
**CLAIMS BETWEEN PROFESSIONALS: LEGAL,
PRACTICAL AND TACTICAL CONSIDERATIONS**

Introduction

1. Claims between professionals have been an obvious growth area in the field of professional liability litigation. There are a number of likely reasons for this:
 - (1) A general increase in litigiousness and the availability of flexible costs options;
 - (2) The opening up of the insurance markets, particularly in the solicitors' field; and
 - (3) The increasing creativity of lawyers.

2. The aim of this paper is to discuss some of the legal and practical considerations that are often encountered in the course of such claims.

Structure of this paper

3. The structure of this paper is as follows:
 - A. Legal considerations arising out of claims between professionals, including the following:
 - A.1. The jurisdictional basis for claims;
 - A.2. Direct claims;
 - A.3. Contribution claims under the Civil Liability (Contribution) Act 1978 ("the 1978 Act"), including the following:
 - A.3.1 The meaning of "same damage" in s. 1(1) of the 1978 Act;
 - A.3.2 "Just and equitable" contribution and s. 2(1) of the 1978 Act;
 - A.3.3 Contribution claims post settlement and s. 1(4) of the 1978 Act;
 - A.3.4 Contribution claims post judgment and s. 1(5) of the 1978 Act.

 - B. Practical and tactical considerations, including
 - B.1. Timing issues;
 - B.2. Pleading issues;
 - B.3. Settlement issues;

B.4. Trial issues: marry or divorce?

A. Legal considerations

A.1. The jurisdictional basis for claims

4. The first topic is the jurisdictional basis for claims between professionals¹. In certain circumstances, there may be a direct claim. More usually, however, a claim will arise under the 1978 Act. The 1978 Act gives a right of contribution against “any other person liable in respect of the same damage.....”, although in practice, claims are often brought between co-defendants who are both denying liability.² The mechanics of the 1978 Act will be considered further below.

A.2. Direct claims

5. Direct claims between professionals are fairly unusual. They can arise where there are direct contractual relationships between defendants, e.g. (i) in construction litigation or (ii) in personal injury litigation (such as where an injured claimant brings a claim against the management company looking after a building, and that management company brings a direct claim against the health and safety consultants who advised on the management scheme).
6. If there is no contractual relationship between the professional parties, then the situation is less straightforward. There are circumstances in which a professional may owe a direct duty of care to another professional when both are advising a client, by analogy to the court’s reasoning in *Coulthard v. Neville Russell (a firm)* [1998] PNLR 276. In this case, the court found that it was arguable that the defendant auditors owed a duty of care not only to a company, but also to its directors where the auditors had discussed the proposed treatment of certain payments with the directors, which was relevant to the way that the directors would discharge their own duties). By reference to this reasoning, it may be possible to argue that where one professional gives advice that may expose another in the discharge of that other professional’s duties, the first professional owes a duty of care to the second.

¹ It is unlikely that proceedings are likely to be brought pursuant to the Law Reform (Married Women and Tortfeasors) Act 1935, which is only relevant where the limitation period has been suspended because the Claimant was under a disability or because of fraud or deliberate concealment by a defendant.

² Jackson & Powell on Professional Negligence, para. 4-03

7. In this context, the traditional arguments on duty of care will apply (and these are set out in some detail in the court's analysis in *Coulthard v. Neville Russell* (at p. 286 ff). It is important to consider the principles on negligent misstatements set out in *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605, *White v. Jones* [1995] 2 A.C. 207, *Banque Bruxelles Lambert SA v. Eagle Star* [1997] A.C. 191. For example, the following factors should be borne in mind (the list is not exhaustive):
- (1) Whether there is proximity between the parties;
 - (2) Whether it is fair, just and reasonable to impose a duty of care; and
 - (3) Whether there has been a voluntary assumption of responsibility.

A.3. Contribution claims under the 1978 Act: an introduction

8. Section 1(1) of the 1978 Act was designed to plug the gaps in the law preventing one defendant recovering a contribution from someone else who was also liable. The limited recovery between joint and several tortfeasors provided for by the Law Reform (Married Women and Tortfeasors) Act 1935 did not go far enough. For example, the Act provided no mechanism to deal with the situation where one defendant was liable in tort and the other in contract, or breach of trust, and so on. For this central reason, the 1978 Act was enacted.
9. Section 1(1) of the 1978 Act provides that a claim for contribution can be made in the following circumstances:
- “...any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)”
10. Section 6(1) adds as follows:
- “A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or defendants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)”
11. Although s. 1(1) appears at first sight to be straightforward, it has often proved difficult to apply in practice. The first question is what is meant by “the same damage”. Any review of this issue inevitably focuses on the decision of the House of Lords in *Royal Brompton Hospital NHS Trust v. Hammond (no 3)* [2002] 1 WLR 1397. Although in *Royal Brompton* the issue of “the same damage” arose in the context of a construction case, it is a question

that can arise across the range of professional negligence claims. This is illustrated by the fact that since *Royal Brompton* the point has arisen in two important cases on solicitors' negligence (which will be examined later in this paper).

