for breach of an implied term to exercise reasonable care and skill. There is also a concurrent duty owed by the producing broker in tort (see *Youell v. Bland Welch* (The "Superhulls Cover" Case¹) and *Henderson v. Merrett Syndicates Ltd*²). In practice most claims are pleaded in contract and tort. The producing broker owes a duty of reasonable care and skill in respect of his own conduct³; he remains responsible for the suitability of the cover obtained (see *Tudor Jones II v. Crowley Colosso Ltd*⁴).

How far is the producing broker liable for the defaults of the placing broker?

It is a well known principle of the English law of agency that an agent is liable to his principal for the actions of his sub-agent⁵. Thus, in the ordinary case, the producing broker will be liable to the insured for the defaults of the placing broker, whom he has appointed. In *The Superhulls Cover* case Phillips J considered that the effect of this well known principle was to render the main broker liable for any breaches of those duties which he had delegated to the sub-agent, or placing broker, to perform⁶. The placing broker, for his part, owes the producing broker contractual and tortious duties to perform the tasks which have been delegated to him with reasonable care and skill.

What are the duties owed by the placing broker to the insured?

Generally there is no contract between the placing broker and the insured. This accords with the general principle that there is no privity between principal and sub-agent save in exceptional circumstances⁷. If there is no duty under contract, any duties will be owed in tort. In most cases it should be possible to show that a placing broker owes a duty of care in tort on the basis of an assumption of responsibility towards the insured (see *Henderson v. Merrett* (supra) and *White v. Jones*⁸) and in various cases judges have assumed that there was a duty of care owed to the assured by the placing broker (see *Superhulls Cover*, *O'Brien, Prentis Donegan & Partners Ltd v. Leeds & Leeds Co Inc*⁹, *Mint Security Ltd v. Blair*¹⁰).

There are two Court of Appeal decisions which appear to be in conflict over the duty which may be owed by a placing broker.

¹ [1990] 2 Lloyd's Rep 431

² [1995] 2 AC 145

³ see *The Law of Insurance Contracts* by Clarke, 4th Edition, para 7-1E

⁴ [1996] 2 Lloyd's Rep.619

⁵ see *Bowstead and Reynolds on Agency*, 17th Edition, para 5-011

⁶ see p.455. In fact both brokers were found equally to blame for not informing insurers of the 48 months cut-off period in the reinsurance. See also *O'Brien v. Hughes-Gibb* [1995] L.R.L.R.90, where neither the producing, nor the placing broker were found in breach of duty by reason that no theft cover had been obtained for the famous racing horse "Shergar".

⁷ *De Bussche v. Alt* (1878) 8 Ch.D.286, see *Prentis Donegan & Partners Ltd v. Leeds and Leeds Inc*. [1998] 2 Lloyd's Rep.326 where Rix J. at p.332 regarded *De Bussche* as a very narrow exception to the general rule.

⁸ [1995] 2 AC 207

⁹ [1998] 2 Lloyd's Rep.326

¹⁰ [1982] 1 Lloyd's Rep.188, Staughton J. at p.199

Tudor Jones II and Marsh & McLennan Inc v. Crowley Colosso Ltd

In this case Marsh & McLennan Inc (“Marsh”), the producing broker, instructed Crowley Colosso Ltd (“CC”), Lloyd’s brokers, to place insurance on the London market for Tudor Jones II. The latter was developing a holiday resort, including a marina, in the Bahamas and required insurance for the entire development. The wording obtained by the placing brokers contained an exclusion clause, which stated that: “*The Insurers shall not be liable for i) loss of or damage to any part of the permanent works... (ii) for which a certificate of completion has been issued.*”

Marsh failed to notice this when they received by fax the draft wording from CC and replied by fax that (apart from one matter relating to splitting the policy period): “*All other terms and conditions outlined in your...fax is satisfactory.*”

Unfortunately, Hurricane Andrew struck the Bahamas causing considerable damage to the development. Lloyd’s underwriters refused to indemnify the insured in relation to damage to the marina as a certificate of completion had been issued in respect of that.

Langley J found Marsh liable along with the placing brokers, CC. Marsh’s liability was personal as it arose from their own negligence in not checking that the insurance wording was in accordance with their instructions from their client. The judge apportioned blame one-third to Marsh and two-thirds to CC.

On appeal, liability was apportioned equally between the two brokers. The Court of Appeal found Marsh was to blame in not providing CC with the information that there were two or more construction contracts, with the result that the marina contract could, and probably would, be completed and paid for long before the entire project was completed. CC’s fault lay in failing to appreciate the problem presented by that exclusion clause.

However, one should not assume that a Court will be prepared to find that any duty is owed by the placing broker to the insured. In the case of *Pangood Ltd v. Barclay Brown & Co Ltd and Bradstock Blunt and Thompson Ltd*¹¹ the Court of Appeal found that there was no duty owed by the placing broker.

Pangood Ltd v. Barclay Brown & Co Ltd & Bradstock Blunt and Thompson

Pangood Ltd (“P”), the owner of a night club, bar and restaurant, instructed Barclay Brown (“BB”) to effect insurance on its behalf. BB asked Bradstock Blunt and Thompson (“BBT”), a Lloyd’s broker, to place the insurance with Lloyd’s underwriters. The insurance contained an auditorium warranty. A fire occurred at the property and insurers refused to meet the claim on the ground that P had failed to comply with the terms of the warranty. P brought proceedings against BB alleging that BB had failed to advise P of the auditorium warranty’s existence or of its terms. BB brought proceedings against BBT claiming a contribution, alleging that it was the duty of BBT to advise P (and/or BB as P’s agent) of the terms of the warranty. Underlying BB’s claim was an assertion that BBT owed P a duty of care. The Court of Appeal held that BBT did not owe any duty of care to P. Beldam LJ stated (at p. 408):

“Whether it is possible to infer an assumption of contractual obligation by a sub-agent depends upon the terms on which he has been instructed by the agent. In my view, an instruction by an insurance broker to a Lloyd’s broker to obtain a quotation and subsequently to effect insurance in accordance with the terms of the quotation is an inadequate basis upon which to infer the assumption of direct responsibility by the Lloyd’s broker to the broker’s principal. Nor do I consider that the circumstances of this case show the existence of a general duty of care owed by the third party to the plaintiff. Any responsibility assumed by the third party was confined to obtaining a quotation and communicating it accurately to the defendant acting on behalf of the plaintiff. This the third party did... There was, in my view, no assumption of responsibility by the third party to bring the terms of the auditorium warranty to the attention of the plaintiff. Nor can it reasonably be inferred that the plaintiff relied upon the third party to do so. The obvious inference from the facts is that the plaintiff relied upon the defendant... Thus it seems to me entirely reasonable that the third party should in this case deal with the defendant as knowledgeable brokers, and make such communication as they are required to make through the defendant.”

¹¹ [1999] Lloyd’s Rep.I.R.405

The Court of Appeal envisaged there being two requirements before a placing broker should be liable to the insured, namely:

- (a) an assumption of responsibility by the placing broker to the insured; and (b) the cause of loss had to be the insured's reliance on the placing broker either exclusively or in combination with reliance on the producing broker.

Causation

The Court of Appeal also found that the same result could be reached by applying causation rules: even if the placing broker had owed a duty of care to the insured, any breach of duty had not caused the insured's loss, as the loss was caused by the producing broker's own failure to pass on the relevant information.

How can one reconcile the Court of Appeal decisions in *Tudor Jones II* and *Pangood*?

At first blush, it is difficult to reconcile this case with the Court of Appeal's decision in *Tudor Jones II*. It has been suggested by some writers that the two cases may be reconciled in that placing brokers owe a duty of drawing attention to unusual clauses or possible lacunae in cover where they are acting for brokers from abroad or brokers unfamiliar with the type of insurance being placed. On the other hand, it is suggested that where brokers are placing insurance which they would expect the producing brokers to be familiar with, they can reasonably expect them to explain terms to their clients.

I do not see this as a satisfactory way of looking at the brokers in a case such as *Tudor Jones II*. There the Court of Appeal considered that the Lloyds placing broker should have drawn the exclusion clause to the attention of the insured. Why shouldn't the placing broker in that case have regarded Marsh as "knowledgeable brokers" able to read the terms of the insurance and able to explain any restriction or exclusion in the cover? That case was not cited in the *Pangood* judgment and the Court of Appeal may not have been referred to it.

It may be that the *Pangood* decision can be reconciled with the case of *Tudor Jones II*, on the basis that it was conceded in *Tudor Jones II* that each firm of brokers owed a duty of care. The negligence of each firm of brokers was in part the cause of the

loss suffered by *Tudor Jones II* and argument appears to have concentrated on how much each broker should contribute to the loss. On the present state of the case law, there is scope for argument about whether a placing broker owes a duty to the insured in any particular case, and if so, how should liability be apportioned between the brokers.

Another route to holding a placing broker liable to the insured/reinsured?

In seeking to hold a placing broker liable, recourse may be had to the Contracts (Rights of Third Parties) Act 1999. Section 1(1) provides that:

"...a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if – (a) the contract expressly provides that he may, or (b) subject to subsection (2), the term purports to confer a benefit on him. (2) Subsection (1) (b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party. (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into."

