Assumption of Responsibility in Professional Liability Claims: Part 1

INTRODUCTION

In the typical professional liability claim, the claimant will be a former client. It will likely be common ground that the professional owed a coterminous duty in contract and at common law. The battleground will be over matters such as the scope of the duty, whether it was breached and whether any breach caused a loss. Less commonly, the claimant may be a third party which insists that, in carrying out services for its client, the professional also assumed a responsibility to that third party.

This is the first in a series of notes which looks at assumption of responsibility in the professional liability field. It focusses on general principles and how the courts' approach has evolved.

A: ASSUMPTION OF RESPONSIBILITY

The concept of an assumption of responsibility derives from the seminal case of *Hedley Byrne v Heller & Partners* [1964] AC 465. The plaintiff there was an advertising agent. A client placed a substantial order. The plaintiff made enquiries with its bankers about the client's financial standing. The bank's response was headed "*CONFIDENTIAL*" and "*For your private use and without responsibility on the part of the bank or its officials*". It went on to suggest that the client was in a strong financial position.

It will no doubt have been guessed what happened next. The plaintiff accepted the order. The client went into liquidation. The plaintiff ended up substantially out of pocket. It sued the bank in the tort of negligence. The Judge accepted that the bank had been negligent but held that no duty of care could arise in the absence of a contractual or fiduciary relationship. The Court of Appeal agreed

The House of Lords took a different view. It was unanimous that a duty of care could arise where the parties stood in a special relationship. Lord Reid suggested that there were three courses open to a reasonable man who knew that his skill and judgment was being relied on: he could decline to give the information, he could give it with the qualification that he accepted no liability for it, or he could respond without qualification. He concluded that a party which took the third course accepted a responsibility. Lord Devlin was satisfied that the category of special relationships in which a duty of care might arise extended to:

> *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.*

Hedley Byrne was a case about negligent misstatement, but it was established in the later case of *Henderson v Merrett Syndicates* (1995) 2 AC 145 that the doctrine extended to the provision of services.

B: THE SEARCH FOR PRINCIPLE

The courts have said inconsistent things about what assumption of responsibility means and in what circumstances it will arise. As Professor Donal Nolan has observed, this is mirrored in academic commentary, which falls into at least four irreconcilable schools of thought[1].

In *Smith v Eric S Bush*; *Harris v Wyre Forest DC* (1990) 1 AC 831, the House of Lords appeared to lay to rest any notion that the concept of an assumed responsibility required a conscious acceptance of the duty. Rather, as Lords Griffiths and Jauncey (with whom Lords Keith and Brandon agreed) explained in their speeches, the defendant is in the appropriate case deemed by the court to have assumed the duty. The courts have nevertheless continued on occasion to speak of a voluntary assumption of responsibility. In a case in 2015, Lord Toulson felt it necessary to reiterate that the duty was imposed by the court rather than consciously assumed by the defendant[2].

In *Anns v Merton BC* (1978) AC 728, Lord Wilberforce identified a two-stage test to determine when a duty arose. The first stage was to ask whether there was a sufficient relationship of proximity between the parties that, in the reasonable contemplation of the defendant, carelessness on its part was likely to cause damage to the plaintiff. The second was to ask whether there were any considerations which would act to negative or limit the duty which would otherwise exist.

The two-stage test was called into question by the Privy Council in *Yuen Kun Yeu v AG of Hong Kong* (1988) AC 175 which quoted with approval an alternative approach posited by Brennan J of the High Court of Australia in *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 that:

> *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*

By the time that the House of Lords overruled *Anns* in *Murphy v Brentwood DC* (1991) 1 AC 398, Lord Oliver considered it beyond argument that mere foreseeability would not be enough to give rise to a *prima facie* duty.

In his speech in *Smith*, Lord Griffiths was widely interpreted as having propounded a threefold test: (a) that it was foreseeable that the recipient is likely to suffer damage if the advice is wrong, (b) that there is a sufficiently proximate relationship between the parties, and (c) that it is fair just and reasonable to impose liability. On a close reading of his speech, it is open to question whether he was indeed intending to lay down a universal test.

