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Duty of care in the construction context –

something old, something new, something borrowed?

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DUTY OF CARE IN THE CONSTRUCTION CONTEXT –

SOMETHING OLD, SOMETHING NEW, SOMETHING BORROWED?

Siân Mirchandani KC

Introduction

1. In 2021 Mr Justice Fraser presided over a trial of preliminary issues[1] encompassing what he referred to as "*classic duty of care issues arising on a complex construction project*".[2]

2. "Classic" in this context may be taken to mean 'having all the features which you would expect such a thing to have'.

3. Yet, in an industry that has made an art form of codifying obligations into set pieces of written contract, it is surprising to hear that there can still arise duty of care issues with such frequency and regularity on complex construction projects that they can rightly be described as 'classic'.

Duty of care in the contractual context

4. In "*Duty of care in contractual chains: have we reached a consensus?*", published by SCL in September 2022, Seohyung Kim of 4 New Square Chambers, and I considered two recent cases: *Multiplex v Bathgate* and *Avantage (Cheshire) v GB Building Solutions*[3] and provided a short refresher on the law which underpins these decisions – namely the restrictions, requirements and considerations for a successful claim in tort in the construction context. I refer you to that paper for the whole refresher course.

5. In summary the principles and concepts that arise for consideration are:

   5.1. **The incremental approach**:

   (1) Has the existence or non-existence of a duty of care on the facts of the instant case been established by reference to existing case law? If so that case law is to be followed.

[1] *Multiplex Construction Europe Limited v (1) Bathgate Realisations Civil Engineering Ltd (formerly known as Dunne Building and Civil Engineering Limited); (2) BRM Construction LLC; (3) Argo Global Syndicate [2021] EWHC 590 (TCC); [2021] P.N.L.R 19.*

[2] *Multiplex v Bathgate, paragraph 12.*

[3] *Multiplex v Bathgate* and *Avantage (Cheshire) Ltd v GB Building Solutions Ltd (In Administration) [2022] EWHC 171, TCC, Mrs Justice Smith.*

(2) If not, (i.e. a novel application), should a duty of care be recognized? Only if there is a novel application will the three stage test from *Caparo Industries plc v Dickman [1990] 2 AC 605,* ('fair, just and reasonable') be applied.

5.2. **The exclusionary rule for recovery of economic loss**:
The starting point is that generally, defendants are not liable in tort for "*pure economic loss"*. "Pure economic loss" denotes financial loss suffered by a claimant which does not arise from physical damage or loss to his property.

5.3. The two main routes[4] to establishing a duty of care:

(1) **Assumption of responsibility**: showing that there was a special relationship between the two parties such that either the defendant assumed a responsibility towards the claimant not to cause them economic loss ("*assumption of responsibility*"), (*Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465*) or that there is a relationship between the two that is "*almost as close as a commercial relationship as is possible to envisage short of privity*"[5] ("*akin to contract*") or that the adviser has ("*'taken on responsibility' for a particular task having a particular purpose*")[6];

(2) **Negligent mis-statement:** Showing that there was negligent misstatement by the defendant where the defendant owed a duty of care to the claimant (*Henderson v Merrett Syndicates Ltd (No.1) [1995] 2 A.C. 145, [1994] 7 WLUK 299; White v Jones [1995] 2 A.C. 207, [1995] 2 WLUK 278*). That is to say, the adviser carelessly gave false advice in circumstances where the adviser knew the advice would be relied on by a specific person and that an inaccuracy in the statement would cause that person loss, and the advisee relied on the statement and suffered loss as a result.

5.4. **Physical damage to property:** The *Hedley Byrne* analysis does not displace the common law 'neighbour' principle that a duty of care will be owed to those who may (or whose property may) foreseeably be injured by a lack of care.[7]

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[4] Another route that has been considered, but has now been rejected and doubted as having any role to play is the so-called 'complex structures theory', derived from Lord Bridge's speech in *D&F Estates v Church Commissioners* [1989] AC 177, (HL) where he was considering a defect in a garden wall that was detected and cured before it causes damage, meant the loss sustained is purely economic, and not physical damage, and accordingly not recoverable in tort: "*However, I can see that it may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to "other property," and whether the argument should prevail may depend on the circumstances of the case. It would be unwise and it is unnecessary for the purpose of deciding the present appeal to attempt to offer authoritative solutions to these difficult problems in the abstract*."

[5] *Junior Books Limited v Veitchi Company Limited* [1982] 3 WLR 477 (HL).

[6] *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 ; 3 WLR 81 at [16].

[7] Per Roskill J at 251-252 in *Margarine Union G.m.b.H. v. Cambay Prince Steamship Co. Ltd*. [1969] 1 Q.B. 219.

5.5. **Collateral duty of care of professionals**: A duty of care collateral to contract is well settled law for professionals – the mere existence of the contract is sufficient (though the scope of the two duties is not necessarily coextensive).[8]

5.6. **No collateral duty of care for building contractor:** no tortious liability arises simply by reason of the construction contract.[9][10]For a building contractor to owe a duty of care there must be something more, namely an assumption of responsibility.[11]

6. This brief talk is concerned with some recent cases in which duty of care issues have arisen, in various guises, which are addressed from the following three aspects:

   6.1. The Bolam test – its application and where it may be disapplied; and
   6.2. The assumption of responsibility – new tricks and old dogs;
   6.3. The scope of duty - when the six point plan from *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20; [2021] 3 WLR 81* does and does not apply.

