SOLICITORS' COMMON LAW LIABILITY: THE DUTY TO GIVE ADVICE BEYOND THE SCOPE OF THE EXPRESS RETAINER IN TRANSACTIONAL CASES AND THE APPLICATION OF THE 'LOSS OF CHANCE' APPROACH TO BREACH OF THE DUTY

LES ARTHUR*

I. THE TRANSFORMATION OF THE LEGAL PROFESSION

Many lawyers, legal commentators[1] and Judges[2] would agree that the legal profession has undergone radical change since the end of the 1970s. Important features of such change include the end of barristerial immunity in England and Wales[3] and New Zealand[4] but not Australia,[5] the 'erosion of insulation of the legal profession from market forces'[6] and the emergence of mega firms. The removal of limited common law immunity for legal practitioners relating to court representation and work 'intimately connected' to it flows from public policy considerations.

In *Chamberlains v Lai* the New Zealand Court of Appeal opined that it is anomalous for one group of professionals to be shielded from the general principle that all who undertake to give professional advice are under a duty to use reasonable care and skill.[7]

Having cleared away the shaky policy reasons for immunity identified in *Rondel v Worsley*[8] the challenge now confronting the Courts relates to problems concerning the scope of the duty of care owed to clients by advocates and possibly the even more daunting issue of causation. It would seem a little curious, however, if a public policy driven decision to give litigants access to the courts in relation to the negligent conduct of proceedings by advocates, were to be defeated by formidable causation problems.

---

* Senior Lecturer, School of Law, University of Waikato.

1 David Weisbrot, 'Competition, Cooperation and Legal Change' (1993) 4 Legal Education Review 1.

2 *Russell McVeagh McKenzie Bartleet & Co v Tower Corp* [1988] 3 NZLR 641, 659-660 (Thomas J) commenting on the competitive environment in which law firms operate and the trend toward mega firms offering specialist services to the commercial community.

3 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615.

4 *Chamberlains v Lai* [2006] NZSC 70.

5 *D'Orta–Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92.

6 See the discussion in Duncan Webb, Ethics, Professional Responsibility and the Lawyer (2006) 23.

7 *Chamberlains v Lai*, above n 4, para 75.

8 [1969] 1 AC 191. Where barristerial immunity was grounded on the public interest in the administration of justice: The rule was thought to serve the public interest by:

- Preventing the fear of subsequent litigation from eroding the barrister's independent duties to the court.
- The risk of recrimination would undermine the application of the 'cab rank obligation' and therefore undermine access to representation for difficult or distasteful clients.
- The effect of re-litigation, particularly in criminal matters, on public confidence in the administration of justice.

In common law jurisdictions the policy driven loss of chance approach to the causation issue in litigation[9] and transactional cases[10] provides a remedy for breach of duty in circumstances where the balance of probabilities approach to causation otherwise would render the claimant unable to prove damage.[11] The scope of duty and causation issues is obviously quite recent in the context of a practitioner's negligence associated with Court proceedings. A reasonable amount of case law has emerged concerning the scope of a solicitor's duty to give unsought advice, particularly of a commercial nature, in transactional matters.[12] A feature of the jurisprudence in this area is the moulding of the scope of the duty of care by reference to the commercial expertise of the client.[13]

There are two fundamental problems which underpin the moulding of the duty of care to the commercial acumen of the client. First, the conventional competent practitioner test established in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*[14] seems a little unrefined given the rationale behind the emergence of mega firms to provide corporate clients with comprehensive and expert legal services.[15] Even so, in most circumstances the rebuttable presumption against a duty to give commercial advice to commercially experienced clients seems justified. The basis is that solicitors ought not to be liable for commercial decisions which go awry in circumstances where it is reasonable for the client to appreciate the nature of the risk. As a matter of principled risk allocation, it is not clear why professional indemnity insurers should underwrite the unfortunate commercial judgment of commercially experienced parties who are, or should be, fully competent to assess the risks associated with a transaction.

The second fundamental problem in using the commercial expertise of the client, as a touchstone for determining the duty of a solicitor to give unsought advice, is the vagueness of the duty in relation to commercially naïve clients. Clearly the rationale underlying principles which determine the scope of a solicitor's duty to give unsought advice to commercially astute parties is inappropriate in the context of clients unversed in business affairs. In these circumstances the law is rather abstract in so far as:

A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering into a commercial transaction that it would be pointless, or even sometimes an impertinence, for the solicitor to offer to an obviously experienced businessman.[16]

In these situations questions arise concerning the scope of the explanation required and the relationship between the retainer and the obligation to offer advice concerning the wisdom of the transaction. In *Clark Boyce v Mouat*[17] a case involving an aged client apparently unversed in business affairs, the Privy Council held that the scope of the express retainer constrained the nature of the explanation given to the client concerning the viability of a proposed loan transaction. In the

9 *Mount v Baker Austin* [1998] PNLR 493, where the solicitors negligently allowed the claim to get struck out, the claimant was required to show that it had lost something of value, not merely a negligible chance.

10 *Allied Maples Ltd v Simmons & Simmons* [1995] 1 WLR 1602 (CA); *Gilbert v Shanahan Partners* [1998] 2 NZLR 528 CA.

11 *Bristol & West Building Society v Mothew* [1997] 2 WLR 436. See below Part VIII (B).

12 See *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC). in relation to commercially naïve clients; *Pickersgill v Riley* [2004] UKPC 14; *Football League Ltd v Edge Ellison* [2006] EWHC 1462 with regard to commercially sophisticated clients.

