THE NEGLIGENT PROFESSIONAL ADVISOR: CAN THE CLIENT SUE IN TORT?

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The purpose of this article is to review with a critical eye the authorities concerned with the liability of a professional advisor to his client for negligent advice which has caused loss to the client in circumstances where the negligence constitutes a breach of the advisor's contractual obligation of care and skill. In particular, attention will be focused on a line of cases[1], English and Australian, going back well into the Nineteenth Century, to the effect that, in such circumstances, the remedy of the client against the advisor is restricted to an action for breach of contract, and that there is no additional or alternative remedy in tort. Frequently, this is a matter of little practical consequence to the client and the possibility of an action in tort will in no way affect the existence or extent of any remedy he might possess. However, as will be seen, in a minority of cases the matter is of crucial importance. These are cases where the lack of such an action will either leave the client without any remedy or leave him with a less adequate remedy than otherwise. It will be submitted that, for this reason, these cases are potentially productive of hardship to the client, also that they are inconsistent with the development of the modern law of negligence particularly since *Hedley Byrne & Co.* v. *Heller*[2], and that in some circumstances they are indicative of an indefensible anomaly when the client's position is contrasted with that of a non-client advisee. Fortunately, the continued authority of such cases can now be tentatively questioned in the light of remarks made in the Court of Appeal in the recent English case, *Esso Petroleum Co. Ltd.* v. *Mardon*[3]. Our treatment of what will be referred to as the professional advisor cases will commence with an identification of the possible hardship to the client to which they can give rise, will then examine the legal justification given for them, and will end by showing the anomolies now inherent in them.

1. The hardship to the client

In one important instance, the lack of any remedy in tort might result in the client having no remedy at all. This is in relation to the operation of statutory provisions governing the limitation of actions. The basic principle is that in an action for breach of contract the limitation period runs from the date of the breach, whereas in an action for the tort of negligence it runs from the date of the damage caused by the defendant's breach of his duty of care. This is because in the latter case, no cause of action can arise until damage has been suffered.

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1. See, e.g., *Howell* v. *Young* (1826) 5 B. & C. 259; *Ward* v. *Lewis* (1896) 22 V.L.R. 410; *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.* [1936] 1 K.B. 399; *Groom* v. *Crocker* [1939] 1 K.B. 194; *Clark* v. *Kirby-Smith* [1964] Ch. 506; *Bagot* v. *Stevens Scanlon & Co. Ltd.* [1966] 1 Q.B. 197; *Cook* v. *Swinfen* [1967] 1 All E.R. 299, per Lord Denning M.R. at p.302; *Belous* v. *Willetts* [1970] V.R. 45; *Heywood* v. *Wellers* [1976] 2 W.L.R. 101, per James, L.J. at p. 113. Most of these cases involved actions brought by clients against solicitors. The two exceptions were *Jarvis* v. *Moy etc.* (stockbroker) and *Bagot* v. *Stevens* (architect).
2. [1964] A.C. 465.
3. "The Times", Law Report, February 6, 1976.
4. Supra, n. 1.

The importance of this in the present context is illustrated by the Victorian case, *Ward* v. *Lewis*[4], and by the English case, *Bagot* v. *Stevens, Scanlan & Co.*[5]

In *Ward* v. *Lewis* the plaintiff was a trustee under the will of a deceased person. He engaged the defendants, a firm of solicitors, to advise as to the disposition of the estate. In breach of their contractual duty to act with reasonable care and skill, the defendants erroneously advised the plaintiff that the will empowered him to invest estate money in two building societies in order to meet an annuity payable under the will. The money was invested but a few years later, the societies went into liquidation and the plaintiff was successfully sued by the annuitant for breach of trust. His action for damages against the solicitors was brought within six years[6] of the loss he had suffered but more than six years from the date of the negligent advice. It was held by Hood, J. in the Victorian Supreme Court that the only cause of action available to the plaintiff in such circumstances was one for breach of contract. Consequently, the limitation period had to be computed as from the date of the breach of contract, that is from the time when the advice was given. Therefore, the plaintiff's claim was statute barred and he was left without a remedy.