7. The cases to be considered are:

   - *Martlett Homes Ltd v Mulalley & Co Ltd [2022] EWHC 1813, HHJ Stephen Davies.*
   - *Multiplex Construction Europe Limited v (1) Bathgate Realisations Civil Engineering Ltd (formerly known as Dunne Building and Civil Engineering Limited); (2) BRM Construction LLC; (3) Argo Global Syndicate [2021] EWHC 590 (TCC); [2021] P.N.L.R 19, Fraser J.*
   - *Avantage (Cheshire) Ltd v GB Building Solutions [2022] EWHC 171, Joanna Smith J.*
   - *BDW Trading v URS Corp Ltd [2021] EWHC 2796, Fraser J.*
   - *Rushbond PLC v JS Design Partnership [2021] EWCA Civ 1889, LJJ Asplin, Coulson and Stuart-Smith.*

8. You can judge whether they amount to something new, something old or something borrowed.

The Bolam test

Martlet v Mulalley – "everyone else was doing it"

9. Almost every barrister in TECBAR will have had some part to play in the tsunami of cladding claims that has flooded the TCC since the tragedy of the Grenfell Tower Fire. Each such claim is a 'sticky web' of liability attaching itself to every contractor, sub-contractor, professional or inspector who ever dared get involved with a project involving insulated

[8] *Henderson v. Merrett Syndicates [1995] 2 A.C. 145* at 194. Per May LJ at [73] to [74] in *Bellefield Computer Services & Others v E Turner & Sons Ltd* [2002] EWCA Civ 1823.
[9] *D&F Estates Ltd v Church Commissioners for England* [1989] AC 177; [1988] 7 WLUK 197.
[10] Per Jackson LJ at [76] of *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9; [2012] QB 44.
[11] *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9; [2012] QB 44.

external wall envelopes and either remains solvent, or has valid professional indemnity insurance.

10. Finally in July 2022, we had the first decision following a full trial in one such case: *Martlett Homes Ltd v Mulalley & Co Ltd [2022] EWHC 1813,* where the contractor (under a design and build JCT) was held liable to the owner of four tower blocks, for the cost of replacing combustible external cladding, where the defects in the cladding installation arose from the use of expanded polystyrene insulation, that did not meet the fire safety standards in force at the time of construction in 2005 to 2008. The contractor was also held to have breached the contractual obligation to exercise reasonable skill and care in the design of the cladding – since the contractor cannot have been satisfied that the cladding conformed with the design principles of BRE 135 (2003).

11. In this short paper I am not going to address the details of that case, though it is a sweet shop of hard candy delights for those doing cases in this area, I am only picking up upon its treatment (and dismissal) of the *Bolam* test.

12. His Honour Judge Stephen Davies stated at [271]:

> "I am also conscious that it is contrary to the evidence of the defendant's experts that at the time the typical designer specifier would regularly specify the StoTherm Classic system even for high-rise residential buildings on the simple basis of its being a well-known system which had a valid BBA Certificate whose use was not expressly prohibited at the time on such buildings. **However, I accept the claimant's argument in closing submissions that the argument that "everyone else was doing it" does not, on a proper application of the "*Bolam*" principle, operate as a get out of jail free card.** Following the analysis of Edwards-Stuart J in *199 Knightsbridge Development Ltd v WSP UK Ltd [2014] EWHC 43 (TCC), at paragraphs 101 to 120* , for the *Bolam* principle to operate to exonerate a defendant, **there must be "evidence of a responsible body of opinion that has identified and considered the relevant risks or events and which can demonstrate a logical and rational basis for the course of conduct or advice that is under scrutiny**" (paragraph 120). "A defendant is not exonerated simply by proving that others … [were] … just as negligent" (paragraph 106). Both of these observations would apply in this case." [12]

Some context

13. **1957:** In *Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582*, McNair J stated, in his direction to a jury determining a case of alleged negligence by a doctor:

> "Where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is ... the standard of the ordinary skilled man exercising and professing to have that special skill. **A man need not possess the highest expert skill. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."** [13]

[12] Emphasis has been added here (and elsewhere in this paper) by use of bold in the extracts cited – unless otherwise stated.
[13] *Bolam v Friern Hospital Management Committee, at 1210-E.*

13.1. **1980:** A further reminder to not set too high a standard was given by Lord Diplock in *Saif Ali v Sidney Mitchell & Co [1980] AC 198:*

> "No matter what profession it may be, the common law does not impose on those who practice it any liability for damage resulting from what in the result may turn out to have been errors of judgment, unless the error was such as **no reasonably well-informed and competent member of that profession could have made.**"

13.2. **1987:** In *Nye Saunders & Partners v Alan E Bristow (1987) 37 BLR*, the test from *Saif Ali* was held by the Court of Appeal to apply to architects, whose initial estimate was so much lower than the up to date estimate as to amount to a breach of duty by reason of a failure to warn.

