
Book Review

Professional Negligence in Construction, 2nd Edition

Ben Patten and Hugh Saunders
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The traditional development of professional negligence is anchored in the concept of the defendant as a member of an established profession. It is the fact that he or she claims to possess the skill of that profession, and to apply it towards the claimant's circumstances, that generates (and delineates) their duty. It also provides the standard against which their conduct will be judged.

As Patten and Saunders point out, that concept has particular problems in its application to the modern construction sector. The *Bolam*¹ test for identifying the requisite standard of care assumes the existence of a body of professionals in an identifiable discipline, and the existence of one or more standards of conduct accepted as proper by that body. By contrast, modern construction projects are characterised by the diversity of persons responsible for bringing the project to fruition, and the integration of their decision-making. With that proliferation of specialisms, how does the court assess the standards of proper practice? In that system of shared or integrated decision-making, how does the court determine upon whom liability rests? How does the court assess negligence in the context of an engineering decision applying state-of-the-art techniques?

It is surprising, then, that specialist texts focusing on the liability of professionals

in the construction sector are few and far between. The analysis is confined to sections of more generalised works on professional liability, or works on construction contracts. *Professional Negligence in Construction* fills that void.

Now in its second edition, the book aims to provide a practical guide to claims against professionals in the construction sector: to explain how professional liability works, and to focus on the way in which the courts are likely to approach the liabilities of persons offering particular skills or services in the business of construction. Moreover, the authors' aim is not to limit themselves to *negligence*, but to analyse all the principal bases of *liability* by which a professional operating in the sector might become liable to their client or to third parties. As a result, the book offers a commendably concise and useful account that explains what the law is, without an elaborate discussion of how it got there or of what the law ought to be.

The authors – two practising barristers at the Construction Bar – are expertly placed to provide that practical guidance. Patten, who is Queen's Counsel, and a leading figure in Construction Professional Negligence, himself argued several of the well-known, recent cases. This second edition introduces the co-authorship of Saunders who, prior to being called to the Bar, was a solicitor in the infrastructure and construction teams of major firms.

Chapter 2 sets the context by describing the roles of the most commonly-encountered industry professions. For each profession, a short but necessary description is given of its origins, its modern functions, its scheme of regulation, and the most common contracts of appointment. The context is completed by describing the typical phases and timescales of undertaking

¹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB).

a construction project. The analysis of the law begins (Chapter 3) with a discussion of how a professional's obligations might arise as a matter of contract, tort, or statute. At this stage, extensive citation of authority is avoided, but (in light of the eminence of the source) without detracting from the value of the analysis.

The meat of the book is in the subsequent chapters. Chapter 4 analyses the standard of reasonable care and skill: what it means and, more importantly, how the court applies it to construction professionals. Chapter 5 illustrates common issues that arise on a construction project. The analysis adopts a logical, thematic presentation that works through the stages and activities of a construction project (from investigating the site, through to administering the building contract during the construction phase), rather than by classification of the professional(s) that might be expected to perform them. Chapter 6 addresses the quantification of claims: how the courts decide issues of causation, and the limits of financial responsibility.

The presentation and analysis are well-suited to those (such as practitioners and in-house lawyers) who come to the subject matter with an existing understanding of the essential principles of contract and tort, looking for practical solutions to frequently-occurring issues. At the same time the sector-specific focus also provides new insights that distinguish the work from the traditional analysis of the standard practitioner texts. An example is the discussion on scope of duty. In a few, brief paragraphs the authors explain how the principle operates as a legally-imposed limit, to ensure that a professional's liability is confined to those losses that are appropriate to the responsibility that they undertook. Patten and Saunders then argue that, in professional claims in the construction sector, it will only be in a rare case that the principle is properly arguable so as to reduce the claimed loss.

That is because that paradigm operation of the principle is where a client relies on the defendant's advice in order to enter into some transaction or take some other step, and that critical feature will usually be absent in claims against construction professionals.

That explanation of the principle – which is, in this reviewer's opinion, plainly right – tends to be overlooked. Notwithstanding the Supreme Court's recent clarification in *Hughes-Holland v BPE Solicitors*,² Lord Sumption's *dicta* are not infrequently relied on to support a generalised principle of loss limitation, said to require the court to ask in every case for what kind of loss the claimant is entitled to compensation.³ By contrast, Patten and Saunders' analysis tends to restrict its application to those cases in which some intermediate step (such as the claimant entering a transaction or taking some other step) occurs after the defendant's conduct, and is the direct cause of the claimant's loss. Only then, and only if the defendant's advice was one factor that led to that step being taken, is it necessary to enquire about the kinds of loss for which the defendant is legally responsible. That analysis explains why (in a decision that post-dates their book) scope of duty was considered to be irrelevant by the Court of Appeal in a claim against project monitors whose negligent over-certification of the value of works caused their client to overpay the builders.⁴ It also obtains direct support from a more recent decision of the Court of Appeal.⁵

2 *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599.

3 See, for example, *Riva Properties Ltd v Foster & Partners Ltd* [2017] EWHC 2574 (TCC), 175 Con LR 45 at [208].

4 *Lloyds Bank plc v McBains Cooper Consulting Ltd* [2018] EWCA Civ 452, [2018] 1 BCLC 609 at [25]–[26].

5 *Chudley v Clydesdale Bank plc* [2019] EWCA Civ 344, [2019] 2 All ER (Comm) 293 at [64], [81].

The final section of the book covers three topics of important, practical significance to professional liability claims. First (chapter 7), an overview of the law and practice of professional indemnity insurance. Secondly (chapter 8), professional liability as it applies to experts, arbitrators and adjudicators. Thirdly (chapter 8), a practical approach to dispute resolution of professional liability claims.

Throughout each chapter, the law is explained with excellent clarity of

expression, avoiding over-elaborate analysis. By doing so, Patten and Saunders succeed in covering a surprisingly broad field of law in a concise volume, while at the same time providing an eminently readable and practical account of a difficult topic.

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