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# LIABILITY FOR NEGLIGENCE BY MEMBERS OF PROFESSIONS

## ABSTRACT

The themes of the thesis arise from a perceived increase in the incidence of liability for negligence by professional persons. Factors affecting the increase are many and show there is a delicate balance to be maintained between independent action on the part of the professional and control by regulatory agencies such as the professional bodies and the courts.

### Chapter 1

The history of professional negligence is intimately connected with the development of the tort of negligence and the law of contract. Professional liability derived from membership of a 'common calling' and was based, initially in tort and later in contract, on doing badly or not at all something which had been undertaken.

### Chapter 2

A profession may be described as an occupation which displays certain traits in common with a number of other occupations. Among most important traits are autonomy from outside control, maintenance of standards and discipline. In the case of the latter two traits the courts also assume an overriding role. As a result, it is inevitable that there can be no absolute autonomy. However, if the professions do their jobs well enough then there should be less need for court supervision, bearing in mind that the courts, and not the professions, will

deal with claims for compensation by those injured by professional activity.

### Chapter 3

Professions are concerned about the increasing incidence of claims in professional negligence. Such is the relationship between professional and client that duties may arise in contract and in tort. For the purpose of investigating professional negligence attention has been focussed upon the legal and medical professions. Much of the concern has been fuelled by disturbing accounts of malpractice liability in the USA. American trends may well develop in the UK but owing to cultural differences and differences between legal and medical systems the full impact will not be felt. Among factors which lead to concern over liability and which affect both professional and client, although differently, are causation, proof of negligence, level of awards, nature of awards and insurance. There are many procedural problems as a consequence of these factors.

### Chapter 4

The liability of the legal profession is examined. The liability of barristers arises in tort. Liability of solicitors, though formerly exclusively based upon breach of contract, is now based on contract and tort. A major area of concern has been the expanding scope of solicitors' negligence, particularly in the light of recent developments in the House of Lords. It appears

that the prospect of widening liability has receded for the moment.

#### Chapter 5

Advocates' immunity produces an anomalous situation of which barristers are the main beneficiaries. Immunity exists because of public policy considerations upheld by the courts. Other professions see no justification for the immunity and it is not granted in some other jurisdictions. In a climate of consumerism the immunity is under attack.

#### Chapter 6

Medical negligence affords an opportunity to examine the mechanism for maintenance of standards of one group of professionals. The General Medical Council is charged with maintaining professional standards. However, it has little control over the standards associated with negligence and cannot, in any event, provide compensation for injured persons. The courts have this task and the issue of negligence standards falls to be considered by them. Unfortunately, the standards of the medical profession as a whole are taken to be the standards relevant for negligence. Thus, the accountability of the medical profession to the courts, and ultimately patients, is limited.

## Chapter 7

Disclosure of risk provides some insight into the doctor/patient relationship. In actions relating to non-disclosure of risk there is no allegation that medical treatment or procedures have been negligently performed. The patient suffers the consequences or side-effects of adequately performed procedures. The gist of the allegation is that there would have been no consent to the procedure if the risks had been disclosed. The problem is - what risks should be disclosed? The issue raises questions about how far a patient has an interest in what happens to his own body, and how much patients should participate in decision-making.

### Conclusions

There is no professional negligence "crisis" but there is a need to maintain vigilance in order that a balance might be maintained. Suggested reforms of the legal profession may produce adequate standards and discipline. Proposed reforms of health care provision may produce their own problems with regard to negligence. Substitution of a 'no fault' system for tort liability might be a way forward.

Liability for negligence by members of professions.

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I hereby declare that none of the material contained in this thesis has previously been submitted for a degree in this or any other university.

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DEDICATION

To Di, David and Michael

## ACKNOWLEDGMENT

It would be inappropriate to submit this thesis without mention of the people who have advised, encouraged and assisted me in its preparation. I am indebted to Dr H. Teff of the University of Durham for the way in which he supervised and guided my work in such a patient and considerate manner. Others who deserve particular mention are M. L. Bowen, J.M.C. Constable and E. Giblin of Teesside Business School for their encouragement, Linda Watson of Teesside Business School and Jean Connell and Pauline Wayne of the Teesside Polytechnic Computer Centre who coped with my handwriting to produce this typed result, and the staff of Teesside Polytechnic Library who helped me locate references in other libraries.

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## Introduction

Professional activity has been a feature of organised society. Professions are themselves organised societies. Early in the development of civilization it is possible to find reference to activity which today we would classify as 'professional.' One of the earliest professions to emerge was medicine. If medicine is used as an example, the nature of professional activity might be illustrated from an early stage. In some ancient civilizations reference may be found to professional regulation. An example may be found by reference to Babylonian law:

'If a surgeon has made a serious wound [presumably meaning "a deep incision"] in a gentleman with a bronze knife, and has thereby saved the gentleman's life... he shall receive ten shekels of silver. If (the patient is) a commoner, he shall receive five shekels of silver. If (the patient is) a gentleman's slave, the slave's master shall pay the surgeon two shekels of silver.

If the surgeon has made a serious wound in a gentleman with a bronze knife, and has thereby caused the gentleman to die,... they shall cut off the surgeon's hand.'<sup>1</sup>

The modern doctor should be thankful that the penalty for failure to conform to standards is no longer so drastic.<sup>2</sup> Babylonian law was harsh but demonstrated that, from an early stage, organised society has felt the need to regulate the rights and duties of some



occupations, particularly doctors. Continuing the theme of doctors, modern regulations may be traced back to Greek society in the 4th century B.C where the Hippocratic Oath represents an ideal by which a doctor should practise. As Greek philosophy provided an intellectual foundation the Hippocratic Oath found ready acceptance by the early Christian Church and the influence continued through the Middle Ages. Modern medical ethics, however, emerged and began to develop towards the latter part of the 18th century. The old professions of physicians, surgeons and apothecaries were undermined by the aspirations of the rising middle classes. As medicine developed and new voluntary hospitals were established, not only were the shortcomings of medical practice revealed, particularly during epidemics, but also public expectations were raised. A code of conduct was drawn up in Manchester in 1789 during an epidemic as a result of friction between hospital staff and a local physician. In 1803 the code was published.<sup>3</sup> The Provincial Medical and Surgical Association was established which concerned itself with medical conduct and ethics. A Committee on Medical Ethics was set up in 1849 and in 1856 the British Medical Association was founded. In 1857 a committee was appointed to frame a code of ethical laws. At the instigation of the British Medical Association the General Medical Council was instituted under the Medical Act 1858.<sup>4</sup>

## Modern Problems

The problems associated with professional negligence appear to be more in the public eye today than at any other time. The evidence to support this statement is to be found in many sources. It is fair to say that newspapers highlight the matters surrounding the professions in a way which was not common years ago. The same may be said of other parts of the media. Whether increased activity on the part of the media is a true reflection of the growth of allegations of professional negligence is difficult to determine. However, public consciousness of the work of professions and their members appears to be heightened. This may be due in part to the increased contact that the public has with professional people. The advent of the National Health Service has allowed more contact with doctors; legal aid and advice provision has brought people into contact with lawyers, and the increase in home-ownership has fostered the use of solicitors' services. It may be that in the case of medicine, the rapid increase in medical knowledge has also raised expectations on the part of the public. Whereas disease, disability and death were once accepted as part of the human condition, almost a matter of destiny, that is not necessarily the position today. Diseases are to be cured, disabilities removed and the sufferers restored to full health and mobility, and death to be put off. Accidents no longer happen - they are caused. They always were but now there seems to be a greater willingness on

the part of the victim of medical injury to seek compensation and, perhaps, to prove the doctor wrong. In the legal sphere more people are engaged in legal transactions - more home-ownerships, greater wealth, desire to make wills leaving that property to the proper recipient, greater interest in property management and tax avoidance. In all there are many business matters affecting ordinary people and requiring professional assistance. Greater protection of people at work has also involved lawyers in activity designed to benefit the victims of accidents. In all of these cases, medical and legal, when something goes wrong, when the benefit sought is not received, people's expectations are likely to set them questioning what went wrong. That is not to say that litigation is the only way by which the problem can be solved. But it is a way and the issue of professional negligence rears its head.

Part of the problem associated with professions and allegations of professional negligence is that the professions and their members also have a point of view. The recognised professions, and in particular medicine and law which have been selected for this thesis, provide vital, even essential, services for the community. A balance has to be maintained ensuring that professional services are properly supplied so that the services may flourish on the one hand and the recipients of the services may be protected on the other. Standards must be kept up and that may be encouraged and achieved in a

variety of ways by the professional bodies and the courts, for example. If standards are kept up the public is better protected. If standards are not reached by individual professionals and someone is injured as a consequence, a remedy should be provided. But the balance is delicate. Not only must the system be such as to provide means by which proper standards are maintained but access to remedies must be provided. Access, however, must not mean that the professional is always found wanting in each case of injury as that would be unjust to the professional and could be detrimental to the whole community if a full range of professional services ceases to be provided.

This thesis sets out to examine some of the problems of professional negligence. Historically, the provision of adequate professional services in England is closely linked with the genesis and development of the law of tort and contract. This in itself is indicative of the importance of professional services in the life even of a relatively primitive English society. However, the term 'professional' itself is subject to scrutiny. By 'professional' is not simply meant 'doing a job' or 'performing a service'. Although the term imports vocational activity it is only certain occupations which attract the label 'profession'. It is with those occupations that this thesis is concerned.

Assuming the provision of a professional services has allegedly caused injury, the role of the professional

body is significant. That there is a professional body is a trait of professional status. The effectiveness or otherwise of a professional body is crucial in maintaining the delicate balance outlined above. Effectiveness in this context is not merely a matter of fact but also of perception. The courts have a role to play in the issue of professional negligence. In fact, the whole legal system is involved. From the point of view of the professional defendant, it is important that the court understands the professional role and does not impose liability based upon inappropriate standards nor grant awards of compensation of a ruinous nature. From the client/patient point of view there is the daunting prospect of the whole edifice of the law. Associated with an action based upon professional negligence there are problems of cost, proof, apparent sympathy of the courts with professionals, particularly doctors and barristers, and awards of compensation which are too small or not provided in the most beneficial way. The legal system must be up to the challenges or it too will contribute to loss of confidence in professional services or may encourage unnecessary litigation. The balance is fine.

As already indicated above, the professions of medicine and law have been examined in this thesis. Those two professions are archetypal and serve as good illustrations of a variety of problems. There are also particular problems affecting lawyers and medical men.

## Lawyers

A present problem for solicitors has been that of ever widening liability. The problem was exacerbated by *Anns*<sup>5</sup> and its progeny. However, now that those developments are under control, the question of solicitors' liability might be addressed more carefully. On the other hand, advocates, particularly barristers, have enjoyed immunity from actions in negligence. Such immunity represents an anomaly in a world of increasing liability for negligence. However, the immunity has been justified by the courts on many occasions and supported by a variety of government and other committees on the grounds of public policy. Support for such immunity has not been forthcoming from other professionals not so protected nor from aggrieved clients. Immunity is examined in this thesis and, it is submitted, found to be ill-conceived.

## Doctors

Doctors are a vulnerable group. They do things to our bodies; we are intimately concerned with these activities. To some extent doctors have created the problems associated with medical negligence. Remarkable advances in medical science have raised expectations of the patients. Cures are now available which were mere dreams but a few years ago. If a cure is not effected then someone must be at fault. Mistakes do occur. Errors

are not the same as negligence although some errors may constitute negligence. As there is no system of compensation yet available to the victim of medical injury other than that associated with litigation for negligence the courts have a crucial role. Victims of negligent errors are compensated; victims of other error are not (except perhaps, in the unlikely case of battery). Medicine must flourish for the benefit of all. Victims must also be compensated. A matter of fine balance. The problems associated with medical negligence have also been added to in cases where the allegation is that of non-disclosure of risk. Does doctor know best or should he work in partnership with the patient? This type of claim is unusual in that the surgical procedure or other treatment has not gone wrong but an undisclosed risk or side-effect has occurred. Had the patient known of the risk, the patient alleges, the procedure would not have been allowed. A real dilemma between a doctor acting in what he considers the best interests of the patient and the patient's rights with regard to his own body. A problem assuming ethical as well as strictly medical dimensions.

#### **The Nature of Liability**

It is often stated that English Law has developed laws of obligation, the main divisions of which are restitution, trusts, contractual liability and liability for tort. A distinction between these areas of obligation

is to be found by reference to the source of the obligation. In particular, in contract the obligation arises out of the agreement into which the parties to the contract have entered, whereas in tort, the obligation need not be self imposed by the parties to the action but imposed by the law itself. This distinction is probably too simplistic; a criticism made, for example, by Atiyah who does not consider these distinctions to be clear cut but rather that the lines of demarcation between the different obligations have become blurred.<sup>6</sup>

Even though there are divisions it would seem that any attempt to rigidly separate claims into contract or tort is futile. Historically, the categories of obligation are closely related and have much in common. This is not to say that there are no important distinctions to be considered when claiming in contract or tort (infra). However, at this stage of this thesis it is suffice to say that in the context of professional negligence an obligation may arise either in tort or contract. It is quite usual for the duties which arise from a relationship of professional and client to be based on a contract. One cannot state generally what the precise form of that duty will be as this depends upon the contractual terms themselves. In *Greaves & Co (Contractors) Ltd v Baynham Meickle & Partners*<sup>7</sup> the general standard imposed by the law was modified by reference to the terms of the agreement. Otherwise, the obligations imposed by the tort of negligence can be best

expressed in the terms used by Lord Atkin in *Donoghue v Stevenson* in 1932<sup>8</sup>, as explained in, for example, *Dorset Yacht Co Ltd v Home Office*<sup>9</sup> and *Anns v Merton London Borough Council*<sup>10</sup> i.e. the importance of policy considerations balanced against reasonable foreseeability. Lord Atkin's statement of what he understood by the tort of negligence in *Donoghue v Stephenson* is expressed as follows:

".... You must take reasonable care to avoid acts or omissions which you can reasonably foresee which 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 affected when I am directing my mind to the acts or omissions which are called in question".<sup>11</sup>

The standard stipulated is that of reasonable care to be judged by the criterion of the "reasonable man". Often that will be the man in the street, the ordinary lay person, sometimes referred to as "the man on the top of a Clapham omnibus". But some persons are under an obligation to perform to a higher standard than that of the reasonable man. They must still take reasonable care but that is evaluated against a standard applicable to the special group to which they belong. That group is known in this context as a profession.<sup>12</sup> The more demanding requirement was expressed in 1838 in *Lanphier v Phipos*: 'Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is

an attorney, that at all events he shall gain your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill'.<sup>13</sup>

This higher standard applicable to the professional person was also referred to by Lord Denning MR in the Greaves case (supra) in referring to the description given by McNair J in Bolam v Friern Hospital Management Committee<sup>14</sup>

"... where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is a well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art".

Thus, the professional person will not be able to discharge his obligations to those whom he has injured by performing up to the standards of the ordinary lay person. The reason for this as Linden says is clear:

"They hold themselves out as being possessed of extra skill and experience. That is why people consult them. That is why they are usually paid for their advice and service ..... In all of these cases, the courts are balancing the interests of the clients or patients in receiving skilled service as well as the interests of professional men in a certain degree of autonomy in their dealings with the community..... Every recognised professional group

has its own individual standard, to which all members of the profession must conform."<sup>15</sup>

Attaching such liability to professional persons seems to be an acceptable state of affairs. There has been a growth in the provision of professional services and, judging from the law reports, an increase in the frequency in which actions for professional negligence are being brought. Whether this liability is to be founded on contract or tort is determined by factors which will be examined later in greater depth. The main differences between the forms of liability relate, inter alia, to the objects of compensation, tortious duties extending (i.e. in addition to parties) to persons other than parties to the contract (if one exists), computation of limitation periods and the operation of the rules of remoteness of damage<sup>16</sup>

#### The Origin of Professional Negligence

To suppose liability for professional negligence is merely another aspect of general liability in contract and tort is to ignore the historical origins of both contract and tort. An understanding of professional negligence, it is submitted, is not merely a matter of considering a branch of the general principles of negligence but is vital to an understanding of the genesis of liability in contract and tort.

With the evolution of the forms of action, notably the actions on the case, negligence was recognised by the

courts as a mode of performance in the commission of some torts,<sup>17</sup> although not a method of committing a breach of contract as the modern law of contract had not yet emerged. Later it came to be regarded as such. Nonetheless the origins are tortious.

"Case" in the action on the case refers to the necessity for the plaintiff to set out in the writ the facts upon which he sought a remedy. In his *Forms of Action at Common Law* F W Maitland states that Case became a sort of general residuary action from which developed much of the law of negligence.<sup>18</sup> Assumpsit for example, which was so important in the development of negligence, emerged as a delictual action on the case.

It is ironic that in tracing the law of contract from its tortious roots one has to consider that the modern tort of negligence developed out of the nineteenth century law of contract.<sup>19</sup> As Atiyah puts it "the tort of negligence which dominates modern tort law grew almost entirely out of contractual-type arrangements".<sup>20</sup> Sir Percy Winfield in 1926 asserted that the tort of negligence did not become established until the late nineteenth century and he supports his assertion with a catalogue of judicial dicta indicating the existence of an independent tort of negligence.<sup>21</sup> The beginning of this development cannot be identified with any precision but he postulated that it was from about 1825 onwards.<sup>22</sup> If the child is called the independent tort of negligence then the parent can be identified in the form of negligence as

a mode of committing certain torts. This transition from mode to independence was not clear-cut but Winfield contended that the judges appreciated this movement sub-consciously. In 1926 he felt able to attribute to negligence the following double meaning:

"....(i) a definite tort, which consists in the breach of a legal duty to advert to the circumstances or the consequences (or both) of an act or omission which causes damage to another, the standard of this duty is that of a reasonable man, so far as advertence to the circumstances of the act or omission is concerned, and that of directness with respect to the consequences;

(ii) merely inadvertence to a legal duty, which inadvertence is a possible, mental element in the commission of some other (but by no means all) torts".<sup>23</sup>

At the time that he was expounding this view, Winfield accepted that some writers denied the existence of the separate tort of negligence but nonetheless prepared a list of cases to support his opinion. In *Brown v Boorman*<sup>24</sup> the House of Lords recognised concurrent actions in contract and tort. But there are perhaps two nineteenth century cases which demonstrate this issue of independence more clearly than any others. The first is *George v Skivington*<sup>25</sup> in which the notion of an independent tort was impliedly recognised by the court. The second authority is *Heaven v Pender*<sup>26</sup> in which it was stated "And for neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence". At a later stage one can identify two cases in the first quarter of the

twentieth century confirming this trend: *Grayson, Lim v Ellerman Line, Lim*<sup>27</sup> and *Attorney General v Cory Brothers & Co.*<sup>28</sup>

Winfield's acceptance of the existence of an independent tort of negligence was not, as previously stated, shared by all. At the same time, developments were taking place on the other side of the Atlantic to reinforce his conception of an independent tort<sup>29</sup>, but ultimate recognition of the distinct tort was only given by the House of Lords in *Donoghue v Stevenson*.<sup>30</sup> The courts continued to affirm this and examples of dicta can be found to this effect in, *Lochgelly Iron and Coal Co Ltd v McMullen*<sup>31</sup> and *Grant v Australian Knitting Mills Ltd*.<sup>32</sup>

It seems that all would agree that the origin of the tort of negligence is recent. R.W.M.Dias writing in 1955 can give no precise date of birth but cites Winfield as locating the process as complete in "almost our own generation", while Payne and Paton isolate the occurrence to 1932 and 1934 respectively.<sup>33</sup> In an endeavour to clarify this general picture a brief historical survey of the way in which this obligation came into being in English law follows with particular reference to the context of professional negligence.

## Notes

1. H.W.F. Saggs, *Everyday Life in Babylonia and Assyria* Batsford, 1965 (Extract from the Laws of Hammurabi).
2. 'For a full account of professional regulation in Babylonia see also C.H.W. Johns *The Oldest Code of Laws in the World. The Code of Law Promulgated by Hammurabi, King of Babylon. B.C. 2285-2242* T & T Clark 1903
3. *Medical Ethics: or, a Code of Institutes and Precepts adapted to the Professional Conduct of Physicians and Surgeons.*
4. See *A Handbook of Medical Ethics* British Medical Association 1980.
5. *Anns v Merton London Borough Council* [1978] A.C. 728; [1977] 2 All ER 492; [1977] 2 WLR 1024.
6. P.S. Atiyah *Introduction to the Law of Contract* 1981 pages 2, and 216-217. P.S. Atiyah *Rise and Fall of the Freedom of Contract* 1979 page 505.
7. [1975] 1WLR1095.
8. [1932] A.C. 562 at page 580.
9. [1970] A.C. 1004; [1970] 2 All ER 294; [1970] 2 WLR 1140.
10. [1978] AC 728; [1977] 2 All ER 492; [1977] 2 WLR 1024.
11. [1932] A.C. 562 at 580.
12. See chapters 1 and 2 in which the notion of a profession is considered.
13. *Lanphier v Phipos* (1838) 8 C. & P. 47 per Tindal C.J.
14. [1957] 1 W.L.R. 582 at page 586.
15. A.M. Linden *Canadian Negligence Law* Butterworths 1972 pages 37-8.
16. H. Street, *Street on Torts* 7th ed. Butterworths 1983 at pages 440-441.
17. P.H. Winfield 'History of Negligence in the Law of Torts' [1926] 42 LQR 184.

18. At page 54.
19. See Chapter 1.
20. P.S. Atiyah 'Contracts, Promises and the Law of Obligations' [1978] 94 LQR 193 at 221.
21. Winfield *op.cit* 199.
22. *op.cit*.
23. *op.cit*. 196.
24. (1844) 11 Cl & Fin 1.
25. [1869] L.R. 5 Ex 1.
26. [1883] 11 Q.B.D 503 at 510.
- 27 [1920] AC 466.
28. [1921] AC 521.
29. Notably *Palsgraf v Long Island Railroad Co.* (1928) 162 NE 99.
30. [1932] AC 562.
31. [1934] A.C. 1.
32. [1936] AC 85. [1935] All ER 209.
33. R.W.M. Dias 'The Duty Problem in Negligence' [1955] CLJ 1989, citing Winfield *op.cit* and Tort 6th ed. 477; Payne 6 *Current Legal Problems* 236 at page 238; and Paton 23 *Austr. L.J.* 158 at page 159, cited by Dias in [1955] CLJ 198 at 199.

## Chapter 1

### A Historical Survey of Professional Negligence

The origin of negligence has been subjected to a long and intensive investigation. The protagonists have been principally Professors Ames, Winfield and Potter<sup>1</sup> although others have taken part. Each has a theory which differs from that of the others' except in this respect. All, among other factors it is conceded, identify the origin of negligence in the performance of a calling or occupation. Linden notes that among the first negligence cases ever brought were actions against persons engaged in public callings such as doctors, lawyers etc.<sup>2</sup> Many of the occupations within this category would not now be recognised as professions in the modern sense even though their basic nature may be unchanged. The reason for this, as will be developed later, is that an occupation which aspires to the status of profession will only attain that status if it conforms with society's perception of a profession. It is appreciated that this criterion is not a clear determinant of what constitutes a profession but in that it is reflective of the general difficulty in this field. Society perceives an occupation to be a profession if that occupation satisfies various criteria. What these criteria are is still the subject of debate but many consider that organisation, training and discipline of members is included. Traditionally, the professions are

medicine, law and the ministry<sup>3</sup>. However, many of the common callings referred to in case law and commentaries would not, by reference to the proposed criteria or even based upon a general impression of the occupation, be called a profession today. It is unlikely that the occupation of shepherd, smith or innkeeper would be considered a profession today. This is a matter to be dealt with more fully in a subsequent chapter.<sup>4</sup>

Nonetheless, it is to the history of the development of negligence that recourse must be made for the purpose of showing how regulation of professional activity by the courts has evolved. A useful theory to commence with is that of Winfield in his seminal article in the Law Quarterly Review of 1926.<sup>5</sup> In this article Winfield identifies four sources of negligence. He locates the origins of liabilities for negligence in common callings, in assumpsit, in nuisance and in liability for dangerous things. The nature of the cases connected with these areas of liability suggests that the greatest relevance to this study are the origins associated with duties imposed upon persons carrying on a common calling and duties voluntarily undertaken in assumpsit.<sup>6</sup> It will be seen that in some instances, the presence of both elements i.e. assumpsit and common calling could be found. What has to be considered is whether in all cases of negligence, the assumpsit need be established. Simpson<sup>7</sup> considers that both actions are possible but not interdependent.

Artificers could be liable for negligent misfeasance without the need for an assumpsit.<sup>8</sup> The way in which these two possible sources achieve special significance can be expressed in this way.

'The whole history of liability for negligence, right up to our own time, reveals a constant interplay between the idea that liability for negligence can only be imposed if there is some previous nexus between the parties and the idea that negligence alone is sufficient, nor is there any indication that the conflict between these two ideas has been resolved<sup>9</sup> in the course of the last five centuries'

The point has now been reached at which more particular analysis of these possible sources of negligence can be attempted.

#### 'Common Calling'

Although there is disagreement as to the meaning of 'common calling' suffice it is at this stage to say that those who professed competence in occupations requiring skill and learning were under a duty imposed by law to behave in a competent fashion. Failure to fulfil such a duty was remedied by the action on the case based upon this general obligation to show skill in that calling.<sup>10</sup>

In his article "History of Negligence in the Law of Torts" in 1926<sup>11</sup> Winfield compiled a 'miscellaneous catalogue'<sup>12</sup> of trades falling into the category of common callings, 'including carrier, innkeeper, surgeon, the marshall or veterinary surgeon, the smith or farrier, the ferryman<sup>13</sup>, the shepherd and the barber'.<sup>14</sup> Other writers

had their own views on the membership of such a group. Some writers confirmed the presence of certain occupations as 'common callings' others doubted the inclusion.<sup>15</sup>

There is thus a measure of consensus as to the possible origin of liability in the performance of particular callings together with dissension as to the membership of such a category. The basis of this liability rests upon obligations imposed by law.<sup>16</sup>

But the compilation of lists alone will not assist in the analysis of these callings for the purpose of determining the nature of liability for negligence. It is essentially the nature of the common calling which is the key to this. There is no pretence at discovering the answer in this survey but this is the path, it is submitted, which must be trodden. It is probably more important than attempting to compile lists of callings. Simpson considers that the 'adjective "common" ..... means no more than available to or for the public, or generally available.... This is the sense in which the word is used in medieval cases, and it cannot be too strongly emphasised that the term is used without any technical overtones whatsoever at this period, it is nowhere found as a legal term of art'.<sup>17</sup> He also states that a common calling is an expression of greater significance than has hitherto been assumed. Members of skilled professions appear to be included in the term 'common calling' as are some artificers. The terms 'artificer' and 'skilled

professional' are not synonymous. That they overlap should not blur the distinct nature of the classifications.<sup>18</sup> If one accepts that common calling has no simple meaning in the sense of common liabilities<sup>19</sup> and also accepts 'that the courts treat the fact that a person exercises a common calling relevant to his legal position in a variety of different ways'<sup>20</sup>, then one can consider the relevance of professional status to liability for negligence.<sup>21</sup>

As an unskilled person might exercise a common calling e.g. labourer, the essence of this action was that the defendant was a member of a skilled profession i.e. the artificer pursuing a common calling. In such circumstances an *assumpsit* appears to have been an unnecessary and immaterial allegation when suing by action on the case for negligent misfeasance.<sup>22</sup> The defendant is to be judged against the standard appropriate to his calling as a skilled professional.

Fitzherbert makes an assertion of liability for negligence based on the narrower specification of artificer within the general context of duties imposed upon those exercising common callings. Simpson does not consider that this assertion is based upon authority but does espouse the principle as a possible basis for the analysis of negligence.<sup>23</sup> That other modes of analysis may be countenanced can be seen by reference to the liabilities arising out of an allegation of *assumpsit*.

But before that step is taken consideration of another related area of activity which might involve both sources of custom and assumpsit may shed some light on the basis of liability in negligence.

#### Bailment<sup>24</sup>

An area of activity attracting liability relevant to this survey is that of bailment. The law of bailment relates to the responsibility of one person for the safe custody of goods entrusted to him by another. A failure to return the goods resulted in liability in detinue. Winfield considers that liability was originally strict and may even have been absolute. He based his view upon Bracton.<sup>25</sup> Plucknett informs us that relief was granted in the medieval period so that in the two centuries following Bracton there were cases in which there was no liability without fault or negligence of the bailee.<sup>26</sup> Holdsworth would agree with this. He gave the reason for these severe rules as partly the regard the common law had for possessions and also the development of such rules prior to the common law conception of negligence.<sup>27</sup> But in 1601 when the issue of liability was considered in *Southcote v Bennett*<sup>28</sup> there is a reaffirmation of strict liability based upon the action of detinue. According to Holdsworth the court was aware that the rules were hard, especially as they could be judged alongside the developing conception of negligence. Only the older types of bailee were to be governed by these rules and even

those professing these callings should have been able to restrict their liability by special contract<sup>29</sup>

A century later the law of bailment became established on the basis of negligence in *Coggs v Barnard*.<sup>30</sup> Holt C J applied Roman law rules as to negligence, which he had taken from Bracton, and determined the modern basis of bailment.<sup>31</sup> The innkeeper and the common carrier remained subject to strict liability as exceptional cases. The innkeeper was liable by the common custom of the realm for the safe custody of his guests' goods. The common carrier who exercised a public employment was responsible for goods, except in cases of act of God or actions of the King's enemies.<sup>32</sup> Lord Mansfield accepted this application of the strict liability rule to common carriers in *Forward v Pittard*.<sup>33</sup>

#### Bailment and Assumpsit

This was not the only line of development. To show liability based upon detinue was only one approach. An alternative was through an assumpsit or an express contract to be careful or provide safe custody.<sup>34</sup> Thus the express assumpsit becomes an essential part of an action on the case based on negligent custody of goods by bailees. According to Ames this action preceded the action of assumpsit by fifty years. Plaintiffs would prefer this alternative action as generally the procedure in case was more satisfactory than in detinue. The first case appears to have been litigated in 1472 and

recognition of the bailor's right to sue in case rather than detinue came before the end of the fifteenth century.<sup>35</sup>

This consideration of the relationship between bailment and the developing action of assumpsit may strengthen the argument that the liabilities of those exercising common callings, including bailees, are a primary source of liability in negligence. This action for negligent custody was regarded as an action in tort for misfeasance and not as one based on contract.<sup>36</sup> The similarity of this action to actions against surgeons is shown by reference to the bailee actively taking the goods into his custody. It is here that the ingredients of the action can be found ie. taking the goods into custody, the assumpsit to keep them safely and the loss caused by the failure to do so. This is tortious liability and as a result gratuitous bailments were brought within its scope.<sup>37</sup>

On the other hand those bailees who carried on a common calling were bound by duties imposed by the common custom of the realm. This was in common with others who similarly exercised a common calling eg. common surgeon. In the case of such bailees, no express assumpsit of the defendant was necessary. And there is no record of any such count being laid in a case against a common innkeeper or carrier<sup>38</sup> for loss of goods. Bailees who did not fall into the "Common" category were liable only upon proof of

an assumpsit. This was a legal requirement in 1598 when the four judges of the Queen's Bench 'all agreed that without such an assumpsit the action would not lie'.<sup>39</sup>

The necessity for this requirement, however, did not continue to receive support and the need for an express assumpsit was dispensed with just as had happened in the case of surgeons.<sup>40</sup>

#### Assumpsit

Throughout this survey reference has been made to the action based upon assumpsit. According to some cases this action was necessary to establish liability, whereas others suggest it was not. Either way it is necessary to explain the meaning of assumpsit, its development and from this the development of negligence and the law of contract.

C.H.S. Fifoot considers that the origins of assumpsit have been a matter of controversy for a long time.<sup>41</sup> This controversy is irrelevant for present purposes and it will suffice to say that the origins of assumpsit are tortious, the action being based upon the action on the case.<sup>42</sup>

In early actions against surgeons for negligent misfeasance, assumpsit formed part of the writ although the precise significance of the undertaking is obscure. Later in the fifteenth century persons exercising occupations requiring skill and training were bound because the nature of their calling determined that they ought to behave in a competent manner. Such persons would

be sued for negligence without assumpsit being alleged. It is on this basis that the artificer is bound and is evidence of a shift from self imposed liability to liability imposed by law by the middle of the sixteenth century.

Winfield's article in the Law Quarterly Review of 1926 draws attention to the history of assumpsit and its relevance to the pursuit of a trade, or profession.<sup>43</sup> It seems established that those professionals or skilled persons who exercised a common calling were liable for their defaults without an assumpsit. The law implied a duty in such circumstances and liability existed by virtue of the custom of the realm. But Simpson<sup>44</sup> denies that there were any principles, or indeed any attempts to lay down such principles, about those who exercised common callings. The miscellany of rules and regulations governing medieval life were not all imposed and enforced by the courts. Other agencies were at work ie. the surgical profession was controlled in London, Master Surgeons were publicly admitted and swore on oath to work well, charge reasonable fees and present to the authorities the defaults of others undertaking cures.<sup>45</sup> Once it is realised, argued Simpson, how miscellaneous occupations could be called 'common' the reason becomes clear.<sup>46</sup> To resume the discussion in hand it seems to Winfield that use of assumpsit is closely related to the development of liability for professional negligence, and

the study of this development shows the ultimate basis of liability for professional negligence resting alternatively on tort or on contract.<sup>47</sup> It seems paradoxical that the action of assumpsit, tortious as it was, developed because of the deficiencies of the writ system in relation to contractual liability. At the beginning of the fifteenth century there were four writs used to enforce contractual obligations at common law.<sup>48</sup> The main drawbacks of pursuing a claim using the writs were largely procedural ie. wager of law, and in the case of one, ie covenant, the requirement of a seal. In addition, plaintiffs no longer had the choice of venues as there had been jurisdictional changes.<sup>49</sup> The judges fell back on a remedy with which they were familiar, ie. trespass on the case, which arose in the latter half of the fourteenth century when one person caused damage to another by the way in which he carried out the duty which he had undertaken to perform. The action of trespass on the case on an assumpsit became known as assumpsit. The earliest assumpsit actions were in the nature of trespass, based upon what we now call professional negligence. Only with the benefit of hindsight can we see their sudden appearance about 1370 as a new development in contract.<sup>50</sup> Thus, the extension of the theory of contract came about by means of what was essentially an action in tort. The choice of suing in contract or tort did not exist in the fourteenth century<sup>51</sup> as the distinction had not been drawn

at that time. Where an assumpsit was the basis of the action in the fourteenth century Fifoot denies its significance. When a plaintiff in the fourteenth century had alleged conduct in breach of an undertaking, the undertaking was incidental to the misfeasance upon which the action depended and was not an operative part of the writ.<sup>52</sup> Although this development was to prove a spring board for the development of contract the link of assumpsit with its trespassory origins was maintained by the inability of the courts for some time to formulate any remedy in case for nonfeasance. In time the action of assumpsit was converted from a tortious remedy to become the main remedy at common law for breach of contract. This evolution came about in the following stages particularly relevant to professional negligence.

- a) to remedy misfeances in breach of an undertaking;
- b) to remedy certain kinds of non-feasance in breach of an undertaking.<sup>53</sup>

#### **Misfeasance in Assumpsit**

The action appears to be based upon the proposition that 'where negligence and imprudence were alleged in actions for misfeasance by contractors eg. negligent cures by surgeons<sup>54</sup>, it became a wrong to do an action negligently where the contract imposed a special duty to take care'.<sup>55</sup> "Contractor" in this context, it is submitted, means the person who was acting pursuant to an undertaking and "contract" should be read accordingly.

The earliest known cases in which an assumpsit was laid are cases concerning the exercise of a common calling eg. ferryman, surgeon, smith. Kiralfy identifies in the case of the Humber ferryman one of the earliest actions on the case,<sup>56</sup> although Plucknett does not agree on procedural grounds.<sup>57</sup> However, Ames identified this as one of the earliest cases in which an assumpsit was alleged.<sup>58</sup>

Be that as it may in *Buckton V Townsend*, otherwise known as the case of the Humber Ferryman (upon which so much has been written), the complaint was made by the plaintiff that the defendant had received his mare to carry over the Humber, the defendant overloaded his boat and the mare drowned. Although Counsel for the defendant argued that the action should have been in covenant, thus rendering the plaintiff without a remedy, the court held the overloading was a trespass. There is, however, no record of an undertaking. It seems that the aspect of the transaction to carry the mare which is most pertinent to the decision is the receipt of the ferryman of the mare for safe carriage. The agreement or undertaking was not taken as important. The transaction is important in that it sets the scene for the wrongdoing. The only reason for the presence of the mare in the boat was the transaction.<sup>59</sup>

The next reported case is *Waldon V Marshal*.<sup>60</sup> The allegation here was that the defendant had undertaken to cure the plaintiff's horse but did his work so badly that

the horse died. Again, counsel for the defence argued that the action should have been framed in covenant, and then, alternatively that the writ of trespass should have been used. This argument was countered by the counsel for the plaintiff who replied that the action was brought as a result of the defendant's negligent cure. It was held that the action sounded in tort. The appropriate writ was the action on the case and the court found in favour of the plaintiff because the defendant's negligent conduct had caused damage to the plaintiff. Around this period cases can be found alleging carelessness causing harm against, for example, surgeons and smiths; and then a number of cases of a similar nature followed, through the medieval age. Ames observed that in these cases 'the plaintiff sought to recover damages for physical injury to his person or property caused by the active misconduct of the defendant..... But the actions were not originally, and are not today, regarded as actions of contract'.<sup>61</sup> Assumpsit did not appear to be essential in such cases and the action lies in these matters without alleging any consideration. The defendant's negligence is the cause of the action, and not assumpsit.<sup>62</sup> Does, then, assumpsit have any significance? In the following sense it does. The defendant had been authorised to come into contact with the plaintiff's person or property and without more there could be no tort. Ames explains it thus 'The person injured took the risk of all injurious consequences,

unless the other expressly assumed the risk himself, or unless the peculiar nature of ones calling, as in the case of the smith, imposed a customary duty to act with reasonable skill.<sup>63</sup> But this does not take fully into consideration that although the form of the action was undoubtedly tortious the substance of the plaintiff's claim was contractual. As Cheshire and Fifoot put it 'The result of (Walden V Marshall) and similar cases was to blur the distinction between tort and contract. A plaintiff might bring Case if his person or property had been injured by the defendant's careless or unskilful performance of a particular undertaking, and it was by pursuing this line of argument that an action for breach of contract was gradually, though somewhat painfully established'.<sup>64</sup> This transition from tort to contract takes place on the basis that a contracting party performs his undertaking badly and thereby causes damage to the plaintiff. Liability was clearly within the scope of case for misfeasance but in modern law it might equally clearly and appropriately be expressed in contractual terms. Thus the stage has been reached that negligent performance of an obligation assumed under an agreement gives rise to the action on the case. While the judges were prepared to accept this, the trespassory origin of the action on the case retarded the process of allowing such actions for nonfeasance.<sup>65</sup>

### Assumpsit for Nonfeasance

The problem of nonfeasance is more acute. Actions for nonfeasance were not allowed in 15th century law. And yet there is a lacuna in that if one approaches a person to carry out a task, real damage may ensue if that task is not performed. The medieval judges felt unable to progress from misfeasance partly because they could not see failure to perform as a tort.

This was a conceptual problem caused by the nature of duties. Misfeasance is wrong where there is a duty to refrain from causing harm. This is the normal form of duty. Less commonly will there be a positive duty to act conferring a benefit and this remains the usual state of affairs today in the modern tort of negligence. Another impediment to the extension of liability for nonfeasance was the circumvention of the Writ of Covenant which the judges were loath to permit. Thus there is a situation in which a person would undertake to perform a task for another. But whereas misfeasance did not necessarily involve a promissory undertaking, failing to perform a future undertaking sounded in covenant as the duty to perform arose out of the agreement or undertaking.

Trespass cannot be committed by nonfeasance and requires that the defendants have done something. It seems, however, that attempts to find liability for nonfeasance can be traced back to the fourteenth century as in the case of *Watton v Brinth*<sup>66</sup> in which the plaintiff

alleged the defendant had undertaken to build a house and had not done so. The plaintiff failed upon the precise issue of misfeasance or nonfeasance. Nonfeasance required a deed and the Writ of Covenant. The crucial distinction between misfeasance and nonfeasance was similarly made in Watkins' case<sup>67</sup> by Marton J. '..... where no tort is alleged in the writ, but only that the defendant has promised to do something and he has not done it; for in such case a good Writ of Covenant lies, supposing that he has a speciality ..... in as much as he had done badly what he had covenanted to do, the covenant is thereby changed and made into a tort, for which a good writ of trespass lies'. Babington C J and Cockayne J disagreed recognising liability in Trespass for loss caused by nonfeasance. This made no difference to the outcome of the case, depending upon some other procedural technicality for conclusion but it does show some judges are prepared to allow case for nonfeasance on the grounds of the resulting loss to the plaintiff.

The trespassory origin of *assumpsit* continued to impede the extension of liability in Case to nonfeasance. In an effort to sidestep this obstacle novel use of Deceit on the Case was made but there are no authorities suggesting that this came any nearer to solving the problem of nonfeasance.<sup>68</sup> Towards the end of the fifteenth century the distinction became a matter of the utmost importance. Fifoot reports that in 1503 it was

declared that, 'where a carpenter makes a bargain to make me a house and does nothing, no action on the case lies, for it sounds in covenant. But if he makes the house improperly, the action on the case well lies'.<sup>69</sup> This, however, appears to be the last statement which makes the distinction. Logical it may have been; unfair it certainly was, denying a remedy as it did. Moving towards liability for nonfeasance may not have been logical but it was expedient and produced a reasonable result. In 1505<sup>70</sup> the liability for nonfeasance was admitted in clear terms and reinforced by a judgment in 1506.<sup>71</sup>

The case of 1505 concerned a plaintiff who brought an action on the case alleging that he had bought 20 quarters of barley from the defendant. These were to be delivered to the plaintiff but the defendant converted the goods to his own use. Frowicke C J said in judgment:

'If I sell you ten acres of my land parcel of my manor and then make a feoffment of my manor, you shall have an action on the case against me, because I received your money, and in that case you have no other remedy against me. And so, if I sell you my land and covenant to enfeoff you and do not, you shall have a good action on the case, and this is adjudged ..... And if I covenant with a carpenter to build a house, and pay him 20 pounds for the house to be built by a certain day, now I shall have a good action on my case, because of payment of money, and still it sounds only in covenant and without payment of money in this case no remedy, and still if he builds it and misbuilds, action of the case lies. And also for nonfeasance, if money paid, case lies'.

Following the recognition of the action for nonfeasance the way was opened for the development of a

general contractual remedy. Much had yet to be done and in time Assumpsit absorbed Debt and was able to remedy breach of executory contracts.<sup>72</sup>

From the middle of the sixteenth century assumpsit could be brought for debt provided that the debtor had expressly promised to pay the debt after it was incurred. Ames explains that this was due to the fundamental differences between debt and assumpsit. To emphasise the distinction, reliance was placed upon the new promise to pay.<sup>73</sup> A further development was caused by the implication of an agreement from the existence of the debt and thus allowing assumpsit to be brought on this implied agreement. This approach by the Court of King's Bench had been resisted by the Courts of Common Pleas and Exchequer Chamber but in 1602 in Slades' Case the King's Bench stance was upheld. From then on Indebitatus Assumpsit replaced the remedy for simple contracts formerly provided by Debt. Supersession of Debt by Indebitatus Assumpsit allowed a remedy by assumpsit for nonfeasance. This allowed a continuation of the line of reasoning which was merely an application of the principle that a person who had changed his position on the basis of an undertaking could sue the person in breach of the undertaking. The subsequent development now applied the principle to both parties to the undertaking and promises if given for promises became actionable. Baker regards Slades' Case as the point 'whence the modern law of contract traces its

life as a single entity.<sup>74</sup> The law of contract is confined through the action on the case of assumpsit. After this date, actions for misfeasance by professional persons such as surgeons could still be brought in tort with no contractual overtones at all. The liability for nonfeasance does not usually exist in tort in the absence of a pre-existing relationship.<sup>75</sup>

#### Negligence as a Tort<sup>76</sup>

The status of negligence was principally as a mode of performance. From the modern standpoint it is more than just a method of committing a tort or breaking a contract. The duties which arose emerged from a relationship based upon a common calling, bailment or assumpsit. No distinction was made between contract and tort and assumpsit covered cases under either head. It was later that negligence acquired the nature of an independent tort. The date of birth is unknown as the infant tort grew imperceptably, possibly even unconsciously, in the minds of the judges. In his article on the nature of duty in tortious negligence published in the Columbia Law Review in 1934<sup>77</sup>, Winfield stated that the transformation took place through the action on the case but that the exact moment could not be identified. With regard to cases involving public callings or bailment there was no need for lawyers to develop any ideas for formulating a new head of tortious liability as the action on the case did that quite satisfactorily. But Winfield fixes upon

1837 as a likely date at which the notion of negligence as an independent tort based upon a duty of care begins to emerge. He cites *Vaughan v Menlove*<sup>78</sup> and *Langridge v Levy*.<sup>79</sup> Paradoxically *Langridge v Levy* is not a case on negligence but it is important because of the reliance placed upon duty by counsel for the plaintiff. In support of his argument in this case counsel for the plaintiff made reference to old cases dealing with callings and bailment. As the issue of duty was hardly even expressed in such cases counsel was developing a novel notion. In addition a broad principle of duty was contended for which the court could not accept.

Winfield next identifies a case of 1842 which although it caused problems in the development of negligence did highlight the requirement of duty so important in the modern tort of negligence. *Winterbottom v Wright*<sup>80</sup> decided in 1842 concerned an action against the defendant who had supplied a third party, under a contract, with a defective mail-coach. The allegation was that the plaintiff, the driver of the coach, was injured because the defendant negligently acted in disregard of his contract. As the driver was not a party to that contract, it was taken from then on that even if the action had been brought for negligence without reliance on a contract lack of privity would nonetheless have defeated the plaintiff. Winfield believed that this case did good service to the development of the tort. The

argument was this. The plaintiff sued because he was injured and allegedly a duty was owed to him by the defendant. That duty did not arise from the contract because the plaintiff was not a party to it. As the plaintiff had not shown that it had arisen from any other source ie. public calling, the defendant was not liable. To Winfield it follows that if the plaintiff could have proved a legal duty to take care (as in public calling types of cases) the defendant would have been liable. Thus, there is an emphasis upon the need to establish a duty of care. Unfortunately, "the hypnosis of 'privity of contract' was so strong upon the Court of Exchequer in *Winterbottom v Wright* that they failed to see that in the tort of negligence the defendant's liability ought to be determined without paying any regard to the existence of a contract between the defendant and a third party .....".<sup>81</sup> The adverse effect that this case had on the development of the tort of negligence is demonstrated by the lapse of ninety years before the House of Lords destroyed this privity fallacy in 1932.

During the first half of the nineteenth century it was important to bear in mind that no distinction was drawn as to contract or tort. Many cases of negligence were based upon the undertaking inherent in *assumpsit*. To this extent *Winterbottom v Wright* is consistent with this absence of distinction. From 1842 up to 1883 there was little development of the notion of tortious duty.

Heaven v Pender in 1883<sup>82</sup> is regarded as having established this notion. Although it was a contract/tort case the absence of a contract between the plaintiff and the defendant was no bar to the plaintiff's success in the action. Winfield<sup>83</sup> cites Lord Esher M R:-

"The action is in form and substance an action for negligence. That the stage was, through want of attention of the defendant's servants, supplied in a state unfit for use is not denied. But want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensued from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant, owes the duty of observing ordinary care and skill by which neglect the plaintiff, without contributory negligence on his part, suffered injury to his person or property"

The point has now been reached at which the requirement of duty was set in the law of negligence. From this moment the necessity of duty in negligence was accepted and further development was concerned with the recognition of the existence of a duty situation as in Donoghue v Stevenson<sup>84</sup> Home Office v Dorset Yacht Co Ltd<sup>85</sup> and Anns v Merton London Borough Council.<sup>86</sup> The courts have also concerned themselves with the scope of such a duty.<sup>87</sup> And at the root of this determination of duty was judicial policy which is itself a product of the judicial will to grasp the nettle and decide on whom the loss should fall. Although the 20th century has seen the clear development of negligence as an independent tort it is also clearly

established that the plaintiff may have the choice of suing in contract or tort where professional negligence is in issue. Perhaps the last bastion for suing in contract only was the law relating to solicitors' negligence. Today, even in cases against solicitors the plaintiff has the choice.

In conclusion, it might be said that the historical foundations have been laid for considering liability for professional negligence whether the action be based on breach of contract or on tort.<sup>88</sup>

#### Notes

1. J B Ames "The History of Assumpsit I Express Assumpsit (1888)" II Har Law Review 1.

J B Ames "The History of Assumpsit II - Implied Assumpsit (1888)" II Har Law Review 53.

Winfield "The History of Negligence in the Law of Torts" [1926] 42 LQR 184.

P H Winfield Province of the Law of Tort.

H Potter Historical Introduction to English Law 4th ed 1958.

Much, but not all, of the historical information which follows comes from these sources.

2. A M Linden Canadian Negligence Law 1972 p.37.
3. See also E Friedson : Profession of Medicine Dodd, Mead & Co. 1970, 78  
E Friedson : The Theory of Professions : State of the Art in R Dingwall and P Lewis (eds) The Sociology of Professions (1983) 23-24.
4. Infra, Chapter 2.
5. [1926] 42 LQR 184 at 185, 188, 190 and 192.

6. It is not immediately apparent to a reader what the term "assumpsit" means. Although its significance will be developed shortly, a brief explanation may clarify matters at this moment. The essence of an assumpsit is the undertaking by the defendant to do something for the plaintiff, and then doing it badly causing damage. This is the basis of the modern law of contract but it is also regarded as a basis of liability in negligence as a tort.
7. On this generally see A W B Simpson A History of the Common Law of Contract: The Rise of the Action of Assumpsit 210.
8. H Potter Historical Introduction to English Law 1958 (Ed A K R Kiralfy).  
  
A W B Simpson : A History of the Common Law of Contract. The Rise of the Action of Assumpsit.
9. Simpson op cit 234. See also O W Holmes The Common Law Macmillan 1968 145.
10. It must be borne in mind that some of these occupations which may be categorised as common callings would also attract alternative liabilities under the heading of bailment. The development of the liability of bailees is also important with regard to the development of negligence and attention will be paid to this later.
11. [1926] 42 LQR 184.
12. C.H.S. Fifoot History and Sources of the Common Law Sweet & Maxwell 1949 157-164.
13. Kiralfy identifies the origin of negligence in the case of the Humber Ferryman: Y.B.22 Ass f 94, p.141, in Kiralfy "The Humber Ferryman and the Action on the Case" [1953] C.L.J. 421. Ames also identifies this as the earliest case in (1888) II Harvard Law Review at 2. However, he based this liability upon assumpsit, infra.
14. Fifoot, 157.
15. Holmes The Common Law at pp.183-198 includes the innkeeper, carrier and smith.  
  
F. Pollock in Pollock on Torts 429 doubted the T.F.T. inclusion of the smith. Plucknett Concise History of the Common Law Little, Brown and Company, 5th ed 1956 451-453 doubted the inclusion of the carrier.

16. Holmes The Common Law 145. 'If damage has been done or occasioned by the act or omission of the defendant in pursuit of some of the more common callings, such as that of a farriers, it seems that the action could be maintained without an assumpsit on the allegation he was a "common farrier ..... It expressed the general obligation of those exercising a public or "common" business to practice their art on demand, and show skill in it. "For", as Fitzherbert says, "it is the duty of every artificer to exercise his art rightly and truly as he ought".'
  17. Simpson op cit 230
  18. op cit 231.
  19. op cit, 232.
  20. op cit, 231.
  21. op cit, 233.
  22. op cit, 234.
- See also Winfield [1926] 42 L.Q.R. 184 at 189.
23. Simpson op cit 233, and 234.
  24. From the footnotes which follow it will be apparent that I am indebted to the work of Professors Winfield and Ames.
  25. P H Winfield Province of the Law of Tort (1931) 92.
  26. T F T Plucknett Concise History of the Common Law 5th ed 1956 477-478.
  27. Sir W Holdsworth A History of English Law (1936) Vol VII 450-451.
  28. (1601) 4 Coke Rep 83b
  29. Sir W Holdsworth A History of English Law (1937) Vol VIII 452.
  30. (1704) 2 Ld Raym 909.
  31. It appears from the judgment that there is no simple doctrine of strict liability only various standards of care appropriate to different types of bailment. But although Coggs V Bernard has been regarded as the leading case on bailment the action was delictual alleging assumpsit. Neither did the action sound in

contract, the use of assumpsit not being so confined. Holme's The Common Law (1881) 155.

32. Probably these exceptions meant 'inevitable accident' in Holt's day. Plucknet Concise History 482.
33. (1785) 1 T.R.27.
34. A K R Kiralfy Potter's Historical Introduction to English Law and Its Institutions (1958) 4th ed.
35. J B Ames "The History of Assumpsit" (1888) II Harvard Law Review 1 at 4-5.
36. Op cit 5.
37. Ames points out that Coggs v Barnard concerned the charge of negligence against a gratuitous bailee: op cit 5.
38. Ames op cit 6.
39. Mosely V Foset (1598) Moore 543 pl 720 cited by Ames op cit 7.
40. Ames op cit 7. 'The acceptance of the goods from the bailor created a duty to take care of them in the same manner that a surgeon who took charge of a patient became bound, without more, in modern times, to treat him with reasonable skill'.
41. G C Cheshire and C H S Fifoot The Law of Contract Butterworth's 6th ed. 1964.
42. Supra  

"Case" referring to the necessity for the plaintiff to set out in the writ the facts upon which he sought a remedy. In his Forms of Action at Common Law pp.54-55 F W Maitland states that Case became a sort of general residuary action from which developed much of the law of negligence. Assumpsit emerged as a delictual action on the case. Precedents reveal the allegations that the defendant had undertaken something and by doing it badly (misfeasance) injured the plaintiff.
43. At p 188.
44. A History of Common Law of Contract 232-233.
45. An illustration of this control being exercised is given by Milsom. Historical Foundations 318.

46. Simpson *ibid*.
47. Winfield *op cit*, 188.
48. a) Debt which lay for a liquidated sum;
- b) Detinue which lay for the recovery of specific goods;
- c) Covenant which enforced agreements made by deed;
- d) Account which based as it was upon a relationship rather than a contract, is of little worth to this discussion due to its limited scope for development.
49. Plucknett *Concise History* 93, n 5. The former jurisdiction possessed by county courts to hear debt, detinue and trespass was abolished when more than forty shillings was involved. The origin of the prohibition is uncertain but is believed to have stemmed from the Statute of Gloucester (1278) c8:
50. S F C Milsom *Historical Foundations of the Common Law* Butterworth 1981 316.
51. Simpson *A History of the Common Law of Contract* 228.
52. Fifoot *History and Sources of the Common Law* 76-77.
53. Holdsworth *History of English Law* Volume III 429.
54. Fifoot *History and Source of the Common Law* 77.
55. Potter *Historical Introduction to English Law* 386-387.
56. A K R Kiralfy "The Humber Ferryman and the Action on the Case" [1953] *Camb L J* 421.
57. Plucknett, *Concise History* 470-471.
58. Ames, *The History of Assumpsit* 1 - Express Assumpsit (1888) II *Harv. Law Review* 2.
59. In particular see Simpson *A History of the Common Law of Contract* 210-212; Holdsworth *A History of English Law* III 430; and J H Baker *An Introduction to English Legal History* Butterworths 2nd ed 1979, 274.
60. Y B Mich 43 Ed 111 f 33 pl 38 referred to in Fifoot *History and Sources of the Common Law* 81.

61. (1888) II Harv. Law Review 1 at 2.
62. *op cit*, 3 referring to *Powtuary v Walton* (1598) 1 Roll Ab.10, pl 5.
63. *op cit*,3.
64. *The Law of Contract* 6th ed 1964, 8-9.
65. *op cit*,9.
66. *Fifoot History and Sources* 331 and 340.
67. *Fifoot, History and Sources* 331 and 341.
68. *op cit*,3.
69. *op cit*,337
70. *Fifoot, History and Sources* 337-338; Holdsworth *History of English Law Vol III* 439-440.
71. *Cheshire and Fifoot, Law of Contract* 10.
72. *Holdsworth, History of English Law* 442-446.
73. Ames, "The History of Assumpsit - II Implied Assumpsit" (1888) II Harv. Law Review 53 at 55.
74. H Baker, *An Introduction to English Legal History* 2nd ed. 1979, 287.
75. *Ibid*, 347.
76. Much of what follows is based closely upon P H Winfield, "Duty in Tortious Negligence", (1934) 34 Col. Law Review 41.
77. *Ibid*.
78. 3 Bing (N.C.) 468.
79. 2 M & W 519.
80. 10 M & W 109.
81. Winfield, "Duty in Tortious Negligence" 41 at 54-55.
82. (1883) 11 Q.B.D. 503.
83. Winfield "Duty in Tortious Negligence". [1934] Col. Law Review 41 at 58.
84. [1932] A.C. 562 at 580.