Similarly, in *Bagot* v. *Stevens*, it was alleged that the defendant architects had negligently performed their contractual duty to their cltent, the plaintiff, in supervising building work on his land, and that this had led to the laying of a faulty drainage system. This occurred in February, 1957. It was further alleged that damage caused by flooding arising from cracks in the pipes constituting the drainage system did not occur until late 1961. The plaintiff's action was commenced in April, 1963. Once again it was held that, because the only cause of action available to the client against his architect was contractual, the limitation period had elapsed and the claim was dismissed. On the particular facts of this case it might not have made any difference to the plaintiff even had he been able to pursue a claim in tort. This is because Diplock L.J. (sitting as an additional judge of the Queen's Bench Division) was of the opinion that, in any event the damage was done, not when the pipes leaked, but when the faulty drainage system was constructed, and that, therefore, the limitation period would have run from that earlier date.[7]

Decisions such as in these two cases mean that in any case where damage to the client caused by the professional advisor's negligent breach of contract does not occur until after the lapse of the relevant contractual period of limitation the client has no effective remedy against the advisor. The hardship to the client caused by such decisions was expressly recognised by Hood, J. in *Ward* v. *Lewis*[8]. It is a hardship which could be avoided if the client was able, as some non-clients are able, to claim in tort. Is there any reason of policy capable of justifying it? A reason was attempted in *Ward* v. *Lewis* when Hood, J. said that any hardship to the client should be, "set off against the serious injury which might happen to solicitors if they had to keep all materials necessary to defend actions all their natural lives".[9] Presumably, the judge would have intended the same consideration to be applicable to other professional advisors as well as solicitors. However, it is submitted that, in the light of the modern availability

5. Supra, n. 1.
6. In accordance with the provisions of the Statute of Limitations, 21 Jac. 1., c.16 which was then in force in Victoria.
7. [1966] 1 Q.B. 197, 203. This view was cited with approval by Lord Denning M.R. in *Dutton* v. *Bognor Regis U.D.C.* [1972] 1 Q.B. 373, 396, 397.
8. (1896) 22 V.L.R. 410, 418.
9. (1896) 22 V.L.R. 410, 418.

and prevelance of professional indemnity insurance and in view of the fact that under the modern law of negligence such advisors can be liable in tort at least to non-clients, whatever validity such justification might have possessed in 1896, at the time of *Ward* v. *Lewis*, has now been overtaken by events.

Rather less importantly, there are some other instances where the availability of a remedy in tort might provide the client with a more adequate remedy. In the field of damages the House of Lords, in *Koufos* v. *C. Czarnikow Ltd.*[10], has recently emphasised that the rules governing remoteness of damage are narrower in contract than in tort, so that there may occasionally be an advantage to the client if he were able to sue in tort. Also, it is well settled that, in tort, a plaintiff can recover damages in respect of mental suffering at least when accompanied by psychiatric symptoms.[11] Most probably this is also the case in contract but the matter is not entirely clear. In *Cook* v. *Swinfen*[12] the Court of Appeal were of the opinion that a client of a solicitor could in principle recover damages in contract for nervous shock caused by the solicitor's breach of his contractual duty of care. On the facts, however, the nervous shock was too remote a consequence of the solicitor's negligence.[13] Similarly in *Jarvis* v. *Swans Tours Ltd.*[14] the Court of Appeal held that in an appropriate case damages in respect of mental distress can be recovered in contract. On the other hand, statements made in the Court of Appeal in *Groom* v. *Crocker*[15], a claim by a client against a solicitor, and in the House of Lords in *Addis* v. *Gramophone Company Ltd.*[16], would appear to suggest otherwise.

