Professional Negligence in the Construction Field

Finola O'Farrell Q.C.
Keating Chambers
clerks@keatingchambers.com

Construction professionals, as with other professionals, may be liable to their clients and third parties for damage and loss caused by the professional's negligence. The starting point in any professional negligence claim is to consider whether the losses are recoverable in contract. However, liability in tort becomes important where the contractual route is unavailable: where the arrangement of commercial transactions results in no direct contractual relationship between the parties, where one of the parties has become insolvent or where the limitation period in contract has expired.

Not every careless act or fault on the part of a professional gives rise to liability in negligence, even where damage is sustained by another as a result.[1] In order to establish a claim in negligence, it is necessary for a claimant to satisfy the following requirements:

- The existence in law of a duty of care
- Behaviour that falls below the standard of care imposed by law
- A causal connection between the defendant's conduct and the damage
- Damage falling within the scope of the duty

This paper examines the circumstances in which a duty of care in tort will arise, the basis on which damages are recoverable in the event of a breach of such duty and the impact of recent developments in this area on construction claims.

[1] Donoghue v Stevenson [1932] AC 562 (HL) per L.Atkin p.580: "...acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy."

1. The circumstances in which a duty of care will arise

In the case of personal or physical injury, reasonable foreseeability of harm is usually sufficient to give rise to a duty of care in accordance with the "neighbour" principle established in Donoghue v Stevenson[2]. However, many construction cases involve claims for economic loss and in such circumstances the test is less straightforward because of limitations driven by policy considerations. An additional complicating factor in construction cases is the contractual matrix which has a significant effect on the scope of any tortious duty of care.

1.1 The fall of Anns

The high point for lawyers seeking to establish a duty of care in tort was reached in 1978 with the decision of the House of Lords in Anns v. Merton[3], setting out a simple, two stage test as to when a duty of care, including a duty not to cause economic loss, would be owed in tort. Lord Wilberforce expressed the test as follows[4]:

> *"...in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in **two stages**. **First** one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient **relationship of proximity or neighbourhood** such that, in the **reasonable contemplation** of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty of care arises. **Secondly**, if the first question is answered affirmatively, it is necessary to consider whether there are **any considerations which ought to negative or reduce or limit the scope of the duty or the class of person** to whom it is owed or the damages to which a breach of it may give rise."*

However, following a flood of claims throughout the 1980s, the tide turned and in 1990 seven members of the House of Lords swept away over ten years of legal authority by departing from Anns in Murphy v. Brentwood[5] and Department of Environment v. Thomas Bates[6], giving judgment in both on the same day.

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[2] Supra per L.Atkin p.580
[3] [1978] AC 728
[4] pp.751-752
[5] [1991] 1 A.C. 398
[6] [1991] 1 A.C. 499

Both Murphy (claim by subsequent purchaser against local authority for negligent approval of plans for foundations) and Bates (claim by lessees against builder for negligent construction of load-bearing pillars) involved claims for economic loss in negligence and both claims failed. In Murphy Lord Oliver stated[7]:

> *"I have found it impossible to reconcile the liability of the builder propounded in Anns with any previously accepted principles of the tort of negligence and I am able to see no circumstances from which there can be deduced a relationship of proximity such as to render the builder liable in tort for pure pecuniary damage sustained by a derivative owner with whom he has no contractual or other relationship."*

Since the builder owed no such duty, there was no basis on which the local authority could owe a duty.