Where a producing broker instructs a placing broker to secure insurance for a specific insured or at least for an insured who is identifiable by description or membership of a class, it is arguable that the sub-contract is one which is intended to confer benefit upon the insured and, thus, he may bring an action upon it in the event that the placing broker fails to meet his obligations.

In my view, this statutory provision (provided that its application has not been excluded by the brokers) would assist an insured to get over the hurdle of enforcing a contract against a placing broker in circumstances where a placing broker seeks to argue that it owes no duty to the insured. Of course, the onus would still be on the insured to demonstrate that the placing broker was in breach of the duty of care and that that breach caused the insured's loss. The Act applies automatically to contracts made on 11 May 2000 or thereafter, so brokers should consider its implications on arrangements they make.

Conclusion

In practice the insured usually turns on both the producing brokers and placing brokers when he finds that he has no cover or inadequate cover, or that cover has been successfully repudiated or avoided by insurers. In nearly all the cases involving both sets of brokers the courts have not spent much time analysing their respective duties; they have generally found that neither are in breach of duty or that both are liable. In *Pangood* the Court of Appeal did give an explanation as to why the placing broker was not liable, but did not consider in any depth the principles involved, nor was there any reference to past cases involving brokers. As brokers' negligence is always a fertile source of insurance litigation, there should be a future opportunity for the Court of Appeal to give some guidance.

Alison Green specialises in insurance and professional negligence work. She has particular expertise in relation to claims involving insurance brokers, especially where brokers have been negligent in placing risks for financial institutions and in handling binding authorities. Alison is Vice President of the British Insurance Law Association and is a former Chairman of that Association.



AN END TO JUSTIFY THE MEANS?

Martin Porter and Sonia Nolten examine *Chester v. Afshar*, and ask whether the ratio is likely to be extended beyond the medical profession.

As every schoolboy, or at least law student, knows, the essential ingredients of the tort of negligence are duty, breach, causation and damage. Lawyers are well used to a flexible concept of duty used as a tool to restrict liability to cases where it is fair, just and reasonable to impose it. We are now getting used to the flexible application of causation as a tool to extend liability in order to meet the reasonable expectations of the public in contemporary society.

In a landmark decision on causation, *Chester v. Afshar*¹, the House of Lords has built upon its decision in *Fairchild v. Glenhaven Funeral*

*Services Ltd*² (the case where the “but for” causation test was relaxed to enable recovery by claimants who had developed mesothelioma after exposure to asbestos dust, while employed by defendants whose wrongdoing had materially increased the risk of contracting the disease).

Miss Chester suffered severe back pain as a consequence of the protrusion of intervertebral discs into the spinal canal. Conservative treatment failed to alleviate her symptoms and she was referred to Mr Afshar, a consultant neurosurgeon. Three days after her initial consultation with Mr Afshar, Miss Chester underwent surgery which

¹ [2004] UKHL 41

² [2002] UKHL 22

resulted in serious neurological damage known as cauda equina syndrome. Miss Chester sued her surgeon alleging that he had been negligent when performing the operation, and alleging further that Mr Afshar had not warned her of the unavoidable 1 to 2% risk that even a carefully performed operation could result in cauda equina syndrome.

The trial judge rejected Miss Chester's case that the operation was performed negligently, but did accept her case that she was not warned of the risks. Miss Chester was unable to say that she would not ultimately have had the operation if cognisant of the risks. However she was able to say, and the trial Judge accepted, that she would have sought further advice and therefore not had the operation 3 days after the initial consultation. Since the eventuation of the risk was entirely random (and not related to her or her surgeon) it was highly probable that a later operation would not have had the same tragic result. The trial judge, the Court of Appeal (unanimously) and the House of Lords (by a bare majority) found that the claimant was entitled to compensation in respect of the cauda equina injury. The finding of liability accords with the finding of the High Court of Australia (by a bare majority) in favour of a claimant in a duty to warn case on facts that were not materially different.

The majority in the House of Lords (Lord Steyn, Lord Hope of Craighead and Lord Walker of Gestingthorpe³) differed from the minority (Lord Bingham of Cornhill and Lord Hoffmann) as to whether Miss Chester had satisfied the "but for" test of causation. The minority thought that the but for test had not been satisfied since the timing of the operation was not relevant to the injury sustained. The injury would have been as liable to occur whenever the surgery was performed and whoever performed it (per Lord Bingham at paragraph 8). They found that where the breach of duty is a failure to warn of a risk, the claimant must prove that she would, if warned, have taken the opportunity to avoid or reduce that risk, not whether a warning would have changed the scenario in some irrelevant detail (per Lord Hoffmann, paragraph 31).

However the majority did not decide the case on the simplistic application of a "but for" test of causation. Lord Steyn drew from *Fairchild* the principle that, where justice and policy demand it,

a modification of causation principles is not beyond the wit of a modern court⁴. Because of the failure to warn, the operation that resulted in the injury was not lawful, and the patient cannot be said to have given informed consent to the surgery in the full legal sense. Considerations of autonomy and dignity justified a "modest departure from traditional causation principles"⁵. The absence of a warning coupled with the eventuation of the very risk that ought to have been covered by the warning were sufficient, and in these unusual circumstances justice requires the normal approach to be modified⁶. The key feature was that the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn⁷.

Finally underlying the decision of the majority is a clear impression that a claimant should not be penalised through her honesty in declining to assert that properly warned she would never have undergone the risk. The ratio is that in cases of negligent failure to warn the clinician will be liable if the very risk which ought to have been the subject of the warning eventuates and that it would not have done so but for that failure.

Plainly facts similar to those in *Chester* might arise outside the parameters of clinical professional negligence, in circumstances where other professionals are in breach of a duty to warn of a small but significant risk, and where the person who should have been warned cannot show that he or she would not have proceeded with the course of action that was in fact taken. For example, a surveyor might fail to warn that there was a small chance of subsidence occurring to a property. The damage eventuates, but the claimant cannot show that she would not have purchased the house had she known of the risk. What she can show is that she would have sought further advice, and that as a result of the delay while she did so, the house would have been sold to someone else, so that the damage suffered by her would have been avoided.

It will surely not be long before arguments of this sort are raised in the context of similar factual scenarios involving other professions. However there are robust counter-arguments, and several indications that the House of Lords may not have intended *Chester* to have implications outside the medical 'duty to warn' cases.

³ Lord Walker specifically agreed with Lord Steyn and Lord Hope. There is some question, however, whether his observations are entirely consistent with the 'but for' test being satisfied. He seems principally to have been convinced by the policy arguments in favour of imposing liability – see below.

⁴ See paragraph 23

⁵ Paragraph 24

⁶ Per Lord Hope paragraphs 62 and 85

⁷ Paragraph 94

In the first place, it is possible to reach the same conclusion as did the House of Lords on the basis of a more orthodox analysis. The Court of Appeal had found for the claimant via an alternative route, namely that, “but for” the defendant’s failure to warn, the claimant would not have sustained the damage of which she complained. The damage of which she complained is not that she underwent an operation unaware of the risks but that she underwent that particular operation on that particular day, which resulted in the syndrome⁸. Thus the proper question was not whether she would ever have undergone the same operation, but merely whether she would have undergone it on that day at that time.

Secondly, the House of Lords nowhere suggested that it intended a general departure from the ordinary principles of causation. Rather, it alluded to the ‘narrow and modest departure’ that was being made ‘in certain....very unusual types of case in which causal principles have to be overridden’ in order to allow a just result⁹. What made this a just result in the circumstances was the value that society gives to

‘the fundamental importance that must be attached to the right of the patient to decide whether he will

*accept or reject the treatment which is being proposed by the doctor*¹⁰, a right which is itself underpinned by the even more fundamental entitlement of the individual not to have their autonomy (whether bodily or otherwise) violated. The invasive surgery undergone by the claimant would, absent consent, be an assault¹¹. It seems unlikely that the court would attach such significance to financial as opposed to bodily integrity: an injury to the former, after all, can be restored as well as compensated.



Martin Porter and Sonia Nolten are members of the 2tg Professional Negligence Group. A version of this article appeared in the New Law Journal.

⁸ See *Chester v Afshar* [2003] QB 356 at 377

⁹ Per Lord Steyn, paras 22 – 23

¹⁰ Per Lord Hope at para 54

¹¹ Per Lord Steyn, para 93

FIREWALLS AND WILDFIRE

Bob Moxon Browne QC looks at the role of construction industry professionals in checking fire spread.

The sight of a bush fire spreading faster than a man can run is familiar from our television screens, but still terrifying: a reminder that while fire under control is man’s oldest friend, the uncontrolled spread of fire is the most destructive natural force we know.

It is unsurprising that the development of English Law relating to responsibility for the spread of fire has often been nurtured from Australia¹, whence so many of those frightening television pictures come. Decisions on home grown facts are fewer, and tend to be concerned with the spread of fire in industrial and urban environments. From the earliest times it has

been recognised that strict liability for the spread of fire was subject to numerous exceptions², and since 1774 the Fire Prevention Metropolis Act has given wide protection to householders and landowners from whose premises fire has spread without negligence on their part. The law continues to be kind: defendants invoking the Act are not required to disprove negligence, and (following *Goldman v. Hargrave*) this area of law provides one of the very rare instances when the resources available to the individual may be relevant to the extent of his duty to abate damage to neighbours.

