

# Tughans

RICS Foundation Seminar:  
*Avoiding Professional Negligence Claims*

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*Desmond Carr & Grainne Lee*  
*Commercial and Construction Disputes*  
*Tughans*

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**Please note:**

This presentation is provided for informational purposes only.

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The law referenced in this presentation may have changed or could be affected by case law developments.

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## Outline

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- Defining negligence
- Understanding your remit and your limitations
- Managing expectations
- KYR (Keep Yourself Right)
- Lessons from recent cases

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## Mistakes by construction professionals

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- Failing to correctly measure and/or plot the boundaries of a construction site
- Failing to identify hazardous or precarious ground conditions
- Failing to comply with planning and building control regulations
- Failing to produce a design that meets a client's brief or is free of defects
- Failing to prepare bills of quantities in accordance with standard methods of measurement
- Failing to advise on the most appropriate form of construction contract
- Failing to issue information or instructions within a reasonable period of time
- Failing to identify construction defects during the course of an inspection

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## What is professional negligence?

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- Occurs where a professional fails to perform their responsibilities to the required standard.
- A claim may be based on one or more of the following:
  - Breach of a contractual term (express or implied).
  - Breach of duty of care owed in the tort of negligence.
  - Breach of fiduciary duty.
  - Breach of statutory duty.
- These claims may be brought by the professional's client, but third parties may also be able to bring an action against the professional, depending on the circumstances.

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## Contract or tort?

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- A tortious duty of care can arise whether or not there is a contractual relationship between the parties.
- Where there is a contractual relationship, the professional may owe concurrent duties in contract and in tort. A concurrent duty in contract and tort exists where a plaintiff can build a tortious claim on either the:
  - Defendant's undertaking based in contract.
  - Defendant's negligence in performing the contract in a way that caused harm to the claimant's property or financial interests.
- As a general rule, professionals are taken to have assumed responsibility towards their clients and so owe both a duty of care in tort and contractual obligations.
- Limitation and damages considerations
- "Gross" negligence

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Contractual liability

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- The scope of the professional's contractual duty is usually established by the terms of the contract or retainer between the professional adviser and the client.
- The retainer: The contract between a professional and the client governs the basis of professional liability, and is the source of the professional duties owed to the client.
- Express terms, and implied terms:
  - Trade custom.
  - The officious bystander test.
  - A previous consistent course of dealings.
  - Statute.

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Contractual liability

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- Precise scope of the contractual terms
- Scope of duty may depend on nature of the client
- Absolute or qualified contractual obligations
- Continuing duty?
- Contractual liability to non-clients
- Advice have to be in writing?

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Negligence: the basic requirements

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- The tort of negligence has three basic requirements which must be proved by the plaintiff on a balance of probabilities, namely:
  - Duty of care. The defendant owed the claimant a duty not to cause the type of harm suffered.
  - Breach of duty. The defendant breached the duty owed.
  - Causation. This has two elements, both of which must be proved:
    - factual causation: the claimant must prove that, but for the defendant's negligence, the claimant would not have suffered loss; and
    - legal causation or remoteness: whether the defendant's negligence was the legal cause of the loss.

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## Establishing a duty of care

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- Different tests to establish whether a duty of care is owed in tort by one party to another.
- The boundaries of proximity and the imposition of a duty of care are still being tested in the courts.
- However, the courts are reluctant to find the existence of a duty of care where there has been no clear assumption of responsibility on the part of the professional.
- *"... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".*  
Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580

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## Assumption of responsibility

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- The precise relationship between the person giving the advice and the recipient.
- The precise circumstances in which the advice or statement, or other information came into existence. Any contract or other relationship with a third party is relevant.
- The precise circumstances in which the advice or information or other information was communicated to the recipient, and for what purpose or purposes, and whether the communication was made by the adviser or by a third party. It would be necessary to examine:
  - the purpose of the communication, both as seen by the adviser and the advisee
  - the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee and
  - the reliance in fact placed on it.
- The presence or absence of other advisers on whom the advisee would or could rely.
- The opportunity (if any) given to the adviser to issue a disclaimer.

