

# **Professional Negligence – recent developments**

## **Mark Simpson – 4 Paper Buildings<sup>1</sup>**

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### **Introduction**

1. The flood of cases in this area continues unabated. In this paper I concentrate on three recent House of Lords decisions, predict the outcome of a fourth, and then consider whether professional liability is set to expand yet further<sup>2</sup>.

### **Dishonesty**

#### **INTRODUCTION**

2. One of the recurring questions in professional indemnity insurance work is whether indemnity can be refused on the ground of dishonesty. This has always been a difficult question, in particular, because the leading House of Lords case on

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<sup>2</sup> For those who take a keen interest in the programme, I have made a couple of changes. "Solicitors' duties to guarantors" has been displaced by "Dishonesty" and "Liability for partners' fraud" has been omitted as the relevant case, *Dubai v Salaam* has not yet been heard by the House of Lords (it is listed for June).

dishonesty in a civil context, *Royal Brunei Airlines v Tan*<sup>3</sup> is not easy to interpret. The law has now been clarified in *Twinsectra v Yardley*<sup>4</sup>.

3. As Lord Hutton stated in *Twinsectra*<sup>5</sup>, there are three possible standards which can be applied to determine whether a person has acted dishonestly:

3.1. A purely subjective test. A person acts dishonestly if he transgresses his own standards of honesty. This is often referred to as the “Robin Hood” test.

3.2. A purely objective test. A person acts dishonestly if his conduct is dishonest by the ordinary standards of reasonable and honest people. Whether he thinks he is acting dishonestly is irrelevant.

3.3. A “combined” test. A person acts dishonestly if:

3.3.1. his conduct was dishonest by the ordinary standards of reasonable and honest people; *and*

3.3.2. he himself realised that by those standards his conduct was dishonest.

4. The courts have rejected a purely subjective test.<sup>6</sup> The battle has been between the objective test and the combined test. The objective test seemed to gain the upper hand in *Royal Brunei*, but in *Twinsectra* the House of Lords has made it clear, by a majority of 4 to 1 that the combined test is the correct one.

#### **TWINSECTRA – FACTS AND FINDINGS**

5. In *Twinsectra* a solicitor, S, undertook to a lender that he would retain loan monies until they were applied in the acquisition of property by his client Y. On being assured by Y that they would be so used, S paid the money to another solicitor, L. L took no steps to ensure that the money was applied in the acquisition of property but

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<sup>3</sup> [1995] 2 AC 378.

<sup>4</sup> [2002] UKHL 12. Decided on 21<sup>st</sup> March 2002.

<sup>5</sup> Para 27.

<sup>6</sup> See eg per Sir Christopher Slade in *Walker v Stones* [2000] Lloyd’s Rep PN 864, para 164.

simply paid it out on Y's instructions. A substantial part of the loan monies were not used for the acquisition of property and the lender sued everyone. The claim against L was the interesting one. He was not retained by the lender. Nor did he deal directly with the lender. The allegation was dishonest assistance in S's breach of trust.

6. The judge found for L. He held that the monies were not trust monies and that, in any event, L had not acted dishonestly. The Court of Appeal reversed both findings. The House of Lords held that the monies were trust monies but refused to interfere with the judge's finding in favour of L on dishonesty.
7. On the issue of dishonesty, the leading speech in the House of Lords was given by Lord Hutton, with whom Lords Slynn, Steyn and Hoffmann agreed. Lord Millett dissented. Lord Hutton examined Lord Nicholls' speech in *Royal Brunei* in detail and concluded that it articulated the combined test<sup>7</sup>. In his dissent, Lord Millett subjected the speech to even more detailed scrutiny and concluded that it articulated the objective test<sup>8</sup>.
8. In *Twinsectra* itself, the judge made life somewhat difficult for the Court of Appeal and the House of Lords by not giving reasons for his finding that L was not dishonest, and not stating the test which he applied to determine dishonesty. He held that in receiving the money and paying it out to Y without concerning himself about its application he was "misguided" but not dishonest. He had "shut his eyes" to some of the problems but thought he held to money to the order of Y without restriction<sup>9</sup>.
9. The "shutting his eyes" remark was the basis of the Court of Appeal reversing the judge's finding. An honest person does not deliberately close his eyes and ears, or deliberately not ask questions, in case he learns something he would rather not know, and then proceed regardless<sup>10</sup>. The Court of Appeal inferred that the judge had

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<sup>7</sup> Paragraph 36.