13.3. **1998:** Nearly forty years after *Bolam*, in *Bolitho v City & Hackney Health Authority [1998] AC 232,* the test underwent a change which has been accepted as part of the 'codification' ever since, with emphasis added in bold, Lord Browne-Wilkinson held:

> "The Court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice … **the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis**. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter."[14]

13.4. **1984:** But before *Bolitho* was the Hong Kong conveyancing case heard by the Privy Council: *Edward Wong Finance Co Ltd v Johnson Stokes & Master [1984] AC 296.* In *Edward Wong*, the Privy Council considered what was described as 'the practice of Hong Kong style completions'. This was a generalised practice in the solicitors' profession whereby the property buyer's solicitors handed over the money to the seller's solicitors, in return for an undertaking to forward the necessary documents of title later but within a stated time.

13.5. The evidence established this was the practice adopted in the majority of conveyancing transactions; and that it enabled conveyancing to proceed far more quickly than a simultaneous exchange. The case was the first time such a transaction had fallen through due to the vendor's solicitor's default on their undertaking (the solicitor had absconded from Hong Kong with the money). Despite the defendant solicitors complying in all material respects with the general practice of the profession at that time in Hong Kong, and despite there being no condemnation of the practice, described as well suited to Hong Kong, the Privy Council held the buyer's solicitors to

[14] *Bolitho v City & Hackney Health Authority,* at pages 241-242.

be negligent because the risk of loss was foreseeable, and had been reported upon by the local Law Society, and it was easily avoidable, without undermining the basic features of the practice.

13.6. This became the first example of a case where the English courts treated a universally held body of professional opinion as wanting. Lord Browne Wilkinson stated:

> "Again, in *Edward Wong Finance Co. Ltd. v. Johnson Stokes & Master [1984] 1 A.C. 296*, the defendant's solicitors had conducted the completion of a mortgage transaction in "Hong Kong style" rather than in the old fashioned English style. Completion in Hong Kong style provides for money to be paid over against an undertaking by the solicitors for the borrowers subsequently to hand over the executed documents. This practice opened the gateway through which a dishonest solicitor for the borrower absconded with the loan money without providing the security documents for such loan. The Privy Council held that **even though completion in Hong Kong style was almost universally adopted in Hong Kong and was therefore in accordance with a body of professional opinion there, the defendant's solicitors were liable for negligence because there was an obvious risk which could have been guarded against. Thus, the body of professional opinion, though almost universally held, was not reasonable or responsible.**"[15]

13.7. His view was that this might be a rare case, where the opinion evidence did not survive logical analysis:

> "In my judgment that is because, in some cases, **it cannot be demonstrated to the judge's satisfaction that the body of opinion relied upon is reasonable or responsible**. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. **But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.**"

13.8. **2000:** In *Michael Hyde & Associates Ltd v JD Williams & Co [2001] PNLR 8*, the architects had been found negligent to a clothing company for failing to adequately investigate the risk that the heating system installed would cause yellowing of the company's textile products due to a phenolic yellowing reaction. The Court of Appeal upheld the judge's decision that the Bolam test did not apply, as the decision to investigate did not require the application of any special architectural skills, but overturned the judge's decision on causation because, if the technical enquiries had been made, on balance this would not have uncovered any unacceptable risk of yellowing. The Court of Appeal has determined that there are only three situations where Bolam does not apply:

[15] *Bolitho*, at p242.

(1) Where expert opinion supporting the practice is not capable of logical support.
(2) Where the evidence did not constitute evidence of a school of thought.
(3) Where the act or omission is so elementary, or unrelated to a question of practice, that there is no exercise of an esoteric or specialised skill, such that the court has no need to inquire into the standards of the profession.

13.9. **2014:** In *199 Knightsbridge Development Ltd v WSP UK Ltd [2014] EWHC 43*, Mr Justice Edwards- Stuart led the way in the field of construction professionals when he critically analysed (at paragraphs 101 to 120) the position of the engineers (WSP), and whilst holding that the design problem should have been foreseen, and dealt with, he found in their favour on causation, because it had not been shown that the steps WSP should have taken would have prevented either of the two failures that led to the flood. He concluded:

> "So far as is relevant to this case, I draw the following principles from the authorities that I have cited.
>
> i) A professional man **does not warrant that the course of action that he takes or advises his client to follow will be successful**….
>
> ii) If a professional man adopts or advises a course of action which **although unsuccessful or shown to be wrong is a course of action that was in accord with or was adopted at the time by a responsible body of opinion held by practitioners in that discipline**, **he will not be negligent provided that that body of opinion has a logical or rational basis**: see Bolitho , at 241–242; Nye Saunders , at 103.
>
> iii) If the exponents of the "responsible body of opinion" relied on cannot demonstrate that the opinion has a logical or rational basis, the defence will be unlikely to succeed: see Bolitho, at 241–242.
>
> iv) If the reason why the impugned course of action or advice was wrong is that the professional man in question and others in his position **did not identify or foresee a particular risk or sequence of events, then there is probably no room for the application of the Bolam test**: see J D Williams v Michael Hyde, at [46]."

