# THE LAW OF NEGLIGENCE RELATING TO THE PROFESSIONS

**by M. H. Vautier,**

1. The fundamental basis of the liability of professional men to those people for whom they perform services is that of breach of contract. The law in every case by reason of the fact of their holding themselves out to the public as possessing special knowledge and skills in their particular field implies in the contract to perform the services a term that reasonable and competent knowledge, care and skill will be exercised.

As was pointed out in a recent address to the Auckland Medico-Legal Society, the mere use of the term professional negligence can be a little misleading to persons who are not lawyers. The word "negligence" is inclined to be thought of as synonymous with "carelessness". But in many of the cases, of course, where liability on the part of the professional man has been held to exist he has not been careless at all – he has on the particular occasion used all the care he could muster, but the standard to be applied is an objective one and he is held liable because the degree of skill or knowledge he was able to exhibit has been held to fall short of the standard which it is considered he should have attained. This will be illustrated in some of the cases to which I will refer later.

2. This general basis of liability to which I have referred is extended or altered, however, in a number of particular instances where professional men are concerned.

First it is necessary to refer to the special cases where what is called a status relationship comes into being. These status relationships do not ordinarily affect professional liability. The English common law from very early times recognised such relationships as coming into being in the case of persons exercising certain common callings such as carriers and innkeepers. So also did it as regards bailors of chattels who can thus incur liability even though the bailment is gratuitous. So it did in the case of master and servant. Unless the professional man happens also to bring himself within one of these special status realtionships liability will not be held to rest upon him in any such way

The existence of one of these status relationships results in the defendant being able to be sued either in contract or tort, i.e. without the necessity of establishing any actual contract at all, but simply on the basis of breach of a duty of care owed to the plaintiff. It is of interest to note that following the decision of the House of Lords in ***Hedley Byrne & Co Limited v. Heller & Partners*** 1964 A.C. 465 to which I will be referring again later, the argument was put forward that because of this decision it should now be recognised that this status situation applied to professional men generally. This was done first in relation to solicitors in ***Clark v Kirby Smith*** (1964) 2 All E.R. 835 and then in respect of architects in ***Bagot v Stevens Scanlan & Co.*** 1964 3 All E.R. 577, but in both these cases the Court held that notwithstanding the House of Lords decision the liability of solicitors and architects ***to their clients*** rests in contract only and the client does not have the option of suing either in contract or in tort.

Secondly, however, there is one large class of professional people whose liability does rest not only on the basis of contract, but also in tort. These persons may thus be held liable even though there is no contract of any kind entered into either expressed or implied with the person for whom the services are rendered and no fee paid or agreed to be paid. These are all those persons who in the course of their work may cause physical injury to the persons whom they serve. Such are, of course, medical men, dentists, nurses, physiotherapists, radiologists, pharmacists, chiropractors and all such callings. The liability of the surgeon, along which lines I should mention with the apothecary, the barber and the blacksmith, in this way goes back to such early times that it may well have originally rested upon the status basis, a view supported by Holdsworth in his History of English Law, but the basis of the liability today clearly can be and is founded upon the fact that there is a general duty of care resting upon everyone not to cause physical injury to the person or the property of another, the breach of such duty being a tort whereas no such general duty is recognised to avoid causing mere financial loss to another person. It should be noted that as was pointed out by a contributor to ***Medicine Science and the Law 1964*** at p. 285 the law does not treat the results of the negligence of a professional man such as an architect or an engineer as resulting in physical damage to property even though the consequence to the plaintiff is a physical defective building.

Then to be considered are those cases where liability arises because of the existence of a fiduciary relationship. This situation arises whenever a person finds himself in a position of trust or has some confidence reposed in him. It is the duty of a person so placed, apart altogether from contract, to use care and skill in the conduct of the affairs entrusted to him. No professional qualifications or calling need be involved here, of course, at all, but it is very common indeed for professional persons to become involved in such relationships. All cases where a person acts as agent for a principal, or trustee for a beneficiary, of course come under this heading, but it is important to note that the relationship arises whenever a solicitor or an accountant becomes personally involved in business transactions in which a client is also involved. Thus in ***Nocton v Lord Ashburton*** 1914 A.C. 932 a solicitor who arranged for a client to give a security over certain property without disclosing that this improved the position of a security the solicitor himself held, was held liable to the client.