13 *Pickersgill v Riley*, above n 12.

14 [1978] 3 All ER 582.

15 See *Russell McVeagh v Tower Corp*, above n 2, 659-660 (Thomas J).

16 *Pickersgill v Riley*, above n 12, para 7.

17 *Clark Boyce v Mouat*, above n 12.

Privy Council decision, the policy consideration of not imposing intolerable burdens on solicitors appears to have outweighed any duty on the solicitor to advise on the problematic aspect of the transaction and financial circumstances of the debtor. Interestingly the New Zealand Court of Appeal considered that Mrs Mouat was unable to fully understand the degree of risk involved in the absence of such advice and held the solicitors were negligent.[18]

The critical question which arises out of *Clark Boyce v Mouat* is should the duty of care, in relation to commercially naīve parties, extend to advice that it is necessary to investigate the financial position of the other party? The argument presented in this paper is that a duty to raise this issue is justified. Such a question ought not to impose an intolerable burden on commercial lawyers. It is however accepted that such a duty is not justified in the context of commercially astute clients who are fully conscious of the risk.[19]

The relevance of the commercial competence of the client to moulding the scope of the duty of care is a less useful touchstone where the advice, although beyond the express instructions of the retainer, involves issues of a legal nature. The problem here relates to the proximity of the unsought advice in relation to the express retainer. In *Gilbert v Shanahan*[20] the court held that the solicitor was negligent for failing to advise the commercially experienced client that he was under no real obligation to sign a guarantee. However, the competence of a client in understanding the importance of disclosing material information to its professional indemnity insurer was the critical factor against a finding of negligence in *John Mowlem Construction plc v Neil F Jones & Co* (*Mowlem v Jones*).[21] Arguably this is an example where the expertise of the solicitor is a relevant factor and the competence of the client is a matter which goes to contributory negligence rather than a scope of duty issue. A finding of negligence then raises the hypothetical question of how the client would have responded had competent advice been given, would the transaction have proceeded in any event, and if so, on what terms? These questions directly raise complex causation issues.

While, arguably, jurisprudence imposing liability on a solicitor is characterised by judicial restraint, the emergence of the loss of chance approach to the causation problem, is a radical, policy driven departure, from well established principles. As observed by Baroness Hale in *Gregg v Scott*, 'damage is the gist of negligence. So it can never be enough to show that the defendant has been negligent. The question is still whether his negligence has caused actionable damage'.[22]

There is precedent in England and Wales,[23] and in New Zealand[24] for treating the loss of a substantial chance of achieving the intended result, as actionable damage in transactional cases involving solicitors. By treating the loss of a chance of avoiding the claimant's loss as actionable damage the claimant's prospects of a successful damages claim are considerably enhanced. This approach sidesteps the need for the clients to prove, on the balance of probabilities that they would not have entered the transaction if they had been correctly advised.

Clearly the loss of a chance approach to causation raises fundamental issues concerning the law of civil liability and, to some extent, heightens the importance of the scope of duty question.

18 Ibid, Sir Gordon Bisson, 647.

19 *Football League Ltd v Edge Ellison*, above n 12.

20 *Gilbert v Shanahan*, above n 10.

21 [2004] EWCA Civ 768.

22 [2005] UK HL 2, para 217.

23 *Allied Maples v Simmons & Simmons*, above n 10.

24 *Gilbert v Shanahan*, above n 10.

This is so, to the extent that the loss of chance approach to causation 'provides a proportionate strict liability' based remedy. In other words, once a duty of care has been established, the stringency of the causal link between the wrong and damage departs from the conventional civil standard. Whether this is an appropriate response to a duty of care which is fault based rather than strict liability based is an important question which does not appear to have been fully addressed in any of the above jurisdictions. What has been addressed is the broad policy question of whether or not '[a] robust test which produces rough justice may be preferable to a test that on occasion will be difficult, if not impossible, to apply with confidence in practice'.[25]

In *Gregg v Scott* the majority preferred rough justice and rejected the proposition that the loss of chance approach should be used in the law of clinical negligence, but in *Phillips & Co v. Whatley (Gilbraltar),*[26] a lost litigation case, Lord Mance noted that '[t]here are also obvious differences between the medical context of *Gregg v Scott* and the present'.[27]

The purpose of this paper is to evaluate the principles which determine the variable duty of a solicitor to give advice beyond the confines of the express retainer and to argue that the loss of a chance approach to causation is a reasonable remedial response to breach. A convenient starting point is to describe how the duty of care arises in contract and the impact of concurrent liability on the solicitor's obligation to give unsought advice

However, as already mentioned, determining the scope of a solicitor's duty of care is not a straight forward exercise. A useful starting point is to discuss how the duty arises in contract and tort. Then it is necessary to analyse how the scope of the duty is moulded according to the express provisions of the contract of retainer and more interestingly the extent to which the scope of implied duties turns on the commercial attributes of the parties.

II. Juridical Basis of the Duty of Care

As stated by Mummery LJ in *Swindle v Harrison,*[28] a case which involved a solicitor who breached his fiduciary duty of loyalty through non disclosure, the correct starting point to examine the scope of a solicitor's duty of care is to understand how the obligation arises and the rationale for the rules imposing the duty. One reason why this approach is not straight forward is the emergence of concurrent liability in contract and tort[29] and to a lesser extent the relationship between fiduciary duties and duties of care.[30] Most of the case law emphasises that the contract of retainer,[31] together with the implied promise to exercise reasonable care (and skill) in the performance of the relevant services,[32] governs the scope of a solicitor's duty of care. While the identification of the source of the duty does not define the scope of the duty it will be suggested that a contractual analysis offers a principled approach to the scope of duty question, and that arguments which seek to widen the

25 *Gregg v Scott*, above n 22, para 170 (Lord Phillips).

