

THE PROFESSIONAL
NEGLIGENCE
LAW REVIEW

Editor
Nicholas Bird

THE LAWREVIEWS

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NEGLIGENCE
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PREFACE

This first edition of *The Professional Negligence Law Review* comes at a time of unusual political challenge to some elements of globalisation. Yet international trade and cross-border transactions are, and will remain, firmly entrenched in the day-to-day business of commercial institutions, and the fact that this is the 54th title published by *The Law Reviews* comes as little surprise. The insight that each title provides into the major commercial jurisdictions is invaluable to all those conducting and advising on modern commerce in specific areas.

Professionals play a vital role in the activities of most commercial entities. Value creation today is more sophisticated than it has ever been, and access to specialist expertise is an essential element of success. Equally, businesses now operate in the fastest ever period of technological development, and professional service providers are having to learn about and participate in these new areas. Understanding the varied conduct- and obligation-based duties of professionals involved in our transactions and engagements is an essential part of project management and enforcement of rights. And as we look forward to emerging developments, such as blockchain and artificial intelligence, the application of the core principles of professional obligations in this complex environment makes a guide like this indispensable.

In my own jurisdiction in England and Wales, the courts continue to be concerned with the scope of the professional's duty, the principles that govern the imposition of duties in relation to non-clients, the type of loss that the professional should be responsible for, and whether it is enough that the professional give correct or non-negligent advice or whether the client also has to be told about the risks. In addition, data-loss incidents continue both in and out of the public gaze, and data collection and processing are an increasing and potentially severe risk concern for all firms. A survey of the chapters reveals a limited number of common themes and a striking amount of diversity of law and practice in the different jurisdictions. The absence of any substantial homogeneity further underlines the need for a work like this.

This first edition is the product of the skill and knowledge of leading practitioners in various jurisdictions, setting out the key elements of professional conduct and obligations. Each chapter deals with the fundamental principles of professional negligence law, including obligations, fora, dispute resolution mechanisms, remedies and time bars. The chapter authors then review factors specific to the main professions and conclude with an outline of the developments of the past year and issues to look out for in the year ahead.

I would like to thank all of those who have contributed to this first edition. The wealth of their expertise is evident in the lucidity of their writing; there are only a limited number of firms that have the breadth of practice to cover all the major professions. The individual contributors' biographies can be found on page 137 onwards. I would especially like to thank my colleagues at Reynolds Porter Chamberlain for their input in preparing the chapter on England and Wales, and to Sophie Newton in particular. Finally, the team at Law Business Research has managed this project from inception to delivery with huge passion and care; I am very grateful to all of them.

Nicholas Bird

Reynolds Porter Chamberlain LLP

London

June 2018

IRELAND

*April McClements and Rebecca Ryan*¹

I INTRODUCTION

i Legal framework

General grounds for professional liability and their legal bases

The main grounds for a claim concerning professional liability are breach of contract, negligence and breach of fiduciary duty. As a general rule, where there are claims for tort and breach of contract available, liability should be determined by reference to contract rather than by reference to tort.²

Negligence

The primary line of authority for professional negligence claims stems from the UK decision of *Bolam v. Friern Hospital Management Committee*³ as approved in Ireland by *Ward v. McMaster*.⁴ The standard of care applicable in professional negligence cases is by reference to the 'ordinary skilled man exercising and professing to have that special skill'.

Contract

There is an implied term that a professional will exercise reasonable care and skill in providing services to their client. The scope of the services to be rendered will usually be defined in the contract and disputes frequently arise where there has been an element of 'mission creep'.

Fiduciary duty

Some professions also owe fiduciary duties to their clients, such as a duty of confidentiality. These may arise where the relationship is one of trust and loyalty. A plaintiff can claim equitable remedies in the event of a breach of fiduciary duty.

Limitations on the extent of the professional's liability

Professionals may limit their liability with regard to the contractual obligations owed to their clients. This can be done, for example, by way of exclusion clauses, clauses limiting the scope of the duty, or indemnity clauses.

1 April McClements and Rebecca Ryan are partners at Matheson.

2 *Pat O'Donnell & Co. Ltd v. Truck & Machinery Sales Ltd* (1 April 1988).

3 [2000] Lloyd's Rep PN 823.

4 [1989] ILRM 400.

Common defences to liability claim

Defences

A defendant may defend a professional negligence claim by establishing that one of the required elements of negligence was not present. The defendant can argue that the service provided was of a reasonable standard, or that the defendant's actions did not cause the damage complained of. The defendant may also argue that the particular duty of care owed did not extend to cover the damage complained of, as it was outside the terms of the retainer. A professional has a duty to protect the client's interests and carry out instructions in the matter to which the retainer relates; however, this duty does not extend to advising on unrelated matters. While this principle can limit the scope of the obligations arising in contract, it does not prevent a duty from arising in tort.

