LOOKING BACK, LOOKING FORWARD – AN ANALYSIS OF TRENDS IN THE LAW RELATING TO PROFESSIONAL'S LIABILITY

By Hugh Evans, Barrister

Introduction

I was reading one of my children a story from Winnie the Pooh recently. You may recall the flood at hundred acre wood, and how Pooh had the idea of using Christopher Robin's umbrella to rescue piglet. Christopher Robin was struck with what a brilliant idea such a very stupid animal could have. I was struck by how little Winnie the Pooh resembles some of the senior judiciary. It is quite extraordinary sometimes how some very clever old people come up with some surprisingly bad ideas.

If there is one trend in the law relating to professional liability which I would like to focus on today, it is the invention and continuation of bad ideas. To be fair, the three examples I have chosen are a bit more mixed. They are: an overingenious idea that hasn't really worked; a good idea that has mostly worked; and a terrible idea which looks like being a small disaster. I do not think they are untypical of developments in professional negligence, and perhaps the law as a whole.

I hope that is not all I shall talk about. I thought I would end with a short quasi-sociological overview But I will start by looking at three particular areas of law. I have chosen them because they are of some interest and importance in themselves, because there have been relatively recent cases of some significance, and because, at least for two of them, I think the law has got itself into something of a mess.

Scope of duty

I will start with the clever idea that has never really worked, namely the scope of the duty. The decision of the House of Lords in *South Australia Asset Management Company v. York Montague* [1997] AC 191 has troubled practitioners and courts for ten years now. Before discussing one recent financial adviser case, and at the risk of telling you about something you all know too well, I will make a few preliminary points about *SAAMCO* and the problems it raises.

First, to recap what *SAAMCO* was about. Someone under a duty to take reasonable care with regard to the information on which someone else relies will generally only be responsible for the consequences of the information being wrong. Thus negligent surveyors who overvalue will only be liable for lender's losses up to the difference between the correct valuation and their negligent one, not the whole loss which may be caused in part by the collapse in property prices. This is a complicated way of limiting liability. On the facts of the valuers cases, the easier way to do it, as Phillips J. did at first instance, was to factor out losses caused by the decline in property prices.

Secondly, the focus on the scope of the duty of care is probably unhelpful. What we are largely concerned with is the extent of liability for the particular breach of duty which is alleged. Lord Hoffman himself has recognised this extra-judicially. I will say a little about the consequences of this in a minute, because I think they are quite significant.

Thirdly, do not be surprised that *SAAMCO* is difficult to apply. Do not be misled by Lord Hoffmann's view that it is all very easy if you ask the right question. And do not be too entranced by his striking imagery of the doctor and the mountaineer's knee, which looks like becoming almost as famous as the snail in the ginger beer bottle. *SAAMCO* appeared to make sense in the context of surveyors: as I have said, the simple solution presented was that they were not responsible for a bank's whole loss which was caused by their negligent valuation, but only the difference between the correct valuation and the negligent one. But even there, it required a couple of further decisions of the House of Lords to sort out the consequences of the new principle. One would expect that applying the scope of duty principle to other areas would be even trickier, and it has been.

Fourthly, at the heart of the principle is the distinction between information and advice. A professional who merely provides information is only responsible for the consequences of that information being wrong. In contrast, if a professional gives advice, he is responsible for all the consequences of that advice. The information/advice dichotomy is not really a distinction between information and advice; which is which is largely nomenclature, a distinction without a difference, and it does not help much for negligent actions or failures to act, like delays in litigation. The point of the distinction is really something like this: is the professional's input merely one ingredient in the transaction the client is considering entering, is he merely advising on one head of risk; or he is giving advice on the merits of the transaction as a whole? However, that is not an end to the matter, as we shall see.

I should say in passing that Lord Hoffmann considered that analysing the consequences of wrong information would be helped by considering what would have happened if the information was correct. Sometimes it is, but often it is not, and it has been rejected in some cases. For example: how can this be of any assistance if what the professional did wrong was a failure to act rather than negligent advice?

