

Twenty Years Forward, Twenty Years Back – A Legal Review
Outline of a Talk to the Professional Indemnity Forum Conference

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Summary

1. I have been asked to speak about the period 1996 to 2036 in relation to the law of claims against professionals. This is quite a long time.
2. *Twenty Years Back.* As to the past, there is a lot of material, and I would like to make some suggestions as to broad trends. For practical purposes, in addressing the insurance community I think these trends can usefully be divided into two categories: (i) trends favourable to claimants, and (ii) trends favourable to defendants/insurers. I will address categories (i) and (ii) separately below.
3. *The Future.* As to the future, it is impossible to make accurate predictions, but some tentative suggestions can be made on the basis of existing trends. Also, one marked development over the last 20 years has been the growth of mediation. If there is time I would like to mention, and ask the audience for their views about, the revised Professional Negligence Adjudication Scheme, recently re-launched with the blessing of Lord Justice Briggs. This is an alternative to mediation. It remains to be seen how much, if at all, it will be used.

Some possible future developments relevant to Professional Liability claims

4. *Robots.* A recent book by Richard and Daniel Susskind² suggests that robots will replace professionals in almost all areas of life. The Susskinds do not, however, suggest a timetable as to when this will happen. As I have been asked to focus on developments in the case law, I will not deal with this topic.
5. *Briggs report, and fixed costs.* It is understood that Lord Justice Briggs will deliver his final report on civil justice this month, but it will then have to be considered by the senior judges. I am not aware of any timetable for implementation. Further, proposals for fixed costs in civil claims, possibly including claims worth up to £250,000, are being considered by the Ministry of Justice, but it is possible that for some time the Ministry may be too busy dealing with Brexit to do much work on anything else. And, again, I am asked to focus on the law, not costs.

¹ I am grateful to my colleagues Alicia Tew, David Story and Spike Charlwood for discussions re this talk.

² *The Future of the Professions* (2015).

6. *Lenders' claims.* Much of the development of the law of professional negligence over the last 20 years has been driven by two rounds of lenders' claims against solicitors and valuers. We now appear to be reaching the end of the round of claims arising from the global financial crisis of 2007/8, though it is possible that the result of the Brexit vote may be that the UK economy and property market will suffer downturns which could generate a new round of claims. Bearing that in mind I will mention some relevant recent cases.

Past Trends: (i) Developments favourable to Claimants

7. In the past experts such as professionals may have been treated with great respect and deference. Those days are gone. As a result, the 19th century approach, whereby for example solicitors could be liable to clients only for gross negligence, was replaced with the *Bolam* test whereby professionals were liable only if they acted in a way in which no reasonably competent professional could act. The judges are influenced by the spirit of the times, which is now less deferential towards professionals.³
8. *The Bolam test.* In the context of medical negligence, it was previously the case that, so long as a reasonable school of medics would have acted as the defendant doctor did, then doctor was not liable. That approach, however, was overturned in *Montgomery v Lanarkshire Health Board*.⁴ The Supreme Court held that an obstetrician who failed to give a pregnant woman advice about the risks she faced in childbirth was in breach of duty, even though a respectable body of medical opinion would have done the same as the defendant. The duty to ensure that the patient had been told of significant risks was more important than the views of the supporting body of medical experts.
9. In effect, therefore, the court was saying that, regardless of what one respectable school of medical opinion would have done, the court would decide whether there had been a breach of duty. It suggests the primacy of the need to ensure that a patient or client gives informed consent to treatment. This is a significant watering down of the test for proving liability in medical cases. It may spill over into the non-medical field, though it might be thought that, in at least some areas such as conveyancing claims, in practice the test of liability is already fairly pro-claimant.
10. *Loss of blanket immunities.* In the last 20 years, the immunity from suit of barristers appearing in court (*Hall v Simons*, 2002), and experts giving evidence in court (*Jones v Kaney*, 2011), have been removed by judicial decision. This is consistent with the general trend of exposing professionals' work to greater scrutiny.

³ See Lord Justice Jackson, *The Professions: Power, Privilege and Legal Liability*, address to the Professional Negligence Bar Association on 21 April 2015.

⁴ [2015] AC 1430.

11. *Limitation*. The law of limitation is an unnecessarily complicated. This is probably because judges have been sympathetic to claimants' attempts to argue that, although their time for bringing a claim in contract has expired, nevertheless they have a cause of action in tort as well, damage was suffered later in tort, and so the claim has been brought within time⁵. Hence there are numerous cases about when recoverable damage in tort is first suffered. This area of the law would be considerably simplified if the government were to accept the Law Commission's proposals that the basic limitation period should be 3 years from the date when the claimant did or could have had the knowledge required to bring a claim, with a 10 year longstop for bringing claims. The government has not done so. As a result the longstop is still 15 years, and we still have to apply the law about when damage in tort was first suffered.
12. *Concurrent liability*. The attempt to help claimants in relation to limitation has probably driven the move to hold that professionals are liable not only in contract but also in tort (*Midland Bank v Hettys Stubbs & Kemp*, re solicitors, 1979; *Henderson v Merrett*, re Lloyd's Agents, 1995). But, as Lord Justice Jackson has argued⁶, the principal liability of a professional is usually in contract, and, if the law of limitation in contract is thought to be unsatisfactory, one answer might be to address that problem directly by reforming the law of limitation in contract, as suggested in the previous paragraph, rather than changing rules of liability for professionals in ways that impact not only on limitation but also on other legal concepts such as remoteness of damage (see below).
13. *The role of equity, and lenders' claims*. In the area of lenders' claims against solicitors, there is a tension between (i) cases decided by those who are not equity lawyers, which tend to suggest that liability in equity should not go any further than liability in contract, since the contract is what gives rise to the solicitor's retainer in the first place (see eg *AIB v Redler*, 2014), and (ii) cases decided by those who are steeped in equity, who have no difficulty with the notion that liability in equity is largely different from, and much more extensive than, liability in contract (*Santander v RA Legal*, 2014, *Purrunsing v A'Court*, 2016). If there is another round of lenders' claims, this tension will, I suggest, be the subject of further case law⁷.
14. In the last few days the Court of Appeal has handed down a further pro-claimant decision in a lender's claim against valuers: *Tiuta International Ltd v De Villiers Surveyors Ltd* (1 July 2016). In early 2011 the defendant valuer valued property, non-negligently, and as a result the lender lent £2.21m. In December 2011 the valuer again valued the property. It had to be assumed that the second valuation was