¹ See e.g. *Goldman v. Hargrave* (1967) AC 645 for an important privy council decision arising from Australian facts.

² See e.g. *Turbeville v. Stamp* 1667 1 Salk 13

It is of course different, if the fire starts in the first place as a result of the negligence of the defendant. He will of course then be liable to neighbours even if the spread of fire is not his fault; and this duty extends even to members of the fire brigade who attend to extinguish the fire³.

While insurance companies continue to do what they can to discourage the accidental inception of fire, increasingly they recognise that it is often the scale of fire spread which hits their pockets hardest. As a result, warranties relating to compartmentalisation of fire risks are beginning to take their place alongside traditional warranties controlling hot work, storage of inflammable materials etc. This trend is in its turn increasing the focus on the importance of design in the battle against fire, and the role of professionals – architects, structural engineers, mechanical and electrical engineers and specialist sub-contractors – in guiding their clients to cost-efficient solutions (in which discounted insurance premiums may increasingly play a part).

*Sainsbury v. Broadway Malyn*⁴ provides an interesting example of the potential economic significance of fire compartmentalisation. In that case a Sainsbury's supermarket was divided by a fire resistant wall into roughly equal warehousing and sales areas. A fire started in the warehouse area and spread through weak spots in the fire wall to engulf the sales area. The ensuing multi-million pound business interruption claim was largely based on the latter damage, which might have been prevented if the fire wall had been adequately designed. In litigation involving both architects and engineers, HHJ Humphrey Lloyd QC held that the architects (but not the engineers) were at fault in the design of the fire wall, and that if the fire wall had been competently designed, the fire brigade would have had "a measurable chance" of containing the fire within the warehouse. The latter finding enabled the Judge to find the architects liable for very substantial damages, applying "loss of a chance" principles.

In the *Sainsburys* case it was common ground that the fire had been started by an arsonist, and so no fault on the part of the supermarket was found. However, the question of the relationship between responsibility for the start of the fire in commercial premises, and the separate responsibility of professionals for its subsequent spread, was examined by the T.C.C. in the recent case of *Sahib Foods Ltd v. PKS*⁵.

The facts of the case were that the fire started in a vegetable kitchen at the claimant's food factory as a result of the obvious and admitted negligence of an employee for whom the claimant were vicariously responsible. However the fire spread out of the kitchen so as to engulf the whole factory, via expanded polystyrene (EPS) panels which had no fire resistance and indeed served to facilitate rapid fire spread. In one of his last important judgments prior to retirement, HHJ Bowsheer QC found that the architects responsible for the specification of EPS panels in a kitchen area were legally responsible for the spread of fire and associated devastation of the factory. The most interesting part of his decision concerned his treatment of the division of responsibility between the architects and the claimants themselves, whose servant had carelessly started the fire in the first place.

Judge Bowsheer rejected an analysis based on the concept of contributory negligence, on the grounds that the admitted negligence of the claimant had operated in an area (guarding against the onset of a fire) where the defendants had no responsibility at all. Instead, the Judge approached the problem by way of causation, holding that the claimants were wholly liable for the fire in the kitchen and all the associated financial consequences; while the defendants alone were responsible for the spread of fire out of the kitchen and the (very much greater) financial consequences of that – in fact effectively amounting to the loss of the whole factory except the kitchen. However on appeal, a different view was reached. It was held that the loss of the whole factory was caused by the negligence of both claimant and defendant, and that therefore the claimant ought to bear a very substantial responsibility for the whole loss – a result which nevertheless left the architects and their insurers nursing a multi-million pound loss.

Whether in cases of unduly rapid spread of fire within buildings the construction industry professionals should be answerable for almost all the losses, or whether the losses ought to be shared with the party responsible for the inception of the fire will no doubt continue to come before the Courts – in recognition that in an overcrowded society, it is not the fact of fire but of its spread that often poses the greatest threat to property interests, if not to life; and that the allocation of responsibility in such cases is by no means straightforward.

³ See *Ogwu v. Taylor* 1989 AC 547

⁴ 61 Con Law Rep 31

⁵ TLR 23.1.2004

An incidental aspect of recent fire spread cases, of which *Sahib* and *Pride Valley*,⁶ are examples, has been the judicial focus on the fact that all current legislation dealing with the prevention of fire spread is directed towards the preservation of life rather than property; it has been the property insurers rather than Parliament who have been in the vanguard of a desire to impress on the construction industry the benefits of fire compartmentalisation with attendant detailed recommendations (including for food factories). While the importance of safeguarding life over property continues to reflect our society's values, we can expect market forces rather than the legislation to dictate the standard of fire prevention built into new projects.

But in future it may be professional indemnity rather than property insurers who bear the brunt of payments for fire which would have been curtailed in scale if better fire prevention had been specified at the construction stage.



Bob Moxon Browne QC heads the 2tg Professional Negligence Group and has long experience of the role of professionals in controlling the inception and spread of fire. He was junior counsel for the defendants in Ogwu v. Taylor, Leading Counsel for the engineers in Sainsbury v. Broadway Malyon and Leading Counsel for the claimants in Sahib Foods Ltd v. PKS.

⁶ (2001 76 CLR)

THE TROUBLE WITH ROGUES...

Leona Powell considers some of the issues arising out of vicarious liability for fraud in the professional negligence context.

*Lister v Hesley Hall*¹ is now the starting point for looking at the question of vicarious liability for the deliberate wrongful acts of employees. *Lister* marked a significant change in the approach of the law. It is, at first glance, a remarkable decision given the facts of the case: an employee was held to be acting in the course of his employment when he sexually abused children in his care, with the result that his employers were held vicariously liable.

The effect of *Lister* is an overhaul of the test to be used when considering liability for the wilfully wrongful acts of employees. Lord Steyn began his speech by reciting the previous test applied to the issue of vicarious liability for the tortious acts of employees:

*'For nearly a century English judges have adopted Salmond's statement of the applicable test as correct. Salmond said that a wrongful act is deemed to be done by a "servant" in the course of his employment if "it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master"*².

Their lordships gave detailed consideration to the Court of Appeal decision in *Trotman v North Yorkshire County Council*³, where it was held that an employer was not liable for indecent assaults on pupils perpetrated by a headmaster. The Court of Appeal in *Trotman* had specifically applied the test as outlined by Salmond, i.e. whether the assaults could be described as an unauthorised or wrongful

¹ [2002] 1 AC 215

² At p223, paragraph 15

³ [1999] LGR 584

mode of doing an authorised act (and found that upon application of that test, the employer could not be held liable). Chadwick LJ had found it

'impossible to hold that the commission of acts of indecent assault can be regarded as a mode - albeit, an improper or unauthorised mode - of doing what ... the deputy headmaster was employed by the council to do ... Rather, it must be regarded as an independent act of self-indulgence or self-gratification⁴.'

The House of Lords in *Lister* expressly overruled the decision in *Trotman*. The speech of Lord Steyn in *Lister* concluded that:

'The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable.'

Similarly, Lord Millet stated:

'What is critical is that attention should be directed to the closeness of the connection between the employee's duties and his wrongdoing⁵.'

Thus the traditional 'unauthorised mode' approach was expressly dispatched to legal history.

There is no indication that the House of Lords decision in *Lister* is limited to cases where the wrongful act has caused personal injury. The judges reviewed the full range of authorities concerning vicarious liability for employees, including for instance *Lloyd v Grace Smith*⁶ (solicitor's liability for a fraudulent clerk). There was particular focus on deliberately wrongful acts, but no meaningful distinction was drawn between acts causing personal injury and those causing financial damage.

Adoption of Lister in the professional negligence context

The course of employment test (as opposed to the 'unauthorised mode of doing an authorised act' test) has been specifically applied in subsequent professional negligence cases.

The most important case, so far, is *Dubai Aluminium Co Ltd v Salaam*⁷ (HL), a case under section 10 of the Partnership Act 1890. The central issue was the vicarious liability of a firm of solicitors for the dishonest assistance of a partner in drawing up agreements to perpetrate a fraud. Lord Nicholls specifically left aside cases such as *Lloyd v Grace* where the wronged person has acted in reliance on the ostensible authority of the employee, on the

basis that, in *Dubai Aluminium*, there was no question of reliance on any authority. Instead, the *Lister* test of close connection was applied:

'If authority is not the touchstone, what is?... Perhaps the best general answer is that the wrongful act must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of liability of the firm of the employer to third parties, the wrongful act may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment⁸.'

Lord Nicholls also confirmed that the court's approach in this context is heavily influenced by policy:

'The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged⁹.'

He concluded that drafting agreements of the sort in fact drawn up was to be regarded as in the firm's ordinary course of business. The actual agreements were drawn up specifically for a dishonest purpose, but they were sufficiently closely connected to the sort of agreements that the fraudulent partner was engaged to perform that it was just to hold the partnership liable.