It should be noted that compliance with an accepted practice will not always provide a full defence, and the fact that a practice is universal within a profession will not of itself protect the professional concerned from liability (*Roche v. Peilow*,⁵ *ACC Bank Plc v. Johnston*,⁶ *Kelleher v. O'Connor*).⁷

Partial defences that reduce the level of costs awarded

Section 34 of the Civil Liability Act 1961 provides for apportionment in cases of contributory negligence. The court can reduce damages owed to a plaintiff as 'the Court thinks just and equitable, having regard to the degrees of fault of the plaintiff and the defendant'⁸ Further, claimants must mitigate their losses, which is a question of fact as opposed to one of law.

Finally, while not strictly a defence, a professional may also be in a position to seek a contribution or indemnity from another party or a 'concurrent wrongdoer', pursuant to the Civil Liability Act 1961. Two or more persons will be concurrent wrongdoers where they are liable to the same party in respect of the same damage. This commonly arises in cases involving construction professionals.

ii Limitation and prescription

Time limits

The Statute of Limitations 1957 (as amended) prescribes the time limits applicable to professional negligence claims. These time limits run from the date the cause of action accrued except in cases of concealment, fraud or mistake, where the limitation periods may be extended. A plaintiff who has a cause of action in both contract and tort is entitled to pursue whichever claim provides the most advantageous limitation period.⁹

Contract

Generally, there is a six-year time limit to institute proceedings based in contract, from the date on which the cause of action accrued, unless otherwise provided in the contract. A 12-year limitation period operates for contracts executed as a deed.

5 [1985] IR 232.

6 [2010] 4 IR 605.

7 [2010] IEHC 313.

8 *Carroll v. Clare County Council* [1975] IR 221.

9 *Finlay v. Murtagh* [1979] IR 249.

Tort

A six-year time limit applies to bring an action in tort, from the date on which the cause of action accrued.

In certain cases of financial loss, where the cause of action is in tort, the Supreme Court has held¹⁰ that the cause of action does not accrue when the wrong is committed but when actual damage is suffered.

iii Dispute fora and resolution

Courts or tribunals in which professional liability claims are in general brought

The jurisdiction in which court proceedings are brought will depend on the monetary value of the claim. The District Court has jurisdiction over claims up to €15,000 and the Circuit Court deals with claims with a value of up to €75,000 (or €60,000 for personal injury claims). Claims with a value in excess of this limit are heard by the High Court, which has an unlimited monetary jurisdiction. Each court has its own set of procedural rules.

High-value professional liability claims may also potentially be heard by the Commercial Court, a fast-track division of the High Court established to deal exclusively with disputes of a commercial nature valued in excess of €1 million. Cases in the Commercial Court are case-managed and tend to progress at a much quicker pace than other High Court cases.

Alternative dispute resolution

Professional liability disputes may also be dealt with by way of alternative dispute resolution (ADR) and it is common for contracts to require disputes to be determined by ADR. Mediation and arbitration are the most common forms of ADR used in Ireland; however, conciliation and adjudication are common in construction disputes. Conciliation is similar to mediation, except that the parties can opt for the conciliator to issue a binding recommendation. Other forms of ADR, such as expert determination and early neutral evaluation, are also available but less commonly used.

In addition, following the Mediation Act 2017, any court may adjourn legal proceedings on application by either party or of its own initiative to allow the parties to engage in mediation. Failure by either party to engage in ADR following such a direction can result in that party being penalised in relation to costs. Further, solicitors must now advise their clients of the option of mediation prior to issuing proceedings.

In Ireland, the law on arbitration is codified in the Arbitration Act 2010, which incorporates the UNCITRAL Model Law on International Commercial Arbitration. The arbitrator's decision is binding on the parties and there is no means of appeal. Where parties have entered into a valid arbitration agreement, the courts are obliged to stay proceedings. Ireland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, allowing Irish arbitral awards to be enforced in any of the 157 countries party to the Convention.

The Construction Contracts Act 2013 provides for adjudication in construction disputes regarding payment. The Act applies to all construction contracts entered into after 25 July 2016. Adjudication has the benefit of providing a decision within 28 days of

10 *Gallagher v. ACC Bank* [2012] IESC 35.

the referral to adjudication (or 42 days if the referring party agrees to this extension). The decision will bind the parties until the dispute is finally settled, such as by arbitral award or a decision of the court.

iv Remedies and loss

Types of remedies

There is a range of remedies available in professional negligence claims, including orders for specific performance, rescission and declarations, as well as interim remedies such as injunctions. Damages, however, are the primary remedy sought.