A.3.1. The meaning of "same damage"

The position prior to Royal Brompton

12. A brief review of the position prior to *Royal Brompton* helps explain the approach taken by the House of Lords in that case. Broadly speaking, the courts approached the question of "same damage" prior to *Royal Brompton* as follows:

- (1) The optimistic approach: the analysis that the "same damage" is merely a "simple question of construction": *Birse Construction Ltd v Haiste* [1996] 1 WLR 675 (this case is also useful because it makes the point that "the same damage" is not the same as "the same damages"- i.e. the two parties do not both have to be liable to compensate the Claimant in the same way);
- (2) The "wide" and "purposive" approach³: *Friends Provident Life Office v. Hillier Parker May & Rowden (a firm)* [1997] QB 85. In this case, Auld LJ saw s. 1(1) of the 1978 Act in wide terms, stating that

"The contribution is as to "compensation" recoverable against a person in respect of "any damage suffered by another" "whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise, It is difficult to imagine a broader formulation of an entitlement to contribution. It clearly spans a variety of causes of action, forms of damage in the sense of loss of some sort, and remedies, the last of which are gathered together under the umbrella of "compensation". The Act was clearly meant to be given a wide interpretation

- (3) The development of the "mutual discharge" test⁴: this is derived from *Howkins & Harrison (a firm) v. Tyler and another* [2001] Lloyds Rep P.N.1. Sir Richard Scott V-

³ It should be noted that the wide purposive approach came in for particular criticism from the House of Lords in *Royal Brompton*. In particular, Lord Steyn was of the view that s. 1(1) should be interpreted "without glosses"

⁴ This "mutual discharge" analysis was subsequently considered by the House of Lords in *Royal Brompton* (see below). It did not meet with wholehearted approval, on the basis that it should not be elevated to the status of a "threshold" test. Lord Steyn said as follows: "If this test [the mutual discharge test] is regarded as a necessary threshold question for the purpose of identifying whether a claim for contribution is capable of being a claim to which the 1978 Act could apply, questions of contribution might become unnecessarily complex....It is best regarded as a practical test to be used in considering the very statutory question whether two claims under

C suggested a “simple test” to ascertain whether the parties were liable for the same damage. It worked as follows:

“Suppose that A and B are the two parties who are said each to be liable to C in respect of “the same damage” that has been suffered by C. So C must have a right of action of some sort against A and a right of action of some sort against B. There are two questions that should then be asked. If A pays C a sum of money in satisfaction, or on account, of A’s liability to C, will that sum operate to reduce or extinguish, depending on the amount, B’s liability to C? Secondly, if B pays C a sum of money in satisfaction or on account of B’s liability to C, would that operate to distinguish A’s liability to C? It seems to me that unless both of these questions can be given an affirmative answer, the case is not one to which the 1978 Act can be applied. If the payment by A or B to C does not pro tanto relieve the other of his obligations to C there cannot, it seems to me, possibly be a case for contending that the non-paying party, whose liability to C remains un-reduced, will also have an obligation under section 1(1) to contribute to the payment made by the paying party”

(p.4, paragraph 17)

- (4) Concurrent tortfeasors: in *Rahman v. Arearose* [2001] QB 351 the Court of Appeal focused on the rationale for s. 1(1) of the 1978 Act. They saw it as curing the potential injustice that can be caused by one concurrent tortfeasor being liable for the whole of the damage. The Court of Appeal stated that the expression “same damage” therefore means the kind of single, indivisible injury that arises at common law in the case of concurrent torts (p. 362);
- (5) The solicitors’ negligence problem: in *Wallace v. Litwiniuk* (2001) 92 Alta LR (3rd) the Court of Appeal of Alberta considered “same damage” in the context of a solicitors’ negligence case. The solicitor in question failed to issue proceedings for personal injury (arising out of a car accident) before the expiry of the limitation period. On being sued by his client for professional negligence, the solicitor issued a third party notice against the driver of the car. The Court of Appeal of Alberta held that no contribution proceedings could be brought because the damage was not the same. The damage for which the negligent solicitor was liable was the loss of a chance to bring personal injury proceedings. The damage caused by the driver was the personal injury itself.⁵

consideration are for the “same damage”. Its usefulness may, however, vary depending on the circumstances of individual cases. Ultimately the safest course is to apply the statutory test”