More recently, in *Barings v Coopers & Lybrand*¹⁰, Evans Lombe J confirmed that the course of employment is 'the test' to be applied in the context of vicarious liability for an employee's fraud¹¹. The case concerned Barings' liability for the fraudulent activities of the infamous Nick Leeson, a factual matrix far removed from the personal injury context, but *Lister* was referred to as setting out the appropriate test.

Principal and agent

One remaining area of difficulty is the impact of *Lister* on the liability of a principal for the wrongdoing of his agent. It is necessary to consider the circumstances in which a principal is liable for the wrongdoing of his agent.

⁴ At pp 592 - 593

⁵ At 245, paragraph 70

⁶ [1912] AC 716

⁷ [2002] 3 WLR 1913

⁸ 1921 B-C

⁹ 1919 G - H

¹⁰ [2003] PLNR 34

¹¹ Page 649 (paragraph 702)

Contracts

A principal's liability for his agent normally has its foundation in the law of contract, rather than the law of tort. A fundamental characteristic of agency is the power to change the legal relations of another, the principal. Most often, in cases involving the acts of agents, the issue is whether or not an agent's acts bind the principal.

An agent's power to affect the legal position of his principal rests upon his authority, which may be actual or ostensible¹². Thus, analysis of whether a principal is *contractually* liable to third parties will fall to be determined by close consideration of the agent's authority to bind the principal. It is a fundamental rule that a principal's contractual liability to a third party cannot be founded on an agent's misrepresentation as to his own authority to enter into that contract. In *Barings* (above), Evans Lombe J specifically remarked that an agent's fraudulent misrepresentation as to his own authority cannot be the foundation of his own ostensible authority to conclude a contract, such that it will then bind the principal¹³.

Tort

In contrast, it is the law of vicarious liability that gives rise to tortious liabilities to third parties. Historically, the law on the liability of a principal for the tortious acts of his agents is not at all clear: this is an area in which it is necessary to be extremely careful in the reading of the cases. The authorities that refer to the liability of a principal for the wrongful acts of his agents are mostly employee cases, and the words 'agent' and 'employee' are used (unhelpfully) very loosely, and often synonymously. Atiyah has commented that:

'The first point which becomes obvious on a most cursory examination of the authorities is that there are literally scores of cases in which judges have used the terms 'servant' or 'agent' indiscriminately as though the legal principles governing the two were identical'¹⁴.

There are two conflicting schools of thought. The first is to suggest that there is no meaningful distinction between liability for employees and for agents. On this analysis, a principal is liable for the wrongful acts of an agent carried out in the course of his authority, just as an employer is liable for an employee. Bowstead & Reynolds specifically remark:

'Vicarious liability in the law of tort seems to have a different basis from agency rules in contract... There are however various ways in which considerable interrelation with the law of agency exists... Parallels between one part of the law have long been cited in the other, and the terminologies of master and servant and principal and agent have been and still are readily interchanged: the same applies to the phrases 'course of employment' and 'scope of authority'¹⁵.

The alternative approach is to say that there is no general doctrine of vicarious liability for the wrongful acts of an agent. Instead, one can analyse the law as imposing vicarious liability in various classes of case, some of which happen to have the quality of agency (i.e employer/ee)¹⁶.

In my view, it is still open to debate as to which approach is correct. The recent decisions of the House of Lords do not expressly deal with the question of vicarious liability for agents who are not also partners or employees.

There are obvious policy reasons why a distinction might properly be drawn between vicarious liability for agents as opposed to employees. As illustrated above, the courts have sought to use vicarious liability as a risk allocation device, by moving liability from a potentially impecunious employee to an insured employer. This policy reasoning does not necessarily apply to principals and agents outside of the employment context, where it is much less obvious that the principal will have deeper pockets or indeed relevant insurance.

On the other hand, it could well be said that this is a distinction without a justifiable difference. Historically, the courts have sought to limit the vicarious liability for the deliberately wrongful acts of employees by adopting the agency-based test for contractual liability (hence Salmond's formulation: whether the act complained of was 'an unauthorised mode of doing an authorised act'). That approach is no longer good law when considering vicarious liability for the fraudulent acts of employees. But this change represents a shift in the approach to the doctrine of vicarious liability, rather than a change in the law on agency. Thus, logically, the same type of test should be applied to the question of vicarious liability for

¹² Ostensible authority applies where the principal, by words or conduct, represents to a third party that the agent has authority to act on his behalf.

¹³ At p649, paragraph 700. Also, see in particular *The Ocean Frost* [1986] AC 717

¹⁴ Atiyah, *Vicarious Liability in the Law of Torts* (1967)

¹⁵ Bowstead & Reynolds on Agency, 17th edition, 8 -176

¹⁶ Eg Clerk & Lindsell on Torts, 18th edition

agents. So, adopting the formulation as in *Lister* and *Dubai*, a principal would be liable for the fraudulent acts of an agent if the acts were sufficiently closely connected to the scope of the agent's authority such that it would be fair and reasonable to impose liability upon the principal.

In reality, aside of the academic question, it is likely that cases which arise will usually fall into previously established categories, or there will be other factors giving rise to arguments of vicarious liability. Thus it is probably unnecessary to consider whether there is a general theory of vicarious liability for the wrongs of agents or not: the issue can normally be resolved by analogy to existing categories of vicarious liability.

This is exemplified in the case of partners. Partners are one another's respective agents, but section 10 of the Partnership Act 1890 expressly provides that partners will be liable for each other's wrongs carried out in the ordinary course of business. Thus it is unnecessary to consider whether or not the fact of agency between partners gives rise to vicarious liability at common law: the Act expressly deals with the issue. The decision in *Dubai Aluminium* makes clear that no meaningful distinction can be drawn between vicarious liability for co-partners and for employees. Thus, the test for liability for a co-partner will be whether a fraudulent act was sufficiently closely connected to the ordinary course of the firm's business.

One area, however, where it may matter if the *Lister/ Dubai Aluminium* approach is to be preferred over the traditional agency (or scope of authority) approach is in relation to financial advisers who are appointed representatives under the Financial Services and Markets Act 2000.

Appointed representatives under s39 FSMA 2000

Appointed representatives are not employees, but they are agents. However, liability for the acts of appointed representatives is dealt with specifically by statute, in section 39 FSMA 2000, which provides:

'The principal of an Appointed Representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the Representative in carrying on the business for which he has accepted responsibility.'

In light of the debate set out above, there could be two potential tests applicable to the question of the liability of the principal for the appointed representative and in particular for determining whether the appointed representative was 'carrying on the business for which he has accepted responsibility':

- (1) The first approach is to focus on the agency (as opposed to employee) quality of the relationship, and to say that liability will only be imposed where the representative is acting within the scope of his authority (but, for instance, does so in an unauthorised manner).
- (2) The alternative approach, based on *Lister/ Dubai Aluminium*, is to consider if there is a sufficiently close connection between the wrongful act and the carrying on of the business for which the principal had accepted responsibility. This test is likely to produce more instances of liability.

There are good reasons for treating appointed representatives differently to employees. In particular, a principal is much less likely to have the opportunity to exercise the same level of control over representatives as an employer over his employees; further, the original purpose of FSMA was to ensure a mechanism for regulatory control of financial advisers, rather than the creation of a loss distribution device for civil liability. Furthermore, the agency relationship between principals/appointed representatives is potentially a good foundation for arguing that the appropriate line of authorities in this context is that relating to liability for agents (namely whether the act was within the scope of the authorisation, rather than merely closely connected to it).

However, as set out above, it is questionable whether it is justifiable to apply a different test in the context of vicarious liability for employees as opposed to agents. It is hard to avoid the suspicion that the courts will be likely to take the less restrictive *Dubai Aluminium* approach in the end. The wording of s39 FSMA is very similar to the Partnership Act. Furthermore, the recent pattern of

cases indicates that the law is currently unfavourable to those in a position of being vicariously liable for the wrongful acts of others. This seems not to be based upon the type of damage that is likely to be sustained (i.e financial loss as opposed to physical loss) but upon the view that carrying on any form of business inherently involves the commercial risk that the individuals performing the work (whether they be employees, agents or partners) will cause loss. Those running businesses (of whatever kind) know that risk. Thus, it seems, in the eyes of the court it is justifiable to allocate the risk of harm being caused to the business and not just to the individual concerned.



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WHEN TOO MUCH KNOWLEDGE IS A DANGEROUS THING...

How will the House of Lords in *Haward v. Fawcetts* resolve the confusion in the law of date of knowledge under section 14A of the Limitation Act 1980? Howard Palmer Q.C. and Neil Moody consider the implications of the Court of Appeal decision in *Haward v. Fawcetts* [2004] PNLR Case 34 p. 658.

The statutory regime

Section 14A of the Limitation Act 1980 was added by the Latent Damage Act 1986, which applied the 'date of knowledge' philosophy contained in section 14 of the Act to non personal injury damage caused by negligence. One difference of importance between personal injury and other cases is that, in the former, any delay in the arrival of the date of knowledge must extend the limitation period, since the basic period is 3 years OR 3 years from the date of knowledge. In all other cases the basic period is 6 years OR 3 years from the date of knowledge, so there is plenty of scope for the delay in acquisition of knowledge being insufficient to extend the overall time limit within which the claimant must commence his action.