85. [1970] A.C. 1004 at 1060.
86. [1978] A.C. 278.
87. *Dutton v Bognor Regis U.D.C.* [1972] 1 Q.B. 373. A rapid expansion of duty occurred after *Anns* culminating in the problems associated with *Junior Books v Veitchi* [1983] A.C. 520; [1982] 3 WLR 477. Subsequently cases have shown that the recognition and imposition of duty has now come under close control.
88. *infra.*

## Chapter 2

### The Nature of Professions

#### A. Introduction

A professional person and a client may enter into a relationship in which a duty to take care is imposed upon the professional. This duty may arise by virtue of an agreement between them or by operation of law. Either way a failure to take care may result in an action for negligence being instituted by that client against the professional.

The legal meaning of "negligence" in cases not involving special skill is failing to act as a reasonable man would act in the circumstances or acting as a reasonable man in the circumstances would not do. This is generally judged by the hypothetical standard of the man in the street.<sup>1</sup> Where the defendant is not an ordinary man but one possessed of some special skill, then the test is 'the standard of the ordinary skilled man exercising and professing to have that special skill.'<sup>2</sup> The duty for the professional and others is the same in that reasonable care is required, but in the case of the skilled person special steps may have to be taken to establish that reasonable care was used.

Exceptionally, the existence of a contract may imply a warranty imposing a more onerous standard to discharge the duty. And in certain unusual circumstances the terms

of the contract are that not only reasonable care be exercised but also be that a desired result must be achieved. This is the effect of Greaves and CO (Contractors) Ltd v Baynham Meikle and Partners<sup>3</sup> on its special facts. There is no general principle that every professional will warrant the successful outcome of his work. Thus, the doctor does not warrant that he will cure his patient nor the lawyer that he will win his case. The only term implied in the usual case is the exercise of reasonable care in the discharge of duties.<sup>4</sup>

Recent cases have established that concurrent liability in contract and tort is possible, except for the immunity of a solicitor or a barrister in the course of litigation in court.<sup>5</sup> This immunity pertaining to litigation is restricted but observations of judges have shown that immunity is not limited to what happened in court but should include 'some things which occurred at an earlier stage broadly classified as related to conduct and management of litigation'.<sup>6</sup> Such protection should be offered to pre-trial work, as well as that done in court, provided the particular work was 'so intimately connected with the conduct of the cause in court that it can be fairly be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing'.<sup>7</sup> However, it must be emphasised that in principle, the general requirement of reasonable care and skill applies to those who give skilled advice. The immunity regarding

litigation is an exception applicable only in the area outlined above.

Notwithstanding the development of the above immunity, clients will usually have the choice of suing in contract or tort whenever a person engaging in his profession undertakes to perform a service for a client where that client is relying on that service. Although the professional/client relationship will usually be covered by a contract, a duty of care in tort will be created by the relationship.<sup>8</sup>

#### B. The Problems of defining a "Profession"

Statements of the above kind concerning the liability of professional persons beg the question: 'What is a profession?' They also leave open the issue: 'Does the nature of a profession have any bearing upon the liability of those members practising within it?'

It cannot be said with certainty what a profession is. Any attempt at a definition of a profession is not primarily the work of lawyers, but judges have on occasion ventured, albeit reluctantly, to provide one.

Scrutton L J<sup>9</sup> asked 'The next question is what is a "profession"?' He continued 'I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me as at present advised that a "profession" in the present use of

language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word "profession" used to be confined to the three learned professions, the Church Medicine and Law. It has now, I think a wider meaning'.

A similar difficulty was encountered by Du Parcq L J in Carr v Inland Revenue Commissioners<sup>10</sup>:

'It appears to me to be dangerous to try to define the word "profession" as Scrutton L J realised ..... I think that everybody would agree that, before one can say that a man is carrying on a profession, one must see that he has some special skill or ability or some special qualifications derived from training or experience. Even then one has to be very careful, because there are many people whose work demands great skill and ability and long experience and many qualifications who would not be said by anyone to be carrying on a profession.

Ultimately one has to ask this question: Would the ordinary man, the ordinary reasonable man ..... say now, in the time which we live, of any particular occupation, that it is properly described as a profession? ..... Times have changed. There are professions today which nobody would have considered to be professions in times past. Our forefathers restricted the professions to a very small number; the work of the surgeon used to be carried on by a barber whom nobody would have considered a professional man. The profession of the chartered accountant has grown up in comparatively recent times, and other trades, or vocations ..... may in future years acquire the status of professions.'

As the judiciary have indicated (*supra*) it is difficult to formulate a satisfactory definition of a profession. Some observers would deny its possibility.<sup>11</sup> However definitions have been attempted<sup>12</sup> and it may be possible to extract the common features of these definitions to produce a working model for the purpose of considering legal liability.

In an attempt to draw out the salient features of a profession A.V.Dicey<sup>13</sup> produced a definition in 1867 which is less than satisfactory but nonetheless draws a distinction between professions and trades. Many professions are sensitive on this issue, particularly it seems, the opticians.<sup>14</sup> One attribute of a professional it is sometimes said is that a professional supplies services but does not sell goods. Borrie doubts this as a real attribute and asks 'Would anyone say that a doctor was any less a professional man if he happened to sell the drugs he prescribes? And is an ophthalmic optician to be denied professional status because he does sell spectacles?'<sup>15</sup> One might also ask whether a dentist continues to be a professional if he sells dentures or a toothbrush. Borrie suggests that 'perhaps it is a matter of degree and, as long as the activity of selling is incidental to the exercise of professional skills, I think we are still in the realm of professional practice rather than commerce.'<sup>16</sup> A similar view appears to prevail regarding advertising, perhaps because advertising and

selling are associated with commerce. The opticians in particular, feel insecure about their professional status for which they struggled over a long period. To maintain their status they oppose advertising and model themselves on medical practitioners.

However, not all professional groups feel this strongly over the subject of involvement in trade. This can be illustrated with the contingency fee for legal services, the attitude to which differs between England and America. The reason for this different approach to contingency fees in England and America appears to be historical. In England, litigation was and is seen as socially disruptive, and to be discouraged, whereas in America it is seen as a socially useful way of settling disputes and to be encouraged. The use of litigation in the middle ages in England in order to challenge authority led to the development of the crimes of maintenance and champerty. Fleming refers to an 'aggravated form of maintenance, known as champerty,<sup>17</sup> [which] consists in unlawfully maintaining a suit in consideration of a bargain to receive by way of reward, part of anything that may be gained as a result of the proceedings, or some other profit... Hence, solicitors, though in other respects free to make any arrangements they like with their clients regarding costs, may not stipulate for remuneration proportioned to the amount recovered in the action, like the customary "contingency" fee of American

plaintiffs' attorneys in tort actions'.<sup>18</sup> A contingency fee has been defined as '... a fee received for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved through the lawyer's efforts.'<sup>19</sup> In most countries including England, such agreements for payment are banned<sup>20</sup> and Zander<sup>21</sup> points out that the only common law country where they are used is the United States of America.<sup>22</sup> It is the dominant system in America but is not allowed there in relation to divorce and criminal litigation.<sup>23</sup>

The real fear in England regarding contingency fees relates to contentious business. Zander states that 'contingency arrangements are in reality not unknown even in England. Many solicitors will accept instructions on a contingency basis to process claims up to the point at which proceedings have become necessary... Moreover, there is frequently a small contingent element in any fee fixed after the event to the extent that a lawyer will normally charge a little more if he wins than if he loses.'<sup>24</sup> But this difference in attitude may be explained more readily by reference to the differing attitudes to the nature of a profession. Contingent fees have been associated with speculation and therefore a means of doing business or engaging in trade and as such beneath the dignity of the professional man. As a result the English legal profession disapproves of them.<sup>25</sup> That there is an

attitudinal difference is supported by considering the American legal profession. Although the American profession is based upon the English system there was a strong anti-professional attitude in the nineteenth century which 'brought about a condemnation of traditional professional groups as aristocratic and anti-democratic. Their exclusive privileges and distinctive standards were looked upon with suspicion. Organization of the legal profession weakened and practically disappeared in many parts of the country... As the counterpart to the animosity towards an organised professional body, the idea spread that practising law, like other occupations, was essentially a means of earning a living, so that it was sometimes argued that the economic relationship between lawyer and clients should be governed by the same principles which establish the price of goods and services generally in a laissez faire economy... The rejection of the contingent fee as "speculation" by lawyers in other countries may reflect this aversion to the supposed immoralities of commercial life as much as it does a belief that the contingent fee will bring harmful effects upon today's lawyers, clients and courts. The English Bar, for example, still retains the rule that being "in trade" is inconsistent with membership in 'the profession.'<sup>26</sup> Writing in 1978 White considered the English attitude to be unreal. There are commercial aspects of legal practice and 'no longer can it be

pretended that fees are a mere honoraria for a service to justice. Lawyers are in business and run their practices in the main as businesses. Furthermore the value of the subject-matter of a lawyer's work is always relevant to the fees charged, even though the normal basis of charging is for the work done.<sup>27</sup> Despite the open connection with 'trade' there is no doubt that the American bar is a profession,<sup>28</sup> probably recognisable as such by any criteria used to recognise an occupation as a profession in England. At the moment the British Government has published a Green Paper on Contingency Fees. Whether or not a system of contingency fees or something approaching such a system is implemented there is no doubt that a change is favoured by some. Perhaps the English profession is becoming more Americanised. In any event the legal profession in England will survive as a recognisable profession.

Thus, it would seem that whereas the occupations of law and medicine, for example, are recognised and accepted as having professional status, the position regarding other occupations may not always be clear-cut. The ranks of the professions are not closed. Those who have attempted to define a 'profession' have indicated the dynamic quality.<sup>29</sup> And some occupations are now accepted as professions when relatively recently they were not so regarded.<sup>30</sup> Many occupational groups aspire to professional status. The desire to do so appears to

puzzle the established professions,<sup>31</sup> although why is not immediately apparent. The commonly recognised consequences of high rewards and prestige, for example, might seem good enough reason.

Bearing in mind the dynamic quality of the process of professionalization, there has to be some means of recognising when this status has been attained. As occupations evolve into the 'professional' category the qualities of professionalism have to be in existence before the associated privileges are granted.<sup>32</sup> The qualities or traits of professionalism will be considered below. However, the qualities which maintain the status need not necessarily be the same as those from which the status can be assumed. Even if the qualities appear to be the same, it may be that they do not necessarily have the same importance. Be that as it may, the problem of determining the attainment of professionalism is a difficult one.<sup>33</sup> But it is a problem to be faced. Western society is an industrial society. Goode asserts that an 'industrialising society is a professionalizing society'.<sup>34</sup> Sir Gordon Borrie recognises that the process still goes on.<sup>35</sup> In terms of American society, Goode identifies it through the indices of the growth of white collar occupations and 'the increase in the number of occupations trying to acquire the symbols of professional status, following a program of action spearheaded by their formal associations, which might lead to recognition as

professions'.<sup>36</sup> Goode's 'encroachment' notion refers to the process whereby one body claims competence to solve a problem formerly solved by another group. An occupation has to engage in a struggle for professional status.

Whatever traits are discernible for the recognition of a profession, Goode identifies as an important part of the process by which an occupation becomes a profession 'the gradual institutionalization of various role relationships between itself and other parts of the society. These clients or agencies, or the society generally, will concede autonomy to the profession only if its members are able and willing to police themselves; will grant higher fees or prestige only when both its competence and its area of competence seem to merit them; or will grant an effective monopoly to the profession through licensure boards only when it has persuasively shown that it is the sole master of its special craft, and that its decisions are not to be reviewed by other professions'.<sup>37</sup> Sir Gordon Borrie also attaches significance to organization as did Scrutton L.J. in *Currie v Inland Revenue Commissioners*.<sup>38</sup> What is also apparent from Goode's analysis of the process is its two way nature. The occupational groups<sup>39</sup> perception of itself needs to be matched by that of the society within which it operates. As Borrie observes 'A particular occupational group's subjective view of itself can hardly be sufficient... no group can actually become a profession

just because it fancies the idea. There must be some public recognition that the occupation has professional status.....<sup>40</sup> A difficulty for the public or a member of the public is that the quality of professional service cannot be adequately evaluated by the layman, although his perception of the utility is important. In the absence of knowledge on the part of their clients, the professions rely on their clients faith.<sup>41</sup> Goode gives chiropractcy as an example of an occupation's evolution into a profession through client's faith. He evidences this by the inability of chiropractcy 'to demonstrate, by ordinary canons of science, its curative powers....'<sup>42</sup> Although Goode gave this as an American example, the British experience of alternative medicine is similar.<sup>43</sup> The medical profession appears to resist the growth of such practices but it also seems that no profession has ever been displaced by another by having its claims to technical effectiveness refuted by empirical test.<sup>44</sup> Thus, although the advantages enjoyed by professions rest upon the inadequate evaluation by members of society (a nebulous body), these advantages are not in the gift of the occupational group.<sup>45</sup>

According to Cogan,<sup>46</sup> the history of the modern profession can be traced to eleventh century Europe when the occupations which were ultimately to develop into professions began to organise into associations. In England, the universities came to be founded after the

formation of exclusive societies by teachers and students in the twelfth century<sup>47</sup> and had the rule 'that no one was to practise his craft without formal license'. The universities later came under the control of the Church but other secular societies were being formed. In the fourteenth century the surgeons organised themselves into a guild and the fifteenth century saw the Common lawyers separating from the Church. By the seventeenth century the universities had returned to a secular foundation. Dictionary definitions tend to apply the word 'professions' specifically to 'the three learned professions of divinity, law and medicine'.<sup>48</sup> Referring to the Shorter Oxford English Dictionary Cogan states that the 'earliest recorded use of the word profession to mean a learned vocation was in 1541, and as early as 1576 its meaning had already been generalised to indicate "any calling or occupation by which a person habitually earns his living"'.<sup>49</sup> A profession is concerned not merely with the possession and use of a skill but with the requirement of an occupation or vocation; viz, the means of earning a living. Whilst there appears to be a fair measure of agreement on this idea of vocation, there are significant legal implications in the different definitions. For example, in addition, there is a notion that a profession applies its skill for the service of others. 'The notion of service - of skilled service to the community in ways more highly esteemed socially than the skills of trades

and crafts - is inseparable from a modern image of a profession'.<sup>50</sup> The assumption that this is usually expressed within some institutional framework, and often under the auspices of some professional organisation or association with a supervisory and regulatory function, must be almost as widespread.

The formulation of definitions can serve a useful purpose as it concentrates thought about professions as a particular type of occupation. Definitions place professions into a category and this may be labelled a taxonomic approach.<sup>51</sup> This taxonomic approach rests on the principle that professions are different from other occupations because they possess unique characteristics and have an important role in society. The approach can be divided into two: the trait and functionalist models. The former is less abstract but tends to be arbitrary. According to Saks, the trait form is centred upon 'the formulation of a list of attributes which are not theoretically related but which are held to represent the core features of professional occupations'.<sup>52</sup> The functionalist model is restricted to elements 'felt to be of functional relevance for either the social system as a whole or the professional-client relationship'.<sup>53</sup>

Saks itemises the most commonly mentioned features of a profession in the various trait models as:

- a) high levels of skill based on theoretical knowledge,

- b) altruistic service,
- c) adherence to a code of conduct maintaining integrity.

The exponents of the functionalist view seem to underpin the trait model with the notion of some form of social contract; that 'in exchange for ethical and non-exploitive control of highly esoteric and complex bodies of knowledge of great importance to society, professions were said to be granted a privileged social and economic position which includes the right to self regulation'.<sup>54</sup>

Although there appears to be no reason why the taxonomic approach should be non-empirical in method, this appears to be the case. Its use of a priori reasoning has resulted in strong criticism. The defect of the non-empirical approach, it is maintained, is that of taking the attributes of professions on trust, accepting the professions' own perception of their character and role, and, as a result, reinforcing the dominant position of established professions. There is similarity between the taxonomic conceptions of professions and the preambles to, and contents of, professional codes.

However, despite criticism, the taxonomic approach continues to be used. Other criticism has been levelled at the failure to provide a proper basis for understanding the nature and role of professions in society. There emerged a refusal to accept at face value the professions' own image, 'profession' being seen as not 'so much a

descriptive term as one of value and prestige'.<sup>55</sup> Similarly Becker spurned definitions of professions containing suppositions about their differentiating intrinsic characteristics<sup>56</sup> and suggested that the term "profession" was not a neutral and scientific concept but "a folk concept, a part of the apparatus of the society we study, to be studied by noting how it is to be used and the role it plays in the operations of that society".<sup>57</sup>

Even the empirical approach has been criticised for its superficial and narrow use of data. Although Hughes and Becker argued that professions were merely occupational groups who had been politically successful in attaining their privileged status, we are still left in the dark as to how this status is likely to be achieved or what privileges were to be attained.<sup>58</sup>

The neo-Weberian approach is one in which professions tend to be regarded as 'legally privileged groups which have managed to monopolise to a considerable degree social and economic opportunities.'<sup>59</sup> There are many views within this school of thought. Freidson, for example, considers that professions are occupations enjoying autonomy in the context of their work and in professional judgment. He argues that 'the most strategic distinction lies in legitimate, organised autonomy - that a profession is distinct from other occupations in that it has been given the right to control its own work.'<sup>60</sup>

In *Professional Dominance*, Freidson observes that 'the economic and political autonomy of the medical profession varies from country to country. What seems invariant, however, is its technological or scientific autonomy, for everywhere the profession appears to be left fairly free to develop its special area of knowledge and to determine what are "scientifically acceptable practices"... Thus, while the profession may not everywhere be free to control the terms of its work, it is free to control the content of its work. Similarly, it is free to control the technical instruction of its recruits.'<sup>61</sup>

According to Freidson, this autonomy is the hall mark of a profession. For him: 'The central issue in the analysis of work is control of performance ..... professions, unlike other occupations, have successfully gained freedom from control by outsiders. Indeed, a profession is said to control its own performance'.<sup>62</sup>

If this is true of professions, it does not answer the question: how far is a profession self-regulating? There are several issues which may throw light on the extent of autonomy and in so doing raise questions as to consistency with legal sanctions. Important areas of professional activity, particularly with regard to the medical profession, but not exclusively so, are resource allocation, informed consent and clinical freedom.

### C. Professional Autonomy and Legal Sanctions

When a patient seeks medical advice, the decision as to the patient's need for medical care is made by a doctor. Many factors are involved in this decision but a major factor is that of resources. 'Whether patients are admitted to hospital or seen as out-patients on a long term basis will depend not only on clinical factors but also on the number of beds and out-patient sessions available to a consultant and the pressure on these facilities... Every consultant has a right to formulate his own concept of patient need and thus to decide what resources are required, in his opinion, to care for them.'<sup>63</sup> However, it must be recognised that where there are constraints, 'consultants .... must decide what they are trying to do and what are the ways of doing it which provide not only effective care for patients but also an efficient use of resources.'<sup>64</sup> Thus, it would seem that within the limits of professional work, the professional is endowed with the ability to make many vital decisions.

With regard to clinical freedom, an expression applicable to both treatment and informed consent, the professional jealously protects itself. The profession claims to regulate the work of its members. There is a significant degree of acceptance of such self regulation by the courts in cases of professional malpractice: that the legal standard of skill to be observed is that of the reasonably competent person within that profession. To

this end, recourse is made to the testimony of expert witnesses, also members of that profession, with regard to which the court must, at least in part, inevitably base its conclusion. But no matter how much a profession may claim to exercise control over its members, the authorities show the courts will have the final word. Expert testimony is not conclusive.

When considering autonomy as a hallmark of a profession it is important to see organisation in a supporting role. Not only is organization a feature commonly relied upon as characteristic of a profession but autonomy appears to be maintained through the organisational framework. There is little disagreement that organization is an essential requirement, and yet discussion of other criteria, such as autonomy, ethics and discipline, do not appear to be realistic in the absence of an organizational structure. Those who have attempted to formulate definitions in which organization is an essential element include Edward Gross, who referred to group identity as an essential of professionalization.<sup>65</sup> Lewis and Maude consider one of the attributes of a group of persons 'professional in character' to be 'the organisation of the Professional Group, devoted to its common advancement and its social duty rather than the maintenance of an economic monopoly.'<sup>66</sup> The Law Society considers a fully developed profession to consist of 'a body of men and women (a) identifiable by reference to

some register or record'.<sup>67</sup> Barrington Kaye in 1960 defined professionalism 'as the institution of an occupation.'<sup>68</sup> On the other hand, Millerson maintains that 'An occupation does not have to be organised to become a profession. An organised occupation is not necessarily a profession.'<sup>69</sup> It is submitted that the second sentence quoted from Millerson is correct, as other essential criteria may be absent. However, the first sentence appears to be out of line with most other opinions. Finally, Borrie also regards organization as essential. In the Fourth Hampton Lecture in 1983 he stated 'that it is essential too that the individuals concerned are backed by and disciplined by a coherent professional organization and administration. A profession must have an organization.'<sup>70</sup>

#### D. Two Systems of Control

##### I Professional Institutions

Autonomy and power of self regulation may be taken as principal traits of a fully developed profession. For the purpose of this thesis attention has been concentrated upon the legal and the medical professions. Both of these professions are regarded as archetypal and demonstrate many of the issues at stake in a consideration of professional negligence. A simple account of these professions follows.

## a) Legal Profession

### 1. The Two Branches

#### 1.1 The Bar

The Bar has a long history stretching back into the Middle Ages. For the purpose of this thesis the modern history will suffice to give an indication of this branch of the legal profession.<sup>71</sup> In 1852 the Council of Legal education was set up. Later, in 1875, the Order of Serjeants was abolished. 1895 saw the General Council of the Bar created. However its functions were not to 'interfere with the property, jurisdiction, power or privileges of the Inns'.<sup>72</sup> Disciplinary powers over barristers remained vested in the Inns, but the rulings of the Bar Council on matters of etiquette were in practice accepted by the Bar as a whole. The Senate of the Four Inns of Court was set up by resolution of the four Inns and the General Council of the Bar in 1966. In 1974 the Senate of the Inns of Court and the Bar took over the former Senate's function. This is the principal body concerned with the profession of barrister.<sup>73</sup>

#### 1.2 The Law Society

The branch of the legal profession we now call solicitors also has a long history. Originally members of this profession were known by different names depending upon the business they conducted - solicitors, attorneys and proctors.<sup>74</sup> The functions of solicitors, attorneys and proctors were merged by the Judicature Act 1873.

However prior to this time, in 1831, a Royal Charter created the Law Society. In 1845 another Charter defined the objects of the Society as 'promoting professional improvement and facilitating the acquisition of legal knowledge.'<sup>75</sup>

## 2. Good Practice

Both branches of the legal profession have developed rules and guidelines as to professional standards and conduct of members. Not all would agree the standards laid down are adequate and in 1989 the Lord Chancellor published a Green Paper *The Work and Organisation of the Legal Profession*<sup>76</sup> which gives an account of the present condition, weaknesses and proposals for reform of the regulation of the legal profession. Briefly, the current regulations are as follows.

### 2.1 The Bar

Standards of the Bar are provided in a written Code of Conduct, a revised version of which came into force on February 1, 1989. The code sets out the general principles applying to all barristers.<sup>77</sup>

### 2.2 The Law Society

The Law Society publishes *Practice Rules*, the current set dating from 1988. The rules are not comprehensive, some matters of good practice being omitted. However, the Law Society also publishes a guide called the

"Professional Conduct of Solicitors" to deal with the matters of practice not covered by the Practice Rules.<sup>78</sup>

### 3. Complaints and Discipline

It is the duty of a professional body to maintain standards of competence and professional conduct. Connected with that duty is the need to exercise disciplinary powers to ensure as far as possible that those standards are maintained and that the public who seek professional services are protected. One of the prime functions of a professional organization is the maintenance of standards by reference to ethical codes and disciplinary powers.<sup>79</sup> With that aim in mind there are in existence arrangements peculiar to the Bar and to the Law Society for the purpose of maintaining standards.

### 4. Present Arrangements for Maintenance of Discipline

#### 4.1 The Bar

Although a barrister is immune from actions in negligence in respect of the conduct or management of a case in court there is no immunity from actions in negligence in other types of work. In respect of claims of negligence a practising barrister is required to have professional indemnity insurance of £250,000.

Apart from liability as above, a barrister is also subject to professional discipline in respect of conduct of a case in or out of work.<sup>80</sup> The present machinery for dealing with complaints is as follows.

First, the matter may be considered by the Professional Conduct Committee of the General Council of the Bar (PCC) Conduct may be dealt with informally. However, there has been a proposal for a summary procedure which has been considered but not yet introduced. Such a procedure would allow the PCC to deal with the matter further without referring it to the Disciplinary Tribunal. The Summary Procedure would be useful where there was no relevant dispute of fact.

If the case is regarded as serious or if there is a relevant dispute of fact the matter is brought before a Disciplinary Tribunal. The Tribunal is chaired by a Judge and has four other members including one lay member.

Appeal from the Disciplinary Tribunal lies to no fewer than three Judges of the High Court nominated by the Lord Chief Justice after consultation with the Lord Chancellor. The Judges are known as Visitors and there is no further internal appeal from their decision.<sup>81</sup>

#### 4.2 The Law Society

All practising solicitors are required to take out professional indemnity insurance in respect of civil liability claims. The Law Society also administers a compensation fund in cases of dishonesty by solicitors with regard to client's money held by them.<sup>82</sup>

Complaints against solicitors may relate to conduct or inadequate professional work. Such complaints must be made to the Solicitors' Complaints Bureau where most will

be settled. Other complaints will be considered by the Solicitors' Disciplinary Tribunal, the High Court or the Lay Observer. 83

#### 4.2.1 Solicitors' Complaints Bureau

Complaints are first dealt with by the staff of the Bureau who prepare the cases for consideration or inform the complainant there is no issue of conduct or poor work. The Bureau's handling of complaints is monitored by the Investigation Committee which has the function principally of reviewing cases coming before the Bureau. The Investigation Committee consists of seven lay members, one of whom is Chairman, and four solicitors, two of whom are Law Society Council members.

The Law Society's disciplinary powers are exercised by the Adjudication Committee. The Committee consists of nine Law Society members, including the Chairman, three other solicitors and six lay members. It has many powers and in particular may take disciplinary proceedings against a solicitor at the Solicitors' Disciplinary Tribunal and may discipline solicitors for poor work.

#### 4.2.2 The Solicitors' Disciplinary Tribunal was established by statute and exercises the delegated power of the High Court. It is to this Tribunal that the most serious cases of professional misconduct are referred. The complaint may be referred by the Solicitors' Complaints Bureau, the High Court, a member of the public,

or the Lay Observer. It usually has three members, at least one of which is lay, appointed by the Master of the Rolls. Its powers are to strike off the roll, suspend, fine or reprimand.

#### 4.2.3 The High Court

Appeal from the Solicitors' Disciplinary Tribunal lies to the High Court. The High Court also has a general supervisory jurisdiction over the profession.

4.2.4 The Lay Observer is an independent office - holder appointed by the Lord Chancellor. The Solicitors Act 1974 S45(1) empowers him to examine any written allegation made by or on behalf of a member of the public concerning the Law Society's treatment of a complaint by a solicitor or his employee. The Lay Observer is empowered to report on treatment and make recommendations but has no power to investigate the complaints. It is in respect of complaints of both conduct and quality of services only that the Lay Observer may make application to the Solicitors' Disciplinary Tribunal in respect of the quality of services.<sup>84</sup> It is of interest that it was as a consequence of complaints about the Law Society's handling of grievances that the Lay Observer was set up in accordance with the Solicitors Act 1974. It is as a result of the Lay Observer's observation that the Law Society organised negligence panels to help those who wanted to bring an action against a solicitor but could

not find another solicitor to accept the case. Even so, it is only the persistent complainants who will eventually be informed of the existence of the negligence panel. Thereafter, of course, the complainant is on his own.<sup>85</sup>

b) Medical Profession

The British Medical Association (BMA) was founded in 1856. The General Medical Council (GMC) was established under the Medical Act 1858 at the instigation of the British Medical Association.<sup>86</sup> These two institutions are separate and have separate functions. The British Medical Association represents the interests of doctors. The General Medical Council has functions related to standards and discipline although originally its purpose was to keep a register of medical practitioners. Standards are maintained by the General Medical Council through a number of committees, one of which is called the Professional Conduct Committee. Under S36 Medical Act 1983 a doctor may be disciplined or punished for 'serious professional misconduct' the concept of which has recently been broadened to include negligence or gross negligence. There is an expectation that 'a medical practitioner will afford and maintain a good standard of medical care.' The Council has moved away from its traditional role with regard to moral turpitude into the realm of professional negligence, an area once regarded solely as a matter for the courts. Now the Council 'is concerned with errors in diagnosis or treatment, or with the kind of matters which

give rise to action in the civil courts for negligence, only when the doctor's conduct in the case involved such a disregard of his professional responsibility to his patients or such a neglect of his professional duties as to raise a question of serious professional misconduct.' An allegation of 'serious misconduct may also include doctor's persisting in unsupervised practice of a branch of medicine in which he does have the appropriate knowledge and skill and has not acquired the experience which is necessary.' Whether this change in the definition means that there has been a blurring of the traditional distinction between the functions of the GMC and the courts is open to argument. The sanctions associated with the functions of the Council and the courts remain different. In the event of serious professional misconduct being found the Council may erase the practitioner's name from the register, suspend for up to 12 months or impose conditions for the protection of the public or in the doctor's own interests. There is no provision for the award of compensation. For compensation the patient must bring an action in respect of an allegation of negligence in the courts. However, it is argued that there is pressure 'for a broader interpretation of culpability, without lowering the threshold of what has to be proved in order to establish the serious medical misconduct.' There are indications that more doctors are being disciplined for serious

professional misconduct.<sup>87</sup> General advice and guidance is in the Blue Book, as amended.<sup>88</sup> The GMC adjudicates but the law is a matter for the Privy Council. As the matter of professional misconduct is grave a high standard of proof is called for and a professional person will not be condemned on a mere balance of probabilities.<sup>89</sup> In respect of negligence, therefore, an allegation of which may be brought before the courts, it may be possible to succeed in a civil claim where a complaint of serious professional misconduct is not upheld.<sup>90</sup>

## II The Professions and the Courts

It would appear that the professional is bound by two sets of norms in the context of negligent malpractice: the general law and the codes of conduct applicable to his profession. The courts and the professional bodies each have responsibility for discipline. Goode<sup>91</sup> related to this dual control the propositions that 'the practitioner is relatively free of lay evaluation and control' and that the norms of practice enforced by the profession are more stringent than legal controls.' If by 'lay evaluation' Goode includes the courts, this may be so, as the incidence of legal actions for professional negligence demonstrates. It is arguably true in functional as opposed to formal terms, particularly in cases of medical negligence. Even in formal terms expert medical evidence is of great importance. If he means freedom from evaluation by other professional bodies this is probably

true. In any event, evaluation is usually a matter of difficulty for the client. With regard to the stringency of the norms involved in professional control this would not seem to be a well founded proposition. The professions appear to be less capable of imposing real sanctions upon their members. The Royal Commission on Legal Services reported that 'A profession is given a measure of self regulation so that it may require its members to observe higher standards than could be successfully imposed from without.'<sup>92</sup> Linden considers the professions to be less than zealous in policing themselves.<sup>93</sup> In the light of *Sidaway v Bethlem Royal Hospital Governors and Others*<sup>94</sup> some members<sup>95</sup> of the judiciary are able to contemplate the medical profession as being capable of developing unacceptable practices from which the public must be protected. And so the courts reserve the right to interfere with medical practice in the interest of the patient, although usually the profession does set and adhere to the requisite standard of care. It must also be considered whether the professions give enough thought to the essential issues of practice. If Linden is correct and 'hardly ever does a doctor ... lose his license to practice medicine because of his incompetence or professional misconduct', then the medical profession seems to be more diligent with regard to penalising sexual misconduct with a patient, for example, than with negligent treatment. Neither has the

Law Society shown itself to be adequate in matters of control over professional misconduct.<sup>96</sup>

It is possible to translate this trait relating to standards into a legal requirement. Commencing with *Lanphier v Phipos* in 1838<sup>97</sup> every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill.' To some this would be taken to mean the standard of the average practitioner within that profession. Furthermore, there are also those who would rely upon the existence of a common practice of the profession as indicating adherence to the appropriate standard for the purpose of avoiding legal liability. To that end the testimony of expert witnesses is adduced but not conclusively. The judges have not abdicated their duty to fix standards.<sup>98</sup> Having said that there is a line of cases supporting the proposition that adherence to a common standard is conclusive disproof of negligence.<sup>99</sup>

The Privy Council in *Vancouver General Hospital v McDaniel* in 1934<sup>100</sup> affirmed that 'A defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice.' This dictum was approved by Maugham, L.J. in *Marshall v Lindsey County Council*<sup>101</sup> in which he stated 'the defendant Council ... have acted in accordance with the recognised practice and are therefore free from liability on the ground of negligence ... An act cannot, in my opinion, be

held to be due to a want of reasonable care if it is in accordance with the general practice of mankind.<sup>102</sup> The dictum of Maugham, L.J. has been accepted by the House of Lords in *Whiteford v Hunter*<sup>103</sup> and, therefore, appears to represent the law in England. The authority of these cases is evident when one considers the dictum of Denning, L.J. in *Hatcher v Black*<sup>104</sup> that the law concerns the doctor only 'when he falls short of the accepted standard of a great profession.' His Lordship added 'No one of the doctors that have been called before you has suggested that Mr. Tuckwell did wrong. All agree that it was a matter for his own judgment. They did not condemn him; nor should we.'<sup>105</sup> In 1953 in *Bolam v Friern Hospital Management Committee* the requirement was expressed as 'A professional man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.'<sup>106</sup> In *Chapman v Rix*<sup>107</sup> Romer, L.J. went so far as to state that he knew of no case in which a medical man had been found guilty of negligence when eminent members of his own profession had approved of what he had done.<sup>108</sup> There is therefore an emphasis placed upon expert testimony in relation to professional negligence by this line of cases. *Whitehouse v Jordan*<sup>109</sup> supports the standard laid down in *Bolam*. Lord Frazer of Tullybenton referred to the meaning of negligence as 'a failure... to exercise the standard of

skill expected from the ordinary competent specialist having regard to the experience and expertise that specialist holds himself out as possessing.<sup>110</sup>

However the issue of adherence to the standard of care has not been settled. There is another line of cases in which the judges have reserved to themselves the right to determine the appropriate standard. In these cases, less emphasis is placed on expert testimony. Such testimony is no longer regarded as conclusive. In *Cavanagh v Ulster Weaving Co.*<sup>111</sup> evidence of a common industrial practice did not preclude the finding of negligence. Despite his statement in *Hatcher v Black Denning L.J. in Roe v Minister of Health*<sup>112</sup> indicated that he would be willing to hold a general professional practice negligent. This is consistent with His Lordships later judgment in *Greaves v Baynham Meikle and Partners.*<sup>113</sup> In *Greaves* he accepted the test laid down for standards in *Bolam* but declared that evidence of a similar practice would not exculpate the defendant. This line of authority has continued up to the present day with the Privy Council's declaration in *Edward Wong Finance Co. Ltd. v Johnson Stokes and Master*<sup>114</sup> that adherence to a common practice could still result in a finding of negligence. However, it must be pointed out that the Privy Council emphasised the foreseeability of the risk inherent in that practice.<sup>115</sup> Finally, the decision of the Court of Appeal in *Sidaway v Bethlem Royal*

Hospital Governors and Others<sup>116</sup> reserves the right of the judge to determine the appropriate standard. Sir John Donaldson M.R. accepted the test laid down in Bolam and found statutory approval in s.1(5) Congenital Disability (Civil Liability) Act 1976. But he reserved the right 'to reject a unanimous medical view of a practice if he were satisfied that it was manifestly wrong and the doctors must have been misdirecting themselves as to their duty in law'.<sup>117</sup> The Master of the Rolls then expressed the test as 'The duty is fulfilled if the doctor acts in accordance with a practice rightly accepted as proper by a body of skilled and experienced medical men.' That there are two lines of authority relating to standards raises doubts as to the cogency of some statements about autonomy.

In our society the ultimate authority is the State, which in terms of standards means the law. This autonomy has to be linked with responsibility and the professions must be seen to discharge their duties properly else the external standards from which they seek immunity will intrude. As Linden puts it: 'All professional groups come under the aegis of tort law. The expertise of doctors, lawyers, engineers and accountants may be impugned in a tort suit. Of course, negligence law normally adopts as its own standards that the professions require of themselves. But this does not make negligence law redundant, because professional groups are less than zealous in policing themselves. Hardly ever does a

doctor, for example, lose his license to practise medicine because of his incompetence or professional misconduct. It may be<sup>118</sup> more common for a physician to be sued by a patient injured by his malpractice. Consequently, it is the judges, not the College of Physicians and Surgeons, who by default become the regulators of the quality of medical practice.<sup>119</sup> It would seem that the ultimate determinant of professional competence in some countries eg Canada, is the law, at least in the sense that it is the ultimate recourse, though not necessarily invoked in practice.<sup>120</sup>

#### E. Problems of Liability for Professional Negligence.

It has been stated earlier that a hallmark of professional activity is government by a professional body. A significant trait for recognising an occupation as a profession is that the governing body has powers of regulation and discipline. The professional person thus carries out professional tasks under a regime of control. As a result liability for negligence places a burden upon the professional which is separate from the standards prescribed by the profession itself. The Royal Commission on Legal Services emphasised 'the importance of high standards, beyond those required by the law, voluntarily set and maintained'. However, cases concerned with the standard of care required of a medical man show that the standards expected of the professional by the law are higher than those expected of the practitioner by his

profession in matters of negligence. Nonetheless, the courts are aware that cases in negligence against professionals may have consequences different from those affecting persons not sued in respect of professional practice. Ironically, the attitudes of the courts appear to foster a lowering of standards. Lord Denning, in the foreword to J.P.Eddy's Professional Negligence<sup>121</sup>, wrote:

'We are so used to actions for negligence in factory cases that we are apt to think the same principles apply to actions for negligence against professional men. This is a great mistake ... a difference is the standard of care which was expected. The courts have no hesitation in holding that mistakes made by car drivers or employers are visited by damages: but they make allowances for the mistakes of professional men. They realise that a finding of negligence against a professional man is a serious matter for him. It is not so much the money because he is often insured against it. It is the injury to his reputation which a finding of negligence involves.'<sup>122</sup>

Not only would the finding of negligence against a professional man be grave but there would be adverse consequences for the profession as a whole and the community in receipt of the professional service. Such an opinion is not necessarily correct. The community may benefit and the quality of services might improve.

'Defensive medicine', often labelled as a bad consequence of litigation, may be indicative of proper care for a patient.<sup>123</sup> Denning L.J., as he was then, urged caution in actions against professional men: 'It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on

our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way. Something goes wrong and shows up a weakness, and then it is put right.<sup>124</sup> And he expressed concern that '... we should be doing a disservice to the community at large if we are to impose liability on hospitals and doctors for everything which happens to go wrong. Doctors would be led to think more of their own safety than that of the good of their patients.<sup>125</sup> Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point but we must not condemn as negligence that which is only a misadventure'.<sup>126</sup>

However, that is not to say that there should not and will not be careful examination of professional activity. The generosity so far indicated by Lord Denning was not to be found in his Lordships judgment in *Allen v Sir Alfred MacAlpine and Sons* in 1968.<sup>127</sup> Nor was it found in the judgment of the other members of that Court of Appeal. It

would be a matter for concern if there was to be a backlash against professionals generally. Fortunately this has not happened in England. Medical practitioners in America have not been so fortunate. It was the incidence of medical malpractice suits in America that underlay Lord Denning's reasoning in *Whitehouse v Jordan and Another*<sup>128</sup>: 'Take heed of what has happened in the United States. "Medical malpractice" cases there are very worrying, especially as they are tried by juries who have sympathy for the patient and none for the doctor, who is insured. The damages are colossal. The doctors insure but the premiums become very high: and these have to be passed on as fees to the patients. Experienced practitioners are known to have refused to treat patients for fear of being accused of negligence.<sup>129</sup> Young men are even deterred from entering the profession because of the risks involved. In the interests of all, we must avoid such consequences in England. Not only must we avoid excessive damages. We must say, and say firmly, that in a medical man, an error of judgment is not negligence.'<sup>130</sup>

However, it is submitted that the fears of Lord Denning may prove to be unfounded in relation to the United Kingdom. There are a number of criticisms of Lord Denning's assessment. First, juries do not decide cases in negligence in the United Kingdom. They are used neither in determining liability nor in assessing damages. Secondly, the attitude of Americans towards medical care

and legal services is different from that prevailing in the United Kingdom. In the USA there is an expectation to pay for medical care and such care is seen as a commercial transaction. In addition, in some states the system of contingent fees operates which critics claim to be responsible for inflating awards. It is, therefore, not too helpful for the judiciary to base their views on professional negligence too closely upon a jaundiced opinion of American developments. None of the foregoing, however, should be taken to suggest that there are no problems in USA nor that the situation in UK would not take a turn for the worse. Havard agrees with Lord Denning that the cost of medicine to the patient has increased in USA.<sup>131</sup> Southwick<sup>132</sup> discusses the situation in USA as one in which the attorneys and physicians blame each other for the medical malpractice 'crisis'. In turn, both groups blame the insurance industry.<sup>133</sup> Weir comments<sup>134</sup> that in England, patients are reluctant to sue their doctors. Not that criticising doctors in England is a modern phenomenon. In 1908 a book reviewer wrote of a newly published work that a chapter on "Negligence and Malpractice" was 'of special importance in these days when every patient considers himself in a position to criticise his doctors supposed lack of skill or want of attention'.<sup>135</sup> Criticism should not, however, be likened to a readiness to sue. Relatively speaking there has not been a rash of actions against doctors in England compared

with USA. It was possible to state that in 1983 one of the medical protection societies could offer unlimited liability insurance for £150 per annum.<sup>136</sup> The extension of litigation and liability would appear to be slow. However, Havard<sup>137</sup> contends that it is the incidence of liability for negligence in England which is causing patients to receive out-of-date or unnecessary treatment. According to Havard the trend in court cases had resulted in an increase in doctors' medical defence insurance of 40% in 1983.<sup>138</sup>

In 1986 the position appeared to have worsened. Doctors had to pay 70% more for cover against medical negligence claims in 1987. This entailed an increase from £336 to £576.<sup>139</sup> In 1988 the premium rose to £1080 and £2000 was considered not improbable as the next increase.<sup>140</sup> Whether the increase in premiums constitutes the problem for doctors often made out by members of that profession is debatable. Premiums are tax deductible and payable by instalments. When compared with premiums paid by members of other professions, the figures do not appear excessive. The Medical Defence Union, the biggest insurance society for doctors, reported that £11.5 million in damages was paid out in 1985. Further fears were expressed of more alarming awards if contingency fees were permitted. An effect has been, confirming Havard (*supra*), that protection from litigation rather than patients' welfare has prompted doctors to practise defensive

medicine whether or not doctors are more careful. Claims against doctors have continued to rise from 16,000 in 1982 to 20,000 in 1985, about 20 per cent related to obstetrics and gynaecological practice. Fears have been expressed that the likely increase in liability in these specialisations could lead to serious shortages of doctors prepared to do the work.<sup>141</sup> And yet even in USA it is not all gloom and despondency. It is worthwhile considering the contrary view given by Southwick from which one might ask 'what crisis'?<sup>142</sup>

'It might be well first to take a different view of the malpractice crisis from that usually offered by news sources, attorneys, physicians and insurers. A 1973 report of an HEW Commission on medical malpractice based on a study of claim files closed in 1970, offers a more objective summary<sup>143</sup> of the magnitude of the so-called crisis to date:

"Despite the publicity resulting from a few large malpractice cases, a medical malpractice incident is a relatively rare event: claims are even rarer and jury trials are rarer still.

In 1970, a malpractice incident was alleged or reported for one out of every 158,000 patient visits to doctors.

In 1970 a claim was asserted for one out of every 226,000 patient visits to doctors.

Fewer than one court trial was held for every 10 claims closed in 1970.

Most doctors have never had a medical malpractice suit filed against them and those who have, have rarely been sued more than once.

In 1970, 6.5 medical malpractice claims files were opened for every 100 active practitioners.

A 10 year survey, from 1960 to 1970, of the claims experience of 2,045 physicians in Maryland indicated that 85 percent had not been sued, 14 percent were sued once, and 2 percent were sued more than once.

Most hospitals no matter how large, go through an entire year without having a single claim filed against them. Sixty nine percent of 4,113 hospitals surveyed from June 1971 to June 1972 had not had a malpractice claim, 10 percent had one, and 21 percent had two or more. Most patients have never suffered a medical injury due to malpractice and fewer have made a claim alleging malpractice.<sup>144</sup>

If the average person lives 70 years, he will have, based on 1970 data, approximately 400 contacts as a patient with doctors and dentists. The chances that he will assert a medical malpractice claim are one in 39,500."

However, the expression 'crisis' does have some currency and there appears to have been a rapid growth in successful actions against medical men in the United States. Doctors had to come to terms with losing negligence suits and found it difficult to predict liability due to conflicting judicial rules. Doctors began to become defensive and avoid risky courses of treatment.<sup>145</sup> Not only that, but in USA an unfortunate development appears to be an alarming absence of a sense of obligation to assist a person in need. There is no legal duty to assist a stranger (although there may be liability to professional discipline) under Anglo-American law. One American doctor in two, according to Havard, is so fearful of legal consequences that he would not give first-aid in a road accident.<sup>146</sup> This is despite the so-called 'Good Samaritan' statutes which seek to encourage emergency aid by relieving doctors from the risk of being charged with ordinary negligence.<sup>147</sup> At the root

of this problem is fault. The idea of no-fault compensation for medical accidents has been rejected by Pearson<sup>148</sup> in Britain, although the British Medical Association established a working party to consider a no-fault compensation scheme.<sup>149</sup> The Working Party has now reported in favour of a no-fault scheme (infra).

The legal basis for medical negligence is now fairly well established. Very few cases actually go to court. Medical defence societies, which handle many claims for negligence, decide whether to settle or defend. The societies expect to win those cases that do require defence in court. Jandoo and Harland consider that this explains why 'the proportion of successful claims for damages in tort is much lower for medical negligence than for all negligence cases.'<sup>150</sup>

It is probably fair to say that it is not only good judgment on the part of the defence societies that doctors win cases. There are many other factors, especially matters of evidence and causation that enable the defence to succeed. In those instances of alleged negligence that do not reach the stage of litigation, legal aid becomes an issue. One of the problems, it is argued,<sup>151</sup> is that the fault based system of tort is in danger of being undermined. This is due to the desire to settle out of court at a lower level of compensation in those cases where liability could not be established.<sup>152</sup> Since where the plaintiff is legally aided, the successful defendant could not recover costs and an ex gratia payment is made.

Compensation based on the establishment of fault under the law of tort gives way to a payment made on the basis of expediency. The unfortunate effect with regard to the professional/client relationship is that the patient is unlikely, and perhaps unable, to differentiate between an ex gratia payment and damages, and feels he has won and the doctor has lost ie is at fault. The doctor/patient relationship is irreparably damaged.<sup>153</sup> It is suggested that reform of the system of legal aid might improve the situation outlined above. Under 13(2) Legal Aid Act 1974 the court must consider whether an order for costs should be made against the assisted party and whether or not it is just and equitable to make provision for costs out of public funds. Stoddart, commenting on a similar statutory provision operating in Scotland,<sup>154</sup> states 'it seems ironic that while the State will not generally hesitate to try and collect expenses from an unassisted party if his assisted opponent is successful, it will not necessarily bear the expense due to the unassisted party if the assisted party loses'.<sup>155</sup> Reform of the system would not be so expensive, it is argued, because so few cases go to court.<sup>156</sup> What is uncertain is how many cases do not go to court because of the costs problem that would go to court if the problem was solved.

An alternative solution has been suggested by Jandoo and Harland viz the adoption of a contingent fee system. Contingent fees are generally viewed with disapprobation (supra) but the supporters of the system

regard it as an alternative to legal aid in that 'it promotes equality before the law. It allows those who have suffered a wrong to get redress through the Courts. Poor people who have meritorious claims have an opportunity to secure competent counsel with no cost to themselves in the event of there being no recovery.<sup>157</sup> It is argued that the contingent fee has served as the only possible alternative to state intervention to assist the poor in obtaining adequate legal services. The system does to an extent, therefore, fulfill the functions of a private enterprise welfare scheme'.<sup>158</sup> One must bear in mind, of course, that the payment of a successful opponent's costs is an English practice not found in America where contingency fees are permissible. On the other hand if a party loses he pays nothing to his lawyer and if he wins he pays out of the proceeds. But assuming the adoption of the contingent fee system and the retention in some form of the present costs system, White suggests<sup>159</sup> that the contingent fee would exclude any award of costs to the successful plaintiff. If the plaintiff loses then the defendant should not be placed in a worse position because the plaintiff had a contingent fee arrangement with his lawyer. The defendant should be entitled to his costs. The plaintiff might have insufficient means and a bill for costs would defeat the contingent fee system as a method of eliminating the costs sanction. A plaintiff without means would require the assistance of public funds. Legal aid by the back door?

White argues that the system of contingent fees could be adopted in the United Kingdom provided safeguards, particularly regarding the merit of the case and the level of fees, were built in. He sees the contingent fee as a supplement to legal aid. The governing bodies of the legal profession can supervise the system. The use of the contingent fee could be conditional upon ineligibility for legal aid or the refusal of an application for legal aid.<sup>160</sup> In this way it would fulfill a useful function. But in the context of medical malpractice, it has been blamed, with other factors, for the alarming state of affairs in America. 'It had not only allowed many claimants with injuries entitling them to compensation to obtain legal counsel which they could not otherwise afford, but it had also encouraged lawyers to accept claims with little merit if the potential rewards were high'.<sup>161</sup> Despite the above criticism of contingency fees the matter is receiving serious consideration in the United Kingdom. A Green Paper was published in 1989. The Government appears to favour a change. It is not likely that a 'no win', 'no fee' system will be adopted but rather a system similar to the speculative action used in Scotland (*infra*).

In conclusion, it seems that, if some members of a profession see the overriding control of the courts as being an intrusion into their domain, evidence shows that the medical profession, for example, formerly favoured the retention of the tort system. Liability is seen as a

means of showing responsibility and could therefore justify professional freedom, but retention has also presumably been favoured because of the tort system's marginal impact in practice.<sup>162</sup> A British Medical Association Working Party has now reported recommending a no-fault system in cases of some medical injury (infra). The legal profession, as one would expect, is closely controlled by the courts in a variety of ways. As it is there is no reason why a professional person should be exempt from legal liability unless a good case is made out.<sup>163</sup> Ultimately the possibility of legal liability might be the only effective regulator of the quality of services provided. Altruism is claimed to be a characteristic of a profession. Members should see their function in terms of the community rather than concern themselves with their own interests.

Notes.

1. Hall v Brooklands Auto Racing Club [1933] 1 K.B. 295 at 224, per Greer L.J.
2. Bolam v Friern Hospital Management Committee [1957] 1W.L.R. 582 at 586, per McNair, J.; approved by the Privy Council in Chin Keow v Government of Malaysia [1967] 1W.L.R. 813 at 816. and endorsed by Lord Edmund-Davies in Whitehouse v Jordan [1981] 1ALL E.R. 267. As far as the professional standard is concerned McNair, J. also considered 'A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art'.  
ibid.
3. [1975] 1W.L.R, 1095.

4. There is an exceptional case where a chattel is to be delivered. See *Samuels v Davis* [1945] 1 K.B.526. Thus, where a dentist may only be required to exercise reasonable care in the extraction of a tooth, if he 'agrees to make a denture for a patient, his obligation is not to exercise reasonable skill and care (nor even exceptional skill and care) but to produce a denture which will be fit for its purpose.' Jackson and Powell *Professional Negligence* Sweet and Maxwell 1982. at page 6.
5. *Rondel v Worsley* [1969] 1 A.C. 191; *Saif Ali v Sydney Mitchell and Co.* [1978] 3 All E.R. 1033. See also *Rees v Sinclair* [1974] 1 N.Z.L.R. 180.
6. *Saif Ali v Sydney Mitchell and Co.* [1978] 3 All E.R. 1033 at 1038, per Lord Wilberforce.
7. *Rees v Sinclair* [1974] 1 N.Z.L.R. 180 at 187, per McCarthy, P.
8. See H. Street *Street on Torts* Butterworths, 1983 at page 205.
9. *Commissioners of Inland Revenue v Maxse* [1919] 1 K.B. 647 at 657. And in *Currie v Inland Revenue Commissioners* [1921] 2 KB 332 at 343 Scrutton L.J. developed his views '... I myself am disposed to attach some importance in findings as to whether a profession is exercised or not to the fact that the particular man is a member of an organised professional body with a recognised standard of ability enforced before he can enter it and a recognised standard of conduct enforced while he is practising it.'
10. [1944] 2 All E.R. 163 at 166-167.
11. Cogan 'Towards a definition of a profession' (1953) 23 *Harvard Educational Review* 33 at page 34.
12. Monopolies Commission Report on Professional Services. 4466 HMSO 1970.
13. *Fortnightly Review* 11 (New Series) page 169.
14. Sir Gordon Borrie 'The Professions. Expensive Monopolies or Guardians of the Public Interest' (1984) *Journal of Business Law*, 111.
15. op. cit. 114.
16. *ibid.*

17. Maintenance: the offence of supporting another's litigation.  
Champerty: agreeing to assist another's litigation for a share of the proceeds.
18. J.G. Fleming The Law of Torts 6th ed. page 591.
19. F.B. MacKinnon Contingency Fees for Legal Services. A Study of Professional Economics and Responsibilities. (1964) Aldine Publishing Co. Chicago page 3.
20. The Law Commission reported on maintenance and champerty in 1966 and recommended abolition of the criminal offences and tortious liability in respect of them. Consideration of contingency fees was deferred. Criminal Law Act 1967 s.14(2). gave effect to this proposal but preserved illegality for agreements to remunerate a solicitor in contentious business. See Solicitors Act 1974 s.59(2)(b). See also Contingency Fees Cm 571.
21. M. Zander Lawyers and the Public Interest 1968 Weidenfield and Nicolson page 116.
22. It has been put forward that some contingency fee agreements may be legalised in New Zealand by s. 56 Law Practitioners Act 1955. Grant 'Contingency Fees' [1980] New Zealand Law Journal 334 at 337.
23. The Code of Professional Responsibility of the American Bar Association 1975 DR2-106(c).
24. Zander op.cit. 115
25. Zander op.cit. 117.
26. MacKinnon op.cit. 15. Grant op.cit. at 338 considers it anomalous that with the integration of England into the EEC English barristers may now obtain contingency fees in respect of foreign instructions. In view of the stance previously taken on the subject of contingent fees, it is also ironic.
27. White 'Contingent Fees: A Supplement to Legal Aid?' [1978] 41 MLR 286 at 291. The evaluation of fees must be conducted in consideration of the impact upon ethical standards -see MacKinnon op.cit. 3
28. White op. cit. 290
29. For example Edward Gross Work and Society, Thomas Y. Crowell Company, New York, 58, p.77; Lewis and Maude Professional People, Phoenix House Ltd., 1952, pp. 55-6; The Law Society in its memorandum of evidence

to the Monopolies Commission in September 1968. And more expressly Millerson *The Qualifying Associations. A Study of Professionalization*, Routledge and Kegan Paul, 1964, pp. 9-10.