There is another area in which the lack of a remedy in tort possibly works in the client's favour. It has been held in Australia that contributory negligence is no defence to an action for breach of contract. For example in *Belous* v. *Willetts*[17] it was held that in a claim by a client against his solicitor for negligent breach of the latter's contractual duty of care the alleged contributory negligence of the client was no defence and consequently damages could not be apportioned under the Victorian Wrongs Act, 1958. However, this is yet another instance of that penumbra of doubt that exists between contract and tort. This is because there are decisions, both Australian[18] and English[19], to the contrary where contributory negligence has been successfully pleaded in actions for breach of contract. In addition it seems to be settled that where the defendant's breach of a contractual duty of care also amounts to a tort, contributory negligence can be raised whether the action is framed in contract or tort.[20] Therefore, if the liability of a professional advisor for breach of duty to his client were to be tortious as well as contractual in nature the advisor would have the

10. [1969] 1 A.C. 350.
11. *Mount Isa Mines Ltd.* v. *Pusey* (1971) 45 A.L.J.R. 88; *Hinz* v. *Berry* [1970] 1 All E.R. 1074.
12. Supra, n. 1.
13. This opinion has now been reiterated and applied by the Court of Appeal in the recent case, *Heywood* v. *Wellers* [1976] 2 W.L.R. 101, to which my attention has been drawn by my colleague, Mrs. Margaret White. In this case Lord Denning has expressed the view that, on this issue, *Groom* v. *Crocker* may have to be reconsidered.
14. [1973] 1 Q.B. 233.
15. Supra, n. 1.
16. [1909] A.C. 488.
17. Supra, n. 1. See also *A.S. James Pty. Ltd.* v. *C.B. Duncan*, [1970] V.R. 705.
18. See *Queensbridge Motors & Engineering Co. Pty. Ltd.* v. *Edwards*, [1964] Tas. S.R. 93, and *Smith* v. *Buckley*, [1965] Tas. S.R. 210. In these cases the Tasmanian Court adopted the views of Dr. Glanville Williams to this effect expressed in his book, "Joint Torts and Contributory Negligence", (1951), 59.
19. See e.g. *De Meza* v. *Apple* [1974] 1 Lloyd's Rep. 508.
20. See e.g. *Sayers* v. *Harlow U.D..C* [1958] 1 W.L.R. 623.

benefit of this defence. It is submitted that this would be a welcome development since there seems to be no good reason of policy for denying the defence to a professional advisor in this context.

2. The legal justification for the cases

The consistent reason given by the courts for the lack of any duty in tort in such professional relationships is that the duty of the professional advisor is one created by the contract with his client. It is a duty which arises ex contractu rather than ex delicto. Therefore, any cause of action arising from breach of such duty must be contractual in nature. For example, this was the reason given in *Ward* v. *Lewis*[21] and in *Groom* v. *Crocker*[22] in relation to a solicitor's duty to his client. It was also the reason given by Greer, L.J. in relation to a stockbroker and client relationship in *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.*[23] The same justification was also given by Plowman, J. in *Clark* v. *Kirby-Smith*[24] and by Diplock, L.J. in *Bagot* v. *Stevens*[25] despite arguments by the plaintiff that the *Hedley Byrne* principle had altered the law on this subject.

The validity of this view depends upon acceptance of its basic premise that the contract between a professional advisor and client is the sole source of any duty of the former to act with reasonable care and skill in the course of their relationship. If there was an alternative or additional source of such duty arising independently on the contract then an action in tort for its breach would lie. This was recognised, for example, in the following passage from the judgment of Greer, L.J. in *Jarvis* v. *Moy, etc.*[26], "The distinction in the modern view, for this purpose, between a contract and a tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract ... "

Therefore, if the plaintiff can successfully allege the existence of a duty arising independently of any contract with the defendant he has an action in tort even though breach of that duty also amounts to a breach of the contract between them.

On this ground the cases involving actions for breach of duty brought by employees against their employers were distinguished in the professional negligence cases. It is well settled that the liability of an employer to take reasonable care for the safety of his employee can be grounded either in tort or in contract. The two leading English cases are *Matthews* v. *Kuwait Bechtel Corporation*[27] and *Lister* v. *Romford Ice & Cold Storage Co. Ltd.*[28], although, on its facts, *Lister*'s case involved a breach of the correlative duty, to act with reasonable care, owned by an employee to his employer. The status of employer and employee gives rise to such a duty independently of the contract of employment between them and this is the reason why an action in tort will lie. For example, Diplock, L.J. in *Bagot* v. *Stevens* distinguished what he described as