<sup>8</sup> Paragraph 121.

<sup>9</sup> See per Lord Hoffmann at paragraph 18.

<sup>10</sup> So-called "Nelsonian dishonesty". See per Lord Nicholls in *Royal Brunei* at p389 and per Lords Hutton and Millett in *Twinsectra* at paragraphs 49 and 112.

misdirected himself and that his finding that L had deliberately “shut his eyes” meant that he had been dishonest.

10. The House of Lords held that what the judge meant by “shutting his eyes” was merely that L had taken a narrow view of his professional duties.<sup>11</sup> This was not a case where L had deliberately closed his eyes and ears. The key question on the issue of dishonesty was whether L had realised that his action was dishonest by the standards of responsible and honest solicitors. The judge had probably applied that test. Therefore no retrial would be ordered.<sup>12</sup>

### **DISHONESTY AFTER TWINSECTRA**

11. Many have found it difficult to understand Lord Nicholls’ speech in *Royal Brunei*. On the one hand, it states that dishonesty is an objective standard. On the other, it seems to introduce subjective elements. It has made it somewhat difficult to advise with certainty on the correct test to be applied on this most important of issues.
12. Of course, there is no acknowledgement in *Twinsectra* that Lord Nicholls’ speech in *Royal Brunei* is not very clear, or that if he had wanted to articulate the “combined” test he could have done it in a sentence, as Lord Hutton does.<sup>13</sup> Nor is there any real explanation of why he drew a distinction between dishonesty in the criminal context, where the combined test applies,<sup>14</sup> and dishonesty in the context of civil liability, if he intended the criminal test to apply. Even Lord Millett, who deploys his formidable legal mind to come to an opposite conclusion from the majority does not hint that this is because the speech itself is difficult to understand. Indeed, he describes it as “magisterial”<sup>15</sup>.
13. The underlying reason for the decision in *Twinsectra* would appear to be that courts at first instance have balked at labelling professional men and women dishonest in circumstances where they have not appreciated that what they were doing would be

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<sup>11</sup> See eg per Lord Hoffmann at para 22 and Lord Hutton at para 49.

<sup>12</sup> See per Lord Hutton at para 50.

<sup>13</sup> See eg paragraphs 27 and 36.

<sup>14</sup> See *R v Ghosh* [1982] QB 1053, summarised by Lord Millett at paragraph 115 of *Twinsectra*.

<sup>15</sup> Paragraph 113.

regarded by honest people as dishonest. The idea that equity looks at a man's conduct, not his state of mind<sup>16</sup> has found little favour. Lord Hutton appeared to acknowledge this reasoning, entirely extrinsic to Lord Nicholls' speech in *Royal Brunei*, when he stated (paragraph 35):

“There is, in my opinion, a further consideration which supports the view that for liability as an accessory to arise the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men. A finding by a judge that a defendant has been dishonest is a grave finding, and it is particularly grave against a professional man, such as a solicitor. Notwithstanding that the issue arises in equity law and not in a criminal context, I think that it would be less than just for the law to permit a finding that a defendant had been “dishonest” in assisting in a breach of trust where he knew of the facts which created the trust and its breach but had not been aware that what he was doing would be regarded by honest men as being dishonest.”

14. This seems fair enough. But to my mind it would have been better to admit that Lord Nicholls' speech in *Royal Brunei* was unclear as to the extent of the subjective element required than to have both the majority and the dissenter pretend that everything has been clear all along whilst paradoxically coming to opposite conclusions.

15. What is the net effect of *Twinsectra*? In a sense, it changes little. It is clear that it, like *Royal Brunei*, is intended to apply generally to civil liability, not just to accessory liability for breach of trust<sup>17</sup>. In the context of professional indemnity insurance, judges have tended to interpret *Royal Brunei* as requiring some subjective element to a finding of dishonesty,<sup>18</sup> and practitioners have advised accordingly<sup>19</sup>. What *Twinsectra* does is finally close the door on any possibility of arguing for a purely objective test. To that extent, it is bad news for insurers.

