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**THE PROFESSIONS: POWER, PRIVILEGE AND LEGAL LIABILITY**

**PETER TAYLOR MEMORIAL LECTURE  
BY LORD JUSTICE JACKSON  
TO THE PROFESSIONAL NEGLIGENCE BAR ASSOCIATION  
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1. INTRODUCTION

1.1 This year marks the 25<sup>th</sup> anniversary of the Professional Negligence Bar Association (“PNBA”). The PNBA was formed in September 1990. Robin Stewart QC was the first Chairman. I was the first Vice-Chairman. Andrew Goodman was the first secretary and carried a huge burden of administration. Andrew served for seventeen years as secretary. His successor, Victoria Woodbridge, also carries a heavy burden of administration. If Victoria serves for the conventional seventeen year term, that will take us through to 2024.

1.2 Lord Taylor CJ was the first President of the PNBA. It was a great honour for this then unknown and fledgling Specialist Bar Association that the Lord Chief Justice agreed to become President. Lord Taylor was diligent in attending our more important meetings and in taking an interest in the PNBA’s affairs. He appreciated the potential of the association and the importance of its role in the future. The present lecture series was established to commemorate Lord Taylor, following his untimely death. I was surprised and delighted when the committee invited me to give the Peter Taylor Memorial Lecture in this anniversary year.

1.3 The PNBA has always looked beyond pure law and considered the other disciplines which intersect with our work. (I say “our” work because most of my

practice at the Bar was professional negligence.) It is for this reason that, at the PNBA's annual clinical negligence weekend, there are more than just "law" lectures. In addition to the legal speakers, there are eminent surgeons and consultants who deliver lectures on a wide range of medical topics.

1.4 In this lecture I shall look at some of the writings of sociologists about the professions and consider the relevance (if any) of those writings to the ever evolving law of professional liability.<sup>1</sup>

## 2. WHAT DO LAWYERS SAY ABOUT THE PROFESSIONS?

2.1 It is traditional for textbooks on professional liability to begin with a brief discussion of what "professions" are and what their role is in society. The books then go on to discuss the legal principles applicable to all professions and, in much more detail, the rules applying to particular professions.

2.2 Simpson. *Simpson's Professional Negligence and Liability*<sup>2</sup> contains a pithy account of the professions in the first two pages of Part 1. Simpson cites the seven characteristics of a profession identified by the Monopolies Commission and opines that the two most important characteristics are:

"(i) Practitioners apply a specialised skill enabling them to offer a specialised service;  
(vii) Practitioners are organised in bodies which, with or without state intervention, are concerned to provide machinery for testing competence and regulating standards of competence and conduct."

2.3 Simpson goes on to quote the definitions of professions formulated by Dicey and subsequently by Sidney & Beatrice Webb. Simpson opines that those definitions retain their force today, but the degree of state intervention is much greater, especially in the field of financial services. Simpson then turns in full and helpful detail to the relevant legal principles and the rules governing the liabilities of each profession.

2.4 Dugdale & Stanton. Some textbooks proceed on the assumption that the professions are self-evidently a discreet and coherent group to which identified legal principles apply. *Dugdale & Stanton on Professional Negligence*<sup>3</sup> is a good example in that regard and provides a clear exposition of the law.

2.5 The new generation of textbooks. The new generation of professional negligence textbooks tend to focus upon specific professions. Examples are *Flenley & Leech, Solicitors' Negligence and Liability*<sup>4</sup> and *Jones, Medical Negligence*.<sup>5</sup> These textbooks necessarily include some discussion of the particular profession under scrutiny. *Flenley & Leech* make the valuable point that expectations of solicitors change over time. Therefore case-law on what constitutes 'improper conduct' or 'professional misconduct' must be viewed against a background of constant change.<sup>6</sup>

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<sup>1</sup> I am grateful to Professor Richard Moorhead for guiding my reading of sociological material and for commenting on this paper in draft; also to Dr Janet O'Sullivan for a helpful discussion of the issues.

<sup>2</sup> Informa, loose leaf, updated to May 2014

<sup>3</sup> Third edition, 1998, Butterworths

<sup>4</sup> Third edition, 2013, Bloomsbury Professional

<sup>5</sup> Fourth edition, Sweet & Maxwell, 2008

<sup>6</sup> See paragraph 6.09.

2.6 Jackson & Powell. All editions of *Jackson & Powell on Professional Liability* (“J&P”) have begun by observing that the occupations which are regarded as professions have the following four characteristics:<sup>7</sup>

“(1) **The nature of the work:** The work done is skilled and specialised. A substantial part of the work is mental rather than manual. A period of theoretical and practical training is usually required before the work can be adequately performed.

(2) **The moral aspect:** Practitioners are usually committed, or expected to be committed, to certain moral principles, which go beyond the general duty of honesty. They are expected to provide a high standard of service for its own sake. They are expected to be particularly concerned about the duty of confidentiality. They also, normally, owe a wider duty to the community, which may on occasions transcend the duty to a particular client or patient.

