PROFESSIONAL NEGLIGENCE UPDATE

by John Walmsley
1. Negligence: Basics

The tort of negligence has three basic requirements which must be proved by the claimant on a balance of probabilities, namely that:

• The defendant owed the claimant a duty of care not to cause the type of harm suffered.

• The defendant breached the duty of care owed.

• The breach caused the harm. This has two elements, both of which must be proved:
Causation and remoteness

• factual causation: the claimant must prove that, **but for** the defendant's negligence, the claimant would not have suffered loss; and

• legal causation or remoteness: whether the defendant's negligence was the legal cause of the loss.
2. Duty of care

The courts use a number of different tests to establish whether a duty of care is owed in tort by one party to another, for example:

- The three-fold test established in Caparo Industries Plc V Dickman [1990], which asks whether:
  - the damage which occurred was foreseeable;
  - there is sufficient proximity in the relationship between the parties; and
  - it is fair, just and reasonable in all the circumstances to impose a duty of care.
3. Assumption of responsibility test

What is the test?

• The assumption of responsibility test asks:

• Has the professional assumed responsibility towards the claimant?

• Was there reliance by the claimant?
A number of cases claiming economic loss have been decided by the House of Lords using the assumption of responsibility principle. The House of Lords' decision in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] established that there is a general duty to take care in the making of statements where:

- There has been an assumed responsibility towards the claimant.

- A special relationship exists between the parties.
4. The test in Caparo – professional advisers

Hedley Byrne is still relied on in many judgments, but the test has since been refined. In Caparo, the question arose whether a firm of accountants owed a duty of care not to cause pure economic loss to existing shareholders and investors who relied on negligently audited accounts.

The court held that there must be specificity of both the recipients of the information and the purpose for which the statement was made. It was insufficient to establish a duty of care merely by reliance on the accounts and the foreseeability of loss.
The test in Caparo is that a duty not to cause pure economic loss may arise where:

• The advice is required for a purpose (whether particularly specified or generally) that is made known (either actually or inferentially) to the adviser at the time the advice is given.

• The adviser knows (either actually or inferentially) that the advice will be communicated to the advisee (either specifically or as a member of an ascertainable class) so that it should be used by the advisee for that purpose.

• It is known (actually or inferentially) that the advice is likely to be acted on by the advisee for that purpose without independent inquiry.

• It is so acted on by the advisee to his detriment.
In Caparo, the House of Lords held that the specific purpose of the accounts was to enable the shareholders of the company to exert control over the company. The duty of auditors was owed to the company.

The purpose of the audited accounts was not to enable investors to decide whether or not to invest and, therefore, no duty was owed to investors who relied on the accounts for this purpose.

The requirement of reliance exists to impose a limitation on the number and classes of potential claimants. But no such limit can apply where the claimants are identifiable and limited in number.
5. Breach of duty: standard of care

Where a duty is owed in contract or tort, the claimant must establish that there has been a breach of that duty. In doing so, the claimant must show that the professional did not comply with the standard owed.

The Bolam Test

Bolam v Friern Hospital Management Committee [1957] laid down the applicable test for the standard of care for professionals.

Although Bolam dealt with medical negligence, the test has been upheld by the House of Lords and is the appropriate test to use in all professional liability cases.
6. Loss

The principle in SAAMCO: loss must be within scope of duty of professional giving inaccurate information

In the context of professional negligence and, in particular, the giving of professional advice, a principle has been developed by the House of Lords in South Australia Asset Management v York Montague Ltd [1997] (SAAMCO).

The basic measure when assessing losses resulting from negligence is found by comparing what the claimant's position would have been if there had been no breach of duty and the claimant's actual position. Often, without the negligent advice, the claimant would not have entered into the transaction.
In such a case, a comparison must be made between the position of the claimant if he had not entered the transaction and his actual position to calculate the claimant's loss.

*In SAAMCO,* the House of Lords placed important restrictions on the losses which could be claimed in the context of inaccurate information, holding that only those losses that are attributable to the breach are recoverable.

To be so attributable, a loss must come within the scope of the duty owed. The starting point is, therefore, to define the precise scope of the duty. This test is more easily stated than it is to apply in practice.
In the case of a negligent valuation provided for a lender, the lender has less security than he would have had if the valuation had been accurate.

SAAMCO held that only those losses falling within the amount of the overvaluation are attributable to the breach. The amount of the overvaluation, therefore, caps the lender's recoverable damages.
A crucial distinction must be drawn between the provision of information to enable someone else to decide on a course of action and actually advising someone on what course of action to take.

In the latter case, an adviser must take all reasonable care to consider all the potential consequences of that course of action.

If he is negligent, he will be responsible for all the foreseeable loss which is a consequence of that course of action being taken. There will be no SAAMCO cap on the damages.
The distinction may not be easy to make in practice. For example, an accountant may be asked to value shares or to give advice on the merits of purchasing shares.

This is a question of defining the scope of the duty owed by the accountant and the answer depends on the precise terms of his instructions.
The accountant will want to ensure that his retainer does not render him an adviser on the merits.

On the other hand, if the client requires the accountant to provide more general advice, the client should ensure that this is expressed in clear terms. The duty owed in a particular case would depend on all the relevant surrounding circumstances.
7. Recent examples of professional negligence claims

(1) Accountants

In Arrowhead Capital Finance Ltd (In liquidation) v KPMG LLP [2012], KPMG had provided due diligence services to a company and the claimant, which invested in the company, alleged that KPMG owed it a duty of care.

On an application for summary judgment, the court dismissed the claim.

It was unfeasible that a business would consider that KPMG had voluntarily assumed such a duty.

Further, even if a duty could be established by the threefold test, it would not be fair, just and reasonable to impose a duty of care which could result in unlimited liability.
(2) Financial advisers

In Rubenstein v HSBC Bank Plc [2012], the Court of Appeal considered whether HSBC had mis-sold a life assurance bond to an investor and, if so, whether the loss suffered by the investor was recoverable. The investor lost around £180,000 of his capital following market turmoil in September 2008.

The Court of Appeal held that HSBC had given negligent advice. The scope of HSBC's duty embraced the regulatory requirements set out in the Financial Services' Association (FSA) Conduct of Business sourcebook. HSBC had breached a number of these requirements.
Ultimately, the Court of Appeal reversing the first instance decision held that the loss suffered as a consequence of the financial crisis was reasonably foreseeable and, therefore, recoverable in damages.

The Court of Appeal stated (Lord Justice Rix):

“It was the bank’s duty to protect Mr Rubenstein from exposure to market forces when he made clear that he wanted an investment which was without any risk (and when the bank told him that his investment was the same as a cash deposit). It is wrong in such a context to say that when the risk from exposure to market forces arises, the bank is free of responsibility because the incidence of market loss was unexpected.”
This presentation contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances.