

Welcome to the new winter edition of *on duty* which as usual contains articles reflecting the very wide variety of work undertaken by 2tg's specialist professional negligence group.

Simon Goldstone writes about the decision of the Court of Appeal in *Barclays Bank v. HM Customs & Excise*, dealing with the duty of bank officials in the execution of a freezing order. Charles Dougherty and Helen Wolstenholme tackle the decision of the House of Lords in *Moy v. Pettman* as well as broader issues concerning the duty of professional people to warn their clients (or patients) of any risks and dangers attaching to their advice. Risks and dangers are also the subject of an article by a new member of the group, Elizabeth Wale, this time in the context of financial advice.

Rehana Azib has contributed a case-update dealing with some of the most important decisions in the area of professional negligence which have emerged in the last few months.

Finally, I have penned an article on so-called "no transaction" damages in professional negligence cases. Prompted by recent experience of a case when a solicitor was alleged to have exchanged contracts to purchase a substantial property without his client's authority, I have examined the Court's approach to cases where the complaint is not that his professional adviser has failed to achieve the desired result, but rather has ensnared the client in a situation which he would have preferred to avoid: an interesting and not always straightforward area of the law concerning damages.

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



Bob Moxon Browne QC
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Edited by *Charles Dougherty* and *Leona Powell*

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

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WELL HERE'S ANOTHER FINE MESS YOU'VE GOT ME INTO...!

Bob Moxon Browne QC looks at no-transaction damages in professional negligence cases.

“Well here’s another fine mess you’ve got me into!” as Hardy used to say to Laurel. This is also the complaint of the client who alleges that as a result of professional negligence he has become ensnared in a situation he never wanted to be in, at any price.

Such a situation can typically arise where a surveyor fails to spot serious defects (such as vulnerability to flooding) affecting a property, which the purchaser says he would never have bought if he had known of the problems. Damages reflecting diminution in value may be nowhere near enough to compensate the client, who may claim with justice that he deserves nothing less than the whole cost of moving to a new property, together with damages for the attendant disruption and inconvenience.

However, it is suggested that at least in some cases the nature and extent of the excess of authority may be relevant in setting a limit on recoverable damages. If a solicitor is instructed to buy a property in sound condition, and in breach of that instruction buys one in poor condition, it is hard to see why he should be liable for the consequences of a falling market, on top of damages based in diminution in value referable to the condition of the property. Equally a solicitor whose instructions to buy property are subject to a ceiling in price, will surely only be liable for the excess payable over the stipulated limit, and not for each and every down-side consequence of the unauthorised transaction. Such cases may be rationalised by reference to the principle that the professional adviser who acts in excess of authority is only liable for the consequences flowing from the fact that the authority was exceeded, and not for all the consequences of the transaction, even if it is plain that if the client’s instruction had been followed there would have been no transaction at all.

Some of these problems were illustrated quite vividly in a recent High Court case, *Roiter Zucker v Minai*, concerning a solicitor who was alleged to have committed his client to exchange contracts to buy a very substantial and expensive property in London,

without full instructions to do so. Numerous discrete allegations included claims that the purchaser did not want to exchange in the immediate aftermath of 9/11, did not want to exchange before her financial arrangements were fully in place, and did not want to exchange until the vendor had agreed to resolve a large number of comparatively minor snags said to affect the property. Her emphatic evidence was that she would not willingly have exchanged contracts in the face of these (and many other) alleged problems; and it was common ground in the case that if the exchange had not taken place when it did, the deal probably would have been lost; i.e. in this event there would have been no transaction at all.

The evidence in the case showed that the property was worth what was paid for it, and had risen in value since it was bought, by at least as much as other property bought at the same time might have done. Damages were claimed on the basis of computing the entire cost of the transaction to the Claimant, down to the date of trial (including the considerable cost of borrowed money) less the present market value of the property. Against this, it was argued for the solicitor that there had been no loss at all, because if the Claimant had not bought the instant property, she would have bought another, at similar cost and with similar consequences. As a secondary position it was argued that any loss should be confined to the direct consequences of the nature and extent of any proven excess of authority by the solicitor (e.g. the effect, if any, of 9/11 on this section of the market etc.). Judgment in this interesting and rather unusual case is awaited, and will be reported in the next edition of *on duty*.

A further question arising in the same litigation, concerned the correct date at which to assess loss. The normal rule in both contract and tort cases is that damages are assessed at the date of the breach (or, in “no transaction” cases, at the date of the unwanted transaction). However as pointed out above, this approach may not always yield a just result in “extrication” cases, particularly when the client’s real complaint is that he has been trapped for months if not years in a situation which was none of his making.

In *Roiter Zucker*, damages could have been assessed at the date of the transaction, by reference to what would have been lost if the property had been sold immediately. On this basis, the damages would have been limited to the cost of stamp duty, and the wasted acquisition and disposal costs. In arguing for an assessment of damages as at the date of trial, the solicitors’ client claimed she lacked the means to put

her unwanted property into a readily saleable condition. As a matter of law, some support for this approach can be found in cases where for one reason or another extrication has proved particularly troublesome and/or time-consuming (see for example *Hayes v Dodd* [1990] 2 All ER 815).

Finally, interesting questions may arise in cases where the client has in fact profited from the transaction which he would not have undertaken if properly advised – a not uncommon situation in, for example, a rising property market, where protestations about the fine mess the claimant has gotten into may sound a little hollow. There are many examples of cases where events between the transaction and the trial have eroded potential damages to vanishing point (see e.g. *Kennedy v Van Emden* [1996] PNLR 409). However it is necessary to keep in mind that the client may be able to claim that if he had not entered the transaction he complains of, he could and would have invested in another transaction which would have been even more profitable (see e.g. *Wroth v Tyler* [1974] Ch 30).

Bob Moxon Browne QC heads 2tg's Professional Negligence Group. He was instructed by Kennedys in *Roiter Zucker v Minai*. His junior was Charles Dougherty.



SHARING DOUBTS WITH A CLIENT

Charles Dougherty and Helen Wolstenholme look at the recent House of Lords decision in *Moy v Pettman Smith* which considered the extent of an advocate's duty to advise as to risk.

"There is still a respectable body of professional opinion that the client pays for the advocate's opinion not her doubts," declared Baroness Hale in the recent case of *Moy v Pettman Smith* (a firm) [2005] UKHL 7. That adage had suffered a few blows from a robust Court of Appeal, before being calmly re-affirmed by a unanimous House of Lords.