Lastly there is the wide extension of liability now to be contended with because of the decision in ***Hedley Byrne & Co.*** following the dissenting judgment of Lord Denning in ***Candler v Crane Christmas & Co.*** 1951 1 All E.R. 426. This may indeed be regarded simply as an enormous extension of the fiduciary relationship concept. The principle laid down by the House of Lords is thus stated:-

> "If in the ordinary course of business or professional affairs a person seeks information or advice from another, who is not under the contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted or that his skill or judgment was being relied on; and the person asked chooses to give the information or advice without clearly so qualifying his answer so as to show that he does not accept responsibility then the person replying accepts a legal duty to exercise such care as the

circumstances require in reply; and for failure to exercise that care an action for negligence will lie if damage results."

This decision in one resounding blow obliterated what had been regarded for nearly a century as being the law, i.e. that in the absence of contract an innocent although negligent misrepresentation could never give rise to an action.

As with every such sweeping new principle laid down in a decision of such authority as this attempts have since been made to show that decisions of the Courts in other allied but dissimilar circumstances have been rendered obsolete. I have already referrred to two such attempts. In New Zealand we saw an example of the far-reaching effect of this decision in a case where, when a land agent was showing two prospective purchasers a house property one pointed to a mushroom-like object on the back lawn and said is that a septic tank. Relying on the information given by the owner the land agent said "No, it used to be but the sewerage is now connected". It wasn't and he was held liable. (Barrett & Anor v J.R. West 1970 N.Z.L.R. 789).

There is no doubt that this decision creates a rather frightening spectre lurking in the wings for every professional man. It is not much comfort to him for Professor Street to point out the commuter who sees his fellow-passenger reading the Financial Times and asks him what shares to buy has no remedy if he receives careless advice and acts on it to his loss. So far as we in New Zealand are concerned the wide scope of the decision has been cut back materially by the decision of the Privy Council in ***Mutual Life & Citizens Assurance Co. Limited v Evatt*** 1971 A.C. 794 where it was held that the duty of care in giving gratuitous advice arises only when the advisor carries on the business or profession of giving advice of the kind sought. There must be in other words a holding out of possession of the necessary skill and competence to give the particular advice. This would very likely have let out the land agent to whom I have referred. It is a little disturbing to reflect, however, that if Mr Whitlam's Government had been elected earlier in Australia we might have had a decision of the High Court of Australia the other way to contend with.

3. The distinction to which I adverted earlier between contractual and tortious liability generally speaking makes little difference to the practical outcome of the case which goes to trial. It is, however, of considerable importance and interest to insurers because of the effect on time limits. The architects in ***Bagot's*** case, for example, escaped liability entirely because the contract was concluded in 1957 and the drainage system did not collapse until 1961 and the writ was not issued until 1963 and the six-year period had then elapsed.In tort the cause of action would have dated from the collapse. I sincerely hope the solicitors were not at fault for not realising that the action lay only in contract and thus not getting the writ out earlier.

There is some importance in the distinction too in that breach of contract entitles a party generally speaking to nominal damages even though no actual damage is proved whereas damage is an essential part of the cause of action in tort. Thus in one case the plaintiff may be entitled to his costs and in the other not. Interesting examples of this are provided in cases cited in Medicine Science and the Law, the Journal of the British Academy of Forensic Sciences, to which I have already referred where plaintiffs have sued and recovered damages in cases

where surgeons have gone beyond the contract and removed in the course of an operation some part of the body even though as in the case of tonsils there is no known useful function of this part or even where it was diseased and better in the patient's interests removed while the other operation was being done.

4. As to the standard of knowledge, care and skill, this, as I have said, is a standard set by the Courts and it is important to realise that it must be a reasonable standard only. The client or patient is ***not*** entitled to the highest standard. As in all walks of life some men are better at their jobs than others. The standard was laid down nearly a hundred and fifty years ago in ***Lamphier v Phipos*** (1838) as it is applied today:-

"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. There may be persons who have higher education and greater skill than he has, but he undertakes to bring a fair, reasonable and competent degree of skill."