26 [2007] UKPC 28.

27 Ibid, para 2.

28 [1997] 4 All ER 705.

29 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Astley v Austrust* (1999) 161 ALR 155 *Riddell v Porteous* [1999] CA 1 NZLR 1.

30 See *Bristol & West Building Society v Mothew*, above n 11.

31 *Midland Bank v Hett Stubbs & Kemp*, above n 14.

32 In *Lanphier v Phipos* (1838) 8 CAR, 479 Tindal CJ said 'Every person who enters into a learned profession undertakes to bring to it the exercise of it a reasonable degree of care and skill'.

scope of the contractual duty, by reference to duties in tort, are contrary to principle,[33] and in any event in most circumstances superfluous.

The conceptual justification for this primacy of contract approach is that contractual duties are fixed by the parties themselves and contract law is concerned with obligations which arise voluntarily, rather than those imposed by law. An obvious problem with this approach, in the solicitor client relationship, is the potential imbalance in knowledge between the parties. After all, a common justification for the monopoly, albeit diminishing, of lawyers over legal services is the professional expertise and skills of the legal profession.[34] Arguably, however, this imbalance can be addressed in most circumstances by a principled adjustment of the implied promise to exercise reasonable care, depending on the sophistication and circumstances of the client. A brief discussion of the principles underpinning concurrent liability in contract and tort illustrate the conceptual difficulties associated with allowing the 'imperial march of modern negligence law'[35] to outflank the contract of retainer.

In *Frost & Sutcliffe v Tuiara*[36] Justice Baragwanath relied on English[37] and Australian[38] authorities in support of the proposition that a solicitor's tortious duty is or may be wider than in contract. His Honour held that the reasonably competent practitioner test which was governed by the retainer:[39]

> [M]ust become in Tort what the practitioner would be expected by the standards of his profession to do having regard to all the circumstances, including:
>
> - The lack of experience and limited education of the clients; and
> - Significance of the transaction; neither of which is of direct moment when construing the written contract of retainer; as well as
> - Consequences of its failure.

In support of this approach Baragwanath J cited the following passage from Dean J's judgement in *Hawkins v Clayton*:[40]

> The clear trend of modern authority is to support the approach that the duty of care owed by a solicitor to a client in respect of professional work prima facie transcends that contained in the express or implied terms of the contract between them and includes the ordinary duty of care arising under the common law of negligence …

The New Zealand Court of Appeal stated that there were 'major difficulties with this analysis'.[41] First, the court observed 'the scope of the retainer was equally apt to influence what a competent practitioner should have done whether the obligation is analysed as contractual or tortious'.[42]

This observation fits neatly with the idea that the scope of implied duties can be adapted to take into account the reasonableness of the solicitor's advice given the circumstances of the client.

---

33 *Henderson v Merrett Syndicates Ltd*, above n 29.

34 Webb, above n 6, 26.

35 *Astley v Austrust*, above n 29, para 170 (Gleeson CJ).

36 [2003] NZCA 277.

37 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, above n 29.

38 *Hawkins v Clayton* (1988) 164 CLR 539, 574; *Waimond P/L v Byrne* (1989) 18 NSWLR 642, 650-2.

39 *Frost & Sutcliffe v Tuiara*, above n 36, para 10 quoting the High Court case.

40 *Hawkins v Clayton*, above n 38, para 22.

41 *Frost & Sutcliffe v Tuiara*, above n 36, para 11.

42 Ibid.

For this reason, it is simply unnecessary, in most circumstances, to invoke tortious principles that broaden the scope of the contractual retainer.

In *Frost & Sutcliffe v Tuiara* the solicitor had advised his commercially unsophisticated clients not to enter into a buy back transaction involving the sale and repurchase of their residential property transaction but had not given reasons for this advice. It seems entirely artificial to argue that the duty in tort required a greater explanation than in contract as to why not to proceed with the transaction. This does leave open the appropriate scope of the duty to warn and the distinction between advising clients not to proceed with a transaction and giving reasons for that advice is consistent with dicta in *Pickersgill v Riley* concerning the need to give more detailed explanations to commercially naīve clients.

The Court of Appeal held that the plaintiffs had been given sufficient reasons to satisfy the duty of care. The more controversial issue is the extent to which the solicitor should have explained the need for the client to investigate the financial position of the company which went into liquidation and could not therefore transfer the property back to the plaintiffs. For present purposes it is sufficient to note that, in most situations, it is unnecessary to rely on tortious principles to enlarge the scope of the contractual retainer.

This reasoning is consistent with the ratio of *Henderson v Merrett Syndicates Ltd* that there is no material difference between the relevant contractual duty and the duty owed in tort[43] the substance of the obligation is the same; to take reasonable care. Indeed, Lord Goff, who gave the leading speech, indicated more than once that, at least as a general rule he did not envisage the concurrent duty of care in tort as being wider in its scope than the duty in contract. The ambit of tort is wider only to the extent that the limitation period in contract does not apply and claims for contributory negligence are not stifled by the existence of a contract. In *Frost & Sutcliffe v Tuiara* the New Zealand Court of Appeal agreed with the dissenting judgment of Mason CJ and Wilson J in *Hawkins v Clayton*, who recognised that:[44]

> [I]t is not appropriate to foreclose entirely on the possibility that in some circumstances it may be necessary, for example to avoid professional impropriety, to hold that the duty in tort is wider than that in contract. The means to achieve that end would be to hold on policy grounds that the law will not in some cases allow the general duty in tort to be cut back by the terms or the scope of the contractual retainer.