The case arose from a vigorous football match in which Mr Moy sustained serious fractures to his leg. Initial treatment had left him with continuing pain and disability, despite remedial surgery some three years later. Mr Moy commenced a medical negligence claim against the hospital, and liability was admitted on its behalf. Causation remained in issue. It was the hospital's case that its negligence was not responsible for Mr Moy's continuing symptoms, which were simply the natural consequence of the fractures he had sustained.

A medical report connecting Mr Moy's continuing symptoms to the hospital's negligence was crucial to his case. His solicitors had, however, failed to obtain such a report within the time permitted by the court. Without attempting to seek either an extension of time or permission to serve a further medical report, Mr Moy's solicitors proceeded to obtain a report from Mr Saleh, the consultant orthopaedic surgeon who had carried out Mr Moy's remedial operation. This report strongly supported Mr Moy's case: not only did it attribute his present symptoms to the hospital's negligence, but it also stated squarely that, "if he decides to carry on in his current capacity... his symptoms will get worse".

Mr Moy's barrister appreciated that the value of the case had to be revised in the light of Mr Saleh's report. She advised that applications would have to be made both for leave to adduce the further medical evidence, and for an adjournment of the trial. Six weeks before the intended trial date, however, both applications were dismissed. The Deputy District Judge was, in the words of Lord Carswell, "very critical, not to say censorious" concerning Mr Moy's solicitors' preparation of the case and the obtaining of medical evidence. The decision to dismiss both applications was appealed unsuccessfully.

A month before trial, the hospital made a payment into court of £150,000. In conference, Counsel advised Mr Moy against accepting this sum. While explaining the difficulties of obtaining leave to admit Mr Saleh's report, she advised that the value of the claim (taking into account Mr Saleh's evidence) was about £300,000, with a 'floor' of £200,000. Her advice was accepted by Mr Moy.

On the first day of the trial, at the door of the court, Counsel was told that the offer of £150,000 was still on the table. She discussed matters further with Mr Moy and advised him that he would be better to proceed

with the action as she was 'hopeful' of obtaining leave from the trial judge to adduce Mr Saleh's report in evidence. Although Counsel reminded Mr Moy that it was a matter for him whether or not to take the £150,000 offered, he accepted her advice and the trial commenced.

Once before the trial judge, it quickly became apparent that the chances of obtaining leave were very slim. The judge rose for a time to consider the papers, and the parties took the opportunity to discuss settlement further. Having listened to the judge's indications, the hospital reduced its offer to £120,000: taking on board the costs implications, this involved a net shortfall of approximately £69,000 from the £150,000 offer. The new offer was still better, however, than the damages likely to be awarded by the judge in the absence of Mr Saleh's report. Left with little option, Counsel advised Mr Moy to accept the revised offer.

Mr Moy duly accepted the £120,000, but proceeded to commence professional negligence proceedings against his solicitors. They, in turn, brought in Counsel as a Part 20 defendant, on the basis that she had negligently failed to advise Mr Moy to accept the offer of £150,000 before trial. Counsel was then added as a second defendant to the claim.

Unsurprisingly, Mr Moy's claim against his solicitors succeeded. His claim against Counsel did not. Judge Geddes, sitting as a High Court judge, found that Counsel's assessment of the prospects of persuading the judge to allow in evidence Mr Saleh's report did not fall outside the range which reasonably competent counsel of her seniority and purported experience could be expected to have made.

Mr Moy's solicitors successfully appealed to the Court of Appeal on the issue of Counsel's negligence. Somewhat incongruously, the Court accepted the finding of Judge Geddes that the thrust of Counsel's advice was not negligent (she had reasonable grounds for advising that the trial judge would give permission to adduce Mr Saleh's report in evidence) but held that Counsel was negligent in failing to give more detailed advice. The Court inferred that had Mr Moy been told that Counsel's assessment of the prospects of persuading the judge to allow the medical evidence were 50:50, he would have decided to take the offer of £150,000.

The Court based its decision on Counsel's failure to expand on what she meant by 'hopeful'. Her evidence in the professional negligence proceedings was that she

had assessed the prospects of persuading the judge to admit the medical evidence as 50:50, those prospects being "probably slightly higher" in favour of the evidence being allowed in; and that she had borne in mind the fact if the application was unsuccessful, and Mr Moy was awarded an inadequate sum, he would have the security of a cause of action against his solicitors for the negligent preparation of his case. While Mr Moy would also have had that prospect open to him if he had taken the £150,000, Counsel opined that to rely on it contained difficulties and risks and should only have been considered as a last resort.

Counsel appealed to the House of Lords, by which time the issues had narrowed. It was no longer contended that her assessment of the prospects of persuading the trial judge to admit the necessary evidence was not one that a reasonably competent barrister could have made (Hart J had concurred in the Court of Appeal on the basis that the advice not to accept the offer of £150,000 was wrong and negligent), but rather the case turned upon how full an explanation of the prospects of success should have been given.

The Court of Appeal's decision provided ripe fodder for appeal. In particular, the following passage in the judgment of Brooke LJ was seized upon by Lord Carswell, who described it as "difficult to reconcile with his conclusion on liability":

"It would be a disaster to the conduct of litigation in this country if an effect of the decision of the House of Lords in *[Arthur JS Hall (a firm) v Simons, Barratt v Ansell [2000] 3 All ER 673]* is that advocates believe that they have to hedge their opinions about with 'ifs' and 'buts' in order to avoid an adverse finding of professional negligence. They are being paid to express their opinion, and if they assess their clients' prospects as 25 per cent, or 50-50 or 'strong', then that advice will usually suffice unless they are expressly invited to explain it."

Unanimously, the House of Lords accepted the argument that, if Counsel's assessment of the risk was not negligent, it was difficult to understand how the advice upon which it was based could be negligent. Their Lordships were also unconvinced by the proposition upon which the solicitors' argument rested, ie that if Mr Moy had been apprised of the (reasonable) considerations which led Counsel to give her advice, he would nevertheless have decided to accept the offer of £150,000 and reject the advice which ex hypothesi was correctly (or at least non negligently) given.