These landmark rulings did not affect the ability of a future occupier of a building to recover damages against a construction professional where the professional's negligence caused personal injury or damage to other property[8]. However, in cases of economic loss, damages were generally irrecoverable in tort against a professional unless the claim could be brought within the concept of negligent misstatement set out in Hedley Byrne v Heller & Partners[9]. In Murphy Lord Oliver explained that economic loss would not be recoverable in negligence where the loss was too remote or where it would be impossible to contain liability in other cases within acceptable bounds (the "floodgates" argument) but[10]:

> ***"The critical question ... is not the nature of the damage in itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained****...The essential question which has to be asked in every case, given that damage which is the essential ingredient of the action has occurred, is whether the relationship between the plaintiff and the defendant is such – or, to use the favoured expression, whether it is of sufficient "proximity" - that it imposes upon the latter a duty to take care to avoid or prevent that loss which has in fact been sustained."*

Beyond British shores, in the jurisprudential Commonwealth, however, things were different. The two stage test in Anns continued to find favour and the reasoning in Murphy was not followed:

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[7] p.489B

[8] Baxall Securities Ltd v Sheard Walshaw Partnership [2002] BLR 100 (CA); Bellefield Computer Services Ltd v E Turner and Sons Ltd [2003] TCLR T159 (CA); Sahib Foods Ltd v Paskin Kyriakides Sands 93 Con LR 1 (CA); Pearson Education Ltd v Charter Partnership Ltd [2007] BLR 324 (CA) – in Pearson the Court of Appeal doubted the principle in Baxall that such duty was confined to cases where the defect was patent

[9] [1964] AC 465 (HL)

[10] p.485

- In Australia, in Bryan v. Maloney[11], the High Court held that a builder of a house owed a duty of care to a subsequent purchaser of the house which extended to a duty not to cause economic loss (the diminution in value of the property built on inadequate foundations).

- In Invercargill City Council v. Hamlin[12], the New Zealand Court of Appeal declined to follow Murphy, finding a local council liable for the cost of repairs to the foundations of a house for which it had approved the plans. The decision was upheld in the Privy Council[13], their Lordships accepting that New Zealand was entitled to develop the common law in its own way and for its own circumstances.

- In Winnipeg Condominium Corp v. Bird Construction Co[14], the Supreme Court of Canada also declined to follow Murphy, holding that a contractor could be liable in tort to a future owner in respect of the cost of remedying a defect which posed a real and substantial danger to the occupants of the building.

- In Singapore, in RSP Architects Planners and Engineers v. Ocean Front Pte Ltd[15], the Court of Appeal also declined to follow Murphy and held that developers owed a duty of care not to cause economic loss to the management corporation which had taken over the management and administration of a condominium.

- Malaysia initially appeared to follow Murphy[16] but in Dr Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants[17] and then again in Steven Phoa Cheng Loon v. Highland Properties[18], James Foong J. held that architects, engineers etc. could owe a duty not to cause economic loss. In the former case[19] he stated:

> *"To adopt the decisions in Murphy and D&F Estates which are based on a foreign policy of no application here would leave the entire group of subsequent purchasers in this country without relief against errant builders, architects, engineers and related personnel who are found to have erred."*

[11] (1995) 128 ALR 163
[12] [1994] 3 NZLR 513
[13] [1996] A.C. 624
[14] (1995) 121 DLR (4th) 193
[15] [1996] 1 SLR 113
[16] Kerajaan Malaysia [1993] MLJ 439; Teh Khem On v. Yeoh & Wu Development Sdn Bhd [1995] 2 MLJ 663.
[17] [1997] 3 MLJ 546
[18] [2000] 4 MLJ 200
[19] p.565

More recently, there have been indications that other common law jurisdictions are moving away from the Anns test[20] but in Spandeck Engineering (S) Pty Ltd v Defence Science & Technology Agency[21] the Singaporean Court of Appeal proposed a single test comprising legal proximity and policy considerations together with factual foreseeability.