The method of assessing loss and damage

Calculating loss

Generally, damages for a contractual claim should place the plaintiff in the same situation, in monetary terms, as if the contract had been performed. The courts have developed various means of assessing damage in professional negligence claims. The expectation approach involves assessing the actual financial position of the plaintiff against the position the plaintiff expected to be in as a result of the advice given or the service received.

The decision of the House of Lords in *Banque Bruxelles SA v. Eagle Star (SAAMCo)*¹¹ has been applied in Irish cases, particularly concerning solicitors' negligence. In that case, the House of Lords held that where a person is under a duty to take reasonable care to provide information on which someone else would decide on a course of action, that person is, if negligent, responsible not for all the consequences of the course of action decided on but only for the foreseeable consequences of the information being wrong.

Further, the 'no-transaction' approach to damages has been adopted in a number of cases to compare the actual financial state of the plaintiff with the position it would have been in had it not been provided with the allegedly negligent advice or service.¹²

II SPECIFIC PROFESSIONS

i Lawyers

Barristers and solicitors are regulated by separate professional bodies. However, the Legal Services Regulation Act 2015 establishes a new Legal Services Regulatory Authority (LSRA), which (once the Act is fully commenced) will regulate the provision of legal services by all legal practitioners. The only sections of the Act that are currently commenced relate to the establishment of the LSRA and public consultations, and consequently solicitors and barristers continue to be regulated separately pending commencement of the relevant provisions.

Solicitors

Professional bodies and key regulatory and disciplinary codes and bodies

Solicitors are currently regulated by the Law Society of Ireland pursuant to the Solicitors Acts 1954 to 2015. The Law Society investigates complaints, including allegations of excessive fees, misconduct or inadequate professional services. The Complaints and Client Relations

11 [1997] AC 191.

12 For example *Kelleher v. O'Connor* [2010] 4 IR 380, *ACC v. Johnston* [2011] IEHC 376.

Committee can uphold or reject a complaint, or direct the solicitor to take certain steps, including paying compensation of up to €3,000. The Committee may also refer the solicitor to the Solicitors Disciplinary Tribunal, an independent statutory tribunal that considers complaints of misconduct. A client may also go directly to the Tribunal. The Tribunal may direct restitution of up to €15,000 and may refer its finding to the president of the High Court, who will determine the sanction to be imposed on the solicitor.

Compulsory insurance scheme:

Solicitors must maintain a minimum level of professional indemnity cover of €1,500,000 for every claim, excluding defence costs, as prescribed by the Solicitors Acts 1954 to 2015 (Professional Indemnity Insurance) Regulations 2017. The Regulations also set out additional minimum terms and conditions required in a solicitor's professional indemnity policy. Cover may only be provided by 'participating insurers' with a minimum financial strength rating of BBB.

Barristers

Professional bodies and key regulatory and disciplinary codes and bodies

Barristers are regulated by the Bar Council of Ireland. The Barristers' Professional Conduct Tribunal hears complaints of misconduct but does not consider claims regarding professional negligence, which are dealt with by the courts. The Tribunal can uphold or reject a complaint and can suspend or disbar a barrister, require return of the client's fee and impose a fine or a caution. It cannot award compensation. Decisions can be appealed to the Barristers' Professional Conduct Appeals Board.

Compulsory insurance scheme

The Bar Council Code of Conduct requires barristers to have professional indemnity insurance, currently set at €1,500,000 (any one claim).

ii Medical practitioners

Professional bodies and key regulatory and disciplinary codes and bodies

Irish Medical Council

Doctors are regulated by the Irish Medical Council (IMC), which maintains a register of practitioners, sets standards for professional competence and investigates complaints. The Preliminary Proceedings Committee (PPC) considers all complaints. If there is a *prima facie* case, the PPC must refer the complaint to the Fitness to Practise Committee (FPC) for a Fitness to Practise Inquiry. If the complaint does not warrant further action, the PPC may refer the dispute for mediation or refer the doctor to performance assessment. At the conclusion of an inquiry the FPC may recommend: a written censure, a fine not exceeding €5,000, attaching conditions to registration, suspending or cancelling registration, or prohibiting the doctor from applying to have his or her registration restored for a certain period.

Nursing and Midwifery Board of Ireland

The Nursing and Midwifery Board of Ireland (NMBI) is the independent statutory organisation responsible for regulation of nurses and midwives and its functions are defined

in the Nurses and Midwives Act 2011. The NMBI complaints procedure is very similar to the IMC procedure, as are the available sanctions. All complaints are initially sent to the PPC and transferred to the Fitness to Practise Committee for Inquiry where required.