Bolam vs Warranty (or absolute obligations)

14. A warranty of success, or an absolute obligation upon a professional to achieve a particular outcome is not the usual position. To achieve this displacement of the standard of 'reasonable skill and care' requires express terms (i.e. "clear wording") and will still be subject to the usual principles of contractual interpretation, having regard to the factual matrix. The enquiry will involve, in particular, the extent of complexity of the task required; whether it calls for the exercise of skill and judgment and whether the outcome is outside the professional person's control. The cases demonstrate that the outcome will be very fact dependent; a mixed standard of obligation is possible, and that an absolute obligation or warranty may be becoming more achievable:

14.1. In **1999** in *Midland Bank Plc v Cox McQueen [1999] PNLR 593,* the Court of Appeal rejected the argument that solicitors owed an absolute duty to obtain Mr & Mrs Dukes' signatures (where Mr Duke had introduced an imposter as Mrs Duke);

14.2. In **2008** in *Platform Funding Ltd v Bank of Scotland Plc* [2008] EWCA Civ 930; [2009] QB 426, the professional valuers were held to have taken on an absolute obligation, where they had certified an inspection of that property – this certificate being construed as a warranty of inspection of the particular, identified property, but only a statement of exercise of reasonable skill and care with regards the actual valuation;

14.3. In **2018** in *B v IVF Hammersmith Ltd* [2018] EWCA Civ 2803; [2020] QB 93, the Court of Appeal found the IVF clinic had undertaken an absolute obligation to obtain the written consent of the father to the thawing and implantation of frozen embryos, where the mother had forged the signature of the father. In her judgment at [50] Nicola Davies LJ confirmed the confinement of the reasonable skill and care test:

> "The fundamental flaw on this point in the defendant's argument is that **the duty not to act without the written consent of [the parents] is a straightforward process which requires the physical obtaining of the written document. It is not a process which is dependent on medical or scientific skill. It does not require account to be taken of medical or scientific uncertainty which, in the context of a process which requires this, is a significant factor in the rationale underpinning the more limited duty to take reasonable care**."

15. So? Where to next for the Bolam test? The writing has been on the wall since 2014, as indicated by Edwards-Stuart J in *199 Knightsbridge* at [40]:

> "In a situation such as the present, where there has been **no consideration or thought given to the risks, the body of opinion cannot fulfil the requirements of Bolitho**. A court is **not simply focused on *what* conclusion a body of opinion reached. Instead, it will also examine the *way* in which that body of opinion reached its conclusion. If it cannot be demonstrated that this was as the result of a process by which the risks have been actively considered, it cannot be logical.** In this case, the risks involved have not been considered. The profession did not direct its mind to the question. Instead, it adopted, uncritically and without thought, a certain practice. Such a practice cannot be logical. There was no basis for its conclusions."

16. It requires more than merely the involvement of a professional, the duty in question must involve an act or process that depends on the exercise of a professional skill, or involves a matter of scientific uncertainty. Blind reliance on a product's certification – probably falls the wrong side of the line, but considered reliance, may not.

The assumption of responsibility – new tricks and old dogs

Multiplex v Bathgate – "but they produced a certificate"

17. In *Multiplex v Bathgate*, a claim for over £12m of losses, Multiplex was the main contractor for the project under a design & build contract. Bathgate, previously known as Dunne, was the specialist sub-contractor for the design & construction of the concrete package of works for Building 1, which comprised both substructure and superstructure works, including a concrete core, constructed level by level using a temporary works piece of equipment called 'a slipform rig'.[16] BRM was the specialist designer/engineering consultancy appointed by Dunne to design the slipform rig. RNP was an independent design checker, engaged by Dunne to carry out a 'Category 3 check',[17] which resulted in RNP providing to Dunne two Category 3 Design Check Certificates.[18]

18. The decision concerns the trial of preliminary issues relating to the legal obligations owed by **RNP to Multiplex**, one of which was: Did RNP owe any duties or obligations to Multiplex in respect of the Category 3 Design Check Certificates? The Category 3 Design Check certificates both contained the following wording: "*we certify that reasonable skill and care has been used in the preparation of this design/check to ensure that the calculations accord with the design brief, current industry practice and design codes.*"[19]

19. Against that background, Multiplex sought to formulate its case as follows:

    19.1. Dunne owed obligations to Multiplex in contract. One such obligation required an independent third party check, which was also required by the relevant British Standard.

    19.2. Multiplex argued that RNP had assumed a duty to Multiplex to exercise reasonable care and skill in considering the design, and that the certificates constituted a negligent misstatement and/or contained warranties that reasonable skill had been used.

    19.3. Multiplex asserted it was entitled to proceed directly against Argo as it claimed that the rights RNP had to be indemnified by Argo were transferred to Multiplex because RNP owed it duties of care and warranties (which it asserted had been breached).