1.2 The Tide Turns Again - Assumption of Responsibility

The decision in Murphy expressly preserved the principle that economic loss could be recovered for negligent misstatement, explained by Lord Morris in Hedley Byrne v Heller & Partners[22]:

> *"...it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise."*

See also Lord Reid[23]:

> *"There must be something more than the mere misstatement ... The most natural requirement would be that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility."*

And Lord Devlin[24]:

> *"...the categories of special relationships which may give rise to a duty to take care...include ... relationships which ...are 'equivalent to contract', that is where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract."*

In Henderson v Merrett[25] it was held that a duty of care in tort was owed by managing agents to Lloyd's names to avoid economic loss regardless whether there was any direct contractual arrangement between them. Lord Goff[26] considered the ambit of Hedley Byrne and the test to be applied to determine the circumstances in which such a duty of care would arise:

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[20] Woolcock Street Investments v CDG Pty Ltd [2005] BLR 92 (Australia); Diesel SE Asia Pte v P T Bumi International Tankers (2005) 21 Con LJ 126
[21] (2007) 114 Con LR 167; Amirthalingam *Refining the duty of care in Singapore* (2008); Leng *The search for a single formulation for the duty of care: back to Anns* (2007)
[22] [1964] AC 465 (HL) pp.502-503
[23] p.483
[24] p.529
[25] [1995] 2 AC 145
[26] pp.180-181

> *"We can see that it rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature. All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other… though Hedley Byrne was concerned with the provision of information and advice, the example given by Lord Devlin of the relationship between solicitor and client, and his and Lord Morris's statements of principle, show that the principle extends beyond the provision of information and advice to include the performance of other services… there is no problem in cases of this kind about liability for pure economic loss; for* ***if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services****. It follows that, once the case is identified as falling within the* Hedley Byrne *principle, there should be no need to embark upon any further enquiry whether it is "fair, just and reasonable" to impose liability for economic loss..."*

This principle has been applied in the Technology and Construction Court in England[27], with one notable exception[28], and has led to the view that a construction professional will owe a duty of care, extending to a duty not to cause economic loss, concurrent with his contractual duties, to his client. However, as discussed below, there is as yet no consensus on the applicable test or tests.

1.3 The Test for a Duty of Care

> *"There is a tendency, which has been remarked upon by many judges, for phrases like "proximate", "fair, just and reasonable" and "assumption of responsibility" to be used as slogans rather than practical guides as to whether a duty should exist or not. These phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance".*[29]

It is generally accepted that the development of any area of law should be founded on some rational set of principles that does not depend solely on the length of the Lord Chancellor's foot. However, the courts have struggled to find a universal test to determine whether a duty of care situation will arise and we have seen the development of a number of tests, greeted with differing levels of enthusiasm, none of which has gained superiority.

[27] Storey v Charles Church Developents Ltd (1996) 12 Con LJ 206; Tesco Stores v Costain [2003] EWHC 1487; Mirant Asia- Pacific Construction (Hong Kong) v Ove Arup and Partners International (No.2) (2005) 97 Con LR 1
[28] Payne v Setchell [2002] BLR 489 – this case is difficult to reconcile with Henderson and is probably wrong
[29] Commissioners of Customs and Excise v Barclays Bank plc [2007] 1 AC 181 per L.Hoffmann

Assumption of Responsibility

In Hedley Byrne and Henderson the Court stated that the basis for the imposition of a duty of care in economic loss cases was the voluntary assumption of responsibility by the defendant to the claimant. This has been followed in a number of cases, including:

- Spring v Guardian Assurance plc[30] (duty of care owed by employer to former employee in providing reference)
- White v Jones[31] (duty of care owed by solicitor to intended beneficiaries under a will)
- Williams v Natural Life Ltd[32] (duty of care owed by director to potential franchisee).

Threefold Test

The threefold test was stated by Lord Bridge in Caparo Industries plc v Dickman[33]:

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the laws as one of 'proximity' or 'neighbourhood' and the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."*[34]

The following elements must be established:

- Foreseeability of damage;
- Proximity;
- Fair, just and reasonable to impose a duty of care.