It is apparent from the judgments that their Lordships empathised with Counsel's plight, in a way that they may not have done had, for example, the case involved a doctor's explanation of the risks involved in a potential course of action. Giving the leading judgment, Lord Carswell noted that:

"The difficulties faced by an advocate who is advising on acceptance or rejection of a settlement are manifold and the pressures, especially if the advice has to be given at the door of the court, can be heavy. In such circumstances it would be surprising if every piece of advice were reasoned with as much comprehensive precision as may be applied in hindsight by an appellate tribunal which has had the benefit of extensive argument and leisurely reflection."

The nexus between the judge and the barrister in professional negligence proceedings of this type is reinforced by the absence of expert evidence. In other types of professional negligence case, the court will be equipped with expert evidence to enable it to assess whether the relevant standard of care has been departed from. In barristers' negligence cases (and most solicitors' negligence cases), on the other hand, judges are relied upon to use their own experience to assess the issue of negligence.

The peculiarity of this notion was brought into sharp relief by Baroness Hale:

"In cases against advocates... the court assumes that it can rely upon its own knowledge and experience of advocacy to make that judgment. This brings... an obvious risk that a judge will ask himself what he would have done in the particular circumstances of the case. But that is not the test. The doctor giving expert evidence in a medical negligence claim is not asked what he himself would have done, but what a reasonable doctor might have done."

And by Lord Hope:

"Judges, recalling how things were when they were in practice, no doubt feel confident that they can [assess the issue of negligence] themselves. If this were to happen, it would vary from judge to judge and become arbitrary. Considerable weight should therefore be given to the decision of the judge at first instance who heard all the evidence."

Lord Hope and Baroness Hale's comments are odd, because they imply that Judge Geddes did not simply

assess the issue of negligence by reference to his own experience. In fact, Judge Geddes said pointedly that:

"In deciding that issue [of negligence] I have to try and put myself into the position of [counsel] at the time, and decide whether her advice fell outside the range of possible advice which reasonably competent counsel of her seniority and purported expertise could be expected to make. In my judgment it did not."

The wisdom of the approach in *Moy* to expert evidence in barristers' negligence cases can be doubted for several reasons. First, advice given by a barrister is almost always specialist. The experience of a barrister at, say, the criminal or chancery bar may be a world away from that of the barrister in *Moy* dealing with a clinical negligence case. If a court is assessing the negligence of a neurosurgeon, a GP is not called as an expert. It is difficult to see why the same principles should not apply to the case of negligent barristers (or solicitors). Second, in the absence of expert evidence, or an authority as to what constitutes reasonable practice, judges may be tempted to give the barrister the benefit of the doubt. (Baroness Hale specifically referred to the fact that the court had "been shown no evidence or authority to support the view that no reasonable barrister would have given her advice in the way that Counsel did in this case.") Third, and more generally, the Bench is increasingly made up of solicitors, who do not have any experience of practice at the Bar and must inevitably be hampered in the assessment of negligence without expert evidence. Similar dangers have long existed in solicitors' negligence cases tried by judges who are former barristers.

The apparent lack of a level playing field amongst the professions is also borne out by the distinction drawn in *Moy* between a barrister's duty to provide an explanation to her client and the duty owed by other professionals in this area. Baroness Hale recognised that "we have not yet developed a clear set of principles governing the terms in which an advocate's advice should be given." At present, however, the obligation on other professionals, for example, to set out all the risks so as to obtain informed consent seems to be much greater than that on barristers. While a doctor, in a situation of equal pressure, is under a duty to spell out the different options open to a patient and the various risks associated with each (*Chester v Afshar* [2004] UKHL 41 illustrated the onerous nature of this duty), a barrister apparently is not. On the contrary, it would appear from the judgment of Lord Carswell that

a barrister need only “concentrate on giving clear and readily understood advice to their clients about the course of action they recommended”. Amplification of that advice was considered by Lord Carswell not to be in the interests of clients because it would lead barristers “to adopt a practice of defensive advocacy in the conduct of litigation or in advising litigants about the course to be taken”. One may argue that in other professions “defensive” practice is both widespread and welcomed (by some, at least). Of course, it might be argued that the need for disclosure is greater in the medical context so as to give proper effect to the patient’s autonomy, but this seems unconvincing. Insofar as possible, every client deserves such explanation as puts him in a position to make an informed decision.

The actual decision in *Moy* is plainly right. In the light of judge’s findings, the Court of Appeal had no proper basis to find any breach of duty on the part of Counsel or that any such breach caused Mr Moy any loss. Further, in the House of Lords, the solicitor’s case was put much too high. Lord Carswell summarised it as a duty “to give clients a catalogue of every factor which might affect the course of the action to be adopted”. In this context, it is unsurprising that their Lordships made a finding that no reasonable barrister in Counsel’s position in *Moy* would have adopted such a course of conduct.

The door remains open, however, for it to be argued in another case that a barrister’s duty to explain the reasons for her advice is dependent upon factors including, for example, the client’s desire for information, the magnitude of the risk to be run and the time available to give the advice. After all, it is not unreasonable for a client to expect to be told about the risks and uncertainties involved in a course of action, if he is to take a decision. Advice simply as to whether to proceed or not, although clear, will often not be sufficient. This was recognised by Lord Hope who noted that it would always be necessary to advise a client of the costs consequences of failing to beat a payment into court as well as the likely value of the claim at trial. In other words, merely saying whether the advice should be accepted or not is insufficient. Whilst *Moy* is authority for the proposition that a barrister’s duty is primarily to advise rather than to set out the underlying reasoning, absent special circumstances, a barrister would be unwise not to provide a clear (and proportionate) assessment of the prospects to the client.

Charles Dougherty is an editor of *on duty* and has particular experience of barristers’ and solicitors’ negligence cases. Helen Wolstenholme is a member of the professional negligence group.



DEVELOPMENTS IN DUTY

Simon Goldstone considers the decision of the Court of Appeal in *Commissioners of Customs and Excise v Barclays Bank Plc*

Introduction

In *Commissioners of Customs and Excise v Barclays Bank Plc* [2004] EWCA Civ 1555, the Court of Appeal again considered the issue of how to determine the existence of a duty of care in a claim for economic loss. Colman J, who heard the case at first instance, said (at paragraph 58) that the issue went “to the very heart of the law of negligence”. The case is expected go before the House of Lords in 2006.

The facts

The Commissioners of Customs and Excise had obtained freezing orders against Brightstar and Doveblue, two companies who had defaulted on VAT payments. The assets frozen were £2.3m and £3.9m respectively. Within three hours of the service of the orders on Barclays, the companies effected substantial electronic withdrawals from their “frozen” accounts. The Commissioners recovered only £560,000 against Brightstar and £130,000 against Doveblue.

Meanwhile, and in accordance with their standard practice, Barclays sent letters to the Commissioners, stating their intention to abide by the freezing orders and requesting payment of £150 for the costs of administering its adherence to the orders. It seems that these letters were not received until after the transactions had been effected.

The Commissioners subsequently launched proceedings against the Bank, alleging that its failure to prevent the withdrawals was negligent. The preliminary issue was: did the bank owe a duty of care to the Commissioners?

The case at first instance

Colman J prefaced his judgment (*Commissioners of Customs & Excise v Barclays Bank Plc* [2004] EWHC 122) by observing that the typical response by a court to a breach of one of its orders was contempt proceedings. He thought that contempt proceedings could in theory be brought against a bank that had negligently facilitated the liquidation of frozen funds. However, the likelihood of such proceedings succeeding would depend on “the degree of culpability as proved to the criminal trial standard of proof” (para 21). Clearly, it would be far easier for the intended beneficiaries of a breached freezing order to gain a remedy via an action in negligence - if a duty of care could be established.

Colman J identified three tests used to determine the existence of a duty of care:

1. The “threefold test” of foreseeability, proximity and fairness, set down in *Smith v Eric Bush* [1990] 1 AC 831 and *Caparo Industries v Dickman* [1990] 2 AC 605.
2. The “assumption of responsibility” test, derived from *Hedley Byrne v Heller* [1964] AC 465 and developed in *Henderson v Merrett Syndicates* [1995] 2 AC 145 and *Williams v Natural Life* [1998] 1 WLR 830.
3. The “incremental test” identified in *Reeman v Department of Transport* [1993] PNLR 618.

Of these, the “incremental test” did not operate independently of the others, but was a checking device used to assess the extent to which a potential extension to the scope of the common-law duty of care would be justifiable.

Methodology

Having identified these various tests one might have expected Colman J to apply them separately. However, the judge in fact analysed the issue within the framework of the “three-fold” test and resorted to the “assumption of responsibility” approach when attempting to determine the issue of proximity. It was the approach to the application of the tests as much as the manner of their application that eventually formed the basis of a successful appeal.

The threefold test

The Bank conceded that foreseeability was not in issue. As to proximity, Colman J found that the Bank was aware that if it was to release assets in breach of a freezing order, the party in whose favour that order was made may suffer losses that were irrecoverable in contempt proceedings. This formed a “provisional foundation for the proposition that as between the

Bank and the Commissioners there existed a neighbourhood or proximity relationship” (at para 58).

Barclays submitted that it was under an automatic duty to comply with the freezing orders: it had no choice in the matter. Its undertaking was to the court, not to the Claimant. Therefore, went the argument, it could not be considered to be in a proximate relationship with the Claimant. Colman J was impressed by this argument, citing *Business Computers International v Registrar of Companies* [1988] 1 Ch 229 as negating the proposition that “where there is nothing more than an undertaking to the court or, by analogy, notice of an injunction, a duty of care [is necessarily] imposed on the party to whom such notice is given” (para 69).

Further, Colman J found that the Bank and the Commissioners occupied positions akin to those of adverse litigants. In these circumstances there could be no proximity unless there was “super-added to the relationship conduct amounting to an assumption of responsibility by that party.”

The case thus turned on the interpretation of the phrase “assumption of responsibility.” The Commissioners submitted that responsibility must be deemed to have been assumed by the Bank’s carrying out business in a jurisdiction where freezing orders were available. Following *Phelps v Hillingdon* [2000] 3 WLR 776, the court was entitled to impose that responsibility where it recognises a duty of care.

Barclays contended that, given the adversarial nature of the parties’ relationship, an active assumption of responsibility was needed: what was required, in the words of Lord Steyn in *Williams*, was for Barclays to have “crossed the line” by some action or word signifying its acceptance of responsibility for its actions vis-à-vis the Commissioners. The Judge preferred the Bank’s submission. As the letters to which I have referred above did not reach the Commissioners prior to the transactions it could not be said, in Colman J’s view, that the line had been crossed. Therefore Barclays had not assumed responsibility for their conduct as regards the Commissioners. The requisite proximity was absent, and the claim accordingly was dismissed.

The Court of Appeal

Longmore LJ gave the leading judgment. He started his judgment with a glowing tribute to the achievements of Colman J as a silk and author. The subsequent 52 paragraphs indicate that this enthusiasm did not

extend to the Judge's reasoning at first instance. Longmore LJ disagreed both with Colman J's analysis of the roles of the three tests in determining the question of whether a duty of care exists, and also with the Judge's findings having applied the tests.

Methodology

In Longmore LJ's view, the correct approach was to apply each test separately, albeit in the expectation that each should come to the same result. He objected to the importation by Colman J of the "assumption of responsibility" test into the analysis of the issue of proximity.

The threefold test

Longmore LJ did not find that the Commissioners and the Bank were "adverse parties". On the contrary, he found that the Bank was the "guardian" of the Commissioners' remedy against Brightstar and Doveblue. The two parties were expected to co-operate with one another. This provided the necessary proximity for a duty of care to be established.

Whether it was "just fair and reasonable" to impose a duty was stated to be more "debatable". Longmore LJ was, however, able to decide the issue without much obvious difficulty. He stated that "I can only say that it seems eminently fair, reasonable and just that the law should require a bank which requires notice of a freezing order to take care not to allow a defendant to flout such an order" (para 31). In a rare moment of agreement with Colman J, Longmore LJ found that the existence of the law of contempt did not preclude the imposition of a duty of care in tort. Contempt proceedings were unlikely to be appropriate or fruitful in cases where the defendant's conduct was merely negligent: it was therefore desirable that tortious liability should encompass a default falling short of contempt.

The incremental test

Longmore LJ found that it was "but a short step" from *Z Ltd v A-Z* [1982] QB 558 to find that a bank could be liable where a claimant is unable to get hold of the defendant's assets due to that bank's failure to exercise reasonable care to preserve them. This test was therefore met.

Assumption of responsibility

The Court of Appeal considered the Bank's submission that in cases of pure economic loss the "assumption of responsibility" test trumps the others; in other words, if no assumption of responsibility is

identified, the inquiry stops at that stage and there is no duty of care. This analysis was rejected. Longmore LJ cited the "frank acceptance of the courts that all the approaches utilise what may be called labels which are conclusionary rather than steps in the argument". Each approach was to be considered in turn.

Further, according to Longmore LJ's analysis, the current matter was only "doubtfully a *Hedley Byrne* type of case" (para 42): he found no reliance by the Commissioners on any negligent misstatement made by the Bank; the Commissioners were not relying on the Bank's competent performance of its services so much as its adherence to the duty to monitor an order of the court. It was therefore not certain that the "assumption of responsibility" test was relevant.

In any event, Longmore LJ found that an "assumption of responsibility" could be deemed to have occurred even where the defendant had not made any statement or action to that extent. It was "rather the case that the law will use the phrase when it decides that there is to be a duty" (para 45). He relied on Lord Slynn's dicta in *Phelps*:

"It is sometimes said that there has to be an assumption of responsibility by the person concerned. That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility. It is however clear that the test is an objective one: *Henderson v Merrett* [1995] 2 AC 145, 181. The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law."

In the circumstances of the current case, it was appropriate to impose a duty. Therefore the "assumption of responsibility" would be deemed to have occurred. By the application of each of the three tests a duty of care was found to exist. Mr Justice Lindsay and Peter Gibson LJ agreed: the Commissioners' appeal was accordingly allowed.

Comment

At appeal and first instance alike, one of the most interesting and complex questions concerned the interplay and relationship between the three tests. As mentioned, the Bank suggested that a hierarchy was in place. Pre-eminent was the "assumption of responsibility" test.

Longmore LJ suggested that all three tests ought to result in the same answer. He applied them in turn, planning to “draw the threads into a conclusion” (para 24). He did not consider the possibility that the various tests may produce different results. One wonders why, from this position, Longmore LJ found it necessary to analyse the issue by systematically applying each of the tests.

He does not suggest that any test is more likely than another to bring the “right” result. However, he appeared content effectively to relegate the “assumption of responsibility” test to the status of a mere label “imposed” by the court. Having done so, the application of that test (if it is still a test at all), was never going to be of much assistance in resolving the issue at the heart of this appeal.

Lindsay J, who gave the second judgment, was more enthusiastic in his assessment of the utility of the “assumption of responsibility” test. He found that the application of that test “draws attention to the subjective facts”; that it “was useful in requiring there to be an examination of the objective situation” (though the writer fails to see how such examination could be eschewed in applying the three-fold test); and that it focuses the court’s attention on the possibility that there had been a “subjective disavowal of the assumption of responsibility”. He would not abandon this test as a separate head of enquiry.

As regards the possibility of that test heading a hierarchy amongst the tests, however, Lindsay J suggested that “even were the assumption of responsibility test to go the Bank’s way, which it does not, it would, even so, be impossible to assert...that so also, without needing to apply it, should the three-fold test or the incremental test.” The judge speculated that where the “assumption of responsibility test” led to an outcome not supported by the other tests, then the “assumption of responsibility” test might need to be revisited.

Longmore LJ’s analysis follows, to the letter, Lord Slynn’s dicta in *Phelps*; but did the learned Lord Justice pay sufficient heed to Peter Gibson LJ’s observation that “the courts take a more cautious approach to imposing that duty where economic loss is claimed” (para 57)? Might there have been another motivation for the court’s readiness to impose a duty of care on the Bank? Here, after all, was a situation in which the Bank’s operational errors had facilitated seven-figure withdrawals in the face of a court order. Peter Gibson LJ

provides a clue: “I can see no sufficient reason why a bank, which makes a mistake leading to the dissipation by the defendant of its assets which the freezing order was designed to prevent, should not owe a duty of care to the claimant. Practical justice requires the recognition of such a duty” (para 63). It will be for the House of Lords to decide whether in the quest for “practical justice” the Court of Appeal might have been hasty in imposing a duty of care.

Banks, in the meantime, face some practical challenges. Can a bank disclaim its responsibility to act in accordance with a freezing order? Ought banks to insure themselves against the results of system errors such as led to the purging of the frozen accounts in the current case? If so, would they be entitled to charge the premium to the beneficiaries of the freezing orders? Or would such expenses be subsumed into the bank’s general running costs and - ironically - be passed on to the account holders?

Conclusion

If anything is clear from the judges’ varying approaches to these three tests, it is that the questions of the nature of relationship between the tests and of their relative utility are unsettled. As Peter Gibson LJ put it: “It is impossible to reconcile all the judicial statements on the correct methodology to be applied to novel situations in which a person is alleged to owe a duty of care to another” (para 57). The law lords will soon have the opportunity to provide clear guidance on these points and it is to be hoped that they will do so.

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OOPS! I FORGOT TO MENTION...

Elizabeth Wale considers the Court of Appeal decision in *Beary v Pall Mall*

Introduction

This article examines the recent Court of Appeal

decision in *Beary v Pall Mall Investments* [2005] EWCA Civ 415 and considers what assistance it gives to financial professionals who offer advisory and managerial services.

Professional financial advice and planning is becoming of increasing importance in the eyes of the public. Nonetheless, many clients have a limited understanding of the world of investments and pension planning, and thus have to place faith in their advisor and accept advice without question. For this reason the duties of financial practitioners are often extensive where the service provided is advisory, or entails the discretionary management of investments. These duties arise from a number of different sources: statute (especially regulatory statutes), the common law and codes of practice.

A common difficulty that faces financial advisors is how best to make an informative and adequate recommendation to a client, without baffling the client with a never-ending list of alternatives and, most importantly, without incurring liability for the losses if the recommended investment performs poorly.

Beary v Pall Mall: the facts

Earlier this year the Court of Appeal was asked to reconsider the conventional principles of causation in relation to financial advice in the case of *Beary v Pall Mall Investments* [2005] EWCA Civ 415: a situation where the client, Mr Beary, was recommended a specific course of action by his advisor, but was negligently not advised of all possible alternatives.

Mr Beary was advised on the administration of his pension scheme by a Mr Jefferies, a partner of Pall Mall Investments. As Mr Beary approached retirement, Mr Jefferies advised him to transfer his share of assets in his pension scheme to the broker-managed PMI fund. He was to receive a tax-free cash lump sum to be taken on retirement, with the balance remaining subject to a drawdown income plan invested in the PMI fund. The majority of the tax-free lump sum was invested into a Luxembourg bond. In relation to this bond, the trial judge held that the advice given was negligent, and permission to appeal on this point on the basis of the judge's approach was refused by the Court of Appeal.

