



# **STRATEGIES FOR DEFENDING PROFESSIONAL LIABILITY CLAIMS**

Andrew Heal  
416.593.3934  
[aheal@blaney.com](mailto:aheal@blaney.com)

This paper and presentation outlines some of the basic strategies and legal principles that apply to defending claims against professionals. There are a number of common legal principles that apply to all professional groups. Professionals are generally regarded as persons who have a particular degree of skill or expertise. Often, along with this skill and expertise comes elevated social standing and the ability to demand fees for services which may be significant. Consequently, the courts have regarded such persons as having elevated duties of care to the public, commensurate with their level of skill and service.

### **Who is a Professional?**

There is no all-inclusive definition of ‘professional’. The hallmarks of a profession - the traditional learned professions being law, medicine and theology - include extended study periods, a special element of experience and, traditionally, that a substantial part of the work is mental or intellectual.

In my view, the essence of a “professional” is the holding out of “special skill”, and the exercise of considered judgment in the application of those skills. Some authors have cited the following list of common criteria connected with occupations generally regarded to be a profession.<sup>1</sup>

1. The work being performed is skilled and specialized, derived from training or experience, and is generally accepted that a substantial part of the work is mental or intellectual, rather than manual.

---

<sup>1</sup> Diana Dimmer, Professional Liability - Basic Principals, *Professional Liability Today: Suits against Suits*, OBA Continuing Legal Education Seminar April 24, 2002, and Diana Dimmer and John Campion, *Professional Liability in Canada*, (Toronto: Carswell, 1994), annually updated.

*Cornell v. London (City) Committee of Adjustment* (1989), 23 O.M.B.R. 507; *Carr v. Inland Revenue Commissioners*, [1944] 2 All E.R. 163 (C.A.)

2. Persons engaged in the occupation are expected to be committed to certain higher standards of service and principles not only for the benefit of the client, but for the benefit of the community as a whole.

*Pierce v. Law Society of British Columbia* (1993), 103 D.L.R. (4<sup>th</sup>) 233 (B.C.S.C.) at 248

3. Persons practising in the profession are members of a self-regulating association which regulates admission and standards for the profession.

**R. Jackson & J. Powell, *Professional Negligence*, 3<sup>rd</sup> ed. (London: Sweet & Maxwell, 1987), at 2**

## **Regulation of Professions**

The Provinces in Canada generally regulate professions.<sup>2</sup>

The structure is manifest in a number of legislative provisions: In the case of doctors, dentists and other medical professionals in the *Regulated Health Professions Act*,<sup>3</sup> in the case of lawyers, the *Law Society Act*<sup>4</sup>, in the case of engineers, the *Professional Engineers Act*<sup>5</sup>, in the case of architects, the *Architects Act*<sup>6</sup>, and in the case of Veterinarians, the *Veterinarians Act*<sup>7</sup>.

---

<sup>2</sup> Section 92(13) of the *Constitution Act, 1967* (U.K.), 30 & 31 Victoria, c.3

<sup>3</sup> S.O. 1991, Ch.18.

<sup>4</sup> R.S.O. 1990, Ch. L.8.

<sup>5</sup> R.S.O. 1990, Ch. P.28.

<sup>6</sup> R.S.O. 1990, Ch. A.26.

<sup>7</sup> R.R.O. 1990, Reg. 1093.

The self-regulating professions have elected bodies who set rules for admission and exercise the authority to discipline their members. Indeed, it is often said that a member of a profession who no longer recognizes the responsibilities and duties that come with being a professional, is said to have become “ungovernable”. These regulatory bodies are statutorily mandated to protect clients and the public. Certainly in Ontario, the various regulatory bodies actively exercise their mandates.