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<sup>16</sup> See per Lord Millett at paragraph 123.

<sup>17</sup> The *Royal Brunei* test for dishonesty has been applied as a general test in civil claims, ie outside the context of accessory liability. And since it is now clear that the civil and criminal tests are the same, a different test for dishonesty in professional indemnity insurance would be somewhat paradoxical.

<sup>18</sup> See eg *Abbey National v SIF* [1997] PNLR 306, cited with approval by Lord Hutton at paragraph 37.

<sup>19</sup> In particular, my impression is that those on the SIF “dishonesty panel” have generally applied the combined test.

16. The threshold that insurers have to surmount in refusing indemnity on the ground of dishonesty thus is a high one. The element of subjectivity also makes it a difficult issue to call in many cases. Sometimes it will only be possible for those advising insurers to say “I don’t believe him/her, but it is perfectly possible that a judge will”. Life may be somewhat easier in cases concerning solicitors and barristers<sup>20</sup>, because judges will tend to expect them to have a clearer view than other professionals of what is seen as honest and dishonest by ordinary standards.
17. Insurers may therefore feel, post *Twinsectra*, that it is only in relatively clear cases that they will want to take dishonesty points. There are always significant tactical considerations peculiar to individual cases, but my own view is that if the opportunity exists for arbitrating the issue at an early stage, that will generally be the best option.
18. Refusing indemnity can, of course, lead to somewhat complicated scenarios. Claimants’ solicitors often plead dishonesty without realising the potential implications for the Defendant’s insurance cover. If an insurer refuses indemnity and the Defendant informs the Claimant that he is without insurance then this can have a miraculous effect on the way the claim is put. Indeed, in those circumstances it is often to the advantage of both Claimant and Defendant to settle the claim on the basis that any allegations of dishonesty are withdrawn.
19. Another complication is that where the insured is a company with few assets, for instance a trust company, if indemnity is refused the directors may decide to let the company go under rather than defend the claim. If judgment goes by default, perhaps with any allegations of dishonesty deleted, then the insurer will face an action under the 1930 Act. Of course, the Claimant will have no greater rights against the insurer than the insured would have had, and thus if dishonesty is proved then there will be no indemnity, but by that time the insurer will have lost the chance to defend the underlying claim.

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<sup>20</sup> I am not aware of any case in which dishonesty has been proved against a barrister in the context of civil liability. This doubtless has more to do with the fact that barristers do not hold client money than any inherent moral superiority.

20. As ever, it is important to be aware of the potential conflicts of interest which exist when dishonesty may be an issue. In particular, if insurers are seriously contemplating taking a dishonesty point then the insured should be informed of this and advised to seek independent advice. This is not only a point of professional conduct for the lawyers involved. Unless it is done then relevant communications between the insured and the solicitors instructed by insurers may be privileged and hence unusable against the insured<sup>21</sup>.

21. One final point. The recent case of *Walker v Stones*<sup>22</sup> concerned the liability of a solicitor trustee. At first instance Rattee J held that a genuine, even if misguided, belief that what he was doing was for the benefit of the beneficiaries “made it impossible to call the trustee’s conduct “dishonest” in any ordinary sense of that word. The Court of Appeal disagreed. Sir Christopher Slade, with whom Mantell and Nourse LJJ agreed, stated:

“At least in the case of a solicitor-trustee, a qualification must in my opinion be necessary to take account of the case where the trustee’s so-called “honest belief”, though actually held, is so unreasonable that, by any objective standard, no reasonable solicitor-trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries.”

22. Although *Walker v Stones* was cited in *Twinsectra*, this dictum was not disapproved. On the face of it, that is surprising. I believe that *Walker v Stones* is itself due for hearing by the House of Lords this term. It would therefore appear likely that their lordships have merely refrained from commenting on a pending case. In the light of *Twinsectra*, it is difficult to see how this dictum can stand. Subjectivity is here to stay.

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<sup>21</sup> See *TSB v Robert Irving & Burns* [1999] Lloyd’s Rep PN 956.

<sup>22</sup> [2001] 2 WLR 623.

## **Damages for distress**

23. In *Farley v Skinner*<sup>23</sup> the House of Lords considered the availability of damages for distress against professionals. I acted for the Defendant surveyor at first instance and on appeal<sup>24</sup>.