(3) **Collective organisation:** Practitioners usually belong to a professional association which regulates admission and seeks to uphold standards of the profession. Such associations commonly set examinations to test competence and issue professional codes on matters of conduct and ethics.

(4) **Status:** Most professions have a high status in the community. Some of their privileges are conferred by Parliament. Some are granted by common consent.”

2.7 Three qualifications. I drafted that passage some 35 years ago (to be precise in August 1980). The current editors have kindly preserved that passage, but state that it now requires three qualifications.

(i) As to the moral aspect, the practitioners’ wider public duty must not constrain them from giving “primacy to the interests of their clients”.<sup>8</sup>

(ii) As to collective organisation, over recent years there has been increasing statutory imposition of regulatory requirements on the organisation of many professions. This generally supplements rather than replaces the self-regulatory model. The exception is in the financial sector, where the Financial Services and Markets Act 2000 has replaced the Financial Services Act 1986.

(iii) As to the high status of professions, this does not fit well with the egalitarian culture of our age.

Nevertheless the current editors believe that, despite those qualifications, the passage quoted above still generally holds true.<sup>9</sup> After that brief discussion about the nature of professions, *J & P* goes on to discuss the legal principles underpinning professional liability, then the rules governing individual professions.

2.8 Comment. The discussion about the nature of professions in all the legal textbooks tends to be brief. Such discussion is essentially based upon the reflections of the authors and their perusal of the law reports (i.e. the reflections of other lawyers). Understandably legal writers do not delve into the mass of sociological literature on the subject of “the professions”. They do not have time to do so. Moreover they have more than enough to cover on the legal side. The multiplicity of relevant judgments and (dare I say it) the interminable length of some of those judgments hardly help the hard pressed legal author. Certainly when I was an editor of *J & P*, I barely glanced at the writings of sociologists.

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<sup>7</sup> See para 1-005 of the seventh edition.

<sup>8</sup> In future editions the editors may need to qualify this proposition by reference to Bar Handbook para gC1 and SRA Handbook para 2.2.

<sup>9</sup> See *J&P* paras 1-005 to 1-008.

2.9 Further reading. For the purpose of this lecture, I have dipped my toes into the vast ocean of sociological writings about the professions. An analysis of the literature may expose some of the intellectual and cultural forces which are shaping the development of the law in this area.

### 3. WHAT DO SOCIOLOGISTS SAY ABOUT THE PROFESSIONS?

#### (i) The altruism theory

3.1 In the early and mid-twentieth century sociologists tended to view professions as ethical occupational groupings which promoted the good of society.

3.2 Tawney. Richard Tawney, writing in 1921,<sup>10</sup> believed that individual self-interest was subverting community interest. He maintained that professionalism was a major force, which was capable of subjugating individualism to the needs of the community in a proper “functional society”.

3.3 Carr-Saunders & Wilson. Carr-Saunders and Wilson, writing ten years later,<sup>11</sup> saw the professions as amongst the most stable elements in society. They set out the historical background of each profession in England. They saw professions as organised bodies of experts who applied esoteric knowledge to particular cases. They argued that the professions inherit, preserve and pass on a tradition. “They engender modes of life, habits of thought and standards of judgment which render them centres of resistance to crude forces which threaten steady and peaceful evolution ... The family, the church and the universities, certain associations of intellectuals, and above all the great professions, stand like rocks against which the waves raised by these forces beat in vain.”<sup>12</sup>

3.4 Talcott Parsons. Talcott Parsons, writing shortly after the Second World War,<sup>13</sup> argued that professions were distinguished by their collectivity-orientation, rather than self-orientation. The professions ensured that knowledge and science would be applied for the public good.

3.5 Durkheim. Emile Durkheim<sup>14</sup> contrasted the professions with other bodies engaged in trade or industry. He saw in the organisation of professions not only the modern expression of the mediaeval corporation, but also a social model that would produce much needed ethics and rules. Durkheim argued that professions were moral communities based upon occupational membership. They brought cohesion to society, which was otherwise lacking.

3.6 Halmos. Paul Halmos<sup>15</sup> commended the professional service ethic. He argued that the ethic of personal service originated in professions such as medicine and social work, but had subsequently spread to other professional bodies. Indeed he believed that this

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<sup>10</sup> *The Acquisitive Society*, 1921, Harvester Press

<sup>11</sup> *The Professions*, Clarendon Press, 1933

<sup>12</sup> *Ibid* page 497

<sup>13</sup> *Professions and Social Structure in Essays in Sociological Theory*, 1954

<sup>14</sup> *Professional Ethics and Civil Morals*, 1957

<sup>15</sup> *The Personal Service Society*, 1970, Constable

ethic, which the professions had promoted, was penetrating other groups and institutions in modern society.

(ii) The new approach

3.7 All of the social scientists mentioned above and others like them, in one way or another, saw the professions as a force for good, which society – if it was wise – would nurture. In or about the 1960s, however, there was a sea change. Social scientists writing since then have taken a different line. They look critically and sceptically at the professions. They frequently come to more jaundiced conclusions.