The types of occupations regulated by provincial legislation have expanded greatly in the last century. As a result, the distinctions between professionals and technicians have become blurred. For example, “engineering technologists” may have a large role in drafting drawings and other undertakings under the supervision of a professional engineer. Many provinces including Ontario have identified a number of other occupations which have been given the statutory power to licence, govern and control persons engaged in those occupations for which technical skill is important. Many of these occupations are cloaked with the criteria usually associated with the traditional professions. For example, there is provincial legislation in Ontario regulating insurance brokers, funeral directors, dental technicians, pawn brokers, psychologists and teachers.

### **Civil Liability**

“With the added prestige and value of his or her services has come, as the leaders of the profession have recognized, a concomitant and commensurately increased responsibility to the public.”<sup>8</sup>

---

<sup>8</sup> *Haig v. Bamford*, [1976] 3 W.W.R. 331 (S.C.C.) at para 13.

The expansion of the liability of professionals is evident in the areas concurrent liability, economic loss, the duty owed by professionals to third parties (to the professional retainer), and the acceptance of class action proceedings against professionals.

Where a plaintiff proves more than one cause of action at trial, the plaintiff can choose the cause of action and remedy most advantageous. The type of action pursued by a plaintiff may affect such matters as limitation periods, the measure of damages and the apportionment of liability.

### **Concurrent Liability**

Not surprisingly, the leading Supreme Court of Canada case confirming the availability of concurrent liability in tort and contract arises in a professional context, as reflected in the Supreme Court of Canada decision in *Central Trust Co. v. Rafuse*.<sup>9</sup>

In *Central Trust Co. v. Rafuse*, the question was whether a firm of solicitors who had acted for a trust company in connection with a mortgage loan to a motel and a restaurant company was negligent for failing to have knowledge of a provision of the Nova Scotia *Companies Act*<sup>10</sup> which resulted in the transaction being void. It was accepted by the plaintiff that the action was statute barred in contract through the passage of the limitation period, but not in tort. Today, the limitation principles that apply to contract cases have, except where clearest contract language excludes such liability, measured the limitation period from discovery of the breach rather than earlier, even where the breach may have occurred earlier, but was undiscovered. In *Central Trust*, the defendant said concurrent liability should not flow for the same error, and that the

---

<sup>9</sup> (1986), 31 D.L.R. (4<sup>th</sup>) 481 (S.C.C.); varied [1988] 1 (S.C.R.) 1206.

<sup>10</sup> *Companies Act, R.S., c. 81, s. 1*

relationship between the parties should be governed solely by the terms of the negotiated contract. Nonetheless, the court found the concurrent liability could exist in both contract and tort.<sup>11</sup>

---

<sup>11</sup> The Supreme Court of Canada summarized the law as follows:

1. The common law duty of care that is created by a relationship of sufficient proximity in accordance with the general principle affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*, supra, is not confined to relationships that arise apart from contract. Although, the relationships in *Donoghue v. Stevenson*, *Hedley Byrne and Anns* were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract. Indeed, the dictum of Lord MacMillan in *Donoghue v. Stevenson* concerning concurrent liability, which I have quoted earlier, would clearly suggest the contrary. I also find this conclusion to be persuasively demonstrated, with particular reference to *Hedley Byrne*, by the judgment of Oliver J. in *Midland Bank Trust*. As he suggests, the question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is for reasons of public policy a general one: see *Arenson v. Casson Beckman Rutley & Co.*, [1977] A.C.405, per Lord Simon of Glaisdale at p. 417. *Junior Books Ltd. v. Veitchi Co. Ltd.*, [1983] 1 A.C.521, in which an owner sued flooring subcontractors directly in tort, is authority for the proposition that a common law duty of care may be created by a relationship of proximity that would not have risen but for a contract.

2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

3. A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.

4. The above principles apply to the liability of a solicitor to a client for negligence in the performance of the professional services for which he has been retained. There is no sound reason of principle or policy why the solicitor should be in a different position in respect of concurrent liability from that of other professionals.