21. Supra, n. 1.
22. Supra, n. 1.
23. Supra, n. 1.
24. Supra, n. 1.
25. Supra, n. 1.
26. [1936] 1 K.B. 399, 405.
27. [1959] 2 Q.B. 57.
28. [1957] A.C. 555.

status relationships from professional relationships in the following passage:[29] "I accept that there may be cases where a similar duty is owed both under a contract and independently of contract. I think that upon examination all these will turn out to be cases where the law in the old days recognised either something in the nature of a status like a public calling (such as common carrier, common innkeeper, or a bailor and bailee) or the status of master and servant. Then it can be properly said, as it was in such cases as *Lister* v. *Romford Ice etc.* that, independently of contract, there existed from the mere status a relationship which gave rise to a duty of care not dependent upon the existence of a contract between the parties. But I do not think that that principle applies to professional relationships of the kind with which I am concerned here, where someone undertakes to exercise by contract his professional skill in relation to the matter. I think that the authorities are much too strong against that and are binding on me in the capacity in which I am sitting here today."

It is however, respectfully submitted that this alleged distinction between status relationships and professional relationships is false particularly in the light of developments in the law of negligence since these two great liberalising cases, *Donoghue* v. *Stevenson*[30] and *Hedley Byrne* v. *Heller*[31]. It is a distinction which harks back to the bad old pre- *Donoghue* v. *Stevenson* days when, as one writer[32] described it, there was a "closed catagory" or "pigeon-hole" approach to negligence. For liability in tort for negligence to arise a plaintiff had to show that the relationship between himself and the defendant was a relationship which the courts had already recognised as giving rise to the existence of a duty of care as with the so called status relationships mentioned by Diplock, L.J. If no such relationship existed and if the court was not prepared to, in effect, create a new one then a plaintiff could only succeed if he could prove breach of a contractual duty of care by the defendant. That is why formerly it was correct to state that the only source of liability in many professional relationship cases was contractual. If there was no contract there was no liability. Today, however, if one poses the question, "If there was no contract between the parties to a professional relationship would then be no other possible liability?", the answer would very probably be different. This is because the old closed catagory approach to negligence has now been demolished on account of the acceptance of the Lord Atkin's neighbour principle in *Donoghue* v. *Stevenson* as a prima facie test for the existence of a tortious duty of care[33] and, more particularly, because the liability of such people as professional advisors has been extended following *Hedley Byrne*. Indeed, the significance of *Hedley Byrne* is surely that a relationship such as professional advisor and advisee is now capable of giving rise to a duty of care in tort in cases of financial loss as well as previously recognised cases of physical injury. Even under the restrictive interpretation of *Hedley Byrne* formulated by the majority of the Privy Council in *Mutual Life Assurance Co.* v. *Evatt*[34] a duty of care in tort could exist where a person in the business of giving advice of the type in issue (a professional advisor) gives such advice knowing that it is being relied and acted upon by the advisee, in circumstances indicating an assumption of responsibility by the advisor. Such assumption of responsibility is no longer dependent upon the existence of a contract or fiduciary relationship between the parties.

29. [1966] 1 Q.B. 197, 204, 205.
30. [1932] A.C. 562.
31. [1964] A.C. 465.
32. M.A. Millner in his stimulating book, "*Negligence in Modern Law*", 1967, Butterworths.
33. See e.g. *Home Office* v. *Dorset Yacht Co.* [1970] A.C. 1004.
34. [1971] A.C. 793.

In effect, the modern decisions denying tortious liability in professional advisor cases involve the proposition that the existence of the contract between client and advisor supersedes and cancels any possible duty that might otherwise arise under the general law. That is the effect of statements to the effect that the contract is the only source of any liability for professional negligence in such cases. It is submitted that, on the contrary, the modern cases on negligence do provide good authority for the existence of a general (i.e. tortious) duty of care which not only embraces the old status relationships, providing an alternative or additional cause of action to that provided by the contract in those cases, but which should also encompass the relationship between professional advisor and client and confer similar causes of action there also. On this view the contract between the parties is no longer the sole source of the advisor's duty to act with reasonable care.