Nevertheless, the wording of the two sections, 14 and 14A is so similar that personal injury cases are bound to be applicable to cases on economic loss or property damage. Section 14A is in the following terms, so far as material:

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4) (b) above is the earliest date on which the plaintiff ... had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such action.

(6) In subsection (5) above the knowledge required for bringing an action for damages in respect of the relevant damage means knowledge both –

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6) (a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6) (b) above are:

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and (b) the identity of the defendant...

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire –

(a) from facts observable or ascertainable by him; or
(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek; but a person shall not be taken by virtue of this subsection to have knowledge of facts ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.”

The facts in *Haward v Fawcetts*

The claimants, who could be treated as one, comprised Mr. Haward, a company of his, and a family trust. The Haward family was wealthy and at the material times was looking for a business which it could take over and in which it could invest and provide diversification away from the traditional Haward business of construction. The defendants were accountants who had acted for the Haward family interests for many years. They acted for the Haward family in the dealings which gave rise to the cause of action against them.

In December 1994 Mr. Haward acquired a controlling interest in an agricultural machinery company called Kings Stag Engineering Ltd, by subscribing for 60,000 newly issued £1 shares at par. Thereafter the claimants invested a further £450,000-odd during the course of 1995. The Company did not prosper and further advances were required. The 1995 accounts showed the net worth of the company as a negative figure of £250,000 – i.e. the company was technically insolvent, relying wholly on further support from the Haward family for its ability to continue to function. The claimants continued to advance large sums in 1996 and 1997, and the losses mounted. However, since the claim form was issued in December 2001, it was only losses which had accrued before December 1995 which could be statute barred under the 6 year rule.

The claimants' case was that at all times Mr. Haward relied on the defendants both in relation to the initial decision to purchase the Company and subsequently in deciding whether to make further advances. The purchase turned out to be a disaster for the claimants. The business of the Company was eventually sold in February 2000. The claimants alleged that Fawcetts were negligent in the advice they gave (or failed to give) to Mr. Haward.

The proceedings were issued by the claimants against the defendants on 6th December 2001. Obviously, any claims in *contract* relating to breaches which occurred before 6th December 1995 were statute barred. The crucial question was therefore whether the concurrent claims in the tort of negligence for damage sustained prior to 6th December 1995 were also barred. It was common ground that 'damage', for the purposes of completing a cause of action in tort, occurred at the time the various investments were made, so that causes of action were complete by 6th December 1995 in respect of all investments made prior to that date.

The Issues

The claimants relied upon section 14A of the Limitation Act 1980 and contended that Mr. Haward did not have the relevant knowledge until May 1999. Limitation was ordered to be tried as a preliminary issue, which came before His Honour Judge Jonathan Playford QC sitting as a Judge of the Queen's Bench Division on 15th April 2003. The way that the claimants approached this preliminary issue was somewhat surprising. Not only in the pleaded Reply (to the Defence pleading Limitation on the basis simply of the 6 year period), but also in the witness statements prepared for the preliminary issue, the claimants championed the contention that they did not know that the defendants had been negligent until after May 1999 (2 years before the issue of the claim). This approach was adopted in spite of the content of subsection (9) which provides:

“Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5).”

The hearing at first instance went entirely the defendants' way and the Judge decided that the claims arising from the purchase of the company and the further advances prior to 6th December 1995 were statute barred¹. His reasoning was simply as follows:

¹ [2003] PNLR Case 36, p722

- (1) the causes of action accrued (as was common ground between the parties) when the individual investments were made by the claimants in reliance on the advice of the defendants to invest or, alternatively, in reliance upon the lack of advice NOT to invest;
- (2) the knowledge required was knowledge of the 'acts or omissions which are alleged to constitute negligence' (subsection (8)(a)); those acts or omissions were the giving of advice or the failure to give advice, which the claimants were aware of at the moment when each investment was made; and
- (3) the only thing which Mr. Haward did not know was that Fawcetts' conduct was negligent, but this was irrelevant under subsection (9) referred to above.

Accordingly the Judge held that Mr. Haward's knowledge accrued at the moment of loss and he had not established a date of knowledge within the three years before the issue of proceedings.

Issues before the Court of Appeal

In the Court of Appeal there were really three issues:

- (1) Could the claimants rely on subsections (6)(a) and (7) which relate to the claimants' knowledge of damage?

These sections are in the following terms:

"(6)... the knowledge required for bringing an action for damages in respect of the relevant damage means knowledge... –

(a) of the material facts about the damage in respect of which damages are claimed;

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment"

The claimants argued that there was implicit in this wording the requirement that the claimants must have knowledge that the damage which they relied on (in their case the investment of monies) had the

character of damage, in the sense that the investment was an unwise one, negligently induced. Clearly the amounts of the investments were 'sufficiently serious' within the meaning of the subsection, but it was suggested that it was not realised that the investments constituted 'damage'. Whilst interesting for its novelty, this argument was not dealt with by the Court of Appeal. In the lower court, the Judge held that the term 'damage' must be synonymous with 'investment', since the investment was pleaded to be the damage. Since the claimants knew the size and therefore the seriousness of the investment, they had sufficient knowledge of the damage for the purposes of subsections (6)(a) and (7).

- (2) The second issue was whether the claimants had knowledge that the damage was "attributable to" the advice or non-advice.

Subsection (8)(a) provides that the claimants must have knowledge that: "the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence". The claimants said they did not, since there was evidence that the company had suffered losses for independent reasons, such as the impact of the foot and mouth epidemic and the defalcations of a director.

- (3) The third issue was whether the knowledge of the acts or omissions of the defendants was sufficient by itself, or whether it had to be accompanied by further knowledge, if not of negligence itself, at least of some 'causal relevance'.

The Court of Appeal Decision

As mentioned above, the Court of Appeal really did not address the first issue defined above. The third issue was the most interesting one. There is a genuine tension between two schools of thought, most clearly exemplified in the Court of Appeal decisions in *Dobbie v Medway HA*² and *Hallam Eames v Merrett Syndicates*³. The facts of each may be shortly stated: in *Dobbie* a woman went into hospital for an investigation under general anaesthetic of a lump in her breast. During the procedure a lump was excised and, based on the visual examination by the operating surgeon, but without a laboratory examination, it was decided

² [1994] 1WLR 1234

³ (decided in 1995 but reported at [2001] LL LR PN 178)

that the lump was cancerous and the breast was removed during the same surgical procedure. The woman woke up to find her breast removed, and this caused her enormous psychological harm. About a day later she was told the 'good news' that laboratory examination of the excised tissue had proved that the lump was benign, and she was persuaded to celebrate her good luck that further treatment for cancer was not required.

It was held by the Court of Appeal that all the requirements for acquisition of knowledge under section 14 of the Act were satisfied: the claimant knew that she had suffered serious injury in that she knew her breast had been removed and she had suffered psychological harm; she also knew that the removal of the breast was attributable to the act of the surgeon in removing the breast. It was that act of the surgeon which formed the essence of the complaint which the claimant eventually wanted to pursue through the courts and was identified as "*the act or omission which is alleged to constitute negligence*". The Court of Appeal held that the claimant had all the necessary knowledge even though she did not know that the surgeon had done anything wrong or negligent in deciding to remove the breast before obtaining a laboratory result on the excised tissue.

In the light of *Hallam Eames* (see below), it is relevant to note that in *Dobbie*⁴ Sir Thomas Bingham MR criticised the trial judge's reasoning because the judge had said the claimant's breast had been removed "*unnecessarily*". Sir Thomas Bingham said that this was an "irrelevant" fact⁵. And Steyn LJ⁶ rejected the submission that "...*the injured party must know that the mastectomy was 'unnecessary'*".

In *Hallam Eames*, the facts were these: names on the Merrett syndicate knew that they had suffered heavy losses, year on year, reflecting heavy losses made on the policies of insurance underwritten by the underwriter, Merrett. Much later, they discovered that the policies of insurance had been negligently underwritten, in that Mr. Merrett had had no, or no sufficient, material upon which to base any sort of sensible risk analysis of the business he was underwriting, or any sensible basis for charging premium. At first instance, Gatehouse J. followed *Dobbie* in finding that the claimants knew they had suffered massive losses; they knew those losses were due to the underwriting of Merrett; and it was clear that the act or omission which was now

put forward as the negligence of Merrett was that very underwriting. He therefore ruled that the claims were statute barred and that sufficient knowledge had been acquired by the claimants to satisfy the requirements of section 14A.

The Court of Appeal, which included Sir Thomas Bingham who had presided in *Dobbie*, overturned the Judge. The Court of Appeal said that the test was whether the claimant had knowledge of "the act or omission which is causally relevant for the purpose of an allegation of negligence". In justifying this statement, the Court of Appeal rationalised *Dobbie* by saying that it was essential in that case that the claimant knew that the surgeon had removed a healthy breast. But as mentioned above, this seems to be synonymous with knowledge that her breast had been removed 'unnecessarily', and that does not seem to have been the way the Court of Appeal in *Dobbie* approached the question!