3.8 Johnson. Terence Johnson<sup>16</sup> argues that the emergence of specialised occupational skills creates relationships of social and economic dependence. The professions have thereby acquired significant and unhealthy power over their clients. There is a need for social control over professions. There are three possible means of control, namely collegiate control, patronage or mediation by a third party, ideally the state. Johnson favours the third option. This will ensure that the occupational group operates in the public interest and becomes more diverse.

3.9 I shall now summarise the recent literature in more detail, focusing on what are (I am told) the three most important works. This is not an easy task. Sociological writing tends to be somewhat dense and does not readily yield up its meaning to the reader.

(a) Andrew Abbott: *The system of professions*<sup>17</sup>

3.10 A firm definition of professions is not possible. The following loose definition suffices: “somewhat exclusive groups of individuals applying somewhat abstract knowledge to particular cases”.<sup>18</sup>

3.11 Each profession has its own set of tasks, which may be described as its ‘jurisdiction’. Jurisdiction is a more-or-less exclusive claim to solve problems falling within that area. Each profession asserts its claim to monopoly mainly through public opinion but sometimes by law. One profession’s jurisdiction pre-empts another’s. Nevertheless the jurisdiction of each profession is not permanent. This is for two reasons.

(i) Professions compete for work. Jurisdictional disputes may be resolved in a variety of ways, for example by division, by amalgamation or by subordination of one profession to another. Abstraction of knowledge helps professions to maintain their jurisdictional strength.

(ii) The tasks requiring to be done are created, abolished or re-shaped by external forces. Professions move to fill vacancies. They may expand, contract or attack as circumstances change. For example, architects have moved into urban planning. Psychotherapists have medicalised many personal problems, which might have fallen within the domain of clergy or social workers.

In this way the professions make up an interacting ever changing system, an ecology.<sup>19</sup>

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<sup>16</sup> *Professions and power*, Macmillan, 1972

<sup>17</sup> University of Chicago Press, 1988

<sup>18</sup> Page 316

<sup>19</sup> Chapters 1, 3 and 4

3.12 All professional work requires an objective foundation, involving special knowledge and some form of organisation. Psychiatry, social work, teaching and computer programmers are illustrations. The practitioners deploy academic or abstract knowledge, but they depend upon an organisation and infrastructure so that they can carry on their work. Professional work usually includes stages which could be characterised as 'diagnosis', 'inference' and 'treatment'. A profession is always vulnerable to changes in the objective character of its central tasks.<sup>20</sup>

3.13 Professions may regress into specialist realms, where they are secure, leaving others to fill the remaining areas. (Abbott suggests that the Bar has done this.) Professions may share the same jurisdiction where they are in a superordinate-subordinate relation, as in the case of medical practitioners and nurses. Professions sometimes delegate routine work to para-professionals and others. This leads to degradation of what was formerly professional work, 'deprofessionalisation'.<sup>21</sup> Technology has taken away much professional work and led to commodification of the tasks. Professions sometimes lose work to administrative organisations. For example, American lawyers have lost much work to trust companies. In France and some other Continental countries the Government exercises much greater control over the jurisdiction of individual professions.<sup>22</sup>

3.14 The cultural environment plays an important role in the evolution of professions. There are changes in the organisation of knowledge. This has led to radical changes in the organisation of electrical engineering in the USA. New ways emerge of legitimating the work which professions do and how they do it. The relationship between professions and the universities is also critical. This relationship is very different in – for example – Germany, the UK and the USA.<sup>23</sup>

3.15 Abbott illustrates his analysis by three case studies: (i) the information professions, where there has been a battle between librarians, statisticians, accountants and others to provide information to business; (ii) lawyers and their competitors; (iii) professions dealing with personal problems.

(b) Eliot Freidson: *Professionalism, the third logic*<sup>24</sup>

3.16 There are different ways of controlling the labour market. In the professional sphere the labour market is occupationally controlled. The professions sit within labour market shelters.<sup>25</sup> Indeed professionalism is "a set of institutions which permit the members of an occupation to make a living while controlling their own work".<sup>26</sup> That is a considerable privilege. It only exists because of a general belief that the particular tasks which they perform are so different from those of most workers that self-control is essential. The work which professions do is so specialised that it cannot be, as Abbott puts it, 'commodified'. Professionals possess specialist knowledge, skill and ability to exercise discretion. This is different from the specialist knowledge and

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<sup>20</sup> Chapter 2

<sup>21</sup> An example of this might be the emergence of will writers and claims handlers in England.

<sup>22</sup> See chapters 5 and 6. But there is a need for caution when generalising about "the Continent".

<sup>23</sup> Chapter 7

<sup>24</sup> Blackwell Publishers Ltd, 2004

<sup>25</sup> Pages 61-78

<sup>26</sup> Page 17

technical skill of, say, pinmakers. The qualifications possessed by professionals enable others to know whether they have the requisite abilities – this is “credentialism”.