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[16] The slipform rig is essentially a piece of equipment that is continuously moving formwork, used where concrete works (such as the concrete central core of Building 1 which contained all the services, lifts and staircases) are cast and constructed incrementally allowing the concrete at a particular level to be poured and to start setting or curing. As the concrete is cast, and sets the slipform rig moves gradually up the height of the building at a rate which allows the concrete to harden sufficiently, whilst the slipform rig moves on to permit the casting of the concrete core to be continuous.

[17] What is a Category 3 check? Complex designs are referred to as Category 3 designs. Category 3 designs require an independent third party to check and approve its use.[17] The third party must be from a different organisation to the designer. The underlying rationale to ensure the integrity of the design of such works; it demonstrates that such design has been performed correctly; it ensures safety. Category 3 checks required under the relevant British Standard. A Category 3 check is the highest level of check and the only one which requires an independent organisation to carry it out.

[18] In fact, the first of the two certificates was not provided to Multiplex in the form it was produced by RNP – Dunne had changed the certificate, deleting certain parts of it, without either Multiplex or RNP being aware.

[19] *Multiplex v Bathgate,* paragraph 34.

19.4. The real issue was: did RNP owe a duty to hold Multiplex harmless from economic loss?

20. Mr Justice Fraser undertook a review of the authorities in this thorny area of law, which is distilled below:[20]

(1). The existence of a duty of care cannot be dealt with in the abstract. The finding of a duty of care is to be made with reference to whether RNP had a duty of care related to the kind of loss suffered, i.e. economic loss as a result of underperformance/failure of the rig. Per Akenhead J in *Galliford Try Infrastructure Ltd (Formerly Morrison Construction Ltd and Morrison Construction Services Ltd) v Mott MacDonald Ltd* [2008] EWHC 1570 (TCC); Per Lord Hoffman in *SAAMCO* [1997] AC 191 and *Caparo Industries v Dickman* [1990] 2 AC 605.

(2). Three different tests for the finding of a duty of care, three different routes of analysis though may not lead to substantially different results, or only do so in the rarest of cases: the assumption of responsibility test, the three-part test and the incremental test.

(3). *Hedley Byrne* distinguished as a basis for the duty contended for. Unlike the company's bankers asked for a reference, who had 3 choices (silent, decline, answer) RNP had no "choice".

(4) Generally no assumption of responsibility where the parties have consciously so structured their relationships (in contract), that to find such an assumption would be inconsistent with those arrangements. Would it be inconsistent to find RNP liable, given that it would be "*short circuiting the contractual structure so put in place by the parties*". Is the contractual structure, "*so strong, so complex*"? *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 ; *White v Jones* [1995] 2 AC 207.

(5). Objectively viewed exchanges: do any statements cross the line? (RNP/Multiplex) Are the certificates such statements? Or simply provided to Dunne to show design had been checked. *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830.

(6). Is the safety aspect of the Category 3 check a determinative factor? A classification society did not owe a duty of care to cargo owners for the statements made by its surveyor regarding the seaworthiness of a vessel: *Marc Rich & Co AG v Bishop Rock Marine Co Ltd ("The Nicholas H")* [1996] 1 AC 211.

(7). What if RNP knew the identity of Multiplex? Not relevant as assumption of responsibility is an objective test.

(8). Assumption of responsibility is a sufficient condition of liability – if that test is passed, then no further enquiry is needed. If not passed, then enquire further. Look at detailed

[20] *Multiplex*, paragraphs 116 to 166.

circumstances and the particular relationship as a whole. *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28: *"the tests used in considering whether a defendant sued as causing pure economic loss owed a duty of care disclosed no single common denominator by which liability could be determined."*

(9). No place for tort in a purely commercial context, where parties have consciously and voluntarily arranged their affairs; tortious duty should not be invoked where there is no "liability gap". A "gap" is not essential, but relevant to consider. *Riyad Bank v Ahli United Bank UK plc* [2006] EWCA Civ 780.

(10) Context of and circumstances in which statements are made need to be considered to determine if there is a duty and, if so, its scope. *Galliford Try Infrastructure Ltd (Formerly Morrison Construction Ltd and Morrison Construction Services Ltd) v Mott MacDonald Ltd* [2008] EWHC 1570 (TCC).

(11). Knowledge of and consent to advice being passed on to a known third party, who will rely on it for a specific purpose, may be sufficient to demonstrate sufficient foreseeability and proximity, and that the context may also show that it is fair, just and reasonable in such circumstances to impose a duty of care owed by the defendant to that third party. More likely for a third party consumer. *Arrowhead Capital Finance Ltd (In Liquidation) v KPMG LLP* [2012] PNLR 30.

(12). Reliance: Multiplex did not allow the certificate issue to "operate on its mind" in such a way that the economic loss was suffered by it on account of that reliance. RNP did not assume responsibility to Multiplex for the statements in the Category 3 check certificates. Per Christopher Clarke LJ in *Hunt v Optima (Cambridge Ltd)* [2014] EWCA Civ 714 at [54] :

> "In order to recover in the tort of negligent misstatement the claimant must show that he **relied on the statement in question**: James McNaughton Paper Group Ld v Hicks Anderson & Co [1991] 2 QB 113,126. **It must operate upon his mind in such a way that he suffers loss on account of his reliance** e.g. by buying at too high, or selling at too low, a price, or making an agreement or doing something which he would not otherwise have made or done".

