Professional Negligence involving Actuaries and Administrators

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Introduction

– **What is professional negligence?**

- A professional fails to perform their responsibilities to the required standard

- But, what are the boundaries of......

  - The duty that the professional owes?

  - Who is the duty owed to?

  - What losses can the professional be held liable for?

What is professional negligence? (1)

– **DUTY OF CARE**

  - Is a duty of care owed?

  - What is the scope of that duty?

  - The specific facts of the case are essential

  - What does the engagement letter say?

  - Is the professional claiming particular expertise?

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What is professional negligence? (2)

– **DUTY OF CARE**

  - For what purpose is the professional acting?
  - Who is the professional acting for?
  - Is a duty owed to a third party?
  - Are there any applicable statutory or other standards?
  - Does the professional know how their advice will be used?
  - How experienced is the client?

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What is professional negligence? (3)

– **BREACH OF DUTY**

- Has the professional breached their duty of care?

- Has the professional failed to meet the standards expected of them (i.e. the standard reasonably to be expected of a similar professional acting in the same circumstances)?

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What is professional negligence? (4)

- **CAUSATION AND LOSS**
  - Has the professional caused the loss that is being claimed for?
  - Would the loss have happened anyway?
  - Breach of contract: claimant to be put in position as if the contract had been fulfilled
  - Breach of tort law: claimant to be put back in position as if the negligence had not occurred
  - Only claim for foreseeable losses

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What is professional negligence (5)

- **OTHER FACTORS TO CONSIDER**
  - Is the claim being made within the limitation period?
    - Six years from breach of contract
    - Six years from damage occurring
    - Three years where there is latent damage
  - Has the claimant been negligent too?
    - Contributory negligence

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Why do we need to know about professional negligence?

– The number of claims for professional negligence is increasing!

  - More awareness of legal rights

  - Work is becoming more complex

  - *Futter*; *Pitt v Holt*

Facts of the case study (1)

- **Mr Py Thagoras**:
  - Senior scheme actuary employed by Einstein Pensions Limited (an actuarial and consulting firm)
  - Mr Thagoras has provided actuarial services to the Calculus Defined Benefit Pension Scheme (the “Scheme”) since 1992
  - The engagement letter between Mr Thagoras and the Scheme Trustees was signed in 1994 (and has not been updated since then)
- **Mr Pierre Fermat:**
  - Works in the administration team at Einstein Pensions Limited
  - Einstein were appointed as scheme administrators in 1999 (taking over from “Useless & Getting Worse Ltd”)
  - The Trustees sacked Einstein as Scheme administrators in 2011 and replaced them with “Cheaper & Quicker Ltd”

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Facts of the case study (2)

- **Calculus Limited**
  - The sole employer of the Calculus Defined Benefit Pension Scheme
  - Calculus became insolvent in January 2014 after losing a key supply contract
  - Previously Calculus had been a solvent trading company making a healthy annual profit

- **Calculus Defined Benefit Scheme**
  - The Scheme currently has a buy-out deficit of £25 million
  - The Trustees are individual lay trustees, except for the Trustee Chairman who is a qualified but non-practising actuary (he left the profession 10 years ago to become a maths teacher)

Facts of the case study (3)

– **Actuarial professional negligence case**

- The Trustees allege that Mr Thagoras' valuations understated the liabilities of the Scheme over a number of years

- Mr Thagoras did not take into account overriding legislative changes (indexation and revaluation) and only used the Scheme rules to determine the assets and liabilities of the Scheme

- The Scheme rules include a lower level of indexation and revaluation than the overriding statutory requirements

- Therefore, the Trustees allege that Mr Thagoras' valuations and advice regarding the level of contributions to seek from Calculus was negligent

- The Trustees can no longer seek additional contributions from Calculus to make up the Scheme deficit

Facts of the case study (4)

– **Administration Professional Negligence Case**

- The Trustees claim that Mr Fermat's team at Einstein overpaid pensions to Scheme members between 1999 and 2007

- The overpayments arose as a result of an incorrect data transfer from Useless

- The relevant pensioners have spent all the overpayments on a series of round the world cruises, so the overpayments cannot be reclaimed from them (change of position defence)

- The existence of the overpayments was highlighted to the Trustees in 2013 after a review by the Trustees' legal advisers

- Einstein are not challenging the Trustees' allegations of negligence

- Instead, Einstein have stated that there is no case to answer as the claim has been brought after the limitation period expired

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Facts of the case study (5)

– **What are the Trustees claiming?**

- £15 million in respect of the actuarial professional negligence (i.e. the present value of the contributions which they allege they would have obtained from Calculus had the Trustees been properly advised of the Scheme liabilities)

- £2 million in respect of the overpayments to pensioners

The parties

- Mr Py Thagoras and Mr Pierre Fermat will give evidence at the trial today

- Gwendoline Davies – counsel for the Trustees (the “Welsh Dragon”)

- Jo Ratcliffe – counsel for Einstein Pensions Limited (the “English Rose”)

- The Right Honourable Tamsin Tinkler – the judge

Did Einstein owe a duty of care to the Trustees of the Scheme and what was the extent of that duty?

- Contractual duty of care?
  - Letter of engagement
  - Implied terms

- Duty of care in tort?

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AUDIENCE VOTE!!

- 1) How many think that a duty of care was owed by Mr Thagoras (and therefore Einstein) to the Trustees?

- 2) How many think that no duty of care was owed?

- 3) If there is a duty of care, was it limited to the terms of the retainer?

  - A) Yes – Mr Thagoras was under no duty to take account of legislative changes

  - B) No – Mr Thagoras' duty of care includes a duty to take account of legislative changes

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Did Einstein breach the duty of care owed to the Trustees and did this cause loss?

– Was there a breach of duty?

– "But for" this breach, would the loss have been caused?

AUDIENCE VOTE!!

- 1) Who votes that Mr Thagoras breached the duty of care he owed the Trustees of the Scheme?

- 2) Who votes that Mr Thagoras acted in accordance with the required standards so there is no breach of duty?

- 3) Who votes that Mr Thagoras' negligent advice did not cause the losses suffered by the Scheme?

- 4) Who votes that Mr Thagoras' negligent advice did cause the Scheme to suffer losses?

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What measure of damages should Einstein be liable for?

- Losses in negligence
- Contributory negligence

AUDIENCE VOTE!!

How much should the Trustees recover in damages?

- Options:-
  - £15 million (the full amount the Trustees claim)
  - £10 million
  - £5 million (the amount that Einstein's counsel have put forward)

Limitation periods

- Has the case against the administrators been brought in time?
- Latent damage?

AUDIENCE VOTE!!

- Who votes that the Trustees were on notice of potential damage to the Scheme in 2011, so the three year limitation period began to run in 2011 and therefore the Trustees are time barred?

- Who votes that the Trustees could not have been expected to know about the damage to the Scheme until they received the legal report in 2013 and therefore they are within the three year limitation period for latent damage?

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Professional negligence claims brought by third parties

– **Can a professional negligence claim be brought by a party who isn't your client?**

- Ratio Limited bought Calculus in 2010

- During the due diligence process Ratio, as purchaser, requested information about the assets and liabilities of the Calculus Scheme

- If Mr Thagoras had been helpful to Calculus and forwarded the latest Scheme valuation directly to Ratio (and we know Mr Thagoras' valuations were not correct) could Ratio bring a claim for professional negligence against Einstein for losses suffered as a result of underestimating the liabilities of the Scheme and therefore paying an excessive price for Einstein?

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Any questions?

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