30. Accountants and engineers.
31. 'The Times' January 5th 1980 p. 13.
32. *ibid*
33. per Scrutton L.J. in *Commissioners of Inland Revenue v Maxse* [1919] 1 K.B.647.
34. A.J.Goode 'Encroachment, Charlatanism, and the Emerging Profession: Psychology, Sociology, and Medicine' (1960) 25 *American Sociological Review* 902.
35. Sir G.Borrie 'The Professions. Expensive Monopolies or Guardians of the Public Interest?' (1984) *Journal of Business Law*.
36. Goode 'Encroachment' p.902.
37. *op.cit.* 903.
38. [1921] 2K.B. 332 at 343.
39. This group in itself becomes a community as an essential part of the process. Goode 'Community within a Community: The Professions.' (1957) 22 *American Sociological Review* 194 at 195.
40. Borrie 'The Professions' at p.113.
41. Goode 'Encroachment' at p.904.
42. *ibid.*
43. Over a million people in Britain are spending £40 million on visits to osteopaths, herbalists and other alternative therapists. The number is growing at the rate of 150,000 a year: Institute of Complementary Medicine, reported in *The Sunday Telegraph* July 1st 1984.
44. Goode 'Encroachment' at p.904.
45. Goode 'Community within a Community' at p.196.
46. M.L. Cogan 'Towards a definition of a profession' (1953) 23 *Harvard Educational Review* 33.
47. University College Oxford ... probably came into existence ie as a result of a benefaction from

William of Durham who died in 1249'. Green The Universities Penguin 1969 at page 15. But see Cobban The Medieval Universities: Their Development and Organization 1975 at page 101 which dates Oxford University "clearly" in the 12th Century. The foundation of Peterhouse in 1284 marks the establishment of Cambridge: Green op.cit. 16.

48. Shorter Oxford English Dictionary (1933 revised.)
49. Cogan, op. cit, 34.
50. G. Holmes Augustan England: Profession, State and Society 1680-1730 Allen and Unwin 1982 at page 3.
51. M. Saks 'Removing the Blinkers? A critique of recent contributions to the sociology of professions.' (1983) 31 The Sociological Review 1.
52. op.cit. 2.
53. ibid.
54. ibid.
55. Hughes 'Work and Self', in Esland, Salaman and Speakman (eds) People and Work Holmes McDougal/The Open University Press, 1977, page 210, cited in Saks, op.cit. 4.
56. Saks op.cit. 6.
57. Becker 'The Nature of a Profession', in National Society for the Study of Education, Education for the Professions, University of Chicago Press, 1962, cited in Saks, op.cit. 4.
58. Saks op.cit. 5.
59. Saks op.cit. 6.
60. Freidson Profession of Medicine Dodd, Mead and Co. 1970, page 71.
61. Freidson Professional Dominance Aldine Publishing Co, 1970, pages 83-84.
62. op.cit 88.
63. Royal College of Physicians The Deployment of Doctors in Medical Specialities page 3.
64. ibid.
65. Work and Society Thomas Y.Crowell Company 1958 77

66. Professional People Phoenix House Ltd. 952 page 55. See current activity relating to conveyancing.
67. Memorandum of evidence to the Monopolies Commission September 1968
68. The Development of the Architectural Profession in Britain George Allen and Unwin 1960 page 21.
69. The Qualifying Associations, A Study in Professionalization Routledge and Kegan Paul 1964 pages 9-10.
70. Borrie op.cit. 114
71. The Royal Commission on Legal Services Cmnd 7648 para 3.5 to 3.8. And see also paras. 32, 38- 32, 46.
72. The Inns of Court are entirely self-governing bodies administered 'Benchers' or Seniors. They are practically uncontrolled by any Act of Parliament. See A Seldon Law and Lawyer in Perspective Penguin 1987, p.86.
73. See Seldon op cit p.88.
74. There was also a lesser branch called scriveners who were in many ways high-class law stationers.
75. Cmnd 7648, paras, 3.10 - 3.11.
76. Cm 570
77. Cni 570, para 4.5.
78. The Green Paper, Cm 570, regards the absence of the principles of good practice from the Practice Rules as odd: para. 4.7. It is of note that the Bar does not yet provide any guidelines of the type mentioned above although it is about to do so: it is stated in the Green Paper that the "Guidelines" provided by the Law Society are inadequate: Cm 570, para 4.10. In the Green Paper (paras 4.11-4.12) it is proposed, that there should in future be written codes setting our professional standards for both branches. The principles to be embodied in the codes will be presented by statutory instrument. It is significant that the legal profession is not to be allowed to determine the principles of the codes. An earlier recommendation on codes had been made by the Benson Commission. In the USA there is a new revised Code of Professional Responsibility: 'A Catalogue of Concern' (1980) New LJ 946.

79. See R.H. Tawney *The Acquisitive Society*, Fontana 1961 p.88. Greenwood *Attributes of a Professional Social Work* 2 No. 3 July 1957 p.44-45; Lewis and Maude (*supra*) cf Millerson.
80. Cm 570, para 4.16.
81. Cm 570, Annex D, Part I.
82. Cm 570, para 4.18. The profession is concerned about dishonest members. It is the presence of such members which requires a levy on each solicitor to meet the claims of compensation. 'A Catalogue of Concern' (1980) *New LJ* 946.
83. Cm 570, para 4.19.
84. Cm 570, Annex D, Part 2.
85. Seldon *op.cit* 99-101.
86. *The Handbook of Medical Ethics* British Medical Association 1980.
87. *The Daily Telegraph* May 23, 1988.
88. G.M.C. 'Blue Book' on Professional Conduct and Discipline: Fitness to Practice', August 1983, as amended.
89. *Bhandari v Advocates Committee* (1956) 1 W.L.R. 1442 at 1452.
90. On this generally see Samuels 'Doctors and Serious Professional Misconduct' (1986) 130 S.J 460.
91. 'Encroachment, charlatanism, and the emerging professions: Psychology, sociology and medicine. *American Sociological Review* Vol. 25 1960 902, 903.
92. Royal Commission on Legal Services Cmnd, 7648, para. 3.18(d).
93. A.M. Linden 'Tort Law as Ombudsman' *Can. Bar Review* 155 at 160, cited in J.Roberts S.Pritchard 'Professional Civil Liability and Continuing Competence' *Studies in Canadian Tort Law* Klar (ed) Butterworth 1977.
94. [1984] All E.R. 1018.
95. See the insistence of Donaldson M R, in his use of the word 'rightly'. And see also n. 96 (*infra*).
96. *The Times* December 15 1983. See also Report of the Law Society Council's Committee of the Enquiry into



the Law Society's Treatment of the Complaints of Mr. L. A. Parsons against Mr. G. Davies. 1984.

97. (1838) 8 Car and P.475 at 479.
98. R.B.M. Howie 'The Standard of Care in Medical Negligence.' [1983] Juridical Review 193 at page 204.
99. Howie, op.cit. 205.
100. (1934) 152. L.T. 56.
101. [1935] 1 K.B. 516 at page 540.
102. It is conceded that this is not a case involving a profession but the judiciary have given similar views in cases which do.
103. [1950] W.N. 553.
104. The Times July 2 1954.
105. *ibid.*
106. [1957] 1 W.L.R. 582 at 586 per McNair, J.
107. The Times November 11 1958. Chapman v Rix was reversed by the House of Lords: The Times December 22, 1960.
108. Howie op.cit. 206.
109. [1981] 1 All E.R. 267 at 277.
110. at page 180.
111. [1960] A.C. 145.
112. [1954] 2 All E.R. 131.
113. [1975] 3 All E.R. 99.
114. The Times, November 8, 1983.
115. It is ironic that the Privy Council indicated that the risk might be avoided by adopting the conveyancing practices of solicitors in England. The Privy Council's idea of Common practice in England appears to be idealised and not consistent with reality.
116. [1984] 1 All E.R. 1018.
117. at page 1928. But in C v S The Times February 25 1987 the Master of the Rolls gave approval to the

words of Sir George Baker P. in *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276, 282 that 'not only would it be a bold and brave judge ... who would seek to interfere with the discretion of doctors acting under the Abortion Act 1967, but I think he would be a really foolish judge...' (author's italics). This would indicate a reticence on the part of the judiciary when dealing with matters of clinical judgment. Medicine does seem to be treated differently from other professions where expert evidence is merely admissible as to what are accepted professional practices, rather than being effectively determinative of the legal standard of care, at least with regard to diagnosis and treatment.

118. In Canada there appears to be a higher incidence of medical malpractice litigation than there is in England.
119. *ibid.*
120. On the extent that it is used see *infra* where the MDU and MPS appear to be the effective judges for the most part.
121. *Stevens and Sons Ltd., London, 1955.*
122. *op.cit* at page vii. of *Griffiths v Evans* [1953] 2 All ER 1364 at 1371 in which the consideration of reputation did not weigh so heavily with Denning L J. as he then was, in favour of the professional. In this case the professional was a solicitor being sued for negligence. 'Surely, in those circumstances, he should have a remedy against his solicitor? I realise that the solicitor's reputation is at stake. We must be very careful of that, but we should remember also that the solicitors' profession will suffer more if the members of it make mistakes which they ought not to make, and cause a loss for which no remedy is given.'
123. It is not easy to see what the opposite of 'defensive medicine' is. Is it 'aggressive medicine'?
124. *Roe v Minister of Health* [1954] 2 All E.R. 131 at 137
125. See Havard 'The Legal Threat to Medicine' (1982) 284 *British Medical Journal* 612.
126. *Roe v Minister of Health* [1954] 2 All E.R. 131 at page 139.

127. [1968] 1 All E.R. 543. a case involving a solicitor. Lord Denning's generosity appears greater with regard to barristers (*Rondel v Worsley*) and doctors than it does towards solicitors. See also *Griffiths v Evans* [1953] 2 All ER 1364 and note 122 (*supra*).
128. [1980] 1 All E.R. 650 at page 658.
129. It seems unlikely that the effect of deterrence from treatment would be likely in England. Jackson and Powell 1982 *op.cit* 213. However, the fear has been expressed in the past. 'During the past seven years a number of medical men, who acted in perfect good faith, have been exposed to the most prolonged embarrassing and costly litigation upon the allegation that they acted without reasonable care in a matter which is the most difficult, delicate, and indefinite in the whole range of medical practice. It may well be, as was stated at the trial before me, that as a result of past litigation many doctors have refused and will refuse to take any part whatever in the work of certification because of the perils and anxieties which may follow' per McCardie J. in *De Freville v Dill* (1927) 96 LJKB 1056, 1062.
130. Despite Lord Denning's dictum, however, the House of Lords took a different view. Lord Russell stated 'Some passages in the Court of Appeal might suggest that if he makes an error of judgment he cannot be found guilty of negligence. This must be wrong. An error of judgment is not *per se* incompatible with negligence... I would accept the phrase 'a mere error of judgment' if the impact of the word 'mere' is to indicate that not all errors of judgment show a lapse from the standard of skill and care required to be envisaged to avoid a charge of negligence.' [1981] All ER 267 at 284.
131. *The Daily Telegraph*, September 6, 1986.
132. Arthur F. Southwick *The Law of Hospital and Health Care Administration* 1978 Health Administration Press.
133. Southwick *op cit* 112: 'The physicians blame the malpractice crisis largely on the legal system and such legal practices as the use of a contingency fee, by which a lawyer retains part of his client's judgment as his fee. Attorneys, on the other hand claim that the crisis has been caused by inapt medical treatment and by the failure of the medical profession to police itself... Attorneys and physicians alike are critical of the insurance industry, because the crisis was precipitated when

insurance companies raised their premiums or even completely withdrew medical malpractice coverage.'

134. T. Weir A Casebook on Tort 5th ed. page 140.
135. [1908] 24 LQR 491.
136. Weir op.cit 140.
137. The Daily Telegraph October 10 1983; And see also J.D.J. Havard 'The Influence of the Law on Clinical Decisions Affecting Life and Death' (1983) 23 Med. Sci. Law 157.
138. See Fleming The Law of Torts 6th ed. page 105 n.34. 'The dramatic rise in medical malpractice claims in the U.S. and Can. has not been equalled in the U.K. and Australia; but claims have at least doubled in the last 10 years.' And see also R.S. Jandoo and W.A. Harland 'Legally Aided Blackmail' [1984] 134 New L.J. 402. But this figure of 40% is probably not as dramatic as it seems given the actual amounts.
139. The Daily Telegraph, August 19, 1986.
140. The Daily Telegraph, September 19, 1988.  
The Daily Telegraph, September 23, 1988.
141. The Daily Telegraph, September 22, 1988.  
The Sunday Telegraph, January 8, 1989.
142. op.cit. 113-114.
143. Perhaps 'description' of the situation might be a better way of putting it rather than 'more objective summary'.
144. This is hardly surprising.
145. Patients in America were paying up to 14 times as much for X rays doctors needed to protect themselves from negligence claims as they were getting in damages for all types of malpractice claims. Southwick also states, op.cit. 112, that the patient pays for the malpractice insurance at a rate estimated to be as high as \$1.60 for every \$10 received in fees by physicians, not to mention the additional charges incurred when physicians are forced to practise defensive medicine.'
146. It is difficult to reconcile this development with the self image of professions i.e. altruism. Havard 'The Influence of the Law on Clinical Decisions Affecting Life and Death' op.cit. 163.

147. Fleming *The Law of Torts* 5th ed. page 144; 6th ed. page 138. Such statutory relief is also provided in Australia: Havard op.cit. 163. Zacharias 'The Politics of Torts' 95 *Yale L.J.* 698 at 718-720.
148. Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd. 7054 para. 1371.
149. M. A. Jones 'Medical Negligence - the Burden of Proof' (1984) 134 *New L.J.* 7. It has also been reported that the Government will be pressed by the defence societies, the British Medical Association and some M.Ps to re-examine fixed rate state funded compensation schemes: *The Daily Telegraph*, August 19, 1986. Since then the BMA has recommended speeding up compensation without recourse to courts. *The Daily Telegraph* March 11 1987, *The Times* March 11 1987.
150. Jandoo and Harland 'Legally Aided Blackmail' 1984 134 *New L.J.* 402. See also Cmnd. 7054, para. 1326.
151. Jandoo and Harland op.cit. 402 and 403.
152. It is not easy to determine the extent to which the defence societies settle unmeritorious claims. The societies deny that they do settle because of the implied effect upon a doctors reputation.
153. Jandoo and Harland op.cit. 403. Damage would be caused to the relationship by the original injury but aggravated by the subsequent accusation of malpractice. However, it might also be argued that if the matter has reached the stage of settlement out of court that relationship is probably irreparably damaged prior to any payment. See also *The Times*, January 13, 1989 in which it was stated that medical negligence claims 'introduced hostility into the doctor-patient relationship... The whole business of litigation was very destructive and extremely uncertain.'
154. S.2(6) and S.13 Legal Aid (Scotland) Act 1967.
155. Stoddart *The Law and Practice of Legal Aid in Scotland* 1979 page 128.
156. Jandoo and Harland op.cit. 403.
157. It is not strictly true that the client has no costs. The only costs saved in an action subject to a contingent fee are legal costs. The cost of medical evidence, expert witnesses and laboratory reports would still have to be covered by the plaintiff. There are claims that only the lawyers

benefit. For details of a contingent fee system see *supra*.

158. G. Palmer 'The Contingent Fee in the United States' [1970] *New Zealand Law Journal* 206 at 207.
159. R.C.A. White 'Contingent Fees: A Supplement to Legal Aid' [1978] 41 *MLR* 287 at 290.
160. *ibid.* See also Justice Report proposals for a Contingency Legal Aid Fund 1978. Royal Commission on Civil Liability and Compensation for Personal Injury. Cmnd 7054.
161. Cmnd 7054, para 1320. However, a contingent fee system produces problems for small or marginal cases. It is a criticism that lawyers 'tend to settle quickly having regard to the maximisation of their hourly rate of work done rather than their client's interests'.
162. *op.cit.* para 1342.
163. See *Arenson v Casson, Beckman, Rutely & Co.* [1977] AC 405 at 419. See the case of the immunity of lawyers in relation to pre-trial work and in litigation itself.

## Chapter 3

### The General Issues of Liability Affecting Professional Negligence

#### Liability in Contract and Tort

The history of professional negligence has been examined earlier. A consideration of the law at the present day shows that the civil liability of a professional person for professional negligence may generally be said to be based upon an action for breach of contract or tort. As the professional relationship often arises as a result of a contract,<sup>1</sup> the action in negligence will often be based upon the contract. The contract will contain terms, either express or implied, to the effect that the professional owes the client a duty of care.<sup>2</sup> Many of the first reported cases in negligence were actions against persons who had undertaken to do something and who, by doing it badly, had injured the other party to the transaction.<sup>3</sup> The old writ of *assumpsit* - the forerunner of the modern law of contract - was used against persons engaged in a profession or skilled trade. Such persons were liable for damage caused when they did not exhibit the degree of care, skill and competence associated with persons practising such callings. Professionals practising the common callings were, however, already liable under traditional doctrine. The common callings e.g. surgeons had always attracted

liability in tort because of their status<sup>4</sup> and such persons were liable in the absence of any consideration in a contract. All consideration did was to provide liability in contract as well as in tort, mere payment not extinguishing the right of action in tort. At an early date liability for breach of duty of care was extended to nonfeasance i.e., a failure to act, as well as misfeasance. Later the action of assumpsit became the general action for breach of contract and the practice of suing professionals in contract arose. According to Lord Denning M.R., at this later stage and particularly the nineteenth century the existence of a duty of care arising out of a contract ensured that the action would be brought for breach of contract and not in tort.<sup>5</sup> Thus, the principal means of exercising control in the courts over professional conduct was the law of contract.<sup>6</sup> The implied term in a contract for professional services is that the professional will exercise reasonable skill and care.<sup>7</sup> However, although the principal action or claim will be for breach of contract there is no longer any prohibition on an action or claim based on tort for 'it can also be based sometimes on negligence on the grounds that a reasonable man, owing a duty of care in such circumstances, would exercise the care of a skilled man doing the work.'<sup>8</sup>

The nature of liability thus stated is consistent with modern law generally. In *Brown v Boorman*<sup>9</sup> the

principle was laid down that whenever there is a contract under which something is to be done, if there is a breach of duty in the course of carrying out the contract the plaintiff may recover either in tort or contract.<sup>10</sup> There are many cases in which this would be true including 'actions against attorneys, surgeons and other professional men for lack of skill.'<sup>11</sup>

Since *Donoghue v Stevenson*<sup>12</sup> there is no reason why, once a duty relationship is established, that duty in tort should cease to apply because of a coexistent contractual relationship. It is accepted that where the duty is imposed solely because the defendant is acting for reward the liability is contractual. However, if a duty of care has arisen as a result of the relationship in the Atkinian sense, the existence of the contract is irrelevant to the extent that there may be a concurrent liability in tort. It seems that very often, both heads of liability will be available under the same or similar set of facts although the obligations under each head of liability arise in different ways and the consequences<sup>13</sup> of each are also distinct. According to many writers the distinction relates to the origin of the obligation.

It has been asserted that the most important principles of the law of obligations are the fulfilment of expectations (contract), the compensation of wrongful harm (tort) and the reversing of unjust enrichment (quasi-contract). Winfield in 1931 stated 'At the present

day, tort and contract are distinguishable from one another in that the duties in the former are primarily fixed by the law, while in the latter they are fixed by the parties themselves. Moreover, in tort the duty is towards persons generally, in contract it is towards a specific person or specific persons.<sup>14</sup> Charlesworth also expresses the distinction between contract and tort as turning 'on the origin of the duty. In contract the duty arises from the agreement of the parties; in tort it is independent of agreement and is imposed upon the parties by the law.'<sup>15</sup> Not all commentators would agree that there is such a simple distinction. Atiyah does not<sup>16</sup> and maintains that the distinction is one of obligations voluntarily assumed i.e. contract, and obligations imposed by the law i.e. tort. This distinction, he argues, is a product of the nineteenth century and there is no reason why this should always be so, there being no absolute truth in the distinction. What is left today is a classical model of contract inherited from the nineteenth century lawyers. Atiyah has argued that this is not a satisfactory way of looking at obligations and therefore no satisfactory division. This disagreement is largely based upon his view that there is little or no justification for protecting the expectation interest. In his article 'Contracts, Promises and the Law of Obligations',<sup>17</sup> Atiyah considers the conceptual framework favoured by lawyers which encompasses the distinction made

within the law of obligations. He sets out the main traits of this 19th century classical model as:

1. being about what the parties intend rather than what they do. (Tort is about what people do).
2. having an objective existence prior to performance.
3. having a deterrent or hortatory purpose (tort has a dispute settling function).
4. being one model.

Atiyah's view is that the traditional legal perception of contract is wrong. There is no one model. There is no such thing as a typical contract. Neither is there a requirement of promise. A contractual obligation may arise based on benefits rendered or reasonable reliance. Furthermore, the requirement of intention is a fiction since intention is determined not by the parties but objectively by the courts i.e. upon what the parties do. Atiyah supports this argument by claiming that contracts based solely upon promises (executory) are very rare whereas benefit and reliance based contracts are common. However, he is prepared to concede that in the case of wholly executory transactions the plaintiff recovers damages for lost expectations, i.e. the difference between the value of the defendant's performance, and the cost to him of his own performance. There is therefore no need to

show him any benefit or any detrimental reliance. But there is not just one possible model.

This claim by Atiyah that there is no justification for protecting the expectation interest for breach of a promise is challenged by Burrows.<sup>18</sup> First, he notes the objective test of intention does not preclude the protection of an expectation. The expectation is strong ie. that the promisee will be put into the expected position by the promisor. Secondly, evidence of benefit or reliance is not necessary. Under the present law, the promisee can claim protection for his expectation interest for breach of the promise. As Atiyah admits<sup>19</sup> even 'in benefit and reliance based liabilities, the damages awarded are often calculated as though the liability was promise-based' and thirdly, the law's protection of expectation interests is not so rare. Burrows points out<sup>20</sup> that Atiyah conveniently ignores promises under seal, the remedy of specific performance and the payment of an agreed sum.

Burrows<sup>21</sup> concludes that 'despite the changes in the law during the twentieth century, the division of the law of obligations into contract, tort and restitution, if correctly understood, is a satisfactory division'. Poulton<sup>22</sup> agrees that the difference is material but does not know why this should be so. In both cases, i.e. liability for breach of contract and for tort, he points out that the duty is imposed by law. All are under an

obligation to keep their contracts. Both tort and breach of contract give rise to a liability which is imposed upon the defendant and owed to the plaintiff.<sup>23</sup> Poulton postulates there is no reason why every breach of contract could not be categorised as a species of tort. Indeed he argues that historically it is surprising that this has not happened.<sup>24</sup>

Holyoak<sup>25</sup> considers that attempts to rigidly and artificially separate claims in tort and contract were doomed to fail given the close relationship which must inevitably exist between them in the light of key common features'. The impact of *Junior Books Ltd v Veitchi & Co Ltd*<sup>26</sup> initially was that the tort of negligence may be applied to protect expectation interests which were formerly solely within the province of the law of contract.<sup>27</sup> The principle is, however, limited in application and the ratio in *Junior Books* is construed narrowly. Cases decided subsequently to *Junior Books* show that the courts were not prepared to allow a principle stated on the basis of the particular facts of *Junior Books*<sup>28</sup>, to develop too broadly and, in so doing, pose a threat to the law of contract and appropriate remedies<sup>29</sup>. It is thought unlikely by Holyoak that the two forms of action will merge or that tort will absorb contract, but rather that both actions will develop into better related but still separate entities. It is submitted that this conclusion is probably justified. Perhaps the situation

related by Winfield in 1931 is the most appropriate at the current stage of legal development:

'... both anciently and at the present day, a plaintiff may sue alternatively (i.e. either in contract or in tort) where he has alternative claims ... and ... if both prove to be substantial, he gets the advantages upon the superior claim'.<sup>30</sup>

Thus the plaintiff gets the choice as to how he will set about framing his action against the professional.

#### Negligence in Contract and Tort

Negligence is a relatively precise and practical action, whether founded in contract or tort. Duties of care must be owed to particular identifiable persons in a recognised relationship.<sup>31</sup> Breach is measured by a determined standard of reasonable care in the circumstances and damage must be a consequence of the breach. The problem of causation is a real problem. No causation, no liability. Negligent acts or omission might not be a cause of injury.<sup>32</sup> There may be uncertainty as to the cause itself, as in the issues of the drugs Thalidomide and Opren and in the administration of whooping cough vaccine. What then, makes a difficult practical situation worse from the plaintiff's point of view on the issue of causation is the issue of the damage which is legally recognised as giving rise to a successful claim: remoteness of damage.

## Remoteness of Damage

The consequences of any conduct might be infinite. The law has to draw a line.<sup>33</sup> This process by which the tests of remoteness have been formulated has not been exact. 'Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician would understand it.'<sup>34</sup> It is essentially 'a practical inquiry'.<sup>35</sup> The question therefore is: 'to what extent should the defendant have to answer for the consequences which his conduct has actually helped to produce?'<sup>36</sup> There has to be a reasonable connection between the harm threatened and the harm done. Mere proof of negligence as a causal factor of the plaintiffs' injury is insufficient. Compensation systems set limits to liability. In the case of negligence liability is traditionally related to fault, though is diminishing in significance owing to the insurance element. The practical task of drawing this line which delimits recovery is not capable of precise definition. The defendant is to be liable for proximate cause. Proximity is determined by public policy.<sup>37</sup>

The dilemma of remoteness of damage in negligence is that of balance. Too strict a limitation may deprive a plaintiff of compensation from a wrongdoer. On the other hand to relax the limitation unduly could involve a wrongdoer in liability totally disproportionate to what

has been an accidental lapse.<sup>38</sup> The test, however formulated, will find its place in the middle ground.

Remoteness of damage or legal causation operates like a judicial horizon. The rope attached to a boat may still move through the hands of a watcher on the shore even though the boat is out of sight beyond the horizon. The damage or injury for which liability in negligence will be established is to be found by reference to policy. The policy at this moment which lays down the test varies depending upon whether the claim is founded upon obligations in contract or tort. Often the duties in contract and tort will be interchangeable and coexisting<sup>39</sup> although the courts have not always been consistent in deciding this question. Concurrence of actions in contract and tort has been recognised on some occasions, but on others, particularly in relation to professional advisers there had been reluctance on the part of the courts to impose liability otherwise than in contract.<sup>40</sup> There have been different views on the pursuit of remedies in contract and tort. A harsher view is that tort has no role when the relationship is governed by contract between the parties. The more liberal approach allows the plaintiff to choose from among concurrent causes of action. There is no reason, it seems, why tort rights should be forfeited by entering into a contract unless there is agreement to limit or exclude them.<sup>41</sup> While the forms of action held sway the plaintiff had the

right to choose, although tort was treated as more appropriate for physical injury<sup>42</sup> and economic loss was associated with contract.<sup>43</sup> Doctors, dentists and carriers were normally subject to tort but solicitors and stock brokers to actions for breach of contract.<sup>44</sup> Tort liability was also usually restricted to the older "common callings" but contract to the newer.<sup>45</sup> Recent decisions have shown that obligations which could give rise to a cause of action in contract do not preclude parallel claims in tort.<sup>46</sup> After all, if a plaintiff could sue in tort when services were performed gratuitously it seems absurd that, in the absence of exclusion in a contract, he could not sue in tort when there was a contract.<sup>47</sup> The plaintiff may pursue his remedy both in tort or for breach of contract. But 'if he sues in tort, he cannot afterwards sue in contract, since the judgement of the first action will make the matter res judicata. Nor would the plaintiff be allowed to pursue two distinct actions at the same time for substantially the same grievance. Either the two actions would be consolidated, or one would be stayed as being frivolous and vexatious.'<sup>48</sup> As a result of freedom of choice the plaintiff may invoke the more favourable rule in tort obtaining advantages such as limitation and contribution. Sometimes, the action in contract will be preferred owing to the unresolved issue of no reduction for contributory negligence in case of breach of contract.<sup>49</sup>

Concurrency of actions may unfortunately lead to anomalies e.g. that a plaintiff might obtain greater compensation for the same damage depending upon whether the remedy is pursued in contract and tort. This result is likely owing to the wider liability in tort and the different tests for remoteness of damage in contract and tort. It is in the area of remoteness of damage and limitation of actions that the anomaly referred to can be seen most clearly. In an action based upon tort remoteness of damage refers to that damage which is a reasonably foreseeable consequence of the breach.<sup>50</sup> In actions based on breach of contract liability is for damages which might reasonably be supposed to have been in contemplation by both parties and when they made the contract as the probable result of a breach of it.<sup>51</sup>

The case of *H. Parsons (Livestock) Ltd v Uttley Ingham and Co Ltd*<sup>52</sup> concerned such an issue. The anomaly was referred to and Lord Denning M.R. suggested a method by which the anomaly could be resolved. The Master of the Rolls, after drawing a parallel between the tests of remoteness of damage in contract and tort, felt he could not apply the apparent differences in the rules. His Lordship could not draw a distinction between what is 'contemplated' and what is 'foreseen', such a distinction being a semantic exercise.<sup>53</sup> The difference should depend upon the type of injury i.e. economic loss or physical injury and not the legal classification. Thus,

in the case of economic loss the defaulting party is only liable for the consequences if they are such as, at the time of the contract he ought reasonably to have contemplated as a serious possibility or danger.' In the case of physical injury 'the defaulting party is liable for any damage which he ought to have reasonably foreseen at the time of the breach as a possible consequence, even if it was only a very slight possibility'. This should be the distinction whether the claim was in contract or tort.

However, it is not apparent from the Master of the Rolls' dictum what the position would be in the event of economic loss in the absence of a contract, nor what the significance of the continued use of 'contemplated' and 'foreseen' is if the distinction is merely a matter of semantics. Scarman L.J. agreed with Lord Denning that it was 'absurd that the test for remoteness of damage should, in principle, differ according to the legal classification of the case of actions'. However, neither Scarman L.J. nor Orr L.J. could find any authority for the distinction suggested by Lord Denning. In due course Lord Denning went on to discuss his view in the later case of *Photo Production v Securicor* in 1978.<sup>54</sup> The *Parsons* case attracted a lot of interest, most commentators agreeing that there was a danger of absurdity if a different outcome based upon different rules of remoteness should emerge in what was substantially the same issue. In the

Law Quarterly Review<sup>55</sup> the view of Lord Denning MR was welcomed. Contract and tort is beginning to merge,<sup>56</sup> and therefore the rules of remoteness should too. Particularly welcomed was the application to economic loss because now that the foreseeability of economic loss alone can give rise to liability in negligence, Lord Denning's distinction could be applied there to contain what otherwise might be an 'uncontrollable and warranted growth in the ambit of that tort'.<sup>57</sup> But, with respect, that would still beg an important question. Lord Denning's test for remoteness in cases of economic loss is that appropriate to contract. The test is what is reasonably contemplated at the time of making the contract. In the event of economic loss in the absence of a contract, what is to be the point in time at which the loss ought to have been contemplated? Perhaps the only reasonable time would be the time at which the advice or whatever caused the loss took place. This, of course, could be much earlier than the breach of duty under the normal tort rule. In the Modern Law Review,<sup>58</sup> Hadjihambis did not consider that Lord Denning's views afford a sound basis in legal principle. Rather than reconciling contract and tort, the difference is emphasised. Hadjihambis considered the view of Scarman L.J. more appealing in that it would be '...absurd that the test for remoteness of damage should, in principle, differ according to the legal classification of the cause of action,...'.<sup>59</sup> However, Scarman L.J.

thought '...the law is not so absurd as to differentiate between contract and tort save in situations where the agreement, or the factual relationship, of the parties with each other requires it in the interests of justice'. In other words, the practical nature of the law will overcome the distinction and even be assisted by what is only a semantic and not a substantial difference in the tests for tort and contract. Perhaps, though, the real problem with Lord Denning's attempts is that complete equation of tests would upset the principles relating to the time for the application of the test. As asked earlier, what is to be the relevant time for the economic loss caused in the absence of a contract and, in addition what is to be the relevant time in cases of physical loss. Lord Denning's application of the tort test to physical injury or loss caused by breach of contract would be at variance with the understood contractual rule of contemplation at time of making contract and not at time of breach as in tort cases.<sup>60</sup>

#### Contract and Tort - Assessment of Damages

At this juncture it is probably of value to consider some of the differences between the rules affecting the measure of damages in contract and tort where the damages are awarded on the principle of awarding compensation. The distinction is latent as the general rule is sufficiently wide to cover both contract and tort.<sup>61</sup> This rule is, according to McGregor<sup>62</sup> 'that the plaintiff is entitled to

be put into the same position, as far as money can do it, as he would have been had the wrong not been committed.' In terms of a contract, the position he would have been in had the contract not been broken, and in tort, on the basis of restoring as far as possible the status quo.

But there appears to be no distinction between the assessment of tort and contract damages as far as the rules as to mitigation of damages, certainty of proof, or as to the extent to which recovery for past and prospective loss is allowed. Whether there is any scope for reduction of damages in contract for contributory negligence remains to be seen. S1(1) Law Reform (Contributory Negligence) Act 1945 does not appear to be restricted to tort and some judges at first instance have been prepared to apply the Act other than just to tort.<sup>63</sup> The Court of Appeal would not be committed in either case. However, it seems that the 1945 Act would have no application in cases of strict contractual duty although where the contractual duty is the use of due care there is support for apportionment of loss under the 1945 Act.<sup>64</sup> In *A.B. Marintrans v Comet Shipping Co. Ltd*<sup>65</sup> this support was expressed in oblique form. In a special case stated pursuant to the Arbitration Act 1950 Neill L.J., at first instance in the Queen's Bench Division, held that on a proper construction the 1945 Act did not apply to permit the damages recoverable by a plaintiff in respect of a contractual or non-tortious claim to be reduced by reason

of the plaintiff's contributory negligence. This would be so even though the breach of contract relied upon was in the nature of a breach of contractual duty of care.<sup>66</sup> His Lordship did not consider this to be a satisfactory state of affairs but felt powerless to do anything about it. 'Thus it may be that a plaintiff will be able to avoid the apportionment provision by suing in contract when a claim in tort would be as or more appropriate. But this is not a problem for a judge at first instance to attempt to solve by placing a strained construction on a statute. The topic may, however, be a suitable topic for study by those with responsibilities for law reform. Indeed, I see great force in the contention that the same rule should apply to claims whether they are based in contract or tort where the act complained of involves the breach of a duty of care.'<sup>67</sup>

#### Litigation in the United States<sup>68</sup>

Much of the concern herein expressed has related to problems besetting professional people in the United States. Consideration, verging on fear, of the so called medical malpractice crisis has caused judicial and legislative activity in USA to take place and, indeed, many proposals for reforming malpractice law and the way in which medical victims are compensated have been suggested. Indeed, so far has pendulum swung against defendant medical men in the courts that numerous legislatures have passed statutes in their favour.<sup>69</sup>

There is a desire to balance 'victim compensation and society's need for a stable and not-too-timid medical profession'.<sup>70</sup> Such legislation has limited the patient's right to sue by capping liability, trimming informed consent rules and requiring plaintiffs to pursue remedies other than litigation.<sup>71</sup> Even so, the discussion on the way forward continues, particularly about medical malpractice and malpractice insurance which has been described as 'one of the nations most visible social and political issues.'<sup>72</sup> The professions and the judiciary in the United Kingdom are aware of the developments in the United States and, as stated earlier, some are deeply concerned with the potential hazards of the United Kingdom going the same way. However, the legal and medical systems operating in USA are so different from those in UK that it does not follow that USA trends will be followed in UK.

#### Medical System

The most glaring difference between medical care in the USA and the UK is that there is a National Health Service in the UK whereas the American system is privately funded. In the UK the bulk of medical provision is under the statutory state funded and operated National Health Service. Private health care, although on the increase, is not the usual way by which patients receive treatment. In the USA the private sector is the main provider. The closest the Americans come to a health service is the

publicly funded Medicare. The Medicare programme was established in 1965 as an insurance plan to help finance medical services to the elderly. Providers of medical services e.g. hospitals are reimbursed for services covered by Medicare according to a pre-set formula determined by reference to a diagnosis related group into which a case falls.<sup>73</sup>

As a consequence it seems that patients form not only the usual doctor/patient relationships with their doctors but a business relationship. It is the 'trade' aspect of medical practice which tends to encourage patients to sue doctors. The existence of the National Health Service and the traditional British awe of doctors tends to discourage litigation. Other remedies are sought other than by way of court action. In addition, the British appear more stoical, prepared to tolerate misfortune in a way that Americans apparently refuse to do. But it may be the legal system itself as it operates in the USA that causes the greatest problem for medical practitioners.

#### Legal System

It may be overstating the case that the American legal system encourages and facilitates a bias towards litigation. Compared with the system in the UK this appears to be the case.

First, the system which the United States inherited from England has been changed. The legal - ethical prohibitions against solicitation, barratry, champerty and

maintenance which prevented English lawyers from stirring up litigation - have been swept aside in the USA. There is a constitutional right to stir up litigation.<sup>74</sup>

Secondly, in England locus standi is an important impediment to litigation. There has to be an aggrieved plaintiff. In the USA, in theory there is still such a rule but it is treated as a technicality when convenient to do so. In addition, the class action in USA provides more clients.

Thirdly, in England, meritless, and in some cases good, lawsuits are discouraged by requiring the plaintiff to pay his own and the defendant's lawyer's fees if he loses. Losing litigants in the USA do not have this financial burden and thus litigation is not discouraged. In addition, the financial burden of one's own lawyer's fees is removed by the device of the contingency fee. The risk of costs is shifted to the lawyer who is in a better position to bear it. Unfortunately, lawyers also have an economic interest in the recovery, increasing the demand for litigation. Even where contingent fee arrangements are not feasible the court may order the successful plaintiff's lawyer's fees paid out of the judgment. Contingent fees may be based on results. More likely they are calculated according to a complicated formula based on the number of hours worked. The result is to encourage lawyers to engage in useless work in order to increase hours.

Fourthly, the common law as developed in the USA has been revised to create more incentives for litigation. Some defences have been removed or curtailed in some jurisdictions e.g. contributory negligence, assumption of risk. Sometimes plaintiffs do not have to prove what in England would be regarded as traditional elements of a cause of action e.g. privity, causation. In addition, courts have fashioned whole new areas of liability. But it is not only the courts which have worked to expand liability. Various legislatures have done so creating new grounds for liability or new remedies.

Fifthly, jury trial in the USA is a real problem. In USA jury trial is protected by the constitution. Juries are usually sympathetic to plaintiffs and are prejudiced against defendants with substantial resources. In UK juries do not feature in civil actions against professionals.

Sixthly, much is said in America which deplores the explosion of litigation but there is no real support for litigation to be limited. For Americans litigation is a quick solution, an expression of individual freedom, part of an optimistic democratic tradition. Remedies are within the reach of everyone. Americans appear to have more faith in litigation than they have in other methods of redress, e.g. politicians, state agencies, and so litigation is in greater demand.

Finally, litigation is a hazard to business. Business, of which medicine and law are part, is more accountable to individuals affected by its actions - because of litigation. In court, because of the factors mentioned earlier, the individual is able to deal on equal terms with large institutions. Even where there is a risk of failure, litigation induces negotiation by large organisations with the individual.

There are many reasons why the legal system in USA is different from UK. Perhaps the USA has gone too far and will not influence UK. The free market philosophy of USA may be the reason why so much litigation abounds. It is not yet apparent in the UK. Whether the UK changes to resemble USA is a matter for the future.

#### Litigation in the United Kingdom

It is a measure of the concern about the liability of professional people in the USA that similarly attempts have been made to restrict the liability of professionals in the United Kingdom in some ways. These attempts have been made by some members of the judiciary, the legislature and the professions all with the same aim of producing a better balance ie between the interests of professional and client/patient, and, if it can be expressed in such a vague fashion, ultimately of society itself.

The attempts by the judiciary to restrict liability have involved findings that no duty of care existed

between professional and client, or, if it existed, the duty had not been broken.<sup>75</sup> In addition the legal devices of limitation of actions and causation, particularly in the form of remoteness of damage, have been utilised. In the event of liability being established, the same judges have been wary of the measure of damages awarded. The attempts to keep compensation levels down have been assisted in part by the absence of jury trial in the United Kingdom in negligence actions. However, it must be said that at times the existence of an available insurance policy has been counter productive to this last effort. Insurance is seen as an important part of the professional's equipment. Insurance will help to stave off financial ruin. But there is concern as to the extent that an available insurance policy is likely to increase the incident of liability and the quantum of damages.

The legislature, on the other hand, working as it does against the background of judge-made law has tinkered with machinery, notably in such areas as liability towards the unborn child<sup>76</sup> and limitation of claims in cases of latent damage.<sup>77</sup> However, change has been effected at a greater rate than had the issue been left to the judiciary, hampered as they are by the accidents of litigation.

Finally, the professions themselves, acting as persuasive and vociferous pressure groups, have attempted to protect their members. How effective their efforts have

been is difficult to assess, as is the case with any pressure groups. But, many of these groups are chartered or on a statutory basis and as established do have access to the important pressure points. In addition, ever cognisant of potential liability of members, the professional bodies have either established insurance schemes or advised members to insure adequately.

#### An Outline of some of the Problems affecting Professional Liability.

It is probably appropriate at this stage to examine some of these attempts with a view to seeing the possible effects upon professional activity. It is to be borne in mind that the basis of liability attaching to professional activity may be in contract and/or tort and be affected accordingly. Indeed, as a result of the distinctions between contract and tort, actions for negligence are subjected to paradoxical and anomalous effects dependant simply upon the choice of action. Many of the effects which follow must also be seen in the light of whether the source of the obligation is in contract or in tort.

Whether or not the action for alleged negligence is brought in tort or for breach of contract, the main burden is upon the plaintiff - the patient or client. Negligence has to be established on a balance of probabilities by the plaintiff. Within the concept of negligence there is the notion of fault. The need to find that fault or blame is a difficult psychological problem for the plaintiff. Acute

embarrassment can be caused when a person sues a professional adviser with whom one previously enjoyed a harmonious or even intimate relationship.<sup>78</sup> Indeed, the problem of fault is that the plaintiff's needs, losses or conduct seem to assume secondary importance. What is crucial is whether the plaintiff can find someone to blame. Condemnation of the defendant depends not so much on culpability of his conduct as on its largely fortuitous consequences.<sup>79</sup> It may be that given a free hand and other means of compensation available, the conduct and consequences alleged would ordinarily not appear to the reasonable man as negligence. But to obtain that compensation fault must be found. Fault appears to be a crucial but perhaps also notional issue. In practice, the concern with fault is outweighed by insurance (infra). In practice, tort liability has little to do with any ideal that those at fault pay.<sup>80</sup> If the claim falls within a class that is usually covered by insurance the plaintiff will even receive greater sympathy than if it is not.<sup>81</sup> As professional indemnity insurance is the norm then one might assume that on proof of negligence, a satisfactory award from the plaintiff's point of view will be granted. But it is proof of negligence which presents a problem. In cases of medical malpractice, for example, it is notoriously difficult for the plaintiff to obtain the professional medical evidence. Doctors are, understandably, reluctant to testify against professional

colleagues.<sup>82</sup> Professionals have little confidence in a fair trial. In a case involving an allegation of professional incompetence the judge or witnesses may be moved by 'ordinary human compassion'<sup>83</sup> towards compensating the plaintiff at the insurer's expense. The outcome of compensation, while not necessarily unfair in terms of repairing a damaged life, has the unfortunate consequence of putting 'the professional reputation of a doctor at stake on the issue of compensation.'<sup>84</sup>

In some cases of negligence the evidential problems may be overcome by the doctrine of *res ipsa loquitur*. The definition of *res ipsa loquitur* refers to accidents happening 'in the ordinary course of things'. This, as was raised in *Mahon v Osborne*,<sup>85</sup> requires consideration of whether reliance is placed upon common experience. If so, the experience of the expert is irrelevant and, indeed, incompatible. In *Mahon v Osborne* Goddard L.J. applied the doctrine but Scott L.J. disapproved on the basis that where the judge could not have enough knowledge of the circumstances to draw an inference of negligence, as in this medical operation case, the doctrine had no application.<sup>86</sup> The doctrine has been applied in subsequent medical negligence cases by the Court of Appeal<sup>87</sup> and rejected by a court of first instance.<sup>88</sup> The point remains open. However, Street<sup>89</sup> suggests 'that where an unexplained accident occurs under the control of the defendant, and medical or other evidence shows that such

accidents would not happen if proper care were used, there is at least evidence of negligence for a jury' (sic).<sup>90</sup> Support for the applicability of the doctrine is to be found subsequently in *Saunders v Leeds Western Health Authority*<sup>91</sup> On the other hand, where expert evidence is available and given, there may be disagreement. Rather than raising an inference of negligence, the reverse occurs. Doctors may choose to follow one school of thought rather than another. The judge may even prefer one school to another but that is not the test for negligence. The test remains whether the defendant exercised the skill of a doctor.<sup>92</sup> Medical evidence however, predominates in such cases, particularly in matters of causation. Where differing opinions are presented the judge must select from among them as best he can.<sup>93</sup> Even so, cause can be misallocated owing to an error of diagnosis.<sup>94</sup>

It is due to the difficulties presented by litigation that many would-be claimants are deterred. The fear of legal costs is a deterrent to those who are either not wealthy or eligible for legal aid or other support. This reluctance to be involved in litigation influences the professional defendant also. There is an understandable fear of adverse publicity.<sup>95</sup> For these reasons alone there is an incentive to settle out of court and most claims are so settled.<sup>96</sup> Litigation appears to favour the large corporation more than the individual.<sup>97</sup> Either way, the claimant appears to suffer adversely from a unequal

bargaining position.<sup>98</sup> This weakness is exemplified by Ison by the formula: 'the bargaining position of the claimant, although directly proportionate to the estimated value of his claim, is inversely proportionate to the urgency of his financial need.'<sup>99</sup> Consequently, even successful claimants, according to Ison, recover less than a full indemnity where the claim is settled out of court.<sup>100</sup> To balance this Jandoo and Harland maintain that settlement out of court where the claimant is legally aided, produces unfairness against the professional. (supra)<sup>101</sup>

#### Assessment of Damages in Professional Negligence

Up to a point the professions, the courts and the legislature share a common concern about the measure of damages awarded. Of the three, the professions feel most closely affected, even threatened, by the awards and have attempted to persuade government to impose limits on the damages awarded. As referred to earlier, in the United States some state legislatures have stepped in and capped liability and required plaintiffs to pursue remedies other than litigation.<sup>102</sup> In the United Kingdom the professions' request to limit the damages that courts can award has been refused by the Government. Prompted by what they described as the 'catastrophic consequences' of huge claims for damages' the professions lobbied the Government to no avail. Various fears were expressed including deterrence of new entrants, a lowering of professional

standards and loss of public confidence. Associated with this impact on the professions there were further problems to be faced by the professions such as the scale of rising claims and the difficulty of obtaining insurance cover.<sup>103</sup> For the Government's part there is still no intention of capping damages. Any figure chosen would be arbitrary and produce injustice when plaintiffs would be unable to recover the full extent of damage suffered. Part of the argument against related to insurance which was available to hospital doctors at relatively low cost. As for the profession's assertion that some services would be withdrawn there was, according to the Government, little evidence to support that.<sup>104</sup>

In considering the issue of damages the professions were alarmed by 'catastrophic consequences should they make an honest misjudgement or error'.<sup>105</sup> It is submitted that this fear is misplaced. Lord Denning MR. in *Whitehouse v Jordan* expressed the view that 'in a professional man, an error of judgement is not negligence'.<sup>106</sup> However, Lord Denning MR. was wrong. In the House of Lords Lord Edmund Davies thought that 'To say that a surgeon committed an error of clinical judgment is wholly ambiguous, for, while some such errors may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising "clinical judgement" may be so glaringly below proper standards as to make a finding of negligence

inevitable.<sup>107</sup> But lest this might be taken to be the test for medical men only, Lord Edmund - Davies was at pains to put this right and stated<sup>108</sup> what is known as the Bolam standard, that is, 'the standard of the ordinary skilled man exercising and professing to have that special skill.<sup>109</sup> Thus, whether Lord Denning's statement, verging on immunity or the qualified view of Lord Edmund Davies is taken, the basic fear of the professions is probably exaggerated, emanating, as it probably does, from the desire to preserve a vested interest.

However, there is some judicial concern<sup>110</sup> that damages may get out of hand and so the judiciary itself is prepared to put the brakes on this expansion.<sup>111</sup> In *Whitehouse v Jordan* Lord Denning referred to the situation in the United States where ' [the] damages are colossal',<sup>112</sup> and there are English cases in which there have been overt attempts to counter the measure of damages and to reappraise the method of assessment.<sup>113</sup> But it is a little presumptuous to translate the American experience into the United Kingdom as there are fundamental difference between the legal systems operating in these two places.

First, the system of contingency fees does not operate in the United Kingdom as it does in some states in America (*supra*).<sup>114</sup> At the moment as it is still regarded as a champertous practice but recent developments indicate a change is likely.<sup>115</sup> Secondly, jury trial is not used

in the United Kingdom in negligence trials.<sup>116</sup> The tendency towards massive awards of damages has not materialised.

In his book *What Next in the Law*<sup>117</sup> Lord Denning identifies the derivation of the law governing damages as trial by jury. As there was only one trial there could be only one award. As a consequence, damages were assessed in terms of a lump sum. There was no system of periodic payments or payment by instalments. But the object of the awards of damages was to give fair compensation. Judges directed juries to that effect.<sup>118</sup> The award, when made, is a composite figure of many parts all of which should come together to give fair compensation.<sup>119</sup> But the composite figure began to break down when Parliament declared that where damages are awarded for personal injuries the court shall 'include in that sum interest on those damages or on such part of them as the court considers appropriate.'<sup>120</sup> Thus, the judges' view of damages became fragmented and divided into various heads.<sup>121</sup> Some of these heads produce difficulties in assessment, particularly those relating to future developments in the life of the plaintiff. In Lord Denning's view this has produced the effect of no longer awarding fair compensation but full compensation based upon actuarial evidence and annuity tables,<sup>122</sup> a task which was never one for the judge or jury at all.

An indication of Lord Denning's concern, at least, is shown by his dissenting judgment in *Lim Poh Choo v Camden and Islington Area Health Authority*<sup>123</sup> where the award was 'a staggering figure... the highest sum awarded up to that time in the courts'.<sup>124</sup> In cases of this type there are issues which go beyond the requirement of compensating the plaintiff.

Where, as is the case in the United Kingdom, there is a public health service, there is a danger of compensating the victim twice. First, there may be the award of substantial damages by the health authority, and secondly, the health service may continue to foot the bill in respect of further medical treatment as a consequence of the original negligence. Not all judges would make the point and in *Lim Poh Choo* it was mainly as a result of Lord Denning's dissenting judgment that this point is presently being made. Indeed, to balance Lord Denning's concern over awarding too great a sum, other judges were prepared to build in sums to allow for inflation, producing even greater awards of damages. But neither stance is wholly right or wrong, both being rooted in the desire to award fair and reasonable damages.

The object of the rules relating to damages is to provide fair compensation for the injury suffered. In *Lim* all the judges involved were concerned to see that the damages were fair and reasonable, even Lawton L.J., who referred to the award as 'startling'.<sup>125</sup> But there was a

difference in the attitude of the judges in the Court of Appeal to this issue. Lord Denning M.R. considered that 'fair compensation must mean that she is to be kept in as much comfort and tended with as much care as compassion for her so rightly demands...' But his Lordship did not see that any more was needed than that, especially in the case of unconscious plaintiffs. Ultimately the real beneficiary of these damages will be the relatives or, if none, the Crown as bona vacantia.<sup>126</sup> His Lordship made this point as a repeated criticism of over large awards. In speaking more generally of the problem in medical malpractice cases of this kind Lord Denning referred to the dissipation of public funds which 'have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation. In many of these cases the National Health Service willingly provides full care, nursing and attention without charging anything for it. Surely this, too, should go to reduce the amount awarded against them. The damages should not be inflated so as to cover the cost of being kept in the most expensive nursing home. It has been known - I am not saying in this case - that when such damages have been awarded, the relatives have afterwards arranged to take advantage of the facilities afforded by the National Health Service... and thus save money for themselves.'<sup>127</sup> His Lordship also referred to the effect on the private sector where large awards merely increased premiums and

the consequent cost of medical treatment.<sup>128</sup> To provide fair and reasonable compensation, Lord Denning argued, it is desirable to exclude an item for loss of earnings by the plaintiff rendered unconscious and include an item for pecuniary loss suffered by dependants.<sup>129</sup> In any event the principles of compensation require radical reappraisal.<sup>130</sup>

Lawton and Browne L JJ in *Lim* did not agree, although Browne L J also considered that the principles on which damages are awarded needed reappraisal.<sup>131</sup> Instead Lawton L J, although he regarded the initial award as 'startling', dismissed the appeal. Parliament would have to take action not the courts.<sup>132</sup> The award as it stood was fair and reasonable and he would agree with the additional factor to take into account future inflation and tax at the higher level. Browne L J concurred, thus proceeding in the opposite direction from Lord Denning MR on the basis of authority. Lord Reid had considered it 'quite unrealistic' to refuse to take [future inflation] into account at all,<sup>133</sup> and that taxation should be taken into account also.<sup>134</sup> But this was against the authorities until *Cookson v Knowles*.<sup>135</sup> Inflation became a factor in awarding damages by the use of multipliers of 4 or 5 per cent but there could be exceptional cases where the award attracted tax at a high rate in which case the multiplier could be increased or inflation allowed for in some other way.

Thus, there is a situation which produces a dilemma. There must be adequate damages for the plaintiff. Lawton L J, rather than restricting the plaintiff's claim preferred to go the other way. His Lordships' concern 'for the plaintiff is that the award may not be enough for her care during her lifetime.'<sup>136</sup>

Lim went to the House of Lords which rejected the appeal without making the reappraisal that Lord Denning M R and Browne L J had requested. Lord Scarman stated<sup>137</sup> 'the question; therefore, arises whether the state of the law which gives rise to such complexities is sound. Lord Denning M R. ... declared<sup>138</sup> that a radical reappraisal of the law is needed. I agree. But I part company with him on ways and means. The Master of the Rolls believes it can be done by the judges, whereas I would suggest to your Lordships that such a reappraisal calls for social, financial, economic and administrative decisions which only the legislature can take. The perplexities of the present case, following upon the publication of the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) (Cmnd 7054) ("the Pearson Report"), emphasises the need for reform of the law.'<sup>139</sup>

Lord Denning does not, of course approve of this refusal to take action by the House of Lords.<sup>140</sup> As Parliament has not yet acted the judge is driven to look forward in time and speculate upon future pecuniary

losses. He is as likely to be wrong as to be right. For Lord Denning the solution is periodic payments instead of a lump sum. But as this is not possible he advocated the next best system is fixing payments for the first three years and linking them with an index. Thereafter, a three yearly review, also index linked, could take into account any changes.<sup>141</sup>

The Pearson Report<sup>142</sup> recognised that in many claims the losses are usually in periodic form e.g. lost income and outgoings also tend to be regular and periodic. This being so the lump sum is not the most appropriate form of compensation. Translating periodic losses into a lump sum is 'inevitably inexact'<sup>143</sup> although there are some advantages. Perhaps foremost there is finality of litigation. Both the plaintiff and defendant are free of the dispute. The defendant may discharge his liability. In cases of professional negligence this would often mean that the insurer can close the file and keep down administrative costs which would be incurred with continuous payments. Premiums could be kept down.<sup>144</sup> The lump sum gives the plaintiff freedom of choice.<sup>145</sup> The court will not be concerned with how the plaintiff uses the award.<sup>146</sup>

However, despite these arguments in favour of lump sum payments the Royal Commission was not convinced in the case of death or serious and lasting injury. Forecasting may be bad and the plaintiff undercompensated, the

plaintiff would enjoy a freedom he would not have had had he not been injured and exhaustion of the lump sum would mean support from the start in the form of supplementary benefit a form of double compensation.<sup>147</sup> Periodic payments offer more advantages in serious cases. First, closer restoration of the plaintiff to his original position. Secondly, account could be taken of actual, rather than forecast, changes in the plaintiff's situation after trial. Compensation could be adjusted up or down to meet a change. Thirdly, if periodic payments were taxed as earned income the payments would avoid the high rates of tax payable on a large lump sum award. Fourthly, other compensation received by the plaintiff could be offset against the periodic payment of damages. This other compensation is also likely to be periodic.<sup>148</sup> Fifthly, the dangers of periodic payments prolonging incapacity are outweighed by the advantages in relieving financial anxiety.<sup>149</sup> The Royal Commission noted<sup>150</sup> that a system of periodic payments would be opposed by virtually every organisation concerned with personal injury litigation. Even so, the commercial insurance market could service such a system. Taken all in all the Royal Commission recommended a system of periodic payments 'for future pecuniary loss caused by death or serious and lasting injury' despite the practical difficulties.<sup>151</sup>

Although this discussion has been restricted to damages for personal injuries, it does emphasise the

concern which is felt for the perceived inadequacies of the present system of assessment. Not all would agree that the system is at fault, nor among those who do, with what is necessary to remedy the defects or the methods for doing so. But there appears sufficient cause for concern about the system and the pressure for reform is unlikely to subside.