III. Fiduciary Duty and Duties of Care

Unlike a solicitor's duty in contract which, in most circumstances, is concurrent and co-extensive with the tortious duty of care, the substance of the fiduciary duty is loyalty rather than a duty to exercise reasonable care.[45] For this reason, arguments which would turn negligent acts by solicitors unconnected to their duty of loyalty into fiduciary breaches, have met with widespread judicial disapproval. In *Bristol and West Building Society v Mothew* the court addressed this issue in the following way:[46]

> The expression 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon to the breach of other duties. Unless the expression is so limited it is lacking in practical utility.

43 *Frost & Sutcliffe v Tuiara*, above n 36, para 11.

44 Ibid para 20.

45 *Bristol & West Building Society v Mothew*, above n 11, 449 (Millett LJ).

46 Ibid 448.

This reasoning emphasises the important point made by Mummery LJ in *Swindle v Harrison* that the correct starting point to establish civil liability, is to identify the relevant wrong which involves identifying the scope of the duty breached. Thus, while fiduciary duties of fidelity and loyalty often exist in conjunction with a duty of care[47] the detailed rules relating to causation and the remedial consequences of breach, vary as a result of the purpose of the duty.[48] In light of the separate duties imposed by equity and the common law, it would be curious if the fiduciary duty enlarged the scope of the contractual duty. This is the point forcibly made by Lord Jauncey in *Clark Boyce v Mouat*, where His Lordship stated that a '[fiduciary duty] … cannot be prayed in aid to enlarge the scope of contractual duties'.[49] This view is entirely consistent with the principle but, of course, raises the issue of the appropriate scope of the contractual duty of care.

For the reasons discussed, the fiduciary duty does not enlarge the contractual duty, the purpose of the equitable obligation being to ensure loyalty in asymmetrical knowledge relationships. It is nevertheless a make-weight argument which reinforces the broad proposition evident in the case law that there is a greater duty of care when advising commercially unaware clients.

A. Overview

So far it has been suggested that the correct starting place to answer the scope of duty question is to focus on the express or implied terms of the contract between the solicitor and the client. Arguments which seek to transcend contractual obligations by reference to tortious or fiduciary duties are inconsistent with principle and precedent. In any event, such arguments are largely redundant given the potential ambit of the contractual duty created by an implied term. The daunting question then becomes what are the relevant principles in determining the appropriate scope and content of the contractual duty of care arising from an implied term. Before turning to this problem in the context of the duty to give legal advice and commercial advice beyond the express confines of the retainer it is necessary to consider refinements to the 'reasonably competent practitioner test'.

IV. The Extent of a Solicitor's Duty of Care

The often cited authority on the extent of a solicitor's duty is the following passage from *Midland Bank v Hett Stubbs & Kemp* in which it was held that:[50]

> the court must beware of imposing upon solicitors, or upon professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. … The test is what the reasonably competent practitioner would do, having regard to the standards normally adopted in his profession ... the duty is directly related to the confines of the retainer.

The rationale for this approach is referred to by Laddie J in *Credit Lyonnais v Russell Jones & Walker* '[a] solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer …'[51]

---

47 See *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, which involved a breach of fiduciary duty as well as undisputed negligence on the part of the solicitors.

48 *Target Holdings Ltd v Redferns (a firm)* [1995] 3 All ER 785 792, (Lord Browne-Wilkinson). *Everist v McEvedy* [1996] 3 NZLR 348, 355 (Tipping J).

49 *Clark Boyce v Mouat*, above n 12, 649.

50 *Midland Bank v Hett Stubbs & Kemp*, above n 14, 583.

51 [2002] EWHC 1310, para 51.

As an important principle of risk allocation the scope of the retainer is clearly important but as the Court observed in *Gilbert v Shanahan*: [52]

> Solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer.

Unfortunately the vagueness of this statement raises more questions than are resolved. The fundamental idea is, however, clear the scope of duty question cannot always be answered by reference to the express retainer.

These statements of the basic law are subject to a number of refinements. First, a critical aspect of the scope of the duty to give unsought commercial advice turns on the commercial expertise of the client. In the light of the decisions in the important case of *Pickersgill v Riley,* it is probably more accurate to state the test as what the reasonably competent practitioner would do given the relevant commercial expertise of the particular client. This test is conceptually analogous to the approach of the High Court of Australia in *Rogers v Whitaker*,[53] which involved the duty of care owed to a patient by a medical practitioner. The Court reasoned that the duty to warn the patient of a material risk inherent in a proposed treatment must take into consideration the circumstances of the particular patient. This approach was adopted as applicable to legal practitioners by Malcolm J in *Heydon v NRMA Ltd*.[54]

The second proposed refinement is not explicitly recognised in case law but it also seems reasonable and practicable to expect a higher degree of competence from a 'mega firm', given that the fundamental reason for the emergence of mega firms is to provide specialist and expert commercial advice to corporate clients.[55] The short point is that the utility of the standard competent practitioner test appears compromised by the transformation of the legal profession. Even so, the scope of the implied duty to give unsought 'commercial advice' to commercial clients must be balanced with an assessment of the legitimate expectations of the client. In this regard it seems unlikely, in circumstances where the client has the expertise to make a commercial judgment, that the solicitor will be considered negligent if the transaction goes awry. This reasoning is exemplified by the decision in *Football League Ltd v Edge Ellison*.