This point becomes of particular importance in the cases where treatment has been provided as it must be if our hospital system is to function by relatively inexperienced house surgeons.

In a number of American decisions it has been stated that the standard of skill and care which is demanded of a medical man practising in a particular locality is the general standard existing among other practitioners in that locality. Thus, for example, a doctor or an attorney practising in a remote country district, it has been said, cannot be expected to conform to the standard set by his big city brethren. No such distinction can be said to be recognised in English or New Zealand Courts, but the ***average*** degree of skill and competence is, it must be noted, all that can be required.

How is this to be established? The Courts have in this regard always accepted evidence on the question in the form of opinions of fellow professionals in the same field. An opinion given by Tindle C.J. in an old case, ***Chapman v Walton*** 1833 10 Bing 57 is still cited today on this point. In a case involving an insurance broker he said:-

> "The most satisfactory way of determining the question is to show by evidence whether or not a majority of skilful and experienced brokers would have come to the same conclusion as the defendant."

The legal practitioner may possibly be in a somewhat disadvantageous position in this regard. Judges themselves always having had extensive experience of practice do not think such evidence necessary in cases involving legal practitioners and because they themselves possessed a high standard of competence when in practice may unconsciously tend to set the standard a little too high. Thus, in a recent case, ***Murray & Anor v Bannerman Brydone & Folster & Co.*** 1970 N.Z.L.R. 1034, a man called Graham being in desperate straits for money arranged to borrow $10,000 from a man named Murray, on the security of Graham's farm. The cheque was handed over with nothing else signed, but an arrangement made to meet the following day, a Friday, in the office of a solicitor in Gore to record the arrangements which had been agreed. It is not

clear whether the solicitor was given any details at all until the meeting at 4 p.m. on the Friday. The solicitor then and there drew up a memorandum recording an agreeement made to give a 2nd mortgage and also recording that Graham give Murray an option to buy the farm within 2 years at a stated price.

In the Supreme Court the solicitor was held to have been negligent for not advising Murray that the option was invalid because it constituted a clog on the equity of redemption.

About 90% of the solicitors engaged in conveyancing in New Zealand if they were honest with themselves probably felt their throats getting a little dry when they read that decision and privately said to themselves, "I'm damned if I would have though of that either at 4 o'clock on a Friday afternoon." We were all relieved to read later that the Court of Appeal said too high a standard had been set by the trial Judge bearing in mind that it is always necessary in deciding whether or not a professional man has been negligent on a particular occasion to consider the circumstances of the moment and the problem that has to be dealt with. This in effect may recognise something of a locality test. It is clear that the facilities for testing research and treatment available to the professional man on the occasion in question must be taken into account.

Does insurance result in the standard being set at a higher level? There can be no question to my mind, whether the mode of trail is before judge or jury, that the fact that everyone today knows that the prudent professional man has insurance against negligence tends to result in verdicts or judgments being given which would not have been given before the practice of insurance became widespread and wellknown. Insurers endeavour to combat both this and the greater tendency for people to claim when they know the professional man is insured by including conditions that the fact of insurance shall not be revealed. They do little to help. The result is something of a vicious circle like that of inflation. The more claims which succeed the more widespread becomes the practice to insure and the number of claims multiply more and awards go higher than they would have if insurance was rare.

There is no question to my mind that the setting of too high a standard is to the disadvantage of the public as well as the professional man. There is the obvious result that increased premiums are passed on where possible in higher charges, but the detrimental results are more widespread. The lawyer plays safe and advises the obvious and well tried path when a more enterprising or novel approach would have been to the client's advantage. The accountant and the engineer do the same. The doctor refuses to adopt new techniques even though sure of the benefit that would result.

5. In relation to negligence claims, with every different profession there are many special considerations to be kept in mind.

