# **Assumption of Responsibility in Professional Liability Claims: Part 4**



**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 fourth in a series of notes which looks at assumption of responsibility in the professional liability field. It focuses on claims against insurance professionals.**

**A: recap**

Part 1 traced the evolution of the law from the seminal decision of the House of Lords in *Hedley Byrne v Heller & Partners* [1964] AC 465. Several of the speeches referred to an assumption of responsibility, but subsequent cases confirmed that the duty was imposed by the court: it did not need to have been consciously accepted.

*Anns v Merton BC* [1978] AC 728 laid down a two-stage test to establish the existence of a duty. The first part involved considering whether there was a sufficient relationship of proximity between the parties for it to be in the reasonable contemplation of the defendant that careless by it was likely to cause damage to the plaintiff. If it was, the second part involved considering whether there were factors which might negative the duty which would otherwise arise.

The Australian courts rejected this approach. In *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, Brennan J preferred an approach by which the law developed “*incrementally and by analogy with established categories”.*

*Anns* was overruled in *Murphy v Brentwood DC* [1991] 1 AC 398. It was long thought that the House of Lords had, in the meantime, endorsed a threefold test in the case of *Caparo v Dickman* [1990] 2 AC 605: (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.

In fact, as a trio of Supreme Court cases culminating in *NRAM v Steel* [2018] UKSC 13 stressed, *Caparo* endorsed the Australian approach and rejected unifying tests. *NRAM* also underlined that, for an assumption of responsibility to arise, it would need to be established that it was reasonable for the claimant to rely on the defendant and reasonably foreseeable by the defendant that it would do so.

Part 2 looked at the approach taken to claims against auditors by parties other than the company. Part 3 considered claims against valuers.

**B: CLAIMS AGAINSt INsurance professionals**

*Henderson v Merrett Syndicates* [1995] 2 AC 145 laid to rest any notion that *Hedley Byrne* was only of application in cases of negligent misstatement. It was a case about the first LMX spiral[[1]](#footnote-1). There were several group actions. In each of them, Lloyd’s Names brought claims against underwriting agents. Some were combined agents, who carried out the underwriting and claims functions themselves. Others were members’ agents, who delegated these functions to third party managing agents under sub-agency agreements. Both argued that the way in which they had structured their relationships precluded any duty of care in tort.

The combined agents prayed in aid a line of authority which suggested that there could be no place for a tort claim where the parties stood in a contractual relationship. Oliver J (as he then was)[[2]](#footnote-2) had already reached the conclusion in *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384 that any such principal could not have survived *Hedley Byrne*. He held that the solicitors owed coterminous duties in contract and tort. The agents maintained that the case was wrongly decided.

The House of Lords disagreed. Lord Goff (with whom Lords Keith, Brown-Wilkinson, Mustill and Nolan agreed) adopted Oliver J’s reasoning. He observed that where, as here, a defendant owed contractual duties towards a plaintiff it had by definition assumed responsibility. This led him to the inescapable conclusion that combined agents owed a duty of care in tort.

The managing agents adopted a slightly different position. It was central to their case that they had assumed responsibility under the sub-agency agreements. But their contractual duties were owed to the members’ agents. It would, they submitted, be inconsistent with this to hold that they assumed responsibility to the Names in tort. Lord Goff was unimpressed with the argument. He was satisfied that the managing agents owed the duties contended for.

It is entirely unsurprising that this line of argument failed. In the professional liability world, a defendant alleged to have assumed responsibility will more often than not be in a contractual relationship with a third party, be it the company in the case of an auditor, a lender in the case of a valuer, or otherwise.

In many of the cases which we have looked at so far in this series, the courts proceeded under the misapprehension that *Caparo* endorsed the threefold test. *Punjab National Bank v de Boinville* [1992] 3 All ER 104 is notable as an early case which recognised that it had in fact rejected it in favour of the incremental approach.

In this case, the Plaintiff bank had accepted letters of credit on behalf of a company engaged in international trade. It maintained that it was entitled to make a claim under various policies which insured against non-payment. Insurers denied that the bank was an Insured. The Plaintiff hedged its position by joining the broker to the proceedings.