Perhaps the strongest impact of the emergence of the mega firms is in relation to specialist areas of law such as insurance law.[56] As might be expected however, the reasonably competent solicitor test is sufficient to support a finding of negligence in areas involving a basic transactional legal issue, such as the failure to advise a client that there was no legal requirement to sign a guarantee.

V. The Duty to give Legal Advice Beyond the Scope of the Retainer

In *Gilbert v Shanahan* the issue concerned the solicitor's duty to advise a shareholder client that he was not legally obliged to sign a guarantee which related to the obligations of a company in which the client was a director and shareholder. Before seeking legal advice the claimant had

52 *Gilbert v Shanahan*, above n 10, 537.

53 (1992) 175 CLR 479.

54 (2000) 51 NSWLR 1, 53.

55 *Russell McVeagh McKenzie Bartleet & Co v Tower Corp*, above n 2.

56 See *Mowlem v Jones*, above n 21.

signed a preliminary agreement which specified the terms of the lease but which contained no reference to any guarantee from the shareholders.

The High Court found that the shareholders were 'experienced businessmen'[57] and 'considerably more experienced in property transactions than most members of society'.[58] The judge also found the plaintiff to be 'by no means without experience with regard to guarantees'.[59] Expert evidence from experienced commercial solicitors confirmed that as a matter of law the shareholders could not be required to sign the guarantee and the company was not obliged to procure it. Given that the omitted advice was characterised as 'legal' the argument that such advice was not within the scope of the retainer was easily rejected by both the High Court[60] and the Court of Appeal. More problematic for the appellate Court was the problem of causation, because it did not follow from the evidence that if the solicitor had told the plaintiff that he was not legally obliged to sign the guarantee the transaction would have proceeded without a guarantee. The issues which arise from this loss of a chance approach, to overcome the problems associated conventional balance of probabilities approach to causation are discussed later in the paper. For present purposes it is sufficient to emphasise that the expertise of the client was considered irrelevant in determining the scope of the retainer, once the omitted advice was classified as legal.

VI. The Issue of Specialist Legal Advice

The argument for the adequacy of the reasonably competent solicitor test seems less than compelling in cases involving 'specialist' legal knowledge, particularly where the solicitors do in fact have specialist legal knowledge. In *Mowlem v Jones* at issue was the solicitor's duty to advise the client to notify its professional indemnity insurers of a threatened claim. The solicitors had been instructed to act in arbitration proceedings for a subcontractor, alleging non payment of monies due from the main contractor. During the proceedings the main contractor intimated a counterclaim based on the alleged negligence of the subcontractor in carrying out the work under the contract. The subcontractor's insurer subsequently declined to meet the claim due to non-disclosure/misrepresentation in the renewal form. Relying on *Midland Bank v Hett Stubbs and Kent, Credit Lyonnais SA* v *Russell Jones & Walker* and *Carradine Properties Ltd v DJ Freeman & Co*[61] the Court of Appeal upheld the decision of the trial court, in deciding that the solicitor was not negligent.

The court reasoned that the solicitors were not retained to advise about insurance by their client, who in any event was perfectly competent to deal with such matters. In answer to the question, would a reasonably competent solicitor have contemplated the need to ask about insurance and the importance of notification, the Court of Appeal affirmed the trial judge's view that he would no, 'supported as it is by the fact that such questions did not occur at the time to other experienced solicitors'.[62]

This view is open to challenge in so far as the insurance question is clearly a legal issue and it would be reasonable to speculate that most undergraduate insurance law papers would refer to

57 *Gilbert v Shanahan*, above n 10, 535.

58 Ibid.

59 Ibid.

60 *Gilbert v Shanahan* 12 PRNZ 185 (Gallen J, 12 September 1997, High Court, Wellington (CP503/93)).

61 [1999] Lloyds Law Rep. P N 483.

62 *Mowlem v Jones*, above n 21, para 20.

the insured's duty to disclose material facts. In this respect *Mowlem v Jones* can easily be distinguished from *Football League Ltd v Edge Ellison* and *Pickersgill v Riley* which concerned commercial rather than legal advice. Indeed it is arguable that in *Mowlem v Jones* insurance advice could be classified as a potential risk or legal pitfall which arose during the course of the retainer. In this respect the competent solicitor test sets too low a threshold, particularly where a mega law firm offers specialist insurance advice in addition to more general legal services.

While an obvious difference between *Gilbert v Shanahan* and *Mowlem v Jones* is the proximity of the advice to the client's express instructions, it is arguable that the legal issue in *Mowlem v Jones* was a legal pitfall which was clearly related to the retainer. Certainly a law firm advertising specialist insurance knowledge should not escape liability. Extending this standard of care to general law firms would increase the level of professional service in line with the professional status of law firms. In cases involving legal issues, the competency of the client to deal with the matter is usually a factor which ought to be addressed under the head of contributory negligence.

VII. Scope of the Duty to Give Unsought Legal Advice: Commercially Experienced Clients

Unlike the obligation to give unsought legal advice, where such advice is material and proximate to the transaction, it is not ordinarily part of a solicitor's function to advice clients on the commercial prudence of a transaction. The law and basic rationale for this distinction is articulated by Lord Jauncey in *Clark Boyce v Mouat*: [63]

> When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.