As regards the medical profession, the science is necessarily an inexact one with huge fields of unexplored and unknown territory still remaining. There is constant research and scientific advances with constant debate as to the merits of one drug or one operative technique against another. The Courts in recognition of this while judging harshly any indication of experimenting with the patient have said that if there is a substantial established school of medical opinion supporting the course the doctor took he will not be held negligent even

though perhaps because of some unkown peculiarity of the particular patient it did harm to him and even though there is a large body of opinion the other way. Then there is the very large question of the consent to operative treatment and the duty to advise and warn – the "informed consent" as it is called. This arises in the case of surgeons because of the law that every interference without legal justification with the person of another is an assault for which the surgeon may be held criminally liable.

In ***Smith v The Auckland Hospital Board*** 1964 N.Z.L.R. 241 and 1965 N.Z.L.R. 191, the consent to operative treatment in the usual form had been duly obtained, but the hospital was held liable because the risks had not been sufficiently explained. There is authority both in England and America and in ***Smith's*** case itself for the proposition that the surgeon need not go fully into the risks involved where to do so would unduly alarm an apprehensive patient. An English reviewer, I would mention, has suggested, perhaps with justification, that a jury finding against the surgeon would probably not have been made in Smith's case but for the dramatic circumstance presented of a man who went into hospital for treatment of a cardiac condition and came out without his leg. The topic is far too wide a one for me to expand upon here.

As to accountants and auditors a prescribed test today should certainly be the 100 page judgment of Moffat J. in ***Pacific Acceptance Corporation v Forsyth & Ors.*** 92 W.N.N.S.W. 29 – the $150,000 judgment which put the cat among the pigeons in the field of professional negligence insurance in Australia and New Zealand. Perhaps the two most salutary warnings provided by that case are that (1) where he can verify further the auditor should never be content only with the assurance of any one, however exalted his office in the company or organisation or however highly regarded and respected he may be, and (2) that there is a duty in the case of company auditors to report to the directors immediately and to the company in general meeting any irregularities or suspicious circumstances encountered and this duty must not be shirked even though it may be thought to involve a reflection upon the board, a director or a senior executive and even though it may be thought that public disclosure will do the company harm.

Valuers and appraisers are particularly open to claims because it is so easy for them to miss some point which detrimentally affects or enhances value and there is always the question as to how far they should go in endeavouring to ascertain whether there are hidden defects. ***Woolbridge v Stanley Hicks,*** 162 Estates Gazette 513 a 1953 case in England, illustrates these difficulties. There a bank asked to finance a possible purchase had sought the valuation and gave the instructions to the valuer in a letter with a postscript saying that the proposed purchasers desired that particular attention be paid to the matter of possible dry rot and woodworm. The premises were occupied by tenants, furnished and carpeted. The defendants were not readily able to make a thorough inspection and reported that a superficial inspection revealed no evidence of dry rot. They were nevertheless held liable to the purchasers who went ahead and bought and then found extensive dry rot.

Architects and engineers are similarly very open to claims and when they err or are held to have fallen short of the standard, the claims are, of course, liable to be very large ones. They have the invidious task of trying to anticipate just what conditions are likely to arise which may affect and the soundness of

their designs when they come to be put into effect and the tendency of everyone to be wise after the event is always likely to operate against them. The case of ***Karori Properties Limited v Jelicich Austin & Co.*** 1969 N.Z.L.R. 698, illustrates an unfortunate weakness in their legal position which arises from the fact of liability in these cases being purely contractual. A firm of architects sued because of the development of large scale leaks in the walls of a brick building sought to join the builders as third parties in the action alleging use of poor mortar and insufficient compacting of cement as it was poured. Their application was dismissed because the builders could not be classed as joint tortfeasors and there was no contract between the architects and the builders. The architects had no way of compelling the owner to sue the builder.

As regards quantity surveyors theirs may be seen as a fearsome responsibility with the hundreds and hundreds of calculations which may be involved and the thousands or even millions of dollars which may be involved. ***London School Board v Northcroft*** (1889) Hudson's B.C. 8th Ed. provides some comfort, however, in showing that where a great many arithmetical calculations are involved an inadvertent or occasional mistake will be insufficient evidence to establish negligence.

Persons who hold themselves as specialists or experts in their own particular field, of course, set for themselves a higher standard than applies to their profession generally. This, of course, operates very much to the benefit of the general body of their profession who may avoid responsibility by taking the opinion of such experts and who are not required to measure up to their standards.