Fifthly, even if the professional only provides "information", that may be of such central importance that the professional is liable for the whole loss. You may recall the *Steggles Palmer* case in the *Bristol & West* litigation [1997] 4 All ER 582. Steggles Palmer, a firm of solicitors, negligently failed to tell the lender that the transaction in question was a subsale, an issue which at the very least went to the value of the security property, and they could not say whether the balance of the purchase price came from the borrower's own resources. The lender would not have wanted to lend money to the borrower if it had known that, so the information was not just relevant to the issue of the value of the security property, but also to the whole transaction. What Steggles Palmer should have advised on went to the very heart of the proposed transaction.

Whether this "centrality" criterion, as it has recently been described by one commentator, is in fact different from the information/advice distinction is not yet wholly clear, but the tendency of the law seems to have been to replace the information/advice distinction with something like this. The two come to much the same thing if one focuses not on the professional's duty as a whole, but on the point of the breach in question.

Having made these preliminary comments, I turn to the recent case of *Andrew v Barnett Waddingham (a firm)* [2006] P.N.L.R. 2. Mr Andrew sought the defendant actuaries' advice on a pension. He was contemplating withdrawing from his employer's pension scheme with Ladbrookes but, despite the nature of his employer, he required a great measure of security in his pension. The defendants recommended, guess what, an Equitable Life "with profits" annuity. The client was advised about the effect of the Policyholders Protection Act 1975, which in broad terms pays out 90% of a policy if the insurer is unable to pay. However, the defendants negligently failed to point out the difference in protection provided to the two types of bonus Equitable Life would pay. A reversionary bonus, that is a bonus which once declared would be guaranteed, was protected under the Act. An additional bonus, unhelpfully described as a terminal or final bonus, could be taken away again, and was not protected. If properly advised on this, Mr Andrew would not have purchased the Equitable Life with profits annuity. However, there was no other allegation of negligence in advising Mr Andrew to take out an Equitable Life policy; it was not suggested that they should have foreseen the disaster which was to strike Equitable Life.

Mr Andrew suffered a loss of about £1m because of Equitable's subsequent and well known financial difficulties. The defendants argued that there was no loss within the scope of the duty. There was even at trial no real prospect of Equitable Life going into liquidation, and thus no real prospect of losing a bonus which was not protected under the Act. While the loss would not have happened but for the negligence, there was no proper connection between the negligence and the loss.

The judge had two answers to this. The first was that if properly rather than erroneously advised about the 1975 Act, Mr Andrew would not have purchased the Equitable Life with profits annuity; and his loss was inextricably linked to the negligently given information. This is a little difficult to understand. The first half of the reason is simply reliance on the "but for" test, which cannot be a way to overcome a scope of duty test, which is an additional hurdle to it. The second half, the assertion of an inextricable connection, is at first sight wrong. The advice was not "central" in the way the negligence in *Steggles Palmer* was, it did not go to the heart of the matter.

The judge's second answer, which is much easier to understand, was that the defendants were giving advice and not information. Their job was to advise whether Mr Andrew should enter the transaction, and they did so. To quote Lord Hoffmann, their duty was to advise him as to what course of action he should take, not just to provide information for the purpose of enabling him to decide upon a course of action.

The Court of Appeal disagreed with the Judge, in judgments which are not yet reported. On the first point, they held that *Steggles Palmer* was a very different case: the lenders would never have lent to that borrower if the solicitors had done their job; in contrast there was no allegation by Mr Andrew that it was negligent to recommend the purchase of a with-profits policy with Equitable Life. Thus far, in dealing with the Judge's first point, the Court of Appeal's decision is very orthodox.