24. Mr Farley had bought a house in the country about 15 miles from Gatwick. He asked his surveyor, amongst other things, to investigate whether the property would be affected by aircraft noise. The surveyor reported that it was unlikely that the property would suffer greatly from such noise, and the Claimant duly bought the property. He then had it refurbished at a cost of £125,000 and moved in some months later. He then found that the property was, in fact, affected by aircraft noise, in particular, by aircraft circling around the “Mayfield Stack”. Having initially decided to sell, he remained there and sued his surveyor. On the basis of expert evidence, it was conceded that the surveyor had been negligent in failing to check the position on aircraft movement with the CAA and that, had he done so, he would not have reported as he did.

25. The Claimant’s claim for diminution in value of his property failed, but the trial judge awarded him £10,000 for “distress and inconvenience”. The Defendant appealed on the basis that this was “mere distress” unrelated to any physical inconvenience. The leading Court of Appeal case, *Watts v Morrow*<sup>25</sup>, precluded such recovery. In *Watts* Bingham LJ said this:

“(1) A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

(2) But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a

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<sup>23</sup> [2001] 3 WLR 899.

<sup>24</sup> I am grateful to Spike Charlwood, who acted with me in the House of Lords, for his thoughts on this section.

<sup>25</sup> [1991] 1 WLR 1421.

house for a prospective purchaser does not, however, fall within this exceptional category.

(3) In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.”<sup>26</sup>

26. A two judge Court of Appeal disagreed and a three judge Court then found for the Defendant surveyor by a majority<sup>27</sup>. The House of Lords held unanimously for the Claimant, but in terms which are likely to reassure insurers of professionals.

27. On the all-important “contract for peace of mind” point<sup>28</sup>, Lord Steyn described<sup>29</sup> the observations of Bingham LJ in *Watts v Morrow* as “useful”, but “never intended to state more than broad principles.” One needed, he said, to bear in mind that *Watts* was a case in which a surveyor had negligently failed to discover defects in a property. It was not a claim “for breach of a specific undertaking to investigate a matter important for the buyer’s peace of mind” and there had been no reason in *Watts* to consider the case where a surveyor was in breach of a “distinct and important contractual obligation which was intended to afford the buyer information confirming the presence or absence of an intrusive element before he committed himself to the purchase.” Given this introduction, it should come as no surprise to learn that his Lordship found for Mr Farley. Lords Clyde, Hutton and Scott gave concurring judgments. Lord Browne-Wilkinson agreed with the judgments of Lords Steyn and Scott.

28. When, then, will damages for “mere” mental distress caused by a breach of contract but unrelated to physical inconvenience, be recoverable? It is too early to be sure how the lower courts will apply the judgments in *Farley*, but the following guidelines can be given:

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<sup>26</sup> Numbering introduced by Lord Steyn.

<sup>27</sup> Thus, as the Claimant pointed out in seeking leave to appeal, by the time the case reached the House of Lords the “judge count” was 3-all.

<sup>28</sup> Their lordships also found that the Claimant had suffered physical inconvenience. See eg per Lord Hutton at paragraph 38.

<sup>29</sup> See para.15 of the judgment. See also paragraph 27 of the judgment: “While the *dicta* of Bingham LJ are of continuing usefulness as a starting point, it will be necessary to read them subject to the three points on which I have rejected the submissions made on behalf of the surveyor.”

28.1. “the entitlement to damages for mental distress caused by a breach of contract is not established by mere foreseeability: the right to recovery is dependent on the case falling fairly within the principles governing the special exceptions”;<sup>30</sup>

28.2. in order to recover a claimant will need to have made it clear to the defendant that a matter relevant to his peace of mind was of importance to him;<sup>31</sup>

28.3. damages for injured feelings caused by the breach (as opposed to the consequences of the breach) are not recoverable;<sup>32</sup>

28.4. recovery is still limited to an exceptional category of cases;<sup>33</sup>

28.5. “It is[, however,] sufficient if a major or important part of the contract is to give pleasure, relaxation or peace of mind”;<sup>34</sup> and

28.6. it is not necessary that the contract should be a contract for a result (as opposed to a contract for the exercise of reasonable skill and care).<sup>35</sup>

29. Although it will undoubtedly lead to more frequent recovery of damages for mental distress, the decision in *Farley* is likely to be of relatively limited significance. In the final analysis, it probably does little more than change the test for recovery from requiring peace of mind to be “the very object” of the contract to requiring it to be a “major or important” part of the contract. The House of Lords’ acceptance of *Watts v Morrow* as the starting point for the argument and its failure to comment adversely on the decision in that case very strongly suggests, for example, that the outcome of a typical valuers’ case (in which there is no special request related to peace of mind) will not change.