21. The salient points found by Mr Justice Fraser were:

21.1. The certificate RNP provided (including the statements therein that the Category 3 check had been performed using reasonable skill and care) was provided to Dunne and not Multiplex. It was provided so that Dunne could meet the CDM Regulations and its own contractual obligations to Multiplex. It was important, even if it wasn't decisive, that there was no direct exchange between RNP and Multiplex, no communication "*crossing the line*".[21] RNP was not asked to give, and did not give, advice to Multiplex at all.[22] For the claim to succeed, RNP would need to have

[21] *Multiplex v Bathgate*, paragraph 138.
[22] *Multiplex v Bathgate*, paragraph 155.

assumed responsibility to Multiplex, or for the certificate's use by Multiplex for particular purposes.

21.2. In a non-consumer context, where the claimant was a main contractor with detailed contracts governing its relationship with others, it was unlikely that the defendant's knowledge of and consent to the passing of their advice to a third party who would rely on it would be sufficient to find a duty of care.[23]

21.3. In fact, given the project's detailed and careful contractual structure, the direct placement of a duty of care on RNP to Multiplex would be inconsistent. RNP was only discharging its duty to Dunne who had full design responsibility. No liability gap results, as Multiplex would have had remedy against Dunne (but for its insolvency).[24]

> "It can therefore be seen that, were Dunne and BRM still solvent and/or insured, the main thrust of Multiplex's case would be against them. Certainly, as a matter of law, Multiplex has a cause of action against Dunne for the same matters advanced against RNP (or its pleading proceeds as though it does). The case against RNP would be an add-on to that main case. **As it is, RNP (or more accurately, Argo, RNP's insurer) may be the only party from whom Multiplex might realistically expect any recovery**."

> "It is correct that a party is free to proceed against any one of a number of other parties against whom it has a good claim. The reason this point is potentially important here is in respect of the matters that must be considered when considering assumption of responsibility and a potential duty of care. The phrase used in some of the authorities is "**gap filling**", by which is meant whether there is a gap in terms of a claimant's contractual relations, which the law of tort might fill. Here, the "artificial claim" point is a more refined, and subsidiary, point which arises under consideration of any gaps. **It is not a strict requirement that there be a gap, but here, in my judgment, there is no gap."**

21.4. Public policy had a role to play. Imposing a duty of care on RNP would not be fair, just and reasonable, because it could lead to unlimited liability on a major construction project, of which RNP had only been provided with a limited set of design information to allow it to check the calculations for a modest fee. It would open the floodgates for Category 3 checkers.[25]

Some context

22. A professional, engaged to prepare a report or a certificate, which it knows will be viewed and relied upon by others, but by whom it is not retained, may owe a duty of care in respect of the accuracy of the report or certificate. However, whether or not that duty arises, and is one that encompasses an obligation to guard against incurring economic loss will be dependent on the facts. It is most unlikely to arise in the face of an express disclaimer, or an incomplete attempt to obtain an assignment of the report, or a novation.

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[23] *Multiplex v Bathgate*, paragraphs 159, 164.
[24] *Multiplex v Bathgate*, paragraph 172.
[25] *Multiplex v Bathgate*, paragraphs 173-174, 179-181.

22.1. **2008:** In *Galliford Try Infrastructure Ltd v Mott McDonald Ltd [2008] EWHC 1570*, no duty of care arose between the contractor (G) and the consulting engineer (M) in relation to information passed by the consultant to the contractor at the tender stage. See [190] for Akenhead J's analysis of the relevant authorities and a summary of the principles.

22.2. **2018:** *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd [2018] EWHC 1915:* the consulting engineers had prepared a geotechnical report for a site that the local authority wished to sell. They did not, by reason of that report, owe any duty of care in tort to the ultimate purchasers of the land, even where it was known the report had been provided to the prospective purchaser without the engineer's objection because: (a) it contained disclaimers of third party rights (b) it expressly limited liability for the specific problem subsequently found (environmental contamination with asbestos containing materials); (c) it was not to be passed to others without the engineers' express consent; (d) the fact that formal assignment of the report to the eventual site purchaser was contemplated, but did not happen, confirmed no duty of care existed.

23. The production of a certificate, did not clinch the duty of care for *Multiplex,* where the complex contractual arrangements, and apparent absence of reliance, counted against the existence of the duty of care. As with the preceding cases, the parties' detailed contractual context for the alleged tortious relationship was not fertile ground for a duty of care.

The scope of duty – when Manchester Building Society does and does not apply

Avantage – "An incremental development?"

24. *Avantage* concerned a care home that had burned down while a roofing contractor was carrying out hot works. Avantage, was the employer who had engaged Gleeson as a design and built contractor. Gleeson in turn had appointed WSP as a fire engineering consultant, to prepare a fire safety strategy ("FSS") for the project. Avantage did not have a direct contractual relationship with WSP.