⁵ Lord Steyn agreed with the conclusion that a negligent solicitor who had caused the loss of personal injury litigation was not liable for the “same damage” as the driver of a car who had caused the personal injuries (cf. *Wallace v. Litwiniuk*)

Royal Brompton Hospital NHS Trust v. Hammond [2002] 1 WLR 1397

13. In *Royal Brompton*, the claimant employer sued its architects, who had granted extensions of time under a building contract. The result of the extensions of time was that the contractor was relieved of its obligation to pay damages in respect of the delay. The certificate of practical completion was issued long after the contractual date of completion. The contractor claimed extra payment from the employer in relation to the delay.
14. The dispute between the employer and the architects went to arbitration, which was compromised on terms that the employer would indemnify the contractor against any claim for compensation made against it (e.g. by the architect). After settling the arbitration, the claimant sued the architects claiming damages for negligence in respect of the issue of the extension certificates and losses caused by advice and instruction to lay a damp-proof membrane. The architect issued Part 20 proceedings against the contractors under the 1978 Act. The contractor applied to strike out the Part 20 notice on the basis that it was not liable for “the same damage” as the architect.
15. The claim for contribution was struck out at first instance by HHJ Hicks QC on the basis that the two claims were not in respect of the “same damage”. The architects appealed to the Court of Appeal but lost. They were then granted permission to appeal to the House of Lords. The most important speeches in the House of Lords were given by Lord Bingham of Cornhill, Lord Steyn and Lord Hope of Craighead.

The approach of Lord Bingham:

16. Lord Bingham’s view of the purpose of the 1978 Act was that while it was intended to widen the classes of contribution claims, it was restrained by the requirement for a “common liability”. He said as follows:

“It is plain beyond argument that one important objective of the 1978 Act was to widen the classes of person between whom claims for contribution would lie and to enlarge the hitherto restricted category of causes of action capable of giving rise to such a claim. It is however, as I understand, a constant theme of the law of contribution from the beginning that B’s claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A. I find nothing in section 6(1)(c) or section 1(1) of the 1978 Act, or in the reports that produced those Acts, which in any way weakens that requirement. Indeed both sections, by using the words “in respect of the same damage” emphasise the need for one loss to be apportioned among those liable.” (p. 1401D-E)

17. Lord Bingham listed the questions which in his view arise from s. 1(1) of the 1978 Act. These are as follows:

- (1) What damage has A suffered?
- (2) Is B liable to A in respect of that damage? and
- (3) Is C also liable to A in respect of that damage or some of it? (p. 1401, G-H)

18. Lord Bingham then emphasised two key points:

- (1) It must be remembered that the “same damage” does not mean “the same damages”;
- (2) The right to contribution depends on the damage for which B is liable to A corresponding (at least in part) with the damage for which C is liable to A.

The approach of Lord Steyn:

19. Lord Steyn took the view that the words “the same damage” should bear their “natural meaning”. He commented that the purposive and enlarged view (such as the one adopted in *Friends Provident*) did not help to interpret the critical words “liable in respect of the same damage”.

20. Lord Steyn’s view was that s. 1(1) of the 1978 Act was deliberately limited in its application. He emphasised that the technique of limiting shared liability to the “same damage” was a “considered policy decision” when the 1978 Act came into force and concluded that the context did not allow an expansive interpretation of “the same damage” to include substantially or materially similar damage. However, whilst emphasising the narrowness of s. 1(1) he concluded that no glosses- whether expansive or restrictive- should be permitted. Instead, the “ordinary and natural meaning” of “the same damage” was the “controlling” factor (p. 1410B-F)

The approach of Lord Hope:

21. Lord Hope emphasised that the starting point for the exercise of considering s. 1(1) of the 1978 Act was the assumption that two or more people had contributed, albeit in different ways, to the same wrong (p. 1414B-C). Lord Hope observed that there was nothing in the 1978 Act that indicated an intention to depart from the assumption that a contribution claim can only be made where a “single harm” has resulted from what various people have done (p. 1417C-D).