#### Mitigation of Damage

Whatever award is given by the court, the final figure will have been arrived at after a consideration of the need for a plaintiff to mitigate his damage. In short, a plaintiff must take reasonable steps to minimise loss once he is aware of the defendant's breach of duty i.e. through negligence.<sup>152</sup> It follows that a plaintiff cannot recover for losses which he could have avoided.<sup>153</sup> However, should the plaintiff take such reasonable steps he may recover for the loss incurred as a result of such steps,<sup>154</sup> although, a plaintiff will not recover for any avoided loss.<sup>155</sup> On the whole, the principle of mitigation of damage benefits the defendant.<sup>156</sup>

The principle of mitigation of damage is equally applicable to contract and tort and will apply, for example, to the case of a plaintiff who has been injured as a result of negligence and has failed to take reasonable steps to seek medical aid thus failing to reduce pain and suffering resulting from the injury.<sup>157</sup>

The rules of mitigation will apply if the original negligence was, for example, medical negligence.<sup>158</sup>

The purpose behind the duty to mitigate<sup>159</sup> is summed up in *Darbishire v Warran* by Pearson LJ as 'that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant.'<sup>160</sup>

The onus of proof is upon the defendant. He has to show that the plaintiff ought to have taken reasonable steps to mitigate. Failure to do so will mean that the normal measure will apply.<sup>161</sup>

The plaintiff is expected to act reasonably, such action being assessed objectively by asking what the reasonable man in the plaintiff's position would have done. In so acting the plaintiff should have his own and the defendant's interests in mind but this does not license the defendant to be overcritical of the plaintiff's conduct. The courts do not readily accept criticism of a plaintiff from a defendant who created the unfortunate situation in the first place. As Lord MacMillan put it 'It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency.'<sup>162</sup> Whether

such steps are reasonable are matters of fact, not law. Even where reasonable steps have been taken and the loss is thereby increased, such entire loss is recoverable from the defendant. Dugdale and Stanton give the example, in the professional context, of where a professional person's negligence leaves his client in a position which he attempts to retrieve by taking proceedings against a third party. If the proceedings do not avail the plaintiff, the expenses incurred in the proceedings will be recoverable from the negligent professional if reasonably incurred.<sup>163</sup> That would apply even if the action to mitigate took place not as soon as possible after the breach but later, provided later action was reasonable.<sup>164</sup> Should the plaintiff be unable to take such steps in mitigation owing to his impecuniosity this will not prejudice him. In the opinion of Lord Collins in *Clippens Oil Co. v Edinburgh and District Water Trustees* '... the wrong-doer must take his victim *talem qualem*, and if the position of the latter is aggravated because he was without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequence flowing from his tortious act.'<sup>165</sup> In *Liesbosch Dredger v S S Edison*<sup>166</sup> Lord Wright considered Lord Collins' dictum to be irrelevant as he was not considering mitigation. *Dodd Properties* confirms *Clippens Oil* but perhaps the principles of remoteness and mitigation should not conflict for if 'the interest

charges were unreasonable, they were too remote; they were not caused by the breach; they were not part of a reasonable form of mitigation.<sup>167</sup>

A final point on this survey of mitigation of damage is shown in the situation envisaged by Dugdale and Stanton.<sup>168</sup> In a case of professional negligence should a plaintiff mitigate by accepting an offer of assistance from the defendant? Usually the relationship between the professional and the client/patient will have been damaged, perhaps beyond repair. If the client has lost confidence in the professional, Stanton and Dugdale suggest that the client should not be expected to accept the offer i.e. not unreasonable conduct. Otherwise, acceptance will be necessary in order to mitigate.<sup>169</sup>

Mitigation will, of course, operate from the base line of the normal measure of damages and therefore, in this sense is directly referable to the system of assessment of damages.

### Jury Trial

However, if the system of assessment is defective in the hands of the judges, how much more would the problem be increased if, as applies in the United States, jury trial were to be adopted in civil cases.

Much of the concern generated about professional liability appears to have been largely as a result of observations made of the situation in the United States. There are, however, many differences between the United

Kingdom and the United States. (supra) The Pearson Commission noted that litigation in the USA is more expensive and the level of damages awarded generally is much higher there than in this country. The system of jury trial makes trials longer and more expensive. Juries award damages but not legal costs,<sup>170</sup> the latter being absorbed under the contingent fee system. Juries are an important feature of trial in the United States, so much so that abolition of jury trial could not be done without amending the Constitution.<sup>171</sup> Thus, in the United States juries reign supreme. Where the jury was considering claims in negligence which is based on the 'fault' system, and its moral overtones, the juries jurisdiction became almost unlimited on both the questions of liability and damages.<sup>172</sup> As a result of the verdicts of juries it is believed, awards of damages were greater, insurance rates increased and this led to still greater awards in industrial cases.<sup>173</sup> In the United Kingdom, although there still is jury trial available in some civil cases,<sup>174</sup> since 1966 it has not been a feature of personal injury trials.

#### Professional Indemnity Insurance

In the meantime, the effect of insurance is felt. The development of liability in negligence has been accompanied by the growth of liability insurance. Potential defendants, in this context professional persons, pool the risks. Nearly all persons who may incur

professional liabilities cover the risk by insurance. This is regarded as being in the interest of both the plaintiff and the defendant, that is, the defendant is now in a position to pay damages and thereby compensate the plaintiff.<sup>175</sup> Atiyah defines the purpose of liability insurance to be... 'to protect the insured against some contingency against which it is virtually impossible for him to guard adequately by other means.'<sup>176</sup> In turn, commentators have come to regard negligence insurance... 'as a necessary part of every well turned out lawyers' professional equipment...'<sup>177</sup> and medical negligence insurance as customary.<sup>178</sup>

Where parties are supported by insurance there is an enhanced chance of settlement.<sup>179</sup> In its Report,<sup>180</sup> the Royal Commission stated 'Usually there is a settlement by agreement between the defendant's insurer and the plaintiff or his representative.' This is to be applauded, provided such a settlement is not misconceived,<sup>181</sup> as it means that litigation will rarely take place. In general, the law favours settlement. It is less expensive than litigation and the law regards the settlement as a contract which binds the parties. More claims are settled than pursued to judgment - over 90% in accident cases.<sup>182</sup> This effect, coupled with the ability to satisfy claims is a positive benefit conferred by insurance.

There is, however, a consideration that insurance can itself be a factor not only in inducing a plaintiff to sue and, possibly, take the claim through to judgment, but also influence the legislature, judges and/or juries as far as the incidence of liability is concerned. It is worth considering who the defendants are in such cases where liability insurance is a feature. On the surface it appears that those who commit torts are those who compensate for what they have done. But the truth of the matter is that people who commit torts very rarely pay compensation to anyone because of insurance.<sup>183</sup> Indeed the expense of litigation is rarely borne by the persons primarily concerned.<sup>184</sup> The great majority of tort claims, especially for professional negligence are made against a person who has insurance against such liability.<sup>185</sup> While there is the benefit that those injured by the negligence will, if successful, be compensated, there is the danger that 'one major factor which determines whether a tort claim is likely to be made at all is the very fact that there is a possible defendant who is insured.'<sup>186</sup> As a result, insurance ceases to be a form of protection for the insured but part of a system for securing compensation. In turn, liability insurance changes its role and exists for the protection of victims,<sup>187</sup> so much so that 'tort liability can... be regarded as a means of inducing those who may cause losses to others to procure insurance in their favour by compelling them to

pay for the losses themselves if they fail to procure such insurance.<sup>188</sup>

It appears, therefore, that while liability should be expected to follow a finding of fault by the defendant, in practice liability seems to follow the incidence of insurance. This increased incidence of liability is thought to be quantitatively significant in areas of activity where liability insurance is customary. It may matter little whether there is insurance or not. If the claim is made in an area where one would expect to find insurance, then irrespective of actual knowledge, the claimant may find more sympathy for the allegation.<sup>189</sup> The existence of insurance is not supposed to be known to the judge but it is usually obvious from the way in which the case is conducted. At a time when there was jury trial if a defendant was insured in respect of liability it was a general rule of practice that the jury must not be informed.<sup>190</sup> Should counsel merely suggest the fact of insurance it was held to be improper<sup>191</sup> and justify the discharge of the jury and a new trial.<sup>192</sup> The reason for keeping the jury in ignorance was stated by Scrutton C J (supra n 188). The defendant was not allowed to join the insurer where the latter disputed liability by use of the third party procedure.<sup>193</sup> This rule does not apply in the case of trial by judge alone.<sup>194</sup> It might be argued, therefore, that in the absence of jury trial, this rule is obsolete.<sup>195</sup>

And so it seems that the effect of liability insurance is two fold. It ensures that compensation is payable even though it may also increase the likelihood that compensation will have to be paid. In turn, there will be higher premiums which the professional will pass on to the client. In a system based upon private medicine, such as the USA, there will be the direct result of passing on costs to the patient/client. In the United Kingdom there is a National Health Service. Practitioners' premiums are paid in part by the NHS. As a consequence increase in awards will push up premiums resulting in a greater burden upon NHS resources. Either that or an increase in taxation to fund the public service. Even so, this is not necessarily a bad effect. If it means that all patients/ clients pay a little more to cover an eventuality that may never come about, it is justified in order that any patient/client who suffers injury will not go uncompensated. This is consistent with the role of the law of tort in allocating losses even though in this case spreading the risk appears to be the method of implementation.

#### A Defective System?

The current state of affairs associated with professional liability is unsatisfactory. Professions are becoming anxious and developing unnecessary and, possibly, unsafe practices. Patients or clients are feeling the strain insofar as the system of compensation to which they

must have recourse is beset with difficulties. All of the above appears to be counterproductive and professions may become regarded as anti-social obstructions to justice rather than bodies concerned with the provision of essential services. So much so that there appears to be a continuous demand from one source or another for a radical overhaul of the system of compensating victims of accidents, and, in this case, professional mistakes.

#### No-fault Compensation

The British Medical Association set up a working party on no-fault compensation which has now reported. The working party proposed that victims of medical accidents should be compensated according to need and not according to cause. To provide compensation would require a state funded scheme of £50 million to provide speedy and automatic compensation to all victims of medical accidents without the need for proving negligence. The new scheme would not prevent those who thought they could prove negligence from pursuing their claim in court. The advantages of a no-fault scheme, recommended on the basis of a study of the schemes in New Zealand and Sweden, would be many. The scheme would not be expensive to set up - in Sweden this was done at less than £1 per head. Lump sum payments based upon an agreed scale of damages would be paid within months instead of years and there would be regular follow up payments based on loss of earnings. The latter payment would, of course, remove some of the

problems of damages discussed supra. In addition, by compensating in many cases without recourse to litigation the incidence of high legal fees, perhaps absorbing as much as 50% - 70% of an award, would be avoided. Finally, it is to be hoped that medicine would become less expensive and less defensive and as a consequence the rate of increase of insurance premiums should not be so great.

However, it would seem there is still a long way to go in the establishment of a no-fault compensation scheme. Not only government but the legal profession and insurance industry will have to become involved and this will take time.<sup>196</sup> Proposals like the above have to be seen against the backcloth of other recommendations regarding no-fault compensation, such as the Pearson Report, which did not recommend the establishment of such a scheme, preferring a mixed system of tort liability complementing social security.<sup>197</sup>

#### Notes

1. Not always - see medical negligence, negligence of barristers and some actions against solicitors.
2. See *Lanphier v Phipos* (1838) 8 C & P.475
3. Winfield 'The History of Negligence in the Law of Torts' [1926] LQR 184, 186-190; W.L. Prosser 'The Borderland of Contract and Tort'. Chap VII Selected Topics on the Law of Torts University of Michigan Law School 1953.
4. Fitzherbert *Natura Brevium*. Michael J. Goodman 'Hazards of an Uncommon Calling' (1964) 108 906 refers to *Ford v White & Co (a firm)* [1964] 1 WLR 885 and *Clark v Kirby-Smith* [1964] 2 WLR 239 in which Pennycuick J and Plowman J respectively held that a

claim of negligence against a solicitor lies in contract not in tort. Goodman continues 'Thus two judges of the Chancery Division have reasserted for the twentieth century that ancient distinction between the "common callings" of innkeeper, carrier, smith, doctor and dentist whose duty of care is owed to all men in common, hence lying in both contract and tort, and those professions such as solicitors, stockbrokers, architects .... and accountants whose duty of care has been said to be owed only to those who retain them and pay their fees, hence lying in contract only'. It is submitted that this view of liability of professional has now been in part overtaken by other developments but the list does seem to clarify the judicial view of what is and what is not a common calling. Yet despite such a judicial view of those professions not common callings the Lord Chancellor, Lord Haldane in *Nocton v Lord Ashburton* [1914] AC 932 at 956 stated 'The solicitor contracts with his client to be skillful 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" See also Goodman op.cit 930 and see also *Forster v Outred & Co* (1981) 125 SJ 309; *The Times*, March 19, 1981.

Confusingly, it seems that sometimes attorneys are included in the list of common callings: A.M. Dugdale and K.M. Stanton *Professional Negligence* p.4

See also Poulton 'Tort or Contract' [1966] 82 LQR 346 at 363 'The liability of a carrier, innkeeper, surgeon or solicitor is in tort because it depends on status rather than contract: "it is the duty of every artificer to exercise his art rightly and truly as he ought".' Fitzherbert, *Natura Brevium* 94D; Poulton adds op.cit 360-361 that there was a time when an action for negligence lay against a solicitor in tort and cites *Russell v Palmer* (1767) 2 Wils 325. Poulton goes on to say 'Modern authorities however, state that a solicitor is liable only in contract.' Poulton does not agree with this.

5. *Photo Productions v Securicor* [1978] 3 All ER 146, 150-151: 'In the nineteenth Century it was thought, and held, that if a duty of care arose out of a contract, no one could sue for breach of the contract except a party to it, and he could only sue in contract and not in tort....
6. R.M. Jackson and J.L. Powell *Professional Negligence* 1982 p.5.
7. *ibid.*

8. R.A. Percy Charlesworth on Negligence 6th ed. p.556 para 928. Lord Denning M.R. in Photo Production v Securicor [1978] 3 All ER 146, 150-151 added 'But during the last few years it has become plain that, if the facts disclose the selfsame duty of care arising both in contract and tort and a breach of that duty, then the plaintiff can sue either in contract or in tort, as he pleases...'
9. (1844) 11 Cl & Fin 1, at 44
10. W.D.C. Poulton 'Tort or Contract' [1966] 82 LQR 346 refers to Brown v Boorman and observes that in 1842 breach of a duty in carrying out a contract is considered to be a tort - at 351: "Tindal C.J. stated the position in these terms in Boorman v Brown: "The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, on the non-feasance is a ground of action upon a tort."
11. Winfield Province of the Law of Tort p.65 i.e. Common Callings.
12. [1932] AC 562
13. Such as bankruptcy, assignment of cause of action, contributory negligence (but see De Meza and Stuart v Apple, Van Straten, Shena and Stone [1974] Lloyds' Rep 508 at 519 cf A.B. Marintrans v Comet Shipping Co Ltd [1985] 1 WLR 1270 in which the 1945 Act was held not to apply to contract even though the breach of contract relied upon was in the nature of a breach of contractual duty of care), damages, limitation of action, economic loss and remoteness of damage.
14. Winfield Province of the Law of Tort p.40
15. Charlesworth on Negligence 6th Ed 557 para 929. Green J in Jarvis v Moy, Davies, Smith, Vandervell & Co [1936] 1 KB 399 at 405 made a similar distinction which was approved in Bagot v Stevens, Scanlan & Co Ltd [1966] 1 QB 197 at 204 by Diplock, L.J.
16. 'Contracts, Promises and the Law of Obligations' [1978] 94 LQR 193.
17. [1978] 94 LQR 193.
18. 'Contract, Tort and Restitution - A Satisfactory Division or Not' [1983] 99 LQR 217.
19. Rise and Fall of the Freedom of Contract, at p.3.

20. Burrows op.cit at page 266.
21. Contract, Tort and Restitution - A Satisfactory Division or Not? [1983] 99 LQR 217.
22. 'Tort or Contract' [1966] 82 LQR 346.
23. Atiyah would agree: 'More broadly, I suggest that there is today a growing recognition that, even where parties enter into a transaction as a result of some voluntary conduct, the resulting rights and duties of the parties are, in large part, a product of the law, and not of the parties' real agreement: Rise and Fall of Freedom of Contract p.734.
24. Poulton op.cit 351.
25. 'Tort and Contract after Junior Books' [1983] 99 LQR 591.
26. [1983] AC 520.
27. Ross v Caunters [1980] Ch 297; [1979] 3 All ER 580; [1979] 3 WLR 605. appears to have done this also.
28. The parties' relationships in Junior Books was described as 'almost as close a commercial relationships as it is possible to envisage short of privity of contract' per Lord Roskill [1983] 1 AC 520 at 542 and [1982] All ER 201 at 211.
29. Muirhead v Industrial Tank Specialities Ltd [1985] 3 All ER 705; [1985] 3 WLR 993; Peabody Donation Fund (Governors) v Sir Lindsay Parkinson & Co. Ltd [1985] AC 210; [1984] 3 All ER 529; Leigh & Sullivan Ltd v Aliakmon Shipping Co. Ltd [1986] AC 785; [1986] 2 All ER 145; Simaan General Contracting Co v Pilkington Glass Ltd, The Times February 18, 1988. Greater Nottingham Co-operative Society v Cementation Piling and Foundations, The Times March 28, 1988. It would seem that the case law above was itself influenced by a fear of the contract/tort distinction collapsing. See Stephenson 'Goodbye Junior Books (1988) New LJ 483.
30. Winfield The Province of the Law of Tort p.81.
31. Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428.
32. Robinson v Post Office [1974] 1 WLR 1176.
33. See Winfield and Jolowicz on Tort 12th ed. pp.126-128; Fleming Torts 6th ed. pp.170, 179-181.

34. Yorkshire Dale Steamship Co. Ltd v Minister of War Transport [1942] AC 691 at 706, per Lord Wright.
35. Weld Blundell v Stephens [1920] AC 956 at 986, per Lord Sumner.
36. See Fleming op.cit 170.
37. Palsgraf v Long Island RR (1928) 248 N.Y. 339 at 352, per Andrews J. The Edison [1933] AC 449 at 460 per Lord Wright.
38. Fleming op.cit 180.
39. Esso Petroleum v Mardon [1976] QB 801, Midland Bank v Hett, Stubbs and Kemp [1978] 3 WLR 167.
40. Fleming Torts 6th ed. p.168, eg solicitors, engineers and architects.
41. Fleming op.cit p.168.
42. Jackson v Mayfair Cleaners [1952] 1 All ER 215.
43. Groom v Crocker [1939] 1 KB 193.
44. Fleming op.cit 168.
45. *ibid.*
46. Midland Bank v Hett, Stubbs and Kemp [1979] Ch 384  
Esso Petroleum v Mardon [1976] QB 801; Batty v Metropolitan Property Realizations Ltd [1978] QB 554;  
Finlay v Murtagh [1979] IR 249. cf Rowe v Cleary [1980] NZLJ 1
47. Fleming op.cit 168-169. And see also Banakas 'Professional Negligence: the New Principles Considered -11' (1985) 129 S.J 389.
48. Glanville Williams and B.A.Hepple. Foundations of the Law of Tort 2nd ed. Butterworths p.11.
49. *infra.*
50. See Overseas Tankship (UK) v Morts Dock and Engineering Co. (The Wagon Mound) [1961] AC 388.
51. Hadley v Baxendale (1854) 9 Exch 341; Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2KB 528; C.Czarnikow v Koufos [1969] 1 AC 35.
52. [1978] 1 All ER 525.

53. [1977] 2 Lloyd's Rep. 522 at 525 and 526. [1977] 3 WLR 990 at 996.
54. [1978] 3 All ER 146 at pp.150-151. See also Lord Denning *The Discipline of Law* pp.278-279.
55. [1978] 94 LQR 171 at 173-4.
56. G.H.L. Freidman 'The Interaction of Tort and Contract' [1977] 93 LQR 422; Atyiah [1978] LQR 193. And see Fleming *Torts* 6th ed. p.169 in which he refers to 'osmosis between contract and tort.'
57. [1978] 94 LQR 171 at 173-4.
58. [1978] 41 MLR 483 at 485.
59. At p.1000 see also C. Manchester 'Remoteness of Damage Contract and Tort Reconciled?' (1978) 128 *New LJ* 113.
60. [1978] 41 MLR 483 at 486.
61. McGregor on Damages 14th ed. 411.
62. *ibid.*
63. *Quinn v Birch Bros. (Builders)* [1966] 2 QB 370; *De Meza and Stuart v Apple, Van Straten, Shena and Stone* (1975) 1 Lloyd's Rep. 498.
64. *Quinn v Birch Bros. Winfield and Jolowicz on Tort* at p.150-151.
65. [1985] 1 WLR 1270.
66. at p 1288. His Lordships words were 'not apt to cover breaches of contractual duty of care (even though described as "negligent breaches of contract")...'
67. at 1288. Compare with similar view expressed in relation to remoteness of damage (*supra*). And see Fleming *Torts* p.169 in which he suggested the 'best solution would of course be to have one and the same rule in these overlapping situations, however the claim is framed; so that for example, a plaintiff's damages would be reduced on account of contributory negligence whenever he could have sued in tort'. He adds in a footnote to his text that a similar consideration for the running of time might also apply.

68. Much of the material under this heading was taken from L. Herzel and D. Harris 'Litigation in the United States' National Westminster Bank Quarterly Review, November 1988, p.14.
69. Zacharias 'The Politics of Torts.' 95 Yale L J. 698, at 718-719. See also 'Rethinking Medical Malpractice' Law in Light of Medicare Cost-Cutting. 98 Harv. Law Rev. 1004 at 1011 (1985).
70. 95 Yale L J. 698 at 721.
71. 95 Yale L J. 698 at 722.
72. *ibid.* i.e. for USA
73. 'Rethinking Medical Malpractice Law in Light of Medicare Cost-Cutting 98 Harv. Law. Rev. 1004 at 1005-6 (1985).
74. 'Litigation in the United States' at p.15.
75. As in the restrictions on the development of liability for economic loss.
76. Congenital Disabilities (Civil Liability) Act 1976.
77. Latent Damage Act 1986.
78. T.G. Ison The Forensic Lottery Staples Press 1967 p.9.
79. Ison *op.cit* 7-8.
80. F.H. Lawson Remedies of English Law 1st. ed. 1972, p332; 2nd. ed. (with H.Teff) 1980 pp. 293-4 citing P.S. Atiyah Accidents, Compensation and the Law p.7.
81. Ison *op.cit* 8-9.
82. Samuels 'Medical Negligence: A Review - II' (1985) 129 S. J. 843 at 849.
83. Ison *op.cit* 11-12.
84. *ibid.*
85. [1939] 2 K.B 14; [1939] All ER 535.
86. at p.23.
87. *Cassidy v Ministry of Health* [1951] 2 K.B.343, [1951] All ER 574.

88. Fish v Kapur [1948] 2 All ER 176.
89. H. Street, Street on Torts Butterworth 7th ed. 1983 p.126.
90. Or more appropriately, for the judge alone.
91. [1985] CL 2540.
92. Maynard v West Midland Regional Health Authority [1984] 1 WLR 634; Samuels Medical Negligence: A Review - II (1985) 129 S J. 843 at 844.
93. Ison op.cit 18 See also Savage v Wallis [1965] 2 Lloyds Rep 272.
94. Ison op.cit 20.
95. Ison op.cit 14-15.
96. Lawson Remedies of English Law 40.
97. Ison op cit 14
98. ibid.
99. ibid
100. Ison op cit 14-15
101. Jandoo and Harland. 'Legally Aided Blackmail' (1984) 134 N.L.J 402.
102. F.C. Zacharias 'The Politics of Torts' 95 Yale L J. 698, 722. In the United Kingdom, extra - legal remedies specific to medical negligence might include the Secretary of State, M.P., letters to legal journals to locate 'fellow sufferers', Family Practitioner Committee, British Medical Association, Health Service Commissioner, a second opinion within the hospital. See Samuel's 'Medical Negligence' op.cit 843 at 849-850.
103. Similar fears were outlined by Lord Denning MR in Whitehouse v Jordan [1980] 1 All ER 650 at 658.
104. The Times 28th October 1986.
105. ibid.
106. [1980] 1 All ER 650 at 658.

107. *Whitehouse v Jordan and Another* [1981] 1 All ER 267 at 276.
108. 267 at 277. See also the following dictum 'I wish at the outset to emphasise one matter. Some passages in the Court of Appeal might suggest that if a doctor makes an error of judgment he cannot be found guilty of negligence. This must be wrong. An error of judgment is not per se incompatible with negligence...' at p.284.
109. *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 121.
110. Most notably that of Lord Denning.
111. '... compared with American awards, British awards look niggardly. This has been a matter of deliberate judicial policy, ranging from the categorical ouster of juries to an unrealistic attitude towards inflation: J.G. Fleming 'The Pearson Report: Its "Strategy"' [1979] 42 MLR 249 at 251.
112. (1980) 1 All ER 650 at 658.
113. *Lim Poh Choo v Camden and Islington Area Health Authority* [1978] 3 WLR 895.
114. Opposition to no-fault systems in North America has come primarily from the "plaintiff's bar" (ATLA) whose livelihood is linked to contingent fees: Fleming 'Pearson' op.cit 252. See the Green Paper Contingency Fees Cm 571 which may reflect the climate of the times. Some see the legal profession as becoming more Americanised. See also *The Daily Telegraph*, March 31, 1989.
115. See *Royal Commission on Civil Liability and Compensation for Personal Injury* Cmnd 7054, paras 1320-1323. H. Teff 'Consent to Medical Procedures: Paternalism, Self-Determination or Therapeutic Alliance?' [1985] 101 LQR 432 at 434-435. Contingency Fees Cm 571.
116. See *Royal Commission on Civil Liability and Compensation for Personal Injury* Cmnd 7054, paras 1320-1323. H. Teff 'Consent to Medical Procedures: Paternalism, Self-Determination or Therapeutic Alliance?' [1985] 101 LQR 432 at 434-435. It may be that it is the combination of jurors and contingency fees which causes the massive awards. Jurors will be aware of the contingency fee system and inflate awards to take account of it.

117. Butterworths 1982.
118. eg Brett J. in *Rowley v LNWR* (1873) LR8 Exch 221 at 230 - '...I advise you to take a reasonable view of the case, and give what you consider a fair compensation.'
119. Lord Denning in *Watson v Powles* [1968] 1 QB 596 at 603. Apart from such compensatory damages other types might be awarded e.g. nominal damages *Columbus Co v Clowes* [1903], but aggravated damages are unlikely to be awarded in personal injuries cases: *J. Munkman Damages for Personal Injuries and Death* Butterworths 6th ed. 1980 pp. 36-37. In *Kralj v McGrath* [1986] 1 All ER 54 at 61 Woolf J considered aggravated damages to be inappropriate for personal injuries claims based on medical negligence (or any other negligence) whether for breach of contract or tort. However the compensatory damages recoverable could be increased if what has happened has made it more difficult for a patient to recover.
120. Administration of Justice Act 1969, S22.
121. 1. Pecuniary loss and expenditure up to date of trial.  
2. Future expenditure.  
3. Loss of future earnings.  
4. Pain and suffering and loss of amenities.
122. *What Next in the Law* p.136.
123. [1978] 3 WLR 895 (CA); [1980] AC 174 (HL).
124. *What Next in the Law* p.138.
125. [1978] 3 WLR 895 at 912 and 916.
126. at 908.
127. at 909. s2(4) Law Reform (Personal Injuries) Act 1948 requires the courts to disregard, in determining the reasonableness of medical expenses, the possibility of avoiding all or part of them by taking advantage of the National Health Service. Recognising the possibility of double compensation, i.e. damages on the basis of private medical expenses and then seeking treatment under the National Health Service, the Royal Commission in para. 342 recommended that s2 should be repealed. Instead, private medical expenses should be recoverable and only if it was reasonable on medical grounds that the plaintiff should incur them. Thus, if a plaintiff were to seek private treatment when equal treatment

would have been available under the National Health Service, the defendant would not have to meet the cost, a consequence which the Royal Commission did not consider reasonable. Jolowicz considers the restriction to seeking treatment privately only when it was reasonable on 'medical grounds' to be too restrictive. He maintains that there are many valid non-medical reasons why private treatment might be sought e.g. the timing of a non-urgent operation. There is no reason to suppose that this particular circumstance i.e. injury requiring treatment through no fault of the plaintiff, should have to become another burden on the plaintiff: Allen, Bourn and Holyoak (ed) Accident Compensation after Pearson Sweet and Maxwell 1979, pp. 63-64.

128. *ibid.*
129. at 910.
130. at 908.
131. at 926.
132. at 913.
133. *Taylor v O'Connor* [1971] AC 115 at 130.
134. at 128 and 129.
135. [1978] 2 WLR 978.
136. [1978] 3 WLR 895 at 916.
137. [1980] AC 174 at 182.
138. [1979] 3 WLR 895 at 908 [1979] QB 196 at 216.
139. Lord Scarman was also concerned that awards be kept down otherwise insurance costs were increased and the burden on public funds would be greater. Supporters of no-fault schemes might find the latter point in favour of their arguments.
140. *What Next in the Law* 140-141.
141. *op.cit* 141
142. Cmnd 7054 paras 535-573.
143. para 557.
144. para 560.

145. para 561.
146. see Lawton L J in Lim. [1978] 3 WLR 895 at 917
147. Lord Denning considered social security payments should be taken into account in fixing periodic payments. What Next in the Law at p.154.
148. Denning op.cit p.154.
149. Cmnd 7054 paras 567-571. See also para 571 and evidence of Royal College of Physicians and Surgeons of Glasgow.
150. para 572.
151. A further attempt to reform the law of damages so that it more properly meets the needs of plaintiff, and not, perhaps in some cases, punish defendants was directed at the awards for 'lost years' i.e. years following death in which income would have been earned, and loss of amenities. The main problem is that the award of damages might go solely to the benefit of the non dependent relatives and the claimants' estate.
152. Dugdale and Stanton Professional Negligence p.258.
153. MacGregor on Damages 14th ed. p.150.
154. ibid See Esso Petroleum Co v Mardon [1976] QB 801.
155. ibid.
156. The effect of deduction from damages appears analogous to, but is different in principle from, contributory negligence.
157. MacGregor op.cit 153. See also McAuley v London Transport Executive [1957] 2 Lloyds' Rep 500; Marcroft v Scruttons [1954] 1 Lloyds' Rep 395 c.f Savage v Wallis [1966] 1 Lloyds' Rep 357.
158. Dugdale and Stanton op.cit 758.
159. Perhaps a misnomer: see the similar position of contributory negligence.
160. [1963] 1 WLR 1067 at 1075.
161. MacGregor op.cit 154.
162. Banco and Portugal v Waterlow [1932] AC 452 at 506.

163. op.cit 259.
164. *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433.
165. [1907] AC 291 at 303
166. [1933] AC 449 at 461 (supra).
167. [1981] 1 All ER 856 at 864, (1981) 1 WLR 274 at 285, per Templeman L.J.
168. op.cit 261.
169. *Columbus Co v Clowes* [1903] 1 KB 244 in which nominal damages of £2 were awarded.
170. But not other costs.
171. para 233. Such entrenchment in Constitutions probably explains why there has been little change in the United States: C.A. Wright *Cases in the Law of Torts* Butterworths 1967 p.351. As a result of constitutional protection of jury trial, American courts have included certain grounds of liability where the danger of abusive litigation is probable. In addition appeals may also be brought against verdicts: Lawson *Remedies of English Law* Penguin ed 1972. p85
172. Wright op.cit 551.
173. Wright op.cit 523.
174. And even in these rare cases there has been a demand for abolition in fraud trials.
175. Cmnd 7054 paras. 59-61.
176. P.S. Atiyah *Accidents, Compensation and the Law* 1970 Weidenfeld and Nicolson pp. 251-252.
177. 'Immunity - from Rondel to Ali' [1978] 128 New LJ 1981.
178. Ison *The Forensic Lottery* Staples Press 1967 p.23. Apparently not, however, in the case of pharmacists. See Brahams 'Uninsured Pharmacists and Illegible Prescriptions' (1989) *The Lancet* 510 discussing *Prendergast v Sam & Dee Ltd* and others.
179. Lawson op.cit 40.
180. Cmnd 7054 para. 61.

181. Jandoo and Harland op.cit 402-3.
182. Lawson op.cit 40.
183. Atiyah Accidents, Compensation and the Law p.7.
184. Lawson op.cit 40.
185. Atiyah op.cit 249.
186. *ibid*
187. Atiyah op.cit 251-2.
188. Hellner Scandinavian Studies in Law (1962) p.150 cited in Atiyah *ibid*. Verification of this trend can be obtained from the various schemes of compulsory insurance, particularly motor insurance. In *Gower v Hales* [1928] 1KB 191 at 196 -7 Scrutton L.J. stated his reason for concern that the existence of an insurance policy should be known: 'if it was not a question of an action against a motorist but a question whether an insurance company should pay a person who was damaged by a motor, it was found extremely difficult to get fair hearings from juries.' Following the introduction of statutory compulsory motor insurance there was no reason for withholding from a jury in cases of negligence driving what they may be assumed to know. The existence of insurance is also the reason why a child may exceptionally sue its mother under the Congenital Disabilities (Civil Liability) Act 1976. Whether the increased liability incurred by motorists due to compulsory insurance is a matter of injustice is open to question. There may be instances of an insured motorist being liable in the absence of negligence but the main financial effect upon him will be an increased premium as the result of the loss of a no-claims bonus. On the other hand, the motorist has bargained for such cover and society expects it. The insurance company has been paid what it has asked and is now playing its part in paying compensation where the risks have been allocated and spread throughout society.
189. Ison op.cit 8, 9. See also *Wright Cases on the Law of Torts* p.523 where jury verdicts led to higher awards in insurance cases and higher premiums.
190. *Askew v Grimmer* (1927) 43 TLR 354.
191. *Wright v Hearson* [1916] CVN 216.

192. Grimsham v Davies [1929] 2 KB 249.
193. Order 16 r1, Rules of the Supreme Court. Clover, Clayton v Hessler [1925] 1 KB1; Jones v Basil Bros [1933] 2 KB 597 at 606-608. Gower v Hales [1928] 1 KB191. And see also Colinvaux The Law of Insurance 5th ed. Sweet and Maxwell 1984 pp 407-408.
194. Harman v Crilly [1943] 1 All ER 140.
195. Carpenter v Ebblewhite [1939] 1 KB 347 at 359.
196. The Times March 11 1987. The Daily Telegraph March 11 1987. For details of other fault compensation schemes see: J.M. Matheson: 'Compensation for Personal Injury in New Zealand. The Woodhouse Report' [1969]18 CLQ 191; P.D. McKenzie: 'Report of the Select Committee on Compensation for Personal Injury in New Zealand' [1973] 34 MLR 542; G.W.R. Palmer: 'Compensation for Personal Injury: A Requiem for the Common Law in New Zealand' [1971] 21 Am J Comp Law' D.R. Harris : 'Accident Compensation in New Zealand: A Comprehensive Insurance System' [1974] 37 MLR 361.
197. Cmnd 7054 para. 275. J.G. Fleming: 'The Pearson Report: Its "Strategy" [1979] 42 MLR 249.

## CHAPTER 4

### Lawyers' Negligence

The legal profession in England and Wales is divided. The division is not merely a matter of label i.e. barrister or solicitor, but is a matter of historical significance. Both parts of the profession have developed differently and separately. There are differing rules for members of each part of the profession but more importantly for the purpose of this thesis there are different rules relating to liability. As will be seen, the general rules relating to negligence apply to both parts of the profession, but as a result of the relationship between the two parts and also the history of each part, those rules are hedged about with exceptions which in turn lead to significant difference in liability.

#### A. Barristers

It is a primary function of barristers to appear before courts of law as advocates. Other work involves advice in connection with litigation and also other work that might be referred by solicitors.

##### 1. Contractual Liability

Normally a barrister can only act on a solicitor's instruction. Unusually, for a professional person, a barrister does not enter into a contract with a solicitor

who instructs or with the lay client upon whose behalf he is instructed. Fees are not contractual but constitute an honorarium for which the barrister has no right to sue.<sup>1</sup>

## 2. Tortious Liability

As there is no contract between a barrister and solicitor nor between barrister and lay client, there is no contractual liability attaching to barristers in respect of professional services rendered. If there is to be liability then this must lie elsewhere. There is no reported decision in England in which a barrister has been held liable for negligence although there have been claims settled out of court<sup>2</sup> since *Rondel v Worsley*.<sup>3</sup> Except in those areas of work for which immunity is granted (*infra*) there seems no reason why a barrister should not be liable just as much as a solicitor or any other professional person.<sup>4</sup> Perhaps in some cases there is more reason, as a barrister may hold himself out to be an expert and should therefore expect to attract liability where a solicitor, acting as a general practitioner, would not. The matter might be taken further in that a barrister might be expected to correct an error made by a solicitor in the instructions if that error is obvious and a reasonable barrister in the defendant barrister's circumstances would have detected and corrected it.<sup>5</sup> There is no duty, it would seem, upon a barrister to perform the duties of the solicitor in respect to his lay client. Consequently in *Matthew v Maughold Life Assurance Co Ltd*<sup>6</sup> it was held that

a barrister was under no professional duty to ensure that his lay client, who was advised by solicitors, fully understood all the implications of the barristers advice.

In this case there was no requirement of specialist knowledge on the part of the solicitor. The barrister had already given adequate explanation of the scheme in question and in so doing had discharged his duty. O'Connor J went so far as to allow a barrister to assume the competence of the solicitor.<sup>7</sup> Unfortunately for the solicitor, he would not appear to be so well protected in his dealings with a barrister.<sup>8</sup> Although not a case dealing with professional negligence *Davy-Chiesman v Davy-Chiesman*<sup>9</sup> is indicative of the expectations contained in the relationship between solicitor and counsel. It is submitted that this decision is more representative of the relationship and accords more with the notion of accountability for the exercise of professional skill. The case stated that although a solicitor was in many circumstances protected from personal liability if he acted on the advice of experienced counsel, he could not be exonerated if he blindly followed the views expressed by counsel without exercising his own independent judgement.<sup>10</sup>

According to Dillon L J in *Davy-Chiesman v Davy-Chiesman* a solicitor will often act correctly if he relies upon the advice of experienced counsel properly instructed<sup>11</sup> as an effect of the divided profession. But

his lordship went on to say that this is not a total protection. No abdication of responsibility will be allowed by the simple device of instructing counsel;<sup>12</sup> the solicitor is expected to form his own opinion.<sup>13</sup> Otherwise, there would be a serious dereliction of duty. The above liability appears to have been moderated by *Ward v Chief Constable of Avon and Somerset Constabulary*<sup>14</sup> in which the Court of Appeal held that although a solicitor having conduct of an action is not expected to rely blindly on counsel's advice, he is justified in relying on it where it embodies a careful and sensible assessment of the legal and factual situation.

It would seem that the judges are sympathetic to the barrister. Errors made by barristers in the practice of what is not an exact science may be treated as mere errors of judgment and not negligence. Not all errors of judgment are to be treated as negligence<sup>15</sup> and, as Lord Diplock pointed out in *Saif Ali v Sidney Mitchell & Co*<sup>16</sup>, the trial judge is well qualified to appreciate and make allowances for the circumstances in which a defendant barrister found himself. None of the judgments on the matter of barristers' liability clarifies what constitutes a distinction between 'errors of judgment' and 'negligence' and there the matter would appear to rest for the moment.

## B. Solicitors

The function of solicitors is to give legal advice more generally and to act on behalf of clients in legal matters.<sup>17</sup> Solicitors may enter into contracts with their clients and attract liability for negligence in the event of a breach of duty to take care. It now seems established that a solicitor may be concurrently liable for breach of contract and in tort or even be liable in tort in the absence of a contractual relationship. Recent cases have equated the position of the solicitor, at least<sup>18</sup>, with that of other professional persons.<sup>19</sup>

### 1. Contractual Liability

'Historically, the law of contract is the principal means by which the courts have exercised control over the conduct of professional men.'<sup>20</sup> The relationship of solicitor and client usually comes into being by contract or retainer.<sup>21</sup> This contract may be oral or in writing although it seems preferable that at some early stage an oral retainer should be confirmed in writing.<sup>22</sup> The effect of not doing so may be something the solicitor will later have cause to regret.<sup>23</sup> The effect of the retainer is to put 'into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the clients interest and carry out his instructions in the matter to which the retainer relates, by all proper means'.<sup>24</sup> This, of course,

explains the purpose of the retainer in rather general terms. What the particular duties are to be and the extent depends 'upon the terms and limits of that retainer and any duty of care to be implied<sup>25</sup> must be related to what he is instructed to do.'<sup>26</sup> Thus, in common with other contracts the terms might be inferred from and influenced by, conduct of the parties.<sup>27</sup>

In a consideration of negligence there is a tendency to think of the duty of care and the appropriate standard. However, concentration on the obligation, express or implied, to take reasonable care may cause one to overlook the other obligations assumed under the contract. The duty of care does not embrace all obligations nor is it an exhaustive statement of obligation. The duty to exercise care is but one among many.<sup>28</sup>

It would seem to follow that each case must be looked at separately. The implied standard of care will be found as a minimum and the usual statements of what this usual standard is will be the guide. The retainer usually provides for a particular service to be performed but not necessarily that a result will be achieved.<sup>29</sup> Although the action is primarily for breach of contract, it can also be based sometimes on negligence on the ground that a reasonable man, owing a duty of care in such circumstances, would exercise the care of a skilled man in doing the work.<sup>30</sup>

There is, however, no reason why the standard of reasonable care should not give way to a higher standard if the contract so provides<sup>31</sup>, i.e. that in the particular circumstances of the case, the design would be reasonably fit for the purpose.<sup>32</sup> The courts must be wary of imposing duties upon solicitors and other professional people beyond the scope of the undertaking.<sup>33</sup> On the other hand it may be possible for a professional person to guarantee a result in which case failure to provide what the client contracted for may be sufficient to involve liability. Usually reasonable care and skill is sufficient. However, there are cases in which a professional person has undertaken to deliver a chattel. In such circumstances 'one who contracts to design an article for a purpose made known to him undertakes that the design is reasonably fit for the purpose'.<sup>34</sup> This would impose a higher duty than that consistent with the standard of reasonable care according to the accepted standards of the profession.<sup>35</sup>

## 2. Tortious Liability

After *Donoghue v Stevenson* the judges had to decide upon the development of the tort of negligence. There were circumstances where there was uncertainty as to whether there should be recognition of a duty of care or whether liability should not exist due to remoteness of damage, a reason for some time expressed in cases of economic loss.<sup>36</sup> However, there were developments which

appeared to favour general extension of the recognition of a duty of care and which required good reasons to deny that extension.<sup>37</sup> It is in *Anns v Merton London Borough Council* that the view favouring an extension of the duty of care came to be formulated<sup>38</sup>, as follows:

'Through the trilogy of cases in this House *Donoghue v Stevenson*<sup>39</sup>, *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>40</sup> and *Dorset Yacht Co Ltd v Home Office*<sup>41</sup>, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoers and the person who has suffered damage there is sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty on the class of persons to whom it is owed or the damaged to which a breach of it may give rise...'

An apparently simple test it has been used in various cases to assist in determining both the existence and scope of a duty of care.<sup>42</sup> But it is misleading to regard the above test as the definitive one in each case.<sup>43</sup> The House of Lords on two occasions has qualified the test. First, it must be borne in mind that 'in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable it should be so.'<sup>44</sup> A second case has added that Lord Wilberforce

'was dealing... with the approach to the questions of the existence and scope of a duty of care in a novel type of factual situation'. The same approach was not to be adopted in a factual situation in which a duty of care 'had repeatedly been held not to exist'.<sup>45</sup> To the qualification made by the House of Lords the Privy Council has now lent its voice to the view that the two stage test in *Ann*s was not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.<sup>46</sup> The first stage of the test had been misinterpreted while the second would be rarely applied.<sup>47</sup> The 'proximity of neighbourhood' referred to by Lord Wilberforce (*supra*) was a composite expression importing the whole of the necessary relationship between plaintiff and defendant described by Lord Atkin in *Donoghue v Stevenson*.<sup>48</sup> Foreseeability of harm was not sufficient of itself; the directness and closeness of the relationship between the parties would need to be present. Such directness and closeness was apparent in *Hedley Byrne*<sup>49</sup>, *Dorset Yacht*<sup>50</sup> and *Junior Books*.<sup>51</sup> The special relationship between the parties in those cases would explain the findings of a duty of care even using the test as enunciated by the Privy Council in *Yuen Kun Yeu and Others v Attorney General of Hong Kong*.<sup>52</sup>

### 3. Concurrency of Actions

None of the foregoing ought to deny the concurrency of liability for breach of contract and tort in general.

It is however not so long ago the existence of a contract between a professional person and a client was held to exclude liability in tort for negligence. The so-called 'privity fallacy' which had been scotched finally, it was thought, in *Donoghue v Stevenson* continued in cases of alleged professional negligence by a solicitor. Many problems were produced e.g. limitation of actions where it would be more beneficial for a client to sue in tort.<sup>53</sup>

If one commences with *Brown v Boorman*<sup>54</sup> the principle was laid down that whenever there is a contract under which something is to be done, if there is a breach of duty in the course of the employment under the contract, the plaintiff may recover either in tort or in contract. There are many cases in which this would be true including 'actions against attornies, surgeons and other professional men for lack of skill.'<sup>55</sup>

There are it seems professional groups who could be liable for negligence in the absence of a contract. But Kaye, in 'The Liability of Solicitors in Tort'<sup>56</sup>, regards as exceptional e.g. medical men, on the basis that there were strong public policy reasons for making a surgeon liable without proof of a contract between himself and a patient whereas no such consideration of policy appear to have arisen in the case of solicitors.

The views on the liability of a solicitor to a client has thus fluctuated between that of liability in contract and tort, to contract only and back again to concurrent

liability. A line of cases supported the proposition that liability might be based on both contract and tort.<sup>57</sup> At the same time there existed authorities that liability lay in contract alone.<sup>58</sup> The Court of Appeal decision in *Groom v Crocker*<sup>59</sup> in 1939 that a solicitor owed no duty to the client beyond the contractual duties arising from his retainer was followed 'without question'<sup>60</sup> in subsequent cases.<sup>61</sup>

However, Kaye,<sup>62</sup> does not consider that *Brown v Boorman* (supra) has the effect of creating liability in negligence in the absence of a contract and stressed that neither the Exchequer Chamber nor the House of Lords decided on the basis of an independent tort.<sup>63</sup> The action in negligence based on breach of contract or tort arose out of breach of contract.<sup>64</sup> Kaye contends that read in that context, *Groom v Cocker*<sup>65</sup> was correctly decided and was not based on a failure to consider 'earlier cases of high authority.'<sup>66</sup> Kaye would further assert that this charge should be levelled at those courts which have since attempted to base liability for a solicitor's negligence on the independent tort.

In the context of a solicitors' liability for professional negligence it was firmly established in *Robertson v Fleming*<sup>67</sup> the Court of Appeal confirmed that a solicitor's duty to his client was based solely on breach of contract and not on tort; a ruling followed by the High Court in *Clark v Kirby-Smith*.<sup>69</sup>

In *Clark v Kirby-Smith* Plowman J gave judgment for the plaintiff on the basis that "the fiduciary obligation to give information or advice arises out of the contractual relationship of solicitor and client"<sup>70</sup> Despite the dicta in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>71</sup> Plowman J did not accept the argument that the *Hedley Bryne* case was an authority for saying that the liability of a solicitor to his client for negligence is a liability in tort.<sup>72</sup> Plowman J noted the opinion of Sir Wilfred Green M.R. in *Groom v Crocker* that the cause of action was in contract and not in tort because the relationship of solicitor and client is a contractual one.<sup>73</sup>

But since the case of *Clark v Kirby-Smith* various dissenting opinions have also been expressed. Lord Denning M.R.<sup>74</sup> thought that a professional man owes a duty of care to persons whom he knows are relying on his skill to save them from harm and could not see why a solicitor should not also be under this duty. Subsequently Lord Denning M.R. gave his opinion<sup>75</sup> that *Groom v Crocker* was wrongly decided and indeed that *Nocton v Ashburton*<sup>76</sup> a case of high authority had not been cited therein. The Court of Appeal<sup>77</sup> considering professional obligations generally, agreed that there was a concurrent obligation in tort and not solely liability in contract. It was not until the case of *Midland Bank Trust Co Ltd and Another v Hett, Stubbs & Kemp (a firm)* in 1979<sup>78</sup> that this notion of

concurrent liability was to form the ratio decidendi of a case involving solicitors' liability. In *Midland Bank Oliver J.*, held that a duty of care was imposed upon the defendant firm of solicitors by reason of the relationship of solicitor and client existing between the parties. The defendants were therefore liable in tort independently of any liability in contract for their negligence. His Lordship applied *Hedley Byrne v Heller* and *Esso Petroleum v Mardon* and declined to follow *Clark v Kirby-Smith*.

In arriving at this decision Oliver J thought that the view of Lord Denning M.R. in *Dutton v Bognor Regis UDC*<sup>79</sup> was quite inconsistent with the restrictive view enunciated in *Groom v Crocker* as indeed was the House of Lords decision in *Hedley Byrne v Heller*. Oliver J thought 'The case of the layman consulting a solicitor for advice seems to me to be as typical a case as one could find of the sort of relationships in which the duty of care described in the *Hedley Byrne* case exists; and if I am free to do so in the present case I would, therefore, hold that the relationship of solicitor and client gave rise to a duty in the defendants under the general law to exercise that care and skill upon which they must have known perfectly well that their client relied'.<sup>80</sup>

This appears to be a consistent development of principle. The cases since 1932 which are identified with developing the principle laid down in *Donoghue v Stevenson*<sup>81</sup> e.g. *Hedley Byrne v Heller*<sup>82</sup>, and *Anns v*

Merton London Borough Council<sup>83</sup> have shown that the stage has been reached where previous authority is not necessary to establish the existence of a duty of care. What has to be considered is whether there is sufficient relationship of proximity or neighbourhood between solicitor and the plaintiff. These cases are also notable in that they express the duty of care in wide terms and disapprove of the restricted approach to the duty problem, as does Oliver J in *Hett* at least with regard to *Groom v Crocker*. And this seems to echo the spirit of flexibility expressed by Ormrod L J in *Esso Petroleum v Mardon*: 'The parties were in the kind of relationship which is sufficient to give rise to a duty on the part of the plaintiffs. There is no magic in the phrase "special relationships"; it means no more than a relationship the nature of which is such that one party for a variety of possible reasons, will be regarded by the law as under a duty of care to the other.'<sup>84</sup> On these terms, *Midland Bank* appears to be in accord with the principle expressed in *Donoghue v Stevenson* and developed in subsequent cases. The contractual duty of care does not appear to preclude a parallel claim in tort under the *Hedley Byrne* principle. It is perhaps prudent to say 'appears' as there has been strong criticism of *Midland Bank*. Kaye in his article 'The Liability of Solicitors in Tort'<sup>85</sup> is not so sure.

#### 4. Liability to Third Parties

With the acceptance of concurrent liability comes the proposition that a solicitor may be liable to his client in negligence based upon either the contract of retainer or in tort. As a professional man may be liable for negligence in tort consequently it is no longer possible to maintain the proposition that the client is the only person to whom a duty is owed. But it is surely going too far to make the professional man liable to all those who are adversely affected by his acts or omissions. Even the principle stated in *Donoghue v Stevenson* establishing the circumstances under which a duty of care may be held to exist has been limited by the House of Lords in *Anns v Merton London Borough Council*.<sup>86</sup> Following the view of Lord Wilberforce<sup>87</sup> in which his Lordship attempted to restrict the duty owed by defendants in negligence cases, there may be good reasons why a professional man should not be liable.<sup>88</sup> In the case of a solicitor much of the work performed is adversarial in nature and carried out for the clients interests and in opposition to the interests of others. In addition, it would appear unfair to allow any person who is affected to rely on the statements of a solicitor even when there are foreseeable consequences owing to the wide nature of the dissemination. Having said that, one of the hallmarks of a professional man is said to be his altruism and detachment from the interest of self or client. A

solicitor is an officer of the court and expected to act with integrity in his dealings. In the case of advocates' (infra) one of the reasons given for allowing immunity to continue was the higher duty owed to the court in the interests of the administration of justice.

It may well prove to be the case that solicitors, by virtue of the adversarial nature of their work may well not be too badly affected. Megarry V.C. has taken the notion of concurrent liability further in *Ross v Caunters (a firm)*<sup>89</sup> as has the Court of Appeal in *Forster v Outred & Co (a firm)*.<sup>90</sup> The third party in *Ross v Caunters*<sup>91</sup> was a beneficiary who, owing to the alleged negligence of the testator's solicitor, had lost a bequest under the testator's will. Counsel for the defendants put forward the proposition established by the authorities that a solicitor could not be liable in negligence in relation to his professional work to anyone except his client and that such liability was in contract and not in tort: the main reference was to *Groom v Crocker*,<sup>92</sup> which was supported by, inter alia, the post *Hedley Byrne* case of *Clark v Kirby-Smith*.<sup>93</sup> His Lordship observed on the matter of liability in contract or tort that both *Groom v Crocker* and *Clark v Kirby-Smith* had been rejected in *Esso Petroleum Co Ltd v Mardon*.<sup>94</sup> The latest authority on this issue, prior to *Ross v Caunters*, was *Midland Bank* in which Oliver, J., after considering the above authorities, concluded that the doctrine in *Groom v Crocker* was not

law. Sir Robert Megarry V.C. in *Ross v Caunters* concurred with Oliver, J, and rejected this contention, and went on to consider whether a solicitor owes a duty of care to a beneficiary under a will made for a client and the basis of that duty.

The first consideration was that there was no doubt that "the defendants could fairly have been expected to contemplate the plaintiff as a person likely to be affected by any lack of care on their part ... The plaintiff was named and identified in the will that the defendants drafted for the testator."<sup>95</sup> The second was that the duty of care to the testator included a duty to confer a benefit on the plaintiff, and thirdly, that to hold the solicitors owed a duty of care to the plaintiff would not impose "on the defendants of uncertain and unlimited liability ... Instead, there would be a finite obligation to a finite number of persons, in this case one."<sup>96</sup>

With these considerations in mind his Lordship made reference to Lord Atkin's statement of principle in *Donoghue v Stevenson*;<sup>97</sup> a principle which according to Lord Reid in *Dorset Yacht Co Ltd v Home Office*<sup>98</sup> "ought to apply unless there is some justification or valid explanation for its exclusion", and which, according to Lord Wilberforce in *Anns v London Merton Borough Council*<sup>99</sup> had reached the stage where "in order to establish that a duty of care arises in a particular situation it is not

necessary to bring the facts of that particular situation within those of previous situations where a duty of care has been held to exist." Instead Lord Wilberforce thought one should ask whether there is a sufficient neighbourhood between the alleged wrongdoer and the person suffering damage so that the former should reasonably contemplate his carelessness would cause injury to the latter, and also whether there are any reasons why the scope of the duty should be reduced or limited.

The facts of *Ross v Caunters* suggested to the Vice-Chancellor that a duty was owed to the plaintiff and that there was nothing in this case requiring that the scope of the prima facie duty of care ought to be negatived, reduced or limited. Indeed, the proximity of the defendants to the plaintiff and the limited amount of liability pointed the other way.