25. The FSS stated that its purposes were to support a submission for building regulations approval in relation to the works, detail the performance requirements for fire safety measures (to be used in the design of the facility) and to assist parties, including Avantage, with understanding of fire safety. It also contained a disclaimer that it was intended for the sole use of Gleeson and was not to be relied upon by any third party. At a later date, WSP had rendered further services, in the form of providing an Operational Fire Safety Management Report ("OFSM") and a Fire Risk Assessment ("FRA").

26. What was novel about this claim is that there was a private finance initiative ("PFI") agreement, and WSP knew that the employer had been engaged under a PFI arrangement. Furthermore, it was procedurally unusual: WSP had brought a summary judgment application against

Avantage and the court was being asked to assess these issues without the benefit of disclosure.[26]

27. Mrs Justice Joanna Smith concluded that this was not an appropriate case for summary judgment:

27.1. The number of potentially complex issues (which included some disputes of fact) – meant this had "all the hallmarks"[27] of an attempt to persuade the court to conduct a mini-trial of the issues.

27.2. The existence of a PFI agreement was relevant background, since it meant there would be 'operators' who would rely upon WPS's recommendation and advice. It was at least arguable that the effect of this was that the Claimants could rely on WSP's fire strategy scheme.

27.3. The circumstances were a 'conventional business-like relationship governed by contractual terms', but the context of WSP's knowledge and intention that operators (like the Claimant) under a PFI arrangement, would rely upon their proper performance of their duties, with the other factual background features.[28]

27.4. The contractual structure, which was created at a particular time, may not reflect the ongoing evolution of the parties' relationship, and the trial judge is best placed to determine whether reliance has been placed on events which occurred after the original contractual structure was put in place.[29]

27.5. The issues of scope of duty and assumption of responsibility have long presented difficulties of definition and limits, including a different legal test depending on whether the case is 'novel' or not:

> "Furthermore, I accept Ms Padfield's submission that the issues of scope of duty and assumption of responsibility by professional people have, over the years, been bedevilled with difficulties of definition and boundaries. **If this is not a novel case, then the test of whether there has been a voluntary assumption of responsibility (or whether, as the test was straightforwardly put in *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20 ; 3 WLR 81 at [16]* , WSP has "taken on responsibility" for advising the Claimants on fire strategy) will ultimately determine the issue of duty, whereas, if this is a novel case, then the question of whether it is fair, just and reasonable to impose liability in negligence will be relevant (see *Meadows v Khan [2021] 3 WLR 147 at [66]*)."**[30]

[26] Contrast with *Multiplex* which was a trial of preliminary issues.
[27] *Avantage v WSP*, paragraph 31.
[28] *Avantage v WSP*, paragraph 54.
[29] *Avantage v WSP*, paragraph 56.
[30] *Avantage v WSP*, paragraph 48.

27.6. The disclaimer in WSP's Fee Proposal did cover the fire safety strategy (FSS) but it did not cover the full scope of WSP's work (for example, the later OFSM and FRA), and it was arguable that WSP's work included an ongoing provision of services by WSP in relation to fire safety – beyond the FSS.[31] The significance of a disclaimer is as a factor to be taken into account in the relevant factual matrix. [32]

27.7. Discussions were taking place between WSP and Avantage, i.e. communications crossing the line, and it was not fanciful that they gave rise to an awareness and intention that the operators of Beechmere would rely upon the non-negligent services of WSP in relation to the FSS, such that WSP (when viewed objectively) assumed a responsibility to the Claimants:

> "It does appear to me that **the existence of the known PFI arrangement** in conjunction with (i) the **terms of the Fee Proposal**, (ii) the **terms of the FSS**, (iii) the **terms of the OFSM**, (iv) the apparent **inter-relationship between the services that were being provided by WSP** and (v) the **involvement** of the Claimants/their predecessors or Mascot **in relevant meetings and discussions** (as is clearly evidenced in Mr Allan's statement) **gives rise to an arguable case that must go to trial.**"

Some context

28. Avantage is an unusual case, but as it is a decision on a strike out application, itself pursued in unusual circumstances (pre-disclosure – but asserting no assumption of responsibility), it is likely to have limited impact. Nevertheless, its context is significant:

28.1. **June 2021:** *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20; [2021] 3 WLR 81* and *Meadows v Khan* [2021] 3 WLR 147, are two Supreme Court decisions handed down the same day, and which are to be read together **as reflecting a "coherent underlying approach" to determining the scope of the duty of care, or the extent of liability of professionals after *SAAMCO*.** Although the decision in *Manchester Building Society* on the appeal (which succeeded) was unanimous, the panel of seven justices dissented on the approach to *SAAMCO*, with the majority expressly stating in *Manchester Building Society* that its judgment was a response to the divergence of opinion about *SAAMCO*, and sought to provide an authoritative view and general guidance regarding the "proper approach to determining the scope of duty and the extent of liability of professional advisers in the tort of negligence".