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<sup>30</sup> *Per* Lord Steyn at para.16 of the judgment. Lord Scott’s reference to *Hadley v Baxendale* in paragraph 75 of the judgment is probably not in disagreement with this statement because of his reference in the same paragraph to *Watts v Morrow* and *Ruxley Electronics v Forsyth*. If, however, it is, then it appears to be a minority view.

<sup>31</sup> See paragraphs 15 and 18 (*per* Lord Steyn) and 51 and 54 (*per* Lord Hutton). Indeed, at paragraph 54 of the judgment Lord Hutton expressly states that the matter should have been made a specific term of the contract.

<sup>32</sup> See paragraphs 18 (*per* Lord Steyn) and 40 (*per* Lord Clyde).

<sup>33</sup> See paragraphs 19 and 20 (*per* Lord Steyn), 44 (*per* Lord Clyde) and 54 (*per* Lord Hutton).

<sup>34</sup> *Per* Lord Steyn at paragraph 24 of the judgment. Lord Clyde puts the matter slightly differently at paragraphs 41-42 of the judgment, where he speaks of, “the object of the particular agreement” (meaning the particular term or request, rather than the whole contract). In practice, however, it is unlikely that a particular agreement which was not a major or important part of the contract would foreseeably lead to distress, etc.

<sup>35</sup> *Per* Lord Steyn at paragraph 25 of the judgment and Lord Hutton at paragraph 53 of the judgment.

### **Aneco – what is left of the SAAMCO cap?**

30. For a while, SAAMCO<sup>36</sup> looked like a godsend to professional indemnity insurers. It undoubtedly saved them, collectively, millions in the lender/valuer claims. It appeared to have the potential to narrow the scope of professional duties and thus the extent of recovery against professionals generally. However, its initial promise has not been fulfilled.

31. Lord Hoffmann gave the only speech in SAAMCO, with which Lords Goff, Jauncey, Slynn and Nicholls agreed. He summarised the basic principle as follows<sup>37</sup>:

“I think that one can to some extent generalise the principle...it is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.

The principle thus stated distinguishes between a duty to *provide information* for the purpose of enabling someone else to decide upon a course of action and a duty to *advise* someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong.”

32. Thus there is a distinction between “advice” cases, in which all foreseeable losses are recoverable, and “information” cases, in which they may or may not be. Defendant professionals therefore naturally seek to argue wherever possible that theirs is an information case and, further, that it is an information case in which not all loss is recoverable.

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<sup>36</sup> [1997] AC 191.

<sup>37</sup> 214C-E.

33. Before going further, it is worth briefly examining information cases. In this type of case, losses will only be recoverable if they are the foreseeable consequence of the information being wrong. In order to discover whether they are, it is necessary to ask the following crucial question: *would these losses have been suffered if the information had been correct?*
34. Thus say, for instance, a valuer reports that a property is worth £50m when it is only worth £35m. As a result, a lender lends £40m. The property market crashes, the borrower defaults and the lender recovers only £5m<sup>38</sup>. If the information that the property was worth £50m had been correct, exactly the same transaction would have taken place. The lender would have lent £40m on the security of a property worth £50m. Thus the lender cannot recover the difference between £50m and £5m, because the consequence of the information being wrong was not that he entered into the transaction in the first place but that he had less security than he thought he had. His loss is “capped” at the difference between the value of the security he thought he had (£50m) and the value he actually had (£35m).
35. There are, of course, “information” cases where no loss would have been suffered if the information had been correct. No “cap” then applies. For instance, if a solicitor tells a lender that a borrower is creditworthy when he is not, and as a result the lender lends to the borrower, then had the information given been correct the lender would have lent to a creditworthy borrower and made no loss.<sup>39</sup>
36. But despite the unanimous support for Lord Hoffmann’s speech in SAAMCO itself, the reasoning in SAAMCO has not received universal acclaim. In particular, the so-called “SAAMCO principle”, summarised in the paragraphs set out above, has come under sustained attack from academics such as Professor Jane Stapleton.<sup>40</sup> Despite the fact that we are in Cambridge today, I want to leave academics aside as far as possible and concentrate on two issues:

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<sup>38</sup> Sounds vaguely familiar....