Dental Council of Ireland

The Dental Council of Ireland (DCI) is the regulatory body for the dental profession, created under the Dentists Act 1985. Dentists must be on the DCI register to practise dentistry. Private patients may complain to the Dental Complaints Resolution Service (DCRS), a voluntary service that offers a free mediation service; however, patients must first raise their complaints with the dental practice concerned. Serious complaints and issues relating to fitness to practise may be referred to the DCI by the DCRS, or by patients. In addition, public patients may complain to the Health Service Executive (HSE) Complaints Officer and, if this outcome is not satisfactory, the patient may seek a review from the HSE's Director of Advocacy, or complain to the Office of the Ombudsman.

Pharmaceutical Society of Ireland

Pharmacists and pharmaceutical assistants must be registered with the Pharmaceutical Society of Ireland (PSI), whose functions are prescribed under the Pharmacy Act 2007. Each pharmacy must have a superintendent pharmacist and a supervising pharmacist, each of whom must have at least three years' experience. Complaints may be made to the PSI and the procedure is similar to that of the IMC, with complaints going to the PPC. If further action is warranted, the complaint will go to mediation or to either the Professional Conduct Committee or the Health Committee for an inquiry (depending on the nature of the complaint). At the conclusion of the inquiry, the committee will prepare a report containing the evidence presented and the committee's findings. The PSI Council can then decide what, if any, sanctions to impose.

Compulsory insurance scheme

The Medical Practitioners (Amendment) Act 2017 requires registered doctors to obtain medical indemnity insurance, except in certain circumstances. The Act only affects doctors in private practice, as practitioners working in the public health service (including private consultants practising in public hospitals) are covered under the state's clinical indemnity scheme, which also covers nurses and midwives. Under the NMBI Guidelines, nurses must have professional indemnity insurance. Nurses working in private practice may be covered by their employer's insurance, and the Irish Nurses and Midwives Organisation Medical Malpractice Scheme provides covers for members who are self-employed or employed outside the public sector. Dentists are required to hold appropriate professional indemnity cover.

Matters varying from Section I or matters from Section I specific to each group of professionals

Medical negligence claims must be brought within two years of the date of injury or the date of knowledge that an injury has occurred. This time limit does not apply to cases involving injuries to minors. In general, medical practitioners will not be found negligent if they have followed a general and approved practice; however, practitioners cannot rely on a general and approved practice with inherent defects that ought to be obvious to any person giving the matter due consideration. If the claim is based on the fact that the practitioner has deviated

from a general and approved practice, it must be proved that the course taken was one that no medical practitioner of similar specialisation and skill would have followed taking ordinary care.

iii Banking and finance professionals

Professional bodies and key regulatory and disciplinary codes and bodies

The Central Bank of Ireland

The Central Bank is responsible for the regulation and supervision of financial services firms. It has the power to conduct investigations, issue warnings, impose conditions on licences, revoke licences or impose administrative sanctions. As part of the Central Bank's Fitness and Probity Regime, it has enforcement powers against individuals found to be in breach when carrying out controlled functions within a financial institution. Finance professionals may appeal certain Central Bank decisions to the Irish Financial Services Appeals Tribunal.

Financial Services and Pensions Ombudsman

Consumers may lodge complaints against a financial services provider or pension provider with the Financial Services and Pensions Ombudsman (FSPO) (formerly two separate bodies, the Financial Services Ombudsman and the Pensions Ombudsman). The FSPO can resolve the matter informally through mediation or provide formal complaint resolution, which is legally binding and may be appealed to the High Court. The FSPO may award compensation of up to €52,000 per year where the subject of a complaint is an annuity, and €500,000 for all other complaints. These levels came into effect on 8 May 2018 and represent a significant increase from the previous maximum award of €250,000.

Compulsory insurance scheme

Investment intermediaries (under the Investment Intermediaries Act 1995) are required to hold adequate professional indemnity insurance of €1,250,000 per claim and €1,850,000 aggregate cover per annum (as set by the Insurance Mediation Directive). Compliance is monitored by the Central Bank.

iv Real property surveyors

Professional bodies and key regulatory and disciplinary codes and bodies

Society of Chartered Surveyors Ireland

The Society of Chartered Surveyors Ireland (SCSI) is the competent authority for the registration of quantity surveyors and building surveyors under the Building Control Act 2007, and is responsible for regulating its members. Failure to comply with SCSI by-laws may result in an action being taken by the Director of Regulation and the Professional Conduct Committee.

Property Services Regulatory Authority

The Property Services Regulatory Authority (PSRA) is responsible for licensing and regulation of property services providers (including property managers and auctioneers), including the investigation and adjudication of complaints. If the PSRA determines that a provider has engaged in improper conduct, it may caution the provider, revoke or suspend the provider's licence or impose penalties up to €250,000. Additionally, the Property Services Regulation Act

2011 introduces offences such as providing property services without a licence, obstructing an investigation or mismanaging client funds. These offences carry penalties of up to €5,000 or 12 months' imprisonment on summary conviction, or both, or fines of up to €50,000 or five years' imprisonment on indictment, or both.