22. Lord Hope was careful to note that the issue of whether the damage was the same is a question that should be determined on a careful review of the facts:

“The effect of these words [“liable in respect of the same damage”] is that the entitlement to contribution applies only where the person from whom the contribution is sought is liable for the same harm or damage, whatever the legal basis of the liability. But the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage. The facts must be examined more closely to determine whether or not the damage is the same”

(p. 1417F-G)

The cases following *Royal Brompton*

23. Since *Royal Brompton* there have been two solicitors’ negligence claims considering the meaning of “same damage”. These are considered below.

(a) *Dingles Building (NI) Ltd v. Brooks* [2003] PNLR 8

24. This case arose out of the purchase by property developers of a piece of land owned by a charity (and registered in the name of seven clerical trustees). The contract to sell the land was only signed by one of the priests (“P”). The other trustees contended that P had signed the agreement without authority.

25. The Claimants sued all six reluctant trustees, the trustees’ solicitors and the estate agents who had acted for them, alleging breach of contract, negligence and deceit and lost professional fees. They asked for damages of some £1.6 million. They also claimed the same sum from P, on the basis of breach of warranty of authority.

26. P applied to join the Claimants’ solicitors, (“HG”), alleging that they had been negligent in failing to advise that the contract should be signed by all seven trustees, and that as a result of this negligence the claimants had been left with an ineffective agreement. He alleged that if he were held liable for the claimants’ loss, then HG should be liable to make a contribution under s. 1(1) of the 1978 Act.

27. At first instance, the Judge refused the application on the basis that it had been made too late (which emphasises the importance of getting the timing right) and that s. 1(1) of the 1978 Act did not apply. P appealed. The Court of Appeal in Northern Ireland held that P’s appeal should be dismissed. In essence, their view was as follows:

- (1) The damage for which P was allegedly liable was the claimants’ failure to obtain a valid contract to purchase the land;
- (2) What HG had done was to deprive the claimants of the chance of obtaining the signatures of all of the relevant trustees to the contract for sale.

- (3) The losses were not of the same character. Accordingly, it followed that HG were not liable in respect of the “same damage”.
28. Caswell LCJ set out the history of the proceedings. He recounted that the first instance judge had held that the measure of damages that the claimant might recover from its solicitors, HG, were not the same that it might recover against P. The appeal was brought on the basis that the judge had based his decision on a difference in measure of damages whereas he should have focused on the nature of the damage.
29. P’s argument on appeal was that that the damage caused by the claimant’s solicitors, HG, was the same as the damage he had caused. In both instances, the claimants were left with an agreement for the purchase of land which was worthless because of the want of execution by the requisite number of vendors.
30. Counsel for HG disagreed. He contended that the damage done by HG and P was not the same. The harm done by P was that he did not have the authority to enter into a binding agreement for the sale of the land. The harm done by the solicitors was failure to advise that to make the agreement enforceable it required the signatures of more of the clerical defendants. As a result, the claimants had lost the chance of obtaining the signatures of a sufficient number of trustees (and it was by no means certain that they would have been able to obtain these). In its analysis the Court of Appeal considered the distinction between a solicitor causing the loss of personal injury litigation, and the personal injury itself (as per *Wallace v. Litwiniuk*, see above). The court drew a distinction between (i) HG causing the loss of a chance of successfully obtaining the requisite signatures and (ii) the damage caused by P by entering into an agreement without authority (p. 159)

(b) Luke v. Kingsley Smith & Co (a firm) [2004] PNLR 12

31. In this case, the claimant had left the army in 1995 following an unflattering report from his commanding officer stating that he was not suitable for promotion. He retained Kingsley Smith (“KS”) to sue for malicious falsehood.
32. After several delays, in 2000 the Claimant dismissed KS. He appointed another firm (“W”) who in turn appointed counsel (“A”). On the advice of W and A the proceedings for malicious falsehood were settled for a low figure on the basis of a high probability of a successful application for strike out being made.