The threefold test has gained wide support in the House of Lords, including the following cases:

- Smith v Bush[35] (duty of care owed by surveyors to prospective mortgagors)
- Spring v Guardian Assurance plc[36] (see above)

[30] [1995] 2 AC 296 per L.Goff pp.316-319
[31] [1995] 2 AC 207 per L.Goff p.268; L.Browne-Wilkinson pp.270 & 274; L.Nolan pp.293-4
[32] [1998] 1 WLR 830 per L.Steyn p.834
[33] [1990] 2 AC 605 pp.617-8
[34] Lord Oliver also referred to this three-stage test at [633] and Lord Jauncey at [658].
[35] [1990] 1 AC 831 per L.Griffiths pp.864-5

- Sutradhar v National Environment Research Council[37] (duty of care not owed by Council to population of Bangladesh)

Incremental Test

The incremental test was set out by Brennan J in Sutherland Shire Council v Heyman[38]:

> *"It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed".*

It has been criticised for stifling the development of a rational basis for imposing liability and creating incohesive "pockets" of law[39] but it has been approved by the House of Lords:

- Caparo v Dickman[40]
- Murphy v Brentwood DC[41]
- Marc Rich v Bishop Rock Marine Co Ltd[42]

Holistic Test

However, the usefulness of such tests has been called into question[43], most recently in Customs and Excise Commissioners v Barclays Bank[44]. In that case, the Commissioners claimed damages against the Bank for releasing the funds of a client in breach of freezing injunctions. In holding that the Bank did not owe the Commissioners a duty of care in relation to the loss that they had sustained, the House of Lords stated that the tests that had evolved disclosed no common principle that could be used to determine the existence of a duty of care. Their Lordships criticised the tendency for the duty of care tests to be used rigidly rather than as practical guides

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[36] [1995] 2 AC 296 per L.Lowry pp.325-6; L.Slynn p.333; L.Woolf p.342
[37] [2006] 4 All ER 490 per L.Hoffmann Para.32
[38] (1985) 157 CLR 424 p.481
[39] Stapleton J: *Duty of care and economic loss: a wider agenda* (1991)
[40] [1990] 2 AC 605 per L.Bridge p.618
[41] [1991] 1 AC 398 per L.Keith p.461
[42] [1996] AC 211 per L.Steyn p.236
[43] For a view that advocates that only one duty of care exists based on fault and causation see Howarth (2006)
[44] [2006] 1 AC 181

and placed a renewed emphasis upon policy factors and a multi-test approach to the factual context of the claim:

- The assumption of responsibility test is a sufficient precondition of the existence of a duty, but not a necessary one[45].
- The assumption of responsibility test must be applied objectively and the further away one moves from a quasi-contractual situation the closer one gets to the threefold test[46].
- In novel cases there is no simple test that can be applied[47].
- The incremental test is of little use of itself and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation.[48]
- Regardless of the test used, in each case attention should be focussed on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole[49].

This holistic approach was adopted in Rice v Secretary of State for Trade and Industry[50] where May LJ warned against applying any test too rigidly:

> *"… there are other ways in which the same essential conceptual approach may be articulated…. it is often, in my view, helpful to ask whether a defendant is to be taken to have assumed responsibility to the claimant to guard against the injury or loss for which the claimant claims damages; or, more simply, whether in the circumstances the law recognizes that there is a duty of care … proximity is convenient shorthand for a relationship between two parties which makes it fair and reasonable one should owe the other a duty of care."*

The decision in Barclays has already been applied in a number of cases[51] but it is questionable whether the House of Lords approach can truly lead to anything other than a *morass of single instances*.[52]

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[45] per L.Bingham Para.4; L.Roger Para.52; L.Walker Para.73; also: Stanton K. *Hedley Byrne and Heller: the relationship factor* (2007)
[46] per L.Bingham Para.5; L.Mance Paras.85-87
[47] per L.Bingham Para.6; L.Hoffmann Para.35; L.Roger Para.53; L.Walker Para.71; L.Mance Para.93
[48] per L.Bingham Para.7
[49] per L.Bingham Para.8; L.Mance Para.83
[50] [2007] EWCA Civ 289 Para.22
[51] Rowley v Secretary of State for the Department of Work and Pensions [2007] 1 WLR 2861 (CA); Calvert v William Hill Credit Ltd [2008] EWHC 454 (Ch)