The true basis of liability is *Donoghue v Stevenson* in *Ross v Caunters* and not the more restricted basis of *Hedley Byrne*. But the nature of the loss causes problems. It had long been maintained that apart from the *Hedley Byrne* situation, a claim in negligence for economic loss could not succeed.<sup>100</sup> In *Ross v Caunters* the plaintiff's loss was, of course, purely financial. Is such loss irrecoverable if it does not fall within *Hedley Byrne*? In *Midland Bank, Oliver, J.*, thought the case of a layman consulting a solicitor for advice was typical of the *Hedley Byrne* relationship. Counsel for the defendants

contended that Hedley Byrne was inapplicable in *Ross v Caunters* because no reliance had been placed on the solicitors by the plaintiff.<sup>101</sup> His Lordship agreed that there was nothing that could fairly be called reliance by the plaintiff on any statement made by the defendants, but added that in any event the true basis of liability in *Ross v Caunters* did not rest on Hedley Byrne but proceeded directly from *Donoghue v Stevenson*. This being so, the applicability of *Ministry of Housing and Local Government v Sharp*<sup>102</sup> was considered.<sup>103</sup> Sharp's case is analogous to *Ross v Caunters* as a negligent mis-statement was also made by the defendant, not to the plaintiff but a third party. Salmon, L J based liability in Sharp's case on *Donoghue v Stevenson*, holding the view that the clerk must, or should, have known that unless the search was conducted, and the certificate prepared, with reasonable care, any chargee whose charge was carelessly omitted from the certificate would be likely to suffer damage. Salmon L.J, went on to say:

"In my view, this factor certainly creates as close a degree of proximity between the council and the incumbrancer as existed between the appellant and respondent in *Donoghue v Stevenson*... It is true that in *Donoghue v Stevenson* it was physical injury that was to be foreseen as a result of the failure to take reasonable care whereas in the present case it is financial loss. But this no longer matters, and it is now well established that quite apart from any contractual or fiduciary relationship, a man may owe a duty of care in what he writes or says just as much as in what he does. See *Hedley Byrne* ... No doubt in our criminal law, injury to the person is or should be regarded as more serious than damage to property and punished accordingly. So far, however,

as the law of negligence relating to civil actions is concerned, the existence of a duty to take reasonable care no longer depends upon whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take such reasonable care."<sup>104</sup>

The Court of Appeal has determined an action in negligence will now lie for financial loss. The case was one in which no statement was made to the plaintiff who of course did not rely on it. This is the analogy with *Ross v Caunters* in which the plaintiff was also passive and ignorant of the defendant's negligence. Sharp's case was conclusive for Sir Robert Megarry V.C. who held the defendant's were liable to the plaintiff in negligence and purely financial loss was no bar to that liability.<sup>105</sup>

However, it must be noted that the previous objections to such loss being recovered were on policy grounds,<sup>106</sup> namely, "a liability in an indeterminate amount for an indeterminate time to an indeterminate class."<sup>107</sup> In *Ross v Caunters* there was "a finite obligation to a finite number of persons, in this case one."<sup>108</sup> *Ross v Caunters* was to be regarded by some as a bold move. In time the decision was followed in *Al-Kandari v J R Brown & Co.*<sup>109</sup> But there have been doubters<sup>110</sup> and the Court of Appeal decided otherwise in *Clarke v Bruce Lance*.<sup>111</sup>

*Al-Kandari v J R Brown & Co.*<sup>112</sup> held that the defendant solicitor owed a duty to the third party in tort because that third party was within his direct

contemplation as someone likely to be affected by his acts or omissions that the defendant could reasonably foresee that the third party was likely to be injured by those acts or omissions. This case, according to Markesinis,<sup>113</sup> presents problems. Foreseeability, alone, is no good reason for imposing liability on a solicitor. Lord Keith of Kinkel in *Yuen Kun Yeu*<sup>114</sup> affirmed the point. 'As Lord Wilberforce observed in *McLoughlin v O'Brien*<sup>115</sup> it was clear that foreseeability did not of itself, and automatically, lead to a duty of care. Foreseeability of harm was a necessary ingredient of a relationship apt to give rise to a duty of care, but it was not the only one'.

In *Al-Kandari* the action was framed for breach of contract and/or tort. The first cause of action did not succeed as the plaintiff was not the client of the defendant solicitors. However, the judge did decide that the solicitor owed the plaintiff a duty of care and had broken that duty. The defendants were not liable because the damage suffered by the plaintiff was not a natural or probable consequence of the breach of duty. On appeal the existence of the duty and the breach was confirmed by the Court of Appeal. The decision of French J. was reversed solely upon the basis that the damage suffered by the plaintiff was a natural or probable consequence of the breach of duty.<sup>116</sup>

The concern expressed by Markesinis is on the basis of the finding of duty<sup>117</sup> which he considers makes

Al-Kandari important. French J gave the clear impression that Al-Kandari was on all four with *Ross v Caunters*.<sup>118</sup> In any event French J was prepared if necessary to extend the principles expressed in *Ross v Caunters*.<sup>119</sup> However, the duty in question was one owed to the court not to the client as in *Ross v Caunters* and yet the judge in Al-Kandari did not acknowledge that point. French J stated 'a solicitor who has authority from his client to give an undertaking, one of whose objects is to protect an identified third party, owes a duty of care towards that third party.'<sup>120</sup> Here it seems French J is using a contractual analogy<sup>121</sup> and producing some confusion.

In *Clarke v Bruce Lance & Co* the decision that solicitors owed no duty of care to the beneficiaries was made on the basis of a factual distinction. In *Ross v Caunters* there had been a close degree of proximity between the defendant solicitor and the plaintiff beneficiary. This was not so in *Clarke*. In addition the interests of the testator and beneficiary were closely allied in *Ross v Caunters*. In *Clarke* the interests were in conflict. Finally, the defendants contemplation of the plaintiff was not actual, nominate and direct in *Clarke* as it was in *Ross*.<sup>122</sup>

Other Common law jurisdictions saw no reason to follow the reasoning in *Ross*. In Australia<sup>123</sup> the contract liability only line was taken. Most Australian States still hold there is liability in contract, some

accept concurrency of liability in contract and tort.<sup>124</sup> The Victoria Supreme Court in two recent cases has said no liability in tort<sup>125</sup> in the first and concurrency of liability<sup>126</sup> in the second. The Supreme Court of Victoria in *Seale v Perry*<sup>127</sup> held that the solicitor owed no duty of care to the intended beneficiaries. The Victorian Court performed a very thorough review of the English cases in the course of judgment. Among this catalogue was *Esso Petroleum v Mardon*.<sup>128</sup> In *Mardon's* case Lord Denning M.R., cited cases from which principles or concurrent liability might be extracted. But, said Lush J, in *Seale v Perry*, although there is reference to cases which refer to duties imposed by law even though there is a contract, breach of which might be a tort, this is not the same as saying 'that a duty so created enures for the benefit of persons not parties to the contract or other event which was the occasion of the duty. Murphy J agreed that no duty was owed to the beneficiaries.'<sup>129</sup>

The Australian judge Beach J stated in *Macpherson & Kelly (a firm) v Kevin J. Prunty Associates*<sup>130</sup> 'I can find no satisfactory basis for the anachronistic exemption of solicitors from the general principle or rule that members of professions are liable to their clients concurrently in contract and in tort. Indeed to hold otherwise could well be productive of injustice.' In the same case Lush J thought that '... in the welfare state, the performance of professional services in situations where there is no real

contract between the skilled man and the patient is increasingly common. Hedley Byrne imposes a duty of care and provides a remedy in such cases".<sup>131</sup>

New Zealand has adopted the position of contractual liability only<sup>132</sup> while the Canadian view is sympathetic to concurrency.<sup>133</sup> But there is the problem of public protection. In the case of a will which takes effect only upon the clients death who can enforce the action, if it be not in tort. The solicitor has a privileged, near monopoly position in the preparation of wills. As Sutherland points out, in New South Wales for example, solicitors do have a legal monopoly in the preparation of wills. 'No other professional group is permitted to provide guidance in exchange for reward in the execution of wills. There must be some protection.'<sup>134</sup>

On the other hand Kaye questions 'the justification for imposing a public duty on a professional man, in addition to a private duty arising from contract or retainer'<sup>135</sup>. A similar problem arises relating to the issue of lawyers' immunity from liability in negligence connected with litigation.<sup>136</sup>

This is not to say that developments in concurrent liability will continue to take place as hitherto. The Judicial Committee of the Privy Council had recently expressed concern about the over development of negligence. In *Yuen Kun Yeu and Others v Attorney General of Hong Kong*<sup>137</sup> the Privy Council maintained that the

principles stated in *Anns v Merton London Borough Council*<sup>138</sup> had been taken too far. Similar concerns were voiced in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*<sup>139</sup> on the undesirability of too rigorous a search for concurrent liability where the parties have a contractual relationship. In the Court of Appeal the same caution influenced the delimitation of liability of a solicitor to third parties.<sup>140</sup>

What then is the prognosis? Criticism cannot be levelled at the judgement in *Al-Kandari* simply because the liability of solicitors is extended. Markesinis cites Cooke J in *Gartside v Sheffield*<sup>141</sup> '[one] should not decide a fairly straightforward case against the dictates of justice because of foreseeable troubles ahead in more difficult cases.' But all of this must be done on the basis of consistent development of the law. There is no real objection to liability being widened provided clear limits can be set to the extension.<sup>142</sup> Solicitors will, according to Markesinis, 'be apprehensive to see their liability widening perhaps one day to uninsurable levels'.<sup>143</sup> The Royal Commission on Legal Services shared this concern<sup>144</sup> and recommended consideration of a limit placed by statute in respect of professional negligence.

To that end the Royal Commission suggested that an inquiry should be set up without delay to review the issue of limited liability for claims of negligence:

'Cases have been known in which partners have lost their personal assets as a result of a claim in excess of their insurance cover; yet where the claim is large, the total personal assets of the partners will cover only a small proportion of it.'

A consideration of Lord Scarman's judgement in *Tai Hing*<sup>145</sup> raises the inference that the line of reasoning used by Oliver, J., in *Hett, Stubbs & Kemp* is incorrect. It may now be that the newly commenced retreat from *Anns* will operate to reverse the trend of widening liability in negligence. However, Privy Council decisions are not binding on English courts, merely persuasive. Only time will tell if this line of reasoning will be followed by English superior courts. *Clarke v Bruce Lance & Co* might be the commencement of a thrust in that direction to the benefit of solicitors.

#### Accountability of Lawyers in a Time of Change

Lawyers must be accountable to those whom they damaged but careful limitation of liability must be the aim of the courts if legal services are to be maintained on an effective basis. What has to be borne in mind, however, is that the future development of the law of negligence as affecting the legal profession may not be smooth. Clarification of the law and the desire to avoid confusion will have to be done against the background of change.

Pressure is being brought to bear from many different sources. Attacks are being made upon the restrictive practices which both branches of the legal profession are alleged to operate. Competition is actively encouraged by Government and monopolies such as conveyancing are under threat. Commercial pressures, too, are coming to the fore and the emergence of larger firms is becoming noticeable. So far mergers have largely been between legal firms but increasingly one might expect to see mergers between firms of different professional groups. Mergers will create ethical difficulties where commercial considerations become more important. Difficulty is likely to be encountered in reconciling different ethical values which may conflict within new multi-disciplinary practices.<sup>146</sup> And reconciled such ethical values must become if the traditional standard of service to the clients is to be maintained. Such changes as outlined above would create difficulties even if the legal profession remained unchanged. The Marre Report and statements made by the Lord Chancellor, Lord Mackay of Clashfern show that reform of the profession itself is probable and within a short time scale. The Lord Chancellor has also indicated that change must also embrace traditional values and the professions must continue to serve the public<sup>147</sup> At an earlier time the Lord Chancellor stated that high ethical standards had to be maintained if the Bar was to survive as an independent profession.<sup>148</sup> The Marre Committee, set

up by the Law Society and the Bar Council reported in July 1988.<sup>149</sup> In many ways it is conservative; several critics might see it as too mild, not challenging the legal profession sufficiently.<sup>150</sup> There were, however, some significant and welcome proposals such as the extension of right of audience in the High Court to solicitors although the two branches of the legal profession do not agree on such a reform. The proposal of direct access to the barrister has attractions but was also opposed by the Bar.<sup>151</sup> Direct access would, of course, affect the barristers relationship with his 'lay' client. Barristers will have a contractual relationship with the lay client and be able to sue for their fees.<sup>152</sup> The Marre Committee did not recommend fusion of the two branches, concluding that there is no public benefit to be derived from such a reform.<sup>153</sup> Nor was there a recommendation to remove self regulation which was seen as the citizens' best safeguard against tyranny. The Marre Committee came to no conclusion on contingency fees, merely recommending further study and discussion of the problem. There have been many studies of this issue<sup>154</sup> and currently a working group established by the Law Reform Committee of the Bar Council is active in this respect.<sup>155</sup> No changes to the immunity of advocates was recommended.<sup>156</sup>

Lord Mackay announced in late October 1988 that he would be preparing three Green Papers on Law Reform early in 1989. The Green Papers were published in January

1989.<sup>157</sup> The main papers are concerned with rights of audience in higher courts, fusion of the two branches of the legal profession, multidisciplinary practices, the eligibility of solicitors for the High Court Bench and an end to the probate monopoly. In addition, the debate about the desirability of contingency fees is set to assume a high profile.<sup>158</sup> Such fee arrangements have generally not been approved by the legal profession. The matter might be taken out of its hands.

Response at this early stage, to the Lord Chancellor's proposals seem to be mixed. Before publication of the Green Papers Lady Marre, stated that even though the main thrust of her report had been supported by the Lord Chancellor, she considered the time scale to be too short. Within the profession the short-time frame has been welcomed by some on the basis of need to remove restrictive practices and commercial sense.<sup>159</sup>

Whatever the outcome in respect of proposed changes, the future will involve change and the challenge that goes with change. A constructive response from the legal profession is necessary if the confidence of the public dependent upon the provision of legal services is to be maintained. The maintenance of that confidence is in the interest of the professions. All may benefit therefrom.

## Notes

1. See R M Jackson and J L Powell Professional Negligence. Sweet and Maxwell 1982 p.192 and infra.
2. Jackson and Powell op.cit p.200
3. [1969]1AC191
4. Mathew v Maughold Life Assurance Co Ltd. The Times February 19th 1987 per O.Connor J: 'Outside the area of his immunity a barrister was subject to the same rules as other professional men when it came to deciding whether negligence had been proved. The standard expected was that of the ordinary skilled man exercising and professing to have a specialist skill'.
5. Jackson and Powell op.cit 202.
6. The Times February 19th 1987.
7. The barrister 'was fully entitled to assume that it was [the family solicitor] who was monitoring the scheme for [the lay client] and that [the family solicitor] was at least familiar with what had been arranged even if he did not understand the tax effect'.
8. cf in medical negligence case the protective relationship which appears between consultant and junior doctor.
9. [1984] 1 ALL ER 321, The Times November 21, 1983.
10. Q - clinical judgment?
11. The requirement of proper instructions imposes a duty upon the solicitor.
12. 'The solicitor is highly trained and expected to be experienced in his particular fields of law and he does not abdicate all responsibility whatever by instructing counsel: [1984] 1 All ER 321 at 335 per Dillon L J.
13. The solicitor 'has to consider for himself the effect of the change of circumstances, to use his own common sense and to form his own opinion, though obviously in doing that he will take the view expressed by counsel into account'.
14. The Daily Telegraph, September 18th, 1987.

15. In the case of solicitors at least. *Stewart Wrightson Group Ltd v Crocker* (1979) 124 S.J. 83. per Lord Denning's view in *Whitehouse v Jordan* [1980] 1 ALL 650 at 658. Such a view must now be read, however, subject to the House of Lord's decision in *Whitehouse v Jordan* [1981] 1 WLR 246.
16. [1980] AC 198.
17. It is to these clients that the appellation 'lay client' is given in the context of barristers' liability.
18. as opposed to barristers.
19. with the exception of advocates' immunity (*infra*).
20. *Professional Negligence* R M Jackson and J L Powell 1982 p.5.
21. 'The retainer' is the foundation upon which the relationship of solicitor and client rests. Without a retainer that relationships cannot come into being... A retainer is a contract whereby in return for the client's offer to employ the solicitor, the solicitor expressly or by implication undertakes to fulfil certain obligations... The obligations deriving from the retainer and imposed upon the solicitor are:
  - i) Those expressly agreed upon when the retainer was constituted or subsequently varied by mutual consent;
  - ii) Those which the law will imply from the circumstances where nothing has been expressly agreed; and
  - iii) Those expressly implied by law which are applicable to the particular retainer: *Cordery's Law relating to Solicitors* ed Frederic T. Horne. 8th ed 1988, Butterworths p.49.
22. *Cordery op.cit* p.52.
23. per Denning L J in *Griffiths v Evans* [1953] 1 WLR 1424,
24. per Scott L J in *Groom v Crocker* [1939] 1 KB 194 at 222.
25. It is usually an implied term, *inter alia*, that the professional man will exercise reasonable skill and care: *Professional Negligence* R M Jackson and J L Powell 1982, p.5

26. per Oliver J in *Midland Bank v Hett, Stubbs & Kemp* [1979], Ch 384 at 402.
27. *Bean v Wade* (1885) 2 T.L.R.157, *Blyth v Fladgate* [1891] 1Ch 337, *Groom v Crocker* [1939] 1 KB 194.
28. per Oliver J in *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384 at 430.
29. *Lanphier v Phipos* (1838) 8 C.&P. 475 at 479 (a medical negligence case) per Tindal C J.  
 'Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill'.

*Greaves v Baynham Meikle* [1975] 1 WLR 1095 at 1100 per Lord Denning M.R.

'Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case'.

*Harmer v Cornelius* (1858) 5 C.B. (N.S.) 236 at 246 per Willes, J.,

'Spondes peritiam artis. Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each implicitly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation or undertaking to all the world that the profession possesses the requisite ability or skill'.

30. Charlesworth on Negligence 6th ed p.926.
31. *Argyll v Beuselinck* [1972] 2 Lloyd's Rep.172 at 183 per Megarry J (obiter)  
 'The essence of the contract of retainer, it may be said, is that the client is retaining the particular solicitor or firm in question; and is therefore entitled to expect from that solicitor or firm a standard of care and skill commensurate with the skill and experience which that solicitor or firm has. The uniform standard of care postulated for the world at large in tort hardly seems appropriate when

the duty is not one imposed by the law of tort but arises from a contractual obligation existing between the client and the particular solicitor or firm in question'.

32. Greaves v Baynham Meikle [1975] 1 WLR 1095; [1975] 3 ALL ER 99 IBA v EMI and BICC (1980) 14 Build L R 1
33. Midland Bank v Hett, Stubbs & Kemp [1979] Ch 384 at 402-3 per Oliver J, 'The test is what the reasonably competent practitioner would do having regard to standards normally adopted in his profession, and cases such as Duchess of Argyll v Beuselinck [1972] 2 Lloyd's Rep. 177; Griffiths v Evans [1953] 1 WLR 1424 and Hall v Meyrick [1957] 2 Q.B. 455 demonstrate that the duty is directly related to the confines of the retainer'.
34. IBA per Lord Scarman at p.48.
35. In IBA the House of Lords did not decide the issue of simple contractual obligation. Lord Scanan considered the issue obiter at p.48. In doing so his Lordship founded himself upon Samuels v Davis [1943] 1 KB 526 that a professional man 'is bound to take reasonable care and to show such skill as may be expected from a qualified practitioner. The case is entirely different where a chattel is ultimately to be delivered'. Thus where a dentist agrees to make a denture for his patient. Despite the view expressed in Harmer v Cornelius (supra) is it not reasonable to expect a chemist to supply the correct drug or the watchmaker to supply a good time-piece. In Greaves v Baynham Meikle (supra) also the consulting engineers had given a warranty that they would achieve a certain result.
36. SCM (United Kingdom) Ltd v W J Whittall & Son Ltd [1971] 1 QB 337, Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] QB 27.
37. Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465.  
Dorset Yacht Co Ltd v Home Office [1970] AC 1004,  
Anns v Merton London Borough Council [1977] AC 729.
38. [1978] AC 729 at 751-752 per Lord Wilberforce.
39. [1932] AC 562.
40. [1964] AC 465.
41. [1970] AC 1004

42. Junior Books Ltd v Veitchi Co Ltd [1983] AC 520 H.L.  
Candlewood Navigation Corporation Ltd v Mitsui O S K  
Lines Ltd [1986] AC 1(P.C.)
43. Anns was not followed by the High Court of Australia  
in Shire of Sutherland v Heyman [1985] 59 ALJR 564
44. Governors of the Peabody Donation Fund v Sir Lindsay  
Parkinson & Co Ltd. [1985] AC 210 241 per Lord Keith  
of Kinkel
45. Leigh and Sullivan Ltd v Aliakmon Limited [1986] 2  
WLR 902, 913.
46. Yuen Kun Yeu and Others v Attorney General of Hong  
Kong The Times, June 11th 1987.
47. as in a case like Rondel v Worsley [1969] 1 AC 191.
48. [1932] AC 562 at 580
49. [1964] AC 465.
50. [1970] AC 1004.
51. [1983] AC 520.
52. [1987] 2 All ER 705.
53. Jarvis v Moy, Davies, Smith, Vandervell and Company  
[1936] 1 KB 399 (Stockbrokers).  
Groom v Crocker [1939] 1 KB 194 (solicitors).  
Bagot v Stevens, Scanlon & Co Ltd [1966] 1 QB 197  
(architects).
54. (1844) 11 Cl & F, 1, 44.
55. Per Winfield Province of the Law of Tort. See Clark  
v Kirby-Smith, Cooke v Swinfen and Heywood v Wellers.  
p.65.
56. [1984] 100 LQR 680, 688-9.
57. eg Boorman v Brown [1844] 11 Cl & Fin, 1 at 44;  
[1844] 3 L.T. (O.S.) 125; Davies v Hood [1903] 88  
L.T. 19 at 20, Nocton v Ashburton [1914] A.C. 932 at  
956.
58. eg Howell v Young (1826) SB & C 259 and Bean v Wade  
(1885) 2 T.L.R. 157.
59. [1939] 1 K.B. 194.

60. Jackson and Powell Professional Negligence 2nd ed p.195.
61. Clark Kirby-Smith [1964] 1 Ch 506; Cooke v Swinfen [1967] 1 WLR 457; Heywood v Wellers [1976] QB 446.
62. 'The Liability of Solicitors in Tort' [1984] 100 LQR 680
63. op.cit 688.
64. op.cit 700
65. [1939] 1 KB 194
66. op.cit 701.
67. (1861) 5 Macq 167.
68. [1939] 1 KB 194.
69. [1964] Ch 506.
70. ibid.
71. [1964] AC 465
72. The idea that there might be liability in tort also was put forward by the plaintiff.
73. [1939] 1 KB 194 at 205, cited in Clark v Kirby-Smith at 510.
74. Dutton v Bognor Regis U.D.C. [1972] 1 QB 373 at 394-395.
75. Esso Petroleum Co Ltd v Mardon [1976] QB 801 at 819.
76. [1914] AC 932.
77. Batty v Metropolitan Realisations [1978] QB 554.
78. [1979] Ch 384.
79. [1972] 1 Q.B. 373; [1972] 2 WLR 299; [1972] 1 All ER 462.
80. [1979] CL 384 at 417.
81. [1923] AC 562.
82. [1967] AC 465.
83. [1970] AC 1004.

84. [1978] AC 728.

Ormrod L J also thought that too restrictive a view, such as that expressed in *Mutual Life and Citizen's Assurance Co. Ltd. v Evatt* [1971] AC 793 by the Privy Council, would virtually eliminate the effect of the decision of the majority in *Hedley Byrne*

85. [1984] 100 LQR 680.

86. [1987] AC729

87. at pp.751-752

88. If the opinion of the Privy Council in *Yuen Kun Yeu and Others v Attorney General of Hong Kong* (1987) is accepted then liability might be even more restricted. The Privy Council believed that Lord Wilberforce's judgment in *Anns* had been too widely interpreted.

89. [1980] Ch 297.

90. [1982] 1 WLR 86.

91. [1980] 1 Ch 297; [1979] 3 WLR 60; [1979] 3 All ER 580.

92. [1939] IK B 19

93. [1964] Ch 506

94. [1976] QB 801

95. [1979] 3 WLR 605 at 613.

96. at page 614.

97. [1932] AC 56

98. [1970] AC 1004, 1027

99. [1978] AC 728 at 751-752

100. *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453;  
*Weller v Foot and Mouth Disease Research Institute* [1966] IQB 569;  
*S.C.M. (United Kingdom) Ltd v W.J. Whittall & Sons Ltd* [1971] IQB 337;  
*Spartan Steel & Alloys v Martin & Co (Contractors) Ltd*[1973] QB 27.

101. Counsel had also contended that even if the plaintiff had relied on the solicitors such advice was confined "to negligent statements of fact, or opinions on matters of fact, and had not application to statements or opinions on matters of law, or to advice whether on law or fact" - at page 619, per Sir Robert Megarry V.C. However, his Lordship referring to the ambit of the Hedley Byrne decisions "was unable to see what magic there was about law that would remove it from the sphere of Hedley Byrne, or for that matter, why all advice should be outside it:, and referred to a similar opinion of Oliver, J, in Midland Bank that the decision in Hedley Byrne "applied to representations and statements of fact, opinion or advice" - also at page 619.
102. [1970] 2 QB 223
103. On this generally see Winfield and Jolowicz on Tort 12th edition by WVH Rogers, pages 90-92 particularly the prophetic example on page 273. This example may also be found in the 8th, 9th, and 11th editions of that work. In 11th ed., p.273.
104. per Salmon, L.J., [1970] 2QB at page 278.
105. [1979] 6 WLR 623.
106. eg. Wellers case, and see particularly the judgment of Lord Denning M.R. in Spartan Steel at page 37.
107. per Cardozo, C.J. in Ultramares Corporation v Touche (1931) 174 N.E. 441
108. at page 614.
109. The Times November 19, 1986 [1987] 2 WLR 469; The Times, February 27, 1988; [1988] 2 WLR 671; (1988) NLJLR 62(C.A).
110. J.M. Kaye 'The Liability of Solicitors in Tort [1984] 100 LQR 680.
111. The Daily Telegraph November 23, 1987 The Times November 16, 1987.
112. The Times November 19, 1986; [1987] 2 WLR 469.
113. B. Markesinis 'Fixing Acceptable Boundaries to the Liability of Solicitors' [1987] 103 LQR 346.
114. The Times June 11, 1987.
115. [1983] A.C. 410 at 420.

116. see footnote 107 (supra).
117. [1987] 103 LQR 346 at 349.
118. [1980] 1 Ch 297.
119. [1987] 2 WLR 469 at 477.
120. [1987] 2 WLR 469 at 477.
121. Markesinis op.cit 349.
122. S.E. Foster 'The duty of care owed by solicitors to potential beneficiaries' (1988) 85 LSG 14.
123. P. Sutherland 'Solicitors' Liability for Negligence in Australia and the United Kingdom [1984] 33 ICLQ 471.
124. Ross v Caunters was accepted in Western Australia in Watts v Public Trustee for Western Australia [1980] WAR 97.
125. Seale v Perry and Another [1982] VR 193.
126. MacPherson v Kelly (a firm) v Kevin J. Prunty Associates [1983] VR 573.
127. [1982] V.R. 193. J.G. Fleming An Introduction to the Law of Torts O.U.P. 2nd ed p.65 '(based on lack of reliance and absence of a vested interest)'
128. [1976] QB 801 at 819-20; [1976] 2 All ER 5.
129. McGarvie J thought that principles contained in recent authorities showed that a solicitor did owe beneficiaries a duty of care. However, he could not hold that view as Robertson v Fleming (1861) 4 Macq 167 precluded him from so doing i.e. that the duty of care was owed only to the retaining client.
130. [1983] VR 573 at 604.
131. [1983] VR 573 at 580. See also Hawkins v Clayton (1988) 62 A.L.J.R. 240 discussed in Fleming 'Must a Solicitor Tell?' [1989] 105 LQR 16.
132. Rowe v Turner Hopkins & Partners [1980] 2 NZLR 550  
Gartside v Sheffield, Young & Ellis [1981] 2NZLR 547
133. Power v Halley (1978) 88 DLR (3d) 381
134. Sutherland op.cit 476.

135. Kaye op.cit 716.
136. Rondel v Worsley [1969] 1 AC 191.  
Saif Ali v Sydney Mitchell & Co [1980] AC 198.  
Demarco v Ungaro (1979) 95 DLR (3d) 385.
137. The Times June 11, 1987. This case played an important part in both Al-Kandari and Clarke
138. [1978] AC 728; [1977] 2 WLR 1024.
139. [1986] 1 AC 80 at 107 per Lord Scarman. 'Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordship believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of actions'. Lord Scarman cited Lord Radcliffe in Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555 at 587: 'Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed is inherently one of contract, it seems to be entirely correct to attribute the duties which arise from that relationship to implied contract.'

Lord Scarman then went on to say in Tai Hing at p.107 'Their Lordships do not, therefore, embark on an investigation as to whether in the relationships of banker and customer it is possible to identify tort as well as contract as a source of the obligations

owed by the one to the other. Their Lordships do not, however, accept that the parties mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract.'

However that is not to say that even though the obligations in tort and in contract are the same, there may still be other advantages to be sought e.g. the limitation rules. It is one thing to state that where there is a contract there should be recourse to the contract for the determination of liability. It is another matter entirely that where there is concurrency of action the plaintiff may choose which one to pursue as hitherto, unless, of course, there is an express policy to restrict the choice. See also Logie 'The Basis of a Solicitor's Liability to his Clients: Rethinking the Rules Again' (1986)83 LSG 3348.

140. Clarke v Bruce Lance & Co (supra)
141. [1983] NZLR 37 at 44.
142. Ruination of firms is surely not the objective but see Report of Royal Commission on Legal Services Cmnd 7648 para 23. 30
143. [1987] 103 LQR, 346 at 347-348.
144. Cmnd 7648, Paras 23.28 - 23.30.
145. [1986] 1 AC 80 at 107.
146. supra. e.g. the call for estate agents to produce an ethical code of practice by which they would be governed: The Daily Telegraph November 16, 1988.
147. 'Every profession is becoming acutely aware that its role in society can only be justified by careful attention not to self-interest, or to group interests, but to the interests of the public.' The Sunday Telegraph October 2, 1988.
148. The Daily Telegraph, July 11, 1988.
149. A Time for Change, Report of the Committee on the Future of the Legal Profession. For accounts see The Times, July 11, 1988; The Daily Telegraph, July 14, 1988; The Independent, July 14, 1988; The Guardian, July 14, 1988.
150. The Times, July 14, 1988 cf The Daily Telegraph, July 14, 1988.

151. A Law Society proposal for direct access in March 1988 was described by the chairman of the Bar Council's Public Affairs Committee as the 'most destructive suggestion' offering no public benefit: *The Daily Telegraph*, March 14, 1988. However, the Bar Council has announced that it will agree to changes which will allow members of other professions to brief counsel: *The Daily Telegraph* November 17, 1988. The announcement also refers to possible changes in the barrister's contractual position, for an explanation of which see *infra*.
152. M. Simmons 'Fusion, confusion and the public interest' (1988) 132 S. J 670.
153. Confirming the conclusion of the Royal Commission Legal Services in 1979. Cmnd 7648, Chapter 24.
154. The Law Society conducted such a study and concluded no change in the rules prohibiting the practice: *The Daily Telegraph* July 14, 1988.
155. See also *The Daily Telegraph*, July 12, 1988.
156. For discussion of immunity (*infra*) Chapter 5.
157. See Conclusion for more detail.
158. *The Lawyer*; November 1, 1988, p1.
159. *ibid*

## Chapter 5

### Advocates' Immunity

The general trend outlined previously indicates that lawyers are subject to control by the courts in respect of the quality of the service they provide. There is no reason to suppose that the position of lawyers, in particular solicitors, should in general terms be different from any other person as far as actions for professional negligence are concerned. The position of the barrister, however, requires further consideration.

Within the context of professional negligence the position of the barrister is anomalous. Alone among professional persons the barrister enjoys an immunity from suit for negligence, although the extent of such immunity is subject to limitations. Such a statement is not to deny that barristers do attract liability in negligence for the way in which they provide some of their professional services. However, the extent of the immunity and liability appears to be in a state of flux and will yet require further examination before a clear picture begins to emerge. The leading case on the subject of immunity is *Rondel v Worsley*<sup>1</sup> although there have been subsequent developments.<sup>2</sup>

According to Jolowicz<sup>3</sup> it is clear from *Rondel v Worsley* that barristers, in common with other

professionals, owe a duty of care to their clients. He based this view in part upon the dictum of Lord Morris<sup>4</sup>:

'I see no reason to doubt that when retained a barrister owes a duty to exercise due and reasonable care and skill. In this respect he is, in my opinion, in the same position as the members of other professions.'

Lord Reid similarly saw little reason why the liability of counsel should be different from that of members of any other profession who give their professional advice and services to their clients. The members of every profession are bound to act honourably and in accordance with the recognised standards of their profession.<sup>5</sup>

Wherein, therefore, lies the difference in treatment of barristers which distinguishes them from the members of other professions when facing an action in negligence? The answer to this question today rests on public policy but historically the rationale is not so clear.

The origin of the legal profession in England is medieval, although in the beginning the Bar was the only representative. Plucknett states 'it is certain that (around 1300)... was the moment when the profession of the law was acquiring its permanent organisation which was to last all through the Middle Ages, survive the desperate trials of Henry VIII's reign and endure in large part until today.'<sup>6</sup> The English system of professional organisation differed from that prevailing on the

continent in that the judiciary was appointed from members of the Bar:

'The English method of appointing outstanding members of the bar to sit on the bench of the superior Courts is, in fact, typically medieval, and is the product of more than two centuries. The year 1300 may be taken as the turning point; after that date it was the general rule for judges to be appointed from among the most eminent members of the bar. Prior to that date, it was more usual for royal clerks and administrative officials to be raised to the bench.'

Because of this established custom of recruitment for the bench from the bar, the profession became unified. But the recruitment was from a particular branch of the bar: the serjeants. The serjeants benefitted due to the centralization of government in England. The legal profession grew with centralized government and the administration of royal justice, particularly in the acquisition of jurisdiction by the Royal Courts at Westminster.<sup>8</sup> By the 14th century it became established that only serjeants could become judges. In addition, it appeared that as the Crown began to call men to be serjeants, this call could not be refused. In time, the serjeants became associated with the Court of Common Pleas and had an exclusive right of audience there. Ultimately, the serjeant became a Crown official.<sup>9</sup>

The development of the order of serjeant does not explain how the legal work of England was conducted. There had never been many serjeants and they could not have conducted all of the business of the Court of Common

Pleas. To explain this gap, reference has to be made to the so-called 'apprentices',<sup>10</sup> Although little is known of these 'apprentices' they have little in common with the notion of indentured trainees. They were 'men of eminence in their profession, competent to give the government useful technical advice, of sufficient substance to be taxed on the highest scale of the profession, and, ...fit to be entrusted with the very responsible task of legal education.'<sup>11</sup> Even so Plucknett is still uncertain about the place of the apprentice in the professional organisation. However, he speculates that in 1292 an apprentice may well have addressed the Court of Common Pleas. A writ of that year granted 'exclusive audience to such "apprentices and attorneys" as the Court may select.' This writ probably left the serjeants unaffected but enlarged the group of persons eligible to practice before the Court of Common Pleas.<sup>12</sup> Intimately connected with the order of serjeants are the Year Books, a principal source of legal history. The Year Books are remarkable in their deference to the serjeants and their almost total absence of reference to apprentices.<sup>13</sup> The Year Books appear to have had a small circulation and directed by serjeants for the use of serjeants. At the present day, the order of serjeants is no more but 'every barrister is the historical successor of the thirteenth century apprentice.'<sup>14</sup>

Consideration of the early years of the legal profession and the Year Book is instructive. Based upon such references, Lawton J, in *Rondel v Worsley*<sup>15</sup>, concluded that at 'about 1435, the leaders of the legal profession, namely, the serjeants at law and the judges, accepted that lawyers who did not do their work properly were liable just as farriers and carpenters were...'<sup>16</sup> Not only were counsel liable to their clients but also, when a barrister was retained as counsel he had a right of action against his client for his fee.<sup>17</sup> Bolland<sup>18</sup> considered that counsel's liability for negligence and the right to sue for fees continued at least until 1451 and thereafter became extinguished. This extinction occurred<sup>19</sup>, according to Bolland, before 1615 although Rastell<sup>20</sup> in 1596 and a case report of 1605<sup>21</sup> indicate no change<sup>22</sup> Baker confirms 'that in medieval times the retainer of men of law was a binding covenant or contract.'<sup>23</sup> Counsel could both sue and be sued upon this retainer. This rule operated up to the middle of the 16th century. Baker adds there was no limit of immunity in medieval times'.<sup>24</sup>

Thus, it seems reasonable to conclude that some time between 1605 and 1615 counsel acquired immunity from suit in negligence and suffered the inability to sue for fees. In 1615, Sir John Davys observed<sup>25</sup> of counsel that 'the fees and rewards which they receive, are not of the nature of wages, or pay, or that which call salary or hire, which

are indeed duties certain and grow due by contract for labour or service, but that which is given to a learned counsellor is called honorarium, and not merces, being indeed a gift which giveth honour as well the the Taker as to the Giver; neither is it certain or contracted for ...the worthy Councillor may not demand it without doing wrong to his reputation.' Even so there is still reference to contractual capacity to sue in 1652 in which year there is reference to a retainer and a claim for five years arrears.<sup>26</sup>

At this juncture it is probably worth observing that other changes affecting the legal profession had taken place. During the middle ages communication between counsel and client was direct. Up to the middle of the 16th century clients had to find their counsel direct and it was only thereafter that solicitors were increasingly consulted who would in turn instruct counsel.<sup>27</sup> Even up to 1640 serjeants newly created were instructed not to take briefs from solicitors but to draw the briefs themselves.<sup>28</sup> It was only in the 1650's that counsel began to abandon direct consultation and to rely upon the instruction of solicitors. Today, this practice is regarded as etiquette but at that time it was regarded as a time saving device contrary to the best opinion of what was correct. At the same time that this transition in practice was taking place, social changes were also affecting the bar. Members now had to be genteel - not

concerned with earning a living. Social contact with the lower branch was prohibited by rules of etiquette. To this end barristers sought to maintain superiority by excluding attorneys from the Inns of Court in 16th and 17th centuries.<sup>30</sup> Gentlemen, therefore, would perform their services for an honorarium and not a salary or wage. As previously stated, the notion of the honorarium has been attributed to Serjeant Davys. Whether or not Davys was the originator of this doctrine is uncertain, but Baker considers him to be influential.<sup>31</sup> Eight years earlier in 1607 this notion of honorarium had been applied,<sup>32</sup> and in 1610 the principle had received judicial support.<sup>33</sup> Baker attributes to Davys the first clear statement of the honorarium principle.<sup>34</sup>

Whatever the genesis of the honorarium doctrine, it appears to have become generally accepted from the middle of 17 century although not, at that time, tested in court. There followed from the beginning of 18 century judicial affirmation of the principle. In 1714, Powys, J., in Dean's case<sup>35</sup> ruled that 'if gentlemen of the Bar would not take fees "after the usual manner" (in advance), they ought not to be allowed to recover them in an action at law'.<sup>36</sup> From 1742 onwards Lord Hardwick declared himself a staunch proponent of the principle in three judgments between 1742 and 1754. In *Thornhill v Evans* (1742) he posited 'Can it be thought that this Court will suffer a gentleman of the Bar to maintain an action for fees which

is quiddam honorarium',<sup>37</sup> and refused to allow a barrister to recover his fees.<sup>38</sup> To Lord Hardwicke's view can be added the considerable weight of Blackstone who, in his Commentaries<sup>39</sup> stated:

'It is established with us that a Counsel can maintain no action for his fees which are given ...not as salary or hire, but a mere gratuity, which a Counsellor<sup>40</sup> cannot demand without doing wrong to his reputation'.

But lest it be thought that the disability was a one way process detrimental to a counsellor Blackstone continued with a statement pertaining to advocates' immunity:

'And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may insinuate even into the most honourable profession) it hath been holden that a counsel is not answerable for any matter by him spoken, relative to the counsel in hand, and suggested in his clients instructions; although it should reflect upon the reputation of another and even though absolutely groundless: but if he mentions an untruth of his own invention, or even upon instructions if it be impertinent to the cause in hand, he is then liable to an action from the party injured.'<sup>41</sup>

By the use of the word 'reputation' Blackstone is referring to immunity from suit in defamation, not negligence. Roxburgh states that there was no immunity with regard to negligence in Blackstone's time.<sup>42</sup>

However, the basis of the immunity from defamation and from negligence is essentially the same, viz. the better maintenance of the administration of justice. These two different immunities are separate strands of a

policy serving the same overall purpose.<sup>43</sup> Therefore, a policy of some advocates' immunity certainly existed in Blackstone's day.

Although there was no immunity from negligence the idea gained in popularity, the notion of inability to sue for fees (honorarium) and immunity from suit becoming linked. In *Fell v Brown* (1741)<sup>44</sup> Lord Kenyon dismissed an action for negligence against a barrister. That same year, Lord Kenyon stated in *Turner v Phillips*<sup>45</sup> the general opinion of the profession that fees were a present from the client to barristers and not a payment for labour. In addition, his Lordship dismissed the proposition that counsel could be liable for *crassa negligentia*. The 19th century produced other cases continuing this line of development.<sup>47</sup> Pollock C B in the classic case on immunity, *Swinfen v Lord Chelmsford*,<sup>48</sup> in 1860, ruled that members of the Bar 'have no legal claim to any remuneration for the services they render, though they usually receive a fee, a honorarium, and they undoubtedly (in the ordinary course of business) enter into no express contract.....and it may be very safely asserted that there is no instance of any action being successfully brought against a barrister for neglect of duty; and on the other hand, there are instances where such an action has been successfully resisted. Upon an express agreement he would no doubt be liable as any other person party to a contract.....We are all of opinion

that an advocate at the English bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express or implied. Cases may, indeed occur, where, on an express promise (if he made one) he would be liable in assumpsit; but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client, but the court in which the duty is to be performed, and the public at large, have an interest.<sup>49</sup> Pollock C B concluded '...and I think it right to express my own opinion that provided an advocate acts honestly, with a view to the interests of his client, he is not responsible at all in an action. It seems admitted on all hands that he is not responsible for ignorance of law, or any mistake of fact, or for being less eloquent or less astute than he was expected to be. According to my view of the law a barrister, acting with perfect good faith and with a single view to the interests of his client, is not responsible for any mistake or indiscretion or error of judgement of any sort.'<sup>50</sup>

With *Kennedy v Broun* in 1863<sup>51</sup> the position relating to fees appeared to become consolidated. Erle C J<sup>52</sup> considered 'that a promise to pay money to a counsel for his advocacy made before, or during or after the litigation, has no binding effect; and furthermore, that the relation of counsel and client renders the parties

mutually incapable of making any contract for hiring and service concerning advocacy in litigation....in all the records of our law... there is no trace whatever either that an advocate has ever maintained a suit against an advocate for break of contract to advocate...The proposition is confined to incapacity for contracts concerning advocacy in litigation. This class of contracts is distinguished from other classes on account of the privileges and responsibility attached to such advocacy: and on this ground, we consider the cases unconnected with such advocacy to be irrelevant.' His Lordship added that physicians suffered from no such incapacity. 'We know of no incapacity affecting a physician. According to usage, physicians practice for a fee which is honorarium, not merces; and no action lies where the parties are presumed to have acted according to this usage. But, if the presumption is rebutted by evidence of an express contract, such contract binds, and the physician may sue and be sued thereon.'<sup>53</sup>

Further consideration of *Kennedy v Broun* reveals issues of policy. Why is it that one professional group cannot sue in respect of fees obtained by way of honorarium for litigation and yet another respectable and dignified group, obtaining fees on much the same basis, can? The answer lies in policy. The advocates' incapacity rests on the relationship of client and counsel in litigation i.e. services as an advocate.<sup>54</sup> 'The

incapacity of a client in litigation to make a contract of hiring affects the integrity and dignity of a advocates, and so is in close relation with the highest of human interests, viz. the administration of justice.'<sup>55</sup> But why would a contract defeat the interests of justice? In the opinion of Erle CJ contractual obligations would divert the advocate from his duty to the court in favour of his clients' wishes as expressed in the contract,<sup>56</sup> would degrade the standards necessary to perform the duty and would create interests in litigation contrary to the policy on maintenance. In short, Erle CJ could perceive no simple benefit to redeem the general and inevitable decline associated with contractual obligations.<sup>57</sup>

Cases decided subsequently to *Kennedy v Broun* confirm the contractual incapacity of an advocate. In *Mostyn v Mostyn* in 1870,<sup>58</sup> where a barrister claimed that a contract with a client in non-litigious business could be created, the court held that the claim against the client was moral, not legal. Fees in respect of non-litigious business could be recovered only on proof of an express contract with the client. According to Erle CJ, in *Kennedy v Broun*,<sup>59</sup> an express contract and an implied contract differ only in mode of proof. But in *Mostyn v Mostyn* there is a suggestion echoing the liability of a physician, i.e. a presumption of incapacity in non-litigious work which may be rebutted by evidence of an express contract.<sup>60</sup> Thus, proof of such an express

contract to pay would convert the moral obligation into a legal one.

The inability of counsel to contract for fees was recognised in a Canadian case brought before the Privy Council, but not on the basis of the reasons given in *Kennedy v Broun*. The consideration of public policy was regarded as unnecessary in *R v Doutre*.<sup>61</sup> Usage and the particular constitution of the English Bar provided sufficient explanation of the rule.<sup>62</sup> Lord Watson recognised the different systems operating in Canada, distinguishing between Quebec, when counsel could recover fees, and Ontario, where, having a system in which the law of England prevailed, counsel could not.<sup>63</sup> It was assumed that *Kennedy v Broun* correctly applied the English position on counsel's fees but on the basis of usage, not policy. A client retains counsel upon the usual terms. In England, the usual terms were to render services of a purely honorary character.<sup>64</sup> Similarly, counsel who 'combines in his own person the various functions which are exercised by English practitioners of every class in England, all of whom, the Bar alone expected, can recover their fees by an action at law'<sup>65</sup> such as in Quebec, is allowed 'by law and practice to sue for his fees.'<sup>66</sup>

But a concentration upon counsel's inability to sue for fees may do this investigation a disservice. That such incapacity was regarded as existing is important not for its own sake but as the foundation of the rule, albeit

one that had emerged centuries before, that a counsel could not be liable for negligence. In 1896<sup>67</sup> Lindley L J, in considering the consequence of allowing a barrister to rely on a contract for fees, opined 'It would, I think, be much regretted if this Court, either by itself or by its officers, did anything to enable counsel to recover his fees from his client, whether the lay client or his solicitor client. Fees are payable as a matter of honour. The solicitor can, if so required by counsel, be compelled either not to retain him or to pay his fees with the brief. That is the remedy of counsel, and he had it in his own hands. If he does not choose to insist on payment of his fees with the brief, the payment becomes a matter of honour, not of legal obligation...I think it is of the utmost importance that the court should not assist barristers to recover their fees. If they do so, the whole relation between a barrister and his professional client will be altered... The inevitable result will be to do away with that which is the greatest protection of counsel against an action for negligence by his client.'<sup>68</sup>

Lopes and Rigby LJJ agreed,<sup>69</sup> the former asserting. 'The decision of the Court of Common Pleas in *Kennedy v Broun* has always been acted upon, and it establishes the unqualified doctrine that the relation of counsel and solicitor renders the parties mutually incapable of making

any legal contract of hiring and service in regard to litigation.'<sup>70</sup>

In the light of this line of judicial authority it is hardly surprising that the textbooks of the period and the succeeding years reproduce the same rule as proposed in *Kennedy v Broun* and later developed. For example, Pollock refers to incapacity to contract for services in litigation.<sup>71</sup> Bevan makes the distinction between litigious and non-litigious business, viz. 'Contracts in cases unconnected with advocacy... are not regarded as being within the incapacity, and consequently the ordinary rules as to the liability for negligence would apply.'<sup>72</sup> Contary to this, Halsbury does not make the distinction; indeed the opposite point is made that 'this immunity from action is not confined to litigation, but extends to all cases where the relation of counsel and client exists.'<sup>73</sup> Winfield regarded the exemption as 'inveterate, whatever might be its justification'.<sup>74</sup>

The modern law of negligence found its greatest expression in *Donoghue v Stevenson* in 1932.<sup>75</sup> Using Lord Atkin's test of foresight the approach to duty became more expansive. But, despite Lord MacMillan's dictum that 'the categories of negligence are never closed'<sup>76</sup>, the courts did not take the generalized view, preferring to develop the tort on a case by case basis. Thus, there were limitations on the expansion of the duty, perhaps most notably in the area of economic loss.<sup>77</sup> It would seem

that not all judges regarded Lord Atkin's 'neighbour' dictum as a statement of principle<sup>78</sup> or of policy. 'That "duty" raises a policy issue has only gained belated overt admission from judges steeped in the British positivist tradition.'<sup>79</sup>

One of the major effects of *Donoghue v Stevenson* was that the 'privity of contract fallacy' was exposed. Liability in tort no longer depended upon the presence of privity or a contract between the parties.<sup>80</sup> As a consequence, the proposition that barristers could not sue for their fees was weakened as a ground for denial of liability in negligence. Despite that, advocates' immunity continued to operate in the sense that no case had yet emerged denying it. However, following the House of Lords' decision in *Hedley Byrne v Heller* the absence of a contractual relationship between barrister and client was no longer adequate. The proposition was that 'if someone possessed of a special skill undertakes quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of law will arise'.<sup>81</sup>

In *Rondel v Worsley*<sup>82</sup> and subsequent cases,<sup>83</sup> this broad statement of Lord Morris in *Hedley Byrne* appears to be unquestioned. The difficulty was to become one of justifying the immunity if it was retained, and defining its extent.<sup>84</sup> Two issues appear to have emerged for consideration as to the scope and extent of advocates'

immunity. The first is in relation to work in court. The second, to pre-trial work in chambers<sup>85</sup>.

With regard to work in court, in *Rondel v Worsley* in 1966 the Court of Appeal decided that immunity was not based on the absence of contract between barrister and client, but on public policy and, according to Lord Denning M.R. and Danckwerts, L.J., long usage in that the administration of justice required fearless and independent advocacy. In addition, the absence of immunity would make the retrying of cases inevitable and contrary to the public interest, and finally, immunity exists because a barrister is obliged to accept any client.<sup>86</sup>

With regard to pre-trial work, immunity was thought to be appropriate by Lord Denning and Danckwerts LJ. (Salmon LJ dissenting). This immunity was again founded on long usage. But immunity was not to be extended to solicitor advocates. The reasons given were that solicitors entered into a contractual relationship with clients and, indeed, could reject clients. Other reasons were that solicitors and barristers were historically different professions and that a barrister faced professional hazards different from those of solicitors'.

In a notable dissenting speech, Salmon L J said that pre-trial issues were not required to be covered by immunity. That was not to say that it was not sometimes difficult to draw the line and to know whether or not an opinion or draft is in reality part of the management or

conduct of a civil or criminal action.<sup>87</sup> Lord Denning agreed with Lord Morris that contractual capacity was not relevant<sup>88</sup>; there had to be some other ground. Danckwerts LJ also thought<sup>89</sup> that by well known usage over the centuries instructions were accepted by barristers on the understanding that he would not be liable to an action in negligence. Thus, the Court of Appeal considered that the barrister advocate was immune from suit in negligence in the way in which he conducted litigation. The traditional immunity so far was reaffirmed. With regard to work conducted outside court, such immunity had yet to be developed. Lord Denning went on to say that in addition to court work there should be 'unrestricted immunity for work done in chambers in cases which might never come to court because he (counsel) should be able to give his opinion fully without being subject to fear. He (Lord Denning) did not think that the public interest required that a barrister should be made liable for negligence'.<sup>90</sup> Danckwerts L J also thought the immunity should extend to work in chambers, although he acknowledged that that part of the policy of immunity was not so obvious.

Salmon L J stated his opinion more clearly and, it is submitted, more consistently with the development of the tort of negligence. However, it is to pre-trial work that Salmon L J addressed his thoughts. His statement is of great value. 'The question is whether public policy demands that, in certain circumstances, the law shall

confer immunity from such actions ... I cannot agree with the view that in relation to matters unconnected with the conduct or management of a case in court the duty of a barrister to take reasonable care and his liability to be sued for breach of that duty should be any different from that of an accountant, architect, solicitor or surgeon ... No doubt this relationship can be restricted so that it does not impose liability; the professional man may expressly state that he is prepared to advise only without responsibility.<sup>91</sup> But there can be, continued Salmon L J, no implication 'that solicitors and counsel must be taken to act on the basis that there shall be no legal responsibility upon counsel to take reasonable care'.<sup>92</sup>

It is particularly unfortunate that no single convincing reason was given for the immunity.<sup>93</sup> However, Danckwerts L J stated 'Public policy in my view really is the reason for the barristers' immunity as regards proceedings in court'.<sup>94</sup> Perhaps in the light of subsequent cases we can be satisfied with this reason. In the lower court, Lawton J gave the reason for immunity from suit arising 'from the part which the advocate plays in the administration of justice, not from membership of an Inn of Court'.<sup>95</sup> This recognition of the reason behind the policy only seems, however, to make the treatment of solicitors by the Court of Appeal all the stranger<sup>96</sup>, because in considering whether a solicitor advocate should be liable in court work, contractual capacity now became

irrelevant.<sup>97</sup> So the unusual position had arisen that the solicitor could be sued even when acting as an advocate in court whereas a barrister when acting outside court could not.<sup>98</sup> According to Jolowicz the majority of the court gave two reasons for distinguishing between barristers and solicitor advocates. First, a solicitor makes a contract with a client; a barrister does not. Secondly, a solicitor may choose his client; a barrister may not. This distinction, says Jolowicz, is inappropriate '... once the barristers' immunity is seen to rest on public policy in relation to the administration of justice, it is particularly strange to see the existence of a contractual relationship between the solicitor and his client used to justify his liability...

... in *Rondel v Worsley* itself Lord Denning made it clear that the barristers immunity can no longer be grounded on the absence of a contract. The *Hedley Byrne* case "made it plain that the immunity can no longer be justified on the ground that a barrister cannot sue for his fees". 'Yet Lord Denning refers to a solicitor's contractual relationships with his client even to the point of locating the solicitors liability in contract and not tort. 'But' continues Jolowicz, 'how the presence of a contract makes the solicitor advocate liable when its absence is not the reason for the barristers immunity is not explained'.<sup>99</sup>

It seems, logically, that the Court of Appeal cannot have it both ways. Either contract is relevant or it is not. If it is not, and policy is the reason why immunity is conferred, then if two people, each from different branches of the profession but carrying out the same function, are treated differently by the law, the valid reasons remained to be given after the Court of Appeal decision.<sup>100</sup> On an issue as sensitive as barrister's immunity it was inevitable that the case would go to the House of Lords. Perhaps it was just as inevitable that the appeal would be dismissed as being 'devoid of merit'.<sup>101</sup> The House of Lords agreed that immunity should remain. But what is the basis of this immunity? What is its intent? Is immunity a rule or an exception to the rule? The majority of the Appellate Committee (Lord Pearce dissenting) thought that immunity is an exception to the rule of liability.

Lord Reid considered that the 'rule' of immunity was based on public policy.<sup>102</sup> This policy was related to the exceptional position of counsel while engaged in litigation. In litigation counsel was under a greater duty to the court than to his client. The discharge of his duty to the court may lead to a conflict with the client's personal interests. Indeed, this duty to the court may result in counsel acting in a way which the client considers detrimental to his case. The client would understandably be disgruntled if he were then to

lose his case.<sup>103</sup> But the policy of immunity is, said Lord Reid, limited to counsel engaged in litigation. Conflict of duty does not necessarily arise in relation to other functions of counsel and there his Lordship could see little reason why the liability of counsel should be different from that of members of any other profession who give their professional advice and services to their clients'.<sup>104</sup>

Lord Morris concurred. He, too, saw no 'reason to doubt that when retained a barrister owes a duty to exercise due and reasonable care and skill. In this respect, he is, in my opinion, in the same position as the members of other professions ... Accordingly, in my view, there cannot be, and indeed there ought not to be, any question of one profession being in a special position, save if at all, in such limited way as the public interest demands'.<sup>105</sup> Lords Upjohn and Pearson spoke in a similar vein.

Lord Upjohn: 'I think that public policy necessitates that, at all events in matters pertaining to litigation, a barrister should have this immunity'.<sup>106</sup> His Lordship made special reference to the counsel's duty to the court and possible conflict with the duty to the client<sup>107</sup> Lord Pearson: 'I think it is right to say that the barrister's immunity from liability for professional negligence in the conduct of litigation is an exception from a general rule

of professional liability. It is based on public policy'.<sup>108</sup>

On the relatively subsidiary issues of non-litigious work and solicitor - advocates immunity the House of Lords determined (Lord Pearson dissenting) that public policy was again the vital factor. Although the statements on this issue were obiter the general view was that no immunity was conferred where a negligence action is based on matters unconnected with cases in court. In such circumstances, failure to act with care and skill puts the barrister in no better position than any other professional person. Secondly, a solicitor acting as an advocate enjoys the same immunity as a barrister.

Thus ended the first modern consideration, i.e. post *Donoghue v Stevenson*,<sup>109</sup> of the issue of advocates' immunity, although with some questions left unanswered, or at best, partly answered, eg non-litigious work - pre-trial work. The matter seemed settled for the foreseeable future.

However, the issue reared its head once more and the Appellate Committee again considered the principle of barristers' immunity in litigation in *Saif Ali v Sydney Mitchell*.<sup>110</sup> In this case, the House of Lords made observations on the extent of advocates' immunity.