Possibly in one sense Diplock, L.J. was correct in *Bagot* v. *Stevens*. That is when he referred to the strength of the restrictive authorities and his inability, sitting as a judge of first instance, to overrule them. The strength of the authorities lies in their antiquity and repeated confirmation. Several of them go back long before the development of the modern law of negligence and are perhaps too firmly entrenched to be overturned, particularly by a court of first instance. Perhaps there is an analogy to be drawn here with another immunity from tortious liability in negligence of long standing antiquity, that of the vendor or landlord of real property. This also, although subject to many qualifications and much criticism, was an immunity deeply embedded in the law long before *Donoghue* v. *Stevenson*. It was an immunity which was held to have surprised that case[35] and, despite the valiant efforts of Lord Denning in *Dutton* v. *Bognor Regis*[36] to consign it to oblivion, it was left, in English law, to legislation to finally lay it to rest.[37] It might be that in the field of professional relationships the same process will be required in order to provide the client with an alternative remedy to that provided by contract.

However, there is now at least one authority which casts doubts upon the continued validity of the cases under discussion. That is the recent English Court of Appeal case, *Esso Petroleum* v. *Mardon*[38]. In this case Lord Denning has once again courageously blazened a judicial trail by suggesting that the professional advisor cases are no longer good law. In brief outline the facts of *Mardon* were as follows. A negligent misstatement as to the anticipated volume of petrol sales had been made by officials of Esso to a prospective tenant, Mardon, of one of their filling stations. The misstatement was made during negotiations which induced Mardon to enter into a tenancy agreement with Esso. Owing to the misstatement, the tenancy proved a financial disaster to Mardon and he claimed damages in both contract and tort. His claim was successful on both counts. In contract because the statement made by Esso, a company having special knowledge and skill in such matters, had become a term of the contract, and in tort, whether or not the statement had become a contractual term, under the *Hedley Byrne* principle in that Esso had made the statement seriously on a business occasion intending Mardon to act upon it which he had done so by entering into the tenancy agreement suffering consequential financial loss. The court rejected Esso's submission that the *Hedley Byrne* principle was excluded when a statement was made during pre-contractual negotiations between the

35. See *Otto* v. *Bolton and Norris* [1936] 2 K.B. 46.
36. [1972] 1 Q.B. 373.
37. The Defective Premises Act, 1972, which came into force on January 1, 1974.
38. Supra, n. 3.

parties, and that, on the authority of cases such as *Clark* v. *Kirby-Smith*[39], the rights and duties of the parties were governed solely by the law of contract. Lord Denning was of the view that such cases were in conflict with other authorities including *Lister* v. *Romford*[40] and *Matthews* v. *Kuwait*[41] which, in his opinion, demonstrated that the duty of a professional man to use reasonable care arose not only in contract but also in tort and was consequently actionable in both. It would seem from this that Lord Denning has rejected the suggested distinction between status relationships and professional relationships made by Diplock, L.J. in *Bagot* v. *Stevens*[42]. In support of his viewpoint Lord Denning cited no less an authority than Viscount Haldane, L.C. in *Nocton* v. *Ashburton*[43]. As will be recalled that was a case involving a solicitor's breach of a fiduciary obligation to his client for which the client was held entitled to relief. However, in the course of discussing the nature of a solicitor's duty to his client, Viscount Haldane expressed the following opinion,

> " ... the solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or *even in tort*, for negligence in breach of a duty imposed on him".[44]

Unfortunately Viscount Haldane cited no authorities for this dictum which has, until *Mardon*, attracted little or no support from other judges. Quite the contrary because, as seen, it is in flat contradiction to decisions denying a remedy in tort in actions against solicitors both before and since *Nocton* v. *Ashburton*. It is doubtful whether *Mardon* can be regarded as having overruled the professional advisor cases. Those cases are probably by now too deeply entrenched to be overruled by statements made in the Court of Appeal which arguably were merely obiter dicta in any event. Indeed, Lord Denning himself appears to have implicitly accepted this in *Cook* v. *Swinfen* when he said, "An action against a solicitor is always one for breach of contract as was held in *Groom* v. *Crocker*."[45] Further *Groom* v. *Crocker*[46] is itself a Court of Appeal authority which, unless it can be regarded as having been overruled by *Hedley Byrne*, or as having been decided per incuriam, or as being inconsistent with another Court of Appeal decision, cannot be overruled by the Court of Appeal itself.[47] This is quite apart from the even less potent authority of *Mardon* in Australia. Despite this it is hoped that any court having the power to overrule the restrictive authorities (i.e. the Australian High Court or English House of Lords) will do so whenever an opportunity arises, both for the reasons already discussed, and because of the indefensible anomaly to which they give rise and to which we now turn.