3.17 The key to occupational control of work is to create the training programmes and to determine who obtains the necessary credentials. Crafts, technicians and professions have different forms of specialist training. The professions control knowledge within their own spheres.<sup>27</sup> The ideology of the market is consumerism. The ideology of bureaucracy is managerialism. The ideology of the professions is the delivery of good work, rather than simply making economic gain or achieving economic efficiency.<sup>28</sup>

3.18 Professions may be classified according to the type of specialist knowledge which they possess. Professions such as medicine depend upon scientific knowledge. The normative professions such as law are based upon man-made rules and matters of value. The status of professions is affected by the nature of the knowledge which they deploy. Architects have a higher status than engineers. They do not simply apply scientific knowledge. The origins of architecture lie partly in the arts and it claims authority over design.<sup>29</sup>

3.19 There have been attacks on professionalism both from consumerism and from managerialism. The professions need to fight back by developing codes of ethics and re-asserting the importance of their professional ideologies: see chapter 8, “The assault on professionalism”, and chapter 9, “The soul of professionalism”.

*(c) Magali Larson: The rise of professionalism*<sup>30</sup>

3.20 The professions began as specialist groups serving the élites. There was a complete change of character and role of the professions during the nineteenth century. The process was similar in both the UK and the USA. The professions moved from restrictive monopolies of practice to organisation and control of the competitive market. In order to achieve market control, the professions need to codify or standardise their knowledge. Professionalisation should be seen as a collective project, which seeks to achieve market control. See, for example, the history of events leading up to the formation of the American Medical Association in 1847 or the enactment of our Medical Act 1858.<sup>31</sup>

3.21 In order to establish social credit, professions have relied upon their ideology and their ‘ideal of service’. The professions’ collective project has involved organising the market for their services. They control training programmes and professional structures.<sup>32</sup>

3.22 The modern professions developed during the industrial revolution. They were seeking both income and social standing. According to the 1861 UK census out of a population of 18 million there were 17,500 surgeons; 2,088 barristers; 11,684 solicitors; 1,486 architects; 853 engineers and 3,416 accountants. The rise of corporate capitalism has consolidated the position of professions. Numerous new occupations

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<sup>27</sup> Pages 83-104

<sup>28</sup> Chapter 5 and page 127

<sup>29</sup> See chapter 7, “Bodies of knowledge”.

<sup>30</sup> Transaction Publishers, 2013

<sup>31</sup> Chapters 1 to 4

<sup>32</sup> Pages 53-79

have achieved professional status, relying upon claims of expertise and altruism.<sup>33</sup>

3.23 Larson then embarks upon a complicated classification of the professions by reference to their connections with bureaucracy, their services and their positions in the market. She argues that professions must be understood in their historical matrix. She questions the utility of some of the privileges which they have achieved.

(iii) Comment

3.24 What emerges from the literature. What emerges from a review of the sociological literature over the last century is that there was a sea change in about the 1960s.

(i) **Until the 1960s** the prevailing view was that professions were occupational groups with superior ethical standards and special expertise. The professions were believed to deploy that expertise for the benefit of their clients/patients or of society generally, rather than for their own gain. Accordingly society should nurture the professions and respect their independence.

(ii) **After the 1960s** sociologists have generally taken the opposite view. Professions are characterised as privileged groups with special knowledge, which they exploit to achieve enhanced income and status. Each profession seeks to expand its empire and to control its own segment of the labour market. The professions rely upon their asserted ethical standards in order to justify self regulation and to defend their territory.

3.25 The appearance of mega-firms. The traditional model of professional practice was based upon sole practitioners or small firms. Up until the 1960s solicitors' firms were not allowed to have more than twenty partners. The traditional model has now been swept away. Wealthy and successful solicitors for the most part belong to huge firms, sometimes multi-nationals. Accountants have moved even further away from the traditional model. The Big Four (Deloitte, EY, KPMG, PWC) have combined annual revenues of \$120 billion. That substantially exceeds the \$89 billion generated annually by the hundred largest law firms combined.<sup>34</sup>

3.25 Professional firms are businesses. Huge professional firms (whether LLPs, limited companies or whatever) are, necessarily, first and foremost businesses, even though – commendably – they make substantial charitable donations and undertake much pro bono work. They are not communities of scholars, who deploy their expert knowledge for the public good with remuneration being merely a secondary consideration. Nor do they see themselves in that light. Reputations largely turn upon the size of annual turnover. In other words modern professional firms now *behave* in the way described by the contemporary sociologists, *not* in the way described by Tawney, Carr-Saunders, Wilson, Talcott Parsons, Durkheim and Halmos.

3.26 Turf wars between professions. Abbott's account of how professions assert or cede jurisdiction over different areas of work is a fair description. The next turf war may possibly be between lawyers and accountants. Some accountancy firms already have their own in-house legal departments. According to the *Economist*, the legal arm of one of the Big Four is now the tenth biggest law firm in the world. If accountancy firms wish to expand their dominions further, the law may be the obvious area in

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<sup>33</sup> Chapters 7 to 9

<sup>34</sup> *Economist*, 21<sup>st</sup> March 2015, page55



which to do so. Whether or not that will happen is, of course, speculation. The point which I make is a simple one. The emergence of mega-firms and the opportunity for turf wars between professions are established features of the 21<sup>st</sup> century scene. This is the antithesis of the orderly professional world and the selfless professional ethic described by the pre-1970 writers. It fits much more neatly with the writings of modern sociologists.