The rationale for limiting the duty on solicitors to give commercial advice together with guidance on the meaning of 'commercial advice' is provided by the Privy Council decision in *Pickersgill v Riley* and the decision in *Football League Ltd v Edge Ellison*. In *Pickersgill v Riley* the solicitor had given commercial advice to the claimant, correctly warning of the risk associated with taking a contractual indemnity from a limited liability company. Having given this advice, the Privy Council held that there was no duty to warn the claimant about the commercial wisdom of accepting the undertaking from the purchasing company or to advise the claimant to investigate the financial substance of the purchasing company. Of critical importance to the reasoning of the court was that the claimant was an experienced businessman, who had a wide experience of guarantees and who must have known from his own experience that the company's future profitability was speculative.

Unlike *Gilbert v Shanahan,* the failure to give advice concerning the financial viability of the purchasing company was unrelated to any legal complexity and, importantly there were no 'hidden commercial pitfalls' for this particular claimant, whose loss could be fairly attributed to the claimant's imprudent commercial judgment. This was really a case about the plaintiff's commercial misjudgement and on the facts of the case there appears to be little justification for extending the role of the solicitor from legal adviser to insurer against unsound commercial judgment.

63 *Clark Boyce v Mouat*, above n 12, 649.

The judgment in *Football League Ltd v Edge Ellison* decides no novel point of law, but does neatly illustrate the fact sensitive nature of the distinction between commercial and legal advice. The case arose from the solicitor's alleged failure to advice on the desirability of seeking parent company guarantees for the Football League Ltd's contract with ONdigital p/c for television rights, with claimed losses of £142 million. Drawing on the principles outlined in *Pickersgill v Riley,* Justice Rimmer had little difficulty in rejecting the contention that the solicitors owed the client a general duty of care: 'There is no duty upon a solicitor to point out to the client things which the client can reasonably be expected to appreciate for himself, being matters in respect of which the solicitor has no special skills of appreciation'.[64]

Such is the force of this 'reasonable expectation' approach to the duty of care issue that it eclipsed the duty of the solicitor to ask a very simple question, concerning the solvency of the bidder ONdigital and the need for parent company guarantees. A meticulous and conscientious practitioner may have ventured beyond the scope of the express retainer, but that is not the test.[65] As to the normative question; is the test appropriate? On the facts of *Football League Ltd v Edge Ellison* it would have been an oddity if the solicitors had been made liable, setting aside causation issues, for a consciously made commercial decision made by a committee handpicked for its relevant experience which admitted that it needed no advice from solicitors. Potentially the weakest aspect of the test applied in *Football League Ltd v Edge Ellison* relates to the level of commercial competence attributed by the court to the solicitor.

The negligence issue may not have been quite so straight forward if the plaintiff had been advised by a 'mega firm', which sought to enhance its competitive edge by offering on websites and in brochures 'sensible and commercial advice' or 'responsive, pragmatic and commercial advice'. Such representations would seem to give rise to an assumption of responsibility to give commercial advice which may well outflank the express terms of the retainer. In these circumstances the focus may shift from the scope of the duty of care to causation and contributing negligence issues. Although on the facts of *Football League Ltd v Edge Ellison* the claimant's admission that it did not rely on the commercial skill of the solicitor would appear to be conclusive.

VIII. Commercial and Legal Issues

In *Football League Ltd v Edge Ellison*, *w*hile the court held that there was no general duty on the solicitors to give advice concerning the wisdom of accepting a bid without guarantees, a duty to advise did arise during the course of the transaction. The duty was triggered by the financial arrangement paragraph in the bid document. The financial arrangements paragraph was ambiguous as it could be interpreted as either an offer of parent company guarantees or merely parent company commercial support for ONdigital's financial commitment.

In these circumstances the court held that a reasonable solicitor had a duty to seek instructions from the client concerning the improbable notion that guarantees were on offer. In this respect the solicitor was fortunate, Rimmer J held, that on the balance of probabilities that Football League Ltd would in any event not have pressed for guarantees, given its perception that it was on the cusp of an exceptional deal.[66] As the company was unable to meet the burden of proof on

64 *Pickersgill v Riley*, above n 12, para 261.

65 *Midland Bank v Hett Stubbs & Kemp*, above n 14, 583.

66 *Football League Ltd v Edge Ellison*, above n 12, para 321.

this point, it was unnecessary, on the *Allied Maples v Simmons* test, for the court to calculate the claimant's lost chance of obtaining guarantees.

A. Scope of Duty: Commercially Naīve Clients

The law in relation to the scope of a solicitor's duty to give unsought advice concerning the financial wisdom of a transaction to commercially unsophisticated clients is far from clear. In part this is because judicial pronouncements concerning the ambit of the duty of care have largely been articulated in cases involving commercially competent clients who did not rely on their solicitors for guidance in relation to commercial issues. In *Pickersgill v Riley* and *Football League Ltd v Edge Ellison* the common theme is that the solicitor's duty of care was abrogated by the commercial competence of the client. It was therefore unnecessary for the court to consider precisely how the duty of care might vary in circumstances where the client was unable to appreciate and evaluate the commercial risks for himself. That said, the Privy Council decision in *Clark Boyce v Mouat* is clear authority for the proposition that there is no duty for a solicitor to go beyond the express provisions of the retainer and give unsought advice on the wisdom of the transaction when a client, who was not a business person, and who is apparently aware of what she was doing. Mrs Mouat had mortgaged her house to secure a loan to her son, who joined in the mortgage as guarantor. He became bankrupt, leaving his mother facing a liability for over $110,000 secured on her house. Mrs Mouat sued the solicitors who had acted in the transaction for both her and her son for breach of duty of care and fiduciary duty. The claim for breach of fiduciary duty was unlikely to succeed given that she rejected the suggestion to seek independent advice. As a matter of principle it seems entirely correct that the fiduciary duty 'cannot be prayed in aid to enlarge the scope of contractual duties'.[67] Rather, what was at issue was the appropriate scope of the implied contractual duty of care. A crucial finding of fact was that Mrs Mouat understood the legal consequences of the transaction and to this extent had received a clear and careful explanation from the solicitor.