Lord Wilberforce in *Saif Ali* considered that the immunity conferred in *Rondel v Worsley* was 'held to exist on grounds, essentially of public policy, mainly upon the

ground that a barrister owed a duty to the court as well as to his client and should not be inhibited, through fear of an action by his client, from performing it; partly upon the undesirability of relitigation as between barrister and client of what was litigated between the client and his opponent. This necessarily involved a removal of the total blanket immunity and restriction of it to such cases as might fall within the area of public policy'.<sup>111</sup>

What then is the area of public policy? *Rondel v Worsley* had been concerned only with matters taking place in court resulting in an outcome undesirable to the client. Observations had been made in *Rondel v Worsley* on the extent of the immunity for matters taking place outside court and in barristers' chambers. Although the categories of negligence were expanding, Lord Wilberforce in *Saif Ali* did not consider that this would justify sweeping away an immunity from suit which had existed for centuries and had recently been restated in *Rondel v Worsley*.<sup>112</sup> Observations in *Rondel v Worsley* also showed that immunity was not limited to what happened in court but should include, as Lord Wilberforce put it in *Saif Ali*, 'some things which occurred at an earlier stage broadly classified as related to conduct and management of litigation'.<sup>113</sup> A helpful expansion of the phrase 'conduct and management' had been suggested by McCarthy, P., in the New Zealand Court of Appeal in *Rees v*

Sinclair<sup>114</sup> namely, that protection should be offered to pre-trial work, as well as that done in court, provided the particular work was 'so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.'<sup>115</sup> In Saif Ali, Lord Wilberforce held that this formulation was correct and added 'the formulation takes proper account, as it should of the fact that many trials, civil and criminal, took place only after interlocutory or pre-trial proceedings. At these proceedings decisions may often fall to be made of the same nature as decisions at the trial itself; it would be illogical and unfair if they were protected in the one case and not in the other. Secondly, a decision that a barrister's liability extends so far as I have suggested necessarily involves that it does not extend beyond that point. In principle those who undertake to give skilled advice are under a duty to use reasonable care and skill. The immunity as regards litigation is an exception from this and applies only in the area to which it extends. Outside that area the normal rule must apply.'<sup>116</sup>

Lord Diplock was concerned about a situation which distinguished barristers from other professional persons. Indeed, the trend as developed by the House of Lords was in the opposite direction i.e. 'to extend to new areas of activity the notion that a man is liable for loss or

damage to others resulting from his failure to take care.<sup>117</sup> Immunity could only be justified by policy.<sup>118</sup> Lord Diplock further considered that there were sound reasons for immunity but that only a limited immunity was justified<sup>119</sup> for two reasons. First, advocates' immunity was part of the general immunity granted to all persons participating in the judicial process and secondly, the maintenance of the integrity of justice. i.e. undesirability of collateral attack on the correctness of decisions except through the appeal process. Lord Diplock accepted the extension of immunity in *Rees v Sinclair* but added that it would not be wise to attempt a catalogue of before-trial work which would fall within extension of the area of immunity. Lord Salmon also concurred

On the other hand, Lords Russell and Keith dissented. Lord Keith thought that the immunity stated in *Rondel v Worsley* extended to 'all stages of a barrister's work in connection with litigation.'<sup>120</sup> He could not see any distinction between 'work in connection with litigation which affects the way the case is conducted when it comes to a hearing and that which did not.'<sup>121</sup> Lord Keith was, of course, recognising that the distinction is a fine one and 'avoids the logic that every request for and giving of advice has in it a seed of potential litigation.'<sup>122</sup>

A major difficulty with the limited immunity afforded to pre-trial work is indeed the definition. There is no catalogue of such work according to Lord Diplock, and

Zander forecasts that there will be further litigation on what constitutes pre-trial work. As the policy is one of restricted immunity one must only suppose that future cases may narrow the immunity further.<sup>123</sup> However, Lord Wilberforce does refer to interlocutory or pre-trial proceedings and Lord Russell referred in his dissenting speech to 'preliminary proceedings before a master' which 'may be regarded as upon the same basis as the trial.'<sup>124</sup> In Lord Russell's opinion 'if a decision by counsel was arrived at - albeit negligently - before trial which might well have been arrived at at trial, or before a master, it should not be open to a claim for negligence... His immunity from claims of negligence should (granted that it is to exist at all) extend to areas which affect or may affect the course of conduct of litigation, in which areas are to be found the public duty and obligation of the barrister to participate in the administration of justice. And this should be so even if the result of the alleged negligence is that litigation does not come about.'<sup>125</sup>

The policy behind conferring immunity, therefore, is the promotion of the administration of justice.<sup>126</sup> The policy is also expressed in terms of a function ie advocacy. There is no distinction between a barrister and a solicitor as regards immunity in the performance of the advocates' function.<sup>127</sup>

Whatever, therefore, might have been the basis of advocates' immunity in the past, there is no doubt that

now the reason is one of policy. But the policy of the law is not immutable<sup>128</sup> and the policy regarding the proper administration of justice was treated in a different way in 1979 by the Ontario High Court of Justice in *Demarco v Ungaro*.<sup>129</sup> The different approach of the court in this case resulted in the same policy not requiring the immunity from suit in cases of negligence involving the conduct of a case in court. Observations were also made in *Demarco v Ungaro* regarding the nature of the legal profession in Ontario. In Canada the legal profession is fused unlike the legal professions in England and Wales. This difference does not exist between the legal profession in Canada and New Zealand i.e. both are fused. Yet counsel in New Zealand<sup>130</sup> is granted a similar immunity to that of counsel in England while in Ontario counsel is not. It follows that the differences in professional structure are a factor but are not the sole determinant of policy on the question of immunity.<sup>131</sup>

Krever, J, in *Demarco v Ungaro*, referred to two points of difference between the English and Canadian professions. First, in England a barrister is not thought to be an officer of the court, although a solicitor is. The court has no jurisdiction over a barrister. But in Canada, the courts do have jurisdiction over counsel. Similarly, in New Zealand, counsel may be struck off the roll by the court. This feature that the English barrister is not an officer of the court did not appear to

be significant to the House of Lords in *Rondel v Wosley*. As Lord Upjohn put it '...but while counsel owes a primary duty to his client to protect him and advance his cause in every way, yet he has a duty to the court which in certain cases transcends that primary duty.'<sup>132</sup> Secondly, an English barrister is unable to sue for his fees because there is a non-contractual relationship between the barrister and client. Ability to sue for fees would mean that there was a contractual relationship and thus the barrister could be sued for negligence. In Ontario, lawyers are both barristers and solicitors, and the lawyer who conducts litigation contracts directly with the client and is able to sue for the fee. In New Zealand, a barrister - solicitor and also has the right to sue for the fee.<sup>133</sup> However, it is worth recalling that the inability to sue for the fee is not regarded as the basis for the immunity of an English barrister from suit in negligence

It appears, therefore, that the differences referred to between the legal professions in various Commonwealth countries are an irrelevance which serve only to cloud the issue. At bottom the issue revolves around policy and policy will exist, as it is or in a changed form, whatever the nature of the professions. An investigation of policy and the desirability of change of that policy is of value.<sup>134</sup>

Lord Reid in *Rondel v Wosley* laid down the parameters

of his judgement. '...I shall confine my attention to conditions in England and Scotland, between which there appears to be no relevant difference. I do not know enough about conditions in any other country to express any opinion as to what public policy may there require?'<sup>135</sup> There is in this statement the recognition that different conditions may produce differences in policy. One must also bear in mind that the 'Privy Council has in a recent case established the principle that a decision of the House of Lords need not be applied in a Commonwealth country where the law has been differently settled in a legal sphere decided on policy considerations which have been fashioned by judicial opinion in that country...'<sup>136</sup>

But what are these considerations of public policy? The immunity conferred by public policy in *Rondel v Wosley* was, according to Lord Wilberforce in *Saif Ali*, necessary to prevent barristers being inhibited in discharging their duty to the court and to avoid relitigation. The judgement of Krever, J. in *Demarco v Ungaro* must, of course, be read in the context of conditions prevailing in Ontario on the matter of duty to the court. Krever J thought that there is no empirical evidence that the risk of counsel subordinating it to the client's interests is so serious that an aggrieved client should be rendered remediless.<sup>137</sup>

The situation which would arise without immunity being conferred upon advocates, viz the need for a retrial of the original case in a civil court, did not find favour with the House of Lords in *Rondel v Wosley*. It might, for instance, involve the retrial of criminal cases in a civil court where the standard of proof, is different.<sup>138</sup> For Lord Reid 'that is something one would not contemplate with equanimity unless there is a real need for it.'<sup>139</sup> And Lord Morris of Borth-y-Gest considered 'a trial upon a trial would raise speculation upon speculation.'<sup>140</sup> Krever J in *Demarco v Ungaro* showed more concern for the client. It was his view 'that the undesirability of that event does not justify the recognition of lawyers' immunity in Ontario. It is not a contingency that does not already exist in our law and seems to me to be inherently involved in the concept of *res judicata* in the recognition that a party, in a action in personam, is only precluded from relitigating the same matter against a person who was party to the earlier action.'<sup>141</sup> Krever J could find no fault with relitigation; indeed he considered it 'Better that than that the client should be without recourse.'<sup>142</sup>

Public policy reflects the public interest. 'Like so many questions which raise the public interest a decision one way will cause hardships to individuals while a decision the other way will involve a disadvantage to the public's interest. On the one hand, if the existing rule

of immunity continues there will be cases, rare though they may be, where a client who has suffered loss through the negligence of his counsel will be deprived of a remedy.<sup>143</sup> Such was the anxiety of Lord Reid. In *Saif Ali*, Lord Wilberforce in considering the boundary of immunity stated '... account must be taken of the counter policy that the loss ought not to be without a remedy.'<sup>144</sup> In the House of Lords, therefore, the judges showed concern for the individual case but were prepared to allow the immunity to continue, albeit in a restricted form. The possibility of a client without a remedy was anathema to at least one judge in Canada, and raising issues of policy, immunity was rejected.

It seems that if immunity is allowed then, irrespective of the blanket thrown over advocacy in some cases the result will be just. Unmeritorious cases against counsel which would damage the public interest in the administration of justice would not be brought to court. But even so, there is unlikely to be fostered any public confidence in the conferment of immunity upon a select few. This effect may in itself damage that same public interest, for the public, the untutored laymen, for whose benefit the judges support the immunity, may consider that no purpose is served except that lawyers are looking after lawyers i.e. their own selfish interests.<sup>145</sup> Thus, the effect of the immunity is to deprive 'Citizens of their rights against negligent

barristers; rights which they have against every other professional man whom they might employ'.<sup>146</sup> That there is lack of trust in the notion of immunity is evinced in a variety of articles, in the press and legal journals, criticising the conferment of immunity in those recent English cases presently under scrutiny.<sup>147</sup>

Although the privileged position of the advocate is assured for the time being, it is surely misconceived. This misconception is over and above the resentment felt by the members of other professional groups and the public in general. The policy of maintaining and upholding the administration of justice is one to be applauded, but so is the counter policy referred to in *Saif Ali* and acted upon in *Demarco v Ungaro*, namely, that a loss ought not to without a remedy. An outcome of the English authorities which appears perplexing is why the general trend of imposing liability for negligence was sidestepped by allowing an immunity. As Catzman<sup>148</sup> puts it:

'In an age when tort liability is being expanded in response to consideration of social policy, liability for professional negligence is the rule and since a barrister falls *prima facie* within the general principle, his immunity from liability constitutes a unique and significant exception.'

The dangers in allowing such an exception are that the impression may be created of lawyers looking after lawyers to the detriment of others. Jolowicz in 1967 regarded the conclusions of the majority of the Court of Appeal in *Rondel v Wosley* as weak and requiring

reinforcement by the House of Lords, otherwise 'the law will merit the reproach of caring too much for its own. *Rondel v Wosley* has already attracted a good deal of attention from the public and the public is aware that the Bench is recruited from the Bar.'<sup>149</sup> However, Winfield and Jolowicz<sup>150</sup> point out in 1984 that the purpose of this immunity is not to protect counsel from allegations of negligence for its own sake but to ensure that counsel will discharge his duty to the court. Fleming agrees and adds that no one who argues for immunity is condoning negligence. All that is being asserted is that the harassment of barristers by clients is too high a price to pay for 'the rare instance where a charge of negligence relating to the conduct of litigation might be justified.'<sup>151</sup> It seems, therefore, that there is support for the view that there may be professional negligence by a barrister but that it is better in the interests of the administration of justice that no action is allowed to commence. Even Salmon LJ, who in *Rondel v Wosley* was keen to limit immunity, thought counsel should be immune from inquiry as to whether he has been negligent.<sup>152</sup> It is the law which is deeming it undesirable that they should defend themselves against such a charge says Fleming.<sup>153</sup> But who pronounced this law if not the lawyers? Such considerations promoting immunity do not, it is submitted, help to reinforce and cultivate confidence in the administration of justice.<sup>154</sup> The expressions 'immunity'

or 'privilege' imply *prima facie* cases of fault or liability, but then allow a special defence rendering the person at fault unaccountable. The problem ought to be resolved without reference to defences.<sup>155</sup> At the root of this non-liability of advocates is the conflict between the duty to the client and the 'paramount'<sup>156</sup> duty to the Court. Counsel, according to Lord Denning M.R. '...owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court.'<sup>157</sup> One must not, of course, make light of this duty to the court as described above. That the judges recognise the integrity of counsel is well and emphatically stated.<sup>158</sup> And despite statements that the advocates duty is one of honour only<sup>159</sup>, Carey Miller agrees that this essential obligation 'is indistinguishable from other forensic obligations which are wholly matters of adjectival law.'<sup>160</sup>

At this point one is prompted to ask 'where is the negligence against which immunity is sought?' Counsel has performed his paramount duty to the court and the client may or may not have suffered loss. In his submission to

the House of Lords in *Rondel v Worsley*<sup>161</sup> Louis Blom-Cooper on behalf of the appellant said, 'There is a fundamental confusion between immunity for things done in performance of duty and immunity for breach of duty.' To which Nightingale added<sup>162</sup> ... and because immunity for the former is perhaps justifiable in deference to public policy, the latter is completely without justification.'

It appears accepted that there is great social utility in the performance of a duty to the court. It would be better, it is submitted, to prevent actions being brought where this duty has been performed than to confer immunity where there may have been a breach of duty to the client by allowing no investigation into the question of breach. It is possible to use standard negligence principles to justify this proposition. Asquith L.J. in *Daborn v Bath Tramways Motor Co. Ltd.* and Trevor Smithy stated,<sup>163</sup> 'In determining whether a party is negligent, the standard of reasonable case is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served in behaving in this way or that... The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk.' Lord Denning M R supported this in *Watt v Hertfordshire County Council*<sup>164</sup> '... you must balance the risk against the end to be achieved.' How, then, in the light of such dicta above, can one say that an advocate who has performed his duty to the court

is negligent. On the problem of harassment of counsel by clients, surely the courts would not find against an advocate who observed the highest standards of the law. In performing his duty the advocate is acting according to the rules and standards of his profession.<sup>165</sup> Nor need the matter proceed to court in the case of an unmeritorious claim. Such claims may, it is submitted, be disposed of in interlocutory proceedings. Who better to determine in such proceedings whether the advocate has performed his duty to the court than a judge trained in the rules and application of that duty. That this is a possible process was indicated by Lord Salmon in *Saif Ali*, 'Once it is clear that the circumstances are such that no question of public policy is involved, the prospects of immunity for a barrister against being sued for negligently advising his client vanish into thin air, together with the ghosts of all the excuses for such immunity which were thought to exist in the past.'<sup>166</sup>

Who does the immunity protect? Not only the advocate who properly performs his duty to the court in contradiction to the client's wishes only but also those who do not. An inevitable result, perhaps, if no investigation of negligence is made. Perhaps the only beneficiaries of immunity are the insurance companies and the incompetent. In an age of expanding tort liability<sup>167</sup> there is the disadvantage of 'conferring an anomalous privilege upon a class of professional men to the

detriment of the public whose interest is to obtain a remedy for negligent treatment at the hands of men in whom they must inevitably put their trust. An unremedied breach of duty to take care must be an evil in society; it needs powerful arguments to permit such evil to stand uncorrected. There are no such powerful arguments; only matters of self interest projected into alleged benefits to the public. Other jurisdictions have demonstrated that the immunity is both unnecessary and unwarrantable.<sup>168</sup> That there are differences affecting the different jurisdictions is recognised and acted upon. In Canada barristers are recommended to take out insurance and this was one factor which influenced Krever, J in his rejection of immunity in *Demarco v Ungaro*. In the case of England, the Royal Commission of Legal Services<sup>169</sup> recommended that, despite the rarity of actions,<sup>170</sup> all practising barristers should be required to have professional indemnity insurance cover against claims for negligence of at least 50,000 pounds, this figure to be reviewed regularly. The profession has long recognised the seriousness of negligence claims and indemnity insurance is widespread. Practising solicitors are required to be insured against claims arising from professional negligence.

If all have the benefit of indemnity insurance who is the real defendant? Who takes the financial burden of the award of damages against the advocate?<sup>171</sup> The load is

passed to the insurance company. The advocate need have no fear of financial loss and ruination if he is adequately insured. Advocates may perform their duty to the court fearlessly. Thus, 'in these days when negligence insurance is increasingly recognised as a necessary part of every well turned out lawyers professional equipment, who is immunity from suit likely, in the last analysis, to protect except insurance companies?'<sup>172</sup> The approach of the Canadian courts to this question should receive a sympathetic hearing in England and the courts policy of providing a remedy for tort showed prevail, or at least be carefully considered. The policy of the law, after all, is not immutable, but to date developments have not taken the law any further on the issue of advocates' immunity. As the law stands at present an advocate enjoys an immunity from actions in negligence based upon public policy. The Royal Commission on Legal Services<sup>173</sup> did not recommend the abolition of immunity and this now has been endorsed by the Marre Committee reporting in 1988<sup>174</sup> and in the Green Paper of 1989.<sup>175</sup> In addition, the law has been amended in such a way as to emphasise that immunity shall continue to exist.<sup>176</sup> *Rondel v Worsley*<sup>177</sup> appears to represent the high water-mark of immunity. At present the law practitioner may assume that only statements made or advice given during trial are safe. Similar activities at other times are less certain to be immune.<sup>178</sup> What do not

appear convincing are the arguments for administrative convenience and long usage given the Bar's claim to expertise. If there is such confidence in professional expertise the incidence of claims, successful or otherwise,<sup>179</sup> should be small. In any event the immunity does not appear to be consistent with the wider social context in which law has to operate. In an age of consumerism<sup>180</sup> and the need to be even-handed in treating different professional categories<sup>181</sup> the conferment of immunity seems strangely out of place. More needs to be done to create a satisfactory state of law.

#### Notes

1. [1967]1QB 443 (C.A.) [1969]1AC 191 (H.L.)
2. *Saif Ali v Sydney Mitchell* [1978] 3WLR 849
3. J.A. Jolowicz 'The Immunity of the Legal Profession' [1968] CLJ 23
4. *Rondel v Worsley* [1969] 1.AC 191 at 244
5. 1969] 1AC 191 at 231
6. T.F.T. Plucknett *Studies in English Legal History* Hambledon Press 1983 p.333 T.F.T. Plucknett 'The Place of the Legal Profession in the History of English Law [1932] XLVIII LQR 328.
7. *Plucknett Studies* 332
8. *Plucknett, op.cit* 332
9. *Plucknett, op.cit* 332
10. *Plucknett, op.cit* 335
11. *Plucknett op.cit* 336 See also on the position of apprentices W.C. Bolland 'Two Problems in Legal History' [1908] 24 LQR 392.

12. Plucknett, op.cit 336.
13. Plucknett, op.cit 336
14. Plucknett, op.cit. 338
15. [1967] 1QB 443 at 455, referring to the Year Books for the 14th year and 20th year of Henry VI.
16. See generally R.F. Roxburgh 'Rondel v Worsley: The Historical Background' [1968] 84 LQR 178
17. Roxburgh, op.cit. 178-9. This is, of course, only evidence of the legal position of counsel in 15th Century.
18. Roxburgh, op.cit. 178-9. W.C. Bolland. Manual of Year Book Studies (1925).
19. Roxburgh, op.cit. 179
20. Rastell's Collection of Entries
21. Brook v Montague (1605) Cro. Jac. 90.
22. W.S.Holdsworth 'The Legal Profession in the Fourteenth and Fifteenth Centuries.1.' [1907] XCII LQR 448 at 453-4.
23. J.H. Baker 'Counsellors and Barristers. An Historical Survey' [1969] CLJ 205 at 207
24. Baker, op.cit 210.
25. Preface to Reports. see also Roxburgh 'Historical Background' 179-80.
26. Roxburgh, op.cit. 180
27. Baker, op.cit 207-8
28. Baker, op.cit 222
29. Baker, op.cit 222-3. Baker also points out that the vast increase of legal work in the 16th Century affected not only serjeants and attorneys, but also barristers: op.cit 220.
30. Baker, op.cit. 223-4.
31. Baker, op.cit. 225
32. *ibid*

33. *ibid* referring to W.Sheppard Grand Abridgement (1675), i.536: 'It is said also that the counsellor shall have debt for his fees. 3H.6, 33. But it seems the law is otherwise for a barrister for his counsel. Trin. 8 Jac. B.R.'
34. Baker, *op.cit.* 225
35. (1714) Viner Abr. Counsellor (A) 22
36. Baker. *op.cit.* 228.
37. (1742) 2 Atk.330
38. see also *Harrison v Ramsey* (1752) 2 Ves. Sen. 488; *Bradish v Gee* (1754) 1 Ams. 229
39. 1765-1769 Vol.3. p.28.
40. There was no rule prohibiting a binding contract between counsel and client, merely a rebuttable presumption: Baker, *op.cit.* 229.
41. Commentaries. Vol.3. p.29.
42. Roxburgh 'Historical Background *op.cit.* 181.
43. See *Saif Ali v Sydney Mitchell and Co. (a firm) and others, P (a third party)* [1978] All ER 1033 at 1038 per Lord Wilberforce.
44. (1791) Peake N.P. 131
45. (1791) Peake N.P. 166
46. Although a *ratio decidendi* of immunity had yet to emerge Lords Pearson and Upjohn found that the change towards immunity had been completed by 1771. See *Rondel v Worsley* [1967] 3 All ER 993 at 1031; [1969] 1 AC 191 at 258 and 279.
47. *Morris v Hunt* (1817) 1 Chitty 544 - counsel could not sue for fees. *Perring v Rebutter* (1842) 2 Moody & R 429 - a special pleader had the immunity of a barrister in a negligence action.  
  
*Purves v Landel* (1845) 12Cl and F 91: 'Against the barrister in England and the advocate in Scotland, luckily, no action can be maintained': per Lord Campbell.  
  
*Re May* (1858) 4 Jur. (N.S.) 1169 - a barrister cannot sue a solicitor for fees.

48. (1860) 5 H. and N. 890
49. (1860) 5 H and N. 890 at 920
50. (1860) 5 H and N 890 at 924.
51. (1863) 13 C.B (N.S.) 677
52. (1863) 13 C.B (N.S) 677 at 727-728
53. at 733
54. at 736
55. at 737. The use of the superlative is indicative of the judicial attitude to their professional work and perhaps explains their attitude with regard to the practice of other professions.
56. cf contingent fees and the surrounding controversy.
57. at 738
58. (1870) L.R. 5 Ch 457
59. (1863) 17 C.B (N.S.) 677 at 732
60. (1863) 17 C.B.(N.S) 677 at 733
61. (1884) 9 App. Cas. 745 at 751
62. R.F. Roxburgh 'Rondel v Worsley: Immunity of the Bar' [1968] 84 LQR 513.
63. (1884) 9 App. Cas. 745 at 750
64. at 752
65. *ibid*
66. at 756
67. *Re Le Brasseur and Oakley* [1896] 2 Ch 489
68. [1896] 2 Ch. 489 at 493-4.
69. at 495-6
70. at 495-6. In these circumstances, professional etiquette ensures that no contractual right or obligation is conferred nor imposed upon the lay client owing to the absence of privity.
71. *Principles of Contract* (1876)

72. Bevan's Principles of the Law of Negligence 1889-1928
73. Halbury's Laws of England 1st ed (1908) p.39. (restated in 3rd ed).
74. Law of Torts (7th ed) 1963 p185.
75. [1932] AC 562
76. [1932] A 562 at 619. Hedley Byrne and Co Ltd v Heller and Partners Ltd (1964) A C 465 at 531 Lord Devlin said that he took this dictum 'quite literally'. See also Winfield and Jolowicz on Tort (12th ed) p.71.
77. Weller and Co Ltd v Foot and Mouth Disease Research Institute (1966) 1QB 569; Electrochrome Ltd v Welsh Plastics Ltd [1968] 2 All ER 205
78. See now Home Office v Dorset Yacht Co.Ltd [1970] AC 1004; Anns v Merton London Borough Council [1978] AC 728.
79. Fleming on Torts (6th ed) 1983 p.131 n14. See also dictum of Lord Denning in Spartan Steel and Alloys Ltd v Martin and Co (Contactors) Ltdd [1973] QB27 and that of MacDonald J., in Nova Mink Ltd v Trans-Canada Airlines Ltd (1951) 2 DLR 241.
80. A more modern case on the way in which tort may circumvent privity is Junior Books Ltd v Veitchi Co Ltd [1982] 3 WLR 477. However, Junior Books is no longer of value (supra).
81. per Lord Morris at p 502
82. eg [1967] 1QB 443 (CA); [1969] 1AC 191.
83. eg Saif Ali v Sydney Mitchell
84. Note that the general development of duty in negligence upon Atkinian lines was progressing and at the end of 1970s Lord Simon was able to say in Arenson v Casson, Beckman, Rutley and Co [1977] AC 405 at 419 that the imposition of liability was the primary policy unless there was some other secondary and supervening policy regarding immunity. This point was reaffirmed by Dillon, L.J. in 1 R.C v Hoogstraten [1984] 3 All ER 25 at 33 in which immunity from professional negligence for court appointed sequestrators was rejected. His Lordship could see no reason why they should not be subject to

the ordinary standard of care. See also Salmond and Heuston on the Law of Torts (1981) (18th ed) p.184.

85. Further consideration was to be given to this problem by the House of Lords in Saif Ali v Sydney Mitchell and Co (A Firm) and Others [1978] 3 WLR 849.
86. But 'awkward' clients can be weeded out by the instructing solicitor. In addition, barristers have some scope for not accepting cases in practice. The notion of a professional person accepting any client who presents himself is not, in any event, confined to the barristers branch of the legal profession. Consider how little scope for manoeuvre or refusal a doctor in casualty cases has.
87. [1967] 1QB 443 at 524
88. Rondel v Worsley [1967] 1QB 443 at 501.
89. at 514
90. Roxburgh 'Immunity' op.cit 513.
91. Many accountants consider disclaimer to be inconsistent with professional standards: R.F.V. Heuston and R.A. Buckley Salmond and Heuston on Torts 18th ed 1987 p197 n 81.
92. at 524. Jolowicz considers Salmon's dissenting judgment to be notable, strong and persuasive 'Immunity from suit and the legal profession' [1967] CLJ 10
93. *ibid*
94. [1966] 3 WLR 950 at 972
95. [1966] 3 WLR 300 at 317-318
96. Jolowicz 'Immunity from suit' op.cit. 12
97. cf Lord Denning M R at [1967] 1 QB 443 at 501
98. Jolowicz 'Immunity from suit' op.cit. 11
99. Jolowicz. op.cit 12
100. Jolowicz, op.cit. 12
101. [1969] 1 AC 191 at 226
102. at 227

103. at 227-8
104. at 231
105. at 244
106. at 281
107. at 282
108. at 289
109. No reference was made to *Donoghue v Stevenson* in the House of Lords.
110. [1978] 3 All ER 1033.
111. at 1037 See also *Somasunderan v M. Julius Melchior & Co (a firm)* *The Times*, July 16, 1988.
112. at 1037
113. at 1038
114. [1974] 1 NZLR 180
115. at 1039
116. at 1039
117. at 1041. In *Saif Ali* Lord Salmon noted that in the eleven years since *Rondel* the juridicial tendency had been to reduce the immunity of professional men. See Dugdale and Stanton *Professional Negligence* p.60.
118. at 1041. See generally on this M. Zander 'The Scope of an Advocates' Immunity in Negligence Actions' [1979] 42 *MLR* 319
119. at 1046
120. at 1055
121. at 1055
122. S.M. Bandali 'Barristers' Liability: a sequel to *Rondel v Worsley* (1978) 16 *Legal Executive* 71
123. Zander, *op.cit* 324
124. [1978] 3 ll LER 1033 at 1053
125. at 1053

126. It is of note that the interests of the administration of justice have not been conspicuous in those jurisdictions which do not allow immunity (infra)
127. per Lord Wilberforce at 1039; per Lord Diplock at 1046; and per Lord Salmon at 1048.
128. See Lord Reid in *Rondel v Worsley* [1969] IAC 191 at 227
129. [1979] 95 D.L.R (3d) 385.
130. [1974] NZLR 180 at 186
131. 95 DLR (3d) 385 at 389
132. at 281
133. *Robinson and Morgan-Coakle v Behan* [1964] NZLR 650
134. It is notable that in New Zealand and the State of Victoria (Australia) the position is governed by statute. The Law Practitioners Act New Zealand: 1955, s13:  
 'Barristers of the Court shall have all the powers privileges, duties and responsibilities that Barristers have in England.' It should also be borne in mind that recovery of fees was considered in *Robinson and Morgan-Coakle v Behan* [1964] NZLR 650. It was held that a person practising as both solicitor and barrister and rendering services to the client in both capacities may sue for fees both as solicitors and counsel. But Perry J stated at p.665 'I add also that, because of my view of the facts, I have not been concerned in this appeal with the case of a barrister suing for work entirely done as a barrister and without being intermingled with solicitor's work. It seems to me that other considerations could well arise in that case, particularly of course, the question who gave the instructions for the work, that is to say who is the client.'

Victoria: Legal Profession Practice Act 1958, s10:

- (1) Every barrister shall be entitled to maintain an action for and recover from the solicitor or client respectively by whom he has been employed his fees costs and charges for any professional work done by him.
- (2) Every barrister shall be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor was on the

twenty third day of November One thousand eight hundred and ninety one liable to his client for negligence as a solicitor.'

In Singapore with a fused profession there is similarly advocate's immunity: *Majid v Muthuswamy* (1968) 2 MLJ 89.

cf Uganda which has a fused profession takes a different approach i.e. all advocates treated alike including liability for negligence in litigation: see *Annual Survey of Commonwealth Law 1969* pp.630-631.

135. [1969] 1 AC 191, 227
136. *Marvin A Catzman, Comments* 46 *Can. Bar. Rev.* 505 (1968)
137. 95 DLR (3d) 385 at 406
138. as in *Rondel v Worsley* itself
139. [1969] 1 AC 191 at 230
140. [1969] 1 AC 191 at 250
141. at 406
142. at 406
143. per Lord Reid in *Rondel v Worsley* at 227
144. at 1039
145. see *Veljanovski and Whelan 'Professional Negligence and the Quality of Legal Services - An Economic Perspective'* [1983] 46 MLR 700 at 715.
146. *Louis Blom-Cooper* for the appellant in *Rondel v Worsley* [1969] 1 AC 191 at 204
147. *The Times*, October 22, 1966  
*Sunday Times*, October 23, 1966  
*Financial Times*, October 24, 1966  
*New Law Journal* October 27, 1966  
*Solicitors Journal* October 28, 1966  
*The Economist* October 29, 1966  
*Law Society's Gazette*, November, 1966.

New Statesman November 11, 1966

Journal of the Law of Scotland November, 1966

The Times November 23, 1967.

The New Law Journal November 9, 1978

148. Marvin A Catzman Comments (1968) 46 Can. Bar. Rev. 505, 501
149. J A Jolowicz 'Immunity from suit and the legal profession.' [1967] CLJ 10, 14
150. Winfield and Jolowicz on Tort (1984) 12th ed WVH Rogers p.88.
151. Fleming The Law of Torts (1983) 6th ed p.133. It is not clear that Fleming is a supporter of this view.
152. [1967] 1 QB 443 at 517
153. Fleming op.cit 133
154. Strong criticism was voiced at the time in 'An Impolitic Immunity' The Times 23 November 1967
155. It is hardly likely to allay public fears of favourable treatment of lawyers when a Statutory Instrument entitled 'Consumer Protection' contains the following provision:  
  
    '2. Section 13 of the Supply of Goods and Services Act 1982 (which provides that, in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill) shall not apply to the following services:-  
    (1) the services of an advocate in court or before any tribunal, inquiry or arbitrator and in carrying out preliminary work directly affecting the conduct of the hearing' ...':  
  
    S.1 1982 No 1771, Consumer Protection. The Supply of Goods and Services (Exclusion of Implied Terms) Order 1982.
156. per Lord Denning M R in Rondel v Worsley [1967] 1 QB 443 at 502 see also Fleming op cit 133: '...the barrister's duty to the court transcends his duty to his client.'

157. per Lord Denning M R at 502
158. Penrikyber Navigation Colliery Co. v Edwards [1933] A C 28 at 33 per Lord Dunedin; Glebe Sugar Refining Co. v Greenock Harbour Trustees 1921 S.C. (H.C.) 72 at 73-4 per Lord Birkenhead. See generally Carey Miller 'Advocate's Duty to Justice: Where does it belong?' [1981] 97 LQR 127 at 129-134. Lord Upjohn in Rondel v Worsley [1969] 1 AC 191 at 282 noted 'the great extent to which the courts rely on the integrity and fairness of counsel in the presentation of the case.'
159. Lord Denning M.R. in Rondel v Worsley at 502
160. Carey Miller op.cit 132
161. [1969] 1AC 191 at 205
162. Jeremy A Nightingale 'The Negligent Practice of Law in Canada: A Chronicle of Client Frustration.' (1976) 41 Saskatchewan Law Review 47 at 53
163. [1946] 2 All ER 333 at 336
164. [1954] 1 WLR 835 at 838
165. Saif Ali v Sydney Mitchell & Co (a firm) and Others, P(third party) [1980] AC 198 at 219 per Lord Diplock; [1978] 3 All ER 1033 at 1042.
166. per Lord Salmon [1978] 3 All ER 1033 at 1050. See also Hill 'Litigation and Negligence: A Comparative Study' [1986] OJLS 183 at 184 'since the court is the final arbiter of what constitutes negligence, if a barrister's conduct is dictated by his duty to the court there can be no possibility of the court's taking the view that the barrister acted negligently.' Veljanovski and Whelan 'Professional Negligence and the Quality of Legal Services - An Economic Perspective' [1983] 46 MLR 700 at 716 '... where the advocate's duty to justice and his client conflict, the former should prevail and not be grounds for negligence.'
167. The trend of expanding tort liability in negligence appears to have slowed down or even gone into retreat in the light of decisions subsequent to Junior Books. Even so, there is still sufficient development of the law of tort as pertaining to professional negligence.
168. Louis Blom-Cooper in Rondel v Worsley [1969] 1AC 191 at 208-9.

169. Command 7648, para 24.11
170. There is no empirical evidence that there will be a rash of law suits if immunity was removed. Evidence, such as there is, points the other way. See Hill 'Litigation and Negligence: A Comparative Study' [1986] 6 OJLS 183 at 185; Veljanovski and Whelan 'Professional Negligence and the Quality of Legal Services - An Economic Perspective' [1983] 46 MLR 701 at 713.
171. There may be another financial burden. As with doctors there is presumably some force in the argument that reputation is at risk where there is publicity.
172. 'Immunity -Rondel to Ali' (1978) 128 New LJ 1081
173. Cmnd 7648.
174. *supra*
175. Cm 570, para 6.2. See Conclusion. (*infra*)
176. The Supply of Goods and Services (Exclusion of Implied Terms) Order 1982 (S.1. 1982 No.1771) made under Part II of the Supply of Goods and Services Act 1982. See note 155 *supra*.
177. [1969] A.C. 191; [1967] 3 All ER 993.
178. *McNamara v Martin Mears & Co.* [1982] 127 So.Jo. 69.
179. Veljanovski and Whelan *op.cit* p.713 n.69.
180. cf S.1. 1982 No.1771 (*supra*).
181. In the context of immunity itself the law seems less than even-handed when concerned with a solicitor's claim. Solicitors appear to be grudgingly granted limited immunity and are more likely than barristers to suffer in circumstances where the policy of restricting immunity is exercised, e.g. *Somasunderam v M. Julius Melchior & Co*, *The Times* July 16, 1988.

## Chapter 6

### Medical Negligence

Historically, the liability of a medical practitioner for injuries occurring as a result of malpractice is founded in tort<sup>1</sup>. Many of the earliest actions based on the developing common law actions of negligence were brought against medical practitioners. It was only later as the modern law of contract began to develop that recourse was made to an action for breach of contract in cases alleging professional negligence generally.<sup>2</sup> It is, therefore, surprising for Lord Templeman in *Sidaway v Governors of Bethlem Royal Hospital* to state 'The relationships between doctor and patient is contractual in origin', the doctor performing services in consideration for fees payable by the patient.<sup>3</sup>

By 'origin' Lord Templeman cannot mean the genesis of liability as that was patently tortious. In modern times a contractual relationship probably became the norm after the development of a law of contract and prior to the setting up of the National Health Service. If Lord Templeman meant the 'origin' in terms of the source of the obligation in *Sidaway* itself it is difficult to ascertain the existence and nature of a contract. But to say that that is true of the period following 1946, when the National Health Service was instituted, is scarcely credible. The National Health Service was established

under the National Health Service Act 1946. The statutory duty of the Health Service is now re-enacted in S 1 National Health Service Act 1977 in similar terms, viz S 1(2) 'The services so provided shall be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment whenever passed'. The majority of people in the United Kingdom are dependent upon or at least make use of the National Health Service at some time. In so doing they are making use of a service which is primarily free of charge. A situation in which doctors perform services in consideration of fees payable by the patient is not the norm.

Be that as it may a medical practitioner may owe a duty of care to his patient as a result of entering into a contract with a patient or because of the operation of the law of tort. If the medical treatment in issue was undertaken under the National Health Service scheme it is probable that there is no contract between the doctor and the patient.<sup>4</sup> If, however, there is a private engagement there is a contract in which there is an implied term imposing a minimum requirement upon the practitioner to exercise reasonable care and skill.<sup>5</sup> A contract of itself does not impose an obligation upon the practitioner to exercise greater care and skill than normal.<sup>6</sup> In addition there appears to be a separate implied undertaking on the part of a practitioner to act in the best interests of the patient.<sup>7</sup>

The imposition of a standard obligation to exercise reasonable care and skill is in recognition that no practitioner guarantees results in the ordinary course of practice. As Tindal C.J. put it in *Lanphier v Phipos* in 1838.<sup>8</sup>

'Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall again your case, nor does a surgeon undertake that he will perform a care...'

That is not to say that a practitioner may not enter into a contract guaranteeing a result.<sup>9</sup> In *Eyre v Measday*<sup>10</sup> the practitioner, in contracting to carry out a sterilisation operation, was held not to have undertaken to render the patient absolutely sterile, whereas in *Thake v Maurice*<sup>11</sup> the practitioner was held at first instance to have guaranteed that very result. In the opinion of Peter Pain J 'the contract in *Thake v Maurice* was to make the male plaintiff irreversibly sterile'.<sup>12</sup> The Court of Appeal reversed this decision.<sup>13</sup> Nourse L J considered that '... a doctor cannot be objectively regarded as guaranteeing the success of any operation or treatment unless he says as much in clear and unequivocal terms. The defendant did not do that in the present case'. Neill L.J. reasserted the unpredictability of medical treatment, considering that a reasonable person would not have expected a responsible medical man to have intended to give a guarantee.<sup>14</sup>

Even if there is no contract the general standard required by the law is to exercise reasonable skill and care<sup>15</sup> provided there is a doctor-patient relationship. Provided there is this relationship the practitioner assumes a duty of care even if acting gratuitously.<sup>16</sup> Liability arising in tort would be additional to liability in contract (if there was one) and the claim would be framed accordingly. Such a duty in tort could also be owed to third parties e.g. in treating a pregnant woman the practitioner owes a duty to the unborn child.<sup>17</sup>

The standard required of the practitioner is that of reasonable skill and care. The standard has been stated and restated on numerous occasions.<sup>18</sup> However, the generally recognised definition of the practitioner's duty is that given by McNair J in *Bolam v Friern Hospital Management Committee*:<sup>19</sup> 'But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill' it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art'.

The 'Bolam test' as it is known has been applied to medical treatment<sup>20</sup> to diagnosis<sup>21</sup> and, indeed, to all aspects of a medical practitioner's work.<sup>22</sup> The problem next to be overcome is that of breach of duty in fact. How is it to be determined that the appropriate medical standard of reasonable skill and care has been observed?

No professional person is required by the 'Bolam test' to know all. Professional practice is dynamic and there are many rapid changes and developments. The law may change overnight and medical techniques and forms of treatment are similarly in a state of rapid change. At the time of trial it would be a simple matter to condemn a practitioner on the basis of what we know now. The test however is what the practitioner should have known at the time of the alleged malpractice. It is essential, therefore, that advances in medical knowledge since the date of the alleged malpractice and up to the date of the trial should be discounted. Negligence is based upon tests of foresight and not the blessing of hindsight.<sup>23</sup> Similarly, a practitioner is expected to keep reasonably up to date. In *Crawford v Board of Governors of Charing Cross Hospital*<sup>24</sup> an anaesthetist was held not negligent in failing to read the particular recent article in *The Lancet*.

A further factor which assists in determination of the appropriate standard of care is the position of the defendant. Regard must be had to the defendant's status

and specialisation, if any. Reference has to be made to the standard of the ordinary competent practitioner in the circumstances of the defendant. Thus, in applying the Bolam test the degree of knowledge or awareness which the professional man ought to have must be considered. If the practitioner had in fact a higher degree of knowledge or awareness and acted in a way which, in the light of that actual knowledge, he ought reasonably to have foreseen would cause damage, he would be liable in negligence even though the ordinary skilled man would not have had that knowledge.<sup>25</sup>

The above test appears to apply in the case of an inexperienced practitioner. The standard in *Junor v McNicol*<sup>26</sup> was couched in terms of the Bolam test viz '... there was a duty on her to display the care and skill of a prudent qualified house surgeon, it being held that such a position was held by a comparative beginner'.<sup>27</sup>

The relevance of 'position' or 'post' was reaffirmed in *Wilsher v Essex AHA* in 1986<sup>28</sup> insofar as the 'duty of care related, not to the individual, but to the post which he occupied and "post" was to be differentiated from rank or status. The standard was not just that of the averagely competent and well-informed junior houseman (or whatever the position of the doctor) but of such a person who filled a post in a unit offering a highly specialised service. It is thus, on the basis of the position held

that it is possible to distinguish Wilsher from Junor even though both cases involved inexperienced practitioners.<sup>29</sup>

It seems a corollary of that rule that when a practitioner lacks skill he should be able to recognise that fact and refer the case to those who have the requisite skill.<sup>30</sup> The possession of skill presupposes also that the practitioner is fit to carry out the treatment or other procedures and is not in some way incapacitated from doing so.<sup>31</sup>

In its task of determining whether or not a practitioner has kept to the standard necessary in the instant case before it, the court will take account of the practices of the medical profession. In order to carry out this task the court is dependent on the expert witness as the judge will usually be ignorant of such matters.<sup>32</sup> The court will have to place great reliance upon the proof of such general and approved practices. There is, of course, a danger of overstating the case in such a way as to indicate that the court will feel bound to accept the evidence as conclusive.<sup>33</sup> It seems that different professions and branches within the same profession vary in terms of success rate. Explanations of success vary. It is not surprising to most people that some patients do not recover or if a client loses in litigation but there are expectations that non-contentious legal work will be properly done and brought to a successful conclusion or that a bridge built by an engineer will not collapse.<sup>34</sup>

This may explain that different judicial approach to medical negligence as in *Maynard v West Midlands R.H.A.*<sup>35</sup> and non-contentious legal work as in *Edward Wong Finance Co v Johnson, Stokes & Master.*<sup>36</sup>

The adoption of this attitude by the judiciary towards the medical profession appears to occur more readily than it does towards the practices of other professions and an analogy with the legal profession may be instructed. With regard to either branch of the legal profession the courts feel more competent to comment upon practices as indeed one would expect. Various practices such as those involved in conveyancing come within the sphere of most judges who are prepared to make some comment. However, it does not always follow that even in such cases the judges will be as in touch with current practice as they might wish to appear to be<sup>37</sup> and they may act upon a notion of proper practices which do not exist or which formerly existed but no longer do so.<sup>38</sup> Thus, in *Edward Wong* the Privy Council expected 'precautions' to be taken which were not part of normal practice in Hong Kong, the place where the alleged negligence took place. As a result 'the defendant solicitors were held liable, despite the fact that they had complied in all material respects with the general practice of the profession in Hong Kong'.<sup>39</sup> Jackson and Powell submit, however, that 'it is only in relatively rare and extreme cases such as *Edward Wong*

that a solicitor who complies with the general practice of the profession, will be held to have been negligent'.<sup>40</sup>

Even so, the courts are still protective of professional people.<sup>41</sup> and never more so it seems than in the case of medical practitioners. The Bolam test appears to be very restrictive of judicial discretion, so much so that where evidence is adduced of different medical practices the judges feels incompetent to choose between them,<sup>42</sup> i.e. he may not show any preference. In practice, the medical profession appears to fare better than other professions. The difference of 'non-negligent mistake' is more readily accepted, partly due, it is thought, to the Bolam test and partly to the greater degree of deference shown to expert witnesses in cases alleging medical negligence. In *Whitehouse v Jordan*<sup>43</sup> Lord Denning M R referred to evidence of the medical experts. In that case, it is alleged by Joseph, he took the step from stating the evidence of medical experts to accepting it.<sup>44</sup> Judges are not likely to be so readily in agreement with expert evidence tendered by experts from other professions.

While accepting that a good defence will usually be provided upon proof that a practitioner acted in accordance with the general and approved practice of the profession,<sup>45</sup> the courts do reserve the right to disapprove of medical practices including diagnosis or treatment even though approved by, or at least not

condemned by, a respectable body of medical opinion.<sup>46</sup> The willingness of the judiciary to disapprove appears stronger in cases in which the issue involves matters touching more upon ethics and morality rather than technical expertise, such as disclosure of risk (infra). Such a stance by the courts is not inconsistent with accepting expert opinions as highly persuasive evidentially. However, there is a danger that suspicion of the 'conspiratorial' nature of professions may arise.<sup>47</sup> The public is already suspicious and the courts must also act to allay public fears and encourage integrity in a profession upon which so many depend. Such a role for the court was well stated in the Supreme Court of South Australia by King C J:<sup>48</sup>

'But professions may adopt unreasonable practices, particularly as to disclosure, not because they serve the interests of the clients, but because they protect the interests or conveniences of members of the profession. The court has an obligation to scrutinise professional practices to ensure that they accord with the standard of reasonableness imposed by the law.'

Ultimately, therefore, the issue as to whether a practitioner has properly discharged his duty is not dependent upon general and approved practice but upon the court after considering the evidence. This view is shared also by the Canadian courts.<sup>49</sup> The court may depart from the views of the profession in arriving at its decision. Hirst J in *Hills v Potter*<sup>50</sup> had no doubt that he enjoyed that freedom. The courts had not abdicated the power of

decision to the doctors by adopting the Bolam principle. The court has to be satisfied that the standard has been met.

But this begs the question of what is the general and approved practice? There may not be one; there may be several. The practitioner is allowed to choose which practice to follow, subject of course, to judicial acceptance of the practice: in *Bolam v Friern Hospital Management Committee* McNair J<sup>51</sup> indicated the limitations on choice:

'(A doctor) is not guilty of professional negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art... putting it the other way around, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion'.

Faced as he will be, in such circumstances, with differing views as to the proper course of action to take, the judge will have to decide. He has, after all, reserved that right of decision to himself. He is not allowed to choose one opinion as apposed to another merely because he prefers it.<sup>52</sup> Lord Scarman stated in *Maynard v West Midlands RHA*<sup>53</sup>:

'I have to say that a judges 'preference; for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose

actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judges' finding, he erred in law ... for in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if, he is a specialist) is necessary.'

Irrespective, therefore, of evidence of general and approved practice the decision regarding negligence has to be made according to the exercise of skill. Such an issue becomes important where there is departure from the practices. If departure takes place for no good reason and damage is caused, the likelihood is that the practitioner will be found to be negligent.<sup>54</sup>

Where the accepted negligence has arisen as a result of a new form of treatment or the use of new techniques, this may be regarded as a greater departure from general or approved practice or, in some cases, a recognition that there is no practice at all with which to compare. How far a new development may be taken and not amount to negligence poses a difficult question for the court. It is a retrospective step to impose restrictions having the effect of stifling all new developments.<sup>55</sup>

Lord Diplock in *Sidaway* expressed this view very clearly<sup>56</sup> and considered the Bolam principle would provide adequate protection for the practitioner. A fortiori, if the new development came to be accepted by a respectable part of the profession. However in the case of innovative treatment, it is probably desirable that the patient be

informed of this fact and be told that the proposed treatment has not yet been approved by the medical profession and that alternative methods are available.<sup>57</sup> The part that clinical trials have to play is recognised by the judiciary. Much of the advance in medical science has been achieved by such trials and it would be undesirable to stifle them by the operation of an over-restrictive rule.<sup>58</sup> But it is important to remember the individual patient. The community at large would be the beneficiaries of trials and it would be inequitable to expect the individual harmed to bear all of the cost. Consequently 'there are sound reasons of policy why anyone who suffers injury as a result of participation in research or clinical trials should recover damages irrespective of negligence by those who treated him.'<sup>59</sup> In practice it is difficult to show that such trials are intrinsically negligent as there is usually consent given by an ethics committee before the experiment commences. In any event, there is a built in element of risk in experimental drug design. Any person injured would therefore have difficulty in recovering if proof of negligence was the only ground.<sup>60</sup>

A difficulty in considering evidence arises where an expert witness advances a view of what he (the expert witness) would have done in the same or similar circumstances. In a case involving a solicitor's negligence,<sup>61</sup> Oliver J considered such evidence to be

inadmissible.<sup>62</sup> Jackson and Powell submit that this is a view applicable only in cases involving lawyers' negligence. The court may assess such evidence and arrive at an independent opinion. In cases of medical negligence the self acknowledged ignorance of the judiciary in technical medical matters makes such a rule inapplicable or at least undesirable.<sup>63</sup>

A final, though related, problem for the court in considering the evidence in medical negligence cases is causation: the assessment of the standard of skill and care is a difficult exercise in itself but causation presents its own difficulties in so far as there is a need to prove the link between the alleged negligence and the injury.<sup>64</sup>

A failure to prove the causal connection is fatal to the case against that defendant.<sup>65</sup> Where a practitioner's negligence was one of several different factors which could have caused the plaintiff's injury the fact that injury followed the negligence does not raise a presumption of causation against the practitioner. In cases of conflicting expert evidence as to whether the negligence could have caused or materially contributed to the plaintiff's injury and the judge was unable to resolve the conflict there is no alternative to a retrial.<sup>66</sup>

### Causation

Causation constitutes a pressing problem for the plaintiff in any litigation. It is a problem which

assumes greater proportion in cases of professional negligence. Apart from the choice of the courts not to be too hasty in attaching liability to medicant persons, largely because from society's point of view that would be counter-productive, there is the difficulty of proving that the medical man's conduct caused the injury to the patient. Recently, attention has been focussed upon the issue of whether brain damage was caused by whooping cough vaccine. In *Loveday v Renton and Another*<sup>67</sup> Stuart-Smith L.J. dismissed a claim by an infant plaintiff that brain damage had been suffered as a result of having been administered whooping cough vaccine as a baby. Stuart-Smith L.J. considered that it is for the court to decide as a matter of fact whether the vaccine could cause permanent brain damage in young children. The burden of proof is on the plaintiff<sup>68</sup> which is discharged on a balance of probabilities. In the circumstances of this case that burden was extremely onerous. Medical opinion was deeply divided. A report in 1981 by the National Childhood Encephalopathy study showed that there was no evidence to show the vaccine caused permanent brain damage.<sup>69</sup> But that is not the sole problem facing the plaintiff in such cases. Proof of causation is only the first hurdle. Next there is the hurdle of proving negligence on the part of the doctor or nurse responsible for giving the vaccine in the face of contraindications. Stuart-Smith, L.J. described the difficulties in showing

such negligence as 'insuperable'.<sup>70</sup> A similar point was made in the House of Lords in *Kay v Ayrshire & Arran Health Board*.<sup>71</sup> It is difficult enough to prove a breach of duty of care although in this case the respondents admitted negligence in the treatment. The difficulty was that the weight of evidence showed no causal connection between the injury i.e. deafness, and the negligent treatment i.e. mistaken overdose of penicillin. Part of the problem is that medicine is an inexact science. There are inherent risks in most forms of treatment and procedure. It is coupled with that possibility that the enquiry may have occurred in the absence of negligence. Causation may be an insurmountable obstacle.<sup>72</sup> It is not always easy to assign a cause. To remedy this Jones suggests reversal of the burden of proof.<sup>73</sup> The Pearson Commission considered this possibility but rejected it says Jones, on the basis that it might work.<sup>74</sup> Like many others the Pearson Commission was wary of producing an increase in defensive medicine. It is submitted that if reversal of the burden of proof should be adopted then it would relate mainly to the issue of breach of duty in circumstances where the plaintiff could show a departure from the general practice.<sup>75</sup> An example of shifting the burden is to be found in the judgement of Peter Pain J in *Clark v MacLennan* in 1983.<sup>76</sup> The Pearson Commission also rejected a no-fault scheme in cases of medical negligence. One would still have to prove causation in the individual

case. However, despite this view, the British Medical Association established a working party to consider a no-fault compensation scheme in 1983 which has now reported.<sup>77</sup> It is not normal for a shift of the burden as indicated above in the judgment of Peter Pain J in *Clark v MacLennan*. It is more usual to shift the burden when applying the maxim *res ipsa loquitur*. Recent cases have shown the courts are willing to apply the maxim in the plaintiffs' favour<sup>78</sup>.

The problem is further aggravated by the passage of time between the injury and the issue coming to trial. This point was noted by May C J in *Dwyer v Roderick and Others*<sup>79</sup>:

'In negligence cases against professional men the words of Denning, L.J. in *Bates v Bates* (1951) p.35, 37 should be noted. It was to shut one's eyes to the obvious if one denied that the burden of achieving something more than the mere balance of probabilities was greater when one was investigating the complicated and sophisticated actions of a qualified and experienced lawyer, doctor, accountant, builder or motor engineer, than when one was inquiring into the momentary inattention of a driver of a motor car in a simple running down action'

#### Policy Considerations

It should be evident from much of the discussion that has taken place about medical negligence that there are many difficult policy considerations. On the one hand there is a need to consider the individual who has been injured. On the other hand there is a danger of imposing too great a strain on the health service in general and on

doctors in particular. There are fears of large awards of damages and the use of defensive medicine both of which would contribute alarmingly to escalating medical costs. On the whole Jackson and Powell consider<sup>80</sup> that the medical profession fares better than other professions before the courts. 'Non negligent' mistake or 'error of judgement' not amounting to negligence succeeds more often as a defence. A primary cause of this phenomenon is thought to be the Bolam principle and the deference paid to expert witnesses. The fears of an explosion of medical negligence litigation are not well founded. Comparisons with the problems in the United States are not apposite. Medical injuries cases are not tried by juries in this country and the potential liability of practitioners is kept down by the use of established tariffs for assessing awards.

However, there is an apparently increasing incidence of claims of medical negligence. Medical practitioners insure against liability.<sup>81</sup> Insurance arrangements are often made with defence societies i.e. Medical Defence Union or Medical Protection Society. These societies claim to contest all unmeritorious claims without regard to the cost.<sup>82</sup> The primary aim is to vindicate the practitioner, to preserve his reputation and to settle only cases which show no prospect at all of a favourable outcome. However, defence societies are unlikely to recover their costs in many of their cases, especially

where the plaintiff is legally aided.<sup>83</sup> Even cases with a good chance of the practitioner being cleared may be settled out of court. The patient thinks he has won and the doctor has lost. Damage is done to the practitioner's reputation. Who on the outside is able to distinguish between a case settled in favour of the patient because of commercial considerations or because of accepted medical malpractice?