33. The claimant sued KS for negligence, alleging that he had lost the chance of a substantial recovery from the MoD. KS then sought a contribution from W under s. 1(1) of the 1978 Act. KS alleged that W had been at fault in advising the claimant to settle his action for so little. W in turn sought a contribution from counsel, A, in relation to the decision to settle.
34. Although the claimant had previously made no complaints against W and A, he also added W and A as defendants to the action (although counsel made clear at the hearing of the Part 24 application that this was done for the sake of caution, that his principal case was that KS was the real cause of the claimant's loss)
35. KS admitted that they were responsible for periods of delay. However, they denied that these delays caused any loss and asserted that their allegations of negligence against W and A broke the causal link between their actions and the alleged loss.
36. W and A argued that they had not been negligent, and that even if they had, they were not liable in respect of the "same damage" as KS. They applied for summary judgment against KS on this point. Davis J dismissed the applications for summary judgment. In reaching his conclusions, Davis J considered the analysis of the House of Lords in *Royal Brompton*. He reminded himself of the emphasis on the fact that only some of the damage has to overlap. He noted that one of the questions to be asked "is whether C is also liable to A in respect of that damage *or some of it*, that the right to contribution depends on the damage, loss or harm for which B is liable to A corresponding, *even if in part only*, with the damage loss or harm for which C is liable to A" (p. 211)
37. Davis J characterised the decision for the court on contribution cases as follows:
- (1) The court's enquiry into whether the "same damage" has been occasioned is "fact sensitive". It is not just a question of law: but a mixed question of fact and law; and
 - (2) The court has to "steer a path between the Scylla of a broad brush approach and the Charybdis of an over-analytical approach;"⁶
 - (3) It is clear from *Royal Brompton* is that "no gloss of the statutory language is warranted" and that the "ultimate task is to apply the language of s.1(1) to the circumstances of each case" (p. 214)
38. Davis J stated that he agreed with the approach of W and A to the following extent:

⁶ This is probably a more realistic description of the exercise than the court's insistence on the simplicity of s.1(1) in cases pre-dating *Royal Brompton*.

- (1) They argued that for there to be contribution the contributors must be subject to a common shared liability. (i.e. there has to be one loss that can be apportioned among those liable);
 - (2) They stressed that the word “damage” was not the same as “damages”, that the word “same” should not be equated with the word “similar” and that the fact that two or more wrongs may lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage. (p. 214)
39. However, Davis J parted company with them when it came to applying this analysis to the facts. W and A submitted that while the allegations of negligence were against KS, W and A were in one broad sense the same (being allegations of professional negligence), the damage said to be caused by KS on the one hand and W and A on the other was different, for the following reasons:
- (1) The analysis depends on the authorities establishing that damage can be caused by delay before a cause of action is actually struck out for delay (see e.g. *Khan v. Falvey* [2002] PNLR 28, *Hatton v. Chafes* [2003] PNLR 24 and now, *Polley v. Warner Goodman* [2003] EWCA Civ 1013⁷);
 - (2) KS caused damage to the action by delaying it and exposing it to strike out for want of prosecution. This had an impact on the value of that action. The claim against KS was for the lost opportunity of bringing the original action untainted by delay and exposure to a strike out application;
 - (3) The damage alleged against W and A was not damage to the original action (since they were not instructed during the period when the delays had occurred). Instead, the allegation was that W and A mishandled the already damaged action that they had inherited. Therefore, the claim against W and A was for the lost opportunity to settle the claim, by reference to its value when they were instructed;
 - (3) Accordingly, there was no single harm for which KS on the one hand, and W and A on the other shared responsibility and which fell to be apportioned between them.
40. Davis J felt unable to accept this analysis in the context of an application for summary judgment, at a number of stages:
- (1) He disputed that the damage had already and separately been suffered by the time what W inherited the action in 2000. Although he saw force in the argument, he was not satisfied that it was the case for summary judgment purpose (and he concluded

⁷ Though there remains the unresolved issue of exactly when such “damage” can first be said to have occurred.

that he could not say on a summary basis that the claimant's action was not necessarily "doomed to be struck out" at this stage (p. 219));⁸

- (2) the damage occasioned to the claimant would not have happened but for both torts. The Judge concluded that the argument that there were two separate torts and separate damage was artificial on the facts before him, and concluded that such an analysis would involve a "complex assessment" for the court.⁹

Summary on the meaning of "same damage"

41. The issue of "same damage" in claims between professionals is up for grabs. The question was not definitively decided in *Luke v. Kingsley Smith* and remains open for a suitable case.
42. S. 1(1) of the 1978 Act is deceptively complex to apply (and Davis J was right in *Luke v. Kingsley Smith* to characterise the task as steering a course between the Scylla of a "broad brush" approach and the Charybdis of an "over-analytical" approach: para. 38). The following issues should be borne in mind:
 - (1) S. 1(1) of the 1978 Act deliberately focuses on the "same damage" rather than the same "damages";
 - (2) Following *Royal Brompton* a relatively restricted interpretation is usually given to the phrase "the same damage";
 - (3) The key point is that there must be a single loss to be apportioned between the parties. The fact that several wrongs lead to a common result does not necessarily mean that the parties are liable for the same damage;
 - (4) The issue is "fact sensitive" and the ultimate task is to apply the language of the 1978 Act to the circumstances of each case: Davis J in *Luke v. Kingsley Smith* (para. 38).