There was a trial of preliminary issues. One of these was whether the brokers owed a duty of care in tort to the bank. The Judge held that they did. The Court of Appeal agreed.

Staughton LJ (with whom Dillon and Mann LJ concurred) observed that it must have been plain to everyone that the bank had some financial interest in the transaction. He did not consider that this would be enough in itself to give rise to a duty of care. Nor would it tip the scales if the broker knew that the bank had a right of recourse against the company.

But on the facts as found by the Judge, there was more. The brokers knew that cover notes were part of the bank’s security and that it was intended that the policies would be assigned to the bank. In these circumstances, he concluded that it was, as he framed it, a justifiable increment to hold that a duty of care existed.

In *Verderame v Commercial Union* [1992] BCLC 793, a differently constituted Court of Appeal again used the language of justifiable increments. The Plaintiffs were the sole shareholders and directors of a company. It carried on a garage business. The First Plaintiff might have started out as a sole trader. At any rate he proposed for and obtained insurance in the name of “*Antonio Verderamae T/A VA Garage*”. There was a break in at the garage. Goods were stolen. The company made a claim. Insurers rejected it.

The First Plaintiff brought an action in his own name. Insurers denied that he had an insurable interest. The claim was struck out. The Plaintiffs then brought another action. They joined the broker as a Defendant. As against Insurers, they argued that there was an agency or trustee relationship with the company. As against the brokers, they argued that to the extent that the wrong party had been named, it was their fault.

The brokers applied to have the claim against them struck out. They accepted that the company might have a claim but maintained that there could be no basis for an assumption of responsibility towards its directors. The District Judge refused to strike out the claim. The Judge dismissed the brokers’ appeal. They had more success in the Court of Appeal.

Balcombe LJ held that it would not be a justifiable increment to extend a duty to the directors. Nourse LJ went further. He suggested that where, as here, the broker owed a contractual duty to the company to place cover, it would be “*startling*” if it also owed a duty of care in tort to its directors. He concluded that this would involve piercing the corporate veil on a massive scale. It is submitted, however, that the point is fact sensitive.

In *Gorham v BT* [2000] 1 WLR 2129, Mr Gorham was an employee of the First Defendant telecommunications company. He was not a member of its pension scheme. This allowed for lump sum payments to dependents in the case of death in service. There was a two-year qualifying period for such payments.

He sought advice from the Second Defendant insurer. This led to him taking out a personal pension. The Insurer neglected to tell him that he might be better off in the company scheme. It appears that it later corrected its oversight. Mr Gorham then died. His dependents did not qualify for death in service payments. They brought a claim against the Insurer. They were successful at first instance and on appeal.

The Court of Appeal decided the case by analogy with the solicitors’ case of *White v Jones* [1995] 2 AC 207 in which disappointed beneficiaries established that the solicitors who drew up the will owed them a duty of care.

Padfield expressed the view in *Insurance Claims* that the same reasoning would apply equally to brokers. This is surely right. The proposition derives some support from *Crowson v HSBC* [2010] 2 Lloyd’s Rep IR 441 in which Master Bragge declined to strike out a claim brought by the Managing Director of a company against its broker on the basis that it owed him a duty to obtain D&O cover. The case is illustrative of circumstances in which it might not be so startling to suggest that the broker owed a duty to directors.

The position of sub-brokers has been considered in a number of cases. By analogy with *Henderson*, it might be thought that there would be no difficulty in establishing the existence of a duty. However, that was not the outcome in *Pangood v Barclay Brown* [1999] 1 All ER (Comm) 460.

The Plaintiff owned a nightclub. It instructed its broker to place fire cover. The broker obtained a quotation from a Lloyd’s broker. This indicated that cover was subject to an auditorium warranty, which required checks to be made at the end of each night for burning cigarettes and matches. The broker instructed cover to be placed.