<sup>39</sup> This would appear to be the rationale between the *Steggles Palmer* case in *Bristol & West v Fancy & Jackson* [1997] 4 All ER 582, per Chadwick J at p622.

<sup>40</sup> See eg *Negligent valuers and falls in the property market* (1997) 113 LQR 1.

36.1. how has SAAMCO been applied?

36.2. what are the implications for underwriters in this market?

37. As to the first question, the most important recent case is *Aneco Reinsurance v Johnson & Higgins*,<sup>41</sup> decided by the House of Lords in October 2001. In *Aneco* the defendants were a firm of insurance brokers retained by B to reinsure certain risks. They approached Aneco, who themselves wanted reinsurance before taking on B's risks. The brokers obtained reinsurance for Aneco but were negligent in presenting the risks to underwriters, who avoided subsequent claims. Had the brokers not been negligent, they would have informed Aneco that reinsurance was not available and Aneco would not have written the original risks, which eventually led to losses of \$30m. The key issue was whether the brokers were liable for the entire \$30m lost by Aneco or only for the \$10m which would have been the limit of the effective cover had it not been avoided.

38. On the face of it, this is clearly an information case. Thus the relevant question is "what would have happened if the information that reinsurance was available had been correct?" The answer is that Aneco would have taken on B's risks but with \$10m of reinsurance cover. Thus they can recover \$10m.

39. In the House of Lords, only Lord Millett agreed with this analysis. The majority, Lords Slynn, Browne-Wilkinson, Lloyd and Steyn, held that the full loss was recoverable. In classic House of Lords style, the speeches of Lords Lloyd and Steyn are somewhat difficult to reconcile, but Lords Slynn and Browne-Wilkinson agreed with both.

40. I do not intend to embark on a detailed textual analysis of the speeches of Lords Lloyd and Steyn. But the nub of Lord Steyn's speech is that this was an advice case. Hence all foreseeable losses were recoverable<sup>42</sup>. If the brokers had advised Aneco of the non availability of insurance cover in the market that would inevitably have

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<sup>41</sup> [2001] UKHL 51.

<sup>42</sup> See paragraphs 41-3.

revealed to Aneco the current market assessment of the risk. Thus the brokers in fact assumed a duty to advise Aneco as to what course to take. Lord Lloyd is somewhat more equivocal on the importance of the advice/information distinction, but he arrives at an identical conclusion:

“In the course of his cross examination [the broker] agreed that he was advising [Aneco] as to the state of the market. In the light of these and other passages Evans LJ said that it would be “highly artificial” to derive from the evidence any suggestion that [the broker] was not advising [Aneco] what course to take. I agree. I agree also with his conclusion... that the current market assessment of the reinsurance risks was central to Aneco’s decision to undertake those risks, and that [the broker] took it upon himself to advise [Aneco] with regard to those risks. This is, as Evans LJ pointed out, far removed from the lender-valuer relationship in *SAAMCO*. The difference does not depend on calling the one “information” and the other “advice”. It depends on a difference of substance, and in particular, of course, on the scope of the advice which the brokers undertook to give. In some cases it may be difficult to draw the line. But I have little doubt on which side of the line the present case falls.