These cases are extremely difficult to rationalise. It may be that the answer is to be found in the rule (applied by *Nash v Eli Lilly*⁷) that the 'act or omission which is alleged to constitute negligence' is to be identified by looking for the essence of the act or omission to which the damage is attributable. In *Hallam Eames* it was not enough to say that the essence of the act or omission was underwriting, since underwriting is by its very nature a risk business and the mere fact that one ends up with a loss is not sufficient to identify the essence of the acts or omissions which are relied on against the underwriter.

However, if the conflicting cases cannot be explained, the tension seems to stem from differing views as to the purpose of sections 14 and 14A. Is the three year period to run from the time when a reasonably competent litigant has sufficient knowledge *to enable him to issue proceedings*, or from the time when he has sufficient knowledge *to enable him to start an investigation*? The defendants' position is that the latter proposition is what the statute is aiming to achieve, whilst the 'gloss' applied by *Hallam Eames* is favouring the former proposition.

In *Dobbie*⁸ Sir Thomas Bingham MR emphasised the legislative history of section 14:

"In its Twentieth Report, Interim Report on Limitation of Actions... (Cmnd 5630), (May 1974) the [Law Reform] Committee reviewed the previous

⁴ at 1243A-C

⁵ [1994] 1 WLR at p. 1243C

⁶ at p. 1247H - 1248B

⁷ [1993] 1 WLR 782, 799

⁸ at [1991] 1 WLR 1238F

history and certain suggested solutions. The Committee accepted that time should not begin to run before a claimant had knowledge... both of his injured condition and of its having been caused by an act or omission of the defendant, but was concerned to decide whether the date of knowledge should arrive (1) on the Plaintiff acquiring knowledge of those facts; or (2) on his acquiring knowledge of those facts and also that he had a worthwhile cause of action against the defendant; or (3) at some intermediate point between these states of knowledge, as for example on his becoming aware, in the words of Lord Pearson: ‘... that the defendants were at fault and that his injuries were attributable to their fault.’ see *Smith v Central Asbestos Co. Ltd.* [1973] AC 518, 545. For reasons given in the Report the Committee rejected (2). The Committee also rejected (3), taking the view that if there was to be an extension of time from the date of knowledge as of right, such date must be capable of precise definition and that the concept of fault lacked the necessary precision.”

It seems that, whilst the earlier cases, such as *Dobbie*, interpreted the Limitation Act 1980 consistently with the above exposition, later cases (including the Court of Appeal in the present case), in adding the ‘gloss’ referred to above, have erred in adopting what was option (3) considered by the Law Reform Committee.

Returning to the Court of Appeal decision in *Haward v Fawcetts*, the Court of Appeal followed the *Hallam Eames* line, and considered that knowledge on the part of the claimants was not sufficient until they had acquired knowledge (ill defined by the Court!) of acts and omissions by Fawcetts “that were causally relevant for the purposes of the allegations of negligence which he makes”, and went on to say that this knowledge was not acquired until after suspicions of negligence on the part of Fawcetts had actually been voiced by the claimants’ advisors.

The Court of Appeal also considered that the claimants did not have sufficient knowledge of ‘attributability’. Here, the Court seems to have ignored the authorities which have defined the term ‘attributable’ as meaning no more than ‘capable of being attributed to’ (*Dobbie*), in the sense of being a ‘real possibility’ (*Spargo v North Essex*⁹).

The Court also ignored the requirement of the wording of subsection 8(a) that the damage has to be no more than attributable ‘in whole or in part’. In

*O’Driscoll v Dudley Health Authority*¹⁰, Otton LJ distinguished “the more stringent test of proof of causation from the much less rigorous statutory test of attributability”, by reference to a passage in *Spargo*:

“After all, the policy of Parliament, in these cases which would otherwise be statute barred, is to give the plaintiff who has the requisite low level of knowledge three years in which to establish by inquiry whether the identified injury was indeed probably caused by the identified omission and whether the omission (identified initially in broad terms) amounts to actionable negligence.”¹¹

The case of *Haward v Fawcetts* is on its way to the House of Lords, who will be faced by various conundrums, and decisions of policy. Broadly speaking, it is the defendants’ ultimate position that, if a claimant invests on advice, and the investment is known to have been lost, there is sufficient knowledge to put the claimant on notice that the advice should be investigated; and this is (or should be – see the Law Commission commentary above) sufficient knowledge for the purposes of section 14A. The fact that the immediate cause of the loss of the investment may be suspected to be inefficient management of the company invested in, or something else extraneous, does not negate the fact that the investment itself was made (and therefore the loss was suffered) solely on the advice of the prospective defendant.



Howard Palmer Q.C. and Neil Moody appeared for the defendants in the Court of Appeal, instructed by CMS Cameron McKenna, Bristol.

⁹ [1997] PIQR P235

¹⁰ [1998] I.L.L.R. Med 210

¹¹ [1997] PIQR, at p244

THE DUTIES OF LOSS ADJUSTERS

John McDonald looks at the evolving area of duties owed by Loss Adjusters.

Introduction

Most professions have come in for scrutiny by the courts in recent years. But how is it that loss adjusters have escaped such attention for so long? It is probably that their unique position in acting (usually) as agents for insurers has meant that few, if any, successful claims against loss adjusters have been through the English courts. Things may well be about to change, and it is a good time to look at the duties of loss adjusters and the possible bases of their legal liability.

The position of loss adjusters

In his primary role, a loss adjuster is appointed by insurers for the purpose of investigating a claim on their behalf, and as such his responsibility is to report to the insurers.

"The role of the loss adjuster would be to inspect the damage to confirm that such damage or loss fell within the ambit of the insurers' policy and ultimately, if the loss were one that would be recoverable under the policy terms, to conduct settlement negotiations on behalf of the insurer with the policy holder. The loss adjuster would also be expected to investigate causation, and to explore, together with the insurers, the prospects of a successful subrogation against any third party¹." However, "these days, chartered loss adjusting companies are just as likely to provide cost effective claims and risk management services to large corporations, captive insurance companies, local authorities, health services or brokers as they are to traditional insurance and reinsurance companies. In addition, Chartered Loss Adjusters are active in the field of claim presentation for policyholders²."

In carrying out their functions, therefore, loss adjusters have many responsibilities:

- (1) To their clients (ie in their traditional role, to the insurer);
- (2) To the insured;
- (3) To uphold appropriate standards of professional conduct.

I shall examine each of these in turn to consider what the duties may be, and the legal basis for such duties.

(1) Duties to clients

The relationship between a loss adjuster and his client will normally be governed by a written contract. As between loss adjusters and insurers, standard form terms of engagement govern the retainer and prescribe the duties, which will include:

- Inspection of the damage;
- Consideration of policy terms to see that the damage falls within them;
- If so, conducting settlement negotiations with the insured, and/or with third parties;
- Arranging for necessary remedial work;
- Investigating causation;
- Considering a subrogated claim against a third party.

The precise nature of these terms will vary from contract to contract, so that detailed consideration of them is not possible here. However, the nature of the retainer between an insurer and a loss adjuster means that for many purposes, the loss adjuster is agent for the insurer in dealings with others. This has two particular consequences: First, an insurer will usually be bound by a loss adjuster's admission of liability to a third party. Thus if, for example, the loss adjuster has been hasty or careless in his investigation, or has overlooked some relevant legal principle, so that it turns out that the defendant may not be liable after all, it is not possible as of right to amend or withdraw the admission. Although under Rule 14.1(5) of the Civil Procedure Rules, the court may allow a party to amend or withdraw an admission, it is generally necessary to look at the prejudice which the parties will respectively suffer if permission to withdraw an admission is given or not given. The party seeking to withdraw or amend an admission will usually have to do so on payment of his own and the other party's costs of the application. Thus, if a loss adjuster has negligently made an admission of

¹ *Graham v. Entec Europe Limited* [2003] 4 All ER 1345

² *Kitchen Design v. Lea Valley* [1989] 2 Ll. Rep. 221

³ *The Claims Professionals: The Chartered Institute of Loss Adjusters*

liability, he will be liable to his insurer client at least for costs, and if the application to withdraw the admission is unsuccessful, he may be liable for the whole value of the claim.

Second, in the recent case of *Graham v. Entec Europe Limited*⁴, it was held that a loss adjuster appointed by a claimant's insurers in a subrogated claim can have knowledge attributable to the claimant for the purposes of the Limitation Act. The facts of this case were as follows: In 1991, the claimant, a property owner, claimed on his insurance policy in respect of cracks in his bungalow. A loss adjuster was appointed by the insurers to investigate the damage on their behalf. The defendants, who were geotechnical engineers, were instructed, and acting on their advice remedial works were undertaken. These were completed in August 1992. However, by the end of the summer of 1995, it was clear that significant cracking was continuing, and the loss adjuster was instructed again. Various experts were appointed, including a geotechnical engineer and an arboriculturalist. The court found as a fact that in about November 1996, the loss adjuster had been told by one of the experts that the cause of the damage was in fact clay shrinkage due to the root water demands of surrounding oak trees. For some reason, proceedings against the defendant for negligent advice in relation to the first remedial works were not brought until July 2000.