Be that as it may, *Caparo v Dickman* (1990) 2 AC 605 was thought to have endorsed the supposed threefold test. In retrospect, at least, it is hard to comprehend why. In fact, Lord Bridge and Lord Oliver (with each of whom the other members of the committee agreed) and Lord Roskill quoted with approval passages from the judgment of Brennan J in the *Council of the Shire of Sutherland.* Lord Bridge concluded that concepts of proximity and fairness were not capable of being defined with the precision needed for them to work as

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[1] *Assumption of Responsibility: Four Questions* (2019) 72 Current Legal Problems

[2] *Wright v Chief Constable of South Wales Police, op cit*

practical tests. Lord Oliver considered that they were aspects of the same exercise and that there was no unifying formula.

In a trilogy of cases in the 2010s, the Supreme Court sought to give the three-stage test its quietus. These were *Michael v Chief Constable of South Wales Police* [2015] AC 1372, *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 WLR 595 and the Scottish appeal of *NRAM v Steel* [2018] UKSC 13. It possibly requires a close reading of *Michael* to pick up the point, but in Robinson Lord Reed (giving the judgment of the court) made clear that:

> *the proposition that there is a* Caparo *test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson JSC pointed out in his landmark judgment in* Michael v Chief Constable of South Wales Police (Refuge intervening) *[2015] AC 1732, para 106, that understanding of the case mistakes the whole point of the Caparo case, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities.*
> ...
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> *It was in any event made clear in* Michael's *case that the idea that the* Caparo *case established a tripartite test is mistaken.*
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> *Properly understood, the* Caparo *case thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries.*

In *NRAM*, Lord Wilson (with whom Lady Hale P, Lord Reed, Lord Hodge and Lady Black) explained:

> *For years afterwards the speeches in the House* in [*Caparo*] *were taken to have indorsed the threefold test.... That the House in the Caparo Industries case did not indorse the threefold test was explained by Lord Toulson in [Michael]...; and it has recently been underlined by Lord Reed in [Robinson].... In the Caparo Industries case, Lord Bridge...and Lord Oliver...quoted with approval the remarks of Brennan J in* Sutherland Shire Council*...that it was preferable for the law to develop novel categories of negligence incrementally and by analogy with established categories....*

It seems, however, that the threefold test refuses to die. It is still sometimes cited by Claimant lawyers. Indeed, *Salzedo and Singla on Accountants' Negligence and Liability* suggests that "*the 'threefold test' is the overarching test for the existence of a duty of care to prevent economic loss*" but with the qualification that the Supreme Court has "*now made clear that the threefold test is generally only applicable where the duty of care alleged is novel*".

In referring to older cases, the editors of *Jackson & Powell on Professional Liability* write of "*the apparent threefold test*" and accept that the existence of such a test has since been rejected. They nevertheless add that it remains to be seen whether the courts will resist seeking to apply it in subsequent cases.

While deprecating unifying tests in *NRAM*, Lord Wilson identified two preconditions in a negligent misstatement case. These were that representee had to establish both that it was reasonable for him to have relied on the representation made and that the representor should reasonably have foreseen that he would rely on it. The same conditions precedent surely apply, with the necessary changes, to other cases in which a responsibility it said to have been assumed,

C: CONCLUSIONS

In the appropriate case, a professional may owe a duty of care in tort to a party other than its client. In such a case, it will be deemed to have assumed a responsibility. This does not require the professional to have consciously chosen to accept a duty: it will be imposed by the court. It was long believed that liability was to be determined by reference to a threefold test embracing foreseeability, proximity and reasonableness, but the Supreme Court has disapproved of this and endorsed an incremental approach. Under this approach, the claimant will need to show that it was reasonable for him to rely on the professional and that professional should reasonably have foreseen that he would.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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Changing Perceptions

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