The Court of Appeal's judgment centred on the advice to transfer Mr Beary's assets into the managed PMI fund, which subsequently fell in value. In relation to this, the original claim advanced by Mr Beary was: (1) that it was an unsuitable investment because it was not

risk free; (2) that in breach of his common law duty Mr Jefferies failed to advise Mr Beary of possible alternative options (specifically the possibility of using the money to buy an immediate annuity) and (3) that he would have purchased an annuity had such advice been given. He thus contended that he was entitled to compensation to place him in the position which he would have been in had he taken out the annuity.

At trial it was admitted that the advisor had breached his duty by failing to advise Mr Beary of the possibility of taking an immediate annuity, and failing to properly explain the merits and demerits of the advice in fact given. However, it was held that causation had not been made out because the court was not satisfied that Mr Beary would have opted to purchase an annuity even if the possibility had been pointed out to him: it was not Mr Jefferies' recommended course of action, and Mr Jefferies could have advised (without negligence) against an annuity. It was found that Mr Beary would have followed such advice if it had been given.

On appeal it was accepted that Mr Jefferies had been negligent in failing to advise of an annuity as a possible alternative, and Mr Beary did not challenge the trial judge's conclusion that he would not have opted for an annuity even had he been told of this possibility. It was also accepted that Mr Beary accepted and acted on Mr Jefferies advice unquestioningly.

The 'but for' position: *Beary and Bolitho*

However, Mr Beary relied on *Bolitho v City & Hackney Health Authority* [1998] AC 232, in support of a submission that the trial judge should have considered first what advice would have been given had Mr Jefferies not been negligent, and, second, if Mr Jefferies would still have advised the drawdown arrangement as opposed to an immediate annuity, whether that advice would have been negligent.

In *Bolitho* the doctor was held to be in breach of duty for failing to attend a child suffering respiratory difficulties. If the child had been intubated, the injury would have been averted. However, causation was not proved because even if the doctor had attended, the evidence was that as a matter of fact she would not have arranged for the child to be intubated, and that decision would not have been negligent. The claim would have succeeded if it could be proved that either (1) it was negligent not to attend and the doctor would have intubated if she had attended or (2) it was negligent not to attend and it would have been

negligent not to intubate. Scenario (2) was not open to the claimant, because the court found that it was possible to attend and non-negligently decide not to intubate. Accordingly, in order to prove causation the claimant had to prove that if the defendant had attended she would have intubated. The key to proving causation lay in the hypothetical conduct of the defendant doctor.

Unsurprisingly, the Court of Appeal in *Beary* held that "...it does not follow that it is necessary in every case to ask what a defendant would have done if he or she had not been negligent. That question falls to be considered only where it is relevant on the facts of the particular case...usually, the only relevant question in relation to the defendant's conduct is: what should the defendant have done?" (Dyson LJ at paragraph 27). In *Beary*, the negligence lay in the failure to advise on the possibility of an annuity. Considering what advice would have been given if Mr Jefferies had not been negligent was meaningless: he should and would have advised on the possibility of an annuity, but such advice would not have led Mr Beary to reject Mr Jefferies recommendation of the PMI fund. The *Bolitho* approach is only relevant where (had there been no negligence) a defendant might have done one of two things, and where only one of those would prove causation.

Causation: *Chester v Afshar*

Mr Beary further submitted that even if it could not be proved that proper advice would have led to the purchase of an annuity, the reasoning of the House of Lords in their recent landmark decision on causation in clinical professional negligence, *Chester v Afshar* [2005] 1 AC 134, was applicable to the facts of his case.

Miss Chester suffered from severe back pain as a result of the protrusion of intervertebral discs into her spinal canal. Her consultant neurosurgeon Mr Afshar performed an elective lumbar surgical procedure, as a result of which Miss Chester sustained serious neurological damage known as "cauda equina" syndrome. Mr Afshar negligently failed to warn her of an unavoidable 1 - 2 % risk of injury that was inherent in the surgery, even if performed with due care and skill. Miss Chester, had she been duly warned of the risks, would have obtained further advice, but failed to prove that she would not have agreed to the same surgery at a subsequent date.

The House of Lords, by a bare majority, found that Miss Chester was entitled to compensation in respect

of the cauda equina syndrome, on the basis that the special circumstances permitted a "modest" departure from conventional causation principles. The ratio appeared to be that in cases of negligent failure to warn, the clinician ought to be held liable if a risk which ought to have been the subject of a warning eventuates: without such an approach the doctor's duty to warn and inform would be rendered useless.

Mr Beary's case was that he was entitled to recover the loss incurred as a result of investing in the PMI fund as a result of Mr Jefferies failure to advise as to the possibility of purchasing an annuity. He argued that the same policy consideration should apply to cases of negligent financial advice as in cases of clinical negligence: the breach of a duty to inform and warn should be treated in the same way in situations of negligent financial advice and clinical negligence alike.

The Court of Appeal firmly rejected those submissions. In the words of Dyson LJ: "the suggestion that the established principles of causation should be rejected in all cases of negligent financial advice is breathtakingly ambitious, contrary to authority and, in my view, wrong". Dyson LJ indicated that it was clear from *Chester* that "the departure from established principles of causation in that case was exceptional, and was justified by the particular policy considerations that are in play where there is a breach of the doctor's duty to advise a patient of the disadvantages and dangers of proposed treatment so as to enable the patient to give informed consent." [*Beary* paragraph 38].

It thus appears settled that, even where a financial advisor fails to exercise reasonable skill and care in advising a client of all available investment possibilities, if the specific recommendation given was proper (albeit with scope for other advisors to give different advice), and the court can be satisfied that the particular client would not have taken an alternative option without the specific recommendation of the advisor, there will be no departure from the conventional principles of causation and the loss.

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PROFESSIONAL NEGLIGENCE UPDATER

Rehana Azib takes a look at some recent professional negligence cases

An area that is seldom covered by this publication but merits consideration is professional negligence in the context of veterinary surgeons, which recently fell for consideration at first instance in *Philip John Glyn (T/A Priors Farm Equine Veterinary Surgery) v (1) Jane McGarel Groves (2) Erik Grandiere (3) Clinique Veterinaire Equine Chantilly* [2005] EWHC 1629 (QB). This case involved a less well trodden area of professional negligence law, namely the nature and extent of the duty of care owed by professionals who were required to simply observe a procedure as opposed to administering actual treatment. Indeed, can such a professional be held liable at all, or should liability rest solely with the person responsible for administering treatment? The answer, it seems, is that there should be joint liability, if causation can be established.