5. The basis of the solicitor's liability in tort for negligence and the client's right in such case to recover for purely financial loss is the principle affirmed in *Hedley Byrne* and treated in

Claims against medical professionals have always tended to be expressed in tort rather than contract language (primarily because tort, not contract, defines the standard of care). Most claims against other professionals will be framed in breach of contract. An exception to concurrent liability may be where the duty of care does not arise independently of the contract, i.e. the nature and scope of the duty of care only arises from the specific obligations or duties created by the expressed terms of the contract. Further, another exception on the applicability of concurrent liability in tort is where a plaintiff is seeking to circumvent a contractual exclusionary clause. I have seen limitation clauses in some circumstances, but no case where a professional was able, by contract, to reduce the standard of reasonable care expected of him or her.

## **Strategies for Defending Liability Claims**

### **Statutory Protections**

The very statutes creating and regulating the professionals may also provide some protections for civil liability.

Some professionals may be able to take advantage of particular protections offered by their legislation. There may be a statutory protection for acting in good faith. In the case of municipal defendants such as building inspectors, they are not personally liable for acts done in good faith.<sup>12</sup>

---

Anns as an application of a general principle of tortious liability for negligence based on the breach of a duty of care arising from a relationship of sufficient proximity. That principle is not confined to professional advice but applied to any act or omission in the performance of the services for which a solicitor has been retained: see *Midland Bank Trust Co. Ltd v. Hett, Stubbs & Kemp*, supra, at p.416; *Tracy v. Atkins* (1979), 105 D.L.R. (3d) 632 at p.638, 16 B.C.L.R. 223.

<sup>12</sup> *Municipal Act*, S.O. 2001, Ch. 25 at s. 448.

In the case of financial advisors, contractual language in account opening agreements often provide that a client cannot maintain claims where the account statements have been read and reviewed, and errors were not corrected or trades were not objected to within a timely manner.

In the case of Geotechnical Engineers, it is standard practice to use limiting language in the retainer documents with respect to the scope of the use of the Geotechnical investigation that uses limited testing to extrapolate.

### **The Contract**

In analyzing an professional liability action which consider the nature of the contract, who are the parties to the contract and what are the terms of the contract whether oral or in writing.

The contract, if it exists in writing, and is detailed maybe sufficient to settle questions of the scope of the duty of care. It is an increasingly common practice for professional to set out the scope of their retainer in detailed written agreements that include, for example, in the case of lawyers, express provisions allowing them to act against former clients in subsequent business transactions except where confidential information has been conveyed. There has been in the case of lawyers, an appropriate recognition by the courts of the duty of a lawyer not to place themselves into a position of conflict. The court recently in Ontario case down against two banks seeking to disqualify a plaintiff's lawyer firm on the basis that they have worked on an unrelated retainer.<sup>13</sup>

---

<sup>13</sup> *McKenna v. Gammon Gold Inc.*, 2009 CarswellOnt 32.



However, where a retainer is silent as to some aspects of the scope or duty of care, the court may imply a term.<sup>14</sup> Even if the issue of coverage is not within the scope of a lawyer's retainer, if important information comes into the lawyers hands that the client does not have and that affects the client's risk in the litigation, the lawyer cannot ignore this information. In the professional liability context, it generally accepted that there is an implied term that the professional carried out its services with reasonable skill, care and diligence in accordance with the standard of care appropriate to his professional status. In *Victoria & Gray Trust Company v. Apple*, the court said as follows in relation to the duty of a solicitor:

“While the claim of the plaintiff is framed in both contract and tort, the distinction between the two is not relevant in this case. A solicitor's retainer, whether it be written or oral, or partly written and partly oral, imposes a two-fold duty upon the solicitor: first, to exercise the care and skill of a reasonably competent solicitor in accordance with the standards of the profession, and second, when the matter for which he has been retained is the carrying out of a contract between his client and another party, to see that the precise terms of that contract for which a solicitor would normally be responsible are carried out in accordance with the terms of the contract, unless he has received instructions to the contrary.”<sup>15</sup>

In the area of professional liability against design consultants, there is some support in the jurisprudence that in an appropriate case, there may be an implied term that the design will or must be reasonably fit for the purpose for which it is intended.<sup>16</sup>

---

<sup>14</sup> *Fellowes, McNeil v. Kanza General International Insurance Co.*, (2000) 138 O.A.C. 28 (Ont. C.A.); leave to appeal granted, 151 O.A.C. 200 (note).