There was a fire at the nightclub. Insurers maintained that it had been caused by a burning cigarette. They declined cover. The Plaintiff alleged that the broker had failed to advise it about the auditorium warranty. It denied this as a matter of fact. But it also brought a contribution claim against the Lloyd’s broker on the basis of an assumed duty. The Judge struck out its third party notice.

The Court of Appeal dismissed the broker’s appeal. It held that any assumption of responsibility would be limited, in the first instance, to obtaining and accurately reporting the quotation and, thereafter, in placing the cover.

A similar conclusion was reached in *Involnert Management v Aprilgrange* [2016] 1 All ER (Comm) 913. Leggatt J (as he then was) held that a London market placing broker which placed cover on behalf of a Greek producing broker did not assume responsibility to the Claimant Insured.

Nevertheless, each case is to be considered on its particular facts. In *European International Reinsurance v Curzon Insurance* [2003] EWCA Civ 1074, Gross J expressed scepticism about the claim against the placing broker but felt unable to conclude that it had no realistic prospect of success. The Court of Appeal upheld his judgment.

*Dunlop Haywards v Erinaceous Insurance Services* [2010] 1 WLR 258 concerned the insurance affairs of a property consultant. The Claimant instructed the Defendant broker to consolidate and renew its insurance covers following a corporate acquisition. The broker instructed a Lloyd’s broker to place cover on terms at least as favourable as existing.

There was an argument about whether the policies obtained extended to valuations. The Insured sued the broker. The broker brought a contribution claim against the Lloyd’s broker. The Lloyd’s broker applied to strike out the claim or for summary judgment.

Field J was unwilling to dispose of the claim summarily. He held that there was a good arguable case that the Lloyd’s broker had assumed a responsibility. In doing so, he found that there were grounds for inferring that it had prepared documents with the intention that they be passed on to the Insured.

A duty was held to exist on the singular facts of *BP v Aon* [2006] 1 All ER (Comm) 789. The oil company, Amoco, which later merged with BP, appointed Aon to place its worldwide insurance covers. The entity which it contracted with was Aon Risk Services of Texas Inc, but it appears to have been understood throughout that Aon entities throughout the world would be involved in placing cover. There was also evidence of direct dealings between BP and the Defendant company, identified in the judgment as Aon London.

Leading Counsel for BP submitted that Aon London sought to perpetuate the heresy rejected in *Henderson*. Colman J did not see the case as quite so straightforward but nevertheless found for BP.

**C: DISCUSSION**

*Henderson* was an important case in confirming both that *Hedley Byrne* extended to services and not just negligent misstatements and that a contractual relationship does not preclude a duty arising in tort. The existence of coterminous duties is central to the modern law of professional liability. The fact that a defendant owes contractual duties to a third party can be no more than a factor to be taken into account in determining whether there has been an assumption of responsibility to the claimant.

A broker will not without more owe a duty to a party other than its client. The position may be different if the claimant was intended to have the benefit of the cover which was or ought to have been placed.

Whether a sub-broker assumed a responsibility to the Insured will depend on all the facts. As in some of the cases we looked at in Parts 2 and 3 evidence of direct dealings with the Insured might be significant. A broker seeking to offload liability onto the sub-broker might conclude that it is more straightforward to bring a direct claim for breach of contract rather than contending for an assumption of responsibility.

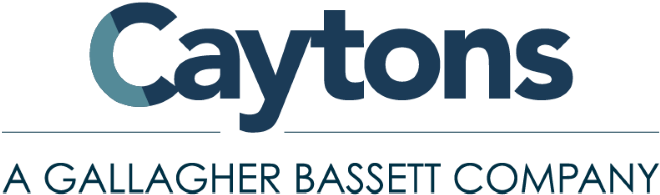
**D: coming up**

In Part 5, we consider the circumstances in which responsibility to third parties might be owed by lawyers. Part 6 will round out the series with a review of claims against construction professionals.

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**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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1. London Market Excess of Loss: incestuous reinsurance arrangements sent catastrophic losses spiralling round the market [↑](#footnote-ref-1)
2. As Lord Oliver he went on to give one of the speeches in *Caparo* [↑](#footnote-ref-2)