3.27 Valuable attributes of the professions, which must be seen in their proper perspective. Although the structure and the character of professions have changed in the way described above, the professions still retain valuable features which inure to the public good.

(i) In addition to their specialised expertise, the professions also have *independence*.<sup>35</sup> Many professions are now regulated by agencies which the state has set up, but those professions are still *independent of the Government*. Lawyers fight fearlessly in the courts against the police, Government departments and all manner of public bodies. Doctors in the health service still staunchly assert their clinical independence. Similar comments could be made about the other professions.

(ii) Each profession has its own code of ethics to which all members should aspire, although some will fall short. For a recent survey of the ethical standards to which the legal profession aspires, see *The virtuous character of the practice of law* published by the Jubilee Centre, Birmingham University in November 2014.

Therefore the professions still are valuable assets of society, just as banks, schools, the Fire Service, the armed forces, the City of London, universities and other institutions are valuable assets of society. Each of those institutions has an appropriate degree of independence and each has its own set of ethical standards to which members aspire. The professions are undoubtedly important, but they are no longer as special or as precious as they once claimed (and were believed) to be.<sup>36</sup>

3.28 The privileges of the professions. As many modern commentators have noted, the professions enjoy distinct privileges because they are the custodians of specialist expertise which society needs. These privileges include for many (but not all) practitioners a comfortable income,<sup>37</sup> status and a high degree of control over their own work: see the writings of Freidson summarised above. In general terms therefore the professions are reasonably well rewarded for the services which they render to society. They should not be characterised as disinterested benefactors acting solely for the public good.

#### 4. DOES THE COMMON LAW REFLECT THE CHANGING PERCEPTION OF THE PROFESSIONS?

4.1 The sea change in sociological writings has been reflected in legal developments over the same period. I do not suggest that judges or practitioners spend their evenings ploughing through textbooks on sociology. The process is more subtle than that. Both the legal profession and the academic community are heavily influenced by the

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<sup>35</sup> See Dingwall & Fenn, “‘A respectable profession’? Sociological and economic perspectives on the regulation of professional services”, *International Review of Law and Economics* (1987), 7 (51-64).

<sup>36</sup> See Moorhead, “Precarious professionalism: some empirical and behavioural perspectives on lawyers”, *Current Legal Problems* (2014) pp 1-35.

<sup>37</sup> One obvious exception is barristers doing criminal work on legal aid.

same Zeitgeist. Although we all see ourselves as completely independent-minded and objective, it is impossible to escape the spirit of the times.

4.2 The Zeitgeist has transformed the way in which sociologists view professions. It has probably also transformed the way in which professions view themselves. In those circumstances it is hardly surprising that the common law has developed in the general direction of expanding professional liability. The common law no longer sees the professions as somehow sacred or as fragile assets of society, which merit special protection.

(i) Standard of care

4.3 The position in the nineteenth century. In the nineteenth century the courts were generally protective of professional men (and they were all men at that time). They only imposed liability in cases of gross negligence. In *Baikie v Chandless* (1811) 3 Camp 17 Lord Ellenborough observed:

“An attorney is only liable for *crassa negligentia*; and it is impossible to impute that to the defendant for not discovering a defect in the memorial of an annuity which was subsequently held to be a defect upon a defect upon a very careful construction of the statute.”

4.4 In *Purves v Landell* (1845) 12 C&F 91 Lord Brougham stated at 98-99:

“... it is of the very essence of this kind of action that it depends, not upon the party ... having received, if I may so express it in common parlance, bad law, from the solicitor, nor upon the solicitor or attorney having taken upon himself to advise him, and, having given erroneous advice, advice which the result proved to be wrong, and in consequence of which error, the parties suing under that mistake were deprived and disappointed of receiving a benefit. But it is of the very essence of this action that there should be a negligence of a crass description, which we call *crassa negligentia*, that there should be gross ignorance, that the man who has undertaken to perform the duty of an attorney ... should have undertaken to discharge a duty professionally, for which he was very ill qualified, or, if not ill qualified to discharge it, which he had so negligently discharged as to damnify his employer, or deprive him of the benefit which he had a right to expect from the service.”

4.5 In *Lanphier v Phipos* (1838) 8 C&P 475 (a clinical negligence case) Tindal CJ directed the jury as follows:

“Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill, and you will say whether, in this case, the injury was occasioned by the want of such skill in the Defendant.”

4.6 In *Rich v Pierpont* (1862) 3 E&F 35 (another clinical negligence case) Erle CJ observed:

“A medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge.”