<sup>15</sup> (1984), 32 R.P.R. 230 (Ont. H.C.) at para 22.

<sup>16</sup> See *Greaves & Co. (Contractors) Ltd. v. Baynham Meikle & Partners*, [1975] 1 W.L.R. 1095 (C.A.); *Leslie R. Fairn & Associates v. Colchester Developments Ltd.* (1975), 60 D.L.R., (3d) 681 (N.S.S.C.); *Medjuck & Budovitch Ltd. v. ADI Ltd.* (1980), 33 N.B.R. (2d) 271 (N.B.Q.B.); *British Columbia Rail Ltd. v. Canadian Pacific Consulting Services Ltd.* (1990), 41 C.L.R. 889 (B.C. C.A.).

## **Negligence**

Negligence is the most common cause of action involving elements of negligence which need to be demonstrated by a plaintiff to establish the claim are:

1. Duty of care.
2. Breach of duty and that the conduct fell below the standard.
3. Damages caused by the act or omission of the professional.
4. Foreseeability and that the damages are not too remote.

Once these elements are proven, the defences may be limited.

## **Standard of Care**

Professionals are not required to be perfect, and more than this, standards change over time. The standards that we would expect of a medical professional for example in the 1950's are not those of today. A professional is required to exercise reasonable care and prudence in light of the knowledge available at the time and work performed of which the professional should be aware. The professional is expected to keep on top of new developments and new technology. However, a professional is not negligent for mere errors of judgment. Inexperience is no defence.

## **Specialization**

A professional holds themselves out as a specialist is subject to the elevated duties associated with such specialization. A general practitioner may be negligent where he or she failed to consult with or seek the advice of a specialist in an appropriate case.

## Negligent Misrepresentations

The Supreme Court of Canada in the *Queen v. Cognos Inc.*<sup>17</sup> adopted and approved of the following description of the standard of care in a negligent misrepresentation case:

“An advisor does not guarantee the accuracy of the statement made, but is only required to exercise reasonable care with respect to it. As with the issue of standard of care in negligence in general, this is a question of fact which must be determined according to the circumstances of the case. Taking into account the nature of the occasion, the purpose for which the statement was made, the foreseeable use of the statement, the probable damage which will result from an inaccurate statement, the status of the advisor and the level of competence generally observed by others similarly placed, the trier of fact will determine whether the advisor was negligent.”<sup>18</sup>

In the context of financial professionals such as accountants and financial advisors, actual reliance is a necessary element of negligent misrepresentation:

“As noted above, the Supreme Court of Canada has held that actual reliance is a necessary element of negligent misrepresentation.”<sup>19</sup>

However, the Ontario *Securities Act* has now provided statutory exposure to those who make material misrepresentations as provided in Part XXIII.<sup>20</sup>

A statement about future events or which amounts to merely a statement of opinion, probability or expectation or is vague and indefinite will likely not be sufficient to satisfy this element as a plaintiff may be unable to demonstrate reliance on it.<sup>21</sup>

---

<sup>17</sup> [1993] 1 S.C.R. 87 (S.C.C.) at para 56.

<sup>18</sup> L.N. Klar, *Tort Law* (Toronto: Carswell, 1991), at 159-60 referred to in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at para 56.

<sup>19</sup> *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165.

<sup>20</sup> Part XXIII of the *Securities Act*, R.S.O. 1990, Ch.S.5.