Barristers fall into a special class as was recognised by the House of Lords in ***Rondel v Worsley*** 1969 A.C. 191 and cannot be sued for negligence in the conduct of litigation. It is commonly thought that this specially privileged position was secured by reason of their preserving a sort of fiction that their services were not charged for in the ordinary way and their fees cannot be sued for and are a kind of gratuity. This, however, is not the real reason at all. There is, indeed, authority in New Zealand to indicate that they can sue for fees (***Robinson & Morgan-Coakle v Behan*** 1964 N.Z.L.R. 650). The real reason for the immunity is the adverse effect that accountability by a barrister would have on the administration of justice. Apart from the inhibiting effect on the counsel's conduct of a case and the adverse effect on the principle that a barrister's duty to the Court transcends his duty to his client, nearly every unsuccessful litigant would be presented with the opportunity of trying to get a retrial of his case by suing his counsel for negligence in losing it.

It is to be noted, however, that in all nonlitigious matters, ***Rondel v Worsley*** made it clear that the barrister has no immunity either as regards his client or under the ***Hedley Byrne*** principle.

In the absence of actual bad faith or wilful misstatements an expert called as a witness cannot be held accountable for a mistake he makes in the course of his evidence and his position does not differ from that of the ordinary witness.

It is of some importance to mention here, however, that where a professional man for reward has furnished a report or opinion he can be held liable in the damges if he fails to attend Court when required to do so to give evidence. There are a number of reported instances where a plaintiff has recovered in this way by showing that he lost his case or recovered less because

of the non-attendance of the expert witness.

6. In the law of tort it is the Courts which define the area of actionable negligence and there can be no question that the years since World War II have seen very great extensions with the Judges, instead of as formerly requiring that the case be brought within one of the established situations where liability has been held in the past to exist, saying openly that the field is limited only by questions of public policy which they themselves will lay down. ***Hedley Byrne*** itself was, of course, a conspicuous example of an extension of the ambit of the duty of care, but there have been numerous other less far-reaching but nevertheless costly extensions. ***Best v Samuel Fox & Co. Limited*** 1952 2 All E.R. 394 drew attention to the fact that the duty of care must have some bounds as to the persons to whom it is owed. If the owner of a business employing a thousand people is killed by someone's negligence, are they all to be permitted to sue because as a result the business is closed down and they are put out of work? If you run over a man and prevent him from going to where he was going to negotiate a million dollar contract, what is to happen?

Notwithstanding the warning note sounded in ***Best's*** case by such wise and experienced judges as Lord Porter and Lord Reid, there has been one extension after another recognised in the scope of the duty. To quote but one in England – ***Schneider v Eisovich*** 1960 1 All E.R. 169 – relatives who had incurred air fares and hotel expenses travelling to visit an injured person in another country were enabled in an indirect way to recover these. In ***Wright v Cooke*** 1967 N.Z.L.R. 1034 parents directly recovered travelling expenses incurred in visiting their injured child on the ground that this was of importance to the child's recovery. Whether the matter is viewed as turning on the extent of the duty or on principles as to remoteness of damage does not now seem to matter very much because in either case the tendency of the Courts is to look at the matter just as a social question – should or should not this plaintiff recover damages?

In the same way the introduction of the "foreseeability" test in place of the "direct result" as regards the type of damage which may be recovered has brought in a large number of heads of damage which would formerly have been excluded.

In a review of a case which effected yet another of these extensions in the scope of the duty of care, a contributor to the Cambridge Law Journal (1965 at p. 186) began his article thus:- "A French jurist has foretold that the law of tort

> "A French jurist has foretold that the low of tort will die of hypertrophy: it will blow itself up like Aesop's frog in the self important attempt to make everyone liable for everything."

7. ***Spartan Steel and Alloys Limited v Martin & Co. Limited*** (1972) 3 All E.R. 557 is a recent example of how a tort-feasor can today be held liable not only for the physical damage he has caused to the property of another, but also for loss of profits thereby resulting – something which, of course, opens up the possibility of claims of stupendous size.