Overall, the question of what is and is not the "same damage" is still very much a matter of debate in the context of claims between professionals and an issue likely to occupy the courts in the years to come.

A.3.2. "Just and equitable" contribution and s 2(1) of the 1978 Act

⁸ See *Khan v. RM Falvey & Co*, *Hatton v. Chafes* and *Polley v. Warner Goodman* on when damage is suffered when a case is liable to be struck out. The argument here revolved around whether it was necessary to say, and when it could be said, that the underlying action was "doomed to failure".

⁹ The courts are often faced with complex assessments: it is difficult to see why this area should be any more difficult for the courts than others.

43. Turning now to the question of deciding the level of contribution between parties, s. 2(1) of the 1978 Act deals with “just and equitable” contribution, and provides as follows:

“.. the amount of contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to that person’s responsibility for the damage in question”

44. The starting point is that the person against whom liability is claimed can rely on any defence that he would have had against the original claimant (s. 2(3)(b) and (c) of the 1978 Act). He can also rely on any limitation on his liability under statute or agreement made prior to the damage occurring (s. 3.3(a) of the 1978 Act).

45. The amount of contribution between parties is a matter for the trial judge to decide and cannot be interfered with unless the judge’s decision was manifestly wrong in the light of the evidence¹⁰. The following general guidance as the practical application of this section can be derived from the following case law/commentary:

- (1) In *Madden v. Quirk* [1989] 1 WLR 702, Simon Brown J noted that the term “responsibility” in s. 2(1) involves considerations of both “blameworthiness” and “causative potency”;
- (2) *Re-source America International Ltd v. Platt Site Services* [2004] EWCA (Civ) 655 provides helpful guidance as to how the courts apply the requirement that the amount of contribution should be “just and equitable having regard to that person’s responsibility for the damage in question”.

46. The following points arising in the specific context of professional negligence claims should also be noted:

- (1) Where two firms of solicitors, who have both delayed in prosecuting a claim are sued, the negligence of the second firm usually has greater causative potency (save for the situation where the action was already so stale when handed to the second firm that it would have been struck out)¹¹ (Jackson & Powell, para. 10-329);
- (2) Contribution claims often arise between solicitors and other professionals. Such claims can give rise to complicated problems with apportionment. The following examples are of use:
 - (a) Contribution claims can easily arise between solicitors and surveyors who have both been involved in a conveyance. One helpful factor to consider is the

¹⁰ *BICC Ltd v. Parkman Consulting Engineers* [2002] BLR 64

¹¹ See the footnote considering *Khan v. Falvey*, *Hatton v. Chafes* and *Polley v. Warner Goodman* above

level of each party's involvement in the overall transaction: *Anglia Hastings & Thanet Building Society v. House & Son* (1981) 260 E.G. 1128¹², and the nature of the particular "problem" (ie legal/property/value/planning etc);

- (b) Claims between solicitors and accountants are also not uncommon (e.g. in relation to schemes to reduce tax liability). The courts have held that it is relevant to consider whether the mistake at the crux of the claim was "legal" or "accounting" in nature. It is necessary to consider who was the party's principal adviser (c.f. claims between solicitors and surveyors, above): *Mathew v. Maughold Life Assurance Co Ltd* (1985) 1 P.N. 142;
- (c) Claims between solicitors and counsel have become more usual:
 - (i) *Moy v. Pettman Smith* [2002] P.N.L.R. 44 is a striking recent example. In this case, the claimant sued the solicitors who had acted for him in personal injury litigation and who had failed to adduce expert medical evidence in time (and in failing to do so, required the permission of the court). At court, the defendant made the claimant an offer to settle that was open for acceptance until the judge came into court. Counsel advised that it should be rejected. However, it soon became clear that the Judge was not likely to allow the expert evidence to be adduced, and the Claimant accepted a lower offer. The Court of Appeal held that the barrister had been negligent in her advice to reject the offer. On apportionment of liability, the Court of Appeal rejected the argument that the barrister was more responsible for the element of the client's loss that would have been avoided if the offer had been accepted (namely, the difference between the offer that was rejected and the offer that was finally accepted). The Court of Appeal found that the barrister and solicitors were equally responsible for this part of the loss (the solicitors by reason of their failure to prepare the evidence on time). This case is helpful in that it displays the need to identify clearly "the same damage" for which both parties are liable: i.e. the barrister was not involved in the damage caused by the solicitors' failure to adduce evidence on time up to the point of advising on the offer at the door of the court (NB. The case has since been to the House of Lords: see further below).
 - (ii) There are also several relevant cases involving the dual legal professions in the wasted costs jurisdiction, e.g. *B. v. B (Wasted Costs)*:

¹² In this case, the valuers' involvement in the transaction was relatively brief. Although the valuation was wildly wrong, Bingham J apportioned liability 30% to the valuers and 70% to the solicitors (who had been involved for much longer)

Abuse of Process) [2001] 1 F.L.R. 843 where Wall J apportioned the wasted costs between solicitors and counsel, with counsel being responsible for 75% (which reflected both seniority and prime responsibility).

A.3.3. S. 1(4) of the 1978 Act and contribution claims post-settlement

47. S. 1(4) of the 1978 Act, which relates to contribution claims once there has been a settlement of previous proceedings, provides as follows:

“A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or was ever liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established”

48. The key points to note are as follows:

- (1) S. 1(4) only relates to payments in settlement (and not settlements for other valuable consideration, e.g. a surrender of rights);
- (2) The 1978 Act is silent as to who bears the burden of proving that a settlement was bona fide (although one would expect the burden to lie on a party challenging the settlement);
- (3) As to the related issues of whether (i) a person who has suffered damage (“A”) and has reached a “full and final settlement” with one party (“B”) may then sue another party (“C”) and (ii) whether C may then bring contribution proceedings against B, the following points should be noted:
 - (a) Issue (i) (i.e. the position between A and C) depends on construing the agreement between A and B and in particular, whether it was merely intended to settle all of A’s claims against B, or whether it was intended to compensate A fully for the losses caused by C as well;
 - (b) Issue (ii) is answered by s. 1(4) of the Act: if A can sue C, then C may also bring contribution proceedings against C.

49. It is necessary to identify the “factual basis” of the Claimant’s claim. This is not always an easy task: sometimes the issue is clear-cut (e.g. in a case of negligent misrepresentation, what the person is alleged to have said is a question of fact) but other cases can give rise to difficulties (e.g. in an allegation of negligence, it is difficult to identify where fact stops and law begins).

50. The next point to note is that a party claiming contribution must show that had the factual basis of the claim been resolved against him, then issues of law as to liability would also have also been resolved against him. (In other words, he must show what the legal consequences would have been of the allegation of fact). In *Dubai Aluminium v. Salaam* [2002] 1 All ER 97 a solicitor (“A”) was sued on the basis that he had dishonestly assisted in a breach of trust. A and his partners (who were alleged to be vicariously liable) settled with the claimant. The court considered whether A’s innocent partners could seek contribution from other parties. This entailed considering whether the allegations of fact pleaded against the innocent partners could amount to liability in law. The House of Lords held that the partners would have been vicariously liable for A, and therefore could seek a contribution.¹³
51. A party seeking contribution also needs to show that the quantum of the settlement entered into was reasonable, and this should be borne in mind when entering into any settlement (see further below).
52. A further issue arises in relation to claiming contribution for costs. It appears to be accepted that these can form part of a settlement sum for the purposes of s. 1(4): see *BICC Ltd v. Parkman Consulting Engineers* [2002] BLR 64 (where the Court of Appeal decided that they could be recovered either under the 1978 Act or as part of the court’s inherent costs jurisdiction).

A.3.4. S. 1(5) of the 1978 Act and contribution claims post judgment:

53. S.1(5) of the 1978 Act relates to contribution claims once there has been a judgment in previous proceedings, and provides as follows:

A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings as to any issue determined by that judgment in favour of the person from whom the contribution is sought”

54. S. 1(5) gave rise to an interesting point in *Moy v. Pettman Smith* [2005] 1 WLR 581 (see the facts set out above). At first instance, the judge decided that the solicitors had been negligent but dismissed the claim against counsel. The solicitors appealed against the judge’s decision to dismiss the claimant’s claim against counsel, and their contribution

¹³ There is a view that the approach taken in this case was wrong: the question of whether a guilty partner is acting in the course of a firm’s business is a question of fact, not law. Therefore, it is arguable that there was no question of law for the court to decide.

claim against her. By a respondent's notice, counsel relied on s. 1(5) of the 1978 Act as barring the claim against her. The House of Lords held that s. 1(5) should not be construed so as to bar an appeal in the case, either by interpreting the word "judgment" to refer to a final judgment after any relevant appeals, or by confirming that s. 1(5) was confined to subsequent actions (see pp. 603-604).