The issues not canvassed by the solicitor and regarded, inter alia, by the New Zealand Court of Appeal as negligent was the failure of the solicitor to disclose that he knew nothing of her son's ability to service the mortgage.[68] To this extent it is arguable that although Mrs Mouat understood that her home would be at risk, if her son defaulted in making the repayments due under the mortgage, in not knowing her son's financial position, she did not know the degree of that risk. In these circumstances it seems unlikely that Mrs Mouat was sufficiently aware of the risk posed by the transaction.

As a matter of principled risk allocation, involving a practical commercial, not entrepreneurial, consideration there appears to be some merit in the view that the risk should probably lie with a reasonably competent practitioner rather than a commercially naīve client. It seems most unlikely that a reasonably competent commercial solicitor would not have turned his mind, given the grave consequences of the son's default, to the son's parlous financial position.

Unlike the commercial cases discussed above it seems unrealistic to contend that Mrs Mouat appreciated the degree of risk and to this extent, simply made an unsound decision. In these cir-

67 Ibid, 649 (Lord Jauncey).

68 Ibid.

cumstances it would not appear to place an intolerable burden on solicitors to ask a simple question and to seek instructions concerning the financial viability of the 'other' party.[69]

On the facts of *Clark Boyce v Mouat,* this strict approach appears to strike at the core of the purpose of the general proposition that it would be unreasonable and artificial to define the scope of the retainer by reference only to the client's express instructions.[70] If this reasoning is accepted, it follows that there would have been a duty in *Frost & Sutcliffe v Tuiara* for the solicitor to have explained the intricacies of how the transactions could go wrong, including a duty to seek instructions and give advice concerning the importance of investigating the financial viability of the 'other' party. This information is directly material to the client's understanding of the degree of risk inherent in the proposed transaction. Quite unlike the cases involving commercial parties, it seems entirely reasonable for a client to rely on his solicitor to raise this issue. It would also seem unreasonable for solicitors to contractually to exclude this duty. Such an exclusion might not avoid the application of a duty in tort.[71]

If this analysis is applied to *Clark Boyce v Mouat*, with the result that the solicitor breached his contractual duty of care, the court would then be confronted with conflicting approaches to the causation issue. Is it necessary for the claimant to establish on the balance of probability[72] that the transaction would not have proceeded if the solicitor's duty had not been breached? Or is it sufficient for the plaintiff to show that as a result of the solicitor's breach, it has lost a chance of avoiding a lost chance of avoiding the loss resulting from the solicitor's breach?[73] If so, on what basis is the percentage value of the lost chance calculated? These questions focus on the conceptual basis and practical problems associated with the loss of a chance approach to the imposition of civil liability.

B. Causation and Damage; the Approach of the Civil Law

At common law and equity the fundamental principle relating to the awarding of damages is that the defendant's wrongful act must cause the damage complained of. In *Target Holdings Ltd v Redferns* the court expressly referred to the rules relating to the award of damages: [74]

> Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such a wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same.

The reason for the different causation rules in equity and the common law is related to the scope and purpose of the relevant duty. Thus, the gravity of a solicitor's breach of the duty of single minded loyalty is evidenced by a less stringent approach to causation than for breach of the duty of care. In *Everist v McEvedy* Tipping J opined, after considering the leading English authorities, that to succeed in a claim for breach of fiduciary duty the plaintiff must show 'that [they] have

69 Ibid. While the transaction in *Clark Boyce v Mouat* was complicated by the conflict of interest issue the reasoning of the Privy Council emphasised that the solicitor's duty of care was governed by the narrow terms of the retainer.

70 *Gilbert v Shanahan*, above n 10, 537.

71 See above Part II.

72 *Bristol & West Building Society v Mothew*, above n 11.

73 *Gilbert v Shanahan*, above n 10.

74 Ibid, cited in *Swindle v Harrison*, above n 28, 727.

suffered a loss arising out of a transaction to which the breach was material.'[75] If the plaintiff is able to establish this legal burden the evidential burden is then transferred to the defendant:[76]

> To establish this in a case involving a solicitor, it is necessary for the solicitor to show that even with appropriate independent advice or full information the plaintiff client would nevertheless have entered into the impugned transaction upon materially the same terms. If that can be shown equity should not attribute the loss to the errant fiduciary; for it cannot fairly be said that without the breach the loss would not have occurred. The breach cannot be regarded as causing the loss. To establish the point the errant fiduciary cannot invite speculation. There must be a proper evidentiary foundation for the conclusion which the Court is asked to draw. Usually the point will be one of inference rather than direct evidence.

Of particular interest in relation to the loss of chance approach is the idea that the link between causation and loss can be established by inference rather than evidence. The rules linking breach to damage are not therefore immutable although the rule that there must be damage remains a fundamental requirement of civil liability. In contrast to the rules of causation applicable for breach of a fiduciary duty the common law rules are more stringent. This difference is discussed by Millet LJ in *Bristol*: [77]

> Where a client sues his solicitor for having negligently failed to give him proper advice, he must show what advice would have been given and (on a balance of probabilities) that if such advice had been given he would not have entered into the relevant transaction or would not have entered into it on the terms he did.