Compulsory insurance scheme

The SCSI requires members to ensure all work is covered by adequate and appropriate professional indemnity insurance cover.

The Property Services (Regulations) Act 2011 and the Property Services (Regulation) Act 2011 (Professional Indemnity Insurance) Regulations 2012 impose a minimum level of professional indemnity insurance of €500,000 for all property services providers licensed with the PSRA.

v Construction professionals

Professional bodies and key regulatory and disciplinary codes and bodies

The Royal Institute of the Architects of Ireland

The Royal Institute of the Architects of Ireland (RIAI) is the regulatory and support body for architects, and the official registration body under the Building Control Act 2007. It produces codes of conduct and standards, and complaints regarding poor professional performance may be made to the Professional Conduct Committee.

Engineers Ireland

Engineers Ireland is responsible for the maintenance and development of professional conduct and standards for its members, as well as for enforcement and disciplinary actions. While membership is optional, the title of chartered engineer is reserved to members of Engineers Ireland. Complaints may be made to the Registrar of Engineers Ireland. The Registrar can refer the complaint to the Ethics and Disciplinary Board, which is responsible for enforcing the Code of Ethics. It will appoint an investigative and disciplinary panel to investigate and adjudicate on a complaint of professional misconduct. The panel may require an undertaking from the member not to repeat the conduct complained of, issue a reprimand or suspend or exclude the member from membership. The panel may also require a contribution towards the costs of the investigation and adjudication.

Compulsory insurance scheme

The RIAI requires practising members to hold adequate and appropriate levels of professional indemnity insurance.

Members of Engineers Ireland must comply with the Code of Ethics, which obliges them to maintain appropriate professional indemnity cover.

vi Accountants and auditors

Professional bodies and key regulatory and disciplinary codes and bodies

Irish Auditing and Accounting Supervisory Authority

The Irish Auditing and Accounting Supervisory Authority (IAASA) is responsible for supervising the manner in which the prescribed accountancy bodies regulate their members, including admissions, licensing, complaints, investigations and appeals. It also conducts inspections of auditors and audit firms, investigates auditors and can impose sanctions.

Chartered Accountants Ireland

There are numerous accountancy bodies in Ireland, but Chartered Accountants Ireland (CAI) is the dominant body responsible for regulating members of the audit and accountancy professions. It handles complaints and takes disciplinary action against members, including for misconduct and poor professional performance.

While the CAI Council remains responsible for the regulation and disciplining of members, the CAI established the Chartered Accountants Regulatory Board to oversee the fairness, impartiality and integrity of the regulatory responsibilities of the CAI.

Compulsory insurance scheme

The Companies Act 2014 (Professional Indemnity Insurance) (Liquidators) Regulations 2016 require liquidators (regulated by the IAASA) to hold professional indemnity insurance. The Regulations require a cover of €1,500,000 for each and every claim, plus defence costs, provided that this level of insurance is commensurate with the value and nature of the work undertaken by the liquidator.

The CAI requires all members to ensure they are covered by their firm's professional indemnity insurance policy. The CAI's Public Practice Regulations set a minimum level of aggregate cover of €2,140,000 with some exceptions available. Failure to adhere to this requirement will result in disciplinary action.

vii Insurance professionals

Professional bodies and key regulatory and disciplinary codes and bodies

Central Bank of Ireland

The Central Bank is responsible for the prudential supervision of insurance and reinsurance undertakings authorised in Ireland. Undertakings must be authorised by the Central Bank and it is an offence to engage in such activities without prior approval. The Central Bank issues standards, policies and guidance with which undertakings should comply, and has powers of enforcement.

Financial Services and Pensions Ombudsman

Complaints against insurance companies can be lodged with the FSPO, as outlined above.

Compulsory insurance scheme

Insurance intermediaries are required to hold professional indemnity insurance. This is set at €1,250,000 per claim and €1,850,000 aggregate cover per annum (pursuant to the Insurance Mediation Directive).

III YEAR IN REVIEW

There have been a number of Supreme Court decisions on cases involving professional negligence in the past year and while these have predominantly been in the area of solicitors' professional negligence, many of the decisions have implications for professionals generally.

The Supreme Court very recently delivered its judgment in the case of *Rosbeg Partners v. LK Shields Solicitors*¹³ (18 April 2018), acknowledging that even where a defendant is negligent it does not follow that the measure of damages is all losses that follow the negligent act. The case related to the calculation of damages for professional negligence occurring in the context of a property market that experienced considerable fluctuations in value. The High Court had awarded damages of €11.2 million against the defendant and this award was upheld by the Court of Appeal. However, the Supreme Court allowed the subsequent appeal before it and reduced the award of damages to €5.2 million.