The courts are aware of the problems affecting practitioners' reputations. There are dicta to the effect that the outcome even in fully litigated claims should not affect the practitioner's reputation.<sup>84</sup> A finding of fault has consequences for a practitioner's career. James<sup>85</sup> considers that the solution is to make the health authority directly liable. Such a solution could preserve the practitioner's reputation where he was possibly not mainly at fault, as in the Wilsher case. But where accidents happen as a result of financial stringency in the NHS which impose greater strains upon medical staff, the problem of financial strain is clouded by the claim of professional negligence.<sup>86</sup>

Unfortunately the award of damages against a health authority has an adverse financial effect upon the resources of that authority. The burden of the award is not cushioned by insurance. National Health Service activities are carried out on behalf of the Crown.<sup>87</sup> As a result the National Health Service is self-insuring.<sup>88</sup> The

award of damages is therefore not paid by an insurance company under a policy of indemnity but by the health authority. Consequently, the award drains from the health authority moneys which could have been spent on furthering the care and treatment of patients. Doctors employed in a hospital are the employees of the health authority. Doctors are thus liable for negligence personally while the health authority is also liable vicariously for the doctor's negligence. Membership of a defence society is now a pre-requisite of obtaining a position in a National Health Service Hospital.<sup>89</sup> It must, however, be borne in mind that a defence society is not in law an insurance company and does not have to comply with the statutes regulating insurance companies.<sup>90</sup> Payments under the scheme are discretionary as the society has a discretion whether or not to support its members in actions and also as to how much of an award will be met.<sup>91</sup> However, schemes operated by the defence societies are treated as providing the indemnity cover required by the National Health Service.<sup>92</sup>

The victim of alleged negligence is in a satisfactory position in compensation terms if he can prove his claim. Funds are available from the self insuring health authority or the insured doctor, or both. Prior to 1954 the injured party would sue the hospital authority who would in turn bring third party proceedings against the doctor.<sup>93</sup> Since 1954 an agreement has existed between

hospital authorities and the defence societies whereby liability is apportioned, provided the defence society accepts liability for the doctor. Apportionment is by agreement or, in the absence of an agreement, in equal shares.<sup>94</sup> The agreement does not affect the problem of apportionment between doctors and members of other professions involved in treatment of the patient.<sup>95</sup>

The difficulty of proving medical negligence is well documented. The Royal Commission on Civil Liability and Compensation for Personal Injury reported that the proportion of successful claims for damages in tort is much lower for medical negligence than for all negligence cases.<sup>96</sup> Not, it would seem only because doctors are well trained but also due to legal impediments. Jones maintains that obstacles are put in the paths of plaintiffs. Policy dictates that the courts have in practice, if not in theory, tended to require a higher standard of proof in cases of medical negligence than in other cases of professional negligence.<sup>97</sup> Why should the medical profession be so protected? Jones asserts that the 'policy behind this pro-defendant attitude has been to discourage medical malpractice claims for fear of encouraging defensive medicine, and an apparent distaste for the inevitable public criticism of the medical profession that a negligence action engenders'.<sup>98</sup> Breach of duty and causation, as has already been discussed present problems in a consideration of medical negligence.

Both of these requirements also have a particular relevance in these cases associated with disclosure of risk or what is sometimes called, the doctrine of informed consent.

#### Notes

1. See Fleming *The Law of Torts* 7th edition. The Law Book Company 1987 p.169.
2. *Supra*.
3. [1985] 2 WLR 480 at 508.
4. But see Jackson and Powell *Professional Negligence* 2nd ed. Sweet & Maxwell p.287 in which they put forward the argument that a contract could be created when a patient enrolls on his general practitioners list. Consideration is provided by the additional remuneration which the practitioner receives. The doctor's legal obligations do not, since Thake and Eyre depend upon whether the patient is treated privately (contracts) or under in National Health Service (tort only) except where there is a clear agreement increasing obligations: Grubb: 'Failed sterilisation: Is a claim in contract or negligence a guarantee of success' [1986] CLJ 197.
5. *Thake v Maurice* [1986] 2 WLR 337. Supply of Goods and Services Act 1982 S13.
6. *Morris v Winsbury White* [1937] 4 ALL ER 494 at 500 per Tucker J: '... a special contract merely emphasises, if necessary, or it merely contains, all the necessary ingredients of the ordinary case where a surgeon is retained to perform an operation of this kind.'
7. *Sidaway v Governors of Bethlehem Royal Hospital* [1985] 2 WLR 480 at 508, per Lord Templeman: 'The doctor, obedient to the high standards set by the medical profession impliedly contracts to act at all times in the best interests of the patient.'
8. (1838) 8 C & P 475 at 479.
9. Where a higher degree of care is contracted for the standard of performance to be expected will be the higher contractual standard: *Independent Broadcasting*

Authority v EMI Electronics and BICC Construction Ltd [1980] 14BLR 1. As most sterilization operations are performed privately, the claims are usually brought in both contract and tort: Personal Injury Litigation 2nd ed., 1987, The College of Law, 'Some Problems of Medical Negligence Claims' P. Molyneux, p.72.

10. [1986] ALL ER 488.
11. [1985] 2 WLR 215.
12. At p.222.
13. [1986] 2 WLR 337. Reversal was largely based upon the 'common experience of mankind' that medical treatment is uncertain.
14. See C J Lewis 'Sterilisation and the Surgeon's Duty of Disclosure' (1986) Professional Negligence 38.
15. Pippin v Sheppard (1822) 11 Price 400  
Pimm v Roper (1862) 2 F & F 783.  
Edgar v Lamont 1914 S.C. 277.
16. Goodes v Nash (1979) 21 S.A.S.R. 419.  
Pimm v Roper (1862) 2 F & F 783 would probably be decided differently today. See Atiyah Vicarious Liability in the Law of Tort p.369. "The courts have been at pains in all the recent cases to stress that it can make no difference whether a patient pays for the treatment he receives, or whether he is treated gratuitously,...
17. Congenital Disabilities (Civil Liability) Act 1976 S.1. N.B. No duty is owed to the child in respect of 'wrongful life' on grounds of public policy: McKay v Essex AHA [1982] 1 QB 1166.
18. (1835) 7 C&P 81, per Tindal C.J.  
(1838) 8 C & P 475, per Tindal C.J.  
(1862) 3 F & F 35, per Erle C.J.  
(1925) 9 4 LJKB 791, per Lord Hewart C.J.  
The Times July 2, 1952 per Denning L.J.  
1955 S.C. 200, per Lord Clyde.  
[1984] 1 WLR 634, per Lord Scarman.
19. [1957] 1 WLR 582 at 586  
This dictum was approved by the Privy Council in *Chin Keow v Government of Malaysia* [1967] 1 WLR 813 at 816 and by the House of Lords in *Whitehouse v Jordan* [1981] ALL ER 267 at 277.
20. *Whitehouse v Jordan* (supra).

21. *Maynard v West Midlands RHA* (supra).
22. *Sidaway v Governors of Bethlem Royal Hospital* [1985] 2 WLR 480 (by a majority of the House of Lords).
23. *Roe v Minister of Health* [1954] 2 Q.B. 66.
24. *The Times*, December 8, 1958.
25. *Wimpey Construction UK Ltd v Poole*. *The Times*, May 3, 1984. Although this case was brought for breach of contract nonetheless it is submitted that this would be the test in tort also.
26. *The Times*, March 26, 1959.
27. It is to be borne in mind that a principal reason for acquitting the defendant was that the instructions of a consultant were being followed.  
  
But note P S Atiyah *Vicarious Liability in the Law of Torts* Butterworths 1967 p.89 n.19: 'The mere denomination "consultant" is not of much significance for it may simply be a title denoting the doctor's place in the hierarchy of the hospital staff: *Razzell v Snowball* [1954] 3 ALL ER 429 at 433.
28. *The Times*, August 6, 1986 per Mustill L J.
29. See M Jones 'Wilsher v Essex AHA - Professional Negligence Again' (1987) 84 LSG 248 - '... the standard of care which is required of a professional person in a specialist position is that of a reasonably competent practitioner in that specialism' - at p.249.  
  
Similarly D Brahams 'Inexperience is no Defence to Negligent Medical Treatment' (1987), 37 New L J 60. And also *Maynard v West Midlands RHA* [1984] 1 WLR 634 at 638 per Lord Scarman; *Sidaway v Governors of Bethlehem Royal Hospital* [1985] 2 WLR 480 at 502 per Lord Bridge.
30. *Payne v St. Helier Group Hospital Management Committee* (1952) CLYB 442.
31. *Nickolls v Ministry of Health* *The Times* February 4, 1955 per Denning L.J. At the time of the operation the surgeon had diabetes and terminal cancer and he died eight weeks after the operation. The action was on the basis that as the surgeon himself was a very sick man he should not have carried out the operation which was regarded as relatively simple. Denning

L.J. said that owing to Mr Joll's (the surgeon's) state of health for some reason or other something went wrong and damage was done. Denning L.J. further stated that surgeons should not operate unless fit to do so. But then surprisingly his lordship concluded that one could not say the surgeon was unfit to operate. See Joseph *Lawyers can seriously damage your health* Joseph. 1984 p.18.

32. *Mahon v Osborne* [1939] 2 KB 14 at 38-39, per MacKinnon L J. 'The proper question... was whether (the surgeon)... had exercised the reasonable degree of skill and care that a surgeon in his position ought to exercise, whether he had done anything that, exercising such skill and care, he ought not to have done, or left undone anything that, exercising such skill and care he ought to have done. This question involves matters of fact as to which neither the Court nor the jury has knowledge. The facts must be proved by the evidence of experts.'

See also *McLean v Weir* (1977) 3 CCLT 87 at 101 (British Columbia Supreme Court) per Gould J.

'It is true that the court may accept in whole or in part or reject in whole or in part the evidence of any witness on the respective grounds of credibility or plausibility, or a combination of both. But in technical matters, unlike in lay matters within the traditional intellectual competence of the court, it cannot substitute its own medical opinion for that of qualified experts. The court has no status whatsoever to come to a medical conclusion contrary to unanimous medical evidence before it even if it wanted to, which is not the situation in this case. If the medical evidence is equivocal, the court may elect which of the theories advanced it accepts. If only two medical theories are advanced, the court may elect between the two or reject them both, it cannot adopt a third theory of its own, no matter how plausible such might be to the court.'

33. As Maugham L J probably did in *Marshall v Lindsey C C* [1935] 1 KB 516 at 540.
34. See *Jackson and Powell Professional Negligence* 6.
35. [1984] 1 WLR 634.
36. [1984] AC 296.
37. *Edward Wong Finance Co v Johnson Stokes & Master* [1984] AC 296.

38. Reduction of the time necessary to establish a root of title in conveyancing became law after practice had changed.
39. Jackson and Powell op.cit 209.
40. op cit 209-10.
41. See Joseph Lawyers can seriously damage your health pp.14-15.
42. Maynard v West Midlands RHA. [1984] 1 WLR 634 at 639 per Lord Scarman.
43. [1980] 1 All ER 650 at 651.
44. op.cit 19.
45. Vancouver General Hospital v McDaniel (1935) 152 LT 56; Whiteford v Hunter (1950) WN 533.
46. See Sidaway v Governors of Bethlem Royal Hospital [1984] 1 QB 493 at 514 - 514 per Sir John Donaldson MR and [1985] 2 WLR 480 at 505 per Lord Bridge. See also Jackson and Powell Professional Negligence p.305.
47. Counsel for the plaintiff raised the spectre of unfairness in Rahman v Kirklees AHA [1980] 3 All ER 610. Cumming - Bruce L.J. addressed the issue at 613: 'The judge decided not to limit the number of witnesses. Counsel for the plaintiff submits that that is onerous and subjects the plaintiff, a mere patient, to the prospect of litigation in which a whole string of men of medical learning may be marshalled to follow each other into the witness box to obscure the truth out of a misguided sense of loyalty to a member or members of the profession charged with negligence. The history of medical negligence actions, I think, can be said to show that counsel's apprehensions are not wholly fanciful, but as against that, this court should not approach a case on the basis that the defendants, a public authority, will consciously try to abuse their position'. See also [1980] WLR 1244 at 1246-7. Molyneux makes a similar allegation of less than fair dealing by hospital authorities: 'In the past hospital authorities have refused to allow plaintiffs to inspect [the National Health Service] reports, claiming they were privileged; but since the House of Lords decision in Waugh v British Railways Board [1980] AC 521 to refuse a claim of privilege for an internal inquiry report into a railway accident that argument can no longer be sustained. The Court of

Appeal in *Lask v Gloucester Health Authority*, *The Times*, December 13th 1985 has now confirmed that N.H.S. accident reports of the kind above mentioned are not privileged'.

Molyneux 'Some Problems of Medical Negligence Claims' *Personal Injury Litigation* 2nd ed 1987 The College of Law.

48. *F.v.R* (1983) 33 SASR 189 at 194.
49. *Reibl v Hughes* (1979) 89 DLR (3d) 112 at 120 per Brooke J A: 'The duty to the patient is determined by the court and the evidence of the expert witnesses, if accepted, is relevant to determining whether or not the defendant has discharged that duty'. And this dictum was approved on appeal to the Supreme Court of Canada. *Reibl v Hughes* (1981) 114 DLR (3d) 1 at 11 per Laskin CJC: 'To allow expert medical evidence to determine what risks are and material and, hence, should be disclosed and, correlatively, what risks are not material is to hand over to the medical profession the entire question of the scope of the duty of disclosure, including the question whether there has been a breach of that duty.'
50. [1984] 1 WLR 641 at 653. See also Lord Bridge in *Sidaway* (supra) at 505.
51. [1957] 1 WLR 582 at 587.
52. The logic of *Bolam* more or less compels the courts to accept what doctors say. Statements such as that made by Lord Scarman in *Maynard* seem inevitable, and coupled with the attitude displayed by Lord Denning M.R in *Whitehouse v Jordan* (supra) so does a finding of no negligence in many cases.
53. [1985] 1 ALL ER 635 at 639.
54. *Slater v Baker* (1767) 2 Wils. K B 359 *Hunter v Hanley* 1955 S C 200; *Chin Keow v Government of Malaysia* [1967] 1 WLR 813; *Stokes v Guest, Keen & Nettlefold* [1968] WLR 1776; *Robinson v Post Office* [1974] 1 WLR 1176; *Clark v MacLennan* [1983] 1 ALL ER 416.
55. Jackson and Powell op.cit. 307.
56. (1985) 2 WLR 480 at 498.
57. Jackson and Powell op.cit. 308.
58. H.A.F. Dudley 'Informed Consent in Surgical Trials' (1984) 289 BMJ 837.

59. Report of the Royal Commission Civil Liability and Compensation for Personal Injury, Cmnd 7054 (1978) Chap 24.
60. Ethical committees are a way of controlling the controversial area of medical experimentation using human subjects. They may be based upon hospitals or at a higher level but there is no central authority with a responsibility for establishing ethical committees. Consequently there may be variations in different places at different times. When established ethical committees usually have both medical and lay membership, the medical predominating, able to appreciate descriptive shortcomings in the research protocol. Ethical committees are subject to criticism but they do provide a safeguard and for the public conscience and cooperative help for the individual medical research. They are likely to become more important. However it should be borne in mind that the committee does not represent merely a formal phase in the organisation of experimentation nor the only limitation upon such activity. The importance of approval by an ethical committee is recognised by outside bodies in the wider medical and social community, e.g. funding may not be provided unless the project has been endorsed by an ethical committee. It may be also that journals will not publish research which has not been approved by a committee. In total, the activities of committees and other external bodies and pressures may help to ensure that all experimentation is responsible. As such the experimentation may gain the support of a responsible body of medical people. In the event of an injury being caused to the human subject, a case based upon negligence is not likely to succeed. However, whatever safeguards against unethical practice are brought in the responsibility for ensuring the trial remains ethical is primarily the responsibility of the trial organisers themselves. See Butterworth's Medico - Legal Encyclopaedia Mason and McCall-Smith pp.200-201. Pocock Clinical Trials.A Practical Approach John Wiley and Sons, 1984, pp.102-103. Mason and McCall-Smith Law and Medical Ethics, Butterworths, 1983, pp.196-198.
61. Midland Bank v Hett, Stubbs, & Kemp (1979) Ch 384.
62. At 402.
63. Professional Negligence, op.cit. 310.
64. (1987) The Law Magazine 31.

65. Barnett v Kensington & Chelsea Hospital Management Committee [1969] 1 Q B 42; Robinson v Post Office
66. Wilsher v Essex Area Health Authority The Times March 11, 1988 per Lord Bridge.  
For a discussion of the problems of causation associated with Wilsher see A. Boon 'Causation and the Increase of Risk' [1988] 51 MLR 508.
67. The Daily Telegraph, April 1 1988.
68. Clark v Maclennan and Another [1983] 1 All ER 416 Peter Pain, J. at 425: 'The burden of proof lies on the plaintiff. To succeed she must show, first, that there was a breach of duty and, second, that her damage flowed from that breach.'
69. One expert witness dismissed the suggestion that the vaccine could cause brain damage as 'mythology': The Daily Telegraph November 24th 1987. However, the Department of Health and Social Security 'admits there may be a remote risk of brain damage as a result of vaccination but insists that the risk of death to an unvaccinated child is much greater: The Daily Telegraph, March 30th 1988.
70. An indication of the difficulties in the matters of this type is that the judgment took eight hours to read and was 300 pages long: The Daily Telegraph, March 31st 1988.
71. The Law Magazine, 12th June 1987.
72. M A Jones op.cit 7.
73. *ibid*
74. *ibid*
75. R. Elsey 'Medical Negligence: Onus of Proof on the Practitioner?' (1985) Lit 319.
76. Clark v Maclennan (1983), All ER 416, 427, per Peter Pain, J., ... where there is a situation in which a general duty of care arises and there is a failure to take a precaution, and that very damage occurs against which the precaution is designed to be a protection, then the burden lies on the defendant to show that he was not in breach of duty as well as to show that the damage did not result from his breach of duty'.
77. See Conclusion (*infra*).

78. e.g. *Saunders v Leeds Western Health Authority* (1985) 129 S.J. 225.
79. (1983) 80 LSG 3003. Add to this the problem acknowledged by the Pearson Commission of the understandable reluctance of doctors to criticise colleagues. M A Jones 'Medical Negligence - The Burden of Proof' (1984) 134 New LJ 7.
80. Professional Negligence op cit 300
81. Health authorities require their medical staff to do so.
82. See *British Medical Journal* March 5, 1983: Letter from Secretary of Medical Protection Society: 'Out of court settlements are entertained only when, on a careful review of all the facts and evidence, the prospect of a successful defence is not good.' Letter from Secretary of Medical Defence Union. 'It is the policy of the Union to defend every claim and make out of court settlements only when factual and expert evidence support there is a serious risk that the case would not be won in court. The Union puts a member's reputation beyond all other considerations.'
83. R S Jandoo and W A Harland 'Legally Aided Blackmail' (1984) 134 New L J 402.
84. *Whitehouse v Jordan* [1980] 1 ALL ER 650 at 606; *Clark v MacLennan* [1983] 1 ALL ER 416 at 433; *Thake v Maurice* [1985] WLR 215 at 227.
85. M Jones 'Wilsher v Essex AHA - Professional Negligence Again' (1987) 84 LSG 248.
86. The Vice-Chancellor, Sir Nicholas Browne-Wilkinson in *Wilsher* referred to the problem of financial stringency - 'should the authority be liable if it demonstrated that due to financial stringency under which it operated it could not afford to fill the post with those with the necessary experience. However, the law should not be distorted by making findings of personal fault against individual doctors who were, in truth, not at fault in order to avoid such questions. The allocation of resources was a question for parliament and not the courts. But the courts would not do society a favour by distorting the existing law so as to conceal the real social questions which arose:' *The Times* August 6, 1986. Problems relating to the rationing of medical resources are not new. Treatment is available to all irrespective of private means. Allocations of

resources must take place and, given increased expectation of patients and doctors, questions of legal liability to patients denied treatment on grounds of expense or availability may arise. Given that resources are finite should doctors take a view of the community need for medical treatment which overrides the needs of individual patients? On an ethical level perhaps doctors should consider their own patients only ignoring the community need. The question also arose as to the legal position of the Secretary of State under sections 1 and 3 of the National Health Service Act 1977. (R v Secretary of State for Social Services, ex p. Hinkes. Unreported Supreme Court Library (1981) 274). It seems the courts will not interfere with the Secretary of State's exercise of discretion provided he has acted reasonably. As for the doctor's legal liability there will be no breach of duty in failing to treat a patient with drugs or equipment which are not available. The problem arose in re Walker's Application (1987). A heart operation on a child had to be postponed five times and the application was to have the health authority's decision judicially reviewed. The legal action was in reality an attack not upon the authority's decision but upon the provision of National Health Service facilities generally. The previously stated legal position was reaffirmed viz; that judicial review was available only where there had been unreasonableness in the allocation of resources. The duty to provide resources under s3 was not an absolute one. As Sir John Donaldson pointed out in re Walker's Application such applications will usually fail but where they succeed in procuring the treatment desired money for the treatment of others is diverted from the health authority's budget perhaps into the lawyers pockets only. See 'Rationing of Resources' (1980) 290 BMJ 374. D. Brahams 'An Attempt to Remedy through the Courts a Lack of NHS Facilities (1987) The Lancet December 5, 1987, 1342.

87. Pfizer Corporation v Ministry of Health [1965] 2 WLR 387.
88. Health care institutions outside the National Health Service will carry independent policies of insurance and will not be self-insuring: J D Finch Health Services Law Sweet & Maxwell 1981 p.96.
89. Butterworth's Medico-Legal Encyclopaedia p.147.

90. Medical Defence Union v Department of Trade [1980] Ch 82; [1979] 2 All ER 421. The ruling would also apply to the Medical Protection Society: Dugdale and Stanton op.cit pp.369-70.
91. Finch op.cit 97.
92. Dugdale and Stanton op.cit 370.
93. Jones v Manchester Corporation [1952] 2QB 852; Payne v St. Helier Group Hospital Management Committee [1952] CLYB 2442; S6. Law Reform (Married Women and Tortfeasors) Act 1935.
94. The agreement resulted in Ministry circular HM (54) 32. For details refer to C R A Martin Law Relating to Medical Practice Pit Medical Co Ltd 1979 pp.95-96.
95. Jackson and Powell op.cit 322.
96. Cmnd 7054 1978 vol 1, para 1326. See also M.A. Jones 'Medical Negligence - The Burden of Proof' (1984) 134 New LJ 7.
97. Jones op cit 7.
98. *ibid.*

## Chapter 7

### Disclosure of risk

From the foregoing discussion of medical negligence it appears that a doctor will not be liable for negligence if he has complied with what has become known as the Bolam principle, that is if he has acted 'in accordance with a practice accepted as proper by a responsible body of medical men skilled in [the] particular art'<sup>1</sup> This is the accepted standard for diagnosis and treatment,<sup>2</sup> and appears to be in accordance with general principles for determining the liability of professional people. There is, however, the problem of determining the appropriate standard for disclosure of risks by a medical man when proposing surgical procedures or other medical treatments. The case of *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*<sup>3</sup> suggests there is a marked reluctance of the English courts to depart from the standards applied by Bolam in favour of any other approach. This is perhaps due to a 'traditional judicial deference to the views of the medical profession about its liability for negligence.'<sup>4</sup> In other words, the paternalistic approach of 'doctor knows best' is favoured, perhaps due to a series of factors which are not solely based on the need to do justice in a particular case. Judicial fears of an explosion of litigation have been voiced over a period of at least thirty years.<sup>5</sup> These fears, appearing sometimes to verge on paranoia in similar

fashion to the 'floodgates' fears of allowing actions for economic loss, are probably unfounded being based upon the so-called American 'malpractice crisis'. But the differences between both the legal and medical care systems operating in England and the United States make such an explosion unlikely.<sup>6</sup> However, the problems of disclosure have occupied much time in the courts in recent years and has generated a lot of opinions as to its relevance in cases of medical negligence.

#### Informed Consent

The doctrine of informed consent is transatlantic in origin and may be traced back in its present form as an issue of malpractice to the American case of *Canterbury v Spence* in 1972.<sup>7</sup> In the context of professional negligence the doctrine has posed a most vexing question; not only in USA and Canada but in the United Kingdom where it has not been received; the courts consistently rejecting the doctrine.<sup>8</sup> The complexity of issues associated with this doctrine is typical of the problems in professional negligence actions generally, particularly how much of a free hand are the courts willing to allow the professions to have. In an earlier chapter it was seen as a significant characteristic of professional bodies that they were independent of much external regulation and being the practitioners of the special occupation largely determined standards of conduct for themselves. But there is a limit to such independence and

in the words of Sir John Donaldson M.R. in *Sidaway v Board of Governors of the Bethlem Royal Hospital and Maudsley Hospital*<sup>9</sup> '... the law will not permit the medical profession to play God.'

The role of the courts is to dispense justice between the litigants and allocate the losses in accordance with the usual principles of law. But as indicated earlier, the courts have another role which is wider than that of doing justice to the litigants in a particular case. It is important that the courts maintain the confidence both of the profession and of the public in the profession. In this sense the courts help to maintain the integrity of the profession. They must not 'throw out the baby with the bathwater' because it is desirable that the occupations which are called 'professions' should continue to provide those services which are necessary in the public interest. However, the integrity of a profession is not maintained either in the long term or the short term if the public is endangered by unsafe practices. Much of the value of the work of the medical profession must be judged in the context of public confidence. Confidence will not be enhanced if the public perceives a conspiracy between the courts and the professions. Nor will individual members of the profession fare well. It is ironic, says Jones, 'that, since the most glaring cases of negligence will be settled before trial, it is doctors whose conduct is least (sic)<sup>10</sup> reprehensible whose

reputations become tarnished even where the action fails'.<sup>11</sup> Then there is the role of public protector which the court assumes in order that the public is not endangered by unsafe practices and that reasonable standards are maintained. Maintaining this balance between the professions and the aggrieved client/patient is a fundamental problem for the courts as may be evinced by the dictum of Denning L.J. (as he then was) in *Roe v Minister of Health*<sup>12</sup> and later Lord Denning M.R. in *Whitehouse v Jordan*.<sup>13</sup> Of all the professions the medical profession appears to enjoy greatest protection by the judiciary. In a variety of ways there appears to be greater legal obstacles placed in the path of the plaintiff pursuing a medical negligence claim. For example a higher standard of proof appears to be necessary to establish negligence and the problem of causation may appear almost insurmountable. The effect created seems to be that the medical profession is composed of persons of greater integrity than would be found in other professions. However, the reality is probably that no greater skill is possessed on average by members of the medical profession than members of other professions. The image is merely better, bolstered by the concurrence of the judiciary in allowing the medical profession to set the standard of competence required at law under the Bolam principle.<sup>14</sup>

At the root of the issue of informed consent is bodily integrity. There is the notion that, in medical treatment, touching without consent will render the practitioner liable in either trespass to the person or negligence. In *Schloendorff v Society of New York Hospital*<sup>15</sup> Cardozo, J. said 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patients consent commits an assault for which he is liable in damages. This is true except in cases of emergency, where the patient is unconscious and where it is necessary to operate before consent can be obtained.' Thus, there is a principle of bodily self-determination. Anglo-American law demands the consent of either the patient or some other person who is authorised to act for that person, before a medical or surgical procedure is performed. Cardozo, J. admits emergency as an exception but even that might be a strictly limited exception. No treatment may be forced on the patient against his will or the will of someone authorised to act on his behalf, regardless of the urgency.<sup>16</sup> Southwick<sup>17</sup> regards this exception as limited to cases where treatment may go ahead without consent because 'some especially strong social policy is called into play to protect the interests of others.' Southwick concludes that 'It can therefore be said that a competent adult has the right to die if he wishes; ...however courts have sometimes

ordered that care be rendered even when a competent adult has expressly refused it.<sup>18</sup> He does not, however, cite these cases. But even if emergency does constitute an exception to the requirement of consent, the problem is exacerbated by the difficulty of defining an emergency. It seems that the 'medical' need for prompt operation or treatment is not tantamount to an emergency, therefore the traditional legal concept of a medical emergency demands a situation where there is an immediate threat to life, or a threat of permanent impairment to health... If delaying treatment while consent is obtained would not increase the hazards to the patient, the "emergency" is not sufficient to justify treatment without consent.<sup>19</sup> The doctor, therefore, is subject to a legal risk if he is uncertain of the existence of an emergency. The unfortunate outcome, apart from the subsequent death or impairment of the health of the patient might be the development of unsatisfactory defensive medical practices.<sup>20</sup> Similar to this is the situation which may arise where consent has been obtained to a medical procedure but something unanticipated at the time of the original consent arises. Consistently with the rules relating to emergency it would seem that traditionally no extension of the original consent must take place with regard to the unanticipated condition which arises unless there is a threat to life or a considerable risk of permanent impairment of health.<sup>21</sup>

However, there are cases in which a more liberal legal rule has developed, viz 'a surgeon may extend the originally contemplated surgery whenever an unanticipated condition becomes evident during surgery and makes it medically advisable in his medical judgment to correct the condition immediately.'<sup>22</sup> The extension of the medical procedures is limited to those which would probably have been consented to by the patient, if conscious, and also involve the same incision and not entailing substantially different risks from those originally contemplated.<sup>23</sup>

#### Trespass or Negligence

The situation discussed above does not deal with the problem of consent in a manner which is relevant to malpractice or negligence. A possible form of action had been trespass. In the case of a trespass, the consent of the patient will make the touching by the doctor legally innocuous.<sup>24</sup> In recent years the form of action has moved away from trespass into negligence:- professional negligence.<sup>25</sup> There has been a considerable increase in the volume of medical malpractice litigation in common law countries, notably USA and Canada, and more lately the United Kingdom. Some of this litigation has focused upon the issue of consent. The doctrine of informed consent has taken on its own special significance in the debate about medical negligence.<sup>26</sup> Even so, the incidence of actions for negligence based on informed consent have hardly reached crisis proportions.<sup>27</sup> Be that as it may, in

Canada until 1976 in *Kelly v Hazlett*,<sup>28</sup> the problem of consent could be treated equally easily as either battery or negligence. The Ontario Supreme Court drew a distinction between the meaning of consent relevant to each form of action. It is clear that to give informed consent the patient must possess reasonably complete information about the advised medical treatment or surgery.<sup>29</sup> The issue is therefore one which relates to material risk and is significant in the action based upon negligence. In relation to battery, informed consent must be to the basic nature and character of the medical treatment.<sup>30</sup> But in the event of an action in negligence for breach of the duty to inform the patient of the collateral risks the judicial approach is more subtle and, as Picard points out, it is difficult to distinguish between the different types of consent. What, Picard asks, is the difference in content between basic nature and character, on the one hand, and collateral risk on the other, to produce a hard and fast rule for deciding which action to pursue. In any event, in practice, the differences between actions for trespass and negligence are many,<sup>31</sup> and hardly likely to depend solely on the role of consent.

It is now commonly held that claims based upon negligence are more appropriate in most of these medical treatment cases.<sup>32</sup> The plaintiff has given his consent to an act, the general nature of which is explained (thus

negating battery on the above test), but there has been some flaw in the consent obtained resulting in no consent at all to certain concomitant features of the act.<sup>33</sup> The negligence of the doctor is based upon a failure to obtain the consent of the patient by virtue of insufficient disclosure of the risk. Thus, although there may be alternative actions based on trespass or negligence, lack of disclosure is now treated as negligence or malpractice rather than as battery<sup>34</sup> as in *Reibl v Hughes*<sup>35</sup> and *Chatterton v Gerson*.<sup>36</sup>

Bearing in mind the importance of the classification, the two actions of trespass and negligence must be carefully distinguished from each other<sup>37</sup> and, indeed, negligence must be capable of definition as the action in negligence appears most likely. Malpractice<sup>38</sup> as Southwick puts it, 'is professional negligence, or the failure to adhere to legally imposed professional standards.'<sup>39</sup> Even so, the question to be asked in matters of negligence relate to the duty and to the appropriate standard if the duty is to be performed.

Commencing with the premise of bodily integrity every person has the right to determine what is to be done with his own body. The doctor faces the dilemma that the treatment may have been successful but the patient has suffered adverse consequences and was not adequately informed.<sup>40</sup> The doctor's duty is to disclose all material risks. Whether this has been done will be determined by

reference to the appropriate standard. But what the standard is seems less clear. Ordinarily in cases involving professional persons the standard is determined by reference to the practices of the reasonable professional or practitioner.<sup>41</sup> Thus, one might ask what constitutes being adequately informed of the material risks<sup>42</sup> since there appears to be a myriad of tests which have been suggested, discussed, rejected and accepted over the last few years.

If the professional standard is adopted this will act in derogation of the patient's right to bodily determination as the standard will be defined primarily by references to the practices of the medical profession. For this reason, the standard has, in some cases, been determined in terms of whether a reasonable person in the patient's position would attach significance to the information given to the patient. The American case of *Canterbury v Spence*<sup>43</sup> has been influential in the respect and has been so referred to in the American case of *Scott v Bradford*.<sup>44</sup>

According to Doolin, J., in *Scott v Bradford*, the court in *Canterbury v Spence* recognised that some jurisdictions considered the customary practice of physicians in making disclosure to the patient to be the appropriate standard. The standard of customary practice was rejected in *Canterbury v Spence* and the court substituted its view that 'The standard measuring

performance of the duty of disclosure is conduct which is reasonable under the circumstances,<sup>45</sup> *Scott v Bradford* also rejected the professional standard. What a doctor needs to tell his patient is measured by the patient's need to know enough to enable the patient<sup>46</sup> to make an intelligent choice. This test requires full disclosure of all material risks, producing the problem of distinguishing the material from the immaterial - a question of fact. In addition, there is an immediate qualification of 'full disclosure' by the existence of a limited privilege of non-disclosure which contains several features. Apart from immaterial risk the doctor is not expected to disclose unexpected risks although this might be a matter of degree. Some risks which are thought improbable might need to be discussed owing to the severe consequences should the risk materialise. Neither is there any need for disclosure in an emergency, or where the patient suffers from incapacity, or where the patient waives his right to receive the information. No disclosure ought to be necessary where there are risks which are commonly understood, and obvious, or are already known to the patient. And finally, though not least in importance, there is non-disclosure, which arises out of the doctor's primary duty to do what is best for the patient and where full disclosure would be detrimental to total care and the best interests of the patient.<sup>47</sup> This latter element, therapeutic privilege, is applicable even

in jurisdictions which focus attention upon the patient's rights and is tested by medical evidence. It is perhaps not surprising that difficulties have arisen in the English Courts which generally support the professional standard.<sup>48</sup> Although *Canterbury v Spence* has been approved in some cases in America, and therefore the professional standard has been rejected, it must be pointed out that the doctrine of informed consent in this form is maintained only by a minority of jurisdiction in the USA.<sup>49</sup>

Also of importance in the determination of informed consent is the matter of causation, identified as the second element after duty in the cause of action.<sup>50</sup> The patient must prove a causal link between the non-disclosure and the harm suffered. The plaintiff has to prove that he would not have undergone the treatment or would have undergone a different form of treatment, had the material risks been made known to him.<sup>51</sup> That the focus of attention has been upon causation is natural as the patient is asserting he would not have suffered injury had he received the information of which he was allegedly deprived.<sup>52</sup> Without such information being provided claim is that the consent given is ineffective. If, of course, the plaintiff would have consented had the doctor complied with his duty then the plaintiff would have no remedy.

As the requirement for informed consent is not to be full disclosure but reasonably complete disclosure only,

consideration has to be given to what fulfills this requirement. There have been various approaches to the extent of the disclosure, necessitated by the presence of patient hindsight. The problem of hindsight was clearly highlighted in *Roe v Ministry of Health*.<sup>53</sup> A patient knowing he has suffered some misfortune as a result of medical procedures may now choose to assert that had he been adequately warned he would not have given his consent. The approaches suggested range from the subjective to the objective, with variants in between.

The subjective approach involves a consideration of that particular patient. This in turn gives a greater weighting to the assertion by that patient that he would not have consented if he had been aware of the material facts. This approach is not generally acceptable since it is regarded as unfairly weighted in favour of the patient. At the other end of the scale, the objective approach considers the reasonable patient i.e. would the reasonable patient have given his consent when confronted with full information of the risks involved. *Canterbury v Spence* deals with this problem by the device of the 'reasonable patient' even though emphasising bodily self determinates. The effect is that a doctor would only be liable for non-disclosure if a reasonable patient would have been affected in making his decision to undergo treatment. That the actual patient would not is irrelevant in this objective test. This approach too is not acceptable

according to Mason and McCall Smith<sup>54</sup> as being potentially unfair to the patient as he may not have consented even though the reasonable patient would have done so. Mason and McCall Smith suggest a third test i.e. an entirely objective approach which is qualified by investing the reasonable patient with the special peculiarities of the patient.<sup>55</sup> As to how realistic this test is remains to be seen but the Supreme Court of Canada laid down such a test in *Reibl v Hughes*.<sup>56</sup> Writing of full disclosure<sup>57</sup>, the cases do not usually involve such a degree but rather a measure of non-disclosure. The issue is usually how much information should be disclosed. In addition, it is difficult to envisage any case of full disclosure, whether in relation to a reasonable patient or a particular patient, where, in the event of an allegation of lack of consent, negligence could be substantiated. Presumably, no doctor can give more than full information and it is difficult to see how a duty framed in such a way could be performed. Difficulty is created by the lack of clarity attached to 'full disclosure'. In theory, the amount of information a doctor could give is virtually limitless.<sup>58</sup> Perhaps a better way of addressing the problem is that, on a subjective basis, a patient might claim that what a "reasonable patient" would regard as "full disclosure" would be so regarded by him.

Even this approach may not result in a satisfactory solution. Full disclosure may prove to be inadvisable on

therapeutic grounds and that measure of disclosure may itself give rise to an action in negligence. But that, it is submitted, relates to another duty and another element of causation.

The Canadian cases thus use a subjective test in so far as the professional standard measures the doctor's duty of disclosure and that standard is modified by evaluation of the particular patient not the reasonable patient.<sup>59</sup> After the English case of *Chatterton v Gerson*<sup>60</sup> the approach adopted in *Reibl v Hughes* was favoured as likely to be applied in England.<sup>61</sup> An effect of the decision in *Reibl v Hughes* was observed in *White v Turner*<sup>62</sup> as being that 'no longer does the medical profession alone collectively determine, by its own practices, the amount of information a patient should have in order to decide whether to undergo an operation.' Cases decided subsequently in England show also that the courts are not prepared to allow the doctors to have the sole and final say as to the practices adopted.

#### The Standards of Disclosure

At this stage it might be worthwhile recapping on the nature of these various standards of disclosure and their effects. There are two standards applying in various jurisdictions - the professional standard and full disclosure.

### Professional Standard

The doctors determine what information doctors usually give to patients. If the doctor gives sufficient information to satisfy that test the patient is deemed to have enough information to give consent. There is no doubt that this standard operates in the best interests of the medical profession. An image of a paternalistic - 'doctor knows best' - profession is created. In turn few doctors will be prepared to testify against the defendant practitioners.

### Full disclosure

This test is supportive of the patients's right of self determination. *Canterbury v Spence*<sup>63</sup> is the most influential case. Using this test the judge (or jury where appropriate) will not be bound by the judgment of the medical community. Full disclosure appears to be welcomed by many American commentators as fostering better doctor/patient relationships. Unfortunately, it is more likely to result in the doctor being defensive and telling the patient everything even when, on therapeutic grounds, such full disclosure would be undesirable. Moreover, there is no doubt that there is great doctor and patient anxiety.<sup>64</sup>

### Standards in Various Jurisidictions

In New Zealand there is a professional standard.<sup>65</sup> In Canada, the professional standard has also been adopted

with the exception of research and experimentation<sup>66</sup> in which case the full disclosure rule applies. One of the fears that the development of the law of consent appears to have generated is that malpractice litigation has been encouraged. In the USA most states have chosen the professional standard of care. A substantial majority have accepted the reasonable patient standard.<sup>67</sup> An unfortunate effect has been therefore an increase in defensive medicine.<sup>68</sup> Such a fear of a litigation explosion is, however probably unjustified. Dyer reports that a national survey of malpractice claims conducted in 1975-6 in U.S.A showed that the issue of consent was raised only in three per cent of cases.<sup>69</sup> Therefore, seen in the context of medical negligence generally it is a minor issue. However, some appear to regard the issue of consent as a 'back door' approach to litigation in the absence of clearer medical negligence.<sup>70</sup> Whatever test is adopted the focus of informed consent is the patient. Has the patient made a decision to allow the treatment or the procedures to be performed on the basis of the information. Strangely Picard makes the observation that 'Comprehension of the information underlies his (the patient's) decision and is most important to negligence because the requirement of causation is made out by the plaintiff proving that had he been fully informed he would not have consented to the treatment which resulted in the injury'.<sup>71</sup> However 'comprehension' does not appear to be

a requisite of disclosure under the Bolam test or any other test. If it were there would be the additional difficulty of testing the extent of such comprehension. It is not always clear in what sense the information given to the patient has been understood.<sup>72</sup>

At this stage it is appropriate to consider the law in England. The doctrine of informed consent had no place in English law. Medical negligence, in whatever form it was to be found was judged according to the usual standards applicable to medical men i.e. the Bolam test. But the law does not develop in isolation and when cases come before an English court concerning issues of disclosure of information and consent it is inevitable that activity in other parts of the common law world will attract attention.

In *Whitehouse v Jordan*<sup>73</sup> Lord Edmund-Davies said "The test is the standard of the ordinary skilled man exercising and professing to have that special skill". If a surgeon fails to measure up to that standard in any<sup>74</sup> respect ("clinical judgment" or otherwise) he has been negligent.....' A similar view that the Bolam standard applied to all aspects of medical treatment was expressed in *Ashcroft v Mersey Health Authority*<sup>75</sup> In *Hills v Potter*<sup>76</sup> the position was made explicit by Hirst J. in that the Bolam standard should apply. In his view there 'was no clear distinction between the standard of care in giving advice and that in diagnosis and treatment. The

standard was not that of absolute and frank disclosure as a fiduciary ...<sup>77</sup> By holding such a view Hirst J. was rejecting the Canadian and American authorities which were cited to him.<sup>78</sup> There was no higher standard of disclosure and Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital and Others<sup>79</sup> confirms the view expressed by Hirst J. In the Court of Appeal in Sidaway Donaldson M.R. declined to develop English law along the lines set out in Canterbury v Spence.<sup>80</sup> The Master of the Rolls took the opportunity to reaffirm the Bolam principle, pointing out that Bolam had been approved on many occasions,<sup>81</sup> although the duty of disclosure is not the same as the duty laid upon the medical man generally in Bolam. The duty of medical man in matters of disclosure was expressed:

'The general duty of a doctor to disclose information to his patient as I would formulate it, is to take such action by way of giving or withholding information as was reasonable in all the circumstances of which the doctor knew or ought to have known, including the patient's true wishes, with a view to placing the patient in a position to make a rational choice whether or not to accept the doctor's recommendation.'<sup>82</sup>

Stating the duty in this fashion begs the question of how much information should be disclosed and when. The Master of the Rolls considered that this question was answered by reference to the doctor's relationship with a particular patient. There is therefore no adoption of the prudent patient test as laid down in Canterbury v Spence.<sup>83</sup>

Performance of the duty of disclosure involves some professional expertise and professional judgment. Whether a doctor has complied with the requirements of the duty is determined by reference to the Bolam test - the way in which other doctors discharge the duty. The Master of the Rolls was, however, concerned that adoption of the Bolam test did not result in an abdication of responsibility by the court. The definition of the duty of care is not a matter for the medical profession but for the judges and the courts. The medical practitioner may only, in the view of Sir John Donaldson, discharge the duty of care as his Lordship defined it. So strongly did the Master of the Rolls feel about this issue he expressed the view that a judge could 'reject a unanimous medical view if he were satisfied that it was manifestly wrong and that the doctors must have been misdirecting themselves as to their duty in law.' In defining the duty of disclosure Sir John Donaldson refined the Bolam principle by the insertion of the word 'rightly'.<sup>84</sup> The test for performance of the duty of disclosure was now to be 'if the doctor acts in accordance with a practice rightly accepted as proper by a body of skilled and experienced medical men'.<sup>85</sup> It is difficult to tell whether he merely expressed that which was implicit in the test or was taking the opportunity to express the courts hostility towards paternalism of the medical profession which denied the patient a real choice.<sup>86</sup> Dunn L.J. concurred with the

view of the Master of the Rolls with a reservation relating to clinical judgment. Where disclosure forms part of the overall clinical judgment of the doctor 'the court should not interfere unless the clinical judgment of the doctor taken as a whole falls below the generally accepted standards of the profession.'<sup>87</sup> As the professional standard is the appropriate standard, in the judgment of Dunn CJ the doctrine of 'informed consent' forms no part of English Law.<sup>88</sup> Browne-Wilkinson L.J. concurred.

The judgment of the Court of Appeal in *Sidaway* had an influential effect upon the development of English law in subsequent cases. In *Freeman v Home Office*.<sup>89</sup> a later Court of Appeal referred to *Sidaway*. It was accepted by Stephen Brown L.J. that 'informed consent' had no place in English law.<sup>90</sup> In *Freeman* Sir John Donaldson also took the opportunity to restate the view expressed in *Sidaway* that there was no place in English law for the doctrine of 'informed consent'.<sup>91</sup>

But a tendency seems to be developing that the *Bolam* principle applies to all aspects of medical practice - diagnosis, treatment and disclosure of risk. Dunn L.J. in *Sidaway*<sup>92</sup> considered that the duty to advise and warn as bound up in the overall clinical judgment of the doctor. No distinction was made in *Bolam* between diagnosis and treatment on the one hand and warning of the risks involved on the other. Although House of Lords' approval

of Bolam is restricted to diagnosis and treatment there had never been the suggestion that failure to warn was judged by a separate test.<sup>93</sup> On the other hand Lord Scarman in *Maynard v West Midlands Regional Health Authority*<sup>94</sup> may have taken a different view. Bearing in mind that this was not a case of disclosure, Lord Scarman referred to the matter of 'clinical judgment'. Later he discussed 'clinical judgment' in terms of 'diagnosis and treatment.'

It may be reading too much into the judgment to come to the conclusion that Lord Scarman restricted 'clinical judgment' to diagnosis and treatment only. His Lordship did not say that disclosure of risks did not feature as part of 'clinical judgment' as disclosure was not an issue before the court. And it might be that the opinion of Dunn L.J. in *Sidaway* (supra) is apposite - i.e. that no reference does not mean that disclosure is excluded. But if Lord Scarman was excluding disclosure from 'clinical judgment' then he was imposing a severe limitation on the Bolam principle. However Lord Scarman's judgment in *Sidaway* in the House of Lords may shed more light on the matter. In his powerful opening judgment in *Sidaway* Lord Scarman dissented from the view that the Bolam test was comprehensive and would embrace all aspects of the doctor's duty of care. In his Lordship's view 'the question whether or not the omission to warn constitutes a breach of the doctor's duty of care towards his patient is

to be determined not exclusively by reference to the current state of responsible and competent professional opinion and practice at the time, although both are, of course, relevant considerations, but by the court's view as to whether the doctor in advising his patient gave the consideration which the law requires him to give to the right of the patient to make up her own mind in the light of the relevant information whether or not she will accept the treatment which he proposes.<sup>95</sup> In Lord Scarman's view the standard of 'competent professional opinion' while appropriate to diagnosis and treatment is not necessarily the 'criterion in determining whether a doctor is under a duty to warn his patient of the risk, or risks, inherent in the treatment which he recommends.'<sup>96</sup> Indeed, his Lordship continued, it would be a strange conclusion if the courts should be led to conclude that our law, which undoubtedly recognises a right in the patient to decide whether he will accept or reject the treatment proposed, should permit the doctors to determine whether and in what circumstances a duty requiring the doctor to warn his patient of the risks inherent in the treatment proposed arises.<sup>97</sup> Lord Scarman concluded that there is room in our law for a legal duty to warn a patient of the risks inherent in the treatment proposed... as a aspect of the duty of care owed by the doctor to the patient.'<sup>98</sup> Lord Scarman was sensitive also to the fact that in very many cases factors other than the purely medical will play a

significant part in the patient's decision making process. In acknowledging this Lord Scarman was opening the way to greater self-determination by the patient.<sup>99</sup>

Thus Lord Scarman preferred to come down in favour of the American view viz there is a duty to warn of risks inherent in treatment provided that it is a material risk. Materiality is to be determined by reference to what a reasonable patient in the patient's position would be likely to attach significance, subject to the doctor's assessment that a warning would be detrimental to his patient's health. The therapeutic privilege exercised by the doctor is a limitation upon the right of self-determination by the patient but is consistent with the doctor's overall duty of care towards a particular patient. American courts which would place greater emphasis upon the right to self-determination also recognised the benefits to be enjoyed in the exercise of such a privilege.

The remaining four members of the House of Lords did not share Lord Scarman's views. By a majority the Bolam principle was reaffirmed. A test of the type suggested by Lord Scarman was regarded as impractical in application.<sup>100</sup> However, the House of Lords reserved some rights to the courts. There is always a danger with a principle such as that laid down in Bolam that the medical profession will have free rein even in matters not solely concerned with medical expertise. It would be intolerable

if the medical profession made the legal rules for the medical profession. In *Canterbury v Spence* there was expressed the desirability of 'a standard set by law for a physician rather than one which physicians may or may not impose upon themselves.'<sup>101</sup> Thus, there may be circumstances where the court will rule that the risk should have been disclosed, e.g. 'that the disclosure of a particular risk was so obviously necessary to an informed choice on the part of the patient that no reasonably prudent medical man would fail to make it.... In such a case, in the absence of some cogent clinical reason why a patient should not be informed, a doctor, recognising and respecting his patient's right of decision, could hardly fail to appreciate the necessity for an appropriate warning'.<sup>102</sup>

The scene is set for further actions to be brought against doctors on the issue of whether there has been proper disclosure of the risk. As this consideration of law began with reference to Canadian law it may be instructive to take a look at yet another Canadian case to see how well the standards marry together. In *Haughion v Paine*<sup>103</sup> the Canadian rule on informed consent involves an objective test ie whether a reasonable person would have proceeded in the circumstances and consented to the treatment. The court held that a reasonable person would not have consented to the operation had there been full disclosure. Accordingly there was a lack of informed

consent. Thus, the Canadian courts are not using a professional standard as indicated in *Reibl v Hughes*.<sup>104</sup> As Brahams puts it 'In Britain, the plaintiff would almost certainly have failed, since the doctor would not have been negligent and the courts would have been unlikely to override professional standards on disclosure.'<sup>105</sup>

Now that the English courts would seem to agree that the test for disclosure of risk is the Bolam principle based upon the professional standard the matter should appear to be settled. *Sidaway* was regarded as a novel case by Lord Scarman<sup>106</sup> as issues were being raised in the House of Lords which had not been previously considered. To Lord Scarman the Bolam principle does not appear to answer the issue of the factors influencing medical decision making. Not all of these factors are medical factors. There are many other critics of the Bolam principle in respect of disclosure of risk and medical decision-making. Kennedy suggests a duty to disclose any unusual and material risks inherent in the proposed treatment and any feasible alternatives, the issue of materiality being determined on the basis of the 'prudent patient' test.<sup>107</sup> Teff addresses the therapeutic value of disclosure, stressing the medically beneficial effects. He points out that enhanced communication would help to form a 'therapeutic alliance which could lead to a general improvement in the patient's condition'.<sup>108</sup>

There are also problems associated with the degree of disclosure needed in cases of 'elective' and 'non elective' surgery or in the case of treatment which is 'therapeutic' or 'non therapeutic'. It is difficult to know precisely what is meant by such terms. Presumably all treatment is elective<sup>109</sup> unless of course the patient was treated at a time when consent could not have been given e.g. unconscious and that patient would not have given consent if he had been conscious. Examples of elective surgery often included sterilization and cosmetic surgery. Even assuming the term elective to be correct, how does one decide upon the issue of whether the treatment is 'therapeutic' or 'non therapeutic'. If one takes the broader view of medical treatment suggested by Teff there is no reason to restrict therapeutic to the removal of life threatening causes or the relief of pain. Patients attach significance to 'quality as against length of life, and to physical integrity or appearance as against diminution of pain'.<sup>110</sup> There is therefore no reason to suppose that 'the optimum "outcome" is ... necessarily to be equated with the technically successful result of a given operation, but may embrace a prognosis of the patient's subsequent medical and psychological condition and ability to function, as well as other social and financial considerations where relevant.'<sup>111</sup> Thus, the labels elective or non-elective, therapeutic or non-therapeutic are not particularly helpful.<sup>112</sup>

However, in the case of experimental medical procedures different considerations may arise. Innovative procedures used in the course of normal treatment probably involves the usual principles of disclosure discussed above provided the patient is notified of this feature, the risks and the alternatives available.

In the case of experimentation on healthy human volunteers it may be that full disclosure of all risks however improbable is the true standard. Dugdale and Stanton<sup>113</sup>, commenting on the Canadian Case of Halushka v University of Saskatchewan<sup>114</sup> suggest the standard to be that there can in no circumstances be any justification for withholding risks from the patient in his own best interests as there is no advantage to be gained by the patient in undergoing the procedure.<sup>115</sup> Dugdale and Stanton suggest further that the approach to experimentation outlined above would be adopted as expressing English Law and that everyday and remote risks would not require disclosure in such circumstances.<sup>116</sup> However, it is unclear what is meant by 'remote' and it is submitted that the two suggestions contain an element of inconsistency. How is it possible to assert there is no justification for withholding risks from such a patient while maintaining that everyday and remote risks are exempted?<sup>117</sup>

The requirement of freely-given informed consent obtained from a patient involved in experimental clinical

tests is contained in the Declaration of Helsinki.<sup>118</sup> But in qualification the Declaration states that 'if the doctor considers it essential not to obtain informed consent, the specific reasons for this proposal should be stated in the experimental protocol...'<sup>119</sup> In the United States there is a legal requirement that patients undergoing clinical trials give written informed consent.<sup>120</sup> In the United Kingdom the situation is different. The British Medical Association recommends that consent to alternative therapies is obtained from individual patients but in practice whether consent is obtained depends upon the decision of a local ethical committee.<sup>121</sup> Sometimes consent is required at other times not. Pocock thinks that the diversity of view is partly due to different attitudes as to whether patients undergoing trials are informed of their disease. This reluctance to inform patients is a characteristic of the paternalistic approach of doctors towards patients who are ill. It should not have any place in the case of the healthy volunteer. The case of *C v S*<sup>122</sup> also produced problems relating to medical matters ultimately coming before the courts for resolution. In *C v S*<sup>123</sup> reference was made to the words of Sir George Baker P. in *Paton v British Pregnancy Advisory Service Trustees*<sup>124</sup> '... not only would it be a brave and bold judge... who would seek to interfere with the discretion of doctors acting under the Abortion Act 1967, but I think he would really be a

foolish judge who would try and do any such thing'. Not all judges appear so cautious. Comyn J. in *Whitmore and Another v Euroways Express Coaches Ltd and Others*<sup>125</sup> displays a more robust attitude towards issues traditionally left to doctors. In the case of shock in *Whitmore* Comyn J. asserted he was in as good a position as any physician or doctor to judge whether the plaintiff had suffered shock. How are the problems to be resolved? Grubb and Pearl<sup>126</sup> draw attention to such cases which often involve 'sociological, moral and profound religious aspects which arouse anxieties',<sup>127</sup> which the courts are not entirely competent to handle, not least because there is no tradition of amicus briefs. Further, Parliament is reluctant to provide legislative guidance in these controversial areas.' They ask has not the time come for the creation of a monitoring body independent of the medical profession with substantial lay representation to review and recommend legislation or codes of practice after wide consultation and having been properly informed of the issues which at present the courts have not?' The prospect is interesting but begs the question of whether such a body will be in a better position to act than the judges and legislators at present. The proposed lay body would have a daunting task ahead if it is to provide for consistency of decision which one imagines both the profession and the public desire.

It would seem that the problem of disclosure is still a matter of controversy. Sidaway has, for the moment, settled the matter in legal terms and the Bolam principle continues to reign supreme. The Court of Appeal has strongly reaffirmed the Bolam principle since the decision in Sidaway. In Gold v Harringay Health Authority<sup>128</sup> the Bolam principle has been applied in the non-therapeutic context.<sup>129</sup> In Blyth v Bloomsbury A.H.A.<sup>130</sup> it is possible for Bolam to apply even when the patient has asked for information.<sup>131</sup> Furthermore, the requirement of disclosure has been considered with regard to a different time within medical treatment. Hitherto, the question of disclosure has been discussed in the content of what is appropriate before treatment or surgical procedures are carried out. It has also been suggested that Sidaway principles imply a 'duty of candour' where something has gone wrong after treatment. Such a 'duty of candour' requires doctor to be frank about what has occurred and has been expressed by Sir John Donaldson MR in Naylor v Preston Area Health Authority<sup>132</sup> in which he took the opportunity to reiterate views earlier expressed by himself and Mustill L.J. in Lee v South West Thames Regional Health Authority.<sup>133</sup> But there are uncertainties ahead owing to the sensitivity of the patient/doctor relationship and the ethical and moral considerations which have to be taken into the balance as well as those of a medical and legal nature.