Under section 5 of the Limitation Act 1980, the basic limitation period for breach of contract is 6 years from the date on which the cause of action accrued. Thus, the cause of action accrued no later than the completion of the remedial works in August 1992, so that the primary limitation period expired in August 1998, ie almost two years before the proceedings were brought. But under section 14A of the Limitation Act, there is an alternative limitation period where facts relevant to the cause of action were not known at the date of accrual: in such circumstances, there is a three year limitation period starting on

*"the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damage in respect of the relevant damage and a right to bring such an action"*⁵.

So, in *Graham v. Entec*, the question was whether the claimant had the relevant knowledge at any time before July 1997 (ie 3 years before proceedings were brought in July 2000). In these circumstances, the loss adjuster himself, and what he knew and when, came under close scrutiny. The judge at first instance held that the loss adjuster was *"an investigator appointed as agent of the insurers to investigate and progress the claim rather than himself being an expert whose help was sought and awaited in order to ascertain the facts upon which a claim might be based, and that, as such, his knowledge was knowledge which was to be imputed to the claimant for the purposes of section 14A."*

The Court of Appeal upheld that judgment: Potter LJ held⁶ that

"the knowledge of a loss adjuster investigating and advising on a claim on behalf of insurers for the purposes of a subrogated claim by those insurers, is to be treated as the knowledge of the insurers for the purposes of section 14(5)."

This sufficed to make the claim statute-barred, since the insurers' knowledge was

*"knowledge of the person who in reality had the right and interest in pursuit of the claim."*⁷

This case, being a decision of the Court of Appeal, is binding precedent, so that those affected by it will have to learn to live with it. But the logical basis for the decision is open to some criticism. The only reasoning behind it is to be found in paragraph 38:

"... it is the custom of many insurers to investigate claims through their own 'in house' loss adjusting department. [There is no] logical reason for distinguishing between the position of such an insurer, who plainly would be fixed with the knowledge of his employee, and the position of an insurer who, for purposes of economy or business efficiency, delegates the task to an independent loss adjuster."

But it must be necessary to consider the scope of the retainer of the loss adjuster in any particular case: it may well be that in some cases the loss adjuster is under a duty to report certain matters to his principal, whereas in other cases he is not. See for example *Bhopal v. Sphere Drake Insurance plc*⁸ in which it was held that a loss adjuster who inspected an insured's

⁴ [2003] 4 All ER 1345

⁵ Section 14A(5)

⁶ paragraph 38

⁷ paragraph 35

⁸ Court of Appeal; 30.11.00; unreported

premises in connection with a flood claim did not fix the insurers who retained him with knowledge that there was a breach of a heating warranty.

Where the client is a policyholder, different considerations will apply, which is why the CILA's Guide to Professional Conduct contains an Addendum expressly providing for "Responsibilities of Members acting for Policyholders". This includes the recommendation that "... prior to, or as soon as possible after engagement the member sets out in writing to the client, the terms on which the case is taken. This letter should include the financial terms of the contract together with any other factors the member believes could give rise to later misunderstanding."

(2) Duties to the insured

One of the "Fundamental Principles of Professional Conduct" set out in the Chartered Institute of Loss Adjusters' Guide to Professional Conduct is as follows:

"3.03 A member shall act impartially when acting on instructions from an insurer in relation to a policyholder's claim under a policy issued by that insurer."

No doubt inspired by that Principle, the loss adjuster in *Graham v. Entec* gave evidence that:

"I believe that we have a duty of care to the policyholder. As I said at the beginning, loss adjusters are bound to deal with the claim impartially and assist the policyholder as best we can."

But, as the Court of Appeal noted, the concession that loss adjusters owe a duty of care to the policyholder when acting in the course of their retainer for the insurance company is not - as yet at least - recognised in English law. Indeed, there appear to be no English cases on the subject at all. So what is the position likely to be?

The question is most likely to arise in fire claims, particularly where - after an investigation by a loss adjuster - the claim is rejected on the grounds of arson. In those circumstances, although the insured has no contractual relationship with the adjuster, it is sometimes argued that the adjuster owes the insured a duty of care in tort. The way it was pleaded in one case was as follows: the adjuster

"knew or ought to have known that, if he should advise that the fire had been deliberately lit by the plaintiffs, the insurer would refuse to meet any claim under the policy and make a complaint to the police, which would or could lead to an arson prosecution... consequently he owed a duty to the plaintiffs to take reasonable care in investigating the cause of the fire and reporting to [the insurer] thereon⁹."

In New Zealand, the matter has been considered by the Court of Appeal in *South Pacific Manufacturing Co. Limited v. New Zealand Security Consultants & Investigations Limited*¹⁰. That concerned two appeals, each involving a case where a fire claim had been rejected on the grounds of arson. A five man court held as follows:

- (1) When a duty of care issue arose in a situation not clearly covered by existing authority, all factors including degree of proximity and public policy considerations had to be taken into account.
- (2) In one of the cases under consideration, there was - other things being equal - a sufficient degree of proximity between the investigator and insured to give rise to a duty of care. But;
- (3) In both of the cases, there were weighty public policy considerations against a duty of care, so that both claims in the event were rejected.

The following factors are likely to be taken into account in England:

- (1) In favour of there being a duty of care owed by the adjuster to the insured:
 - The vulnerability of the insured, who is highly dependent on the investigator carrying out his task carefully.
 - The potential proximity between the two, particularly since the adjuster will be aware that a report adverse to the insured is likely to be seriously damaging to his interests.
 - The objective of promoting professional competence among investigators.

⁹ *Mortensen v. Laing* [1992] 2 NZLR 282, 290

¹⁰ [1992] 2 NZLR 282

(2) Against there being such a duty of care:

- The loss suffered is purely economic, which is generally irrecoverable in tort.
- Where the parties have chosen to regulate their relationships by means of contracts, there is normally no scope for introduction of tortious duties¹¹.
- If such a duty were to exist, it would probably mean that an insured could recover sums as heads of damage which were not recoverable from the insurer as insurance monies.
- If there were such a duty, it could not reasonably be confined to loss adjusters and persons in a similar position, and so would open the floodgates to new claims.
- If there were such a duty, it would cut across well-established principles of defamation, and so impose a greater restriction on freedom of speech which exists at present.
- Even though an insured may be vulnerable, the relationship between him and the loss adjuster is essentially adversarial (because of their different interests). An insured can now always protect himself by appointing his own loss adjuster to act for him.
- No duty of care is owed by the insurer to the insured. This being so, how can a duty of care be owed by the insurer's agent, the adjuster, to the insured¹²?

Although it was said in *Graham v. Entec*¹³ that a duty of care by a loss adjuster (acting for insurers) to the policyholder was not "as yet" recognised in English law, it is to be doubted whether such a duty will in fact ever be held to exist, save perhaps in very limited and carefully defined circumstances. The Courts are reluctant to impose ever-expanding duties of care in tort, and to find that a loss adjuster was generally under such a duty would probably be regarded as a step too far.

¹¹ *Simaan v. Pilkington Glass* (No.2) [1988] QB 758

¹² See Clarke on the Law of Insurance Contracts, paragraphs 30-12 and 23-15D

¹³ at paragraph 34

(3) Professional conduct

The Chartered Institute of Loss Adjusters' Guide to Professional Conduct sets out certain "Fundamental Principles of Professional Conduct".

These include the requirements:

- To behave ethically and with integrity
- To strive for objectivity in all professional and business judgments
- To act impartially
- To conduct himself with courtesy and consideration for all people
- To carry out work with due skill, care, diligence and expedition
- To keep up to date with developments
- To have a proper regard for and to comply with the relevant law.

While a member of the CILA can be subject to disciplinary procedures for breach of these requirements, they do not give a remedy in law to any third party. In these days when everyone wants to be able to enforce whatever they regard as being their "rights", professional codes of conduct such as this may not seem an adequate substitute. But it may be that the public is as well served by a profession governed by clear professional rules, as by one where piecemeal remedies may exist, but in circumstances which are impossible to predict.



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Helen Wolstenholme takes a look at the noteworthy professional negligence cases over the last year.

There have been several recent decisions relating to the use of strike out in professional negligence cases. Firstly, in *Green v Alexander Johnson (A Firm)* [2004] PNLR 40 (a barrister's negligence case) it was noted per curiam that it was generally unwise to separate off some of the issues in a professional negligence case for a separate hearing because issues that arise on one part of a case may well have an impact elsewhere. In *Green* Peter Smith J was forced to consider only one of three allegations of negligence made against the defendant and then only that against the second defendant, with the remaining other two of the allegations against him and the entirety of the three allegations as against the first defendant having been stayed.

Somewhat predictably, given the current trend in auditor's negligence cases, the Court of Appeal in *Equitable Life Assurance Society v Ernst & Young (A Firm)* [2003] 2 BCLC 603 held that strike out and/or the reduction in scope of claims involving complex and developing issues of law and fact was inappropriate. The claimant had sued the defendant for negligence in its auditing of the claimant's statutory accounts for the financial years of 1997, 1998 and 1999.