2. Impact on Cases concerning Construction Professionals

Henderson clarified that professionals owe their contractual clients a concurrent duty of care in tort in relation to the provision of their services. However, any tortious duty may not be co-extensive with the contractual duty. In exceptional circumstances the professional's duty in tort will extend further than their contractual duty[53] but it is more common for the contractual arrangements to limit or exclude any duty of care as explained by Lord Goff in Henderson:[54]

> *"My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded..."*
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> *...in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties... Let me take the analogy of the common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers... there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility. This was the conclusion of the Court of Appeal in Simaan General Contracting Co. v. Pilkington Glass Ltd. (No. 2) [1988] Q.B. 758..."*

In Riyad Bank v Ali United[55] the Court of Appeal considered whether the existence of a contractual chain (and in particular, the deliberate decision of the parties to the action not to enter into direct contractual relations) prevented the imposition of a duty of care. The Second Claimant (RBE), a wholly owned subsidiary of the First Claimant (Riyad Bank), entered into an agreement with the Defendant (UBK) for UBK to provide financial services in connection with the

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[52] See: Morgan J. *The rise and fall of the general duty of care,* (2006); the failure to find a universal test for the imposition of a duty of care was recently criticised by the Singaporean Court of Appeal in Spandeck Engineering v Defence Science and Technology Agency (2007) 114 Con LR 166 at Para.80

[53] Holt v Payne Skillington (1995) 77 BLR 51 - surveyors were retained to advise purchasers on matters which did not include planning matters but they chose to give free advice on planning and the Court found that in such circumstances a duty of care would be owed in tort but not in contract.

[54] [1995] 2 AC 145 pp.193 & 195-196

[55] [2006] 2 Lloyd's Rep 292

development of a Sharia compliant investment fund. The Third Claimant (the Fund) was set up as a separate entity on the advice of UBK in order to attract Saudi investors. The investment was unsuccessful and the Fund suffered losses.

The principal issue which came before the Court of Appeal was whether the deliberate construction of a contractual chain that did not include a direct contract between UBK and the Fund prevented the imposition of a duty of care in tort. A number of cases[56] and academics, such as Stapleton[57], have advocated the view that a tortious duty should not be imposed where the claimant *could* have taken the opportunity to protect its position by contract, but failed to do so. However, the Court of Appeal held that there was no presumption against the existence of a duty of care where there was a separate contractual chain, particularly where the arrangements differed from the traditional chain envisaged by Lord Goff in Henderson. This was explained by Neuberger LJ:[58]

> *"If a duty of care would otherwise exist in tort, as part of the general law, it is not immediately easy to see why the mere fact that the adviser and the claimant have entered into a contract, or a series of contracts, should of itself be enough to dispense with that duty. If a claimant is better off relying on a tortious duty, it is not readily apparent why a claimant who receives gratuitous advice should be better off than a claimant who pays for the advice (and therefore would normally have the benefit of a contractual duty), unless, or course, the contract so provides."*

This issue was considered recently by the TCC in Biffa Waste Services v Maschinenfabrik Ernst Hese[59]. The Council entered into a PFI Contract for a recycling facility with the First Claimant who entered into a back-to-back contract with the Second Claimant. The Defendant Contractor was engaged by the Second Claimant to design and build the facility. The Contractor gave a direct warranty in favour of the First Claimant under which the Contractor's liability to the First Claimant was limited to that which the Contractor owed to the Second Claimant. The Contractor entered into a number of sub contracts. A fire occurred as the result of negligence on the part of sub-contractors who became insolvent. In holding that the Contractor owed a duty of care in tort

[56] Simaan General Contracting Co v Pilkington Glass Ltd (No 2) [1988] QB 758; Pacific Associate Inc v Baxter [1990] 1 QB 993
[57] Stapleton J. *Duty of Care Factors: a Selection from the Judicial Menus"*, in Cane & Stapleton (eds), The Law of Obligations: Essays in celebration of John Flemming (Clarendon, 1998) p 59 and Stapleton J. *Duty of Care – Peripheral Parties and Alternative Opportunities for Deterrence* (1995)
[58] Para.42
[59] (2008) 118 Con LR 1

to the Claimants, reduced by the limitations on liability in the contractual arrangements of the parties, Ramsey J set out a helpful summary of the principles:[60]

- That a duty of care in tort can exist in parallel with or in addition to any contractual duties between the parties. The duty will depend on general principles of forseeability and proximity and such other requirements applicable to the nature of the particular duty.