## Notes

1. Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 at 587.
2. Whitehouse v Jordan [1981] 1WLR 246; Maynard v West Midlands Regional Health Authority, [1984] 1 WLR 634.
3. [1985] 2 WLR 480.
4. H. Teff 'Consent to Medical Procedures: Paternalism, Self-determination or Therapeutic Alliance?' [1985] 101 LQR 432.
5. e.g. Roe v Ministry of Health [1954] 2 QB 66; Hatcher v Black, The Times, July 2, 1954; Davidson v Lloyd Aircraft Services [1974] 3 All ER1; Whitehouse v Jordan [1980], 1 All ER 650; and Sidaway itself.
6. Teff, op.cit, 435.
7. 150 US App D.C. 263, 464F. 2d. 772 (D.C. Cir. 1972) cert. der. 409 U.S. 1064.
8. e.g. Chatterton v Gerson [1981], 1 QB 432; Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudesley Hospital. [1984] 2 WLR 778, 791
9. See also Canterbury v Spence 464F. 201 772 and 784 (D.C.Gir 1972) in which was expressed the desirability of 'a standard set by law for a physician rather than one which physicians may or may not impose upon themselves'.
10. It is submitted that Jones means 'less reprehensible'. Those doctors who are least reprehensible and unlikely to have their reputations tarnished as it will not be possible to prove negligence against them. However, those whose conduct is less than adequate but which fall short of the 'glaring cases of negligence' will appear in an action and subjected to the public case.
11. M.A. Jones 'Medical Negligence - the Burden of Proof' [1984] 134 New L.J.7.
12. [1954] 2 All E.R. 131 at 137
13. [1980] 1 All E.R. 650 at 658

14. 'For reasons of policy the courts have in practice, if not in theory, tended to require a higher standard of proof in cases of medical negligence than in other cases of professional negligence... The policy behind this pro-defendant attitude has been to discourage medical malpractice claims for fear of encouraging defensive medicine and an apparent distaste for the inevitable public criticism of the medical profession that a negligence action engenders':  
M.A. Jones 'Medical Negligence - The Burden of Proof' (1984) 135 New LJ 7
15. 21 N.Y. 125, 129, 105 N.E. 92, 93 (1914)
16. Note that in U.K. consent is not always required in circumstances covered by ss 56-64 Mental Health Act 1983 i.e. medical treatment may be given to persons suffering from mental illness without requiring their consent.
17. Southwick The Law of Hospital and Health Care Administration 204
18. *ibid*
19. Southwick *op.cit* 209-10
20. *supra*
21. *Mohr v Williams* 95 Minn. 261, 104 N.W. 12 (1905)
22. *Bennan v Parsonnet*, 83 N.J.L. 20, 83 A. 948 (Sup. Ct. 1912); Southwick *op.cit* 211
23. *ibid.* *Kennedy v Parrett* 243 N.C. 355, 90 S.E. 2d 754, 56 A.L.R. 2d 686 (1956). There may also be a justified assumption that the patient might have consented in order to avoid a second, separate operation: Southwick, *op.cit* 211. See Jackson and Powell *Professional Negligence* ed pp.316-317. The authors suggest that in England the problem is avoided because the consent form signed by the patient before surgery authorises the specific operation and 'such further or alternative operative measures as may be found necessary during the course of such operation'. Also cited in the view of P.D.G. Skegg *Law, Ethics and Medicine*, p.104, 'a doctor is justified in proceeding without consent with any procedure which it would be unreasonable as opposed to merely inconvenient to postpone until consent could be sought.' See also the Canadian cases of *Marshall v Curry* (1967) 64 D.L.R. (2d) 105; *Murray v McMurchy* (1949) 2 DLR 442.

24. However the consent for this purpose is so general as to beg the question as to whether it is true consent at all.
25. In *Medicine, Morals and the Law*, Maclean and Maher, 1983, Gower, the authorities point out that the shift of emphasis from trespass to negligence makes the issue of consent another aspect of duty rather than a matter related to the personal autonomy of the patient. In this way, it is suggested, 'the law gives priority to the general good of medical treatment rather than to the interests of the individual: pp.93-94.
26. J.K. Mason and J.A. McCall-Smith *Law and Medical Ethics* Butterworths 1983, 112.
27. See Teff 'Consent to Medical Procedures: Paternalism, Self-determination or Therapeutic Alliance?' [1985] 101 LQR 432 and 434 n.20 and p.435; C. Dyer 'Suitable Case for Telling the Truth'. *The Times*, December 3 1984; G. Robertson 'Informed Consent to Medical Treatment' [1981] 97 LQR 102 at 125.
28. (1976) ICCLTI (Ont); (1976) 75 DLR (3d) 536.
29. Southwick op.cit 205
30. See note 24 (supra) as to the generality of the consent required.
31. E.J. Picard 'The Tempest of Informed Consent' 136. *Studies in Canadian Tort Law*, ed L. Klar Butterworths 1977.
32. See also Prosser and Keeton on Torts 190
33. Prosser and Keeton on Torts op.cit 118
34. See also W.L. Prosser, J.W. Wade and V.E. Schwartz, *Cases and Materials on Torts* Foundation Press, 7th ed 1982, 107 which identifies the transition from battery to negligence around 1960. And also Prosser and Keeton on Torts 190
35. (1980) 114 DLR(3d) 1, 10 per Laskin C.J.C. See also *Lepp v Hopp* 98 D.L.R. (3d) 464 at 467 in which Prowse J.A. (in a dissenting judgment) stated that with respect to battery in this case there was no suggestion of a intentional unconsented invasion of the plaintiff's person and that the matter should be treated as negligence.

36. [1981] 1 QB 432;  
[1981] 1 All ER 257
37. Practical difficulties associated with the distinction include 1) onus of proof; 2) causation; 3) importance of expert medical evidence; 4) significance of medical judgment; 5) proof of damage; 6) substantive basis upon which liability may be found; 7) limitation as it is normally only for negligence. See Picard *op.cit*
38. 'Malpractice' is an American term of art carrying with it a stronger allegation than 'negligence'. It appears to be an emotive term. Perhaps the term is connected with the notion that careless conduct by a professional person is somehow more reprehensible than careless conduct by others. Or perhaps it has its origins in the rhetoric employed in persuading the jury in American civil trials. The Concise Oxford Dictionary defines the term as 'wrongdoing; (law) physician's improper or negligent treatment of patient; treatment of patient; (law) illegal action for one's own benefit while in a position of trust'. Whatever the origin and purpose of the term 'malpractice' the term 'professional negligence' or merely 'negligence' is favoured by the English courts.
39. Southwick *op.cit* 205
40. Prosser and Keeton *op.cit* 190
41. Southwick *op.cit* 205
42. In addition, one might also ask how the test can be consistent with the premise of bodily self-determination. Even the *Canterbury v Spence* test fails by this criteria.
43. 150 U.S. App. D.C. 263, 464 F.2d 772 (D.C. Cir. 1972) Cert. der. 409 U.S. 1064.
44. See Prosser, Wade and Schwartz *op.cit* 197-201
45. Prosser, Wade and Schwartz *op.cit* 198.
46. Prosser, Wade and Schwartz *op.cit* 199.
47. See Doolin, J. in *Scott v Bradford* in Prosser, Wade and Schwartz *op.cit* 199 and also Prosser and Keeton on Torts 192

48. See Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] 2 WLR 480 (supra)
49. Teff 'Consent to Medical Procedures'. Paternalism, Self-Determination and Therapeutic Alliance'? [1985] 101 LQR 432, 434. See also Mason and McCall Smith Law and Medical Ethics p 122 in which is found reference to the fact that in some jurisdictions full disclosure applies and in others the professional standard applies. Diversity of standard is also observed within the Commonwealth Smith v Auckland Hospital Board [1964] NZLR 241 endorses the professional standard - see dictum of Woodhouse J. at 250.
50. per Doolin J. in Scott v Bradford
51. Thus, there is only a causal connection between the doctor's breach of duty to disclose and the injury suffered by the plaintiff 'when and only when disclosure of material which is incidental to treatment would have resulted in a decision against it' *ibid*.
52. Mason and McCall Smith *op.cit* 119. The deprivation complained of which prevents the consent from being informed is where 'a doctor fails to warn the patient adequately regarding the risks accompanying the contemplated treatment or surgical procedure, the acceptable alternative methods of treatment, and the contemplated benefits of the proposed course...' Southwick *op.cit* 295. But how often under the Bolam test is it necessary to indicate alternatives or indeed, what counts as an alternative? In Gold v Harringey Health Authority [1988] 1 Q.B. 481 the defendants were acquitted of negligence in the Court of Appeal because 'there was a body of responsible medical opinion which would not have given any warning as to the failure of female sterilisation, and the possible alternatives, in the circumstances in which the defendants actually found themselves'. per Lloyd L.J. at p.491.
53. [1954] 2 Q.B. 66.
54. Mason and McCall Smith *op.cit* 119.
55. *op.cit* 119-120.
56. Reibl v Hughes (1980) 114 DLR (3d)1.
57. *ibid*

58. 'It is apparently common practice in English hospitals for the information deemed relevant to patient consent to be provided by "the most junior and inexperienced doctor, who will not perform the operation and who knows nothing of the likely complications...": Teff 'Consent to Medical Procedures: Paternalism, Self-determination or Therapeutic Alliance?' [1985] 101 LQR 433 at 451.
59. E.J. Picard 'The Tempest of Informed Consent' Studies in Canadian Tort Law ed L. Klar Butterworths 1977 p.144.
60. [1981] QB 432; [1981] All ER 257
61. Mason and McCall Smith op.cit 120
62. (1981) 120 D.L.R. (3d.) 269 at 283.
63. supra
64. Picard op.cit 138-139.
65. Smith v Auckland Hospital Board [1964] NZLR 241; [1965] NZLR 191.
66. ibid. Halushka v University of Saskatchewan (1965) 53 DLR (2d) 436 at 442-443.
67. Schultz 'From Informed Consent to Patient Choice: A New Protected Interest' 95 Yale L.J. 219 at 249 (1985) By 'most states' the article indicates twenty six. In any event, the matter of disclosure is subject to therapeutic privilege.
68. Mason and McCall Smith op.cit 125
69. Dyer 'Suitable case for telling the truth' The Times December 3 1984.
70. Mason and McCall Smith op.cit 125.
71. Picard op.cit 141. See also Prosser, Wade and Schwartz Cases and Materials on Torts p.202; Prosser and Keeton on Torts p.191.
72. Teff 'Consent to Medical Procedures: Paternalism, Self-determination or Therapeutic Alliance?' [1985] 101 LQR 432 at 452. In Blyth v Bloomsbury A.H.A. The Times April 24, 1985 Leonard J at first instance distinguished Sidaway on the basis that Mrs Blyth was a nurse and 'would be trusted not to act irrationally' and she had requested information. Sidaway had been concerned with 'a woman with no

experience in health care' who requested the information. According to Leonard J in Blyth the standard of disclosure was to supply all available disclosure on request. The Court of Appeal refused to make such a distinction favouring the Bolam test which required the doctor to give the amount of information depending upon the circumstances. See Montgomery 'Power/Knowledge/Consent: Medical Decision Making' [1988] 51 MLR 245 at 246-248.

73. [1981] 1 All ER 267 at 277  
[1981] 1 WLR 246 at 258
74. Lord Edmund-Davies' emphasis: Note also that Lord Scarman in Whitehouse v Jordan quoted Lord Edmund-Davies in Whitehouse v Jordon who in turn had quoted Bolam at [1957] 2 All ER 118 at 121 and [1957] 1 WLR 582 at 586.
75. [1983] 2 All ER 245 at 247 per Kilner Brown, J.
76. The Times May 23, 1983; [1984] 1 WLR 641 at 652-653.
77. See also [1984] 1 WLR 641 at 652-3.
78. [1984] 1 WLR 641 at 652.
79. The Times February 24, 1984; [1984] 2 WLR 778; [1984] 1 All ER 1018, (CA); The Times, February 22, 1985; [1985] 1 All ER 643; [1985] 2 WLR 480. (HL).
80. [1984] 2 WLR 728 at 791.  
[1984] 1 All ER 1018 at 1027.
81. In particular Whitehouse v Jordan. See Maynard v West Midlands Regional Health Authority [1985] 1 All ER 635 at 369 per Lord Scarman.
82. [1984] 2 WLR 778 at 791.
83. [1984] 2 WLR 778 and 791.
84. [1984] 2 WLR 778 at 791.
85. per Donaldson M.R [1984] 1 All ER 1018 at 1028;  
[1984] 2 WLR 778 at 729.
86. Diana Brahams in a letter to The Times, March 26, 1984 regards the definition of the Master of the Rolls as reassuring and likely to encourage doctors to be frank with their patients.
87. [1984] 2 WLR 778 at 794-5.

88. [1984] 2 WLR 778 at 795.
89. [1984] 1 All ER 1036.
90. [1984] 1 All ER 1036 at 1043
91. [1984] 1 All ER 1036 at 1044.
92. [1984] 2 WLR 778 at 795.
93. [1984] 2 WLR 778 at 794.
94. [1984] 1 WLR 634.
95. [1985] 2 WLR 480 at 483.
96. [1985] 2 WLR 480 at 487-8.
97. [1985] 2 WLR 480 at 488.
98. [1985] 2 WLR 480 at 491.
99. [1985] 2 WLR 480 at 491. This view is gaining favour. In his article 'The Gillick Case: Parental Authority, Teenage Independence and Public Policy (1987) CLP 93 at 115 G.L. Peiris comments 'But it has now been recognised, fortunately, that the focus on customary practice, to the exclusion of the vitally important relationships between the individual doctor and his patient which must play a large part in any discussion of surgical treatment, in particular, with a patient, introduces into the law, in a fundamental respect, an element of incompleteness. Accordingly, English law accepts today that there might be circumstances where the proposed treatment involves a substantial risk of grave consequences in which a judge could conclude that, notwithstanding any practice to the contrary accepted as proper by a responsible body of medical opinion, a patient's right to decide whether to consent is so obvious that no prudent doctor could fail to warn of risk save in exceptional circumstances.
100. Per Lord Bridge of Harwich at p.503.
101. *Canterbury v Spence* 464F. 2d 772 at 784 (D.C. Cir 1972).
102. [1985] 2 WLR 480 at 505 per Lord Bridge.
103. [1987] 4 WWR 97.
104. *supra*.

105. D. Brahams 'Informed Consent: A Canadian Case in a British Perspective', (1987) *The Lancet*, 1474 at 1475.
106. [1985] 2 WLR 480 at 483.
107. I. Kennedy 'The Patient on the Clapham Omnibus' [1984] 47 MLR 454 at 470.
108. Teff 'Consent to Medical Proceedings: Paternalism, Self-determination or Therapeutic Alliance?' [1985] 101 LQR 432 at 452. Jackson and Powell *Professional Negligence* 2nd ed. 339. Maclean and Maher *Medicine, Morals and the Law*, p.88.
109. 'All operations are elective as the patient always has a choice. What the patient needs to have placed fairly before him or her are the alternatives' per Sir John Donaldson MR [1984] 2 WLR 778 at 792; [1984] 1 All ER 1018 at 1028.
110. Consent to Medical Procedures: Paternalism, Self-determination or Therapeutic Alliance?' [1985] 101 LQR 432 at 451.
111. Teff *op.cit* 450.
112. In *Gold v Harringey Health Authority* [1988] 1QB 481 at 489 Lloyd L.J. describes the line between therapeutic and non-therapeutic medicine as 'elusive'. See also Montgomery 'Power/Knowledge/Consent: Medical Decision Making' [1988] 51 MLR 245 at 248-249. A valuable effect of pointing to the non-clinical dimension of medical treatment is that we are alerted to the questionable nature of the Bolam test which allows doctors to judge matters not necessarily related to their expertise i.e. perhaps only the patient or the patient in collaboration with the doctor can decide what is 'therapeutic' in the broad sense. See Teff 'Consent to Medical Procedures: Paternalism, Self-determination or Therapeutic Alliance?' [1985] 101 LQR 432 at 450-453.
113. *Professional Negligence* 160.
114. (1965) 53 DLR (2d) 436.
115. Dugdale and Stanton *op.cit* 160.
116. *ibid.*
117. Perhaps it is only possible to justify withholding risks in terms of general tort principles such as *volenti*

118. Issued by the World Medical Association in 1960 and revised in 1975. See Mason and McCall Smith *op.cit* Appendix F.
119. S.J. Pocock *Clinical Trials. A Practical Approach*. John Wiley and Sons 1984, p.105.
120. *op.cit* 106.
121. It is submitted by Pocock at p.106 that this is motivated by a desire to protect doctors rather than for the benefit of the patient. In the United Kingdom there is a system of local ethical committees. All clinical trials must have their protocol approved by the committee beforehand. The committees consist of medical and lay people. Pocock *op.cit* 102 considers this has the advantage that proposals for clinical trials are subjected to broader social standards than might be achieved by the medical profession alone but has the problem that all the clinical implications and technicalities of each proposal may not be fully appreciated by committee members. Clinical trials of a new drug also require permission from the Committee on Safety of Medicines. The British Medical Association provides guidelines on medical research on human subjects and the General Medical Council maintains a national overview of ethical matters.
- See Pocock *Clinical Trials. A Practical Approach* Chapter 7.
122. [1987] 2 WLR 1108.
123. [1987] 2 WLR 1108 at 1124.
124. [1978] 2 All ER 987 at 991 and 992.  
[1979] QB 276 at 282.
- For a discussion of this case see C.M. Lyon and G.J. Bennett 'Abortion - the Female, the Foetus and the Father' (1979) 32 CLP 217.
125. *The Times*, May 4, 1984.
126. Grubb and Pearl 'Protecting the Life of the Unborn Child' [1987] 103 LQR 340 at 345-6.
127. [1987] 2 WLR 1108 at 1117 per Heilbron J. However, it should be made clear that Heilbron J. was discussing abortion which 'is a very controversial subject... people feel genuinely and sincerely for and against the operation', [1987] 2 WLR 1108 at 1117.

128. [1988] 1 QB 481; [1987] 2 All ER 888;  
[1987] 3 WLR 649.

129. *supra*.

130. *The Times*, February 11, 1987.

131. *supra*

132. [1987] 1 All ER 353 at 360; [1987] 1WLR 958 at 967.

133. [1985] 2 All ER 385 at 389-390;  
[1983] 1 WLR 845 at 850.

See also R.A. Buckley *The Modern Law of Negligence*  
Butterworths 1988 at pp. 287-288.

## Conclusion

The investigation conducted above has examined the nature of professional work, the maintenance of standards and the sanctions if standards fall below an acceptable level. When standards fall too low and someone alleges damage or loss as a consequence thereof, complaint may be made either to the courts or to the professional body. It is when the complaint is made to a court that the issue of professional negligence arises and such a complaint may be pursued in both contract and tort, if appropriate. However, pursuing an action in court is not without considerable difficulty as has been indicated in earlier chapters. There is much anguish. Plaintiffs feel anguish because the legal system produces what seem to be laborious procedures and, sometimes, insuperable obstacles. The professional feels the anguish of being subjected to proceedings which he would regard as destructive. The perception of destruction operates on two levels at least. First, years of study and practice coupled with a growing reputation are put in jeopardy as a result of an accident which has happened during the course of some activity which was intended to be for the benefit of the plaintiff. Secondly, there is the anguish of members of the profession that they are attracting the unwelcome gaze of the public. The attention is no good for them personally and puts the profession in a bad light generally. Even when the professional and the profession

are vindicated, the public may still harbour fears that all is not well and that the outcome was due to factors other than the merits of the case. All of this is destructive, although that is not to deny that some good may come of it, insofar as it suggested that there may be a better way of dealing with conduct we label as negligent.

Should a dissatisfied client or patient approach the professional body with a complaint of negligent treatment, the matter, it is often alleged, is not always disposed of satisfactorily. Professional bodies are charged with the duty of maintaining standards and imposing sanctions should members of the profession fall short of the standards laid down. But cases over the last few years show that the professions have not always discharged this duty adequately. Concern has been expressed publicly and steps are needed to put the situation on a more satisfactory basis. The stage now seems to have been reached that unless the professions put their own house in order someone else i.e. Parliament, will have to do it for them.

What are these changes to be? A consideration of the legal system shows many inadequacies when allegations of professional negligence are made.

## A. Problems associated with the Legal System

Many of the problems associated with disputes involving allegations of professional negligence are also related to liability generally. The usual method for obtaining redress for injury suffered as a result of professional negligence is the tort system. Increasingly, the tort system has become subject to criticism. Critics have advocated reform of the tort system at the least and even abolition at the other extreme. Almost everyone seems to agree that some reform is necessary.<sup>1</sup> The most radical proponents of reform of the law of tort have suggested its abolition with regard to property damage.<sup>2</sup> Most attention has, however, been directed to problems associated with personal injury claims<sup>3</sup> and it is to this form of damage that the following remarks relate. It may appear a narrow choice insofar as the types of damage considered in this thesis have been property damage, financial loss and personal injury. Despite that, an investigation of changes deemed necessary with regard to personal injury caused by professional negligence may still give an indication of what improvements might be made. Instances of property damage caused by professional negligence will in many instances also be remedied effectively by recourse to the law of contract.

Buckley in *The Modern Law of Negligence* identifies the major objections to the tort system under three heads. First, that tort is an inefficient and wasteful

compensation system. Secondly, that its operation in both practice and theory is arbitrary and capricious. Thirdly, the spread of the insurance system which shields tortfeasors from the financial consequences of their actions has robbed the tort of negligence of its moral basis.<sup>4</sup> It is submitted that the second and third of these objections are probably most pertinent to professional negligence causing personal injury although the first has its own significance. Many victims of accident and disease cannot lay a claim for compensation at anyone's door under the present fault based system. Indeed, only a small proportion of accident victims actually succeeds in obtaining compensation.<sup>5</sup>

Although these problems are general to tort, in many ways, and in particular with regard to personal injury, the problems can be examined under the head of medical negligence.

#### B. Medical Negligence

In Chapters 6 and 7 of this thesis there was an examination of problems associated with medical negligence. Some of those problems are now to be rehearsed with a view to arriving at some conclusion. There are problems associated with causation i.e. no compensation under the tort system unless the disability was caused by others. In addition, there are problems associated with proof. Although the burden of proof in a civil action is discharged by establishing fault on the

balance of probabilities, the onus is often difficult for plaintiffs. The issue of insurance raises mixed problems. On the one hand, the existence of insurance has kept the tort system in operation by providing the funds without which it would not be worthwhile pursuing most defendants. On the other hand, the existence of insurance may prompt a claim, may increase the likelihood of the court finding liability and, thus, potentially introducing distortion and, finally may remove the stigma of responsibility which, on the face of it, fault suggests. If fault, in the normal sense, need not be present for the purpose of liability, as some cases would suggest<sup>6</sup>, perhaps some comprehensive insurance scheme would achieve much the same result without the need for establishing fault and all the problems this entails.

#### 1. Proof of Negligence

However, on the assumption that the tort of negligence is to be the means of establishing whether compensation is to be paid as a result of medical injury, consideration has to be given to other issues which also cause problems. Perhaps the most pressing is that of proof.

Medicine is not an exact science. There are many schools of thought, all of which might be reasonably maintained. Judges may not show preference for one school as opposed to another.<sup>7</sup> It is not possible to establish either cause of injury or breach of duty by simply

producing a medical expert prepared to testify in support of the plaintiff's case. The defendant may similarly produce an expert. There may even be batteries of experts. In addition to that it is sometimes difficult to get a doctor, or any professional, to testify against a colleague.<sup>8</sup> In any event, the burden of proof is on the plaintiff.<sup>9</sup> As a means of countering this problem suggestions have been made that the burden of proof should be reversed.<sup>10</sup> These suggestions have not been implemented and the Pearson Commission made no recommendation as to the burden of proof in medical injury cases.<sup>11</sup> However, the Commission did refer to statutory attempts at reversal of proof, referring to the Road Traffic (Compensation for Accidents) Bill introduced (but never passed) in 1932. Buckley refers to Ontario's Highway Traffic Act 1980, s167, which does reverse the burden of proof and which, submits Buckley, deserves further consideration.<sup>12</sup> As matters stand the nearest approach to the implementation of a reversal of the burden of proof operates through the maxim *res ipsa loquitur*.<sup>13</sup>

## 2. Defensive Medicine<sup>14</sup>

The Commission expressed its fear that there would be an increase in claims and a resultant increase in defensive medicine. It is submitted that the constant reference to defensive medicine, bordering on obsession, when any attempt is made to redress the balance in favour of a plaintiff who has suffered medical injury, will in

time probably assist in robbing the medical profession of its moral authority. Facing up to responsibilities is also the hallmark of a professional body and a perceived reluctance to do so does not help its cause.

Defensive medicine is a catch-phrase used both by doctors concerned with the incidence of medical negligence actions and the courts who are anxious to preserve a professional standard for testing medical practice. There is an implication that doctors practise patient care more in the interests of avoidance of allegations of professional negligence than of the best interests of the patient.<sup>15</sup>

There are, of course, positive aspects of what is usually expressed in negative form. So-called defensive medicine might result in extremely good patient care, whatever the motive for giving it. There may be more thorough examination and treatment. On the other hand, it may be alleged that defensive medicine constitutes expensive and unnecessary treatment. Recent developments in the UK may affect attitudes towards, and even the utilisation of, defensive medicine. First, the Green Paper on Contingency Fees<sup>16</sup> might be the forerunner of a system which critics fear might escalate medical negligence claims. Secondly, the increase in private medicine may change the doctor/patient relationship from that currently encountered in the NHS. Thirdly, the White Paper on the Health Service<sup>17</sup> may lead to the introduction

of budgetary controls. On the one hand such controls may preclude the expensive procedures which are a trait of defensive medicine. On the other hand, patients who are offered more cost-conscious treatment and procedures and then suffer medical injury may feel they have been subjected to an inadequate standard of care and consequently be more prepared to litigate. It is too early to say.

However, the issue of health service funding is politically controversial. Arguments range over whether the funding of state provided health care has been increased or has been cut. In any event, it appears that closer budgetary control is envisaged. Bearing in mind the difference in the UK and the USA health provision and the different philosophy behind provision in each country, recent exercises in cost control in USA may give some indication of a future possible trend. Malpractice liability led to the growth of defensive medicine and the physicians were reimbursed under Medicare. As the control began to take effect some of the procedures adopted as part of defensive medicine were cut back and the expectation was that there was likely to be 'an increased rate of erroneous diagnosis and a consequent increase in preventable injury and mortality.'<sup>18</sup> The result may be greater malpractice or medical negligence exposure.<sup>19</sup>

The final consideration of problems associated with medical negligence is that of insurance. Claims against medical practitioners are increasing and as a result insurance premiums are increasing also. The medical profession has expressed concern. If we are to retain a tort system of compensation then professional indemnity insurance is going to be a fact of life. But the picture is perhaps not so black as it is painted. Medical and dental practitioners in the United Kingdom insure against negligence claims with one of three defence societies. The Pearson Commission reported that just over a third of the claims made led to payments of compensation; a much lower proportion than for other personal injury claims.<sup>20</sup> If this be so today, and I have no data to suggest otherwise, the incidence of liability is not so great. The insurance premiums for doctors have increased over the last few years,<sup>21</sup> but not more so than for other professional groups. In any event, it is a tax deductible expense and one to which Health Authorities contribute. However, doctors put £90 million a year into indemnity insurance of which less than half reaches damaged patients.<sup>22</sup> It is submitted that it is this latter point which raises a major issue for concern.

That so little of the insurance reaches the plaintiff is a serious indication of the inefficiency of the system which is referred to above. And that brings us back to the consideration of an alternative system of compensation

discussed above. Also related to claims is the position of the Health Authorities. These bodies which are self-insuring are not able to compensate other than out of their budgets. As a result funds which could be used to treat the sick are diverted into satisfying awards of compensation. Even allowing for the sharing agreement with the Defence Societies the sums involved are significant. A separate fund in respect of medical injury would reduce the burden upon the Health Authorities and help to prevent a situation where the reduction of funds itself might increase the potential for medical injury.

### 3. Reform of the Law of Tort

It has been suggested that the law of tort should be reformed. The Royal Commission on Civil Liability and Compensation for Personal Injury was set up in 1973 under the chairmanship of Lord Pearson.<sup>23</sup> Apart from consideration of compensation for accidents from a particular cause e.g. road traffic, the Pearson Commission recommended reform of the law of tort. A step proposed would, if implemented, constitute a disincentive to commencing litigation for negligence. The recommendation was that benefits received by plaintiffs from social security should be fully offset against any damages in tort subsequently recovered.<sup>24</sup> In an attempt to redress the imbalance in the present system, the Pearson Commission also recommended changes preventing the less seriously injured from being compensated and ensuring that

the more seriously injured are better compensated.<sup>25</sup> The problems of lump sum awards for personal injuries also received attention. The Commission recommended that the court should be obliged to award damages for future pecuniary loss caused by death or serious and lasting injury in the form of periodic payments. Lump sum awards would only be made if the court was satisfied that such an award was more appropriate.<sup>26</sup>

However, the Report of the Pearson Commission has come in for severe criticism. Those who opposed the continuance of the present tort system of compensation believe that the Commission could have made firmer recommendations for the abolition of tort in the area of personal injuries. Those critics would have favoured the development of a scheme along the lines of that operating in New Zealand since 1974.<sup>27</sup> If one takes the case of professional negligence resulting in medical injury the effect of the Pearson Commission's approach would have been thus: apart from injury incurred as a result of voluntary clinical trials where liability should be strict<sup>28</sup>, the basis of liability in tort should continue to be negligence.<sup>29</sup> The Commission went on to recommend that a no-fault scheme for medical injury should not be introduced but that the New Zealand and Swedish schemes should be studied and assessed if a decision was taken to introduce a no-fault scheme in the United Kingdom.<sup>30</sup>

If the Commission had recommended the establishment of a scheme along the lines of New Zealand, and if that recommendation had been implemented what would have been the result? There would have been a radical reform introducing a comprehensive state compensation system for those who suffer personal injury as a result of an accident. Such an accident may be caused as a result of professional conduct, and in particular, medical injury. The relevant New Zealand legislation is the Accident Compensation Act 1972, as amended. It is to be observed that the scheme deals only with personal injury caused by accident and not with disability caused in some other ways. This causal distinction will no doubt disappoint many who wish to see reform in the United Kingdom.<sup>31</sup>

But at the moment this is not to be. In the United Kingdom the victim of injury as a result of medical treatment will have to pursue a claim for compensation through the machinery designed to establish negligence. Professional negligence is still a relevant issue with all its implications. However, the desire for a future no-fault system has not abated. The British Medical Association is strongly in favour of the introduction of a no-fault system and has reported to that effect. As recently as 1989<sup>32</sup> it has confirmed interest in reform to remove a source of the problems currently besetting personal injury.

The British Medical Association has emphasised that any compensation system will impose a financial burden on doctors.<sup>33</sup> However, the primary concern is to identify an arrangement which is fairer to patients than the one currently operating. Need, and not proof of negligence, should be the basis of a system of compensation. The proposed scheme would not replace the tort system in its entirety in respect of medical injury. Nor is the scheme, strictly speaking 'no-fault'.<sup>34</sup> All that is desired is to relieve the patient of the necessity to prove culpability in order to obtain compensation. However the eligibility of an individual for compensation should not depend upon an undertaking not to take proceedings in court. Nor would such an individual be judged ineligible if the proceedings were unsuccessful and he subsequently applied for compensation under the scheme.<sup>35</sup> Although compensation under the suggested scheme would be for physical injury there are areas not envisaged as lying within the scope of the scheme. Compensation would be confined to physical injury; problems resulting from progress of the underlying disease would not be compensated. Neither would there be compensation for injury caused by error of diagnosis judged reasonable by a panel of experts or for complications arising from competently performed procedures.<sup>36</sup> Injury caused by the use of drugs used in accordance with the manufacturer's recommendations would not be compensated either. There

is, of course, with a 'no fault' scheme, a danger that compensation for trivial injury would be sought. As a consequence the Report recommends that a minimum period of disability would be necessary before claims could be made. A minimum disability of 30 days or 10 days excess time spent in hospital seemed reasonable to the working party.

Such a scheme would be expensive. A scheme similar to the Swedish scheme would, according to the British Medical Association, cost annually £50M for England, probably £75M for the UK as a whole.<sup>37</sup> Much of the cost would fall upon doctors who already contribute £90M a year in indemnity cover. To what extent the Health Authorities could share the burden is not clear. Currently, the Health Authorities do not insure against medical injury risks. Awards made as a result of successful litigation against them strain over-strained budgets. Government assistance would be needed if only to permit Health Authorities<sup>38</sup> to join such a scheme. Nothing will be served by damaging the National Health Service as a result of such a scheme. As the scheme would not replace the tort system but operate at its side, failure to implement such a scheme may mean that the tort system will have to be reformed. If the law's delays were reduced, if proof became less of an obstacle and if the cost of action became less of a deterrent to those seeking compensation, that would itself be a major improvement.<sup>39</sup>

The British Medical Association has continued to back this scheme by reference to potential liability currently deterring would-be specialists. The frequency of claims against obstetricians has doubled in the last three years. There is a danger that Britain will see a decline in medical practitioners entering what is perceived to be a high-risk speciality.<sup>40</sup> The British Medical Association has stated that the Government and the medical profession must grapple with the problem and propose a new compensation system not requiring proof of negligence.

#### 4. The Medical Profession

An agency for reducing the potential for inflicting injury might be the professional body itself in the way in which standards are maintained. Standards maintained to the satisfaction of the medical profession performing its functions adequately should result in a better service generally. Given the nature of accidents, however, the greatest supervision in the world cannot prevent injury at some stage to someone. How may the improvement be effected? Continuing the theme of medical negligence the General Medical Council now has 'gross negligence' added to its jurisdiction over 'serious professional misconduct'. Although the jurisdiction of the GMC is not designed to compensate victims, a serious attempt to ensure higher standards among practitioners might result in a lesser incidence of successful claims for negligence in the courts. Only time will tell if this reduction can

be achieved. The power with regard to 'gross negligence' is of fairly recent introduction. Hitherto the GMC appears to have been more concerned with the maintenance of moral propriety, which, although desirable, was not directed towards a maintenance of high standards in the practice of medicine.<sup>41</sup>

### C. Lawyers' Negligence

Other problems associated with professional negligence may also be examined by reference to the provision of legal services.

A lawyer who has had an allegation of negligence made in respect of his work will face the possibility of control by a) the courts in litigation, b) the court by virtue of its supervisory jurisdiction over a solicitor as an officer of the court or c) the relevant branch of the legal profession.

#### 1. The Courts' Control over the Legal Profession

As far as controlling the legal profession is concerned the courts are able to play a much more significant role. By virtue of their membership of the legal profession most judges are able to understand and appreciate professional conduct in a way that most judges cannot with regard to the medical profession. As members of the Bar the judges exercise control through the regulatory machinery associated with that branch of the legal profession. Solicitors may be controlled by the

courts owing to a solicitor's status as a court officer.<sup>42</sup> Under the Solicitors Act 1974 the court has an absolute right to ensure high standards of conduct are maintained. As the solicitor is an officer of the court he may be made liable for losses caused to a client.<sup>43</sup>

In matters of litigation for negligence the courts have shown themselves prepared to find a solicitor liable in circumstances where a member of the medical profession or the Bar might have been more fortunate, as in *Griffiths v Evans*.<sup>44</sup> However, when it comes to discipline of members of the Bar through the process of litigation the law appears less than even handed.<sup>45</sup> Members of the Bar exercise a wide range of functions, although principally advocacy. Professional negligence claims based upon the conduct of litigation invariably fail owing to advocates' immunity.<sup>46</sup> Solicitors act as advocates less frequently,<sup>47</sup> barristers being regarded as specialists in that area. Owing to the exclusive right of audience in the superior courts that barristers should be regarded as specialists is hardly surprising.

## 2. Advocates' Immunity

It is in respect of advocates' immunity from negligence in conducting litigation that members of the Bar in particular, appear to enjoy special privilege. The rule conferring immunity is a common law rule created by the judges. The continuance of immunity has been

recommended by the Benson Committee, the Marre Committee and most recently the Green Paper.<sup>48</sup>

In the Green Paper<sup>49</sup> the Government has accepted the cogency of the arguments for preserving advocates' immunity. The Green Paper states that in future all recognised advocates should enjoy the immunity from actions in negligence. The immunity is based upon public policy. The lawyers' notion of public policy in the case of immunity is not shared generally by others. The notion appears to be tainted with the influence of 'self aggrandisement'. Other professions do not enjoy immunity nor does there seem any need to seek it. Common law does not impose any liability for error of judgement unless that error is one that no reasonably competent member of the profession would have made. Surely this is sufficient protection for lawyers.<sup>50</sup>

### **3. Control of Members of the Legal Profession by the Legal Profession**

As mentioned above the legal profession has power of discipline over its members. In the case of the Law Society this power is conferred by statute. There is considerable disquiet about the way in which standards are maintained by the Law Society and how powers of discipline are exercised.

a. Criticism of the Present Arrangements for Discipline

It is hardly surprising that most of the criticism of the complaints procedures has been directed at the Law Society. The Solicitors' Complaints Bureau received 17,800 complaints in 1987, the Bar possibly 1% of that. It is hardly surprising as there are many more practising solicitors than practising barristers and the solicitor's work brings him into more direct contact with the client.<sup>51</sup>

The Solicitors' Complaints Bureau was set up in 1986 to handle the complaints previously handled by the Law Society's Professional Purposes Department. The earlier procedure had been criticised on grounds that it apparently lacked impartiality. Part of the problem is that both the Bar and the Law Society combine supervisory and representative roles.<sup>52</sup> However, it was in an attempt to counter criticism of the handling cases the Law Society set up the Solicitors' Complaints Bureau with a lay dominated Investigation Committee. They do not appear to have been successful.

The Green Paper highlights several problems with the Law Society's present arrangements and echoes other criticisms made over the recent past. First, the Law Society's investigation of complaints was confined to matters of conduct until 1987. Under the Administration of Justice Act 1985 it may now investigate complaints about inadequate professional service. The Chairman of

the Adjudication Committee in the first report of the Solicitors' Complaints Bureau expressed the difficulty encountered in identifying what this poor work might be. From the Government's point of view, this difficulty is largely due to the absence of written codes of conduct.<sup>53</sup> Secondly, the Solicitors' Complaints Bureau is unwilling to take action where the complainant raises the question of negligence as opposed to professional misconduct. The Solicitors' Complaints Bureau explains it cannot act in matters of negligence because that is a matter of law for the courts. Instead the Solicitors' Complaints Bureau sends the complaint to a solicitor on one of its negligence panels.<sup>54</sup> The Solicitors' Complaints Bureau admits that it is guilty of delay in handling complaints.<sup>55</sup> In order to improve the handling of complaints the Government expects the Law Society to institute an arbitration procedure to obviate using the full Bureau procedure.<sup>56</sup>

The Investigation Committee had hoped that lay elements and independence would reduce the workload of the Lay Observer. However, the Bureau has not developed machinery for dealing with complaints that inspire public confidence. The Lay Observer's powers are limited being confined to how a complaint is handled, and not extending to the substance of the complaint itself. The Lay Observer's powers are regarded as inadequate. In addition, there is an anomaly that there is no equivalent

officer with regard to the complaints procedure of the Bar.<sup>57</sup>

Because the system above is inadequate the Government intends to abolish the office of Lay Observer and the Lord Chancellor will appoint a Legal Services Ombudsman with greater powers to examine the handling of complaints by the Bar, the Law Society and any other legal professional groups.<sup>58</sup>

#### b. A Catalogue of Criticism

Even before publication of the Green Paper in 1989 some of the attempts made by the Law Society to improve its handling of complaints had been labelled as inadequate to say the least. The Law Society itself has acknowledged that the Negligence Panel was set up as a public relations exercise to defuse criticism of the profession.<sup>59</sup> In 1985 a whole series of complaints about the Law Society's handling of complaints received publicity. A private member's bill to create a General Legal Council taking over the Law Society's role for investigating complaints was introduced in Parliament. The main criticism related to the conflict of interest inherent in the Law Society's role as a body protecting members' interests and investigating complaints against members. The new body was to be independent of the Law Society. It is fair to say that the complaints about the Law Society arose after the Parsons affair. The Law Society, in an attempt to improve its image hired management consultants.<sup>60</sup> The

consultants reported a need for 'substantial improvement in the machinery for dealing with complaints.' At that time it was seen that a radical approach was needed.<sup>61</sup>

Later in 1985 the National Consumer Council called for a complete overhaul of the machinery for dealing with complaints against solicitors. The Council supported the creation of an independent body to process all complaints and criticised the fragmented system currently in force.<sup>62</sup>

According to the Legal Action Group the opportunity to tighten up controls over solicitors was missed when the Solicitors Act 1974 was amended by the Administration of Justice Act 1985. It is however acknowledged that the Law Society did acquire greater power over solicitors.<sup>63</sup>

From this stage on, it was always going to be a difficult task for the newly established Solicitors' Complaints Bureau to restore public confidence in the Law Society's handling of complaints.<sup>64</sup> There would seem to be no alternative to changing the present situation faced by the Law Society. The roles of protection of members interests and discipline of members must become separated and dealt with by truly independent bodies. Irrespective of what steps the Law Society might take with regard to discipline, public confidence in the disciplinary role appears to have been lost. An independent complaints body is needed. Perhaps the Green Paper has come not a moment too soon.

#### 4. Multi-disciplinary Practices

A further problem will have to be faced when considering the setting up of multi-disciplinary practices. Essentially such practices would be partnerships between solicitors and members of other professions. At present the Solicitors' Practice Rules<sup>65</sup> prevent such partnerships and the suggestion has been made that the rules should be changed. The Benson Committee<sup>66</sup> considered the possibility of partnerships with doctors, estate agents and accountants but concluded '...we do not think that it would be in the interests of clients or in the general public interest if at present partnerships were permitted between solicitors and members of other professions.'<sup>67</sup>

The Green Paper<sup>68</sup> proposes that solicitors should be allowed to engage in multi-disciplinary practices and the law would have to be amended accordingly. The Law Society would be expected to change its Practice Rules. Should these changes occur then there would have to be safeguards for protecting clients. The proposal includes continued personal responsibility of the practitioner and being subject to the rules of his or her professional body. Barristers may be allowed to enter into partnerships and even multi-disciplinary practices. It may be that other forms of organisation may be allowed for members of each profession.

Whatever happens in the future there will be a radical change. All those concerned will have to continue to be vigilant to prevent abuses and maintain standards.

#### 5. Contingency Fees<sup>69</sup>

Hitherto contingency fee arrangements have not been permitted in England and Wales. In Scotland solicitors have been allowed to conduct litigation on a 'speculative' basis. The Benson Commission recommended no change in the law should be made as it was not in the public's interest to do so.<sup>70</sup> Pressure has arisen to re-examine the possibility of allowing contingency fee arrangements.<sup>71</sup> One of the main arguments for such an arrangement has been based on the inadequacy of the legal aid system. Many people whose means take them out of the legal aid scheme cannot afford to bring a legal action. The fear of losing and the consequent burden of costs is a great deterrent. A contingency fee system would improve access to the courts for such people. It must be borne in mind that such an arrangement may save a party's own costs only not necessarily those of an opponent.<sup>72</sup>

There seems to be a good possibility therefore that increased access to the courts would result but also there might be an escalation of litigation. The Green Paper casts doubts upon that particularly in marginal cases where there was little prospect of success.<sup>73</sup> In any event, what is envisaged is not unrestricted contingency

fees but something akin to speculative actions, as in Scotland, based on a fee structure.<sup>74</sup>

Only part of the costs problem is addressed by reference to a contingency fee system. Other costs are large and as long as the plaintiff is beset with problems of causation, and of evidence in medical negligence actions, failure could still be financially disastrous.

#### D. The Objects of Professional Negligence

The continued existence of the professions would seem to be in the public interest. The services provided by professions are needed and, in the main, are carried out satisfactorily. The argument has centred around regulation and maintenance of standards. There is a delicate balance to be maintained between too much and too little regulation. Too much and the professions lose the necessary freedom to operate. And members of professions need some freedom if they are to exercise judgment. Too little regulation and standards may slip endangering the public. There are issues of public interest at both extremes of control.

Whether the professions are seen to be acting in the public interest is a matter for doubt. The public perception of professional activity may be that professions are no more than monopolies acting in the best interests of their members. The public confidence must be restored.

## 1. Medical Care

The public must feel that doctors are acting in the best interests of the patient.<sup>75</sup> There are increased expectations as to what medical science can achieve and patients are now better educated. The remoteness that many doctors appear to have from their patients may have a detrimental effect. More and more patients probably wish to know more about their condition and what is proposed. Bearing in mind that a doctor must exercise his own clinical judgment it may be that more confidence must be placed in patients. They too have an interest in what is going on.<sup>76</sup> Not all matters affecting a patient are peculiarly matters of clinical judgment. Relaxation of a traditional reluctance to communicate on the part of doctors might make patients feel partners in the decision making process. And having participated in the decision itself, the patient may not feel inclined to complain of bad treatment if, as must happen sometimes, something goes wrong.

## 2. Legal Services

The legal profession appears to be suffering a crisis of confidence. Criticism is being voiced that the professions are incapable of, and unwilling to, maintain standards among their members. The courts are criticised too. 'Lawyers looking after the interests of lawyers' has been a complaint. Lawyers must be held fully responsible for their negligence and immunities are misplaced.

#### E. The Future

What needs to be done? Many of the problems associated with professional negligence appear to be based on expectations of the public not being satisfied. Perhaps the expectations are unreal. In other ways the professions' loss of public confidence appears to be a self-inflicted wound. Given that there is a common interest among all concerned that professional services should be provided properly, the professions, the courts and the public will have to be responsive to change in order to derive maximum benefit from the services provided. The balance must be maintained.

It is difficult to avoid the conclusion that many of the recent proposals for reform put forward by the Government affecting both the medical and legal professions are motivated by ideology. There is no doubt that professions are not perfect and require reform. However, the two apparently motivating factors, i.e. budgetary control and competition, at the root of the recently suggested reforms in the White Paper and the Green Paper do not relate necessarily to improvement of standards which could have a marked effect upon the incidence of negligence actions. Concern has been expressed that the reforms could be destructive of professional activity if professionals are not encouraged to work according to an ethic of service but rather one of

profit maximisation.<sup>77</sup> In addition, the absence of adequate consultations with the professions themselves, apparently regarding the members of professions as obstructive conservers of vested interests, is to ignore the real part that professions could, and should, play in reform.<sup>78</sup>

There are many who regard the proposed reform of the legal profession as ill-conceived. There are, it is claimed, real dangers that the independence of the profession, particularly the Bar, will be destroyed.<sup>79</sup> An attempt to introduce the contingency fees of the American pattern was thought likely to increase vexatious litigation against doctors.<sup>80</sup> Increased claims and awards will result in increased medical insurance premiums. In turn, defensive medicine, it is argued, will increase. How likely this development is remains uncertain but on tight budgets even less resources may be available for the care of the patients.

The situation described above is pessimistic when it should be optimistic. There should be increased scope for professional activity. Insurance should be the norm in cases of liability established by the courts. All that is then needed is the formulation by the courts of principles by which liability might properly be attached to negligent conduct and proper, balanced awards of fair compensation given. The worst excesses of the legal system might be avoided by the introduction of no-fault liability in cases

of medical injury. Professionalism implies maturity and responsibility. It also entails admitting where that responsibility lies in respect of that often vulnerable party: the patient/client. It should be possible to allow professional services to flourish in a climate of adequate protection for the public.

#### Notes

1. R A Buckley *The Modern Law of Negligence* Butterworths 1988 p.389.
2. Buckley *op cit* 378, Ison *The Forensic Lottery* ch.6 *Atiyah Accidents, Compensation and the Law* 4th ed. Ch.25 pp.576-577.
3. Buckley *ibid*.
4. Buckley *op.cit* 378.
5. Buckley *op cit* 379 6.5% is the figure revealed by the Pearson Royal Commission investigation: Cmnd 7054-I para 78, Table 5.
6. *Nettleship v Weston* [1971] 2 QB 691, [1971] 3 All ER 581.
7. *Maynard v West Midlands Regional Health Authority* [1985] All ER 633; [1984] 1 WLR 634.
8. *Rahman v Kirklees AHA* [1980] All ER 610.
9. *Clark v MacLennan and Another*, [1983] 1 All ER 416.
10. per Peter Pain J in *Clark v MacLennan*. Cmnd 7054-I, paras 1069-1076.
11. Cmnd 7054-I, para 1336.
12. Buckley *op.cit* 387-8.
13. *Saunders v Leeds Western Health Authority* [1985] 129 S.J. 225.
14. For a brief account of defensive medicine see J.K. Mason and R.A. McCall *Smith Butterworths Medico - Legal Encyclopaedia* Butterworths 1989 p.148-149.

15. Once more it is concern about the US experience which has fuelled the concept. However, fears of the escalating incidence of medical negligence claims in the US being translated into a UK trend is probably exaggerated. The US concept of negligence is broader than that held in UK and there is also a different relationship between doctor and patient prevailing in UK as opposed to US. Finally, the UK does not at the moment at least, operate a contingency fee system for lawyer.
16. Cm 571
17. Working for Patients, Cm 555.
18. Rethinking Medical Malpractice Law in light of Medicare Cost-Cutting 98 Harv L. Rev 1004 at 1013 (1985)
19. op.cit. 1015.
20. Cmnd 7054-2, paras 237-238.
21. The Times, January 13, 1989.
22. Medical Defence Union was expected to announce an increase in the tax deductible premium to £1700 in its annual report in 1988: The Daily Telegraph, August 9, 1988.  
  
Roberts v Ramsbottom [1980] 1 All ER 7, [1980] 1 WLR 283.
23. 'The Pearson Commission'.
24. Buckley op.cit 382, see also Cmnd 7054-I para. 482.
25. Cmnd 7054-I para 388. Cmnd 7054-1 Ch.15 Buckley ibid.
26. Cmnd-I para 576.
27. Buckley op cit 382.
28. Cmnd 7054-I, para 1341. A brief account of the New Zealand scheme with references may be found in Chapter 3.
29. Cmnd 7054-I, para 1347.
30. Cmnd 7054-I, para 1371.

31. There are difficulties associated with "medical misconduct" in the New Zealand system: Cmnd 7054-III, para. 917. See also Smith 'Problems with a no-fault system of accident compensation' (1982) 284 Brit. Med. J. 1323.
32. The Times, January 13, 1989.
33. Ultimately the burden will probably be borne by the State.
34. There have been many articles on 'no fault' compensation systems. With regard to the current proposal by the British Medical Association see  
  
D. Bolt 'Compensating for medical mishaps - a model 'no-fault'scheme. (1989) New LJ 109  
  
D. Brahams 'No-fault compensation' (1989) The Lancet 170.  
  
D. Brahams 'The Swedish Medical Insurance Schemes: The Way Ahead for the United Kingdom' (1988) The Lancet 43.  
  
M. Whincup 'New Zealand's no-fault answer' (1988) New LJ. 474.
35. In New Zealand no action may be brought for personal injury or death resulting from an accident: Cmnd 7054-III, para. 863. However, common law actions for professional negligence are not finished in New Zealand. All that is clear is that if a claim is accepted by the Accident Compensation Corporation (sic) then it is not possible to make a claim through the courts. Smith 'Compensation for medical misadventure and drug injury in the New Zealand no-fault system: feeling the way' (1982) 284 B.M.J 1457. The BMA's suggestion that the tort system should be retained as an alternative to a 'no-fault' scheme weakens the principle of compensation according to need, not proof of negligence.
36. See note 31.
37. It is not clear whether these estimates include the cost of determining whether a claim falls within it. In New Zealand the scheme is financed from national revenue and the scheme is administered by the Accident Compensation Commission: Cmnd 7054-III, paras. 866 and 888.

38. For an account of the procedures involving medical negligence claims against Health Authorities see  
R. Bowles and P. Jones 'A Health Authority's Experience' (1989) *New LJ* 119.
39. See M. Mildred 'Re Focusing the Tort System' (1989) *New LJ* 124.
40. As an indication of the high risk nature of obstetrics the Medical Protection Society is introducing differential premiums. From April 1989 obstetricians will be charged £5,000 p.a. compared with £1000 for family doctors and £1800 for surgeons. Existing subscriptions as at March 1989 are £1,350 p.a. for all doctors, irrespective of speciality. The Medical Defence Union shares the concerns. See *The Daily Telegraph*, March 6, 1989.
- There is also a fear that the trend will extend to the speciality of anaesthesia in the near future.  
D. Bolt 'Compensating for medical mishaps - a model "no-fault" scheme.' (1989) *New LJ* 109.
41. A lay member of the General Medical Council published a report on the way the medical profession maintains standards. In essence the report maintains that the medical profession put itself before the interests of patients: Jean Robinson: *A Patient Voice at the GMC, Health Rights 1988*.
- A letter to *The Sunday Telegraph* from seven lay members of the General Medical Council stated that the report did less than justice to the work of the General Medical Council. As far as the authors of the letter were concerned improvements had been made and the voice of the patient did not go unheeded: *The Sunday Telegraph*, November 20, 1988.
42. S50(2) Solicitors Act 1974.
43. *Cordery's Law relating to Solicitors* Butterworths 7th ed. 1981 p.129. See also *Marsh v Joseph* [1897] 1Ch 213. See also powers under Supreme Court Act 1981 S51.
44. [1953] 1 WLR 1424, [1953] 2 All ER 1364. See also Chapters 3 and 4 (*supra*).
45. See Chapters 2 and 4.
46. See Chapter 5 and *infra*.

47. If one takes into account the conduct of litigation in the minor courts carried out by solicitors then solicitors collectively may perform more advocacy.
48. A call to end immunity has been made by the National Consumer Council in Ordinary Justice. A Consumer view of legal services and the Courts of England and Wales, HMSO, 1989. Extract in The Daily Telegraph March 6, 1989.
49. Cm 570, para 6.2
50. Seldon op.cit pp.97-98. It is submitted that the main point has been missed in the Green Paper. An advocate who has performed his duty to the court should not be regarded as in breach of duty to a client. Consequently, no allegation of negligence need arise from which immunity is sought. The stigma of protection (unjustified in some eyes) from the consequences of negligence would be avoided.
51. Cm 570, para 4.20.
52. The medical model is probably better with the General Medical Council handling disciplinary cases and the British Medical Association representing members of the profession. The Government believes each professional body should demonstrate that it has a supervisory body to investigate complaints which can be shown to be both impartial and independent of the professions' representational body: Cm 570, para 4.32.  
A. Seldon Law and Lawyers in Perspective Penguin 1987 p.100 regards this mixed function of 'trade union' and disciplinary body as a 'fundamental defect in the system.' The 'Society cannot be expected to discipline them [its members] as rigorously as an independent organization empowered to do so.'
53. para 4.23
54. para 4.25
55. para 4.28
56. para 4.29
57. para 4.30
58. para 4.31
59. L A G Bulletin April 1984 p.5
60. The Daily Telegraph February 11, 1985

61. The Daily Telegraph, February 26, 1985
  62. 'In Dispute with the Solicitor.' National Consumer Council The Daily Telegraph, April 11, 1985
  63. The Times, May 16, 1985
  64. The Daily Telegraph, September 8, 1986
  65. Rule 7 Solicitors' Practice Rules 1987
  66. Cmnd 7648 Ch.30
  67. Cmnd 7648, para 30.15
  68. Cm 570, Ch.12
  69. Earlier reference to contingency fees is to be found in Chapter 2.
  70. Cmnd 7648
  71. Marre Report
  72. In the USA where contingency fees are allowed in many states, there are no rules about costs similar to those in the UK.
  73. Cm 571, para 3.11
  74. The Scottish Faculty of Advocates reports that only 1% of caseload is conducted on a speculative basis.  
Cm 571, para 4.3
  75. See note 36 supra
  76. In 1957 Walker wrote 'Nor have hospital authorities recognised that the National Health Service now brings into hospitals educated men and women of enough intelligence to allow of them being as partners in the work of recovery. There is still a tendency on the part of medical and nursing staff of hospitals to be unnecessarily secretive and to fail to appreciate how much anxiety is caused by their withholding information from the patient and his relatives.'
- K. Walker Patients and Doctors Penguin 1957  
pp.111-112.
77. The Sunday Telegraph February 12, 1989

78. *ibid.* The Government appears to have had a change of heart and now seems more willing to consult: *The Daily Telegraph*, March 24, 1989.
79. Notably, Lord Lane LCJ, Lord Donaldson, M.R., and Lord Denning, former M.R. commenting on the Green Paper shortly after publication.
80. Such a scheme is not envisaged. The Scottish speculative action appears most favoured.

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