It was not disputed that the defendant was negligent in failing to secure a registration of the plaintiff's title. However, it was common case that the problem was a failure to take certain steps within a reasonable timescale and that the transactional steps that were left undone were always capable of being carried out and were eventually completed by other solicitors when the problem came to light.

O'Donnell J observed that 'the butterfly may beat its wings and cause an earthquake on the other side of the world, but this is not the principle on which loss is to be recoverable in law'. The Court considered that it was incorrect to say that the defendant's negligence was the 'direct' or 'factual' cause of the plaintiff's loss other than in the sense that 'but for' the defendant's negligence the plaintiff would not have suffered the loss and while that is a necessary step in the recovery of damages it is never sufficient. The Court considered there were other 'but for' causes that could be identified in this case, most obviously the collapse in the property market but also the plaintiff's decision not to sell.

Considering the recent decision of the UK Supreme Court in *Hughes-Holland v. BPE*,¹⁴ O'Donnell J noted that the law is concerned with assigning responsibility for the consequences of the breach and a defendant is not necessarily responsible in law for everything that follows from his or her act, even if it is wrongful. 'Where the negligence is failing to do something which can yet be done, then at least, *prima facie*, the measure of damages is, first, the cost of the substitute performance of the duty and, second, any foreseeable loss in value caused by the delay in doing so. If the market is static or rising, it may be that the defendant escapes without any liability for damages under this latter heading, but whereas here the market is falling, then the plaintiff is entitled to recover the difference in value of the property between the date at which the works ought to have been done, which would have allowed for a sale, and the point at which that problem could have reasonably be remedied (assuming it can be established that the plaintiff intended to sell, and was deprived of a sale by the defect).'¹⁵

In another recent decision of the Supreme Court concerning solicitors' professional negligence, *Martin Murray v. Budds, Hanahoe and Michael E Hanahoe Solicitors*,¹⁵ the Supreme Court considered that a claim framed as a professional negligence action seeking damages for negligence and breach of contract, where the loss and damage claimed was for 'worry and stress' short of a recognised physical injury, should be treated as a personal injury

13 [2018] IESC 23.

14 [2017] UKSC 21.

15 [2017] IESC 4.

action, subject to the limitation period applicable to personal injury actions and the claim was therefore statute-barred. The Supreme Court also affirmed the decision of the Court of Appeal that damages would not lie for worry and stress in the absence of a psychiatric illness.

The Supreme Court went on to consider whether the loss and damage claimed by the plaintiff for worry and stress may be recoverable in an action for breach of contract or professional negligence and held there was no exceptional reason to depart from the position in *Addis v. Gramophone Co Ltd*,¹⁶ and rejected a stand-alone ‘right of claim for being upset’ as damages would not be capable of being awarded for this breach of contract. The plaintiff had been represented by a solicitor and counsel and there was no breach of professional standards as he was competently represented. The Court was satisfied that *Addis* remains the law in Ireland and the plaintiff’s claim did not come within one of the recognised exemptions to *Addis*. This case demonstrates the restrictive approach of the Irish courts to non-pecuniary loss (i.e., emotional distress).

The Supreme Court delivered its judgment in the case of *Brandley v. Deane & Anor* on 15 November 2017.¹⁷ This case involved a claim for damages against an engineer and a builder for breach of contract and negligence arising from defective foundations. The High Court dismissed the claim on the basis that it was statute-barred as the structural defects complained of occurred more than six years after the foundations were laid and the certifications issued. However, the Supreme Court upheld the Court of Appeal’s finding that the point at which the damage occurred was when the cracks appeared in the building and thus the claim was not in fact statute-barred. The Supreme Court concluded that the date of manifestation is the appropriate starting point in property damage claims and the Statute of Limitations 1957 should be construed accordingly. The Court found there was a distinction between a ‘defect’ and the subsequent damage it causes. Damage is manifest when it is capable of being discovered. Time runs from the manifestation of the damage rather than the underlying defect (and thus it is the subsequent physical damage caused by the latent defect, rather than the latent defect itself, that must be capable of discovery).

In the June 2017 decision of *Walsh v. Jones Lang Lasalle Limited*,¹⁸ the Supreme Court considered an estate agent’s liability to a purchaser for errors in a sales brochure, clarifying the validity of disclaimers of liability by professional service firms to third parties. The High Court had awarded the plaintiff damages in the sum of €350,000 in respect of a negligent misstatement in a sales brochure produced by the defendant. The decision of the High Court was overturned on appeal by the Supreme Court (by a majority of 3:2). The measurement of the premises as set out in the sales brochure was incorrect and the legal issue for determination was whether, in light of the disclaimer contained in the brochure, the defendant was liable for the misstatement.