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## Establishing a breach of duty

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- Where a duty is owed in contract or tort, plaintiff must establish that there has been a breach of that duty.
- Plaintiff must show that the professional did not comply with the standard owed.
- In other words, negligence will be established only if the professional has made an error which no reasonable member of their profession, in the circumstances, would have made.
- Nb: Expert evidence in professional negligence claims

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## Establishing a breach of duty

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- Standard of care in **contract claims** – Usually, in the case of giving advice or providing some other professional service, the duty of reasonable care and skill is likely to apply.
- Standard of care in **negligence** – The reasonable man, which is an objective test. The mere fact of an error does not constitute negligence; the standard required is not one of perfection.
- Bolam test: held that a doctor was not necessarily negligent if he conformed to a practice accepted as proper by some responsible members of his profession, even if other members would have taken a different view. The doctor would not have breached his duty if he acted in a way regarded as proper by a responsible body of opinion.
- Eg, a QS can only be negligent if his valuation is erroneous. It is not enough that, at some point in reaching a valuation, he failed to meet the standards of the ordinary competent QS.
- Level of experience is not relevant
- Special skill may raise the standard of care
- Professional standards

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## Causation

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- A professional may have acted negligently, but if his actions or advice did not cause the claimant's loss, the claim will not succeed.
- The claimant must establish that the negligence has caused him to sustain loss as a matter of fact on the balance of probabilities.
- In other words, a claimant must prove that, but for the defendant's carelessness, the claimant would not have suffered any loss.
- The claimant's claim will fail if either:
  - The claimant would have suffered the same loss even in the absence of the defendant's negligence.
  - The true cause of the claimant's loss was something other than the defendant's carelessness.
- Scope of duty
- Factual causation
- Legal causation or remoteness

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## What's the loss?

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- Contract v tort claims
- Time at which loss will be assessed
- SAAMCO principle: loss must be within scope of duty of professional giving inaccurate information
- Contributory negligence: *Law Reform (Miscellaneous Provisions) Act (NI) 1948*
- Contribution: *Civil Liability (Contribution) Act 1978*
- Mitigation

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**Budget – managing expectations**

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*Riva Properties Limited & Others v Foster & Partners Limited* [2017] EWHC 2574 (TCC)

- Who has responsibility for budget?
- Fosters were required "to identify their client's requirements and possible constraints in any event".
- Value engineering was not the answer

**Takeaway points**

- Be pro-active – always take into consideration any budget constraints
- Never assume there is no budget or that budget does not matter to the client
- Considering budget and advising on costs are not the same
- Manage client expectations as to what is and is not achievable

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**Riva – a cautionary tale**

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- The importance of client care
- Mr Dhanoa "was not the sort of client that Fosters really wanted"
- Fosters suggestion that Mr Dhanoa was not a client of their usual calibre directly fed into the courts decision
- Client care is important even when the relationship has broken down
- Fosters negligence was a direct result of their low regard for Mr Dhanoa

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**Once a professional,  
always a professional**

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*Lejanvarn v Burgess & Another* [2017] EWCA Civ 254

- No contract
- No payment
- "no intent to create legal relations"
- "She held herself out as having professional skills. She said she would perform professional services and did so"

**Takeaway points**

- An informal arrangement with no contract in place does not mean that a professional duty is not owed
- Professional liability does not distinguish between 'clients' and 'friends'
- Key question to ask – 'will this person rely on my advice?'

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The importance of scope

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*Denning v Greenhalgh Financial Services Ltd* [2017] EWHC 143 (QB)

- Defined what work he would undertake
- Expressly stated what work he would not carry out
- "The courts are loath to extend that duty far beyond the retainer"

**Takeaway points**

- The importance of 'allocation of risk by contract'
- Retainer letters offer protection but there is no such thing as a 'general retainer'
- Document any scope revisions – don't be afraid to revisit retainers
- Be conscious of regular clients

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KYR – Keep Yourself Right

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- Professional Indemnity Insurance! Coverage, indemnity limit, excess, defence costs
- Limitation periods: contractual v statutory
- Exemption clauses to reduce or exclude liability: To be effective, an exclusion or limitation clause must be incorporated into the contract and brought to the attention of the other party before the contract is concluded.
- An exclusion clause must cover the breach and it will be strictly construed (contra proferentem rule). It must be wide enough to cover negligence.
- Unfair Contract Terms Act 1977 (UCTA)
- Where a contract is made with a consumer, the Unfair Terms in Consumer Contract Regulations 1999 (SI 1999/2083) will apply to contract terms that have not been individually negotiated.
- Excluding liability to third parties

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KYR – Keep Yourself Right

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- Clearly define scope of retainer before starting substantive work
- Not only what is included, but crucially what is NOT included
- Letter or engagement – professional appointment/contract – terms
- Professional body regulations or code of conduct
- Flag exclusion clauses
- Audit trail
- Attendance notes or email to confirm discussions or instructions
- Documents changes to scope
- Reporting claims
- Get legal advice early!

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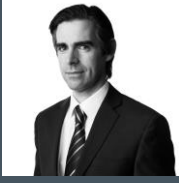
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**DESMOND CARR**  
Director

Desmond.Carr@tughans.com  
T: +44 (0) 28 9055 3300  
D: +44 (0) 28 9082 0507

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