Only Richards LJ commented on the second point, although Sir Paul Kennedy agreed with him. He said that this was an information case, not an advice one. Crucially, the advice on the 1975 Act was only one of the factors which went into Mr Andrews' decision-making. This is plainly correct if one is concerned with the particular breach in issue, rather than the scope of the duty of care as a whole, and indeed it is little different from the first point, which is perhaps why Brooke LJ did not comment on it. What Richards LJ said is plainly wrong if one is concerned with the advice of the actuary as a whole, which did go the merits of the transaction as a whole. It seems to me that the information/advice distinction, as it is now recast, focuses on the particular breach in question rather than the professional's role as a whole. It has therefore largely collapsed into an enquiry as to whether the negligent breach was central to the client's transaction. This is a significant development.

SAAMCO is plainly here to stay. It is mostly good news for defendants, because it is an attempt to limit the losses they are liable for in many cases where it appears unfair that they should be responsible for all the client's losess. It is good news for lawyers who have to spend their client's time and money trying to make sense of it. I am not predicting its demise. But in the long term, how are we going to make sense of it? I think we may find some assistance in the law on establishing duties in tort. There are broadly three approaches used there: the voluntary assumption of responsibility; the tripartite test of foreseeability, proximity and justice and reasonableness; and the incremental approach building on decided cases. The information/advice distinction might be thought of as akin to the voluntary assumption of responsibility. It may or may not be collapsing into the alternative analysis of centrality, akin the tripartite test.

And do not dismiss the incremental approach. The more decisions we have on the application of *SAAMCO* the easier it should be to advise clients on novel situations. The use, for instance, of the *Fancy & Jackson* case in subsequent decisions has been illuminating already.

Attribution

The next issue I would like to mention is attribution. I will be brief because I think that recent developments in the law are something of a success story, so there is not much to say. The law works well in large part due to the intervention of Lord Hoffmann.

A starting point, at least in relation to companies but I think more generally, is Lord Hoffman's dictum in *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 2 A.C. 500 at 507 which I think is worth quoting in full:

> "*The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability ... the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was* ***for this purpose*** *intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.*"

What goes for attribution will also apply to non-attribution. I think the thrust of what Lord Hoffman was saying is that normal rules of attribution need to be flexible enough to be disapplied when there is a principled reason to do so.

At first sight, there are some strikingly different results in different areas of law, but they can normally be explained by an application of *Meridian Global.* In *Lloyd v. Grace, Smith & Co*. [1912] A.C. 716 the House of Lords held that the defendant solicitors were vicariously liable for the fraudulent conduct of their employees in disposing of the client's property and pocketing the proceeds, as in general "*the loss occasioned by the fault of a third person in such circumstances ought to fall upon the one of the two parties who clothed that third person as agent with the authority by which he was enabled to commit the fraud*." This is the normal position, and the principle has been applied many times since. Contrast, for instance, *Arab Bank v Zurich Insurance Co* [1999] 1 Lloyd's Rep. 262. Insurers repudiated John D Wood's insurance on the basis of nondisclosure and breach of warranty based on the assumed fraud of the its managing director. While the insured was vicariously liable for the fraud of the managing director, on the true construction of the policy the insurers were liable to indemnify, for reasons we do not need to go into. More importantly for present purposes, the managing director's knowledge was not attributed to the company. Rix J. did not follow the normal rules of attribution as that would have been inconsistent with the structure and wording of that insurance contract.

How does the law of attribution apply to the case of a negligent auditor who may fail to spot the fraud of a company's officers or employees? Would the latter's defaults be attributed to the company? There are three possible positions, none of which are entirely satisfactory.

First, the fraud should be attributed to the company, following the general rule. Further, the auditor can claim some measure of contributory negligence. This is at first sight an odd position given that the company is, ex hypothesi, fraudulent, and the auditor is only negligent.

Thus, secondly, following traditional rules, the fraud of the employee is attributed to the company, and this fraud prevents the company recovering damages at all. This is, I think, the worst possible result. An auditor will get away scot-free with the breach of an important duty.