41. The SAAMCO principle is thus being eroded by stealth. As Lord Millett pointed out in his powerful dissent<sup>43</sup>, the broker was instructed to obtain (outwards) reinsurance for Aneco. He had to test the market to find out if it was available. He undertook these duties as Aneco’s broker but in relation to the reinsurance, not the underlying reinsurance of B’s (inwards) risks. He had no responsibility for advising or reporting with regard to Aneco’s conditional decision to take on those risks.
42. Yet the broker was held to have advised Aneco, which could only be described as a “grown up” client, well able to assess risk for itself, as to what course to take<sup>44</sup>.
43. I can only say that I find Lord Millett’s dissent much more powerful than the reasoning of either Lord Steyn or Lord Lloyd. However, the majority state the law, and it is with that law that we must deal. My view is that in the light of *Aneco* more cases will be held to be advice cases, where all foreseeable losses are recoverable. Whilst the House of Lords did not articulate the principle particularly clearly, I think that the position which we are moving towards is that expressed by

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<sup>43</sup> Paragraph 96.

<sup>44</sup> See *Carradine v DJ Freeman* [1999] Lloyd’s Rep PN 483 on obligations to experienced commercial clients.

Elias J in the recent case of *Hagen v ICI*<sup>45</sup> (in which judgment was given the day after the judgment in *Aneco*, but which does not refer to *Aneco*):

“In my view where a party makes a series of representations which are negligent and which, taken together, would in fact cause a reasonable person to adopt a particular course of action, then it is tantamount to advice and the representee ought to be liable for all the consequences of that action being taken.”

44. The only gloss that I think Elias J should have added to that is that the “reasonable person” should be the reasonable person with the experience and characteristics of the client. Thus an experienced commercial client will be taken to be more able to assess risk, and to evaluate advice, for himself. However, this point seems to have been ignored by the majority in *Aneco*.

45. If I were underwriting in this market I would consider that *Aneco* had eroded SAAMCO sufficiently to affect my assessment of professional risks. It is more likely, post *Aneco*, that professionals will be held to have advised rather than merely provided information and hence that the scope of their duty will embrace wider losses.

46. I would make one final point. The fundamental principle underlying recovery of damages in professional negligence, as in all other cases, is that expressed by Lord Blackburn in *Livingstone v Rawyards Coal*<sup>46</sup>, where he defined the correct measure as:

“that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”.

47. In all cases it is therefore necessary to ask: “what position would the claimant have been in if he had not sustained this wrong?”. Where the Claimant has entered into a transaction such as a loan or property or company purchase or an insurance contract because of the defendant’s negligence there are, broadly, four possibilities:

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<sup>45</sup> Unreported, 19 October 2001, QBD.

<sup>46</sup> (1880) 5 App Cas 25.

47.1. he would have entered into the same transaction on the same terms;

47.2. he would have entered into the same transaction on different terms;

47.3. he would have entered into no transaction;

47.4. he would have entered into a different transaction.

48. It will always be important for both Claimants and Defendants to consider in detail which of these scenarios was most likely and what would have been the net outcome of each. Claimants will want to show that any alternative transaction to the one which actually occurred would have been profitable, defendants that it would have been unprofitable (or less profitable). When Lord Hoffmann stated in *SAAMCO* that the old “transaction/no transaction” distinction in lender/valuer cases was not based on any principle and should be abandoned<sup>47</sup>, he was simply saying that it is too blunt an instrument to accommodate the many different cases which may arise. In every case it will be necessary to investigate in detail what would actually have happened if the negligent statement had not been made. In some cases it will be possible to show that the Claimant would have made equal, if not greater, losses on the alternative transaction that he would have entered into had he not entered into this one.

### **Limitation and deliberate concealment**

49. Seldom has a decision of the Court of Appeal attracted such universal criticism as that levelled at *Brocklesby v Armitage & Guest*<sup>48</sup>. As everyone knows, the net effect of *Brocklesby* was to treat any negligent act or omission as deliberately concealed, for the purpose of Section 32 of the Limitation Act 1980, if it occurred intentionally but without any knowledge of the breach of duty. Since the defence of automatism is a rare one in the context of professional negligence *Brocklesby* meant that almost all negligent acts or omissions by professionals were deliberately concealed. Thus “innocent” professionals, who had not acted unconscionably in any way, were potentially exposed to claims years after the event.

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<sup>47</sup> 218G.

<sup>48</sup> [1999] Lloyd’s Rep PN 888.

50. The appeal in *Cave v Robinson Jarvis & Rolfe*<sup>49</sup>, which revisited *Brocklesby*, was recently heard by the House of Lords and a decision is expected soon. It seems almost certain that *Brocklesby* will be consigned to history. It will not be a moment too soon.