Laffoy J considered that the core issue was whether in furnishing the brochure to the plaintiff, having regard to the disclaimer, the defendant could be found to have assumed responsibility to the plaintiff for the accuracy of the information in the brochure. This question must be determined objectively by reference to what the reasonable person in the position of the plaintiff would have understood. Reading the disclaimer as a whole, it was clear that the disclaimer made clear the defendant was not guaranteeing the accuracy of the information and the plaintiff was told in clear terms that he should satisfy himself as to its

16 [1909] AC 488.

17 At the time of writing, the approved judgment has not yet been published.

18 [2017] IESC 38.

accuracy. What is required is that a person in the position of a defendant should clearly and unambiguously state that it is not assuming responsibility for the task of ensuring that the information is accurate and that the recipient of the brochure has responsibility for that task. The Court was satisfied that the defendant had done so. Laffoy J considered that the High Court had erred in failing to recognise that the starting point for the analysis should have been whether the defendant owed a duty of care to the plaintiff.

O'Donnell J, also allowing the appeal, considered that this was a case of negligent misstatement (rather than a negligent act) and that the High Court judgment blurred the distinction between the two. In the case of a negligent misstatement, O'Donnell J held that the disclaimer is one piece of evidence in determining whether or not there has been an assumption of duty and therefore a duty of care. O'Donnell J found that the defendant had not assumed responsibility to all purchasers for the accuracy of statements in the brochure.

McMenamin J (dissenting) placed emphasis on the form and words of the disclaimer and distinguished the disclaimer before the court from another disclaimer, the terms of which he considered to be 'crystal clear'.

*Emerald Island Assurance and Investments Limited v. Coakley Moloney Solicitors*¹⁹ dealt with the scenario in which a client does not wish to follow his or her solicitor's advice and the Court of Appeal considered how far a solicitor must go in warning the client of the consequences of not following the advice. The Court of Appeal set out the warning that might be given by a solicitor in this scenario in the following terms: 'Obviously, the more perilous the situation, the more explicit and compelling the warning needs to be, and if the warning was not appreciated fully or complied with or responded to appropriately in the first instance, then it would call for a second warning to be given by a competent professional adviser. What the solicitor cannot do is simply to say that the client would not have paid attention to any warning and therefore he is not liable.'

i Legislative developments

Legislation affecting the legal profession

The Legal Services Regulation Act 2015 will involve a significant change to the regulation of the legal profession, once fully commenced. It establishes the Legal Services Regulatory Authority (LSRA), which will be responsible for regulating the provision of legal services by barristers and solicitors. It also establishes a Legal Practitioners Disciplinary Tribunal, which will hear complaints against solicitors and barristers. The Act also provides for a mediator to assist in the complaints procedure and, failing this, a determination to be made by the LSRA. It introduces new practice structures and a new costs system. Currently, the only provisions that have been commenced relate to the establishment of the LSRA, a report by the LSRA on the operation of multidisciplinary practices, and public consultation on operation of legal partnerships and issues relating to barristers.

The Mediation Act 2017 came into force on 1 January 2018 and imposes an obligation on legal practitioners to advise their clients to consider mediation before bringing court proceedings. Where clients choose to bring proceedings without engaging in mediation, solicitors must sign a statutory declaration confirming that they advised the client of the

19 [2016] IECA 12.

option of mediation. The Act also gives courts the power to suspend proceedings to facilitate mediation and provides that an unreasonable refusal or failure to attend mediation may be taken into account in awarding costs.

Legislation affecting banking and finance professionals

A new office of the FSPO was created by the Financial Services and Pensions Ombudsman Act 2017, which came into force on 1 January 2018. Notably the Act also extends the limitation period for customers to bring a complaint against a financial services provider regarding long-term financial services to either six years from the date of the conduct giving rise to the complaint, or three years from the date on which the person making the complaint first became aware or ought to have become aware of that act or conduct, or such longer period as may be permitted by the FSPO. The matter complained of must have occurred during or after 2002.

With effect from 8 May 2018, the FSPO may award compensation of €52,000 per annum where the subject of the complaint is an annuity, or €500,000 in respect of all other complaints. This is an increase from the previous maximum level of compensation, which was €250,000.

The Minimum Competency Framework replaces the Minimum Competency Code 2011 with effect from 3 January 2018. The Framework comprises the Minimum Competency Code 2017 and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1) Minimum Competency) Regulations 2017. It sets out minimum professional standards for persons providing financial services. It also sets out base levels of qualification and experience for staff of financial services providers.