This approach can, however, be contrasted with that of the Court of Appeal in *Sutradhar v Natural Environment Research Council* [2004] PNLR 30, a class action brought by 700 litigants living in Bangladesh who had suffered personal injury from drinking contaminated water, allegedly as a result of the defendant's hydro geological survey being inaccurate (it had failed to test for levels of arsenic). The claims were struck out on the basis that the defendant had assumed no responsibility to provide a legally enforceable assurance to a large cohort of the Bangladeshi population as to the safety of their water; in the absence of this it would not be fair, just and reasonable to impose a duty of care. The Court noted that where a necessary pre-condition of liability could not be proved, it had a duty to act to terminate the claim, and that such a duty was even greater where the litigation is likely to be expensive

and lengthy. Interestingly, Clarke LJ dissented partly on the grounds that where a claim raised a novel point in a developing area of the law it should normally be decided on facts found at trial.

Analysing loss of a chance had a spot in the limelight in *Ball v Druces & Attlee (A Firm) (No. 2)* [2004] PNLR 39. The claimant was one of the originators of the Eden Project in Cornwall and instructed the defendant solicitors to oversee his interests as an organiser. It had always been the claimant's intention to share in the profits made, but he was prevented from doing so because the enterprise was set up as a charitable trust, without it being communicated to him that this may defeat his expectations of personal benefit. Nelson J found that the defendant had been negligent in failing to advise the claimant to propose a binding agreement, and that the claimant was entitled to damages accordingly. Nelson J calculated the damages owed to the claimant by assessing the value of each of the various hypothetical negotiations which may have taken place between the claimant and the Trust/Millennium Commission, scaled down to reflect the percentage chance of that agreement having taken place, but for the defendant's negligence. Where there were various possible outcomes in play, it was held that the right approach was to evaluate the chance of success of each of the possible outcomes, giving a percentage assessment for each category of lost chance.

In *Coudert Brothers v Norman Bay Ltd (formerly Illingworth, Morris Ltd)* [2004] EWCA Civ 215, the Court of Appeal considered the effect of negligence of legal advisors on the ability of a Russian company to secure an acquisition contract. It reviewed and reiterated the test for loss of a chance, refusing to reconsider and narrow the principles established in *Allied Maples Group Ltd v Simmons & Simmons (A Firm)* [1995] 1 WLR 1602. The Court also refused to accept the defendant's argument that the transaction failed for a cause independent of the reasons pleaded by the claimant, such that the value of the chance should be reduced due to an "intervening" act of negligence on the part of the

claimant. Waller LJ referred to the case of *Bolitho (deceased) v City and Hackney Health Authority* [1998] AC 232 and held that there should be a principle that disallows a defendant from relying on a wrong which it has committed so as to reduce the damages which would otherwise flow from a tort or breach of contract.

The issue of damages in a solicitor's negligence case was considered not only in *Ball*, but also in *Greymalkin Ltd v Copleys (A Firm)* [2004] PNLR 44. The court in that case undertook a detailed review of the case law and legal principles relating to the measure of damages applicable in a case involving the defendant solicitors' failure to identify that a property being bought speculatively by the claimant property developers was in fact subject to 3 charges in favour of other lenders, which were not overreached by the title. The diminution in value approach to damages was held to be the right one in these circumstances as opposed to that in which the "costs of extrication" were available.

In *Daniels v Thompson* [2004] PNLR 33, the Court of Appeal considered a case in which the defendant solicitor had given negligent advice to the testatrix to the effect that she could transfer her property to her son, by way of gift to avoid inheritance tax. She did this, but continued to live in her property without providing valuable consideration. Accordingly, after her death she was deemed to have an interest in possession of the property which was treated as part of her estate. The Court dismissed the case as pleaded on the basis that it disclosed no cause of action: the testatrix herself could never suffer any liability to pay inheritance tax and therefore did not suffer any loss as a result of the defendant's negligence. The true detriment suffered was that the defendant's negligence frustrated her wish to confer on her son the benefit of a reduction in the inheritance tax liability of her estate. This is not a detriment recognised in law as damage capable of assessment in money terms (an analogy was drawn with the "disappointed beneficiary" cases, such as *White v Jones* [1995] 2 AC 207). An application to amend the Particulars of Claim to allege a breach of duty owed to the son as a personal representative was not allowed.

Section 14A of the Limitation Act has once again been the subject of close scrutiny. In *Haward v Fawcetts (A Firm)* [2004] PNLR 34, the Court of

Appeal was asked to consider the effect of s.14A of the Limitation Act 1980 in a case where the claimant, a businessman, had relied over a period of years on negligent advice given to him by the defendant accountants. He said he only realised the fact and extent of the negligence some years later, when he engaged a financial consultant. It was held that under s.14A time begins to run once a claimant knows that the loss he has suffered is attributable to the acts or omissions of the defendant, rather than when he knows he has acted upon advice given by the defendant. The Court of Appeal's decision is being appealed to the House of Lords. For more on this one, see the article by Howard Palmer QC and Neil Moody.

The issue of limitation was also considered in *Law Society v Sephton & Co (A Firm)* [2004] PNLR 27 and, specifically, s.32 of the Limitation Act 1980. The defendant was a firm of accountants who were retained by a solicitor between 1989 and 1995 to prepare annual reports for delivery to the Law Society. During the period of the defendant's retainer, the solicitor had misappropriated substantial sums from his clients. The Law Society's Compensation Fund made payments to the aggrieved clients some years later, and claimed damages in respect thereof from the negligent accountants. It was held that all of the Society's claims were statute barred, the cause of action having arisen as soon as there was a detriment which was capable of assessment in money terms. The Society had suffered loss prior to its first Compensation payment, when the solicitor first misappropriated a client's money with the effect of increasing the deficiency on his client account. The remaining causes of action accrued when the Society relied on the respective reports and took no steps to investigate or intervene in the practice. The Society had sufficient knowledge when it knew or assumed that as a result of the dishonesty a payment would have to be made.

S.32 of the Limitation Act 1980 was again considered in *Williams v Fanshaw Porter Hazlehurst (A Firm)* [2004] 2 All ER 616 by the Court of Appeal. Without communicating with the claimant, the defendant solicitors agreed in 1994 that her clinical negligence claim be struck out, in the mistaken belief that this did not preclude a new action. The claimant was eventually advised in

1996 to consult alternative solicitors and, as a result, brought proceedings against the defendant for loss of a chance to pursue her clinical negligence claim. She issued proceedings against the defendant in 2000, these being met with the defence of limitation, the cause of action having accrued in 1994. It was accepted by the Court that the defendant had deliberately concealed facts relating to the claimant's cause of action in 1994: what was required was an act of concealment or a deliberate omission to provide information, done with the intent to conceal the facts on question. If the defendant appreciated that he had committed a serious mistake or had been negligent and made a deliberate attempt to conceal that fact, this amounted to deliberate concealment even if the defendant had acted to avoid embarrassment and in the mistaken belief that it would be possible to start a new cause of action.

A solicitor's duty to give commercial advice was considered in the recent Privy Council decision in *Pickersgill v Riley* (2004) 14 EG 140 (CS), a case which illustrates the courts' general reluctance to impose on solicitors a general duty advise on commercial aspects of a transaction. Lord Scott drew a distinction between the absence of a general duty of to give such advice, and the existence of a duty to point out "legal obscurities" and "hidden pitfalls": the scope of a lawyers normal duty is to equip their clients with the legal information needed to assess the commercial implications of a particular transaction.

In *Oldham v Kyrris* [2004] BCC 111 the Court of Appeal rejected the claim that an administrator appointed under the Insolvency Act 1986 owed a duty of care to unsecured creditors in relation to his conduct of the administration. It was considered that the situation was analogous to that of a director and shareholders: a director would only owe such a duty to shareholders if special circumstances amounting to a special relationship between the director and the shareholders existed. Directors' duties were otherwise owed exclusively to the company, not the shareholders.

In *Sahib Foods Ltd v Paskin Kyriakides Sands (A Firm)* [2004] PNLR 22, the Court of Appeal considered the application of the Law Reform (Contributory Negligence) Act 1945. The Court overturned the decision at first instance that the

defendant architects were negligent in failing to advise on the use of proper fire-retarding materials and were liable for the loss caused by the spread of a fire, and the claimant was not contributorily negligent for the fire's spread even though its own negligence had started the fire. The Court held that the claimant was contributorily negligent in starting the fire and in failing to look after its own interests and that damages could, therefore, be reasonably reduced in the proportion of two thirds. For more on this one, see Bob Moxon Browne QC's article 'Firewalls and Wildfire'.

And finally, the latest decision of the House of Lords in (1) *Three Rivers District Council & Ors* (2) *Bank of Credit & Commerce International SA (In Liquidation) v Governor and Company of the Bank of England* [Times, 12.11.04] partially rescued legal advice privilege from a process of erosion by the Court of Appeal over the last two years. Their Lordships rejected the Court of Appeal's restrictive ruling that legal advice privilege can only apply to advice from lawyers relating to their clients' "legal rights and liabilities". Rather, privilege can apply to all situations where advice is given by the lawyer in a "relevant legal context" where the lawyer is being consulted because of his special professional knowledge and skills. The judgment does, however, leave open the question of identifying which individuals constitute a lawyer's "client" for these purposes, and the Court of Appeal's restrictive take on this must still stand (i.e. those employees of the client who actually instruct the lawyers, as opposed to any other employees who also communicate with them).



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