- That, in the case of liability in tort both for pure economic loss in accordance with the principle in Hedley Byrne and for loss arising from personal injury or damage to property, the terms of any relevant contract between the parties or authorised by a party will be relevant to the existence, scope and extent of a duty of care.

- The appropriate question in considering the impact of any relevant contractual terms is the same whether the case involves an assumption of responsibility for Hedley Byrne liability or whether it relates to what is just, fair and reasonable when imposing liability in tort for personal injury or physical damage to property.

- The test is whether the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility or with it being fair, just and reasonable to impose liability. In particular, a duty of care should not be permitted to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

Another recent application of the holistic approach with an emphasis on the contractual matrix was Galliford Try Infrastructure Ltd v Mott Macdonald Ltd[61], in which Akenhead J found that the contractual arrangements and factual context militated against a duty of care.

Given the widespread use of special purpose vehicles, PFI contracts and other more complicated contractual arrangements within the construction industry, it is likely that there will be more test cases in this area.

[60] Para.169
[61] [2008] EWHC 1570

3. Recoverable Damages

Negligent advice which results in a foreseeable type of loss will not always entitle the injured party to recover all losses suffered. Since the decision of the House of Lords in South Australian Asset Management Corp. v York Montague Ltd[62], it has been settled law that a valuer is not liable for all the consequences that result from his conduct, such as fluctuating market values, but only for those which fall within the scope of his duty of care. However, ten years on, academics and practitioners are still discussing what this actually means and how it affects the professional's liabilities.

3.1. The significance of SAAMCo

The House of Lords held that[63] it was necessary to determine between professionals providing information to enable a claimant to decide upon a course of action (as in SAAMCo) and those providing general advice:

- The starting point should be to consider whether the type and quantity of damage complained of falls within the scope of the duty said to have been broken.

- Where the criticism is a failure to provide proper or accurate information, in circumstances where the defendant does not assume responsibility to protect the claimant from all of the risks of the associated transaction, the defendant should only be liable in respect of damage that would not have been sustained had the information provided been accurate.

It is this latter point which has mostly troubled the courts, perhaps because there is clearly some overlap between this emphasis on scope of duty and the conventional approached to causation as a question of fact[64].

[62] [1997] AC 191
[63] Lord Hoffmann pp.211-214
[64] Kinsky C. *SAAMCO 10 years on* (2006); Lord Hoffmann has now conceded that the restriction on the valuer's liability in SAAMCo is not best described by some limitation on the scope of his duty: Hoffmann *Causation* (2005)

3.2. Application of SAAMCo

The principles of SAAMCo are not confined to valuers[65]. In Aenco Reinsurance Underwriting Ltd v Johnson Higgins[66] the House of Lords considered the application of SAAMCo principles to a negligence claim between the Defendant Insurance Brokers and the Claimant Reinsurers. The Reinsurers claimed that the Insurance Brokers were negligent in failing to disclose material risks to the reinsurer, which resulted in the reinsurers being able to avoid the contract with the Claimant Reinsurers. The House of Lords held that if the Insurance Brokers had disclosed the risk, the Reinsurers would not have entered into the reinsurance contract. Further, it held that the Insurance Brokers had undertaken to *advise* about the transaction and not merely provide information. It was on this basis that the majority distinguished Aenco from SAAMCo: SAAMCo concerned a duty to provide specific information whereas Aenco concerned a duty to advise generally. As such, the usual rule on damages applied and it found that the Insurance Brokers were liable for *all* of the foreseeable loss suffered by the Reinsurer. In their Lordships' opinion, SAAMCo created an exceptional sub-rule to the more general view that professionals are normally liable for the foreseeable consequences of their negligence[67].