Glyn involved a counterclaim by the owner of a valuable dressage competition horse named "Anna", against the vet who had initially sued her for unpaid fees. Not long after becoming French National Champion, Anna's performance began to drop and her owner was advised by the French Dressage Team that Anna had orthopaedic problems for which she required cortico-steroid treatment. Ms Groves consented to the treatment on the condition that Anna's vet, Mr Glyn, attended the treatment to protect Anna's interests and ensure that she was not endangered. Mr Glyn duly attended the treatment but was unaware of the exact drugs being used to treat Anna as all the treatment bottles had French labels. Anna developed laminitis as a result of the treatment and had to be put down to prevent further suffering. It was common ground that the treating surgeon had been negligent. The issue before the Court was specifically whether Mr Glyn was also liable and more generally, the nature and extent of the duty of care owed by an observing professional who was not actually administering treatment.

Mr Justice Forbes held that Mr Glyn was 15% liable. Where a professional had been tasked with the observing of a procedure, it was incumbent upon him to take reasonable steps to clarify and seek an understanding of what he was in fact observing.

Specifically in this case, Mr Glyn had been given the task of observing and if necessary intervening in order to protect Anna and had rendered himself unable to do so by his failure to make any inquiry as to the types or dosages of steroids to be administered. Mr Glyn himself had given evidence at trial that if he had known which steroids were being administered and the extent of the dosages, he would certainly have intervened and prevented the procedure from continuing. Accordingly, causation as between Mr Glyn's omission and the negligent treatment was established with relative ease. The 85/15 apportionment as between the treating vet and Mr Glyn was decided on the basis of their respective roles and responsibilities in the procedure, the treating vet understandably bearing the lion's share of liability.

In keeping with the French theme, in *Thomson v Christie Manson & Woods Ltd* [2005] P.N.L.R. 38 the Court of Appeal explored the extent of an auctioneer's duty to accurately describe a lot put up for sale, in this case a pair of Louis XV porphyry and gilt-bronzed two-handled vases, catalogued under this description. In this particular case, it was argued that a special duty of care arose between the Defendant and client, distinct from that owed to the public as a whole from catalogue entries generally. Two of Christies' employees had been appointed as special advisors to the Claimant buyer who had been earmarked as a "special client". These advisors' function was to provide the Claimant with information as to lots that might interest her, in the knowledge that she was not in the habit of seeking her own independent legal advice. Having parted with over £1.75 million for the vases, the Claimant became aware of rumours that the vases were not as described but rather later copies worth £25,000, a fraction of the price she had paid. At first instance, it was found that whilst there was a 70% probability that vases had been made during the reign of Louis XV, it was impossible to say whether they had been manufactured in Paris or Italy and a reasonable auctioneer would have catalogued them as "possibly Italian" in these circumstances. Because of the Claimant's "special client" status, the Defendants had been under a duty to give her a fuller picture which included apprising her of possible doubts as to the dating and origin of the vases.

The Court of Appeal reached a different conclusion to that of the trial judge on the facts. Having considered the evidence, their Lord Justices held that at the time the items were catalogued, whilst there were doubts as to the dating and place of manufacture

of the vases, they had not been sufficiently serious as to require the Defendants to specifically draw the Claimant's attention to them. Importantly, Lord Justice May expressly rejected arguments as to particular types of duty that were owed to the Claimant as a special client of the Defendants and adopted a refreshingly clear approach, framing the duty of care in simple terms – the single question in each case, irrespective of the particular facts, is whether the Defendant assumed responsibility to the Claimant to guard against the kind of loss suffered. On the question of Christies' alleged negligence, the issue was whether, by the standards to be expected of international auctioneers, the unqualified opinion that the vases were Louis XV was an unreasonable one. Under the *Bolitho v City and Hackney Health Authority* [1998] A.C. 232 test, the Claimant had failed to establish that it was.

Fears as to the impact of *Chester v Afshar* [2004] 4 AER 587 upon professional negligence generally have subsided following the decision of the Court of Appeal in *Beary v Pall Mall* [2005] EWCA Civ 415. Beary involved the provision of financial advice and dealt with the situation where the warning of a risk was required. It was held that the causation approach in *Chester* should not be applied generally in claims for negligent financial advice, and the same will doubtless apply in the context of solicitors' negligence. For a more detailed discussion of this case, see Elizabeth Wale's article.

B.E. Studios Limited v Smith and Williamson [2005] EWHC 1506 (Ch) is a stark reminder that causation can often be a stumbling block for Claimants, even where negligence has been established. This case involved a claim for damages by the Claimant software company against accountants who had failed to inform them of the availability of tax relief for research and development. The Defendant accountants accepted that their failure to inform the Claimant of possible relief constituted a breach of their retainer and was accordingly negligent. However, the claim failed as the Claimant had failed to keep records of the work it undertook which would have established whether it qualified for relief. The Claimant attempted to overcome the causation hurdle by submitting that the absence of records proving its entitlement to the relief flowed directly from the Defendant's breach of duty in not informing it of the existence of such relief until after its business had been mothballed. The Court rejected this argument and held that it was for the Claimant to satisfy the Court that it had originally been entitled to such relief. On the facts, the Claimant had

failed to prove that it qualified for such relief. The decision is not as harsh as it might first appear. The judge noted that the Claimant failed to retain any system of recording its work at all, and there was accordingly, no means of knowing whether the work qualified under the scientific definition of research and development work. Accordingly, there would not have been sufficient basis to advance a claim for R&D credits to the Inland Revenue in any event, quite apart from any omissions of the Defendant. Further, the evidence of the Claimant's own employees indicated that they were far from engaged in sufficiently innovative work to qualify as R&D for the purposes of tax relief.

Professional negligence, property damage and limitation were once again reunited in the case of *Abbott v Will Gannon Smith Ltd* [2005] PNLR 562. The Claimant company retained the Defendant consulting engineers to design works necessary to remedy defects in a large bay window of their hotel. The works were then completed by a builder in accordance with the design specification. Years later, cracks in the surrounding structure began to show and remedial works had to be carried out as a result. The Defendants argued that the limitation period began when the construction works had been done and accordingly, the Claimant's action was statute-barred. However, the Court of Appeal held that a cause of action in tort for construction defects arose at the time when the physical damage occurred. The fact that the defects in construction which caused that damage to be present had been present at an earlier date was irrelevant, even if it resulted in economic loss to the Claimant. In fact, Tucker LJ went further than this and stated that if the cause of action had arisen when the Claimant suffered economic loss the claim would still not have been statute-barred, since the value of the building concerned would only have depreciated in the market once the cracking had appeared.