4.7 The position in the early twentieth century. Writing the foreword to *Eddy on Professional Negligence* in 1955 Denning LJ stated:

“The courts have no hesitation in holding that mistakes made by car drivers or employers are visited by damages: but they make allowances for the mistakes of professional men. They realise that a finding of negligence against a professional man is a serious matter for him. It is not so much the money, because he is often insured against it. It is the injury to his reputation which a finding of negligence involves.

One hundred years ago the courts said that a solicitor was not liable except for gross negligence. This phrase has been discarded but the cases are treated much the same now as then. The courts hesitate long before holding a solicitor is negligent. Likewise with doctors and hospitals... their special position has now been recognised, and they are not liable simply because something happens to go wrong.”

4.8 The Bolam test. What is now called the *Bolam* test evolved in the mid-twentieth century and was most famously articulated in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582:

“ 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 ... he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... Putting it another way round, a man is not negligent if he is acting in accordance with such a practice merely because there is a body of opinion who would take a contrary view.”

The *Bolam* test is a watered down version of the nineteenth century yardstick of “gross negligence”. The effect of *Bolam* is that, save in exceptional circumstances,<sup>38</sup> each profession sets the standards by which its members are judged. This should be contrasted with other walks of life, where the court sets the standards and determines what constitutes reasonable care.

4.9 The operation of the Bolam test. The operation of the *Bolam* test is illustrated most clearly in the medical field. There are numerous reported cases where doctors have made mistakes with grave consequences, but have nevertheless escaped liability on the basis of *Bolam*.<sup>39</sup> Such cases make chilling reading, if one focuses on the individual case rather than the issues of principle which are at stake. Therefore it is necessary to consider the underlying rationale for the court’s approach.

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<sup>38</sup> As explained in *Bolitho v City and Hackney HA* [1998] AC 232

<sup>39</sup> See, for example, *Dove v Jarvis* [2013] Med LR 284: D carried out a total hip replacement on C, which was not successful. C was left in permanent pain and needed to use crutches for walking. There were a number of shortcomings in the procedure and D admitted that he had carried out an “imperfect operation”. Nevertheless the court held that D had not been negligent.

4.10 The rationale of the *Bolam* test. The rationale (which some would support and others would reject) is that we live in a world of human frailty, where everyone makes mistakes; if every medical error gave rise to financial liability, the diversion of NHS funds from healthcare to compensation would be disproportionate. Outside the medical sphere the rationale advanced for the *Bolam* test is essentially the same: if excessive liability is imposed upon the professions, indemnity insurance premiums will escalate and the costs of that insurance will all be passed on to clients/consumers. Shortly stated, a balance must be struck between (a) the allocation of finite resources to delivering the primary professional service and (b) the allocation of those same resources to compensation for failures in the primary service. *Bolam* is one way, but not the only possible way, of striking that balance.

4.11 The attack on *Bolam*. In the latter part of the twentieth century many claimants had their guns trained on *Bolam*. My impression during 25 years' practice at the Bar (1973 to 1998) was that, although everyone paid lip service to *Bolam*, it became steadily more difficult to persuade judges that errors made by professional people were non-negligent mistakes. The one exception was the medical profession, where the full majesty of the *Bolam* test continued to hold sway. But even that stronghold *Bolam* was coming under attack. In *Sidaway v Board of Governors of Bethlem Royal Hospital* 1985] AC 871 (a case concerning the doctor's duty to advise) the *Bolam* test only survived by a 3:2 majority. Finally, just a month ago, the invaders captured the citadel. In *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] 2 WLR 768 the Supreme Court held that the majority in *Sidaway* was wrong. The *Bolam* test did not determine the extent of a doctor's duty to advise.

4.12 Future battles. Now that the invaders have broken through the castle walls, they will not stop there. I predict that over the coming years there will be continuous onslaught on *Bolam*. The argument will be that the ordinary principles of tortious liability should apply to the professions in the same way that they apply to everybody else. There is no reason for the courts to accord special protection to the professions. Whether any of those attacks will succeed I do not know and it would be wrong for me, as a judge, to predict. I merely state where I foresee the next battles being fought.

#### (ii) Professional immunity

4.13 Total immunity of barristers in earlier times. In the eighteenth and nineteenth centuries it was firmly established that barristers could not be sued for professional negligence. The undercurrent in those cases seems to be that the very idea of suing the gentlemen of the Bar was unthinkable. In *Fell v Brown* (1791) Peake 131 a claim against a barrister for negligent drafting was dismissed as impermissible. Lord Kenyon stated that this action was the first, and he hoped it would be the last of its kind.

4.14 The scaling back of barristers' immunity in the twentieth century. By the twentieth century the world had changed. The proposition that a barrister might be sued for negligence could no longer be dismissed out of hand as an affront to the dignity of that learned profession. Accordingly if barristers' immunity from suit was to survive, it required rational policy justification. In *Rondel v Worsley* [1969] 1 AC 191 the House of Lords sought to provide just that. However, the policy justifications stated in *Rondel* could not survive later scrutiny. In *Saif Ali v Sydney Mitchell & Co* [1980] 1 AC 198 the House of Lords whittled down the immunity of barristers to advocacy in court and work directly related to that advocacy. The court held that that

limited immunity applied to solicitors and barristers equally.