28.2. These Supreme Court decisions have culminated in six questions to be posed when a claimant seeks damages from a defendant in the tort of negligence:

> "(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the **actionability question**)

[31] *Avantage v WSP*, paragraph 83.
[32] *Avantage v WSP*, paragraph 84.

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the **scope of duty question**)

(3) Did the defendant breach his or her duty by his or her act or omission? (the **breach question**)

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the **factual causation question**)

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the **duty nexus question**)

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the **legal responsibility question**)."[33]

28.3. **Oct 2021:** *BDW Trading v URS Corp Ltd [2021] EWHC 2796,* where a developer had discovered structural defects 14 years after completion of a building's construction, it was held to be entitled to bring negligence claims against the structural designer for the cost of remedial works, even though the building no longer belonged to it; and where it faced no third party claims. The scope of duty owed by the designer extended to the risk of economic loss arising from the structural defects which resulted from a negligent design, but did not extend to any reputational loss it might suffer. The six point plan from *Manchester Building Society v Grant Thornton* was treated as the correct approach and directly applicable even though that case derives from a "professional advice" case, and the instant case was expressly noted to not be a professional advice case.

28.4. **Dec 2021:** *Rushbond PLC v JS Design Partnership [2021] EWCA Civ 1889,* the Court of Appeal overturned the Judge's decision to strike out the developer's claim in negligence which concerned the defendant architect's leaving a door unlocked whilst performing an inspection of the building. A third party had entered the building and later started a fire. It could not be unequivocally said that the architect did not owe a duty to take reasonable care not to do or fail to do something which permitted others to burn down the property; such a duty could not be said to be based on "pure omissions"; alternatively the duty fell within a recognized line of negligence authorities where a duty was found to be owed by a defendant in respect of the security of the claimant's property. Lord Justice Coulson expressly noted this was not a novel claim to which the six point plan from *Manchester Building Society v Grant Thornton* applied.[34]

> "Thus far it has been unnecessary to refer to the recent Supreme Court authorities which have considered the essential ingredients of a claim in negligence:

[33] *Manchester Building Society*, (ibid), para [6].
[34] *Rushbond Plc v JS Design Partnership LLP,* at [74].

Meadows v Kahn … and its sister case *Manchester Building Society v Grant Thornton UK LLP* ….. That is primarily because those two cases focused upon what used to be called the *SAAMCO* principle (which does not arise here), and because…**the suggested six-point test is aimed at alleged duties which fall outside the established categories of negligence cases. The present case is not a novel claim to which the six-point plan might be applied:** instead, it is a recognised type of claim, well-covered in the authorities to which I have already referred, some of which the Supreme Court themselves cite in their judgment at [37].

28.5. **July 2022:** *Spire Property Development Ltd v Withers LLP [2022] EWCA Civ 970,* a case concerning whether solicitors, asked specific questions by a former client developer, had assumed a duty to advise the developer on its rights and remedies against the seller of land it had purchased. The limits on the "purpose test" were stated by Carr LJ:

> "70. The decisions in *Manchester* and *Khan* addressed the concept of scope of duty in the tort of negligence as illustrated by the decision of the House of Lords in [SAAMCO]. The majority opinion was set out in the speech of Lords Hodge and Sales. The majority suggested a six-stage analysis as a useful (though non-prescriptive) approach to placing the scope of duty principle in the tort of negligence: see *Manchester* at [6]; *Khan* at [28]. The second question asked what were the risks of harm to the claimant against which the law imposes on the defendant a duty to take care. It held (at [4]) that the scope of that duty was "governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given" ("the purpose test") and at [17] that "in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk."
>
> 71. Although, as set out above, the Developers argue that the decisions in this respect support their position, **I consider that the purpose test is inapposite to the question arising here, namely the content of the duty owed by the professional as a matter of conduct.** By contrast, **the purpose test was formulated in order to address the recoverability of damages; to that end it is relevant to ask whether the scope of the professional's duty extended to certain risks in respect of activities which the professional was required to perform. The purpose test addresses the question of scope of duty in law (and the *SAAMCO* principle), rather than the extent of the duty in the first place. Indeed, the purpose test was formulated for a different exercise and on the assumption that the professional's obligation to advise fell within the scope of duty (as reflected for example in the use of the words "negligent advice" in [17] of *Manchester*).**

29. These cases present a divergent approach as to precisely when and where the six point plan from *Manchester Building Society* is to be applied. However, it should be clear enough from the judgment itself – which is expressly stated by their Lordships as:

> *"..to provide general guidance regarding the proper approach to determining the **scope of duty and the extent of liability** of professional advisers in the tort of negligence."*

And where the six point plan is to be followed is clarified by the following explanatory sentence:

*"Application of this analysis gives **the value of the claimant's claim for damages** in accordance with the principle that the law in awarding damages seeks, so far as money can, to put the claimant in the position he or she would have been in absent the defendant's negligence."*

30. The six point plan is aimed at removing the divergence of opinion **about SAAMCO** and the recoverability of damages, where a professional's obligation to advise fell within the scope of duty. It is not to be applied to the actual determination of the content (or "scope" in that sense) of the duty.

Siân Mirchandani KC

TECBAR Conference, 24 November 2022