In the context of professional liability, certain professional relationships such as real estate agents, financial advisors who have discretionary trading privileges and typically a solicitor and client are considered to be prima facie in a fiduciary relationship. Other professional relationships the court may find a fiduciary relationship on the facts after applying the test at *Frame v. Smith*:<sup>22</sup>

### **Pre-Trial Attacks on Claims**

Most claims settle, with or without payment, and fewer than 10% of actions commenced are actually resolved by trial. Claims against professionals are often disproportionately represented in both claims which may require a trial to resolve, or which are frivolous or not well founded at the outset.

In Ontario there are three main ways to attack a claim before trial: a motion to strike (Rule 21), a motion for summary judgment (Rule 20), or a motion to dismiss for delay.

Motions to strike are most often successful in defeating claims which have been pleaded unsuccessfully before, or involve statutory interpretation questions that can be answered without

---

<sup>21</sup> *Beer v. Townsgate I Ltd.* (1997), 36 O.R. (3d) 136 at p. 148, 152 D.L.R. (4<sup>th</sup>) 671, O.A.C. 161 (Ont. C.A.), additional reasons at (February 24, 1998), Doc. CA C23123, (Ont. C.A.); *Hinchey v. Gonda*, [1955] O.W.N. 125 at p. 128 (Ont. H.C.)

<sup>22</sup> [1987] 2 S.C.R. 99 (S.C.C.); See, for example, *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.), where McLachlin and L'Heureaux-Dube, J.J. found a fiduciary relationship in a doctor-patient situation. For a similar result in a doctor-patient relationship, see *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 per La Forest J. and also *Henderson v. Johnston*, [1956] O.R. 789 (H.C.); affirmed [1957] O.R. 627 (C.A.); affirmed [1959] S.C.R. 655; *T.(L.) V. M. (W.K.)* (1993), 110 D.L.R. (4th) 64 (N.B. Q.B.). For an example where an accountant was found to be in a breach of a fiduciary duty see *Wakeford v. Yada Tompkins Huntingford & Humphries* (1986), 4 B.C.L.R. (2d) 306 (B.C.C.A.), see also *Drabinsky v. KPMG* (1999), 33 C.P.C. (4th) 318 (Ont. S.C.J.). There are cases that go both ways in dealing with stockbrokers and other financial advisors, which turn on the circumstances of the individual case.

a factual inquiry. Is it plain and obvious the claim cannot succeed? Is the plaintiff without capacity to sue? If successful, the action is stopped in its tracks at relatively little expense.

Motions to dismiss for delay brought by a defendant require the defendant not to be in default of moving the case along. Has there been inordinate delay? Has a witness died? What is the real prejudice caused by the passage of time? This motion, if well founded, disposes of stale claims.

Motions for summary judgment (and the rule will change in January 2010) require no genuine issue for trial. An issue of credibility on a material fact can create a triable issue. It avoids a trial unless the responding party can show “a real chance of success” and in the words of the Supreme Court of Canada “A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter was allowed to proceed”.<sup>23</sup>

### **Limitation Defences**

Many statutory protections are no longer available because of the passage of the *Limitations Act*, 2002.<sup>24</sup> The Court of Appeal has recently said that where an act or omission upon which a claim is based occurred before January 1, 2004 the former *Limitations Act*<sup>25</sup> applies. The former *Limitations Act* provided for a 6 year limitation period. Claims discovered before January 1, 2004 expire at the “sunset” at the end of 2009.

Generally, the limitation period is now 2 years from the date of discovery of the claim, which is statutorily presumed to be the date the act or omission occurred, unless proven otherwise.

---

<sup>23</sup> *Canada (Attorney General) v. Lameman* 2008 SCC 14.

<sup>24</sup> S.O. 2002, Ch. 24, Sched. B.

<sup>25</sup> R.S.O. 1990, Ch.L.15 as rep. by *Limitations Act*, 2002, S.O. 2002, Ch. 24, Sched. B.