⁵ Lord Justice Jackson, PNBA lecture (above).

⁶ "DAMAGE LIMITATION IN THE 21ST CENTURY - Remoteness and Scope of Duty revisited", lecture to TECBAR on 28 April 2014.

⁷ Another pro-claimant decision in the field of lenders' claims, albeit on the basis of implied contractual duty rather than equity, is *Goldsmith Williams v E Surv* (2015). In the conveyancing negligence field, *Various Claimants v Giambone* (2015) is a further decision favourable to claimants, but the Court of Appeal has granted permission to appeal and so the status of that decision is uncertain.

negligent. The lender lent £2.84m in reliance on the second valuation, *but* £2.56m of that was used to pay off the lending made in reliance on the first, non-negligent, valuation. The defendant argued that the £2.56m was paying off a loan to which the lender was already committed, and for which the defendant could not be blamed, so that the lender could not recover damage in respect of paying off the £2.56m. The majority in the Court of Appeal disagreed, but I understand there may be an appeal to the Supreme Court.

Past Trends: (ii) Developments favourable to Defendants/Insurers

15. The overall picture of the law of professional liability is, however, not one of complete doom and gloom for defendants and their insurers.
16. *Extent of the retainer.* In *Mehjoo v Harben Barker* (2014), the Court of Appeal allowed an appeal and held that a non-specialist accountant did not have a duty to advise a wealthy client to try to save capital gains tax by claiming to be non-domiciled in the UK. The court focussed on the terms of the retainer, holding that there was no duty to go beyond those terms. So again, note the focus on the retainer/contract.
17. Further, in *Minkin v Landsberg* (2015), a divorcing wife reached agreement with her husband on settlement of their financial disputes. She engaged the defendant solicitors to put the agreement into binding legal form, which they did. The Court of Appeal rejected an argument that the defendants had a duty to go further and advise her against entering into the settlement deal at all. This is another example of focussing on the terms of the contract/retainer, and not imposing obligations which go beyond it. It was motivated in part by the point that in today's environment of funding cuts clients often cannot afford to pay solicitors to provide anything more than a minimal service.
18. *Saamco.* Probably the most important decision in professional negligence law in the last 20 years has been that in *Saamco v York Montague* (1997), which tends to reduce the extent of liability, in favour of defendant professionals. That case has been the subject of many talks and there is no need to discuss it further here. There was an attempt to row back on *Saamco* by the appeal to the Supreme Court in *Gabriel v Little*. The Supreme Court granted permission to appeal, but it looks as if the appeal may not proceed, so that *Saamco* survives for the moment
19. *Remoteness of damage.* There are different tests for remoteness of damage in tort and contract: in summary: (i) tort: was damage of the kind suffered reasonably foreseeable if the defendant was negligent? (ii) contract: was the damage suffered (a) such as would arise naturally from the breach of contract or (b) in the contemplation of the parties at the time when they made the contract as the probable result of the breach of it? The contractual test is generally thought to be more restrictive of recoverable loss,

and thus more helpful to defendants. In the solicitors case of *Withers v Wellesley* [2015], the Court of Appeal had to decide which test applied to solicitors who owed the claimant duties in both contract and tort. The court ruled that it should be the contractual test. Here, too, therefore, there is an emphasis on contract rather than tort as the principal source of professional liability.

The Future

20. It seems likely that there will be further attempts to water down the *Bolam* test, but the recent emphasis on contract, in terms of the extent of the retainer and the test for remoteness, may enable defendants to keep these in check.

Adjudication

21. In May 2016, with the support of the Ministry of Justice, Lord Justice Briggs, and representatives of both claimants and insurers, a revised version of the Professional Negligence Adjudication Scheme was launched. See www.pnba.co.uk for details. This is intended to provide a cheap, fast and non-binding mode of trying professional negligence cases by barristers specialising in the field. It is certainly an alternative to mediation, though it is too early to say whether parties will find it a useful addition to the armoury of alternative dispute resolution.

William Flenley QC, 4 July 2016.

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William Flenley QC has been listed by the legal directories as a leading barrister in professional negligence for many years. He was Chairman of the Professional Negligence Bar Association from 2013 until 2015. He is co-author of *Solicitors' Negligence and Liability* (Flenley & Leech, 3rd edition), and a Bencher of the Middle Temple. Recent cases (all for defendants) include *Harding Homes v BDB* (2015), a 2 week trial in which his clients admitted liability but proved that no damage had been caused, thus being awarded all the costs; *Purrusing v A'Court* (2016), a case on identity fraud which has been the subject of a number of articles in the legal press; and *Various Solicitors v Giambrone*, a managed case involving 100 conveyancing claims, tried in 2015 and going on appeal in 2017. He is also instructed as an arbitrator and mediator. He read law at Oxford and Cornell Universities, and has taught at the LSE.