B. Practical considerations

B1. Timing issues

55. Ideally, potential Part 20 defendants should be involved at an early stage. The reasons for this are various, e.g.:
- (1) To reduce the scope for the Part 20 defendant challenging a settlement on the basis that it was unreasonable,
 - (2) To prevent costs being unnecessarily incurred (and in this regard, the pre-action protocols should be borne in mind);
 - (3) To prevent applications being made too late, or at an inopportune moment. A good example of this is *Dingles Building v. Brooks* both the trial judge and the Court of Appeal in Northern Ireland took the view that the application to join a Part 20 defendant had been made too late. The Court of Appeal was particularly concerned that the effect of allowing the application would be to create a conflict of interest between the claimants and their solicitors at a sensitive moment in the main litigation (p. 160).
 - (4) To allow all parties to consider the most appropriate forum: e.g. whether arbitration would be simpler and less expensive than litigation.

B.2. Pleading issues

56. When acting for a defendant in circumstances where it is likely that the defendant will make a claim for contribution, careful thought needs to be given to the contents of the defence. For example, in circumstances where the defence contends that the chance the claimant has alleged to have lost was only of negligible value, the defendant may run into difficulties justifying the quantum of any settlement when it comes to contribution proceedings. The fact that the defence will carry a statement of truth may make it very difficult for the

defendant to justify that the settlement it entered into was reasonable. To avoid this pitfall, care needs to be taken to identify the real adversary: if the crux of the claim will be in the contribution proceedings, then the defendant's defence against the claimant should not jeopardise this. (The defendant in *Luke v. Addy*, KS, encountered particularly acute difficulties in this regard at full trial when taking an assignment of the claimant's cause of action against W and A.)

B.3. Settlement issues

57. The points set out below should be borne in mind when settling.
58. First, thought must always be given to whether there are potential contribution claims. For example, in circumstances where defendant solicitors settle with a claimant, and there is a chance that the claimant may then sue another professional, who may bring the defendant solicitors into those proceedings by means of a contribution claim, consideration should be given to obtaining an indemnity from the claimant.
59. Second, where the party who is settling is considering making a contribution claim against another person, then the following issues are important:
- (1) It would be wise to break down a settlement figure into its component parts (and this is especially important where the party who will be seeking a contribution is liable for greater damage than the party against whom a contribution will be sought);
 - (2) A settlement should contain a separate figure for costs;
 - (3) Some settlements may be difficult to value in monetary terms, e.g. if they contain confidentiality clauses, or a surrender of rights;
 - (4) Careful consideration needs to be given to the issues of law that might be brought up in a contribution claim so as to defeat it (see section A.3.3. above on s. 1(4) of the 1978 Act);
 - (5) Limitation should also be considered. A claim for contribution must be brought within 2 years of judgment or settlement of the original action: s. 10 of the Limitation Act 1980; ¹⁴

¹⁴ The fact that by the time contribution proceedings are issued, the person from whom contribution is sought would have a limitation defence against the original claimant does not provide a defence unless the defence barred the right and not the remedy. Remember that the s. 14B "longstop" bars the right

- (6) The co-operation of the original claimant should be secured, if possible (e.g. to waive confidentiality over a mediation or other negotiations for settlement, or to agree to the use of otherwise confidential documents).

B.4 Trial issues: marry or divorce?

60. This is another example of having to take care to identify the correct adversary. If there is a strong defence to the claimant's case, then it may be preferable for defendants with contribution claims against one another to "marry" at trial. Conversely, the real dispute may be between the defendant and the party against whom he is seeking contribution in which case it is preferable for the defendant to bear in mind the way in which claimant articulates his claim at trial, and whether he has any influence over this).
61. There can be real pitfalls in failing to identify the real adversary at an earlier stage, e.g. in relation to expert evidence (if two professionals share an expert, and then become involved in a dispute with one another, this can cause thorny problems in relation to that expert evidence).

Conclusion

62. Claims between professionals are a fertile source of professional liability litigation. However, they require to be handled with care. Before embarking on a claim against another professional, questions as diverse as (i) jurisdiction, (ii) the allegations of fact and law to be made (and their impact on both the main proceedings and the contribution proceedings) and (iii) tactics and procedure all need to be addressed and as early as possible.

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