Solicitors' negligence cases have enjoyed a busy few months. *Accident Assistance Ltd v Hammonds Suddards Edge (A Firm)* [2005] P.N.L.R. 29 dealt with the duty incumbent upon solicitors to explain the import of Counsel's advice. In that case, Counsel's advice was obtained in relation to the enforceability of credit hire agreements, the lay clients being the operators of a credit hire business. Counsel had advised that a repayment period of less than twelve months was likely (though not certain) to take the agreements outside the Consumer Credit Act 1974. The Defendant solicitors noted Counsel's views although their notes implied, falsely, that according to Counsel, the

Claimant's credit hire agreements were unaffected by the Act. The Claimant took no steps to redraft the agreements and following the House of Lords decision in *Dimond v Lovell* [2002] 1 A.C. 384, all of its credit hire agreements were rendered unenforceable. The Claimant sued the Defendant for negligence alleging that it had failed to bring home to them the import of Counsel's advice and had it done so, the Claimant would have redrafted the agreements sooner. Hart J dismissed the claim stating that the Claimant had been led through its dealings by an experienced businessman to whom a solicitor's duty to explain the import of advice was somewhat lower than to a less experienced client. In the circumstances, the Claimant had failed to show that the Defendant had acted negligently and had equally failed to prove that, had it appreciated the effect of Counsel's advice, the agreements would have been redrafted earlier.

The scope of a solicitor's retainer came under scrutiny in *Kevin Andrew Feakins v (1) Anthony Michael Burstow (2) Argles Stoneham Burstows (A Firm)* [2005] EWHC 1931 (QB). In that case, the Defendant firm was instructed by the Claimant to represent him in his claim against the Intervention Board for Agricultural Produce for the recovery of "clawback," sums of money that he had been required to pay under an EC scheme on the export of sheep. Unfortunately, the Board succeeded on its counterclaim against the Claimant for unpaid clawback, the amount of which was then challenged by the Claimant on the basis that some of the sheep had been exempt. The judge, however, decided that it was too late to raise this argument and a subsequent appeal was also dismissed. The Claimant alleged that he had lost the chance to challenge the amount of counterclaim awarded against him due to the Defendant's negligence. The Defence was put forward on the grounds that the issue of exempt sheep did not fall within the Defendant's retainer which was limited to the conduct of the group litigation or that the Defendant had been insufficiently instructed on the point. It was held that the Defendant's retainer went beyond simply having conduct of the case and that it was in fact involved in advising more generally about the route and tactics to be adopted – this was apparent from the documentation. The Defendant had negligently failed to advise his client about the need to raise a dispute as to the quantum of the counterclaim as a defence and had failed to ensure that the point was pleaded. It had been clear from meetings that had taken place that the Claimant was seeking advice from the Defendant as to what further action to take and the duty was on the solicitor to take further instructions so

as to better understand the system of clawbacks and the rationale behind the unusually large sums being claimed by the Board, which had been flagged in correspondence. It is important to note that this case is extremely fact specific and does not extend the scope of a solicitor's duty beyond reasonable bounds – it had been clear from contemporaneous notes and documents that the exemption issue had been raised at a time when it could have formed part of the Claimant's defence, and the trial judge suspected that the oversight had been partly due to the Defendant's excessive workload and lack of sufficient competent support.

Over in Ireland, a spouse got the raw end of the deal, when her personal claim against the solicitor dealing with both her and her husband failed. The case of *O'Carroll v Diamond* [2005] P.N.L.R. 31, dealt with the question of the duty of care owed in circumstances where a conflict of interest arose. The Claimant was a joint owner of the matrimonial home. She and her husband had been sued jointly in a civil claim for investment money which had gone unaccounted for, and the Claimant was required by the High Court to make an affidavit disclosing her husband's assets. Both husband and wife consulted the Defendant who advised the Claimant that in order to prevent further proceedings, including a possible criminal investigation, the family home would have to be sold and charges given over the property owned. The Defendant added that since he was the solicitor for both the Claimant and her husband, he could not advise the Claimant whether to agree to her share in the matrimonial home being used to pay her husband's liabilities. Instead, he informed her that there were other solicitors to whom she could go for independent advice. The Claimant declined to take further advice, and then sued the Defendant for failing to advise her to take independent advice and/or taking steps to ensure that she took such advice. Whilst at First Instance the claim failed, it was not for the obvious reason. In fact, the trial judge found that the Defendant had been negligent in failing to ensure that the Claimant had the benefit of independent advice, but dismissed the claim on the grounds that she had failed to demonstrate any loss flowing from the Defendant's fault by failing to prove that she would have followed any advice received.

The Supreme Court of Ireland could not fault the trial judge's conclusions on causation as there was no evidence that the Claimant would have acted any differently upon receiving independent advice.

However, the Defendant had acted properly in refusing to give the Claimant advice in light of the conflict of interest that arose. However Hardiman J issued a word of caution when he stated that it was not necessarily the case that a solicitor in such circumstances discharged his duty merely by urging a person to take independent advice and blandly accepting a decision not to do so. Depending on the circumstances, his obligation might be much greater and include declining to act until such advice was taken. He also stated that determinations as to the acceptability of the relevant professional practice in determining whether a solicitor had been negligent were for the court and not for expert evidence from a practitioner.

Finally, retrospective property valuation in the context of surveyor's negligence was discussed in *Preferred Mortgages Ltd v Countrywide Surveyors Limited* LTL 9/8/05. The Claimant sought to argue that the surveyor's valuation of the property had been negligent and submitted quantum evidence as to the extent of devaluation from its' own expert, who had subsequently valued the property with reference not only to other valuations but also to the eventual sale price. It was held that the process of retrospective property valuation by working back from later valuations was non-probative and contrary to authority. The correct approach was to fix a property value by using the information that had been available at

the relevant date. A valuer who was considering an earlier valuation by another had to put himself as far as possible in the position of that other valuer at the time of the earlier valuation, which was advice given in relation to making retrospective valuations in the Royal Institution of Chartered Surveyors guidance notes. The valuer was not entitled to verify his retrospective valuation by reference to later prices as this clearly involved the application of hindsight.

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