In HOK v Aintree[68] HHJ Thornton QC confirmed that SAAMCo principles were applicable to construction professionals in determining the basis upon which damages were recoverable by the Racecourse Owner as a consequence of the Architect's predecessor's breach of its duty to warn in relation to the design. The Court decided that the Architects had provided "information" as opposed to "advice" to the Owner but held that the Owner could recover damages to reflect the losses attributable to the Architect's failure to warn.

In Equitable Life Assurance Society v Ernst & Young[69] the Court of Appeal considered whether the Claimant's losses fell within the scope of the Defendant Auditor's duty of care. Brooke LJ identified five questions that a court needs to ask itself in such a case[70]:

- Does a legally enforceable duty of care exist?

[65] Lloyds Bank plc v Burd Pearse [2001] EWCA Civ 366; Andrews v Barnett Waddingham [2006] PNLR 24
[66] [2002] 1 Ll.Rep 157
[67] See: Lord Lloyd at Para.13
[68] [2003] BLR 115
[69] [2003] EWCA Civ 1114
[70] Para.105

- If so, what is the scope of that duty?
- What is the prospective harm, or kind of harm, from which the person to whom the duty is owed falls to be protected?
- Has there been a breach of that duty?
- If so, was the loss complained of caused by that breach, or was it caused by some other event or events unconnected with the breach?"

The Court of Appeal found that the Claimant had an arguable case that the claims fell within the Auditor's scope of duty. Brooke LJ stated[71]:

> *"When auditors undertake for reward to perform services such as those listed … above and are found to be negligent in the way they perform those services we do not understand the law to require the client to ask for specific advice before it can recover damages for the foreseeable losses it later suffers..."*

It therefore appears that where a professional is obliged to advise generally, he will be liable for all the foreseeable consequences that result from his negligence. This can be distinguished from the case where a professional is asked to provide specific information in which case he will be liable only for those losses resulting from his negligence in respect of that information. In every case the court must identify the nature of the tortious duty or the contractual obligation that forms the basis of liability in order to decide whether the loss claimed is one against which the defendant had an express or implicit duty or obligation to protect the claimant.

4. Conclusion

It would appear that the Courts have at last recognised that the tests used in negligence claims over the last 50 years do not provide a rational basis on which to develop the law. That is welcomed, as is the recognition in the "holistic" test that many different policy issues arise for consideration in negligence cases, depending on the factual and contractual matrix. However, what is now required is a policy debate to identify the circumstances in which it is accepted as desirable for economic loss claims to be actionable. Only then will it be possible to define that elusive single test for the existence and scope of a duty of care.

[71] Para.129

References

Amirthalingam K. *Refining the duty of care in Singapore,* (2008) LQR 42

Hoffmann L. *Causation* (2005) 121 LQR 592

Howarth D. *Many Duties of Care – or a Duty of Care? Notes from the Underground* (2006) 26 OXJLST 449

Kinsky C. *SAAMCO 10 years on: causation and scope of duty in professional negligence cases* (2006) 22(2) PN 86

Leng T. *The search for a single formulation for the duty of care: back to Anns* (2007) 23(4) PN 218

Morgan J. *The rise and fall of the general duty of care* (2006) 22(4) PN 206

Stanton K. *Hedley Byrne and Heller: the relationship factor* (2007) 23 PN 94

Stapleton J. *Duty of care and economic loss: a wider agenda* (1991) 107 LQR 249

Stapleton J. *Duty of Care Factors: a Selection from the Judicial Menus",* in Cane & Stapleton (eds), The Law of Obligations: Essays in celebration of John Flemming (Clarendon, 1998) p 59

Stapleton J. *Duty of Care – Peripheral Parties and Alternative Opportunities for Deterrence* (1995) 111 LQR 301