Thirdly, one can argue that although the fraud of the employee would normally be attributed to the company, this makes no sense when the very duty of the auditor is to detect such fraud. The problem with this solution, which is a perfectly workable one, is as follows. If there is no such attribution at all, it may appear inequitable if the company can be held contributorily negligent if the employee is negligent, but not if his behaviour is more seriously wrong. Of course, if there has been a fraudulent director or employee, it is quite likely that there is still some contributory negligence because the company did not protect its own interests as it should.

The point has been in part decided just three years ago in *Barings PLC v. Coopers & Lybrand* [2003] P.N.L.R. 34 in a slightly curious way. The point was framed around a counterclaim by the auditors for deceit causing their loss which was the money they owed Barings as a result of their own negligence. They relied on representations instigated by the fraudulent Mr Leeson. The judge rightly found them as made within the course of his employment. More controversially, he followed normal principles of attribution and Mr Leeson's conduct was attributed to Barings. He refused to find that the auditors were officers of Barings and thus could not rely on the general rule of attribution, or fashion a special rules of attribution as was done in the *Arab Bank* case. As I have suggested, there may be good reasons why a special rule on attribution is necessary in this case. The judge's way of defeating the auditor's claim was different, but it comes to the same result. He held that the cause of the auditor's loss was their own failure to investigate Mr Leeson's representations. This is not necessarily the last word on the subject. The answer provided by special rules of attribution seems to me a better one.

Lost litigation.

I turn to an issue of more parochial interest as it only concerns claims against lawyers, lost litigation. The broad principles have been established for a long time, and I will summarise them only very briefly. In assessing what the claimant has lost through his lawyers' negligence, for instance failing to issue a claim within the limitation period, the court does not attempt to try the original case. Instead, it attempts to value the claimant's lost chose in action. Thus suppose he had a 50% chance of obtaining £100,000, then he will be awarded damages in the professional negligence action of about £50,000. The Court will also attempt to set a notional trial or settlement date, value the claim as at that date, and award interest on it from then until trial.

One thorny issue which sometimes arises is how to treat evidence and facts which occurred after the notional trial or settlement date. An example might be a medical report casting a new light on the claimant's condition. I should say that the two significant cases and most of the discussion on the issue concern personal injury litigation, but the same issues do arise in other forms of lost litigation.

In principle, the answer is clear. The parties or the judge at the notional trial or settlement would not have known about such a development, and they should be ignored. However, later facts or evidence may be a very good guide as to the evidence which might in fact have been available at the notional trial or settlement, and would have been if the lawyers had done their job and not delayed so that the action was struck out. This is the orthodox view.

However, one Court of Appeal case, *Charles v Hugh James Jones & Jenkins* [2000] 1 WLR 1278 appears to go much further. It appears to suggest that where the claimant has an uncertain prognosis at the notional trial date which has become more certain since then, the court should assess damages on the basis of later evidence. Although all the cases explaining how loss of a chance works were cited in the judgment of Swinton Thomas LJ, his remarks strongly suggest that he did not really agree with the principle behind it, when he said:

> "*Although a judge at the notional trial date is making an assessment, it is to be hoped that it is an accurate assessment and evidential matters which would assist in that task are, to my mind capable of being received in evidence ... it would be absurd, and in my judgment wrong if, for example at the notional trial date the medical evidence indicated that there was a strong probability that the claimant would in future suffer some adverse medical consequences as a result of the injuries sustained in the accident, but it was shown as at the date of the actual hearing that there was no such risk, that the claimant should recover damages in respect of it*."

His one rider was as follows: "*I would be prepared to accept that if some entirely new condition which can be attributed to the accident manifests itself for the first time after the notional trial date it may be that it has to be ignored. I would wish to reserve any final opinion in relation to that*."

