RECENT DEVELOPMENTS IN PROFESSIONAL NEGLIGENCE CASE LAW

ADDRESS BY PATRICK LAWRENCE QC:

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PROFESSIONAL DO NOT GIVE WARRANTIES

- As a rule a professional does not warrant (i.e. guarantee) the success of a transaction: *Greaves v Baynham Meikle* [1975] 1 WLR 1095.
- "The surgeon does not warrant that he will cure the patient; nor the solicitor that he will win the case"

LENDER'S ATTEMPTS TO RELY ON WARRANTIES

- Successful in *Mortgage Corp v Zwebner*
- Unsuccessful in *Midland Bank v Cox McQueen* and other cases decided in the late 90s

PLATFORM FUNDING V BANK OF SCOTLAND

- Valuer deceived into valuing the 'wrong' property
- No allegation of negligence
- Claimant argued that the obligation to value the relevant property was absolute, not fault-based
- CofA agreed, 2-1

DOES IT MATTER

- In the context of loss caused by fraud, yes
- Professionals who are blameless are at risk of liability imposed by, say, the small print in a report on title
- No contributory negligence defence
- No defence of "you would have suffered the loss anyway"

ANOTHER FORM OF STRICT LIABILITY

- If an insurer successfully takes a coverage point, you can be sure that a claim against the broker will follow
- Successful defences of claims against insurance brokers are almost unknown.
- Why?

STANDARD LIFE ASSURANCE V OAK DEDICATED LTD

- Oddly worded definition of the ‘excess’ enabled the insurer to avoid paying out on a £100m claim
- Broker liable
- Broker’s duty: to identify the client’s required cover; to obtain it; to ensure that the policy terms meet the client’s needs and contain no traps
- Same obligation, each renewal

NOT SO STRICT

- Barristers have had a better time of it
- *Williams v Thompson Leatherdale*: a failure to advise on a possible change in the law relating to ancillary relief, but causation not proved
- *Pritchard Joyce & Hinds v Batcup*: CofA reverse finding of negligence
- *McFaddens v Platford*: pressure of time a good excuse

- Need to carry out “minutely detailed reconstruction with the assistance of thousands of documents” indicative that “if error there was, not so blatant as to amount to negligent professional conduct”

WHITEHEAD v HIBBERT POWNALL

- Birth of child suffering from spina bifida
- Mother issues proceedings in 1989
- Mother commits suicide in 1995
- Subsequent application to strike out
- Case settled for markedly less that the value it would have had during the wife's lifetime

QUANTUM?

- If the case had been properly conducted, it would have been settled on the basis of a normal lifespan
- But at trial of the negligence action, clear that such a settlement would have been ‘too high’ given the mother’s death
- Court held that it should take into account all relevant information, even though it would not have been known at the time of notional settlement

RATIONALE

- "*With the light before him, why should he shut his eyes and grope in the dark*"
- Cf. *Charles v Hugh James Jones*; *Dudarec v Andrews*; *Golden Strait Corp v Nippon Yusen*

LIMITATION

- In *Pegasus v Ernst & Young* Lewison J observed that the mundane question "when did the claimant suffer damage" has in recent years been considered on 3 occasions by the House of Lords and countless times by the Court of Appeal

- "*Unfortunately this concentration of judicial fire power does not give easy answers for the first instance judge*"

HOUSE OF LORDS CASES

- *Nykredit*
- *Law Society v Sephton*
- Could be read as disturbing the orthodox approach in the professional negligence field, which since *Forster v Outred* has very broadly been to treat loss as being sustained at the moment the claimant enters into a potentially adverse or disappointing transaction

WATKINS v JONES MAIDMENT

- Appears to some extent to have reinstated the orthodox *Forster/Moore/Bell* approach
- The decision of Lewison J in *Pegasus* is worth reading – though the facts are complex – for its air of polite bemusement at the incoherence of some of the authorities by which the court was bound

STONE & ROLLS v MOORE & STEPHENS

- A rogue uses his one-man company to defraud banks
- The company enters liquidation
- The liquidator (in effect on behalf of the banks) sues the company's auditors
- The action fails for illegality, since the rogue = the company
- Such, for the moment, is the law.