What is highlighted by these differing approaches is that ultimately the stringency of the causation test turns on the policy and purpose of the particular duty. As illustrated by the decisions in *Arthur JS Hall* and *Chamberlain* public policy is not static. However, it does seem essential expressly to articulate why changes to the rules relating to causation for a particular group of claimants are justified and to consider as noted by Lord Phillips in *Gregg v Scott*[78] the practical problems associated with such changes. Unsurprisingly, the most difficult practical problem relates to the calculation of the percentage value of the lost chance. These problems are confronted by the English Court of Appeal in *Allied Maples v Simmons*.

In *Allied Maples v Simmons* the defendant solicitors conceded that their advice had been negligent in not warning the client company that it could acquire certain liabilities in purchasing a business belonging to the vendor. The defendants argued that the complaint had failed to establish causation. Even had the complainant been advised of the risk of liability it was not proved on the balance of probabilities that the vendor would have granted the warranty excluding liability. The Court of Appeal applied a two stage test to the causation issue.

First it was necessary for the claimant to prove on the balance of probabilities that it would, if correctly advised, have taken action to avoid the risk (on the facts to seek the warranty). This step is simply an application of the law as outlined in *Bristol*. The second step involves a further hypothetical question, the response of the third party to the claimant's request. At this step the Court

---

75 *Everist v McEvedy*, above n 48, 355.

76 Ibid. This test is a move away from the absoluteness of the *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465, 469 (Lord Thankerton), which held that once the duty had been breached, speculation as to what course of action the plaintiff would have taken but for the breach, is not relevant.

77 *Bristol & West Building Society v Mothew*, above n 11, 443.

78 *Gregg v Scott*, above n 22, para 190.

unanimously accepted that the claimant can succeed provided it shows that it 'had a substantial chance rather than a speculative one'[79] of receiving the benefit (in this case the warranty).

The Court did not agree on the assessment of the lost chance, Millett LJ curiously proposed an evidential assessment of the lost chance, and considered that:[80]

> [T]he evidence was not even sufficient to justify the inference that there was any real or substantial chance that [the vendor] would have acceded to the Plaintiff's request. Whether they would or would not have done is, on the evidence so far adduced, a matter of pure speculation.

This approach appears to confuse the evidential approach to causation with the possibility of drawing inferences from the facts to establish quantification. To this extent the utility of the loss of a chance approach is significantly reduced. The majority judges did not consider the assessment of the lost chance speculative:[81]

> Those with experience of commercial negotiation are able, with a reasonable degree of accuracy, to form a view of what can be achieved by such negotiation. … It is possible to make an informed judgment of what the chances were of achieving certain results.

This approach is based on reasonable inferences drawn from the facts, rather than on precise quantification based on evidential burdens that would appear just about impossible to meet.

In *Gilbert v Shanahan* the New Zealand Court of Appeal dispensed with the two step process applied in *Allied Maples v Simmons*. In *Gilbert v Shanahan* it did not follow on the evidence that if the claimant had been correctly advised that he was not legally obliged to sign the guarantee that the transaction would not have proceeded without a guarantee. Indeed the Court held that it was highly likely that if correctly advised the claimant 'would have agreed to sign, perhaps with some amelioration by way of limit …'[82] As in *Allied Maples v Simmons,* the Court found it possible to assess the likely result of the negotiations in the event that the claimant refused to sign the guarantee. On this basis the Court held that the solicitor's negligence lost 'Mr Gilbert a 20 per cent chance of avoiding entry into a guarantee of a kind which caught the liability which he ultimately had to assume'.[83]

The rationale of the English Court of Appeal in *Allied Maples v Simmons* for relaxing the stringency of the causation test at the second step of the inquiry was because of the hypothetical nature of the inquiry. It is difficult to see why the balance of probabilities test should apply at the first step as that too is a hypothetical inquiry.

IX. Conclusion

This paper has attempted to argue that solicitors ought to have a contractual duty to offer specialist legal advice beyond the scope of the retainer. This argument is strengthened in the context of mega law firms which purport to give expert legal advice in specific areas. Arguments based on advertised expertise do not and should not easily shift the strong presumption that solicitors should not be responsible for the commercial misjudgement of commercially competent clients who consciously decide to take a commercial risk.

---

79 *Allied Maples Ltd v Simmons*, above n 10, 914.

80 Ibid, 924.

81 Ibid, 922.

82 *Gilbert v Shanahan*, above n 10, 538.

83 Ibid, above n 10, 530 (emphasis added).

This principle of risk allocation, based on the reasonable expectation of the parties, is not applicable to commercially naīve clients. In these circumstances the commercial experience of a competent commercial solicitor is likely to be superior to that of the client. It would not place an intolerable burden on solicitors, in this situation, to inquire into the commercial viability of the transaction or to recommend that the client seek the advice of other professionals. There is little point in suggesting an increased ambit of the duty of care if claimants are then confronted by onerous causation hurdles. The loss of a chance approach is an attempt to ameliorate the stringency of the common law balance of probabilities test. To a proportional degree this approach results in strict rather than fault based liability. It is arguable that such an approach is justified on policy grounds although it will never be sufficient to impose damages without a careful analysis, usually as a matter of inference rather than direct evidence, regarding quantification of the chance lost.