To my mind the Judge failed to grasp the nature of lost litigation claims. The claimant is not recovering damages for personal injury, and to follow the Judge's example he is not recovering damages for the potential future adverse medical consequences. What is being awarded should be damages for his lost chose of action. That obviously represents, subject to discounts for loss of chance, what he would have been awarded for his personal injuries at the notional trial date. It is not the same as the value of the personal injury action if it were tried now, nor should it be. Nor is it unjust that the claimant should be awarded what he has lost, namely the value of his chose in action, whether that is more or less than he would be awarded now if the personal injury action were being tried. Taking account of developments after the notional trial date in this illegitimate way is in principle, it seems to me, no different from taking account of evidence as to how the claimant would in fact have frittered away any damages he would have been awarded after the notional trial date, or have made a fortune from them; those considerations are simply irrelevant.

Charles leaves us with at least four difficulties. First, on a theoretical level it is simply contrary to principle. Secondly, we are told that later evidence, effectively regardless of whether it would have been available at the notional trial, should be "taken into account." What does this mean: do you give damages for the future adverse medical consequence, or not, or do you take it into account by giving, say, half? I think this problem is more apparent than real. What "take into account" means is that the assessment of damages should be wholly guided by what happened afterwards. Thirdly, how confined is the doctrine? The Court of Appeal reserved their final opinion in regard to some entirely new condition attributable to the accident which appeared after the notional trial date, which is a reasonable indication that such a development should be ignored. What will happen in such a situation, and why? They did make it clear that evidence would be taken into account in two cases: the feared future adverse medical consequences later shown to be none; and the uncertain employment future later resolved one way or another. But how far does this go? Is everything effectively susceptible to determination by what happened later? And if not why not? Fourthly, are the remarks of Swinton Thomas LJ obiter?

There have been remarkably few cases which touch on these issues since it was decided in 2000. However, the recent decision of *Dudarec v. Andrews* [2006]

P.N.L.R 26 does in an unhelpful way. It is one of the more bizarre cases one could imagine. In 1982 the claimant was injured in an RTA, liability being admitted. His solicitors negligently delayed the action so that it was struck out for want of prosecution in 1996. He issued proceedings against his solicitors in 2002, and a preliminary issue was ordered to decide whether the claimant failed to mitigate his damage by failing to have an operation to correct an aneurism which he said prevented him working. In 2004 a scan showed that there was in fact no aneurism. The Judge deducted 40% of the damages on the basis that the Court at the notional trial may have held that the claimant had acted unreasonably.

The claimant appealed, arguing that in deciding whether he failed to mitigate his loss, the Judge should have taken account of the 2004 evidence that there was no aneurism. The Court of Appeal agreed. The main reason for their decision is entirely orthodox. The experts agreed that they would have wanted the 2004 scan performed in 1996 for the notional trial, and thus it would not have been unreasonable in 1996 to refuse an operation for a problem that did not exist. The case is of importance for two further points the Court of Appeal made.

First, the consequences of the Court of Appeal's findings are unusual on the facts of the case. On the most likely scenario of the true position being available to the notional trial judge, there was no basis for saying that the claimant has failed to mitigate his loss. However, there was also no basis for a lost earnings claim after 1996, which would not have been awarded by the notional trial judge. But what the Court of Appeal seemed to be saying was that there should be recovery of the full loss of earnings from 1996 to 2004. One can see the sense of a loss of earnings claim after 1996 on the basis that the loss was caused by the solicitor's negligence, even though it would not have been awarded at the notional trial. It might seem rather odd, though, that evidence that later there was no aneurism should turn a 60% loss of earnings claim into a 100% one. On the other hand, it would also appear that the prospects of a loss of earnings claim after 2004 was much reduced.