3. The Anomalous nature of the cases

The anomaly inherent in the professional relationship cases arises from the fact that the advisor can be liable in tort to a non-client. Since there is no contract involved in such a case any duty owed must be one arising in tort.

39. Supra, n. 1.
40. Supra, n. 28.
41. Supra, n. 27.
42. Supra, n. 1.
43. [1914] A.C. 932.
44. [1914] A.C. 932, 956. Italics added.
45. [1967] 1 All E.R. 299, 302.
46. Supra, n. 1.
47. *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] 1 K.B. 718.

Therefore, if the professional relationship cases are still good law, in the situations mentioned earlier the non-client could be in a more advantageous position than the client. An indication of this can be seen in the following interchange between Diplock, L.J. and counsel for the defendant in *Bagot* v. *Stevens*.[48] After counsel had submitted that an architect's liability for breach of his contractual obligation of care could be grounded only in contract Diplock, L.J. asked, "What of the case where an architect acts gratuitously for a friend? Is not a duty owed? If he is negligent what is the cause of action?" Counsel replied that, while not conceding that any right of action would necessarily arise in such a case, if one does arise it must be a cause of action in tort. Indeed, no other answer could have been given to that question. Also it is clear that, since *Hedley Byrne*, if the professional advisor and gratuitous advisee is a relationship "equivalent to contract" in the sense used by Lord Devlin in that case[49], a right of action in tort can arise in respect of loss or damage caused by negligent advice.

Thus the non-client who suffers damage caused by the negligence of a professional advisor can bring his action within a limitation period running from the date of the damage and can avail himself ot the possibly wider scope of liability in tort. For example, the lay client of a barrister with whom there is of course no contractual relationship (at least in those jurisdictions which still adhere to a divided profession) in the relatively few circumstances in which a barrister can be sued for negligence (i.e. for non-litigious work[50]) might be in a better position than the client of a solicitor. Similarly, it is submitted that if the facts of *Ward* v. *Lewis* were to arise today with the vital difference that the plaintiff was a gratuitous advisee of the defendant solicitor the decision would be different. Since the defendant solicitor was carrying on a profession involving the giving of advice as to the investment powers of the plaintiff trustee under the trust instrument he would most probably be in a special relationship with the plaintiff for purposes of *Hedley Byrne* and *Evatt*'s case. Therefore he could be liable in tort if his advice was negligent. Consequently, the cause of action would not have been statute barred and the hardship mentioned by Hood, J. would not have occurred.

It is submitted that no possible reason of policy can justify this potentially more favourable position of the non-client. The contrast between his situation and that of the client points to an indefensible anomaly, an anomaly which serves no purpose except to add to the cogency of the argument against the validity of the professional advisor cases.

Conclusion

It is hoped that this article has at least to some extent achieved its purpose of indicating some of the shortcomings of the professional advisor and client cases. Although, as mentioned at the beginning, the lack of a remedy in tort is of only infrequent practical importance to the client this is no reason for an uncritical acceptance of those cases. As we have seen, they are of long standing authority having stood for many years with very little challenge. Despite this and for the reasons already outlined, it is submitted that developments in the modern tort of negligence particularly in the area of negligent advice demonstrate that the professional advisor cases, in so far as they deny the possibility of a tortious action to the client, now rest upon somewhat vulnerable legal foundation.

48. [1966] 1 Q.B. 197, 200, 201.
49. [1964] A.C.465, 530.
50. *Rondel* v. *Worsley*, [1969] 1 A.C. 191.