As to the quantum of damages we all know that awards are constantly escalating. One point I would mention in relation to the increasing number of claims and increasing damages is that most lawyers experienced in the field of personal injury claims foresee that when the Accident Compensation Act comes

into force there is likely to be a substantial increase in the number of public liability and professional negligence claims arising out of personal injury – particularly against doctors and hospitals. In the United States the biggest awards of recent years have been against doctors, hospitals and drug manufacturers and the bonanza of a large lump sum damages claim will always have more attraction than any weekly state-paid pension. In a recent case in the State of Florida a small boy secured an award of 1¼ million dollars against a private hospital.

8. What is the precise nature and effect of the contract which the professional man enters into by accepting instructions or agreeing to treat someone for a fee. Except where it is complicated by the existence of other elements referred to it is submitted that it is basically no different from any other contract. It requires two consenting parties. A doctor is under no obligation to treat anyone and everyone who seeks his services. It may well be in particular cases, however, that it is a contract to perform services personally and not by delegating to anyone else. In such cases it cannot be assigned or the performance delegated. A more interesting question is whether a term can be incorporated in it limiting the professional man's liability for any want of care or skill. This is a question upon which I have been able to find little in the way of authority beyond some reference to recent cases in American Courts where it has been held that such terms are in the case of medical men invalid as contrary to public policy. It is difficult to see why this should be so when carriers of goods, shipping companies and airlines are able to do so and have statutory approval and recognition of their so doing.

***Charlesworth Negligence***, 5th Edition (1971) p. 675 says a duty which is imposed by common law or by statute for the protection of a particular person can in general be waived. He goes on, however,

> "In the case of a common law duty contracting out is permissible unless it is against public policy . . . there does not appear to be any instance in which it has been held that contracting out of liability for common law negligence is contrary to public policy."

As to the liability of partners the only point here which time permits me to mention is that a retiring partner should take particular care to see that insurance is maintained which will still protect him after his retirement. A change in the new firm's insurance cover may leave him entirely unprotected. It may even be necessary to keep an existing policy in force and renew it from year to year until the six year period of limitation has expired.

9. Vicarious liability and the position of professional persons in salaried employment can create special problems. As has been mentioned the contract may be expressly or impliedly a personal one which permits of no delegation at all. Professional practice or trade custom will be of importance here in determining just what is to be implied where there are no written terms. In a recent case, ***Moresk Cleaners v Hicks*** 1966 2 Lloyds Reports 338, however, an architect was held liable for defective design of a building and the architect's plea that it was an implied term that he could delegate specialised design tasks to qualified sub-contractors did not avail him.

10. Where an expert acts as an arbitrator or in any semi-judicial capacity he ceases to have a duty of care to the person employing him and provided he acts fairly and honestly he will not be held liable to either party through lack of skill, ignorance of the law or any negligent conduct in that capacity. He will, however, be liable for fraud or collusion (see ***Madge — Professional Negligence*** (1968) p. 17).

11. The subject of pitfalls into which the professional man may fall in relation to indemnity insurance is also too wide a topic for me to do more than touch upon. It is extremely important, however, to note that the forms of policy issued may vary fundamentally. The policy may be issued on the basis of covering — (1) claims made during the currency of the policy regardless of when the actual negligent act, error or omission giving rise to it actually took place, (2) claims made for negligence committed during the currency of the policy only or within a limited or unlimited time after it has lapsed. It would be very difficult today to find an insurer willing to agree to be liable for claims arising at any time in the future and the first form of policy is that which is now usually encountered. The important thing to note is just what the position is in this regard and to remember that in the case of the first form I have mentioned all protection is lost once the policy is allowed to lapse because the provision made is for indemnity in respect of claims made ***during the period specified in the policy.*** This, of course, will be usually the period of 1 year covered by the premium. Particularly to be watched is the situation pertaining when a change is made from one insurance company to another.

A further point which must always be kept in mind is that the usual form of policy provides indemnity only in respect of negligence occurring in the course of the policy. Any claim arising through the professional man having gone outside the scope of those duties will not be covered by the insurance. Thus a solicitor giving gratuitous advice outside the ordinary course of his practice and rendering himself liable under the ***Hedley Byrne*** principles will find that his insurance policy provides him with no protection.