Legislation affecting medical practitioners

The Medical Practitioners Amendment Act 2017 Act introduced a mandatory requirement for doctors in private practice to hold professional indemnity insurance (with limited exceptions). Doctors in the public health service are covered under the state's clinical indemnity scheme.

The Civil Liability Amendment Act 2017 was enacted on 22 November 2017 and at the time of writing is expected receive a commencement date shortly. The Act introduces a legislative basis for the courts to make periodic payment orders in catastrophic injury cases. At present, damages are awarded in a lump sum at the conclusion of an action; however, periodic payment orders allow a plaintiff to have the compensation paid in a series of index-linked payments, over the course of the plaintiff's life, limiting the possibility of being undercompensated.

IV OUTLOOK AND FUTURE DEVELOPMENTS

i General Data Protection Regulation

The General Data Protection Regulation (GDPR) came into force on 25 May 2018, making data protection a priority issue for professionals. The GDPR will have wide-ranging implications for professionals, most notably for solicitors, banking, finance and insurance professionals, given the nature of the data they hold in relation to their clients. In essence, the GDPR strengthens existing protections and introduces new rights for individuals. The obligations that will be imposed on professionals include ensuring appropriate record-keeping and implementing adequate security standards, which will involve cost implications, as well as the possibility of regulatory recourse in the event of a breach.

The Data Protection Act 2018 was signed into law on 24 May 2018 and is intended to give further effect to the GDPR in Ireland and to transpose the accompanying directive into Irish law. The Act outlines additional details regarding the technical and organisational measures that should be implemented to comply with key obligations.

ii Cyberattacks

Cyberattacks have been on the rise and it is likely that there will continue to be an increased number of cyberattacks against professionals, particularly those who manage client funds or hold valuable data. Law firms hold a vast array of sensitive information on their servers, from intellectual property to medical records and bank details. This information is highly valuable and recently law firms have become popular targets for cyberattacks. The Garda National Cybersecurity Bureau has advised the Law Society of Ireland that various cyberattacks on Irish law firms have been reported in recent months, with a surge in cyberattacks resulting from business emails being compromised, and has warned of an ongoing campaign against legal firms in Ireland. These attacks appear commonly to be phishing attacks; however, they can also take many other forms, such as using ransomware to lock firms out of their information and firms being targeted by cybercriminals seeking information on mergers to be used for inside trading. Under the GDPR, firms will be obliged to report a cyber-breach within 72 hours, which will open the firms up to significant reputational damage, as well as the potential for negligence actions, and, if the firm is in breach of GDPR standards, it may be liable for fines of up to 4 per cent of annual global turnover or €20,000,000 (whichever is greater).

iii Increased use of technology

Emerging technologies also present opportunities and challenges for professionals. Automation is increasingly a feature of professional life and various professions, including the legal profession, are investing in new technologies and automation.

The use of commercial drones is increasing in the construction industry, particularly among surveyors. The technology surrounding drones is rapidly developing and, to mirror the emerging technology in this area, legislative reform is proposed. The draft Small Unmanned Aircraft (Drones) Bill 2017 proposes to place an obligation on commercial drone operators to have insurance in place, and imposes criminal liability for certain drone offences. It prohibits the use of a drone for surveillance, capturing images, videos, etc. where there is a reasonable expectation of privacy, and without consent. There is currently no timeline for implementation.

In the insurance sector, in future there is likely to be litigation challenging the claims decisions made by automated claims-processing systems and regarding the interpretation of the specific GDPR articles that confer rights on individuals in relation to automated decision-making.

iv Limitation periods

Following the recent decision of the Supreme Court in *Brandley v. Deane & Anor*,²⁰ there is potential for claims being successfully brought against construction professionals outside the traditional six-year limitation period on the basis that the damage in question manifested at

20 At the time of writing, the approved judgment has not yet been published.

a later date, and this may lead to an increase in claims by plaintiffs who previously believed their claims were statute-barred. An extension of the limitation period applicable to claims brought before the FSPO in respect of long-term financial services may also lead to an increase in claims previously thought to be statute-barred being brought against financial services providers.

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April also works in the area of general commercial litigation with a particular focus on contractual disputes, most of which are litigated in the Commercial Court. She is also a strong advocate of ADR and has acted for clients in mediation and arbitration.

April is a member of the Law Society of Ireland, the Insurance Institute of Ireland and the British Insurance Law Association. She has contributed to various industry publications and has participated in seminars as a speaker on insurance issues.

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Prior to joining Matheson in 2008, Rebecca qualified as a solicitor with UK law firm Russell Jones and Walker, practising in all areas of personal injury and disease litigation. During her time with RJW, Rebecca was involved in the pilot scheme for the pre-action protocol prior to its launch in 1999. She proactively pursues the opportunity to utilise her

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