4.15 Abolition of advocates' immunity in the twenty first century. In *Hall v Simons* [2002] 1 AC 615 the House of Lords administered the coup de grace. They completely abolished the immunity of advocates for work done in court.<sup>40</sup> Lord Hoffmann took as his starting point the principle that “English law provides a remedy in damages for a person who has suffered injury as a result of professional negligence”. Any exception to that principle required sound justification. Lord Hoffmann concluded that there was none in the case of claims against barristers or solicitors for work done in court.

4.16 Immunity of expert witnesses. Members of any profession giving expert evidence remained immune from suit until very recently. The Court of Appeal confirmed that immunity at the very end of the twentieth century in *Stanton v Callaghan* [2000] QB 75. In *Jones v Kaney* [2011] UKSC 13, however, the Supreme Court by a majority overruled *Stanton* and all the preceding authorities. The court held that there was no longer any policy justification for exempting expert witnesses from liability for negligence.

### (iii) Concurrent liability

4.17 The position up to the 1960s. For many years it was accepted that the liability of professional persons to their clients lay only in contract, not in tort. See *Jarvis v Moy, Davies, Smith, Vandervell & Co* [1936] 1 KB 339 (re stockbrokers); *Groom v Crocker* [1939] 1 KB 194 (re solicitors); *Bagot v Stevens Scanlon & Co Ltd* [1966] 1 QB 197 (re architects). In *Bagot* a firm of architects was employed to supervise construction works. (The reference to “supervise” in the report probably means “periodically inspect”.) As a result of the architects’ alleged negligence in overlooking defective work, cracking of the drains and settlement of the building subsequently occurred. The employer issued proceedings against the architects more than six years after construction but less than six years after the damage developed. Diplock LJ, sitting as an additional judge of the Queen’s Bench Division, held that the architects’ liability lay only in contract and not in tort. Therefore the claim was statute barred.

4.18 The position after the 1960s. In the 1970s a new stream of authority developed holding professional persons to liable to their clients in both contract and tort. It started with *Midland Bank v Hett Stubbs & Kemp* [1979] 1 Ch 384 (re solicitors) and culminated in *Henderson v Merrett* [1995] 2 AC 145 (re Lloyd’s agents). The limitation rules have been the driving force behind this more recent line of authority. That is because tortious claims become barred later – sometimes much later – than contractual claims. The clear policy objective behind this line of cases, sometimes stated openly, has been to extend the range of situations in which professional persons can be held liable to their clients.

4.19 I have argued elsewhere<sup>41</sup> that the law has taken a wrong turn in relation to concurrent liability. What we should be doing is harmonising the limitation rules for contract and tort (as recommended by the Law Commission)<sup>42</sup>, not mangling the law

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<sup>40</sup> The House of Lords unanimously abolished the immunity of advocates in respect of civil litigation. By a majority of 4:3 they abolished the immunity in respect of criminal litigation.

<sup>41</sup> TECBAR annual lecture on 30<sup>th</sup> October 2014, now published in (2015) 23 Tort L Rev pages 3-15.

<sup>42</sup> See Law Commission Report no. 270, *Limitation of Actions*.

of tort. I do not now venture back to into that hostile territory. For present purposes what is significant is that the courts have consciously developed the common law so as substantially to cut down the limitation defences available to professional persons. This is entirely consistent with all the other developments in the law of professional liability since the 1970s.

4.20 The position in France. French law has in general rejected concurrent liability. The doctrine of *non-cumul* maintains the separation between contract and tort. Nevertheless even French law makes an exception for professional negligence. In such cases there is concurrent liability in contract and delict: see paragraphs 3.1 to 3.7 of my previous lecture. This reflects the prevalent concern in both civil and common law jurisdictions to extend the liability of professional persons.

#### (iv) Liability to third parties

4.21 Up to the 1960s. Up to the 1960s the general principle was that professionals owed no duty to persons other than their clients to protect such persons against economic loss. In *Candler v Crane Christmas & Co* [1951] 2 KB 164 C invested £2,000 in a company in reliance on the company's accounts. The company's accountants had given C a copy of those accounts and discussed them with him. The accounts had been prepared negligently and C lost the whole of his investment. The Court of Appeal dismissed C's claim, holding that the accountants owed no relevant duty to him. Denning LJ dissented. He held that in such circumstances accountants or other professional persons (such as surveyor or valuers) would owe a duty of care to people other than their clients.

4.22 The turning point. The turning point came in 1963 when the House of Lords decided *Hedley Byrne v Heller* [1964] AC 465. In the course of their speeches the House of Lords overruled *Candler* and approved Denning LJ's dissenting judgment.