A further pitfall was illustrated in the case of ***West Wake Price & Co. v Ching*** 1956 3 All E.R. 821. This case concerned the Q.C. clause — a very valuable provision from the point of view of the insured because under its terms the professional man is not obliged to contest the case in Court unless a Queen's Counsel whose appointment is agreed to by both parties advises that the proceedings should be contested. In the case referred to, however, the accountants concerned were held not entitled to rely on the protection of this clause because the proceedings were framed both on the basis of negligence and as a claim for money had and received.

A further important point to watch is that the limit of indemnity usually provided is an aggregate limit for any period of insurance. It follows that upon payment of a claim the indemnity stands reduced by this amount until the next renewal date. To obtain maximum cover, therefore, the indemnity should be immediately reinstated to its previous limit.

## QUESTIONS ADDRESSED TO MR M.H. VAUTIER

*Question:*

**Mr Tompkins:**

Asked about contributory negligence where there had been a breach of contract by a professional man.

*Reply:*

**Mr Vautier:**

My understanding of the position would be that this is indeed the situation. Certainly where the claim rests as it so frequently does ***solely*** in contract. There is just no room then for any notion of a plea of contributory negligence. Was there a breach of contract? Was there not? Solely that. And if a breach can be established, if the actual breach of the contract is shown, then the damages must flow and the question of the contribution that may have been made by the plaintiff is irrelevant. It may in certain circumstances affect the quantum of the damages. It won't affect the course of the action and it won't be a case where a plea of contributory negligence can be pleaded and the Contributory Negligence Act applied to it.

*Question:*

**Mr Bendon:**

Asked what degree of protection would be afforded a solicitor whose advice is proved wrong if the client has not sought the second opinion recommended by the solicitor at the time of giving the advice.

*Reply:*

**Mr Vautier:**

That would be one of the circumstances to be taken into account to which Mr Justice North referred in the case I mentioned. It would then be a question of whether it could be shown that the solicitor had fallen short of his duty in the particular circumstances. He has given the warning to the client that this is a difficult matter on which he would like some other opinion and I think this would go some distance towards protecting him.

That plea may not succeed but it would certainly be one of the circumstances to be taken into account in judging whether he falls short.

*Question:*

**Mr Bailey:**

Particular professions are subject to special considerations. For instance over a vast number of calculations the quantity surveyor would not be held liable for small errors in addition. Would the same latitude apply to a structural engineer?

*Reply:*

**Mr Vautier:**

That is a curly one because the situations are rather different. All that can tend to happen with the quantity surveyor is that there is going to be a pecuniary loss to the extent of some miscalculation he has made. The case I have mentioned was a case where some hundreds of pounds was lost because of these several small errors made by the quantity surveyor. Where the calculation is going to affect the stability of a building there would be different considerations apply. If it was going to be an important one then certainly it would have to be checked and re-checked and would not be in the same category.

*Question:*

**Mr Speedy:**

What is the position of the company employee. Is the individual liable as well as the company?

*Reply:*

**Mr Vautier**

I think the answer to that goes back again to this question of contract or tort. If the action is one that can be framed in contract only then the employee won't be able to be sued because the contract will not have been made with him. It will have been made with his employer. He is responsible for the action of his employee. But if it gets into the ***Hedley Byrne*** area I would think the answer is the opposite way.If you can frame it outside the contract altogether and frame in tort anyone is liable and the employee himself could be sued in my view.

*Question:*

**Mr Adam:**

Where there is a substantial delay between the accruing of the damage and the case coming to court and there is an escalation of costs as far as rectifying the damage is concerned, is there a rule that can be applied in the assessment of damages? Should they be assessed at the time the damage occurred or at the time of judgment?

*Reply:*

**Mr Vautier:**

In breach of contract certainly one goes back to the time of the breach. And I think the answer would be much the same in tort also, but of course because the damages would be fixed at that stage it is a question of the time when the cause of action arises in each case and that may differ and the situation thereafter should be a claim for interest which can be made from that time onwards until recovery.