## **The future – ever greater expansion of liability?**

### **THE BOLAM TEST UNDER ATTACK**

51. In *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, McNair J famously stated:

“A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.”

52. This is the *Bolam* test. It has been applied in almost every field of professional activity. It makes life difficult for Claimants. There are some in the Court of Appeal who take a dim view of it, in particular, the influential Sedley LJ<sup>50</sup>.

53. The problem with *Bolam* is that it makes professionals judges in their own cause. They are free to set their own standards, however low those standards may be. For that reason it has been rejected both by the Supreme Court of Canada in *Reibl v Hughes*<sup>51</sup> and by the High Court of Australia in *Rogers v Whittaker*<sup>52</sup> in relation to failure to warn of the risks of medical treatment. The law in the United Kingdom has taken a somewhat different approach, developing derogations from the *Bolam* principle rather than discarding it. These give judges some room to find a defendant negligent even if he has expert evidence in his favour. They were summarised by Ward LJ in *Williams v Michael Hyde*<sup>53</sup>:

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<sup>49</sup> [2001] 1 All ER 172.

<sup>50</sup> See eg *Williams v Michael Hyde* [2000] Lloyd's Rep PN 823 and *Adams v Rhymney Valley DC* [2000] Lloyd's Rep PN 777.

<sup>51</sup> (1980) 114 DLR (3d) 1.

<sup>52</sup> [1992] 67 AJLR 47.

<sup>53</sup> [2000] Lloyd's Rep PN 823, 830.

53.1. if the professional opinion relied upon by the defendant is not capable of withstanding logical analysis;

53.2. if the expert evidence relied upon by the defendant does not constitute evidence of a responsible body of professional opinion;

53.3. if the performance of the relevant duty by the defendant requires no special skill.

54. I suspect that the *Bolam* test will survive here, but that in the future we will see judges using these derogations to a greater degree. In particular, it is becoming increasingly difficult to use the “everybody did it” defence when the act or omission in question looks, in the impermissible but inevitable light of hindsight, incapable of withstanding logical analysis<sup>54</sup>.

#### **LOSS OF A CHANCE**

55. This area is still developing. Arguing loss of a chance has usually been seen as helpful to Claimants. In particular, if a claim can be characterised as a “loss of a chance” claim, the net effect is that the Claimant does not need to prove his loss on the balance of probabilities<sup>55</sup>.

56. But I think that there is also potential here for defendants. The leading case is, of course, *Allied Maples v Simmons & Simmons*<sup>56</sup>, in which the Court of Appeal held that where the Claimant’s loss depended on the hypothesis of how a third party would have acted, it was permissible to claim on a loss of a chance basis.

57. Returning to a theme which I have already mentioned above<sup>57</sup> it seems to me to be arguable that Defendants could exploit the loss of a chance doctrine in the context of alternative transactions. In other words, where there is a real and substantial but less

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<sup>54</sup> The leading case on this point is *Edward Wong Finance Co v Johnson Stokes & Master* [1984] AC 296.

<sup>55</sup> Whilst it can be argued that what he really needs to do is prove, on the balance of probabilities, that he has lost a chance, the reality is that it is much easier to prove loss of a chance, and proportionately easier the smaller the chance is.

<sup>56</sup> [1995] 1 WLR 1602.

<sup>57</sup> See the section on *Aneco*.

than 50% chance that the Claimant would have entered into an alternative loss-making transaction which would have depended on the actions of a third party (eg the purchaser of a property), the Defendant could argue that he should be given proportional credit for the chance that the Claimant would have made that loss.

58. The problem with this, of course, is that where the chance was greater than 50% but less than 100% Claimants will seek to argue that the Defendant should not get 100% credit.

### **CONCLUSION**

59. As ever, developments in the law are likely to be driven not by sensible and measured consideration of areas which need reform,<sup>58</sup> but by the random chance of what points happen to arise in difficult cases, particularly where large sums of money are at stake<sup>59</sup>. I therefore feel justified in saying that at the end of the day, I have little idea what is going to happen over the next 12 months.

60. But that is what makes life interesting.

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<sup>58</sup> per the Law Commission.

<sup>59</sup> per the lender/valuer litigation.