4.23 Developments after the 1960s. Although the courts have been careful to impose restrictions and caveats, they have steadily enlarged the ambit of third party liability since the seminal decision in *Hedley Byrne*. Perhaps the classic example is *White v Jones* [1995] 2 AC 207, in which solicitors acting for a testator were held liable to intended beneficiaries. The Court of Appeal's decision in *Dean v Allin & Watts* [2001] EWCA Civ 758; [2001] PNLR 39 marks another step down the same road. In *Dean* solicitors acting for the borrower in a loan transaction were held to owe a duty to the lender to exercise reasonable care to ensure that the intended security was in place. The lender was unrepresented in the transaction and he trusted the solicitors to do their work properly.

4.24 An interesting recent example of third party liability is *Gorham v British Telecommunications plc* [2000] 1 WLR 2129. In that case S gave negligent pensions advice to G, who subsequently died. G's dependants brought a claim against S for their losses. The court allowed the claim on the basis that S owed a duty to the dependants not to give negligent advice to G which would adversely affect their interests (as intended by G).

4.25 And so. In this area too we can see a progressive widening of the liabilities of professionals, which began in the 1960s.

## 5. ANALYSIS

5.1 The special position of the professions – an unconscious motivation? Although it is seldom expressed in judgments, one senses that the special position of the professions in society is one of the drivers of judicial decision-making in the realm of professional negligence. This unconscious driver has pushed the law in different directions at different stages of our history.

(i) In the nineteenth century this driver led judges to adopt extreme measures in order to reject claims for professional negligence.

(ii) In the first half of the twentieth century the general respect in which professions were still held (as exemplified by the writers referred to in paragraphs 3.1 to 3.6 above) led judges to restrict the liability of professionals. They did this by limiting claims to contract only, by excluding liability to third parties, by upholding immunities and by a fairly strict application of *Bolam*.

(iii) Since the 1960s the changed perception of professions has had a dramatic effect. The privileged position of the professions now seems to have become an unconscious driver in the opposite direction. It leads courts to *extend* the liabilities of professionals beyond their natural bounds.

5.2 Sometimes even a conscious motivation. In *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 the New Zealand Court of Appeal held that the solicitor for a testator owed a duty of care to the intended beneficiary. Cooke J observed that to refuse a remedy “would seem to imply a refusal to acknowledge the solicitor’s professional role in the community”. Lord Goff in *White v Jones* cited that passage in *Gartside* and expressly relied upon “the role played by solicitors in society” as one of the justifications for his decision.

5.3 Congruence of social science and the law. By and large lawyers don’t read textbooks on sociology and sociologists don’t read the law reports. Nevertheless there is congruence between the theorising of sociologists and the development of the common law. This is unsurprising. Both the academic community and the judges are creatures of their own time. Moreover, the “fair, just and reasonable” test which the courts apply when determining the existence and scope of any duty of care, specifically requires judges to tap into the *Zeitgeist*.

5.4 Oliver Wendell Holmes’ analysis. Oliver Wendell Holmes pithily described the way in which common law rules evolve in his famous lectures entitled *The Common Law*. In Lecture 1 he wrote:

“The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”

5.5 Holmes then reviewed the unconscious process by which judges develop the common law. Towards the end of lecture 1 he wrote:

“The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been

absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.”

5.6 The process which Holmes described is what we see happening in the evolving law of professional liability.

5.7 Application of Holmes’ analysis. The legal principles regulating the liability of professional persons have mutated over time and they have done so in a way that reflects the changing perception of the professions in society. Professional persons are no longer generally seen as a class of individuals superior to other workers, driven by higher ideals and meriting protection. Most sociologists now characterise the professions as special interest groups which exploit their skills in an endeavour to achieve greater income and higher status in society. Many laymen take a similar view. The privileges of the professions are seen as bringing with them enhanced responsibilities. The courts have reflected this general shift in public perception by (a) slowly stripping away the protections which they previously accorded to the professions and (b) devising new ways of imposing liability upon professionals.

5.8 This progressive development of the law should not be seen as an autonomous project of the judiciary aided by members of the PNBA. It is best understood as the product of a changing society. The study of social science just as much as poring over the law reports sheds light on that process.

5.9 Where will it all end? For the reasons stated by Holmes the evolution of the common law will never end, except where it is blocked by statute. Nevertheless, peering into the future as best one can, it may possibly be that the general attacks on *Bolam* will succeed. If that happens, the court will set the standards for professional persons, in the same way that it sets the standards for everybody else, paying due regard to any relevant evidence of practice and any relevant expert evidence. The other perquisites of professional status, such as immunity and restrictions on liability, are already vanishing. We may therefore be approaching the position that there is no discrete body of law on “professional negligence” or “professional liability” at all.

5.10 Conclusion. The above analysis does not detract from the utility of legal textbooks focused on the position of the professions. Nor does it detract from the utility of the PNBA, which is a vibrant and effective Specialist Bar Association. What it does mean is that in defining the legal liabilities of professional persons we must shed the mythology of earlier centuries, including the twentieth century.

Rupert Jackson<sup>43</sup>

21<sup>st</sup> April 2015

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<sup>43</sup> Chairman of PNBA 1993-1995, President since 2011