Secondly, the status of *Charles* is now rather clearer. The orthodox part of that decision, that evidence which becomes available later but which should have been available if the solicitors were not negligence should be taken into account, was applied in *Dudarec.* What is more interesting is the Court of Appeal's reaction to Swinton Thomas LJ's more heretical views which I have just criticised. Waller LJ suggested that Swinton Thomas LJ's dicta were obiter, and that although Robert Walker LJ seemed to agree with them, it was less clear whether Sir Richard Scott V-C did. Waller LJ appeared to express no view on them. Sedley LJ appeared to accept that the observations were dicta, but also seemed to be inclined to accept them. Smith LJ clearly followed the dicta, though plainly obiter. She said:

> "*the fact that the claimant died of unrelated causes between the dates of the notional and actual trial must be taken into account because, if it were not, the claimant's estate would recover an unjustified windfall. If the claimant won the lottery after the notional trial date and would have given up work even if fully fit, it would be unjust to ignore that and allow him to recover from his solicitors the loss of further earnings he would have recovered from the tortfeasor*."

It seems to me that the sudden death Smith LJ refers to after trial is really the reverse of Swinton Thomas LJ's example where he reserved his position, that is "*some entirely new condition which can be attributed to the accident manifests itself for the first time after the notional trial date."* For my part, I cannot see the force of the objection the judges are making. Once it is realised that what we are valuing is a chose in action, then the fact that it might now appear to be worth more or less is not to point: the value of shares can go up as well as down. The force of the "windfall" type objection must be the idea that claimants should be properly compensated for their losses caused by their personal injuries, rather than their losses caused by their lawyers' negligence. If that idea is followed, then we should jettison the whole structure and learning of how to value lost litigation cases. If one tries to make artificial rules about where the windfall objection will apply and where it will not, then any distinctions drawn will be unprincipled and simply lead to further uncertainty.

The rise and fall of professional liability litigation

I turn from three particular areas of the law of professional liability to a more general overview of its trends. The law on professional liability has multiplied over the last, say, 25 years. I think I can give two illustrations of this. First, the length of Jackson and Powell on Professional Negligence. When it was first published in 1982 it was 352 pages long. The fifth edition in 2002 was 1,320 pages. The sixth edition, which will be published in six months time if we get round to writing it in time, and under the correct title "Professional Liability", will I expect be much longer. While we have added a few new chapters, we have also compressed the coverage particularly of some old cases. So I think the growth in the size of the book does roughly reflect the increase in authority. Let met give another more dramatic illustration. In the fifteen years to 1989 six professional liability cases were decided by the House of Lords or Privy Council, by my counting. In the subsequent fifteen years 23 were, ten of them being since the turn of the millennium.

In contrast, the number of cases which get to trial, while it may have increased steadily or even dramatically until about 1998, has declined since then, even if this is not properly reflected in the number of cases which are reported. The major reason for this is plainly the Civil Procedure Rules. There are, of course other reasons. A major one, at least for cases against solicitors, is that the gravy train of lenders claims tailed off.

But there is good news for those of us involved in the industry. Professional Liability litigation continues, and in the long term should gradually increase. Let me give you three reasons for this.

First, as a society becomes richer, it becomes more professionalized. In future, there are likely to be more professionals around to make mistakes and be sued. There is no particular reason to think that statutory changes are likely to greatly change professional negligence litigation, as our law is mostly based on common law. However, the regulation of financial professionals under the Financial Services and Markets Act 2000, and the introduction adjudication which applies to construction professionals, as well as the introduction of the CPR, suggests that one cannot ignore the impact of regulatory change. Nevertheless, I would predict a slow and steady increase in litigation and authority over the coming decades.

Secondly, disappointed clients are more likely to seek redress than they would have been twenty or thirty years ago. It appears to be a commonplace observation that clients are far less deferential to professionals than they were a generation ago. One would therefore expect them to be more likely to investigate, complain and take action if they think their professional advisers may have let them down. One would not expect this trend to reverse itself. Whether it will continue rather than remain static is conjecture, but I would expect it to do so.

Thirdly, as I hope I have showed with the examples I have given, you can always rely on the judges to make changes to the law which either do not work or at the very least take a great deal of litigation to bed down. Thus I would predict that the number of cases which reach the House of Lords in the next decade should not decline much from the last decade. Indeed, I think that there is much work for their Lordships to do, as I hope I have illustrated.